

**ADMINISTRATIVE APPEAL DECISION
FOR
ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
APPROVED JURISDICTIONAL DETERMINATION
PERRY CITY, UTAH
1200 WEST STREET EXTENSION SITE
ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE # 200250385**

February 16, 2005

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

Technical Advisor to Review Officer: Antal Szijj, Regulatory Project Manager, Los Angeles District, Ventura, California

District Representative: Jim Thomas, Regulatory Project Manager, Sacramento District, Intermountain Region Regulatory Office, Bountiful, Utah.

Appellant: Edward Skrobiszewski, Mayor, Perry City, Utah

Appellant Representative: Lone Goose Environmental, Rigby, Idaho

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal: Initial Request for Appeal (RFA) submitted July 26, 2004. This initial submittal was determined to be incomplete. Revised RFA submitted September 14, 2004 and accepted for detailed consideration.

Appeal Conference Date: October 12, 2004 **Site Visit Date:** October 12, 2004

Summary of Decision: The District's decision that 2.42 acres of wetlands and waters on the Appellant's 1200 West Street Extension Site in Perry City, Box Elder County, Utah were within Clean Water Act (CWA) jurisdiction was reasonable and supported by the Sacramento District, Army Corps of Engineers, Regulatory Branch, administrative record for this action. The Appellant's appeal did not have merit.

Background Information: On November 6, 2002, (administrative record pages 297 – 298) the Sacramento District, Army Corps of Engineers (District) notified the Appellant that fill material had been placed to increase the width of portions of 1200 West Street, by filling wetland areas in roadside channels without a CWA Section 404 permit. The District stated it believed a violation of Section 404 of the CWA had occurred as no CWA permit had been obtained for fill of a "water of the United States" (i.e. an area within CWA jurisdiction).

After several communications, the Appellant's consultant (Lone Goose Environmental) (LGE) by letter of May 15, 2003, informed the District that they would be developing

and submitting a CWA jurisdictional status evaluation for District consideration. After more communications and several submittals by the Appellant and LGE addressing different issues between Fall 2003 and Spring 2004, the District issued an approved CWA jurisdictional determination on June 2, 2004.

The District's CWA jurisdictional determination was for a 66-foot wide corridor called the 1200 West Street Extension Site, located in Perry City, Box Elder County, Utah as depicted in the Appellant's December 13, 2003 *Wetlands Delineation Report*, on pages 98, 120, and 121 of the administrative record. For discussion purposes the entire 66-foot wide corridor is referred to as the Project Site.

The southern portion of the Project Site, referred to as the South Site in this appeal decision, begins at the intersection of Maddox Lane and 1200 West Street. The South Site extends approximately 1,100 feet northeast along the existing route of 1200 West Street. At that point, the North Site begins. The North extends due north from Road 1200 West across approximately 2,200 feet of wetland and agricultural areas to intersect with 1100 South Street. No road currently exists on the North Site. The District also evaluated a limited additional area of approximately 75 feet in length between the North Site and 1500 South Street as part of this CWA jurisdictional determination. The Appellant disagreed with the District's June 2, 2004 CWA jurisdictional determination and appealed.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):

Reason 1: The Appellant asserts that the wetlands on the Project Site cannot be within Clean Water Act (CWA) jurisdiction because they are not adjacent to waters within CWA jurisdiction.

FINDING: This reason for appeal did not have merit

ACTION: None required.

DISCUSSION:

Overview of District's and Appellant's conclusions regarding the CWA jurisdictional status of the Project Site.

The District and the Appellant agreed on the amount of wetlands within the Project Site. The Appellant prepared a *Wetlands Delineation Report* for the Project Site dated December 13, 2003 (administrative record pages 88 – 119) that identified the extent of wetlands in accordance with the requirements of the Army Corps of Engineers 1987 Wetland Delineation Manual.

In applying the Corps regulations defining CWA jurisdiction to reach its conclusions, the District evaluated the following questions and made the following determinations, which are all reviewed in this administrative appeal decision:

1. The District reviewed the CWA jurisdictional status of the GSL, and concluded the GSL was within CWA jurisdiction. The Appellant disagreed with this conclusion
2. The District reviewed whether surface water tributary connections existed between the Project Site and the GSL and found that such connections were present. The Appellant disagreed with this conclusion.
3. The District reviewed whether the surface water connections it found between the Project Site and the GSL were within CWA jurisdiction. The District those connections were within CWA jurisdiction. The Appellant disagreed with this conclusion.
4. The District reviewed whether the wetlands on the Project Site were adjacent wetlands within CWA jurisdiction. The District concluded the wetlands on the Project Site were within CWA jurisdiction as adjacent wetlands because they were bordering and contiguous with tributaries within CWA jurisdiction. The District also concluded those wetlands were within CWA jurisdiction as part of a continuum of adjacent wetlands neighboring the GSL. The Appellant disagreed with these conclusions.

The administrative record includes various records documenting report submittals and telephone, email, letter, and face-to-face communications between the District and the Appellant that reiterated their respective positions described above.

Clean Water Act jurisdictional status of the Great Salt Lake

This section evaluates the District's conclusions regarding whether the GSL is within CWA jurisdiction. The District's CWA jurisdictional determination for the Project Site ultimately depends on the CWA jurisdictional status of the GSL. The District concluded that the GSL was within CWA jurisdiction under 33 CFR 328.3 (a) (1) which states that waters within CWA jurisdiction include:

“All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”

The District and the Appellant disagree whether the GSL is within CWA jurisdiction because of their differences in interpretation of the U. S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* 531 US 159 (2001) (*SWANCC* decision) and their differences in interpreting the Corps regulations defining waters within CWA jurisdiction (33 CFR 328.3 (a) (1) – (7)).

The most recent federal guidance regarding the interpretation of the *SWANCC* decision is the Environmental Protection Agency (EPA)/Department of the Army Joint Memorandum of January 15, 2003 issued jointly by the General Counsel of the EPA and the General Counsel of Department of the Army, (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” – Federal Register Vol. 68, pages 1995 – 1998) (referred to as the Joint Memorandum in the remainder of this decision). The Joint Memorandum also provided guidance regarding the Corps regulations that define the extent of waters within CWA jurisdiction (33 CFR 328.3 (a) (1) –(7)) subsequent to the *SWANCC* decision. The Joint Memorandum describes the holding in the *SWANCC* decision as:

“In *SWANCC*, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to section 404 (a) over isolated, intrastate, non-navigable waters under 33 CFR 328.3 (a) (3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the “Migratory Bird Rule,” 51 FR 41217 [1986]. “Navigable waters” are defined in section 502 of the CWA to mean “waters of the United States.”...After reviewing the jurisdictional scope of the statutory definition of “navigable waters” in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the Corps’ assertion of jurisdiction over the waters involved in *SWANCC*. ...Finding “nothing approaching a clear statement from Congress that it intended Section 404 (a) to reach an abandoned sand and gravel pit” ...the Court held that the Migratory Bird Rule, as applied to the petitioners’ property, exceeded the agencies’ authority under section 404 (a).”

The Joint Memorandum discusses “traditional navigable waters” regulated in accordance with 33 CFR 328.3 (a) (1) as follows:

“In accord with the analysis in *SWANCC*, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters *i.e.*, if they meet any tests for being navigable-in-fact. *See, e.g. Colvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal 2001) (isolated man-made water body capable of boating found to be “water of the United States.)”

The *Colvin v. United States* federal court decision described various boating activities on the Salton Sea, an isolated intrastate lake in the California desert, including boat racing, recreational boating, and water skiing. The Joint Memorandum directs that these activities should be considered as examples of evidence that can be used to identify that a body of water is navigable-in-fact.

The GSL currently has recreational marinas on its shorelines and it is common knowledge that recreational boating activities now occur on the lake. During this appeal

the Division also reviewed a federal court decision identified by the District that addressed the navigability of the GSL. In *State of Utah v. U.S.*, 403 U.S. 9 (1971) the Supreme Court made a case-specific determination that the GSL was navigable as of Utah's date of statehood, January 4, 1896. The Court found the lake was navigable because it was used, or susceptible of being used, as a highway for commerce based on past navigation to haul cattle, sheep, salt, and tourists. The information above represents evidence of current and past navigability of the GSL. Based on the Joint Memorandum, the evidence above represents sufficient evidence of past and current susceptibility of use of the GSL in interstate commerce to meet the definition of a water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) of the Corps regulations.

The District and the Appellant agree that the GSL is not within Rivers and Harbors Act jurisdiction. The GSL does not provide a continuous, waterborne highway of interstate transit. The Appellant asserted that only waters within Rivers and Harbors Act jurisdiction should be considered traditional navigable waters, and that the District had erred by concluding that the GSL was a traditional navigable water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1). The Appellant's assertion is contrary to the Joint Memorandum, Footnote 2, which identifies that CWA traditional navigable waters are more extensive than waters within Rivers and Harbors Act jurisdiction stating that:

“These traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899; traditional navigable waters include waters which, although used, susceptible (sic) to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne (sic) highway.”

The District had substantial evidence that the GSL met the definition of a water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) and reasonably concluded that the GSL was within CWA jurisdiction.

Evidence of surface water tributary connections between the Project Site and the Great Salt Lake.

This section evaluates the District's conclusions regarding whether tributary connections extend from the North Site and South Site to areas west of Interstate 15 and on to the GSL. The following section then discusses whether such connections are within CWA jurisdiction. More detailed explanations of materials evaluated and conclusions reached in this appeal decision are included as End Notes.

The Corps regulations at 33 CFR 328.3 (a) (5) defines that waters that are tributaries to waters within CWA jurisdiction as also within CWA jurisdiction. The Appellant disputed the District's conclusions that surface water tributary connections extended the entire distance between the GSL and the Project Site, and disputed that any such connections, if present, could be within CWA jurisdiction.

The Appellant's representative evaluated the CWA jurisdictional status of the Project Site during site visits on July 24, August 8, and October 8 while completing their *Site Analysis for Isolated Wetlands* report dated November 20, 2003. The Appellant's conclusions from that report are in the administrative record (page 167) and state that:

“The study area¹ is physically isolated from the Great Salt Lake and its adjacent wetlands by a series of substantial man-made berms. There is no hydrologic connection between surface flows across the site and the Great Salt Lake and its adjacent wetlands....There may be a hydrologic connection to the Great Salt Lake for other wetlands east of the I-15 (to the south or north of this study area), but it is a physical impossibility for water crossing this discrete site...to reach the Great Salt Lake and its adjacent wetlands west of the Interstate highway. Analysis of site conditions reveals that wetlands enclosed by Interstate 15, its frontage roads, 1100 South, 1200 West, and 2250 [South] are physically and functionally isolated.”

text in brackets [] added for clarity.

On May 10, 2004 the Appellant submitted annotated maps with elevation information for each end of culverts crossing under Interstate 15 and the 1100 South Street/Interstate 15 interchange. While the source of this elevation data was not included in the Appellant's submittals, the Appellant's consultant stated to the Review Officer during review of this appeal that the Appellant's engineering contractor collected the elevation data with a land survey quality Global Positioning System Unit that could record topographic elevations to the 1/100th of a foot. This elevation data was considered during the evaluation of possible tributary connections.

The Appellant's representative asserted in his May 10, 2004 letter that because the gradients between several culverts were less than 2 percent (2%), that the water in those areas would not flow freely between the culverts but rather would pond (i.e. be isolated). In the Appellant's May 10, 2004 letter (administrative record page 151) they stated:

“...slopes between the culverts are typically 1% or less. On vegetated ground or in swales, 2% is considered the minimum slope for water to flow freely, but slopes between these pipes are generally 1% or less.”

The Review Officer requested at the appeal meeting that the Appellant's representative document their conclusion that water would pond rather than flow in vegetated areas with gradient of less than 2%. The Appellant's response stated in their addendum to the Appeal Meeting Summary Notes was that:

“The minimum slope to achieve unimpeded overland flows on vegetated ground and in vegetated swales is 2%. This standard is taught in civil and landscaping engineering classes at the prestigious University of Pennsylvania (PENN).”

The Appellant's representative stated in a follow-up telephone call with the Review Officer that water flow would be impeded in vegetated areas of a less than 2% gradient

because of the increased friction or surface tension between vegetation and water, when compared to water flow over paved areas. However, the Appellant acknowledged that whether water flowed or ponded in areas of less than a 2% gradient would depend on specific conditions (i.e. such as the volume of water flowing). The District reasonably concluded there could be tributary connections in areas where the gradient was less than 2%. The administrative record provided evidence that surface water connections occurred in areas with gradients of less than 2%, and those are discussed in this appeal decision.

The Appellant conducted additional site visits and an experiment to further document and support his conclusion that no surface water connection exists between the Project Site and areas west of Interstate 15. The Appellant prepared a *Surface Connectivity Report* (administrative record pages 138 – 150) dated May 12, 2004, which described his experiment to evaluate the presence or absence of surface water connections between the Project Site and areas west of Interstate 15 using colored ping-pong balls. The District concluded the methodology used in the Appellant's *Surface Connectivity Report*, which had been developed without District involvement, was substantially flawed.² As a result, the District reasonably concluded that the ping-pong ball test results were not reliable or conclusive as evidence of the lack of a surface water connection between the Project Site and the GSL.

The District's administrative record directly contradicts the Appellant's assertion that there are no surface water connections between the Project Site and the GSL. The District described its conclusions regarding the CWA jurisdictional status of the Project Site in its June 2, 2004 letter as follows:

“Approximately 2.42 acres of waters of the United States, including intermittent channels and wetlands, are present within the survey area. These channels and other waters are regulated under Section 404 of the Clean Water Act since they flow from the survey area through culverts under I-15 and through culverts under the West Frontage Road to the Knutsen Marsh which is connected to the Black Slough, a tributary of the Reeder Overflow which is a tributary of the Great Salt Lake. The wetlands in the survey area are jurisdictional because they are part of the ecological complex system associated with the Great Salt Lake.”

While the District's narrative descriptions of tributary connections are relatively brief, the District's administrative record includes an extensive variety of photographs³, maps, and elevation information that documents four surface water connections between the Project Site and areas west of Interstate 15. I found that the District had sufficient information in its administrative record to support its conclusion that there were four surface water tributary connections between the Project Site and the GSL. The District's conclusions are summarized below and described in detail in the End Notes associated with each of the four surface tributary connections. From north to south these four surface water tributary connections are:

1. a surface water connection at the north end of the North Site that extends northwest under 1100 South Street and eventually extends west under Interstate 15 to areas northwest of 1100 South Street/Interstate 15 intersection that connect to the GSL⁴.
2. a surface water connection that extends north, then west, from the middle of the North Site, and continues northwest through the 1100 South Street/Interstate 15 interchange via a series of culverts, and continues northwest of that same intersection to eventually connect to the GSL⁵.
3. a surface water connection that extends west from the north end of the South Site, eventually extending under Interstate 15 south of the 1100 South Street/Interstate 15 Interchange and continuing to the GSL⁶.
4. a surface water connection that extends west from the south end of the South Site, eventually connecting to the third tributary described above, about 200 feet east of the Union Pacific Railroad tracks, then continuing to the GSL as described for tributary number 3 above⁷.

Evidence that surface water tributary connections between the Project Site and the Great Salt Lake are within CWA jurisdiction

This section describes the District's conclusions regarding whether tributary connections between the Project Site and the GSL are within CWA jurisdiction. Although, the administrative record supports the District's conclusion that four surface water tributary connections exist between the Project Site and areas west of Interstate 15, the presence of surface water tributary connections alone does not establish that these areas are within CWA jurisdiction, or that adjacent wetlands within CWA jurisdiction are present.

The Corps regulations at 33 CFR 328.4 (c)(1) and (2) establish the limits of CWA jurisdiction in non-tidal waters as:

“(c)(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark”

The District stated on administrative record page 17 that it identified the Ordinary High Water Marks (OHWM) on the various culverts through barriers between the Project Site and the west side of Interstate 15. The District also stated that some portions of the drainages between the Project Site and the west side of Interstate 15 did not have an OHWM. The District attributed the absence of a continuous OHWM in some areas to livestock grazing and land use practices.

The District's June 2, 2004, approved jurisdictional determination (administrative record page 12), stated the route of a CWA jurisdictional tributary connection west of the West Frontage Road as flowing:

“...to the Knutsen Marsh which is connected to the Black Slough, a tributary of the Reeder Overflow which is a tributary of the Great Salt Lake.”

The administrative record, particularly the photographs described in End Notes 4, 5, 6, and 7, provide sufficient evidence that tributary connections with ordinary high water marks were present between the Project Site and areas west of Interstate 15. The photographs and maps on administrative record pages 44, 125, 126, 133, and 135 provide sufficient evidence that these tributary connections continue to the GSL. The CWA jurisdictional status of wetlands on the Project Site are discussed separately after this discussion of tributaries.

If there were no other factors to consider, the presence of an OHWM on the tributaries, and the evidence that they ultimately connect to the GSL (also within CWA jurisdiction) would be sufficient evidence to establish the presence of tributaries within CWA jurisdiction. However, irrigation water deliveries are known to occur in the area being evaluated. The Appellant’s representative described the existing drainages in the study area¹ they evaluated in their *Site Analysis for Isolated Wetlands* dated November 20, 2003 (page 164 of the administrative record) stating that:

The drainages crossing the site are probably natural in origin, but they are intermittent at best, and flows in the drainages appear to be regulated by irrigation devices, irrigation practices, and legal water rights specific to beneficial uses for agriculture.”

[italics added for emphasis]

The Appellant’s representative asserted that water flows with assigned water rights conveyed for irrigation use were not within CWA jurisdiction in accordance with the Corps Regulations at 33 CFR 323.4 *Discharges not requiring permits*. This assertion by the Appellant’s representative represents an incorrect interpretation of the Corps regulations.

Several subsections of 33 CFR 323.4 identify specific agricultural activities that are exempt from Corps permit requirements regarding the disposal of dredged or fill material in waters within CWA jurisdiction (including certain activities appurtenant and functionally related to irrigation facilities). However, the fact that fill material associated with an exempt activity might have been placed in an area within CWA jurisdiction, or may be placed there in the future, does not alter the Corps regulatory definitions of waters within CWA jurisdiction (i.e. 33 CFR 328.3 (a) (1) to (a) (7)). The District must still use those regulatory definitions when making CWA geographic jurisdictional determinations. As long as the geographic area in question still meets the definition of a water within CWA jurisdiction, the fact that an exempt activity has occurred there in the past, or may occur there in the future, is not germane to a determination of whether the area meets the definition of a water within CWA jurisdiction.

The presence of water control structures in some areas evaluated in this administrative appeal does not conflict with a conclusion that the four tributaries described earlier in this

appeal decision are within CWA jurisdiction as tributaries to the GSL. In this case, some exempt activities may have occurred in the four tributaries discussed above, and some unspecified amounts of irrigation water probably flow in those tributaries as well. However, the four tributaries between the Project Site and the GSL still meet the definition of tributaries in accordance with 33 CFR 328.3 (a) (5), and therefore are within CWA jurisdiction.

Evidence of the Presence of Adjacent Wetlands Within Clean Water Act Jurisdiction on the Project Site

This section evaluates the District’s conclusions regarding whether the wetlands present on the project site are within CWA jurisdiction as adjacent wetlands. The Corps regulations at 33 CFR 328.4 (c) (2) establish the limits of CWA jurisdiction in non-tidal waters with adjacent wetlands as:

“(c)(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.”

The Corps regulations at 33 CFR 328.3 (c) defines adjacent wetlands as:

“(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands”.”

The wetland adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or *that are in reasonable proximity* to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, *and similar obstructions.*”
[*italics added for emphasis*]

The Corps has not established a national standard regarding a maximum distance limit for reasonable proximity between adjacent wetlands and the waters to which they are adjacent. This is discussed in the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Fed Reg Page 59113 (1991), which states that:

“Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural berms.”

Wetland adjacency was also discussed in the Preamble to the 1991 reissuance of the Corps Nationwide Permits, 56 Fed Reg page 59113, 1991 which states that:

“In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous.”

The District’s summary of its CWA jurisdictional determination on administrative record page 17 stated that:

“... the wetlands in question are part of an overall mosaic of wetlands and playas adjacent to the Bear River and the Great Salt Lake and, as such, are inseparably ecologically associated with both.”

The Appellant and the District agreed that wetlands west of the West Frontage Road were adjacent to the GSL. The Appellant stating in his *Site Analysis for Isolated Wetlands* dated November 20, 2003 (administrative record page 165) that:

“A critical focus of LGE’s site inspection was to determine if there was any hydrologic connection between water flowing in drainages across the study area to wetlands considered truly adjacent to the Great Salt Lake.”

and on administrative record page 166 stating that:

“In this portion of Utah, wetlands to the west of Interstate 15, which are adjacent to the Great Salt Lake, are mostly in public ownership and managed for waterfowl and wildlife habitat.”

The Appellant representative’s *Wetlands Delineation Report* dated December 13, 2003, includes separate maps of the Project Site wetlands (North Site and South Site wetlands on administrative record pages 121 and 120 respectively). Along the Project Site 66-foot wide corridor the Appellant identified three wetland areas on the North Site area, and one generally continuous wetland area on the South Site area. The administrative record includes photographs and maps that support the District’s conclusions that all wetlands within the Project Site are within CWA jurisdiction as adjacent wetlands. From north to south these adjacent wetlands are:

1. A North Site wetland area extending from 1100 South Street south for approximately 360 feet. This adjacent wetland is contiguous with tributary 1 described on page 7 of this appeal decision, and therefore is within CWA jurisdiction⁸. The District also concluded that all the wetlands on the Project Site are part of the eastern portion of a continuum of wetlands that are all within CWA jurisdiction as adjacent to the GSL⁹. The administrative record includes sufficient information to support the District’s conclusions as reasonable.
2. A North Site wetland area on 1500 South Street extending from approximately 35 to 75 feet east of the 1500 South Street/North Site corridor intersection. The District reasonably concluded this wetland is within CWA jurisdiction as part of a continuum of adjacent wetlands that are neighboring the GSL⁹. This wetland may

also border or be contiguous with tributary 2 described on page 8 of this appeal decision in the area between the North Site and the Union Pacific Railroad tracks. The District did not have access to adjoining private property to investigate that question and so there is not sufficient information in the administrative record to conclusively determine if this wetland would also be within CWA jurisdiction on that basis.

3. A North Site wetland area extending south from the 1500 South Street/North Site intersection corridor for approximately 600 feet. The District reasonably concluded this wetland is within CWA jurisdiction as part of a continuum of adjacent wetlands that are neighboring the GSL⁹. This wetland may also border or be contiguous with tributary 2 described on page 8 of this appeal decision in the area between the North Site and the Union Pacific Railroad tracks. The District did not have access to adjoining private property to investigate that question and so there is not sufficient information in the administrative record to conclusively determine if this wetland would also be within CWA jurisdiction on that basis.

4. A wetland area extending almost the entire distance of the South Site on both sides of 1200 West Street. The District reasonably concluded this adjacent wetland is contiguous with tributaries 3 and 4 described on page 8 of this appeal decision, and therefore is within CWA jurisdiction¹⁰. The District also reasonably concluded this wetland area is within CWA jurisdiction as part of the eastern portion of a continuum of wetlands that are all within CWA jurisdiction as adjacent to the GSL⁹.

The Appellant asserted that the District should not take jurisdiction over any adjacent wetland that is separated from the body of water it is adjacent to by more than two linear features. The Appellant asserted in his September 14, 2004 RFA that the District should not have considered these areas adjacent wetlands, but instead adhere to a “two barrier” rule that the Appellant stated as:

“Hence, many Districts (cited above) adopted the reasonable policy establishing that a wetland is considered isolated (no longer adjacent) in those cases where there are at least two, substantial upland barriers, which effectively isolate a wetland from navigable waters of the U.S. In the case of 1200 W., there are at least five (5) substantial upland barriers separating these remote wetlands from the GSL.”

The Appellant then identified five Corps Districts that the Appellant claims have “two barrier rule” policies. The Appellant provided no specific written examples of the “rule of two barriers” wording, but there was general agreement at the appeal meeting that a “two barrier” policy meant that a District who followed such a policy did not regulate as adjacent wetlands within CWA jurisdiction those wetlands that were separated from a water within CWA jurisdiction by two solid barriers. Although the District does not have a “two-barrier rule” policy, even if it did it would be irrelevant in this situation because

two solid barriers are not present. The District identified routes of surface water flows via culverts and/or ditches through all the barriers identified by the Appellant¹¹. The District reasonably concluded that all the wetlands on the Project Site were within CWA jurisdiction as the eastern portion of a continuum of wetlands that was adjacent to the GSL.

The District developed this CWA jurisdictional determination based on a reasoned, logical evaluation of the information available and determined that the wetlands on the Project Site were within CWA jurisdiction as adjacent wetlands. While the District's administrative record would have been clearer if more written narrative description of its findings had been included, the record provides substantial and sufficient documentation in the form of photographs, maps, observations, and topographic elevation data to support the District's conclusions. The District's CWA jurisdictional determination was reasonable.

Reason 2: The Appellant asserts the District's prior decisions regarding authorizations to fill waters within CWA jurisdiction under Nationwide Permit 26 *Headwaters and Isolated Waters Discharges* in the area east of the GSL establishes that the District believed that areas in the vicinity of the Project Site were isolated, and that this provides evidence that the Project Site is outside of CWA jurisdiction.

FINDING: This reason for appeal did not have merit.

ACTION: No action required.

DISCUSSION: The scope of Nationwide Permit 26 (NWP 26) was discussed in the Preamble to the Corps *Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits*, Fed Reg Vol. 61., pages 65890 – 65891 dated December 13, 1996 that stated:

“In 1977, the Corps developed the headwaters and isolated waters nationwide permit (NWP 26) as we extended section 404 jurisdiction to all waters of the United States (including isolated and headwaters areas). Prior to 1977, the Corps did not require Section 404 permits for discharges of dredged or fill material into waters in these geographic areas.”

In the Appellant's consultant's March 14, 2004 letter (administrative record page 156) they state:

“The final question that needs to be considered is the underlying reason for the issuance of a Nationwide Permit 26 which authorized the filling of wetlands for road construction work and utility installation on the frontage road located immediately west of I-15 and adjacent to the previously discussed irrigation trench. This permit (NWP #26) could only been (sic) used for wetlands that had been determined to be either isolated, or wetlands that occurred (sic) within a drainage basin above (up-stream) the (sic) point within the drainage basin where

the average annual flow is less than 5 cubic feet per second (CFS); these are commonly referred as headwater wetlands. As we discussed during the site inspection, Mr. Carter agreed that the wetlands located west of I-15 clearly do not fit the definition of headwater wetlands. Therefore, we must assume, and depend upon the former Corps determination, that NWP #26 was used to authorize wetland fills along the frontage road because these wetlands are isolated.”

It is unnecessary to examine the basis of the District’s prior authorizations under NWP #26 to establish whether the District’s determination that the current CWA jurisdictional determination for the Project Site is reasonable. As described above, the administrative record for this action reasonably established that the GSL is within CWA jurisdiction. The administrative record also established that there were tributary connections within CWA jurisdiction between the wetlands on the Project Site and the GSL. Furthermore, the administrative record established that there were wetlands within CWA jurisdiction adjacent to those tributaries, and that even if such a tributary connection did not exist that the District could reasonably conclude that the wetlands on the Project Site were within CWA jurisdiction as part of the eastern portion of a continuum of wetlands within CWA jurisdiction that extended to the GSL.

Information Received and its Disposition During the Appeal Review: The Division evaluated this appeal based on the Appellant’s request for appeal, the District’s administrative record, clarification of the administrative record at the appeal conference including the Review Officer’s appeal meeting summary, and the following submittals:

1. Kerry Curtis, Sacramento District Office of Counsel e-mail of October 19, 2004 regarding Federal Court decisions relevant to the evaluation of CWA jurisdictional status of the 1200 West Extension Site.
2. District’s Regulatory Branch Memorandum 04, *Regulatory Jurisdiction in Irrigated Areas* dated July 20, 2001.
3. District’s Regulatory Branch Memorandum 07, *Wetland Delineations under Snow Cover Conditions* dated June 15, 2001.
4. District submittal of the U.S. Supreme Court decision in *State of Utah v. U.S.* 403 U.S. 9 (1971).
5. District submittal of the United States Court of Appeals, Ninth Circuit decision in *Headwaters Inc. v. Talent Irrigation District* 243 R. 3d 526, 534 (9th Cir 2001).
6. District submittal of the United States District Court decision in *Colvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal 2001).

7. LGE (Appellant's biological consultant) e-mail of October 27, 2004 to Appeal Review Officer discussing Kerry Curtis, Sacramento District Office of Counsel e-mail of October 19, 2004.
8. Appellant's appeal conference summary addendum submitted by Appellant's consultant LGE on November 12, 2004.

Conclusion: The District's decision that 2.42 acres of wetlands on the Project Site are within CWA jurisdiction is based on substantial evidence in the administrative record and is reasonable. The Appellant's appeal does not have merit.

original signed by

Leonardo V. Flor
Colonel, U. S. Army
Acting Commander

End Notes:

1. Appellant's *Site Analysis for Isolated Wetlands* dated October 10, 2004, page 164 defines the study area as: "The study area is a large rectangle roughly bounded by I-15 and its frontage roads to the west, 1200 West to the east, 1100 South to the north (the highway on which Walmart is located), and 2250 South at the southern end of the rectangle....the Union Pacific railroad slices through the middle of this rectangle."

2. The Appellant disagreed with the District's analysis that tributaries within CWA jurisdiction were present, and independently conducted an evaluation described in his *Surface Connectivity Report* (administrative record pages 138 – 150) dated May 12, 2004, to counter the District's conclusion that surface water tributaries within CWA jurisdiction exist between the Project Site and the GSL. Starting April 4, 2004, the Appellant conducted a 10-day surface water connectivity field test between the Project Site and areas west of Interstate 15 using colored ping-pong balls.

The Appellant stated he placed 12 red and orange fluorescent ping-pong balls in each of the drainages flowing west from the existing road edge along 1200 West Street (South Site) (there are photographs of the drainages used in this test in the administrative record, but the test drainage locations were not shown on any map in the administrative record). The Appellant anchored appropriately sized nets on the culverts west of Interstate 15 to catch any ping-pong balls that reached the west side of Interstate 15.

The Appellant made observations to locate the colored ping-pong balls on days 3, 5, 7, and 10 after release of the ping-pong balls at the drainage culverts along the Project Site, at the Union Pacific Railroad tracks, at the East and West Frontage Roads at Interstate 15, and at the catch nets. No ping-pong balls were found during the 10-day test, and only one ping-pong ball was found at all, several days after the test ended.

The Appellant and the District had very different interpretations of the Appellant's ping-pong ball test results. The Appellant inferred from the test results that no functional, surface water connection (i.e. a surface water connection capable of carrying pollutants – or in the Appellant's test, ping-pong balls) existed between the wetlands bordering the Project Site and areas west of Interstate 15. The Appellant concluded from the test results that no tributary connection within CWA jurisdiction existed between the 1200 West Extension Site and the GSL. The Appellant further claimed that his test results should be considered definitive unless the District conducted a dye test and tracked the route of surface water colored by the dye.

The District disagreed with the Appellant's conclusions because it believed that there were too many uncontrolled variables that could have accounted for the ping-pong ball test results including that the 10-day test was specific to the water flow regime present at that time, ping-pong balls could become obstructed in vegetation, accidental loss of ping-pong balls due to activity of persons, animals, or wind, wind resistance of ping-pong balls, and the possibility that ping-pong balls evaded the net system. For these reasons the District reasonably concluded that the ping-pong ball test results were not reliable or conclusive as evidence of the lack of a surface water connection between the Project Site on the GSL. There is no Corps regulatory requirement to conduct a dye test to establish connectivity of surface waters. A dye test is time and labor intensive, and influenced by seasonal flow regimes. Also, a dye test does not provide conclusive evidence whether an area should be within CWA jurisdiction because adjacent wetlands can be within CWA jurisdiction even if there is not a surface water connection from the wetland to waters within CWA jurisdiction. In this case, the District reasonably concluded it had sufficient information to evaluate surface water flows and CWA jurisdictional status of the Project Site without undertaking a dye test.

3. The District used several groups of numbered photographs to document its conclusions that tributary connections within CWA jurisdiction extended from the Project Site to tributaries to the GSL. These photographs were organized in the following manner in the administrative record. The administrative record includes maps that identify where the District's numbered photographs were taken. This appeal decision refers to each map of photograph locations as a "Photoindex." This appeal decision refers to each individually numbered photographic location on a Photoindex map as a "Photopoint". The administrative

record contains a corresponding photograph taken at each numbered Photopoint on each Photoindex page. References to Photopoint numbers on Photoindex page 21 refer to corresponding photographs numbers 1 to 102 found on pages 25 through 42 of the administrative record. References to Photopoint numbers on Photoindex page 81 refer to photographs on administrative record pages 46 to 65. References to Photopoint numbers on Photoindex page 82 refer to photographs on administrative record pages 61 to 76. References to Photopoint numbers on Photoindex page 83 refer to photographs on administrative record pages 77 to 79.

4. The first tributary connection extends:

- Northwest from the North Site as documented by Photoindex page 21, Photopoints 1 and 2 and shown by a dashed line on the *Watershed Analysis* map on administrative record page 44.
- Crosses from south to north under 1100 South Street approximately 4,700 feet east of the 1100 South Street/Interstate 15 interchange as shown on administrative record page 44.
- Continues west as documented by Photoindex page 21, Photopoints 3 through 17 and shown in part on the northern edge of the *Watershed Analysis* map administrative record page 44, including crossing under the Union Pacific Railroad tracks.
- Continues west to connect to tributaries to the GSL west of Interstate 15. The District's annotations to the *Watershed Analysis* map, administrative record page 44, show a tributary route extending west from Photoindex page 21, Photopoint 17 to a culvert extending from east to west under the northbound on-ramp to Interstate 15. Administrative record page 153 shows a culvert at this point labeled number 14/15, that extends from east to west under the northbound Interstate 15 on-ramp, under the northbound and southbound lanes of Interstate 15, under the southbound off-ramp of Interstate 15, and exiting west of the Interstate 15. The District identified that water flows through this culvert from east to west. This direction of flow is consistent with the Appellant's administrative record page 153 elevation data that found the bottom of east end of the culvert was at elevation 4219.41 feet, and that the bottom of the west end of the culvert was 4218.26 feet, a lower elevation to which water would flow.

5. The second tributary connections extends:

- North, then west, from the North Site as shown by a dashed line on the *Watershed Analysis* map administrative record page 44, located approximately 1,000 feet south of the 1100 South Street, and as documented by Photoindex page 21, Photopoints 25 and 26.
- Continues west in a gently meandering pattern crossing under the Union Pacific Railroad tracks as documented by Photoindex page 21, Photopoints 27, 28, 29, 30, 31, and 32 and on the *Watershed Analysis* map administrative record page 44.
- Continues west towards the southeast edge of the 1100 South Street/Interstate 15 intersection as documented by Photoindex page 21 Photopoints 33, 34, and 34, by Photoindex page 81, Photopoints 11 and 12, and on the *Watershed Analysis* map administrative record page 44.
- Continues northwest of the Road 1100 West/Interstate 15 freeway interchange to the west side of Interstate 15 via surface flows and culverts as documented by Photoindex page 81, Photopoints from southeast to northwest 10, 9, 8, 7.
- Administrative record page 153 shows the bottom elevations of culverts along this route of flow from east to west as follows: Culvert 9 (30" culvert) elevation east end 4224.57 ft, midpoint 4222.54 ft, west end 4220.83 ft; Culvert 7 (30" culvert) south (east) end 4221.62 ft, north (west) end 4221.18 ft; Culvert 12 east end 4220.92 ft, west end 4220.85 ft; and Culvert 13 east end 4220.02 ft, west end 4219.68 ft. The Appellant asserted that water would pond between the west end of Culvert 9 (elevation 4220.83 ft) and the east end of Culvert 7 (4221.62 ft) because the exit of Culvert 9 is 0.79 ft lower than the entrance to Culvert 7. While the administrative record supports the Appellant's conclusion that water would pond to some extent at

the west end of Culvert 9, the administrative record also supports the District's conclusion that once water ponds to a depth greater than 0.80 feet, that water would flow west from Culvert 9 to Culvert 7. This is because once water at the west end of Culvert 9 ponds to depths greater than 0.79 ft, that water would then exceed the bottom elevation of the east end of Culvert 7 (elevation 4221.62) and would then start flowing through Culvert 7 and continue westward to the GSL. As Culverts 7 and 9 were both 30" culverts, such conditions would occur even if Culvert 9 was not conveying water at its full capacity. The conclusion that water could periodically flow from Culvert 9 to Culvert 7 is consistent with the Photoindex page 81, Photopoints (from southeast to northwest) 9, 10, and 8 (administrative record pages 54, 55, and 53 respectively), which show water flows from the south and east extending towards the south end of Culvert 7.

- Continues west of the Interstate 15 southbound on-ramp as shown in Photoindex page 81, Photopoints 6, 5, and 4.
- Turns north by exiting a metal culvert and entering a black culvert flowing north as shown in Photoindex page 81, Photopoints 5 and 4.
- Turns west as shown in Photoindex page 81, Photopoints 3, 2, and 1 and continues west to tributaries connecting to the GSL.

6. The third tributary connection extends:

- West from near the intersection of the North Site and the South Site (i.e. where the Project Site diverges from 1200 West Street and extends due north towards 1100 South Street), approximately 2,200 feet south of the 1100 South Street, as shown by a dashed line on the Watershed Analysis map administrative record page 44. Photoindex page 21, paired Photopoints 65 and 66, and 62 and 63, show channels in this area.
- Continues west in a gently meandering pattern crossing under the Union Pacific Railroad tracks as documented by Photoindex page 21, Photopoints 59, 60, and 61 and on the Watershed Analysis map administrative record page 44.
- Continues west towards southeast edge of the 1100 South Street/Interstate 15 intersection as documented by Photoindex page 21, Photopoints 57 and 58; and Photoindex page 81, Photopoints (from east to west) Photopoints 19, 20, and 18; and on the Watershed Analysis map administrative record page 44.
- Continues west through culverts and channels at the south end of the Road 1100 West/Interstate 15 freeway interchange to the west side of Interstate 15 as documented by Photoindex page 81, Photopoints (from east to west) 18, 13, 14, and 15, the Watershed Analysis map administrative record page 44, and the culverts shown on administrative record page 153. This tributary enters the east end of Culvert 3 at elevation 4224.47 and exits the west end of Culvert 3 at elevation 4220.53. This tributary then enters Culvert 2 at elevation 4219.99 and exits at elevation 4219.27. The elevation information is consistent with the District's determination that the water flows from east to west.
- Continues west from that point to tributaries connecting to the GSL.

7. The fourth tributary connection extends:

- Southwest from southern end of the 1200 West Extension Site where 1200 West Street intersects with Maddox Lane. The District's annotated Watershed Analysis map, administrative record page 44, identifies a tributary connection approximately 100 feet south of Maddox Lane extending northwest from Photoindex page 21, Photopoint 71.
- Continues northwest in a gently meandering pattern where it connects to the third tributary described above approximately 200 feet east of the Union Pacific Railroad tracks as shown by the Watershed Analysis map administrative record page 44, and continues on to the GSL.

8. The wetland area at the northern end of the North Site extends south from 1100 South Street for approximately 360 feet as shown on administrative record page 121. This wetland area is contiguous with tributary 1, which is within CWA jurisdiction as a tributary to the GSL as described in End Note 4 above. In accordance with 33 CFR 328.3 (c), wetland areas that are contiguous to tributaries are considered adjacent to those tributaries. As this wetland is adjacent to a tributary within CWA jurisdiction, it is also within CWA jurisdiction.

9. The following documents show a more or less continuous band of wetlands west of Interstate 15 and a lesser amount of additional wetlands interspersed with greater amounts of upland and agricultural areas east of Interstate 15: the wetland inventory map on administrative record page 86; the wetland resource map on administrative record page 125; the aerial photograph on administrative record page 133; and the Pointe Perry wetland delineation on administrative record page 135. Therefore, all the wetlands areas on the Project Site area within CWA jurisdiction as part of a continuum of wetlands that extends to the GSL even though there may not be tributary connections between each wetland and the GSL.

10. A wetland area extends almost the entire distance of the South Site on both sides of 1200 West Street as shown on administrative record page 120, occasionally interrupted by narrow areas of upland. The administrative record documents channels extending from east to west across the South Site at Photoindex page 21, Photopoints 65 and 66 (tributary 3 described on page 11 of this appeal decision) and Photoindex page 21, Photopoints 67 and 68. The administrative record also documents another channel that crosses the South Site from east to west about 100 feet south of the 1200 West Extension boundary, at Photoindex page 21, Photopoints 70 and 71 (tributary 4 described on page 11 of this appeal decision). These channels all extend west and eventually cross under Interstate 15 and continue west to connect to tributaries to the GSL. The District reasonably concluded the wetlands on the South Site are adjacent wetlands within CWA jurisdiction because they are all contiguous with and/or neighboring channels within CWA jurisdiction.

11. The Appellant identified linear features between the wetlands on the Project Site and the GSL including the Union Pacific Railroad roadbed, the East Frontage road, the two-lane northbound Interstate 15, upland traffic island (median strip between northbound and southbound Interstate 15), two-lane southbound Interstate 15, and the two-lane gravel West Frontage road. The District's evaluation of the Project Site identified drainage routes and culverts (described in this administrative appeal decision in End Notes 4 – 7 above) that conveyed water through all these barriers to wetlands west of Interstate 15 that both the District and the Appellant consider wetlands adjacent to the GSL. The District also identified culverts that conveyed water through a road associated with a powerline right-of-way west of Interstate 15 in Photoindex page 21, Photopoints 47, 48, 49, 50, 51, 52, 87, 88, 89, 90, 91 and 92.