

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE TULE RIVER IMPROVEMENT JOINT POWERS AUTHORITY FOR
TULE RIVER WATERSHED DRAINAGES BELOW LAKE SUCESS AND
SUCESS DAM INCLUDING THE NORTH AND SOUTH FORKS OF THE TULE
RIVER, AND PORTER SLOUGH**

TULARE AND KINGS COUNTIES, CALIFORNIA

ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE # 200300193

January 14, 2004

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

District Representatives: Nancy Haley and Matt Hirkala; U.S. Army Corps of Engineers, Sacramento District Regulatory Office

Appellant Representative: Dan Dooley and Alex Peltzer; Dooley and Herr, Visalia, CA

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

Receipt of Request For Appeal (RFA): July 25, 2003

Appeal Conference Date: October 16, 2003 **Site Visit Date:** October 16, 2003

Summary of Decision: I conclude the Army Corps of Engineers Sacramento District's (District) administrative record did not provide sufficient documentation to establish CWA jurisdiction under the Corps regulations for drainages within the Tule River Improvement Joint Powers Authority (TRIIPA) area. I also conclude that the District did not follow the Corps guidance that required the District to seek formal project-specific Corps Headquarters approval prior to any assertion of jurisdiction under 33 CFR 328.3 (a) (3). I remand this action to the District for detailed reconsideration of the factors as I have specified in this administrative appeal decision.

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

Background Information: This administrative appeal decision evaluates the District's administrative record and the Appellant's reasons for appeal separately for each subsection of the Corps CWA jurisdictional regulations at 33 Code of Federal Regulations (CFR) 328.3 that are relevant to this administrative appeal decision. Reason 1 discusses CWA traditional navigable waters (33 CFR 328.3 (a) (1)), Reason 2 discusses tributary connections (33 CFR 328.3 (a) (5)), and Reason 3 discusses intrastate, isolated waters that are not navigable (33 CFR 328.3 (a) (3)). The District summarized its conclusions in two documents in the administrative record: (1) the April 10, 2003 approved JD for this action, and (2) the District's May 8, 2003 "Memorandum for the File" that expanded on the evidence supporting the District's conclusions. The District's administrative record included additional supporting materials.

The TRIJPA, located within the San Joaquin Valley in Tulare and Kings County, near Visalia, California, is appealing the CWA jurisdictional status of drainages in for which it has maintenance responsibility. These include the north and south forks of the Tule River and Porter Slough. The TRIJPA area includes the Tule River watershed below Success Dam, which receives water from Lake Success. Lake Success is formed by the impoundment of the Tule River at Success Dam. Lake Success can currently store approximately 82,000 acre-ft of water and covers approximately 2,450 acres when full. The District and the Appellant disagree as to whether the drainages below Success Dam are within CWA jurisdiction.

The District and the Appellant agree that Lake Success and the areas below Success Dam are part of an isolated, intrastate watershed. The TRIJPA area drainages are downstream of the Success Dam spillway and extend to the western boundary of the TRIJPA, which roughly corresponds to the 200-foot Mean Sea Level elevation contour. This 200-foot contour is also considered the upper edge of the Tulare Lake Bed area. The primary land use of the Tulare Lake Bed area is intensive agricultural production. As the lowest point of an isolated, intrastate closed basin, the Tulare Lake Bed area occasionally floods. The Appellant asserts that the Tulare Lake Bed area has not flooded to a sufficient level to connect to the San Joaquin River, and then eventually to the Pacific Ocean, since 1878. Several newspaper accounts in the administrative record discuss flooding in the Tulare Lake Bed area. These newspaper accounts discuss that water was removed from the Tulare Lake Bed area in high water years, such as in 1983 when a newspaper account stated water from the lake bed was pumped into the San Joaquin River.

The District and the Appellant disagree regarding whether the jurisdictional status of Lake Success, which is upstream of the drainages in question, has any relation to the CWA jurisdictional status of downstream areas that receive its waters. CWA jurisdictional determinations (JD) in the area are further complicated by the complex irrigation and drainage systems in the area that support local agricultural production. These modifications include the ability to route waters through multiple channels, and the ability to introduce water from other sources. The District and the Appellant also

disagree regarding the interpretation of certain regulations and guidance regarding the CWA.

Reason 1: The Appellant asserts the District incorrectly concluded that the isolated, intrastate drainages considered in this CWA approved JD were traditional navigable waters within CWA jurisdiction under 33 CFR 328.3 (a) (1).

FINDING: The appeal had merit

ACTION: The District must reconsider its conclusion that portions of the TRIJPA area are within CWA jurisdiction under 33 CFR 328.3 (a) (1) as discussed in greater detail in this appeal decision.

DISCUSSION: The District issued an approved CWA JD for this action on April 10, 2003, and subsequently further documented the basis for its decision with a Memorandum for the File completed on May 8, 2003. On May 22, 2003 the Appellant contacted the District and advised that no Request for Appeal form had been included in the April 10, 2003 CWA JD. The District provided a Request for Appeal form by letter of May 28, 2003 and allowed the submittal of a Request for Appeal up to 60 days from the date of that letter. The District and the Appellant agreed that the areas under consideration were isolated, intrastate waters.

The District's April 10, 2003 CWA JD cites the Corps regulations at 33 CFR 328.3 (a) (1), discussed here, and 33 CFR 328.3 (a) (3), discussed under Reason 3, as its reasons for asserting CWA jurisdiction over the drainages in the TRIJPA area. However, the District's April 10, 2003 CWA JD did not differentiate between the information it considered as documentation that 33 CFR 328.3 (a) (1) applied and what information it considered as documentation that 33 CFR 328.3 (a) (3) applied.

The Corps regulations at 33 CFR 328.3 (a) (1) state 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 Environmental Protection Agency (EPA)/Department of the Army Joint Memorandum of January 15, 2003 (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) stated that:

“Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”

and then immediately after this statement listed the citation “ 33 CFR 328.3 (a) (1).”

However, the definition of CWA traditional navigable waters given in the Joint Memorandum that includes the words “...susceptible for use to transport interstate or foreign commerce” does not match the definition of waters within CWA jurisdiction in the Corps regulations at 33 CFR 328.3 (a) (1) which instead describes the areas it defines as “...susceptible to use in interstate or foreign commerce” and omits the “to transport” wording.

The Joint Memorandum description of CWA traditional navigable waters is essentially the same wording as that of the Corps general definition of navigable waters within Corps jurisdiction under the Rivers and Harbors Act (RHA) at 33 CFR 329.4 that states:

“Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”

This might lead some to believe that the Joint Memorandum directed the Corps to limit CWA traditional navigable waters to those waters that were also within RHA jurisdiction, and this was the Appellant’s position. However, Footnote 2 of the Joint Memorandum specifies the Corps is not to adopt that position. Footnote 2 states:

“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.”

Furthermore, Footnote 1 of the Joint Memorandum states that:

“The CWA provisions and regulations described in this document (the Joint Memorandum) contain legally binding requirements. This document (the Joint Memorandum) does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on the Corps.” (Text in parentheses added for clarity).

The Joint Memorandum also states that:

“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 of the tests for being navigable-in-fact. *See, e.g., Colvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal. 2001).”

So the Joint Memorandum considers the *Colvin v. United States* federal district court decision as a suitable *example* of tests of CWA navigability-in-fact tests, but not as a definitive or exclusive set of tests of CWA navigability-in-fact. The District's documentation for the presence of waters within CWA jurisdiction under 33 CFR 328.3 (a) (1) is described below.

The District's administrative record identified that Success Lake above Success Dam provided boating, camping, fishing and day use. Lake Success is clearly navigable-in-fact on an essentially permanent basis (it apparently rarely if ever has so little water as to preclude boating) and attracts a substantial number of recreational visitors. The District did not specify whether it considered Lake Success within CWA jurisdiction under 33 CFR 328.3 (a) (1) or 33 CFR 328.3 (a) (3). The administrative record reasonably documents sufficient evidence of interstate commerce uses and navigation to establish that Lake Success is within CWA jurisdiction under 33 CFR 328.3 (a) (1). However, as discussed under Reason 2, the District's administrative record has not established that the CWA jurisdictional status of Lake Success or any other area upstream of Success Dam is relevant to the CWA jurisdictional status of the isolated, intrastate areas within the TRIJPA area downstream of Success Dam.

I conclude that the District has not sufficiently documented in the administrative record that any areas in the TRIJPA area downstream of Success Dam are within CWA jurisdiction. The District did not conduct and document an analysis of whether 33 CFR 328.3 (a) (1) should apply to the areas below Success Dam.

The District must reconsider its conclusion that areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) are present in the areas covered by this approved JD. This reconsideration must also include a consideration of the tests of navigability-in-fact including but not limited to those such as in *Colvin v. United States* for any areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) as CWA traditional navigable waters. Other factors which must be included as part of this reconsideration are: (1) the frequency of use of these drainages for navigation purposes that meet the requirements of 33 CFR 328.3 (a) (1) – with specific consideration of the typical variation in flow levels in the areas within TRIJPA drainages or any associated downstream areas; (2) whether the areas are legally accessible to the public (i.e. is access authorized or unauthorized (trespass) access) and how the extent of such access was considered in relation to the use of the area in interstate or foreign commerce in accordance with 33 CFR 328.3 (a) (1); and (3) what specific factors make the drainages within the TRIJPA area susceptible to use in interstate commerce.

As the Joint Memorandum and *Colvin v. United States* provide examples, but not exclusive, tests for identifying CWA traditional navigable waters, the District may seek the assistance of higher authorities within the Corps, and/or the views and information available from other relevant parties, such as the Appellant or other government agencies, prior to finalizing its decision. The District is not required to seek Corps Headquarters project-specific approval prior asserting CWA jurisdiction over traditional navigable waters in accordance with 33 CFR 328.3 (a) (1).

After reconsideration, if the District determines that areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) are present, the District must specifically and individually identify its basis of CWA jurisdiction for each of the drainages in the TRIJPA area below Success Dam covered by 33 CFR 328.3 (a) (1). The District must also explain and document whether any other subsections of 33 CFR 328.3 (a) would then apply as a result of the District's reconsideration (For example 33 CFR 328.3 (a) (5) regarding tributary connections.)

Reason 2: The Appellant asserts the District incorrectly concluded that the CWA jurisdictional status of Lake Success and the Tule River upstream of Success Dam were relevant to the determination of CWA jurisdictional status of drainages within the TRIJPA area downstream Success Dam. The Appellant asserts this is an incorrect interpretation of the Corps regulations.

FINDING: The appeal had merit.

ACTION: The District must reconsider its conclusion that the CWA jurisdictional status of an upstream area can establish CWA jurisdiction over a downstream area. The District must also reconsider the CWA jurisdictional status of downstream areas beyond the boundaries of the TRIJPA area in order to properly assess which drainages within the TRIJPA area may be within CWA under 33 CFR 328.3 (a) (5) as tributaries to waters within CWA jurisdiction.

DISCUSSION: The District asserted that because areas upstream of Success Dam were within CWA jurisdiction that areas downstream of Success Dam would also be within CWA jurisdiction. The Appellant asserts that regardless of whether Lake Success and the Tule River are within CWA jurisdiction upstream of Success Dam, such a determination is irrelevant to establishing CWA jurisdiction downstream of Success Dam.

The Appellant asserts that the definition of areas within CWA jurisdiction under subsection 33 CFR 328.3 (a) (1), or any other subsection of 33 CFR 328.3 (a) of the Corps regulations, does not provide for establishing CWA jurisdiction over downstream areas based on the jurisdictional status of upstream areas. The District's administrative record did not document how the Corps regulations defining CWA jurisdiction (33 CFR 328.3 (a) (1) - (a) (7)), or other CWA guidance, could support a conclusion that the CWA jurisdictional status of an area upstream of Success Dam could establish CWA jurisdiction over an area below Success Dam.

The Corps regulations identify that waters that are "tributaries of" waters that have been independently determined to be waters within CWA jurisdiction under 33 CFR 328.3 (a) (1) – (a) (4) are within CWA jurisdiction under 33 CFR 328.3 (a) (5). Tributaries are commonly understood to be upstream waterbodies that flow into downstream waterbodies, and not the reverse. I have not found a basis in the Corps regulations and CWA guidance to support a conclusion that the CWA jurisdictional status of waters upstream of Success Dam, such as Lake Success or the Tule River, may be used to

establish CWA jurisdiction over downstream areas, such as the downstream drainages within the TRIJPA area that are at issue in this administrative appeal.

The District must reconsider its conclusion that the CWA jurisdictional status of an upstream area can be used to establish CWA jurisdiction over a downstream area. In order to assert CWA jurisdiction on this basis the District must specifically document why such a conclusion is consistent with the Corps regulations, CWA guidance, and legal requirements including a discussion of the appropriate subsection of 33 CFR 328.3 (a) (1) – (a) (7) under which such a determination can be made. If after reconsideration the District concludes that such a basis for CWA jurisdiction is appropriate, it must specifically document why such a basis for CWA jurisdiction is appropriate for each drainage within the TRIJPA area to which it applies.

In this CWA JD, the District did not establish the downstream limits of CWA jurisdiction for the entire watershed below Success Dam but generally limited its discussion to the drainages within the TRIJPA area. As a result, the District may not have evaluated some areas that are downstream of, and receive waters from, drainages within the TRIJPA boundaries. If any of those downstream areas are within CWA jurisdiction, then the drainages that are within the TRIJPA area that are upstream of those areas might also be within CWA jurisdiction as tributaries under 33 CFR 328.3 (a) (5).

In order to insure that no tributaries to waters within CWA are inadvertently missed in this isolated system, the District must evaluate the following for each drainage within the TRIJPA area under consideration in this CWA JD; (1) the route of each drainage in the TRIJPA area; (2) whether or not that drainage ultimately reaches a waterbody that is within CWA jurisdiction under any provision of 33 CFR 328.3 (a) (1) – (a) (4); (3) if the drainage does not terminate in an area within CWA jurisdiction under 33 CFR 328.3 (a) (1) – (a) (4), identify what if any portions of the drainage itself meet the criteria to be within CWA under 33 CFR 328.3 (a) (1) – (a) (4); (5) evaluate whether any wetlands within CWA jurisdiction under 33 CFR 328.3 (a) (7) are present; and (6) reconsider whether any additional drainages within the TRIJPA area are tributaries to any of the areas just discussed above, and therefore now within CWA jurisdiction under 33 CFR 328.3 (a) (5). This will probably require evaluation of some areas beyond the downstream boundaries of the TRIJPA area. It may be appropriate to contact additional entities or landowners for information regarding such additional areas, and to advise them that the District is having to consider the CWA jurisdictional status of their property in order to complete a CWA jurisdictional determination for the TRIJPA area.

Reason 3: The District incorrectly determined that the channels within the TRIJPA area were within CWA jurisdiction under 33 CFR 328.3 (a) (3) and did not follow that guidance in the Joint Memorandum regarding such determinations.

FINDING: The appeal had merit.

ACTION: The District must reconsider its conclusion that a sufficient connection between the TRIJPA area channels and interstate commerce exists to establish CWA

jurisdiction under 33 CFR 328.3 (a) (3). In accordance with the Joint Memorandum, if after reconsideration the District believes that subsection 33 CFR 328.3 (a) (3) of the Corps regulations applies, the District should provide its evaluation to Corps Headquarters via standard chain-of-command and seek formal, project-specific Headquarters approval prior to asserting CWA jurisdiction over any such area as required by the Joint Memorandum.

DISCUSSION: The Joint Memorandum discusses 33 CFR 328.3 (a) (3) under the heading “*Isolated Intrastate Waters that are Non-Navigable.*” and reiterates that the Corps CWA jurisdiction under subsection 33 CFR 328.3 (a) (3) of the Corps regulations is specific to isolated, intrastate, and non-navigable areas. The Corps regulations at 33 CFR 328.3 (a) (3) state that waters within CWA jurisdiction also include:

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

The Joint Memorandum directs that in view of the *SWANCC* Decision, the Corps would not assert CWA jurisdiction under 33 CFR 328.3 (a) (3) on the basis of the connection to interstate commerce of the actual or potential use of a waterbody by migratory birds that cross state lines (precluded by the *SWANCC* decision) or assert jurisdiction under any other factor listed in the ‘Migratory Bird Rule’ 51 FR 41217 (November 13, 1986) (i.e. the Corps cannot currently consider (a) use of the water as habitat for birds protected by Migratory Bird Treaties; (b) use of the water as habitat for Federally protected endangered or threatened species; or (c) use of the water to irrigate crops sold in interstate commerce, as a sufficient basis to establish an interstate commerce connection and assert CWA jurisdiction).

The Joint Memorandum also stated that:

“...in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3 (a) (3) (i)-(iii) over isolated, non-navigable, intrastate waters. (i.e. use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce).”

and that:

“... in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3 (a) (3) (i) – (iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over, such waters, including permitting and enforcement actions.”

Although the District’s administrative record described several reasons that the District believed it could assert jurisdiction under 33 CFR 328.3 (a) (3), there is no evidence in the administrative record that the District consulted Corps Headquarters prior to asserting such jurisdiction. The Joint Memorandum requires that field staffs seek formal project-specific approvals prior to asserting jurisdiction based on 33 CFR 328.3 (a) (3). The Joint Memorandum provides no exemption to this requirement in cases when only a portion of a site is determined to be within CWA jurisdiction under 33 CFR 328.3 (a) (3). Therefore, I conclude that the District did not follow current Corps CWA guidance when asserted CWA jurisdiction under 33 CFR 328.3 (a) (3) prior to seeking Corps Headquarters project-specific approval of that action. As the District’s documentation that 33 CFR 328.3 (a) (3) applies must be submitted for Corps Headquarters approval, it is superfluous to conduct an evaluation of the sufficiency of that documentation as part of this administrative appeal decision.

The District must reconsider whether there is a sufficient connection to interstate commerce to consider portions of the TRIJPA area within CWA jurisdiction under 33 CFR 328.3 (a) (3) as isolated, intrastate, non-navigable waters. If after reconsideration the District still believes that a sufficient connection is present, it should provide its evaluation to Corps Headquarters via standard chain-of-command and seek formal, project-specific Headquarters approval prior to asserting CWA jurisdiction over any area using 33 CFR 328.3 (a) (3).

Information Received and its Disposition During the Appeal Review: In addition to the administrative record the Review Officer received the following information:

- 1) The Appellant submitted an October 29, 2003 letter reiterating the positions he expressed at the October 16, 2003 appeal meeting and site visit.
- 2) As part of the administrative record the District included a May 8, 2003 “Memorandum for the File” that expanded on the District’s the April 10, 2003 approved JD for this action. Based on a review of the administrative record, it appears that some of the material included in the District’s May 8, 2003 document was information that was unavailable when the District issued its April 10, 2003 CWA JD. Such compilations of supporting documentation should be developed in advance of the District issuing its JD to insure that all relevant information has been considered prior to issuing a jurisdictional determination. It was unnecessary to determine which portions of the May 8, 2003 “Memorandum for the File” included new information as other portions

of the administrative record clearly established that this action would be remanded to the district for reconsideration.

Conclusion: I conclude the District's administrative record did not provide sufficient documentation to establish that CWA jurisdiction existed within any TRIJPA area channel below Success Dam. I conclude the District's administrative record did not establish that there was a basis in the Corps regulations to assert CWA jurisdiction over a downstream area based solely on the CWA jurisdictional status of an area further upstream. I conclude that the District did not sufficiently evaluate whether tributary connections between drainages within the TRIJPA area and downstream areas within CWA jurisdiction were present. I conclude that the District did not follow the direction provided in the Joint Memorandum that the District must seek formal project-specific Corps Headquarters approval prior to any assertion of jurisdiction under 33 CFR 328.3 (a) (3). I remand this action to the Sacramento District for detailed reconsideration of the factors I have identified in this administrative appeal decision.

Leonardo V. Flor
COL, EN
Commanding