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 UNITED STATES COAST GUARD

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29 JAN 1976

From: Commandant (G-L)
 To : Commander, Eleventh Coast Guard District (dl)
 Subj: Navigable Waters of the United States; Sweetwater River (above mile 0.8), San Diego County, California

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Ref : (a) CCGD11(dl) ltr 3270/5920 to COMDT(G-LMI) of 18 Dec 1975
 (b) COMDT ltr 5903/33-2 to CCGD11(dl) of 23 Sep 1975
 (c) COMDTINST 5920.4A of 4 Aug 1975
 (d) 33 CFR 2.05-25(a) (3), 40 Fed. Reg. 49326 (22 Oct 1975)

*Rec'd
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 (dl)
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 to dcs/d*

1. In reference (b) it was the opinion of the Coast Guard that the Sweetwater River (above mile 0.8), San Diego County, California, and the proposed extension of Sweetwater River Channel, located in the same area, are not part of the navigable waters of the United States. Subsequent to the issuance of reference (b), because of additional evidence, the District Commander issued his interim finding that the Sweetwater River, from its mouth to mile 2.0, is part of the navigable waters of the United States. See reference (a). Pursuant to paragraph 4b(1) of reference (c), for the reasons stated below, it is hereby determined that there is an insufficient factual basis to support the interim finding. Accordingly, it is the opinion of the Coast Guard that the Sweetwater River (above mile 0.8), and the proposed extension of Sweetwater River Channel, are not part of the navigable waters of the United States. Reference (a) also adduces facts that necessitate clarification of portions of reference (b). This is dealt with in paragraph (2) below.

2. In paragraph (1) of reference (b), Paradise Creek Diversion Channel and Lower Paradise Creek Diversion Channel were, for the purposes of the opinion, referred to as "Paradise Creek Diversion Channel". Because this Channel was subject to the ebb and flow of the tide, it was considered to be part of the navigable waters of the United States. A map enclosed with reference (a), and not available when reference (b) was issued, shows that what was referred to in reference (b) as Paradise Creek Diversion Channel is, in fact, Lower Paradise Creek Diversion Channel. Thus, it is Lower Paradise Creek Diversion

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Channel that is subject to the ebb and flow of the tide and so part of the navigable waters of the United States. The new map also shows that there is a proposed Upper Paradise Creek Diversion Channel, to be located just east of Edgemere Avenue. This proposed Channel is not tidally influenced, nor is there a showing of past, present, or susceptibility to future, use as a highway for substantial interstate commerce. It is thus not considered part of the navigable waters of the United States. Statements in reference (b) respecting Paradise Creek Diversion Channel and Lower Paradise Creek Diversion Channel are superseded by this paragraph.

3. Concerning the Sweetwater River above mile 0.8 (to mile 2.0), reference (a) concludes that the river will be available for navigational use when the proposed extension of Sweetwater River Channel is completed. The proposed Channel will divert portions of the Sweetwater River, and thus improve the river's capability for use, within the meaning of U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940). However, an enclosure to reference (a) states that the proposed improvement is primarily for flood control, and that, when completed, the controlling depth will be 1.06 feet of tidal water at Edgemere Road. There are no facts showing that, when completed, the Channel and River will, or may be, used as a highway for substantial interstate commerce.

4. Applying Appalachian, supra, and other cases, reference (d) defines navigable waters of the United States for purposes of Coast Guard jurisdiction. Reference (a) fails to demonstrate sufficient facts, especially concerning susceptibility to use as a highway for substantial interstate commerce, to support a finding that Sweetwater River, above mile 0.8, and the proposed extension of Sweetwater River Channel, are part of the navigable waters of the United States. While recreational use may in some cases be evidence of susceptibility for commercial use, in the instant case, the fact that the proposed channel is for flood control purposes, and the fact that it will have a controlling depth of only 1.06 feet of water, militates against relying on potential recreational use alone as sufficient to support a finding that the waters are navigable waters of the United States.

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5. An additional factor must be considered -- whether future tidal influence alone is a basis for finding that a water body is part of the navigable waters of the United States. Reference (a) projects that when the proposed extension of Sweetwater River Channel is completed, its waters will be tidally influenced to station 140, approximately 400 feet below Edgemere Avenue. Analysis of the relevant case law necessitates the conclusion that future tidal influence alone does not allow a finding that the proposed extension (presently dry land) is part of the navigable waters of the United States. However, a proposed waterway, once it is created, if tidal, becomes by operation of law part of the navigable waters of the United States. United States v. Stoeco Homes, Inc., 498 F. 2d 597 (3d Cir. 1974). See also United States v. Joseph G. Moretti, Inc., 478 F. 2d 418 at 429 wherein the Court found that the Army Corps of Engineers "... has no power landward of [the mean high tide line] to regulate [the developer's] conduct or force reconstruction of the topography as it existed before he began work," under sections 10 and 12 of the Rivers and Harbors Act of 1899.

6. Since the proposed extension of Sweetwater River Channel is not presently subject to the ebb and flow of the tide, and since it does not meet the criteria of reference (d), it is found that the proposed Channel is not part of the navigable waters of the United States. Similarly, Sweetwater River, above mile 0.8, and the proposed Upper Paradise Creek Diversion Channel (see paragraph (2) above), are not part of the navigable waters of the United States.

7. This finding does not apply to the jurisdiction of the Coast Guard respecting "navigable waters" under the Federal Water Pollution Control Act. This finding solely represents the Coast Guard's opinion of the extent of its own jurisdiction, and does not represent an opinion of the extent of the jurisdiction of the United States or any of its other agencies.

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