

Subject: Jurisdictional Determination for the Salton Sea and its tributaries in light of the U.S. Supreme Court decision in the Solid Waste Agency of Northern Cook County (SWANCC), Petitioner v. U.S. Army Corps of Engineers regarding Clean Water Act (CWA) jurisdiction within isolated, non-navigable, intrastate waters of the United States.

From: Chief, South Coast Section

To: Chief, Regulatory Branch

Thru: Chief, Office of Counsel *TW 1/24/01*

1. References:

- a. Supreme Court Decision No. 99-1178 for Solid Waste Agency of Northern Cook County (SWANCC), Petitioner v. U.S. Army Corps of Engineers dated 9 January 2001.
- b. Memorandum from CBCC-ZA dated 9 January 2001, Subject: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters.
- c. Joint Memorandum from General Counsel, EPA and Chief Counsel, U.S. Army Corps of Engineers, Subject: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters.
- d. Corps regulations implementing Clean Water Act found in 33 CFR 328.3 (a).

2. On 9 January 2001 the Supreme Court issued its decision per ref. 1a regarding isolated waters of the U.S. which was then transmitted to the Los Angeles District (LAD) office with guidance from EPA, HQ and Corps, Chief Counsel per ref. 1b and 1c. Based on the guidance received from Headquarters this memo addresses the jurisdictional determination for the Salton Sea in Riverside County, CA.

3. The Supreme Court in the SWANCC case concluded the entire "Migratory Bird Rule" was not supported by the CWA. The "Migratory Bird Rule" is found in the 1986 Federal Register Notice and stated in the Supreme Court Ruling as, "In 1986, in an attempt to 'clarify' the reach of its jurisdiction, the Corps stated that 404(a) extends to intrastate waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.'

The guidance from Corps, Office of Counsel stated that, "Although the Court held that the Corps application of 33 CFR 328.3 (a)(3) was invalid in SWANCC, the Court did not strike down 33CFR 328.3(a)(3) or any other component of the regulations defining "waters of the United States." Based on HQ guidance, the Corps still regulates isolated, non-navigable, intrastate, water bodies that have a significant federal interstate commerce nexus that do not rely on migratory bird use as the sole basis. The definition of isolated waters of the U.S., that the Court did not strike down, per 33 CFR 328.3(a) is stated below,

- (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 and shellfish are or could be taken and sold in interstate or foreign commerce;
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

4. The Corps reviewed the potential for such nexus' to exist within the Salton Sea and found that there were four significant Federal interstate commerce nexus' that are documented in LAD's decision in the paragraphs that follow.

5. The first Federal interstate commerce nexus concerns the use of the Salton Sea by interstate or foreign travelers for recreational or other purposes. The Corps contacted the Salton Sea State Recreation Area and the State Department of Boating and Waterways and the superintendent stated there are approximately 7,000-8,000 recreational boat trips that launch from the State Park boatramps in the Salton Sea. On these boat trips, people or travelers from Arizona, Nevada, Oregon, and Canada, do utilize the Salton Sea on an annual basis for recreational fishing, boating, and water-skiing. Thereby a significant Federal interstate commerce nexus under 33 CFR 328.3(a)(3)I exists that would qualify the water-body as used by interstate and foreign travelers. In addition many people recreationally fish from other states and Canada which further supports a significant interstate and foreign fish commerce nexus.


6. The second Federal interstate commerce nexus concerns isolated waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce. The Corps found at least four commercial fisheries near and adjacent to the Salton Sea that used the Salton Sea in their operations. These commercial fisheries export commercially raised sea bass and other fish all over the world including other states and thereby qualify as foreign and interstate commerce. Thereby a second significant Federal interstate commerce nexus exists under 33 CFR 328.3(a)(3)(ii).

7. The third Federal interstate commerce nexus is defined as isolated waters that are used or could be used for industrial purposes by industries in interstate commerce. The Corps contacted the California Regional Water Quality Control Board - Colorado Desert Region to inquire as to whether there were any industrial users using the Salton Sea. They stated that there were several geothermal power plants that export electric power to other industrial users. The geothermal plants have existing Waste Discharge Requirements Permits (WDRs) with the State of California that designates them as an industrial beneficial user. The Corps hereby references these WDRs as validation that the Salton Sea is used in industrial interstate commerce and thereby qualifies as a third significant Federal interstate commerce nexus under 33 CFR 328(a)(3)(iii).

8. The fourth Federal nexus for the Salton Sea is under 33 CFR 328.3 (3) that defines waters of the United States as waters that affect the degradation and destruction of foreign commerce. Since the New River and Alamo River and hundreds of agricultural and industrial drains come from Mexico that are used by hundreds of Mexican industries in foreign commerce the Corps has determined that a fourth significant Federal interstate commerce exists under the foreign commerce nexus.

9. In summary the Corps hereby determines that the Salton Sea is waters of the United States given the four significant Federal interstate commerce nexus' that have been documented in this memorandum. Thereby all tributaries that flow into the Salton Sea are deemed jurisdictional by the Corps under 33 CFR 328.3(a)(5).

Mark Durham



Acting Chief, Regulatory Branch

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MEMORANDUM FOR ALL COUNSEL

SUBJECT: New Post-SWANCC Decision--Colvin v. U.S., U.S. Dist. Ct. Central Dist. CA, ED CR97-32-RT

1. The subject case is another post-Solid Waste Authority of Northern Cook County (SWANCC) case. The movant, Bobby Joe Colvin, was convicted of criminal violation of the Clean Water Act for willfully discharging waste material in the Salton Sea, an isolated waterbody in southern California. In attempting to overturn his conviction, Colvin argued that 1) a bulldozer could not be a point source; and 2) that based on the SWANCC decision, the Salton Sea is not a navigable water as defined in the Clean Water Act.
2. The Court quickly rejected the first point, citing numerous cases holding that a bulldozer used in moving dirt around in waters of the U.S. were "point sources" as defined in the Clean Water Act. As to whether SWANCC mandated a finding that the Salton Sea is not a navigable water, the Court, citing Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9<sup>th</sup> Cir 2001), found that SWANCC merely invalidated the "migratory bird rule" but did not invalidate the other tests set forth at 33 C.F.R. 328 for establishing jurisdiction. Because the Salton Sea is actually used by tourists in interstate commerce, as well as being subject to tidal ebb and flow, the Court concluded that the Salton Sea was a Clean Water Act navigable water.
3. This decision is important in a number of ways. First, it continues the growing number of post-SWANCC cases that have held that SWANCC is limited to invalidating the migratory bird rule. Further, it found jurisdiction over an isolated water based on actual interstate commercial use (as well as tidal influence) of the waterbody, and it did so in the context of a criminal case. This case should be cited in post-SWANCC briefs in answer to allegations that SWANCC limited our jurisdiction over isolated waters. This case should also be shared with our regulatory clients.

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