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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN CALIFORNIA RIVER
WATCH, a non-profit corporation,

No. C 01-04686 WHA

Plaintiff,

v.

CITY OF HEALDSBURG,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND REMEDIAL ORDER
AFTER BENCH TRIAL**

Defendant.

INTRODUCTION

The basic question concerns the extent to which a pond formed from an old gravel pit and adjacent wetlands, all alongside the Russian River, are within the jurisdiction of the Clean Water Act. The issue is of importance because defendant City of Healdsburg discharges all of its treated sewage into the pond, which then drains via an aquifer into the nearby Russian River. It does so without an NPDES permit. After a bench trial, this order now holds that an NPDES permit is needed.

PROCEDURAL HISTORY

Plaintiff Northern California River Watch filed the instant citizen suit under the Clean Water Act against defendant City of Healdsburg on December 4, 2001. The complaint was based on allegations that Healdsburg routinely makes unauthorized discharges of pollutants from its waste-treatment facility into Basalt Pond, a pond formed from an old gravel mining pit

This is
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1 alongside the Russian River. The pond and its wetlands, River Watch claims, are part of the
2 "navigable waters of the United States." It is stipulated (No. 28) that plaintiff has standing to
3 assert claims with regard to the Russian River under the Act. Similar allegations formed the
4 basis of a companion suit filed by River Watch on July 9, 2002, against Syar Industries, Inc.,
5 as to its wastewater discharges into Basalt Pond. The actions were consolidated. Syar settled.
6 The consent decree was filed on August 5, 2003, bringing to a close the litigation as to Syar.

7 River Watch and Healdsburg filed cross-motions for summary judgment. The Court
8 granted partial summary judgment in favor of River Watch, finding that Healdsburg
9 (i) discharged (ii) treated wastewater (iii) from a pipe extending from its treatment plant into
10 Basalt Pond (iv) without an NPDES permit. On the summary-judgment record presented,
11 however, whether Basalt Pond was within the "navigable waters of the United States" remained
12 an open question. A bench trial commenced December 16, 2003. After four days of evidence
13 and argument, this order now sets forth the Court's findings of fact and conclusions of law.¹

14 **FINDINGS OF FACT**

15 The Russian River, all agree, is within the navigable waters of the United States. Its
16 headwaters originate in Mendocino County, California. Its main course runs about 110 miles,
17 flowing into the Pacific Ocean west of Santa Rosa. Before modern times, the Russian River
18 occasionally overflowed its banks and created natural ponds and wetlands along its banks.
19 During high water, it forged new channels, stranding the old channels, creating oxbow lakes,
20 and saturating and supporting adjacent wetlands. All of these ponds and wetlands, together
21 with the river, supported plant life and fish and wildlife in an integrated ecosystem.

22 With civilization, the river became more controlled. Towns grew up along and near the
23 river. Nearby land was cleared for agriculture and ranching. To protect these developments,
24 levees were built in some places, dams in others, and the channel was dredged for flood control.
25 The river was not completely tamed, however. Even today, large storms overpower the flood
26 controls on occasion. In 1995, during persistent winter rains, the levee between the river and the
27

28 ¹ Except in instances where citation may be of particular use to the parties or the court of appeals, this order will *not* cite the record, finding it unnecessary and cumbersome.

United States District Court
For the Northern District of California

1 site here in question, the so-called Basalt Pond in Sonoma County, was breached twice and once
2 again in 1997. In 2002, the flood level reached within a foot of the levee top, even after an extra
3 three vertical feet had been added to the levee.

4 The Russian River and surrounding area rest on top of a vast gravel bed extending as
5 much as sixty feet into the earth. The gravel bed is the result of ancient processes over geologic
6 time whereby rock was washed downstream, the edges sanded smooth. This resulted in huge
7 deposits of river rock, sand, and gravel. The gravel bed is a porous medium, saturated with
8 water. Through it flows an equally vast underground aquifer. This fact poses two significant
9 points of interest in this case. It explains why so much gravel mining has occurred along the
10 river. It also supplies the principal pathway for a continuous passage of water between
11 Basalt Pond and the Russian River.

12 Basalt Pond lies alongside and west of the river, the two separated by a levee. Whether a
13 tam, even a slight one, pre-existed the Basalt Pond excavation is doubtful on this record. Be
14 that as it may, we know that in approximately 1967, the Basalt Rock Company, a division of
15 Dillingham Construction Company, began excavating gravel and sand from the terrace land near
16 the river (as well as other mining locations in the surrounding area). The terrace top soil was
17 ripped away. Large machines then tore out rock and sand. When the water table was reached,
18 drag lines continued the excavation, dropping into the water and pulling out more rock and sand.
19 The ore was hauled away and processed at a nearby plant. The result was a pit. It filled with
20 water up to the line of the water table of the surrounding aquifer, i.e., the pond opened the
21 aquifer to the sky. In this manner, Basalt Pond was created. Today, the pond has 58 acres of
22 surface water. It is a half-mile long and a quarter-mile across. A map of the river and the pond
23 is reproduced in Figure 1.

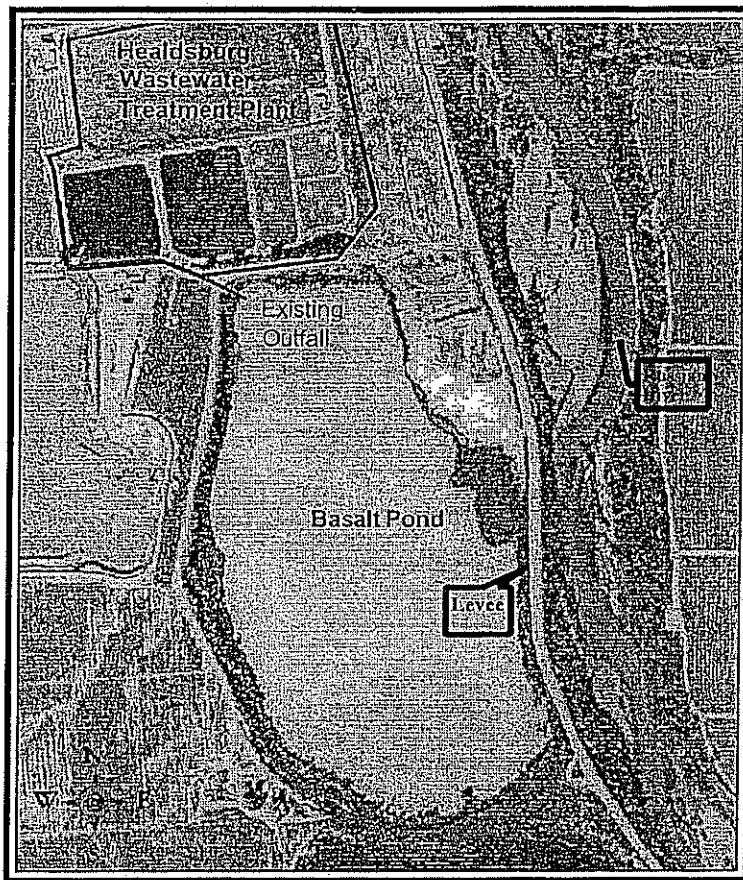


Figure 1

17 The horizontal distance between the river's edge and the pond's edge varies between
18 fifty and several hundred feet, depending on the exact location and the height of the water. For
19 at least 750 feet along the east side of the pond, the distance is less than 100 to 200 feet at
20 normal water stages (TX 21 at H1365). Normally, there is no surface connection, the levee
21 blocking the way. But for the levee the pond would be inundated by high river waters in the
22 rainy season. As stated, the levee has broken three times in the last eight years, each time the
23 levee being repaired within a few months (Stip. No. 18). To a minor extent, a vestige of uplands
24 remain in some places near the pond, but they are below the levee top and are likewise subject
25 to inundation.

26 Beneath the surface the story is different. There, water soaks in and out of the pond via
27 the pervasive underground aquifer. This action is continuous, 24 hours a day, seven days a
28 week, 365 days a year. In fact, water from the aquifer flows downhill from the side of the

this would be issue of NPDES discharge

disruption of groundwater flow

*
Official description of groundwater connection
RIDGES issued to Basalt Pond discharge based on protection of Russian River.

most groundwater is connected to surface water. Did Congress acknowledge this fact & exempt from federal jurisdiction anyway?

1 valley, through the pond and under the levee — all via the gravel-laden, water-saturated aquifer.
2 The subterranean flow finally bleeds into the river itself or at least a large part of it does. It is
3 stipulated herein that the pond and the river overlie the same unconfined aquifer and that the
4 land separating the two is saturated below the water table [In this sense, the underground
5 aquifer is a slow-moving, underground tributary of the river.] The pond is an open way station
6 on the underground tributary.

7 In an official report, Healdsburg itself has characterized the water system as follows.
(TX 24 at H3037):

The groundwater basin is hydraulically connected to the Russian River. In the Russian River Valley, groundwater moves from the margins toward the Russian River during most of the year. Groundwater in the project area generally flows to the southeast with a gentle gradient. When groundwater levels are depressed, usually during the fall, flow in Russia River recharges the groundwater reservoir. River water moves into the alluvium during high river stages in the autumn and winter, and also during the summer in locations where large volumes of water are withdrawn from the river. Most recharge to the groundwater is derived from infiltration of rain that falls on the valley floor and from seepage into permeable deposits that underlie channels of the tributary streams.

16 Although the Basalt Rock Company began its excavation of Basalt Pond in 1967,
17 excavation ceased in 1984. In 1986, Syar Industries, Inc., acquired all of the local land and
18 business of the Basalt Rock Company. Syar did not resume any extraction at Basalt Pond.
19 Syar, however, carried on and still does carry on extraction at *other* pits in the area. Since 1984,
20 no excavation has occurred at Basalt Pond. No activity at all was underway at the pond between
21 1984 to 1986 (TX 7 at RW0462-63). Healdsburg itself has referred to Basalt Pond as
22 "an abandoned quarry" (TX 24 at H3038).

23 Reclamation activities by Syar, however, have been underway at Basalt Pond since 1986.
24 To this end, Syar has pumped a slurry of sand and sediment from its main aggregate processing
25 plant near Healdsburg via a long pipe into Basalt Pond. This slurry is a by-product of rock
26 extracted elsewhere — again, not from Basalt Pond. The outfall from the slurry pipe flows onto
27 the margin of Basalt Pond, the outfall point being moved from time to time, such that the
28 sediment and fill have slowly been filling in and reclaiming the edges of the pond as wetlands.

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constructed
wetlands

1 As well, a considerable amount of sediment has drifted over the entirety of the pond and settled
2 to the bottom, forming a layer that helps filter out pollutants as water drains into the aquifer.
3 Since 1993, Syar has been directed by the county to direct the flow of sediment to the bank near
4 the levee. This is meant to strengthen the levee (on the pond side). The reclamation/slurry
5 process is expected to go on for many years.

6 Trees and plants have also been planted along the reclaimed margins, all for the purpose
7 of developing man-made wetlands. Most of the plants and trees that inhabit the riparian forests
8 along the river and pond are wind pollinated and disperse their seeds by wind. The result is that
9 similar plants and trees appear in abundance in both locations. A few of the most common
10 include cottonwoods, coyote brush, willows, and red willow trees. Although virtually the entire
11 perimeter of the pond is now wetlands, the predominate wetlands are along the east and
12 southeast margins of the pond. The perimeter is characterized by the presence of vegetation that
13 requires saturated soil conditions for growth and reproduction.

14 The wetlands, in turn, now support substantial bird, animal and fish populations, all as
15 an integral part of and indistinguishable from the rest of the Russian River ecosystem. Many of
16 the bird populations at the pond are familiar along the river, including cormorants, great egrets,
17 mallards, sparrows, and fish-eaters. Fish indigenous to the river also live in the pond due to the
18 recurring breaches of the levee. As a result, it would be hard to distinguish Basalt Pond from
19 any of the natural wetlands and tarns that have developed alongside the Russian River over the
20 course of time.

21 In 1971, defendant City of Healdsburg built a secondary waste-treatment plant on a
22 35-acre site located on the north side of Basalt Pond about 800 feet from and west of the river.
23 Prior to 1978, Healdsburg discharged its wastewater into another water-filled pit located to the
24 north. In 1978, Healdsburg began discharging into Basalt Pond. It continues to do so pursuant
25 to permission from Syar and pursuant to a state water permit. The treated outfall, however, does
26 not meet NPDES standards. No NPDES permit has ever been obtained.

with
standards
in these

27 Wastewater discharges to Basalt Pond from the plant were between 420 and 455 million
28 gallons per year between 1998 and 2000. The volume of the pond itself is of the same order of

1 magnitude — 450 to 740 million gallons. The annual outflow from the sewage plant, therefore,
2 is sufficient to fill the entire pond every one to two years. The pond would, of course, soon
3 overflow in these circumstances were it not for the fact that the pond drains into the surrounding
4 aquifer. Because of this drainage, the pond has reached a steady state in which the “volume in”
5 equals the “volume out.”²

6 Much evidence was received at trial on the precise underground relationship between the
7 pond and the river. The normal surface level of the pond is only a few feet higher than the
8 normal level of the river. This conforms to the general terrain by which the underground
9 aquifer, collecting water from the larger drainage of the river valley, flows downhill through the
10 pond and then into the river or river bed. The large quantity of treated sewage has caused the
11 level of the pond water to rise somewhat higher than the normal water table of the groundwater.
12 As stated, the downhill flow passes through the pond, albeit slowly, and eventually moves yet
13 farther downhill. According to Healdsburg’s water expert at trial, at least one-fourth of the
14 liquid in the pond finds its way into the river proper. Healdsburg’s own environmental impact
15 report gave a higher and more probable estimate: “It is likely that the entire volume of treated
16 wastewater and aggregate wash water discharged to Basalt Pond (2.1 cfs) will eventually
17 migrate to the River, either directly through the aquifer or indirectly” (TX 24 at H3186-87).
18 Pond water will ordinarily take several months to find its way to the river and drains into the
19 river over a stretch as long as 2200 feet. Although the discharges into the pond do not meet
20 NPDES standards, the pollutants are diluted by the time they actually bleed into the
21 Russian River.

22 In passing through the bottom and sides of the Basalt Pond, the effluent is partially
23 cleansed. This cleansing and settling process is sometimes referred to as “polishing” or
24 “percolation” by Healdsburg. Since groundwater flows through the pond, the flow is not only
25 through the bottom, as Healdsburg contends, but also is through the sides including through the
26 wetlands along the margin of the pond — particularly those heavier wetlands between the pond
27

28 ² The primary “volume in” comes from the plant. The primary “volume out” is drainage to the aquifer. There is also rainfall (in), aquifer leakage (in), and evaporation (out), all lesser factors.

why
EIRs
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United States District Court
For the Northern District of California
Is this the worst const. anyone could cite to?

1 and the levee. These wetlands also help cleanse the outflow by passing the effluent through the
2 wetlands sediment, just as the outflow through the silt bottom likewise filters the fluid. The
3 filtration is effective in reducing biochemical oxygen demand and removing some pollutants.

4 The filtration is not perfect. The concentrations of chloride in the groundwater between
5 the pond and the river, for example, are substantially higher than in the surrounding area.

6 Chloride, which already exists in the pond due to naturally occurring salts, reaches the river in
7 higher concentrations as a direct result of Healdsburg's discharge of sewage into the pond.

8 Mr. John Lambie, a water trial expert for Healdsburg, testified that the average concentration of
9 chloride appearing *upstream* in the river is only 5.9 parts per million. In contrast, the average
10 concentration of chloride in the water exiting Basalt Pond is 36 parts per million. At a
11 monitoring well between the pond and the river, the underground concentration is diluted to
12 some 30 parts per million. Ultimately, a chloride concentration of 18 parts per million appears
13 on the west side of the river adjacent to the pond. As such, chloride from the pond over time
14 makes its way to the river in higher concentrations than naturally occurring in the river
15 (Tr. 588-92).³

16 The river and the pond rise and fall in tandem. The reason is that they are connected by
17 the aquifer. A relative change in the heads of pressure between the two waterbodies will
18 influence each, almost immediately, causing an adjustment in the surface levels. This influence
19 is "hydraulic," meaning the pressure is transmitted within the underground fluid body itself.

20 * One might think that river water was flowing into the pond via the aquifer, but not so. The
21 levels do not rise and fall in tandem for any such reason. Such a direct effect would be difficult,
22

23 ³ This finding is further supported by Dr. Larry Russell, one of River Watch's trial experts. Chloride is
24 a highly soluble pollutant that moves with the flow of water. Were it not for the discharge into the river,
25 Dr. Russell stated that the chloride in the pond would build up, thereby making it saltier and saltier from year to
26 year. That, however, is not the case here. The chloride levels in the pond generally remain steady, which means
27 that what Healdsburg discharges into the pond in the form of chloride must go through the groundwater aquifer
28 and eventually out into the river, even if it is in a more diluted form (Tr. 94-95). Although Dr. Russell did not
express an opinion as to what quantity of chloride could emerge in the river from the pond, he did examine data
taken from the monitoring well fifty feet away from the pond. The data was gathered and presented in an
environmental impact report prepared by Healdsburg. The measurements were commensurate with the figures
considered by Dr. Lambie in that the chloride levels at the pond and at the well were of the same order of
magnitude. Dr. Russell concluded that there was a migration of chloride from the pond through the well and
then to the river (Tr. 96-97).

1 given the slow transit time of water through the sponge-like, gravelly texture of the alluvium.
2 Instead, the reason is, as stated, because the gravel is saturated with water and it instantly
3 transmits any pressure change. Any pressure difference in the river, as it rises and falls, is thus
4 transmitted through the aquifer, which forces groundwater up into the pond or pulls pond water
5 through bottom and side layers down into the alluvium, as the case may be. The above represent
6 the findings necessary to address the main conclusions of law. For clarity and ease in
7 presentation, additional findings will be made below.

8 **CONCLUSIONS OF LAW**

9 The Clean Water Act of 1972 established two programs of importance to this case.
10 Section 402 authorized the Environmental Protection Agency to administer the National
11 Pollution Discharge Elimination System (NPDES). Under Section 301(a), sewage treatment
12 facilities and other point sources were barred from making discharges into the navigable waters
13 of the United States without an NPDES permit. 33 U.S.C. 1311(a). The Act allowed EPA to
14 authorize state agencies to administer the NPDES program. In most states, including California,
15 the NPDES program is administered by state agencies pursuant to federal standards. The
16 second program of note herein was authorized by Section 404. It prohibited dredging or filling
17 of any navigable waters of the United States without a permit from the Army Corps of
18 Engineers. 33 U.S.C. 1344. Thus, the jurisdictional reach of both programs depends on the
19 term "navigable waters of the United States."

20 All agree herein that the Russian River falls within the "navigable waters of the
21 United States." The Healdsburg system is a "point source." All agree that Healdsburg has
22 never had an NPDES permit. The issue is whether Basalt Pond and/or its wetlands fall within
23 the navigable waters of the United States such that an NPDES permit is required.

Healdsburg can't be a "point source" unless it discharges into a water of the U.S.
under State law, no such definition.

24 If Healdsburg were required to apply for and obtain an NPDES permit, it would be
25 subject to regulation over and above that imposed by its state-issued permits. For example,
26 Healdsburg currently chlorinates its treated sewage but is not required to de-chlorinate it prior to
27 discharge into Basalt Pond. This would change if the pond were within the "navigable waters of
28 the United States." Healdsburg would then need an NPDES permit and be required to

trying to more gently discharge Basalt Pond

why?

total residual chlorine reqmts?

is this not already required??

1 de-chlorinate its treated sewage prior to discharge (Tr. 295-96). Thereafter, to ensure
2 compliance with the Act, Healdsburg would have to establish and maintain records and install,
3 use, and maintain equipment to monitor and sample the chlorine (or any other pollutant) present
4 in its discharge. On a regular basis, compliance reports would have to be submitted to the
5 California Regional Water Quality Control Board for review.

6 1. THE NAVIGABLE WATERS OF THE UNITED STATES.

7 The "navigable waters of the United States" is a term of venerable vintage, first
8 appearing as "navigable waters" in the celebrated case of *Gibbons v. Ogden*, 22 U.S. 1, 21-22
9 (1824), and then in full form in *Mayor of New York v. Miln*, 36 U.S. 102, 135 (1837). It defines
10 a federal servitude, derived from the commerce clause, that overlays what might otherwise be
11 considered state waters. After decades of federal common-law usage, Congress adopted the
12 term to set the jurisdictional limits of numerous river, harbor, and waterway laws.

13 The Clean Water Act of 1972 defined the term "navigable waters" to mean "waters of
14 the United States, including the territorial seas." 33 U.S.C. 1362(7). This definition is an
15 important one, for it defines the outer jurisdictional limits of two federal agencies under the
16 Act — the Environmental Protection Agency and the Army Corps of Engineers. The manifest
17 intent was expansive — to cover not just waters deemed navigable under the traditional test but
18 to cover any waters affecting interstate commerce. *Leslie Salt Co. v. United States*, 896 F.2d
19 354, 357 (9th Cir. 1990). Even under the narrowest definition, it is generally agreed that the
20 term covers (i) actually navigable waters, (ii) their tributaries, and (iii) wetlands adjacent to
21 each. This case presents issues under both the "tributary" prong and the "wetlands" prong. The
22 latter will be considered first.

precedent tributaries - waters U.S.

23 2. WETLANDS.

24 After the Act was passed, an issue arose concerning the extent to which adjacent
25 wetlands were covered. Subdividers, developers and others wished to fill in wetlands and build.
26 In 1978, the Army Corps of Engineers, however, issued an interpretative ruling stating that
27 "adjacent wetlands" were within the protection of "waters of the United States." This brought
28 such wetlands under Section 404 of the Act which prohibits dredging or filling without a permit

For the Northern District of California

1 from the Corps. 33 U.S.C. 1344. Although the wetlands regulation has been reissued from time
2 to time, and twice reviewed by the Supreme Court, the language here relevant has been in the
3 regulation all along.

4 Under the interpretive regulation, the term “waters of the United States” includes
5 “[w]etlands adjacent to” a navigable water like the Russian River. 33 C.F.R. 328.3(a)(7)
6 (2003).

7 In turn, the term “wetlands” is defined as follows:

8 The term *wetlands* means those areas that are inundated or
9 saturated by surface or ground water at a frequency and duration
10 sufficient to support, and that under normal circumstances do
11 support, a prevalence of vegetation typically adapted for life in
12 saturated soil conditions. Wetlands generally include swamps,
13 marshes, bogs, and similar areas.

14 *Id.* at 328.3(b).

15 “Adjacent,” in turn, is defined as follows:

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

20 *Id.* at 328.3(c).

21 The interpretive rule of the Army Corps of Engineers was litigated all the way to the
22 United States Supreme Court by a Michigan owner of a housing developer, Riverside Bayview
23 Homes, Inc. Ruling for the developer, the Sixth Circuit had limited jurisdiction over wetlands
24 to those created by frequent flooding of the nearby navigable waters and excluded wetlands
25 saturated by groundwater or surface water. The Supreme Court reversed and sustained the
26 broader reach of the Act over wetlands as defined in the regulation. The Supreme Court
27 recognized that some point must be found where water ends and land begins. *United States v.*
28 *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). In this transitional zone, a regulatory
definition was warranted. When the purposes of the Act were considered, the Supreme Court
found a more expansive regulation of wetlands under the Act was reasonable and deferred to the
Corps’ interpretation (*id.* at 132–33):

Faced with such a problem of defining the bounds of its regulatory
authority, an agency may appropriately look to the legislative

1 history and underlying policies of its statutory grants of authority.
2 Neither of these sources provides unambiguous guidance for the
3 Corps in this case, but together they do support the reasonableness
4 of the Corps' approach of defining adjacent wetlands as "waters"
5 within the meaning of § 404(a). Section 404 originated as part of
6 the Federal Water Pollution Control Act Amendments of 1972,
7 which constituted a comprehensive legislative attempt "to restore
8 and maintain the chemical, physical, and biological integrity of the
9 Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective
10 incorporated a broad, systemic view of the goals of maintaining
11 and improving water quality: as the House Report on the
12 legislation put it, "the word 'integrity' . . . refers to a condition in
13 which the natural structure and function of ecosystems [are]
14 maintained." H.R. Rep. No 92-911, p. 76 (1972). Protection of
15 aquatic ecosystems, Congress recognized, demanded broad federal
16 authority to control pollution, for "[w]ater moves in hydrologic
17 cycles and it is essential that discharge of pollutants be controlled
18 at the source." S. Rep. No. 92-414, p. 77 (1972).

19 The Supreme Court repudiated the notion that wetlands themselves had to be navigable
20 (*id.* at 133):

21 In keeping with these views, Congress chose to define the waters
22 covered by the Act broadly. Although the Act prohibits discharges
23 into "navigable waters," see CWA §§ 301(a), 404(a), 502(12),
24 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of
25 "navigable waters" as "the waters of the United States" makes it
26 clear that the term "navigable" as used in the Act is of limited
27 import. In adopting this definition of "navigable waters," Congress
28 evidently intended to repudiate limits that had been placed on
federal regulation by earlier water pollution control statutes and to
exercise its powers under the Commerce Clause to regulate at least
some waters that would not be deemed "navigable" under the
classical understanding of that term. See S. Conf. Rep.
No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972)
(statement of Rep. Dingell).

29 The Supreme Court found reasonable the agency's conclusion "that adjacent wetlands are
30 inseparably bound up with the 'waters' of the United States." *Id.* at 134. In part, the
31 Supreme Court stated (*ibid.*):

32 . . . The Corps has concluded that wetlands may affect the water
33 quality of adjacent lakes, rivers, and streams even when the waters
34 of those bodies do not actually inundate the wetlands. For
35 example, wetlands that are not flooded by adjacent waters may still
36 tend to drain into those waters. In such circumstances, the Corps
37 has concluded that wetlands may serve to filter and purify water
38 draining into adjacent bodies of water, see 33 CFR
§ 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff
into lakes, rivers, and streams and thus prevent flooding and
erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent
wetlands may "serve significant natural biological functions,
including food chain production, general habitat, and nesting,

1 spawning, rearing and resting sites for aquatic . . . species.”
2 § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands
3 adjacent to lakes, rivers, streams, and other bodies of water may
4 function as integral parts of the aquatic environment even when the
5 moisture creating the wetlands does not find its source in the
6 adjacent bodies of water.

7 This ringing language is now invoked by River Watch. Without question, *Riverside*
8 *Bayview* militates in favor of an expansive view of Clean Water Act jurisdiction over wetlands.
9 Healdsburg contends, however, that a later decision by the Supreme Court limited *Riverside*
10 *Bayview*. More specifically, Healdsburg maintains the Supreme Court has now imposed a
11 “hydrological-connection” requirement or, to state what Healdsburg really means, a “*surface*
12 hydrological-connection” requirement.

13 It is true that *Solid Waste Agency of Northern Cook County v. United States Army Corps*
14 *of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), held that the Corps had gone too far in
15 asserting jurisdiction over a series of nonnavigable, intrastate, isolated, and abandoned mining
16 pits away from any navigable waters and whose only connection to navigable water was that
17 migratory birds used both as habitat. In rejecting the Corps’ so-called “migratory-bird rule,” a
18 wetlands rule added by the Corps in 1986 to reach isolated intrastate waters, the Supreme Court
19 said: “The term ‘navigable’ has at least the import of showing what Congress had in mind as its
20 authority for enacting the CWA: its traditional jurisdiction over waters that were or had been
21 navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S. at 172.

22 Although the Ninth Circuit has not yet ruled on the restrictive theory advanced by
23 Healdsburg, the Ninth Circuit seems to have read *SWANCC* as only invalidating the
24 migratory-bird rule as applied to isolated waters. *Headwaters, Inc. v. Talent Irrigation Dist.*,
25 243 F.3d 526, 533 (9th Cir. 2001). At all events, as this Court reads it, *SWANCC* did not impose
26 a rule of “hydrological connection,” much less a rule of “*surface* hydrological connection.”

27 *SWANCC* dealt specifically with physically *isolated* rather than *adjacent* waterbodies.

28 The Supreme Court recognized this when it stated:

We found [in *Riverside Bayview*] that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up with the ‘waters’ of the United States.”

1 It was the significant nexus between the wetlands and “navigable
2 waters” that informed our reading of the CWA in *Riverside*
3 *Bayview Homes*. Indeed, we did not “express any opinion” on the
4 “question of the authority of the Corps to regulate discharges of fill
5 material into wetlands that are not adjacent to bodies of open
6 water” In order to rule for [the Corps] here, we would have to
7 hold that jurisdiction of the Corps extends to ponds that are *not*
8 adjacent to open water. But we conclude that the text of the statute
9 will not allow this.

6 *SWANCC* at 167–68 (citations omitted and emphasis in original). Rather than impose a
7 hydrological-connection requirement, *SWANCC* reaffirmed that wetlands (and other waterbodies
8 like ponds) *adjacent to navigable waters* share a significant nexus worthy of protection under the
9 Clean Water Act. *See id.* at 171 (acknowledging that “it is . . . plausible . . . that Congress simply
10 wanted to include all waters adjacent to ‘navigable waters’ such as nonnavigable tributaries and
11 streams”). *SWANCC* does not impose a hydrological-connection requirement for adjacent
12 wetlands and waters.

13 Therefore, even in its narrowest reading, *SWANCC* appears to recognize jurisdiction over
14 (i) actually navigable waters, (ii) their tributaries, and/or (iii) wetlands adjacent to each.

15 Once adjacency is established, the tributary issue is superfluous. Once wetlands are
16 found to be adjacent to a river actually navigable, there is no need to investigate whether the
17 wetlands are interconnected by surface or groundwaters. The regulation, approved in
18 *Riverside Bayview*, recognizes this in stating that wetlands separated by berms or levees are
19 covered. Plainly, a berm or levee is inconsistent with any surface connection. No caselaw is
20 cited holding that adjacent wetlands must also have a surface hydrological connection.

21 Although the Corps does not administer the NPDES program — EPA does so in
22 conjunction with state agencies — EPA has adopted a parallel definition for wetlands. 40 C.F.R.
23 122.2 (2003). Since the Act authorizes both the NPDES regulation and the dredge-and-fill
24 regulation, their jurisdictional scope should be the same. Therefore, it is proper to use the Corps’
25 definition in this NPDES case.

26 Applying the regulation to the facts of this case, this order now holds that Basalt Pond
27 and its wetlands are “adjacent” to the Russian River within the meaning of the regulation. The
28 Basalt Pond wetlands are within a few hundred feet of the Russian River and at points as little as

1 fifty feet, the difference depending only on the water level of the river and the exact point used
2 along the half-mile long length of the pond. A man-made levee separates the two. The
3 regulation specifically states that “[w]etlands separated from other waters of the United States by
4 man-made dikes or barriers . . . and the like are ‘adjacent wetlands.’” 33 C.F.R. 328(c). Again, a
5 surface-water requirement would be inconsistent with this definition, for dikes and barriers and
6 levees are manifestly intended to prevent a surface-water connection. Although the
7 Supreme Court held in *Riverside Bayview* that there is no requirement that the wetlands be
8 inundated periodically by the river, the wetlands at issue would, in fact, be flooded in the rainy
9 season but for the levee.

10 While such a connection is unnecessary for jurisdiction purposes, there is, in fact, an
11 intimate and persistent hydrological connection, albeit underground. The pond drains into the
12 aquifer and at least 26 percent of the pond’s volume concededly surfaces in the river itself (and
13 this order finds that substantially more drains actually into the river). There is also an immediate
14 underground hydraulic connection between the two bodies, such that the water level in each
15 immediately affects the water level in the other. Even on the *surface*, there is an episodic
16 connection; when the levee breaches, as it has three times in the last eight years, the two
17 waterbodies substantially commingle.

18 Finally, as in *Riverside Bayview*, the pond, the river, and the wetlands all share the same
19 ecosystem. The wetlands in question help filter pollutants entering the aquifer and hence the
20 river proper.⁴ In every way the pond and wetlands are “adjacent to” the Russian River.
21 Healdsburg’s own trial expert on wetlands, a private consultant for hire on the Corps’
22 regulations, even admitted that the pond could be considered a type of wetland defined by
23
24

25
26 ⁴ To avoid the observation in *Riverside Bayview* that wetlands serve to filter and to purify waters,
27 Healdsburg argues that no water filters through the *sides* of Basalt Pond and that all the water exits *only* through
28 the *bottom* of the pond. This curious suspension of the laws of physics fails on the facts, as found above. Given
that Healdsburg also argues the bottom of the pond is up to a million times less permeable than the surrounding
aquifer — practically hermetically sealed — there is all the more reason that fluid must drain, at least in part,
through the sides and through the wetlands to avoid overflowing (as millions of gallons yearly pour in from the
plant).

1 Section 404 of the Clean Water Act (Tr. 402-03). In short, the pond and the wetlands are
2 "waters of the United States" within the meaning of the Act.⁵

3 **3. OPEN WATERS VS. WETLANDS.**

4 The accused discharges, Healdsburg contends, are to "open water," not to the sides of the
5 pond where the wetlands reside. This argument draws a sharp distinction between the middle
6 and sides of the water body. Healdsburg contends it may discharge with impunity into the
7 middle. The argument, however, fails on the facts. The outfall is at the northwest corner of the
8 pond, not in the center. The pond is now surrounded by wetlands. Healdsburg's own wetlands
9 expert testified that virtually the entire perimeter qualifies as "wetlands" (Tr. 406). The
10 discharges at the northwest corner near the wetlands must be deemed into the wetlands.

11 Even if the outfall were in the dead center of Basalt Pond, the pond is sufficiently small
12 that the entire pond must be deemed to be inseparably bound up in the wetlands now surrounding
13 it. The saturated margins of the pond — concededly wetlands — are, of course, part of the pond
14 itself. The margins meld into water in one direction and into land in the other. Sediments from
15 the shoals spread across the pond and sink to the underwater sides and bottom. Wetlands are
16 typically characterized by wet earth interspersed with open pools, inlets, outlets and other water.
17 At some size, a pond surrounded by wetlands becomes so small with such a cross-identity of
18 ecology and with such a cross-identity of water quality, that the pond must be deemed
19 inseparable from the wetlands rather than a separate sheet of open water. So here.⁶

20 An alternative way to view the problem, reaching the same result, is that the pond itself is
21 a "point source" directly abutting and discharging into the wetlands. There is substantial merit to
22 this conclusion since Healdsburg itself argues vigorously that the pond is an integral part of its
23 treatment facility, supplying a final step it calls "percolation" or "polishing." If so, the entire
24

25 ⁵ Contrary to Healdsburg's argument, it does not matter that the wetlands were man-made. *Leslie Salt*
26 *Co., supra*, 896 F.2d at 358.

27 ⁶ On summary judgment, this Court previously held that, regardless of the wetlands here involved,
28 ponds adjacent to navigable rivers and sharing the same ecosystem and having underground connection to the
river are subject to Clean Water Act jurisdiction. The Basalt Pond would so qualify even without the wetlands
(absent an exception). This is an alternative ground for rejecting the "open-water" argument advanced by
Healdsburg.

1 pond must be deemed a “point source” — otherwise, Healdsburg would have no point source at
2 all. The term “point source” has been taken beyond pipes and ditches and now includes less
3 discrete conveyances, such as cesspools and ponds. An analogous holding was made concerning
4 a 38-acre man-made tailing pond in *Washington Wilderness Coalition v. Hecla Min. Co.*,
5 870 F. Supp. 983, 988 (E.D. Wash. 1994); *see also Community Ass’n for Restoration v. Bosma*
6 *Dairy*, 305 F.3d 943, 955 (9th Cir. 2002). So viewed, the point source is right in the middle of
7 and directly abuts the protected wetlands.

8 This leads to Healdsburg’s invocation of an express exception under the regulation. The
9 definition of “waters of the United States” excludes:

10 Waste treatment systems, including treatment ponds or lagoons
11 designed to meet the requirements of CWA (other than cooling
12 ponds as defined in 40 CFR 423.11(m) which also meet the criteria
of this definition) are not waters of the United States.

13 33 C.F.R. 328.3(a) (last paragraph).

14 This exception does not aid Healdsburg. Although the Healdsburg waste-treatment
15 system was designed so as to use a former mining pit like the Basalt Pond as a percolation pond,
16 and it was intended that natural filtration would occur as fluid percolated through the lining of
17 the pond, this order holds that Basalt Pond itself was not “designed” to meet the requirements of
18 the Clean Water Act or “designed” to be part of the waste-treatment system. The pond
19 preexisted the plant. It preexisted the Clean Water Act. The pond was not “designed” with
20 sewage disposal in mind. The pond was simply the result of digging a pit in the earth that filled
21 with groundwater. No doubt, the actual plant was “designed” to take advantage of abandoned
22 mining pits like Basalt Pond, but the pits themselves were not so “designed.”

23 **4. TRIBUTARY.**

24 Although it is unnecessary to reach it, this order also holds that Basalt Pond and the
25 subterranean groundwater that flows through it are “tributaries” of the Russian River. This order
26 recognizes that the caselaw is divided over whether the “tributary” prong can be satisfied by
27 *groundwater* as opposed to surface waters. The Ninth Circuit has not yet addressed the question.
28 This Court finds persuasive the line of authority represented by *Idaho Rural Council v. Bosna*,
143 F. Supp. 2d 1169, 1178–80 (D. Idaho 2001), holding that the Act extends federal jurisdiction

1 over groundwaters hydrologically connected to surface waters that are themselves navigable
2 waters.

3 It is urged that no discernible impact on the river has been shown and therefore a *sine qua*
4 *non* of jurisdiction is missing under *Bosna* and similar cases. Contrary to Healdsburg, however,
5 the record shows that excessive amounts of chloride from Healdsburg's effluent in fact pollute
6 the river. The record shows actual measurements from the monitoring wells between the pond
7 and the river showing pollution. One may reasonably infer, as this order does, that this pollution
8 reaches the nearby river. It, of course, is then greatly diluted by the river. Nonetheless, the total
9 volume of pollutants reaching the river over a year is substantial. This is an alternative ground
10 for concluding that Basalt Pond and the wetlands are within the navigable waters of the
11 United States.⁷

12 **5. ABANDONMENT OF EXCAVATION OPERATIONS.**

13 The final argument made by Healdsburg is not based on any statute or regulation or
14 caselaw but on an agency statement in a preamble to the 1986 revision of the wetlands
15 regulation. In the preamble, the Corps stated that it usually does not consider "pits excavated
16 in dry land for the purpose of obtaining fill, sand, or gravel" to be "waters of the
17 United States . . . until . . . [the] excavation operation is abandoned. . . ." Here is the background.

18 Pursuant to a directive of the Presidential Task Force on Regulatory Relief, the Corps
19 proposed revisions to its Clean Water Act regulation. After public input, the definitions relevant
20 here were not changed and were simply recodified at 33 C.F.R. 328.3 (1987). In its preamble to
21 the Federal Register announcement, however, the Corps added a clarification:

22 For clarification it should be noted that we generally do not
23 consider the following waters to be "Waters of the United States."
24 However, the Corps reserves the right on a case-by-case basis to
25 determine that a particular waterbody within these categories of
26 waters is a water of the United States. EPA also has the right to
27 determine on a case-by-case basis if any of these waters are "waters
28 of the United States."

⁷ For this, among other reasons, plaintiff has standing to bring this suit, for a remedial order will benefit the river. It is stipulated that plaintiff has standing to bring this action to vindicate aesthetic and recreational interests concerning the river.

1 (a) Non-tidal drainage and irrigation ditches excavated on dry
2 land.

3 (b) Artificially irrigated areas which would revert to upland if the
4 irrigation ceased.

5 (c) Artificial lakes or ponds created by excavating and/or diking
6 dry land to collect and retain water and which are used exclusively
7 for such purposes as stock watering, irrigation, settling basins, or
8 rice growing.

9 (d) Artificial reflecting or swimming pools or other small
10 ornamental bodies of water created by excavating and/or diking dry
11 land to retain water for primarily aesthetic reasons.

12 (e) *Waterfilled depressions created in dry land incidental to
13 construction activity and pits excavated in dry land for the purpose
14 of obtaining fill, sand, or gravel unless and until the construction
15 or excavation operation is abandoned and the resulting body of
16 water meets the definition of waters of the United States (see
17 33 CFR 328.3(a)).*

18 51 Fed. Reg. 41206, 41217 (1986) (emphasis added).

19 The comment has never been reduced to a formal regulation. Nonetheless, this order will
20 treat the preamble statement as entitled to deference concerning the agency's own interpretation
21 of its own wetlands regulations and will give it full effect.

22 Healdsburg urges that the paragraph concerning excavated mining pits, italicized above,
23 saves it from NPDES regulation. Healdsburg argues that Syar has not "abandoned" its
24 "excavation operation" at Basalt Pond because, although excavation itself ceased long ago, the
25 reclamation slurry is still underway. As long as Syar is continuing to reclaim the pond, no matter
26 how slowly, then jurisdiction is absent, Healdsburg urges.

27 This order rejects the argument. Healdsburg itself, in a recent environmental impact
28 report, called Basalt Pond "an abandoned quarry" (TX 24 at H3038). No rock or sand has been
excavated from Basalt Pond since 1984. It is stipulated herein that "excavation at Basalt Pond
ceased in approximately 1984" and that Syar conducts "pit-excavation activities" on "nearby
lands," there being no similar stipulation as to Basalt Pond. In fact, Syar itself has never
extracted rock or sand from the pond, having acquired it after all such extraction was over.
Instead, its only operation has been *to insert, not to extract*, silt. The silt, moreover, is not even
from Basalt Pond but from elsewhere. The silt is the by-product of processing sand and gravel

1 (again, from elsewhere) and is pumped via a long pipe to Basalt Pond, where it is slowly being
 2 fed into the margins of the pond, the feed point being moved from time to time. This is being
 3 done pursuant to a local order to reclaim the pond.

4 Healdsburg would stretch "excavation operation," as used in the preamble, to
 5 comprehend not only excavation but steps taken thereafter to fill the pit. The word "excavation"
 6 cannot bear this reading. As the preamble sentence in question states, excavation is "for the
 7 purpose of *obtaining* fill, sand, or gravel." It is not for the purpose of filling in or remediating
 8 the pit after excavation has ceased. Filling in and extraction are opposites. Once filling in
 9 begins, extraction is foreclosed and must be deemed abandoned. *Golden Gate Audubon Soc.,*
 10 *Inc. v. United States Army Corps of Engineers*, 796 F. Supp. 1306, 1315 (N.D. Cal. 1992)
 11 (Henderson, J.). There is also a big difference in terms of water quality between *extracting*
 12 natural materials from a pit versus *filling up* a pit with foreign matter that could be anything from
 13 dirt to wastes to toxics. Any doubt should be resolved against any exclusion, in order to promote
 14 the purpose of the Act. *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).

15 Even the preamble refused to say that all pits would be ignored. Instead, the preamble
 16 merely stated how the Corps "generally" considered them and acknowledged that pits would be
 17 subject to jurisdiction on a case-by-case basis under Section 404. EPA likewise so reserved
 18 case-by-case jurisdiction under Section 402. Necessarily, this means that at least some
 19 water-filled pits are waters of the United States. In deciding which are which, we must harken
 20 back to *Riverside Bayview* and the fundamental objectives of the Act. We should, therefore,
 21 consider the proximity to the river, the beneficial role of the wetlands, the intertwined ecology
 22 and riparian habitat. Rather than focus only on Syar's desultory slurry, the focus should also be
 23 on the gushing flow of treated sewage into the pond. Once thriving wetlands have curled about
 24 such a site, it would be topsy turvy to reject protective jurisdiction solely because reclamation
 25 efforts are underway. Indeed, a contrary ruling would allow dumping of *anything by anyone*
 26 Syar licensed insofar as federal law is concerned.

27 While the foregoing is dispositive of Healdsburg's argument, this order must reject
 28 plaintiff's alternative ground in opposition. The argument is that the pit was abandoned from

1 1984 to 1986 and was by then already within the navigable waters of the United States. Between
2 1984 and 1986, there was no commercial activity of any kind at the pond, even remediation.
3 (TX 7 at RW0462-63). The pit was idle without any question in that two-year period. The pond
4 then would have been subject to jurisdiction so long as the pond otherwise qualified as a water of
5 the United States. Plaintiff so urges. The difficulty with plaintiff's alternative argument is that
6 the wetlands around the pond developed *after* 1986. The thriving aquatic life portrayed at trial as
7 part of the integrated ecosystem all came *later*. The record does not show that the pit, even
8 though abandoned in 1984-86, qualified *then* as a wetland or as water of the United States.
9 Plaintiff's alternative argument therefore must be rejected.

10 **6. THE DISTRICT OFFICE LETTER.**

11 This leads, finally, to the refusal by the district office of the Corps of Engineers to assert
12 jurisdiction over Basalt Pond, a separate point of deference urged by Healdsburg. This has
13 proven to be one of the more remarkable aspects of the case. In brief, at a time when Syar was
14 still a party herein, plaintiff's counsel asked the Corps' district office to assert jurisdiction over
15 Basalt Pond. It declined to do so. Healdsburg now argues that deference is due to the judgment
16 of the district office to decline jurisdiction, the NPDES jurisdiction being coextensive with the
17 Corps' jurisdiction.

18 Although deference is due to a reasonable agency interpretation of a statute administered
19 by the agency and to nationally-promulgated interpretations of its own regulations, a different
20 problem is presented in deciding how much deference is due to a single refusal to act by a
21 single district office of an agency. Before turning to the law that governs, it is most illuminating
22 to review what actually happened here. The following seven paragraphs constitute the Court's
23 further findings, placed here for convenience and clarity in presentation, on the issue of the
24 Corps' letter.

25 After this litigation began and before Syar settled out, plaintiff's counsel wrote a letter to
26 the district office of the Corps of Engineers in San Francisco. Counsel supplied information.
27 He requested that the Corps determine that the Basalt Pond wetlands were "waters of the
28 United States."

1 The response was prepared by Peter Straub, a Corps employee. After receiving the letter,
2 Mr. Straub solicited input from personnel at Syar, whom he admitted at trial were his personal
3 friends. He knew that Syar was then still a defendant. Syar's letter warned Mr. Straub that the
4 request from plaintiff's counsel should be viewed "with skepticism" and that counsel was
5 "attempting to embroil the Corps in these lawsuits." Syar's input showed that reclamation
6 activity was still underway via the slurry described above.

7 Mr. Straub circulated an internal e-mail within the district office. In the e-mail, he
8 explicitly referred to plaintiff's counsel and Clean Water Act suits in a derogatory and
9 unprofessional way, stating that plaintiff's counsel "reaps money from the public trough by
10 engaging in citizen lawsuits involving the CWA, ESA, etc." After referring, correctly at first, to
11 plaintiff counsel as Silver & Silver, Mr. Straub changed it to "Slither & Slither" in later
12 references in the same e-mail. He further noted the pendency of the present case and ventured
13 that plaintiff's counsel had requested the Corps' action to bolster plaintiff's case, stating that the
14 suit would "have greater merit if the Corps were to exert jurisdiction . . ." (TX 7 at RW0460).

15 The e-mail was four paragraphs long, all on one page. The lengthiest paragraph was
16 devoted to demeaning plaintiff's counsel, their motives and the lawsuit. The e-mail concluded
17 that "the Basalt Pond has not been abandoned" and requested the "thoughts" of the four agency
18 recipients of his e-mail. The record shows no responsive analysis by anyone. The record shows
19 no other analytical memos or e-mails by Mr. Straub. The record shows no reprimand or censure
20 of Mr. Straub.

21 Healdsburg presented Mr. Straub as a trial witness. Significantly, he conceded that in
22 thinking through the issue, he did not focus on whether the reclamation slurry was an
23 "excavation operation" within the meaning of the preamble (Tr. 445-46; 456; 465). Indeed, his
24 final letter to counsel even recognized that "mining operations" had long since ceased (TX 7 at
25 RW0480). Rather, his focus was solely on whether any associated activity whatsoever was still
26 being conducted at Basalt Pond by the owner. In other words, his view was that as long as the
27 owner had any activity underway relating to the pond, however slight, then there was no
28 "abandonment" within the meaning of the preamble and thus no jurisdiction.

1 How much deference is due to the district office's refusal to act? Healdsburg's counsel
2 would invoke the letter with all the full-dress deference required by *Chevron U.S.A., Inc. v.*
3 *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984). Of course, the
4 Supreme Court there held that a court must give effect to an agency's regulations containing a
5 reasonable interpretation of an ambiguous statute. But as counsel must surely know, the
6 Supreme Court has limited *Chevron* and refused to apply it to a localized letter like the one at
7 issue here. In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), for example, the
8 Supreme Court refused to give any deference to an agency interpretation contained in an agency
9 opinion letter without any formal adjudication or notice-and-comment rulemaking:

10 Here, however, we confront an interpretation contained in an
11 opinion letter, not one arrived at after, for example, a formal
12 adjudication or notice-and-comment rulemaking. Interpretations
13 such as those in opinion letters — like interpretations contained in
14 policy statements, agency manuals, and enforcement guidelines, all
15 of which lack the force of law — do not warrant *Chevron*-style
16 deference. See, e.g., *Reno v. Koray*, 515 U.S. 50, 61 (1995)
17 (internal agency guideline, which is not “subject to the rigors of the
18 Administrative Procedur[e] Act, including public notice and
19 comment,” entitled only to “some deference” (internal quotation
20 marks omitted)); *EEOC v. Arabian American Oil Co.*, 499 U.S.
21 244, 256–258 (1991) (interpretative guidelines do not receive
22 *Chevron* deference); *Martin v. Occupational Safety and Health*
23 *Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretative rules
24 and enforcement guidelines are “not entitled to the same deference
25 as norms that derive from the exercise of the Secretary's delegated
26 lawmaking powers”). See generally 1 K. Davis & R. Pierce,
27 *Administrative Law Treatise* § 3.5 (3d ed. 1994). Instead,
28 interpretations contained in formats such as opinion letters are
“entitled to respect” under our decision in *Skidmore v. Swift & Co.*,
323 U.S. 134, 140 (1944), but only to the extent that those
interpretations have the “power to persuade,” *ibid.* See *Arabian*
American Oil Co., *supra*, at 256–258.

22 Similarly, in *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), the Supreme Court
23 refused to give *Chevron* deference to a ruling letter of the Customs Service regarding a tariff
24 classification. The Supreme Court held it was only entitled to “seek a respect proportional to its
25 power to persuade.” The Court noted that “there would have to be something wrong with a
26 standard that accorded the status of substantive law to every one of 10,000 ‘official’ customs
27 classifications rulings turned out each year from over 46 [customs] offices placed around the
28

1 country at the Nation's entryways." *Id.* at 238 n. 19. So too here. The Corps has 36 district
2 offices, nine division offices, and countless employees in positions like Mr. Straub.

3 In evaluating the "power to persuade," *Mead* stated (*id.* at 228):

4 . . . The fair measure of deference to an agency administering its
5 own statute has been understood to vary with circumstances, and
6 courts have looked to the degree of the agency's care [footnote
7 omitted], its consistency [footnote omitted], and relative expertness
8 [footnote omitted], and to the persuasiveness of the agency's
9 position, see *Skidmore, supra*, at 139-140. The approach has
10 produced a spectrum of judicial responses, from great respect at
11 one end, see, e.g., *Aluminum Co. of America v. Central Lincoln*
12 *Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) ("substantial
13 deference" to administrative construction), to near indifference at
14 the other, see, e.g., *Bowen v. Georgetown Univ. Hospital*, 488 U.S.
15 204, 212-213 (1988) (interpretation advanced for the first time in a
16 litigation brief).

17 *Mead* then summed up with a quote from *Skidmore v. Swift & Co.*, 323 U.S. 134, 140
18 (1944):

19 The weight [accorded to an administrative] judgment in a
20 particular case will depend upon the thoroughness evident in its
21 consideration, the validity of its reasoning, its consistency with
22 earlier and later pronouncements, and all those factors which give
23 it power to persuade, if lacking power to control.

24 Applying these factors here, the Corps' letter was not "thorough," nor was the
25 "investigation" preceding it. Nor was the letter or investigation "reasonable," given the manifest
26 prejudice of the staffer principally charged with generating the opinion and the thinness of the
27 inquiry. No attempt was made to perform a case-by-case analysis as reserved by the preamble.
28 As for consistency, no evidence shows that the letter was consistent with other rulings. There is
no evidence that anyone with special expertise on the issue ever touched the file. To this Court,
the ruling seems completely inconsistent with the preamble itself as to the meaning of
"excavation operations." The Court has carefully considered the letter and its reasoning as well
as the remedial purposes of the Clean Water Act, finding the letter unpersuasive on the merits for
all of the reasons stated above.

29 * * *

30 The foregoing sets forth the principal findings of fact and conclusions of law. The
31 parties, however, submitted findings and conclusions after trial. This order will now approve

1 certain of those submissions. To the extent not inconsistent with the foregoing, this order
2 approves plaintiff's proposed findings of fact numbered 3, 7-8, 11, 13, 14-15, 17-23, 25-27,
3 30-39, 44-45, 47-48, 50, 53-56, 58-59, 61-74, 76-79, 81-82, and 85, and plaintiff's proposed
4 conclusions of law numbered 2-7, 11-19, 27, 32, 33, and 38. This order also approves
5 defendant's proposed findings of fact numbered 1-2, 4, 6-7, 10, 12-15, 18, 20-21, 30, 33,
6 38(A)-(D), (G)-(M), (O)-(V), (X) (but not the lead-in to No. 38), 39(A)-(B), (G)-(I) (but not
7 the lead-in to No. 39), 41(F)-(G) (but not the lead-in to No. 41), 43, 46, 47, 49, 53-61, 63-65,
8 69-70, 75-77 (except during flooding), 79 (but how uniform the layer is was not established),
9 85-87, 92, and defendant's proposed conclusions of law numbered 3 and 12. Unapproved
10 proposals were unapproved for a variety of reasons. For instance, some proposals were
11 (i) argumentative or conclusory, (ii) misleading or confusing, overly broad or vague, or
12 (iii) arguably correct but better covered by the Court's own findings. Given that some findings
13 were rejected because they were better covered in the text of this order or were confusing or
14 argumentative, it does not necessarily follow that the Court affirmatively disagreed with all
15 unapproved proposals (and counsel should please not argue otherwise on appeal).

16 Some proposals, although supported by the testimony, were rejected because the Court
17 found the testimony unpersuasive. For example, defendant's water expert, Mr. Lambie, offered
18 large conclusions based on small evidence, *i.e.*, he tried to take a little bit of empirical evidence
19 too far. His methodology, for example, was to compare *real* groundwater contamination
20 measurements *above* the pond with *hypothetical* groundwater measurements modeled by him
21 *below* the pond (rather than take real-world samples). His conclusion that the bottom layer of the
22 pond is up to one million times denser than the surrounding aquifer is very hard to believe, given
23 that such a figure would make it so impermeable, practically a hermetic seal, that the pond would
24 overflow or drain only through the sides (rather than percolate through).⁹

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27 ⁹ Healdsburg makes the impermeable-bottom argument in an attempt to show that the pond is
28 "designed" to be a "closed" system with a "hydrologic separation" from the river and groundwater, an issue this
order finds unnecessary to reach. Obviously, however, a membrane permitting percolation is inconsistent with
an impermeable membrane.


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RELIEF

Defendant Healdsburg is **ORDERED** to take immediate steps to obtain an NPDES permit and will be **ENJOINED** from making any further discharges into Basalt Pond without an NPDES permit effective **APRIL 22, 2004**, or effective upon such later date Healdsburg can show on noticed motion is the earliest practicable date for obtaining such a permit. A hearing will be held at **8:00 A.M. on FEBRUARY 26, 2004**, to determine the extent of any penalties, each side to submit briefs **TEN CALENDAR DAYS** before. A separate order shall issue concerning attorney's fees.

IT IS SO ORDERED.

Dated: January 23, 2004.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE