

From: John Kessler
To: Christopher Dennis; Dick Ratliff; Docket Optical System; Emily Capell...
CC: Eileen Allen; Eric Knight; Paul Marshall; Robert Worl
Date: 2/24/2009 11:10 AM
Subject: Fwd: Army Corps Update on Ivanpah

FYI

The following is an email from the Army Corps District Office indicating that they intend to recommend to their headquarters and to EPA that the dry washes within the ISEGS are not jurisdictional waters. If headquarters and EPA agree, there would not be any need for a 404 permit.

Docket Staff - Please docket this email to Ivanpah (07-AFC-5), and include the following phrase in the file name, "Army Corps email indicating that the ISEGS dry washes may not be jurisdictional".

Thank you,

John

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DOCKET	
07-AFC-5	
DATE	<u>FEB 24 2009</u>
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>>> "Steve DeYoung" <sdeyoung@brightsourceenergy.com> 2/24/2009 10:21 AM >>>
 Per our discussion.

From: Russell.Huddleston@CH2M.com [<mailto:Russell.Huddleston@CH2M.com>]
 Sent: Monday, February 23, 2009 2:38 PM
 To: Steve DeYoung
 Cc: John.Carrier@CH2M.com
 Subject: FW: Update on Ivanpah
 Importance: High

From: Pankratz, Shannon L SPL [<mailto:Shannon.L.Pankratz@usace.army.mil>]
 Sent: Friday, February 20, 2009 2:16 PM
 To: Huddleston, Russell/BAO
 Cc: Durham, Mark SPL; Salas, Gerardo SPL
 Subject: Update on Ivanpah
 Importance: High

Hello Russ,

We have had further internal discussions and review within our District regarding a jurisdictional determination for the Ivanpah Solar Energy project. As we mentioned to everyone at our last meeting, there is a lack of guidance and direction from Corps HQ on post-Rapanos JDs, and on how, or if, the Rapanos/Carabell cases have any bearing on (a)(2), (a)(3), and (a)(5) waters determinations. And specifically for this project, what relation (a)(5) waters may now have to (a)(2), or interstate, waters. It is unclear

how tributaries to (a)(2) should be addressed, in this time of post-SWANCC and post-Rapanos. Ivanpah Playa and its tributaries function as an isolated system, that also lack the presence of a TNW.

Further complicating the situation is that the (a)(2) water in this project, Ivanpah dry lake, is only regulated by the fact that it crosses state boundaries. Ivanpah and its tributaries do not have any evident commerce connections other than occasionally wind sailing as a form of recreation.

Therefore, the Corps at this time has decided to proceed with an Approved jurisdictional determination, rather than the Preliminary JD that was discussed prior. The Approved JD will address all 5 categories of Ivanpah tributaries as isolated, non-jurisdictional waters. This District-level determination will be coordinated with both Corps and EPA headquarters. Typically, Corps HQ has at least 21-days to initially respond back to our District.

There are two possible outcomes of HQ coordination:

(1) If Corps HQ concurs with the District's determination, or if neither HQ responds within this general period, then the District Engineer may finalize this JD and issue to the applicant a letter stating that no 404 permit is required for this project.

(2) It is also possible that Corps HQ may not concur with the District's decision. Or Corps HQ may agree with the District's decision, but EPA HQ does not. In either case, the JD for this project would undergo further review by Corps HQ. And it is also possible that Corps and EPA HQs may not agree, and any final approved JD decision may be delayed.

We feel it is unlikely EPA HQ would object to our non-jurisdictional determination.

Thus, in light of these two possible scenarios the Approved JD route could take, the District will proceed (in accordance with existing national guidance) as follows:

We will draft and submit our initial Approved JD decision (non-jurisdictional per the SCANCC decision) to both EPA and Corps HQs. However, we will still remain as a cooperating agency with BLM, for the project EIS. If the first above scenario occurs, then once the Approved JD is finalized, we would simply end the Corps' role as a cooperating agency for the EIS and issue a letter to the applicant that no 404 permit is required.

If scenario #2 occurs, there are two possible outcomes. For the first outcome, a timely, finalized Approved JD decision could rule that Ivanpah tributaries are jurisdictional. Yet, there would be no time lost in the 404 permitting process. This is because the Corps will have continually functioned as a cooperating agency for the project EIS, throughout all JD review processes. For the second possible outcome, the Corps is aware and sensitive to the applicant's need to proceed as quickly as possible, with all permitting for this solar project. Therefore, if the Approved JD becomes indefinitely delayed, in either EPA or Corps HQs, at that point in time we would agree that the applicant may proceed with a Preliminary JD, solely in the interests of keeping to project goals and timelines.

Please pass this information on, as soon as possible, to the applicant. If the applicant wishes to further discuss 404 jurisdictional issues that affect

this project, we certainly can arrange an in-person meeting or teleconference to do so. Our Regulatory Division Chief, David Castanon, would also be willing to participate in that meeting.

Also, if you have any other questions, please let me know.

Thanks,
Shannon

(a)(2)-> [interstate waters],
(a)(3)-> [waters with commerce connection], and
(a)(5)-> [tributary waters, thereof]

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