

To: Regstaff, Office of Counsel
From: Chief, Regulatory Branch, and District Counsel
Subject: Determining the upstream limit of a navigable water of the U.S.

1. **Purpose of this memo:** To provide guidelines for establishing the upstream limit (head of navigation) of a navigable water of the U.S. pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403); 33 C.F.R. §§329.14-16.
2. **Background:** The attached Navigable Waterways list of 2 August 1971 (“the List”) is outdated and should be used with *caution*. The original intent of the list was to establish the upstream limit of navigable waters of the U.S. (Section 10 waters) on the major waterways within our District. This upstream boundary is often referred to as the “head of navigation.” Waters upstream of that limit would not have been considered a navigable water of the U.S., and of course, any activity above the head of navigation, generally, would not have required a Section 10 permit.¹ The establishment of the upper reach of a Section 10 waterway was usually based on either a man-made or natural obstruction that restricted flows, and therefore would have impeded navigation by recreational or commercial boats moving upstream or downstream.
3. **Problem:** The Section 10 upstream limit of a tributary as identified in the *Remarks* column of the List may no longer be valid for some waterways since the List is over 30 years old. For example, the List identifies the Smith River to be a navigable water of the U.S. from its mouth to 4.5 miles upstream, where there is an “island near Morrison Creek Junction (to Rowdy Creek).” Apparently, the island is no longer there. It may have been removed by man or nature or a combination of the above. In any case, since the landmark or obstruction is no longer there, where is the head of navigation or upper limit of our Section 10 authority on the Smith River today? Do we (1) continue to limit our Section 10 authority up to 4.5 miles, (2) extend our jurisdiction to some point further upstream (or downstream) where navigation by a boat is no longer practical, or (3) use some other basis to establish the upstream limit of a navigable water of the U.S.? This memo will provide general guidelines for determining the upstream limit of a Section 10 waterway, when the landmark

¹ There are exceptions to this general rule where a Section 10 permit would be required above the head of navigation. Generally, if an activity outside a navigable water of the U.S. can affect the course, location or capacity of a navigable water of the U.S., a Section 10 permit would be required. See 33 C.F.R. § 322.3(a).

or obstruction identifying the upper limit in the List no longer exists or is no longer relevant.

4. **Tidal waters:** Our regulations have changed since 1971, and in particular, the definition of navigable waters of the U.S. has been made slightly clearer. For example, as per 33 C.F.R. §329.4, “waters that are subject to the ebb and flow of the tide” are, by definition, clearly navigable waters of the U.S. **Therefore, this definition supersedes the upper limit of any tidal waterway identified in the List if the tidal flow extends beyond the upstream limit set for that particular waterway in the List.** As an example, Coyote Hill Slough is considered navigable for 4 miles up to the “Newark Blvd. Bridge.” Assuming tidal waters are evident beyond the Newark Blvd Bridge, and based on the definition that all waters subject to the ebb and flow of the tide are Section 10 waters, the upstream extent of the Corps’ Section 10 authority over Coyote Hill Slough would go beyond the bridge (assuming the bridge is still there), and would end where tidal action is no longer evident (i.e., where the mean high water mark (MHWM) is no longer perceptible). It may be difficult to determine where tidal action is no longer evident (especially if it is muted by a tidegate or other barrier that restricts flow moving upstream), and may require on-site observation of reverse flow during a high tide. Muted tidal action is still tidal action, and therefore, is still considered Section 10 waters. *The important point is that the navigability test in tidal waters is not relevant because all waters subject to the ebb and flow of the tides are, by definition, navigable waters of the U.S. This is not true for non-tidal waters, and navigability continues to be an important test for measuring the Corps’ Section 10 jurisdiction over non-tidal waters.*

What if the current tidal limit on Coyote Hill Slough is far below the Newark Blvd. Bridge because of a downstream obstruction (such as a low level weir or dam) legally placed after August 1971? Does that obstruction become the current upstream limit of a navigable water of the U.S.? The answer is *NO*, because: (1) the Corps established the upper navigable limit of Coyote Hill Slough to be *at least* the Newark Blvd. Bridge in the List, and (2) a Section 10 waterbody cannot be extinguished except by Congress, even if obstructions were placed legally in the waterway that limited the tidal flow or its navigable capacity. 33 C.F.R. §329.4 states, in part: “A determination of navigability, once made. . . is not extinguished by later actions or events which impede or destroy navigable capacity.” Moreover, if a waterway at one time was navigable in its natural or improved state, or was susceptible to navigation by way of reasonable improvement, it retains its navigable status even though it is not presently used for commerce, or is presently incapable of use because of changed conditions or the presence of obstructions. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940). This legal doctrine is sometimes referred to as the “rule of indelible navigability.”

5. **Non-tidal waters:** As proscribed by case law, the regulations, and Corps policy, we will continue to use the List for Section 10 purposes *if* the landmark/obstruction identifying the upstream limit for that waterway still exists, with the *exception* of tidal waterway, unless Congress or the courts decide otherwise for any particular waterway, or there are other changed conditions, or new information warranting a revision of the determination. See 33 C.F.R. §§ 329.4, 329.16; Regulatory Guidance Letters 90-06, 94-01 for additional information. *Remember, the upstream limit of Section 10 authority on a waterway or tributary extends to **at least** the limit established in the List, even if there are now obstructions downstream of the limit stated in the List that impede potential navigability.*

6. **Obstructions:** What if the waterway or portion thereof below the head of navigation identified in the List has been filled, or no longer functions as a watercourse? Public Notice No. 71-22(b), dated 6 July 1976, provided criteria for establishing Section 10 authority in areas behind dikes around San Francisco Bay. To be consistent, we will use similar criteria for determining Section 10 authority over waterways or portions thereof that have been filled, obstructed, or no longer function as a watercourse. As stated in paragraph 4, above, filling a Section 10 waterway does not necessarily extinguish Section 10 authority. Administratively, we will continue to assert Section 10 authority and require Section 10 permits over waterways up to the head of navigation covered by the List, except where any of the following conditions are present:
 - a) the area will no longer return to or function as a watercourse even if the obstruction or fill were to be removed (e.g., the waterway has been rerouted and the area filled; therefore, removing the fill would not return the waterway back to a watercourse); or

 - b) the area is currently characterized by the prevalence of streets, houses, office buildings, and other similar construction; or

 - c) the area was historically above the ordinary high water mark (OHWM) before it was filled or artificially obstructed, such as an area that subsided below the OHWM after the area was filled.

7. **Landmarks:** Lastly, what if the landmark for the head of navigation is no longer there? For simplicity, we will use the post mile limit as the head of navigation if the landmark described in the List no longer exists, unless the area is now subject to the ebb and flow of the tides (see paragraph 4). The landmark is merely a convenient way to determine the head of navigation, and is not the actual upper limit of Section 10 jurisdiction. The actual head of navigation is the “Navigable length in miles” established in the List. If the river mouth or channel has dramatically shifted since the List was published in August 1971, then we will have to decide whether the upper limit of navigation has been correspondently affected, and determine, on case-by-case basis,

what the proper head of navigation for that watercourse is. If we decide to research and change the head of navigation on a non-tidal waterway, we will follow the procedures outlined at 33 C.F.R. §329.14, Determination of Navigability.

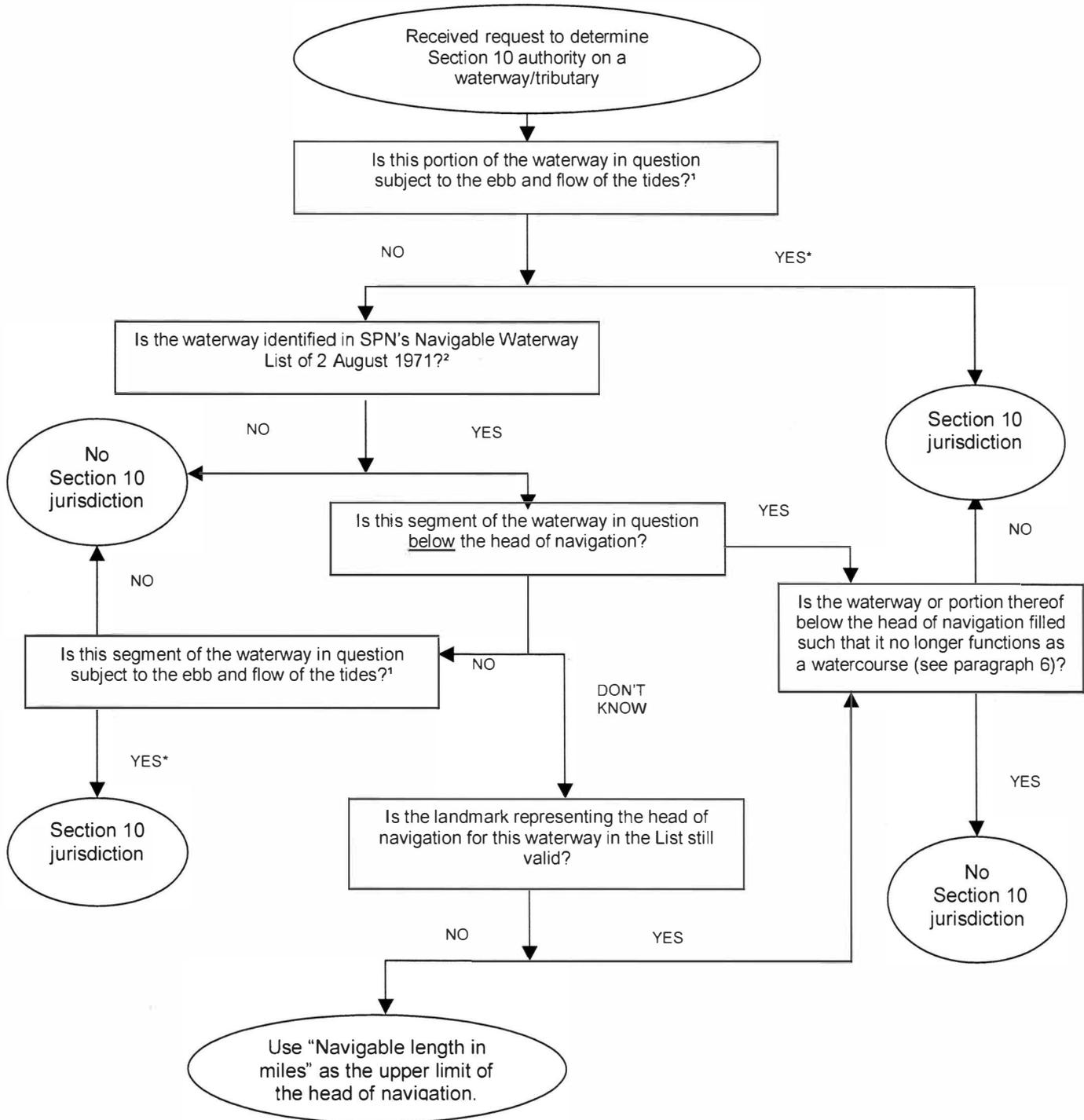
8. **Flowchart:** A flowchart is attached that summarizes the steps to determining the head of navigation of the tributaries described in the List.

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Encl. 1, San Francisco District Navigable Waterways as of 2 August 1971.

Determining the Head of Navigation of a Navigable Water of the U.S.



¹ The ebb/flow of the tides need not be unobstructed. It could be muted due to downstream barriers like culverts and tide gates.

² Note: the list could be modified by Congress, the courts, changed conditions or new information. See paragraph 5.

* Yes, if there is a perceptible MHW.