

ADMINISTRATIVE APPEAL DECISION

PARKWOOD LAND COMPANY; FILE NUMBER SWG-2007-1014

US ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT

17 December 2007

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant & Representatives: Henry R. Stevenson, Jr., Robert T. Edgar, Parkwood Land Company and James G. White, GTI Environmental, Inc

District Representatives: Dwayne Johnson and Kenny Jaynes

Appeal Meeting/Site Visit: 9 October 2007

Authority: Section 404 of the Clean Water Act (33 U.S.C. § 1344)

Background Information: On 11 October 2006, Mr. Henry R. Stevenson, Jr., of Parkwood Land Company, (PLC) submitted a packet to the US Army Corps of Engineers' Galveston District (District) requesting verification of a wetland delineation completed by GTI Environmental, Inc (GTI) on behalf of PLC (Appellant). In its report, GTI stated that "[T]he investigation was conducted for the purpose of determining the existence and approximate extent, if any, of waters of the United States (jurisdictional waters), including wetlands, within the ± 79-acre tract, which would be subject to regulation under Section 404 of the Clean Water Act." The project site is located north of Interstate 10 and east of the Neches River, near Rose City, Orange County, Texas (the site).

After completing its initial review of the GTI determination, the District found that the wetland delineation map, included with GTI determination documents needed to be revised. GTI submitted the revised delineation map to the District on 6 December 2006. Attachments 2 and 8 of the GTI delineation report identified 71.22 acres of wetlands exist on the PLC property. By letter dated 19 January 2007, the District issued a preliminary jurisdictional determination (JD) concurring with GTI's findings that the site contained approximately 72 acres of wetlands that are subject to the Corps jurisdiction under Section 404 of the Clean Water Act.

PLC submitted an appeals packet to the District on 18 March 2007. PLC was appealing the preliminary JD it had received on 19 January 2007. PLC was informed that a preliminary JD is not an appealable action.

Subject: Parkwood Land Company Appeal Decision

Mr. Stevenson met with District staff on 15 May 2007 to discuss permit and determination issues. During the meeting, Mr. Stevenson stated that PLC wanted to appeal its jurisdictional determination and requested that the District issue an approved JD. On 17 May 2007, the District received an e-mail from Mr. Stevenson requesting that the District issue an approved JD on the 79-acre tract owned by the PLC. The District issued PLC an approved JD on 5 July 2007. PLC submitted a Request for Appeal on 23 July 2007.

Appeal Decision Evaluation, Findings and Instructions to the Galveston District Engineer (DE):

Reason 1: We appeal the Corps of Engineers' determination of approved jurisdiction as to the referenced property and contend that this property is either isolated/non-jurisdictional or not subject to the Corps of Engineers jurisdiction (grandfathered) due to its origin prior to the Act's creating jurisdiction, or both.

Reason 2: We believe that this property is not subject to the Corps of Engineers' jurisdiction since the levee and the contained property were constructed prior to the inception of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the Nationwide Permit (NWP).

Finding: These reasons for appeal do not have merit.

Action: No Action Required.

Discussion: On 11 December 2006, the Appellant submitted a request to the District seeking authorization to repair an existing levee located on the project site. The levee was constructed during the early 1930s to create a disposal area for a road construction project. By letter dated 17 April 2007, the District authorized the repairs to the existing levee under Nationwide Permit (NWP) 3¹. In its authorization letter, the District stated "Since the levee was built prior to the inception of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP, the levee is considered to be previously-authorized and can be repaired pursuant to NWP 3."

The appellant has interpreted the term "grandfathered" to mean "...that this property is not subject to the Corps of Engineer' jurisdiction since the levee and the contained property were constructed prior to the inception of Section 404 of the CWA and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP.

¹ NWP 3 authorizes the repair of a previously authorized currently serviceable structure or fill provided the structure or fill is not put to a different use than that for which it was originally constructed. Minor deviations due to changes in construction techniques, materials or the like are authorized.

Subject: Parkwood Land Company Appeal Decision

Consequently, the levee and the contained property should be considered previously-authorized.”

In the Corps of Engineers Regulatory Program Regulations, 33 CFR Part 330, § 330.3 Activities occurring before certain dates, the Corps regulation addresses activities that were completed before the CWA was passed. § 330.3 states:

“The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:
(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended section 404 jurisdiction to all waters of the United States. (These phase-in dates are: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.) (b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation”

What the Corps regulation provides is that any discharges of dredged or fill material into areas identified as waters of the United States prior to the phase-in dates is considered an authorized activity, it does not authorize an individual to discharge dredge or fill material into jurisdictional waters of the United States after the phase-in dates without a Corps permit. This is why the District issued a Nationwide Permit 3 to Parkwood to perform maintenance on its existing serviceable levee. The applicant misapplies the “grandfather” provision in his attempt to extend it to this set of facts and circumstances. Therefore, this reason for appeal does not have merit.

The second part of the appellant’s appeal is PLC’s belief that the estimated 71 acres of cypress/swamp tupelo marsh, identified by the appellant’s consultant, is not an adjacent wetland but that it is an isolated wetland that is not subject to the Corps jurisdiction.

The appellant stated two reasons why the site is “isolated” and not “adjacent”. The appellant’s first reason is that the site is separated from the Neches River by a 13-foot high levee, which Mr. Stevenson stated does not allow for any hydrologic exchange between the marsh and the Neches River.

To support its claim that the site is isolated, the appellant referenced the District’s policy regarding adjacent/isolated criteria.² The appellant stated during the appeal meeting that the District’s policy supports his assertion that the site is isolated under the “proximity”

² MEMORANDUM FOR ALL SWG-PE-R Personnel, SUBJECT: Adjacent/Isolated Criteria, Galveston District Policy Number 01-001, 13 February 2001.

section of the policy document. Mr. Stevenson stated the policy states that a water or wetland should be “touching” another water of the US to be “adjacent”. What the policy actually states is “[I]f a wetland/water is contiguous (touching) another water of the U.S., such as a surface tributary system, **or if it is separated from other waters of the U.S. by a man-made dike or barrier, natural river berm, or beach dune, it is “adjacent.”** (Emphasis added). The Corps regulation in § 328(a) (7) (c) defines the term “adjacent”. The term “adjacent” means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands. Based on this definition, the District’s policy adheres to Corps regulations and supports the District’s determination that the wetlands located on the PLC site are “adjacent” and not isolated³.

In addition, Mr. Stevenson also feels that the site has a “perched” water table, which he feels acts as an additional barrier between the wetlands located on the PLC property and the Neches River. Again he cited the District’s policy regarding the identification of an adjacent wetland versus an isolated wetland. Mr. Stevenson cited the portion of the policy document that states “[F]or example, it is possible, but not common; to have a water situated close to navigable water, and be isolated if it is “perched” and has no hydrologic connection.”

A perched water table is defined in the Jefferson County, Texas Soil Survey as “the highest part of the soil or underlying rock material that is wholly saturated with water. In some places an upper, or perched, water table may be separated from a lower one by a dry zone.” Another accepted definition of a perched water table in geomorphic terms is “A perched water table (or perched aquifer) is an aquifer that occurs above the regional water table, in the vadose zone (non-saturated zone). This occurs when there is an impermeable layer of rock (an aquiclude) or sediment relatively impermeable layer (an aquitard) above the main aquifer but below the surface.”

The wetlands located on the PLC site are not located in a geomorphic landscape position that would typically support a “perched water table”. Based on the many human disturbances to the substrate on this site (e.g. disposal of dredged material, levee work, etc.) there is still sufficient hydrology to support a forested wetland, and as such, indicative that the hydrology on this site is not associated with a perched water table.

It should also be noted that in the wetland delineation report completed by the appellant’s environmental consultant, which was provided to the District, it stated that “[T]wo man-made relief areas have been cut into the levee system to allow storm water to sheet flow into the moat channel.⁴” This indicates that there is a hydrological connection between the wetlands located on the site and the Neches River.

³ (Federal Register November 22, 1991) – Isolated waters mean those non-tidal waters of the United States that are: (1) Not part of a surface tributary system to interstate or navigable waters of the United States; and (2) Not adjacent to such tributary waterbodies.

⁴ “The levee appears to have been constructed by digging a “moat” channel around the tract and depositing the spoil just inside the property from the new channel.”

Subject: Parkwood Land Company Appeal Decision

The appellant's second reason, in support of his second basis for appeal, is based on the recent Supreme Court decision known as "Rapanos". The appellant stated "[P]ursuant to the Rapanos decision, the Corps of Engineers regulatory authority should extend only to relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters, and to wetlands with a continuous surface connection to such relatively permanent waters⁵." Based on the above statement the appellant has identified the Neches River as a "relatively permanent" water. In actuality, the Neches River is a "traditional navigable water."⁶

On 5 June 2007, the Corps and EPA issued a memorandum Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*. This memorandum provides guidance to Corps districts and EPA regions on how to implement the Supreme Court's decision in the above cases. The guidance specifically states that the EPA and Corps "will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3(a)(1)." In addition, the memorandum also states:

"The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring."
Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States." (Emphasis added)

Applying the guidance to the facts and circumstances involved in this appeal, the wetlands located on the appellant's property are subject to the Corps jurisdiction under § 404 of the Clean Water Act.

Conclusion: For the reasons stated above, I conclude that this request for appeal does not have merit.

Kendall P. Cox
Colonel, US Army
Commanding

⁵ Relatively Permanent waters are non-navigable tributaries of TNWs that typically flow year-round.

⁶ §328.3(a)(1) "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." The Neches River is subject to the ebb and flow of the tide at the project site.