

ADMINISTRATIVE APPEAL DECISION
MR. W. S. REAVES
FILE NO. D-6193/1
GALVESTON DISTRICT

30 May 2001

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

Appellant Representative: Mr. W. S. Reaves, Trustee, Mr. Ronald G. Byrnes; Attorney At Law

Receipt of Request For Appeal (RFA): Original RFA received 2 January 2001; Revised RFA received 20 February 2001

Appeal Conference/Site Visit Date: 10 April 2001

Background Information: By letter dated 10 October 1994, MAINSALE WETTLING REALTORS (MWR) requested that the Galveston District (SWG) Regulatory Branch perform a jurisdictional delineation on an estimated 1-acre tract located at 1309 Todville Road, Seabrook, Harris County, Texas. Based on SWG's 26 October 1994 site visit and its review of aerial photography, it was determined that approximately 0.45-acre of the tract was jurisdictional. The wetlands identified on the site were determined to be adjacent. MWR was informed of the SWG determination by letter dated 2 December 1994.

SWG received a letter, dated 8 November 1999, from Mr. Kent C. Sinex requesting an extension of time for SWG delineation D-6193. The delineation had an expiration date of 2 December 1999. Mr. Sinex stated that the additional time was needed to complete a Department of the Army Permit application to discharge fill material into jurisdictional areas located on the property.

SWG regulatory personnel performed a second site visit on 10 February 2000 and again determined that the site contained approximately 0.5-acre of waters of the United States, specifically wetlands. These wetlands again met the criteria to be identified as adjacent wetlands. Mr. Ronald G. Byrnes, Attorney At Law, submitted a letter dated 7 November 1999, (received 13 November 1999, one day after Mr. Sinex's letter was received) stating that the legal title to the property was in the name of W. S. Reaves, Trustee. Mr. Byrnes letter further stated that all communications regarding the property should be made to Mr. Reaves or himself. Messer Reaves and Byrnes were informed on 16 November 2000, that the property contained waters of the United States subject to the Corps jurisdiction under §404 of the Clean Water Act.

Mr. Byrnes submitted an RFA to the Southwestern Division Engineer (SWD-DE) on 2 January 2001. The SWD-DE determined that the RFA did not meet the criteria to be accepted for review under the Corps Administrative Appeal Process. A certified letter, dated 22 January 2001, was

sent to Mr. Byrnes detailing the reasons why the RFA was not acceptable. The letter also informed Mr. Byrnes that he had 30 days from the date of letter to revise the RFA and re-submit it to the SWD-DE. The revised RFA was received by the SWD-DE on 20 February 2001. The revised RFA was determined to be acceptable for review under the Corps Administrative Appeal Process.

Summary of Decision: I find that SWG properly delineated and identified the wetlands located on this site as “adjacent”. Therefore, I find that this Request for Appeal has no merit.

Appeal Evaluation, Findings and Instructions to the SWG District Engineer (DE): The reasons for appeal are listed as presented by the appellant.

Reason 1: 1309 Todville Road was initially commercial real estate utilized for 42 apartments.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Reason 1 is a statement regarding the historical use of the property and is not disputed by the Galveston District. Reason 1 does not specifically address a procedural error or an incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands. Therefore, I have determined that Reason 1 does not meet the criteria to be reviewed under the administrative appeal process. (The discussion under Reason 2 discusses changes in limits of waters of the United States.)

Reason 2: In 1983, Hurricane Alicia struck and as a consequence, the apartments were uninhabitable. Ultimately the property was cleared and the indentation on the property was man-made.

FINDING: This reason for appeal does not have merit.

DISCUSSION: At the time Hurricane Alicia hit the Galveston–Houston area in 1983, the property did not exhibit any wetland characteristics and was not subject to the Corps jurisdiction under §404 of the Clean Water Act. Section 328.5 of the 1986 Corps Regulations address changes in the limits of waters of the United States. This section of the Corps regulations states “Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States.” (The Corps 1982 regulations under section 329.13 addressed this same issue. The 1982 regulation stated “gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable water of the United States.”) Section 328.5 also states in part “Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer.” In 1994 SWG personnel using the *Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1* (Manual), verified that the site contained waters of the United States (adjacent wetlands).

In addition to the regulations, the Corps issued Regulatory Guidance Letter (RGL) 82-2. This RGL clarified that “normal circumstance” is determined on the basis of actual, present use of an area.” RGL 86-9, issued 27 August 1986, reaffirmed RGL 82-2 and further clarified what was meant by the term “normal circumstance”. RGL 86-9 stated that it was the Corps intent to regulate discharges of fill material into waters of the United States, which include wetlands “as it exists and not as it may have existed over a recorded period of time.” RGL 86-9 also states “Normal circumstances are determined on the basis of an area’s characteristics and use, at present and in the recent past.” The original delineation of the site was completed using information obtained from a 26 October 1994 site visit and use of a 1989 aerial photograph. This indicates that the jurisdictional area located on the property met the three mandatory criteria, as required in the Manual, to be identified as a wetland for approximately seven years prior to the appellant’s request for appeal. In addition, use of the 1989 aerial photography indicates that the property might have contained waters of the United States prior to the 26 October 1994 site visit by SWG personnel. Based on the information obtained during site visits to the property, the “normal circumstance” is that adjacent wetlands exist on the property and have existed for several years.

Reason 3: The tract is separated from Galveston Bay by land and Todville Road. There is no evidence in the record that the tract is subject to the ebb and tide of Galveston Bay and in fact the record states that the tract is separated from navigable water by a man made road and additional land adjoining the road. In fact there are houses between Galveston Bay and the instant tract.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record for this action includes a Memorandum for the Record, dated 14 November 2000, which states “The wetland is separated from tidal (navigable) waters by one man-made barrier (a road) and is adjacent.” The Corps in the 1977 regulations defined the term “adjacent” wetland. In the preamble to the 1977 regulations under Part 323 it states, “the landward limit of Federal jurisdiction under §404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of the aquatic system.” It further stated that “adjacent” means, “bordering, contiguous, or neighboring” and that the term includes “wetlands directly connected to other waters of the United States, or are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.” Part 323.2(d) of the 1977 regulation and Part 328.3(c) of the 1986 Corps regulation defined “adjacent” to mean 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.

A review of the SWG policy regarding identifying adjacent waters indicated that the district’s policy was followed and that the policy adhered to current Corps regulations and policies.

During the 10 April 2001 site visit, it was determined that houses are not located between the site and Galveston Bay. In fact only the north side of the property is not adjacent to a water of the United States. Galveston Bay touches Todville Road and in fact Todville Road is the only barrier between the site and the bay. Seabrook Slew abuts the site on the south and west sides of the property. Todville Road has recently been raised to prevent flooding from Galveston Bay. The bay side of Todville Road, located across from the site, has been riprap to prevent further erosion. To prevent flooding of their property, homeowners along Todville Road have elevated their property with fill material and/or constructed their homes on pilings.

Based on my review of the administrative record for this action, I have determined that SWG followed the regulations regarding identification of “adjacent” wetlands and was correct in identifying the wetlands located on this site as being “adjacent”.

Reason 4: In *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers*, 2000 WL 15333, decided January 9, 2001, the Supreme court of the United States clearly held that the Army Corps of Engineers’ rule extending definition of “navigable waters” under Clean Water Act (CWA) to include intrastate waters used as habitat by migratory birds exceeded authority granted to Corps under CWA, and therefore, abandoned sand and gravel pit containing ponds used by migratory birds was not subject to Corps’s jurisdiction under CWA. Federal Water Pollution Control Act Amendments of 1972, §404(a), as amended, 33 U.S.C.A. §1344(a); 33 C.F.R. §328.3(a)(3). The same rationale is applicable in the instant situation. The tract is not adjacent to navigable waters, since it is locked from Galveston bay by land and road.

Finding: This reason for appeal does not have merit.

Action: No action is required.

DISCUSSION: Under the Federal Water Pollution Control Act amendments of 1972 (Public Law 92-500), Congress extended Corps’ regulatory jurisdiction beyond the traditional “navigable waters” to include “all waters of the United States”, including wetlands (33 U.S.C. 1362). “Waters of the U.S.” include traditional navigable waters and their tributaries, adjacent wetlands and isolated waters with an interstate commerce nexus. In the Supreme Court decision cited, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, hereinafter called “SWANCC”, the Supreme Court struck down the “Migratory Bird Rule” as a basis to assert Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters that are not tributary or **adjacent** to navigable waters or tributaries. Since the “Migratory Bird Rule” has not been the basis for jurisdiction in the instant case, the holding in SWANCC is not applicable.

Section 328 of the Corps regulation defines “waters of the United States”. At 328.3(a)(7) waters of the United States include “Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6).” In addition, in its SWANCC decision, the Supreme Court did not overturn the U.S. v Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) decision. This decision upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetland adjacent to each. Therefore, I have determined that SWG’s

determination that the wetlands located on this site met the criteria of adjacency is consistent with current Corps regulations and policies.

Reason 5: Obviously, the Corps' quick response would be that SWANCC arises under different facts that are not analogous; however, there is no legal rationale that Congress intended the Corps to exercise jurisdiction over prior commercial areas where the tract does not and cannot affect navigable waters and in fact the Corps is essentially converting isolated commercial property in the City Limits of Seabrook, Texas, to wetlands. This is an inappropriate extension of the CWA that exceeds the Corps jurisdiction.

Finding: This reason for appeal does not have merit.

Action: No action is required.

DISCUSSION: In SWANCC, the Court did not overturn its decision in the Riverside Bayview Homes case. In Riverside Bayview Homes the Court clearly affirmed the Corps' jurisdiction over adjacent wetlands. The Court stated "that it recognized that Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed 'navigable' under the classical understanding of the term." The Court also found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparately bound up with the waters of the United States. The Court observed, "It was the significant nexus between the wetlands and navigable water that informed our reading of the CWA (Clean Water Act) in Riverside Bayview Homes." The Court also determined that the term "navigable" in the statute was of limited effect and held that §404(a) extended to non-navigable wetlands adjacent to open waters.

Therefore, the SWANCC decision does not eliminate the Corps authority to exert jurisdiction over adjacent wetlands.

Reason 6: A reading of 33 C.F.R. §328.3(a)(3) defines "wetlands" and continues: "the use, degradation or destruction of which could affect interstate or foreign commerce including any such water:" There is nothing in the record that reflects the foregoing to being applicable. Continuing on are the definitions (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (obviously non applicable) (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; (raising fish on .45 acres is really not applicable, together with no evidence of such ability) (iii) Which are used or could be used for industrial purpose by industries in interstate commerce (no evidence of any ability to use the tract for this use). The rationale is that an isolated .45 acres out of .81 acres out of a commercial area being delineated as wetlands exceeds the Corps' jurisdiction.

Finding: This reason does not have merit.

Action: No action is required

Discussion: Section 328.3(a)(3) is not the applicable part of the regulation for this particular action. Sections 328.3(7) and (7)(c), 328.4(b)(2), and 328.5 are the appropriate sections of the

regulation for this action. Section 328.3(7)(c) deal with wetlands adjacent to waters and defines the term “adjacent”, which has been discussed in more detail under Reason 3. Section 328.4 deals with limits of jurisdiction. Part (b) states: “Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters: (1) Extends to the high tide line, or (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.” Paragraph (c) deals with Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters: (2) “When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetland.” Section 328.5 deals with the changes in limits of waters of the United States. This section was previously discussed under Reason 2. Based on these parts of the regulation the Corps does have authority to regulate “adjacent” wetlands.

In its decision concerning the SWANCC case the court quoted from its earlier decision, in Riverside Bayview Homes, 474 U.S. 121 (1985) in which the Court held that the Corps had sufficient power under §404(a) to regulate wetlands adjacent to navigable waters.

CONCLUSION: For the reasons stated above, I conclude that the six reasons presented in this Request For Appeal do not have merit.

<signed>
DAVID F. MELCHER
Brigadier General, USA
Commanding