

ADMINISTRATIVE APPEAL DECISION

ARMOND WEILBACHER, FILE NO. MSJ02-01893-T

MOBILE DISTRICT

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

Appellant Representatives: Mr. Armond Weilbacher.

Receipt of Request For Appeal (RFA): October 25, 2002.

Appeal Conference/Site Visit Date: February 18, 2003.

Background Information: The 25.3-acre undeveloped tract owned by Mr. Weilbacher is located adjacent to Ladnier Road and Old Spanish Trail, Gautier, Jackson County, Mississippi. By letter dated April 26, 2002 Mr. Weilbacher requested that the Mobile District (District) concur with the findings of the wetland delineation report completed by his consultant, Dr. Lionel Eleuterius of Wetland Inc. Dr. Eleuterius concluded that Mr. Weilbacher's property contained 7.8 acres that met the criteria in the USACE Wetlands Delineation Manual to be identified as wetlands. Dr. Eleuterius failed to indicate in his report if he concluded the wetlands located on Mr. Weilbacher property were subject to the Corps jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. District staff conducted two site inspections on July 24 and August 14, 2002. Based on the site inspections, the District determined that the property contained more wetlands than indicated in the consultant's wetland delineation report. By letter dated August 27, 2002 the District issued an approved jurisdictional determination regarding the wetlands on the property. The District stated that approximately 15.7 acres (62 percent) of the site was wetlands and not 7.8 acres (30.8 percent) as stated in the consultant's report. Mr. Weilbacher was informed that the wetlands were subject to the Corps jurisdiction under Section 404 of the Clean Water Act.

Summary of Decision: After reviewing and evaluating the administrative record provided by the Mobile District, I conclude that there is insufficient information in the administrative record to support the District's determination that the wetlands located on the appellant's 25.3-acre site are subject to the Corps jurisdiction under Section 404 of the Clean Water Act. Accordingly, I conclude that this Request for Appeal has merit. Therefore, I am referring this matter back to the Mobile District for additional evaluation.

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

Reasons for the appeal as presented by the appellant:

Reason 1: “I am requesting from you the specific chapter and page number of the... [USACE] Wetlands Delineation Manual that supports your “modified” Wetland Delineation Map for my property as referenced above.”

FINDING: This appeal reason has merit.

ACTION: The District’s administrative record does not adequately address this issue. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

DISCUSSION: The District’s administrative record does not contain any supporting documentation/information clarifying why the District did not agree with the appellant’s wetland delineation report. The only indications that the delineation needed to be “modified” were two sentences contained in the District’s Enforcement Section (OP-SA) Inspection Report which stated: “Consultant’s wetland delineation map needs to be modified. Additional wetland areas (~8 ac.±) identified by Corps representatives.” The record does not contain any “field data sheets” completed by District personnel. There is no documentation in the record that indicates that the District’s Project Manager discussed the report’s discrepancies with the appellant or his wetland consultant. The appellant did not find out that the District disagreed with the wetland delineation until he received the District’s approved jurisdictional determination letter. The approved jurisdictional determination issued by the District on August 27, 2002 states “[t] hat Federally-regulated wetlands comprise approximately 62 percent not 30.8 percent of the property as indicated in your wetland delineation report. Additional ‘transitional’ wetland areas were identified by members of my staff during the field review. This determination was based upon available soils data, aerial photographs, and a field review of your wetland delineation map.” The District did not indicate in its letter why the wetlands were considered jurisdictional under Section 404 of the Clean Water Act.

The District shall adequately document its findings that the site contains more wetlands than identified by the appellant’s wetland consultant. Documentation should include field data sheets, field notes and/or any other information supporting the District’s findings. Copies of this documentation should be provided to the appellant and his consultant.

Reason 2: The ultimate issue is “Does the Corps have jurisdiction under § 404 of the CWA?” “On August 27, 2002, the Mobile District Office of the Army Corps of Engineers determined it had jurisdiction over the subject property. You determined, based on “information extrapolated from the Soil Survey of Jackson County, aerial photographs and a ‘previous’ reconnaissance field inspection conducted on the property on July 24 and August 14, 2002, that a § 404 permit would be required before the property could be developed.” Due to recent interpretation of the law by the United States Supreme Court in *Solid Waste Agency of Northern Cook County [SWANCC] v. United States Army Corps of Engineers*, [531 U.S. 159,] 121 S. C[T]. 675 (2001), ... (“SWANCC”) and *Rice v. Harken*, 250 F. 3d 264 (5th Cir. 2001), I believe the prior assertion of jurisdiction is invalid and I can proceed with either developing the site or selling it to a developer. The SWANCC further removes the need for me or a future developer to apply for a preliminary review for a § 404 permit.”

FINDING: This reason for appeal has merit.

ACTION: The District's administrative record does not adequately address this issue. The District shall reconsider its approved jurisdictional determination decision as appropriate and include sufficient documentation to support its determination.

DISCUSSION: On January 9, 2001 the US Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S. CT. 675 (2001) ("SWANCC"). This decision recognized limits on the Corps' jurisdiction under the Clean Water Act (CWA) to regulate isolated waters. Specifically, the Supreme Court struck down the use of the "Migratory Bird Rule"¹ to assert CWA jurisdiction over isolated, non-navigable, intrastate waters that are not tributaries to or adjacent to navigable waters or tributaries.

In its SWANCC decision, the Court did not overturn its earlier decision in the Riverside Bayview Homes case. In United States v. Riverside Bayview Homes, 474 US 121 (1985), the Court held that the Corps had the authority to regulate wetlands adjacent to navigable waters. 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 inseparably 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 Court's decision in SWANCC did not eliminate the Corps authority to regulate adjacent wetlands.

Since SWANCC, some courts have expressed the view that SWANCC raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters. On April 25, 2001, the US Court of Appeals for the Fifth Circuit issued a decision, Rice v. Harken, 250 F. 3d 264 (5th Cir. 2001). This decision interpreted the scope of "navigable waters" under the Oil Pollution Act. The Fifth Circuit relied on SWANCC to conclude "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."

The appellant is convinced, based on SWANCC and Rice v Harken that the District failed to find any connection or adjacency of the wetlands on his property to any navigable water or tributary of a navigable water that would give the USACE jurisdiction under §404 of the CWA.

During the administrative appeal visit, the District staff stated that they had determined that the site was part of an historic contiguous wetland and based on guidance received from the Chief,

¹ The "Migratory Bird Rule" extended § 404(a) jurisdiction to intrastate waters: (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines; or (c) Which are or would be used as habitat for endangered species; or (d) Used to irrigate crops sold in interstate commerce.

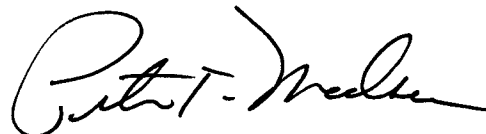
Regulatory Branch, HQUSACE, these type of wetland are subject to the USACE jurisdiction under Section 404 of the CWA. However, the administrative record does not support the District's conclusion that the wetland located on this site is part of a contiguous wetland. There is no discussion in the record regarding impacts that development of the surrounding area has had on the geographic limits of jurisdiction. 33 CFR 328.5 states, "Man-made changes may affect the limits of waters of the United States..." The only information contained in administrative record is the appellant's wetland delineation report and the District's approved jurisdictional determination. The administrative record does not contain any documentation why the District is exerting Section 404 jurisdiction over the wetlands located on the site. Therefore, I cannot conclude that the District's administrative record leads to a reasoned conclusion that the wetland is part of a contiguous wetland or that the wetland is adjacent to a tributary of a navigable water.

Information Received and its Disposition During the Appeal Review:

The Mobile District furnished a copy of the administrative record.

CONCLUSION: After reviewing and evaluating the administrative record provided by the Mobile District, I conclude that there is insufficient information in the administrative record to support the District's determination that the wetlands located on the appellant's 25.3-acre site are subject to the USACE jurisdiction under Section 404 of the CWA. Accordingly, I conclude that this Request for Appeal has merit. Therefore, I am remanding this matter to the Mobile District for additional evaluation.

11 Aug 03
(Date)



PETER T. MADSEN
Brigadier General, US Army
Commanding