

ADMINISTRATIVE APPEAL DECISION

BARRY ALLEN - FILE NUMBER 200206120 (JF-EPS)

JACKSONVILLE DISTRICT

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

Appellant Representative: Dr. Joe Edmisten, Edmisten and Associates, on behalf of Berry
Allen, Santa Rosa County, Florida.

Receipt of Request For Appeal (RFA): September 25, 2003.

Appeal Conference Date: December 9, 2003. **Site Visit Date:** December 9, 2003.

Background Information: The 1.7-acre parcel owned by Mr. Allen is located approximately 300 feet east of Kell Road in Section 24, Township 02 South, Range 28 West, Santa Rosa County, Florida. By letter dated September 9, 2002, Dr. Joe Edmisten, on behalf of his client Mr. Barry Allen, requested that the Jacksonville District (District) concur with their findings that the wetland located on the Allen tract is "isolated". The District initially responded to Dr. Edmisten's request by issuing a Preliminary Jurisdictional Determination (JD) on November 21, 2002. The District's preliminary determination was that the wetland was "adjacent" therefore subject to the Corps jurisdiction. Dr. Edmisten submitted a request for an approved jurisdictional determination on May 19, 2003. Dr. Edmisten again stated that the wetland located on the Allen property was isolated and not subject to the Corps jurisdiction under the Clean Water Act (CWA). By letter dated September 8, 2003, the District issued an approve JD. The District again stated that the wetland was "adjacent" and subject to the Corps jurisdiction.

On January 9, 2001 the US Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (Slip Opinion, No. 99-1178, October Term, 2000). This decision limited the Corps jurisdiction under the 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 tributary 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

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.

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.

The appellant believes, based on SWANCC, that the wetlands at issue are isolated and not subject to the Corps jurisdiction under §404 of the CWA.

Summary of Decision: I find that the appeal has merit as follows: I find that the District decision does not follow the guidance contained in the March 30, 1988 Memorandum to the Field regarding adjacent wetlands. Nor does it follow criteria for identifying adjacent wetlands contained in the Jacksonville District’s Approach on Identifying Adjacent Wetlands and Isolated Waters July 11, 2003. This matter is remanded to the District Engineer for reconsideration of the jurisdictional determination decision consistent with the instructions in this administrative appeal decision.

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

Reason for appeal as submitted by the appellant: “The wetland on the Allen land is clearly isolated. Ditches within 200 feet of the wetland are through uplands and are high and dry 90% of the year, even during normal rainfall amounts.”

FINDING: This reason for appeal has merit.

ACTION: The decision is remanded to the DE to reconsider and further document the decision regarding adjacency that established jurisdiction under 33 CFR 328.3(a)(7) between the wetland identified on Mr. Allen’s property and other waters of the US. The District’s decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

DISCUSSION: The District’s approved jurisdictional determination included a Basis for Jurisdiction that states, “Property...contains waters of the United States based on...[t]he presence of wetlands as determined by the [USACE] Wetland Delineation Manual...[t]he wetlands are adjacent to waters of the U.S. (other than waters that are themselves wetlands).” It also included a Memo to File that describes the proximity of the wetland to a drainage ditch located on the north side of U.S. Highway 98. The memo also stated that the drainage ditch is a water of the US because it replaced a historic natural flow. It was further stated that the “Jacksonville District Approach on Identifying Adjacent Wetlands and Isolated Waters July 11, 2003” supports the adjacency determination in the following ways:

1. The “wetland is within 200 feet of open waters”

2. The “open waters” exist as a manmade tributary connection in the form of the drainage ditch on the north side of U.S. Highway 98.
3. This drainage ditch has a defined OHWM.
4. “...drainage ditches in Florida are tributaries, because they re-route former natural flows of waters of the U.S.”
5. “Culverts under roads and other upland features, weirs, drop structures and other structures do not eliminate the tributary connection, provided there is some conveyance of water from upstream to downstream”. A continuous conveyance of water is evident from the drainage ditch on the north side of U.S. Highway 98 to the navigable waters of East Bay.

As stated previously, the District believes that there is a continuous flow of water from the drainage ditch on the north side of U.S. Highway 98 to the navigable waters of East Bay.” The District identified this drainage ditch as a water of the United States because it replaced a historic natural flow. There is no evidence in the record to support the District’s determination that the drainage ditch replaced historic flow from the appellant’s property. In fact during the December 9, 2003, site visit, the appellant’s consultant and the District’s Project Manager (PM) agreed that there was not a hydrologic connection between the wetland and any of the drainage ditches located adjacent to the project site. A natural channel and wetlands are located on the west side of Kell Road. The drainage ditch located on the north side of Highway 98 flows into a ditch located on the east side of Kell Road, which flows under Kell Road into the natural channel and wetlands. However, the water that flows in the drainage ditch located on the north side of Highway 98 does not originate from the appellant’s property but flows from the opposite side of the highway. As stated above, no flow from the appellant’s property enters into any drainage ditch.

During the site visit, the Review Officer observed that the property located on the west side of the project site had been cleared and filled in the past. This property is located between the appellant’s property and the natural drainage way located on the west side of Kell Road. This work appears to have eliminated the natural drainage way from the appellant’s property to East Bay. The PM stated that the fill work was not a violation of Section 404 of the Clean Water Act. Because certain alterations (either man-induced legally-accomplished actions or natural events) can change the status of a water of the United States, including wetlands, the determination of whether a water of the United States is isolated should be made based on current conditions rather than historic conditions.

The District’s “Approach on Identifying Adjacent Wetlands and Isolated Waters July 11, 2003” states the following: (1) “The District has viewed adjacent wetlands to have two components, a physical component and a hydrologic connection component.” (2) “Wetlands or other waters that are surrounded by uplands and are not either adjacent or tributary as described above are isolated waters. This includes wetlands that directly communicate with ground water but do not have a “substantial” downstream flow to other waters of the U.S. Isolated waters that have no connection to interstate commerce other than use of the water or wetland by migratory birds are


not waters of the U.S.” This guidance closely follows the guidance issued by Corps Headquarters regarding adjacent wetlands on March 30, 1988. That guidance states “...proximity by itself is not sufficient to determine that a wetland is adjacent to a waterway”. It also stated “There should also be some hydrological relationship between the waterway and the wetland”. In addition to discussing proximity, the guidance also discussed the use of historic hydrological connections to determine adjacency. The guidance states that historic connections should not be used unless the connection was eliminated by an unauthorized activity, or the intervening area is a berm, dike, or other narrow landscape feature suggested by the definition for adjacent. There is no evidence in the administrative record to indicate that an unauthorized activity eliminated the historic natural drainage of the appellant’s property, or that the separation of the wetland is due to a narrow upland landscape feature such as a berm or dike. Additionally, the guidance states “ If we take the broad-based view that any historic connection makes a wetland adjacent to another water, it could create substantial problems with trying to prove that the exact upland parcel now separating the wetland from another water of the U.S. was, indeed, filled. This position also fails to recognize that the wetland is currently functioning as an isolated wetland.”

As discussed above, both the District’s guidance and the Corps Headquarters guidance states that there should be some type of hydrological relationship between a wetland and another water of U.S. before that wetland can be identified as adjacent. There is no evidence that water flows from the instant wetland to the drainage ditch. In fact, the District’s PM and appellant’s consultant agree that there is no hydrological connection between the instant wetland and the drainage ditch located on the north side of U.S. Highway 98. The fact that the PM stated that there is not a hydrological connection is in direct conflict with the District’s guidance that was initially stated in support of the District’s findings. Based on the fact that the wetland does not have a hydrologic relationship with the drainage ditch, it appears that the wetland on the Allen property may not meet the criteria to be identified as adjacent. The decision is remanded to the district to reconsider its’ decision regarding the hydrological relationship that established jurisdiction under 33 CFR 328.3(a) (7) between the wetland identified on Mr. Allen’s property and other waters of the US. The District’s reconsideration must follow the guidance contained in the March 30, 1988 Headquarters’ Memorandum as well as its own July 11, 2003 guidance Approach on Identifying Adjacent Wetlands and Isolated Waters.

Information Received and its Disposition During the Appeal Review:

The District provided a copy of the Administrative Record.

Date 21 May 04


Randal R. Castro
Brigadier General, US Army
Commanding