

**ADMINISTRATIVE APPEAL DECISION**

**FILE NO. 200100939 (JF-DHB)**

**JACKSONVILLE DISTRICT**

**October 18, 2002**

**Review Officer:** Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

**Appellant Representative:** Dr. Jerry Weaver, Pastor, First Baptist Church Panama City Beach, Panama City Beach, Florida.

**Receipt of Request For Appeal (RFA):** July 21, 2002.

**Appeal Conference Date:** August 29, 2002. **Site Visit Date:** August 29, 2002.

**Background Information:** The property owned by First Baptist Church Panama City Beach is located at the Northeast corner of Front Beach Road and Cobb Road in the City of Panama City Beach, Bay County, Florida. The portion of the property at issue is currently undeveloped. The majority of the property is considered upland, much of which has been mechanically cleared. The property also includes a wetland area located on east side of the property along Front Beach Road. By letter of March 9, 2001 First Baptist Church Panama City submitted an application that included a development feasibility assessment, prepared by Garlick Environmental Associates, Inc., and requested a "No Permit Required Letter" from the Jacksonville District (District). The District responded on April 22, 2001 that a site inspection on April 16, 2001 revealed that the wetland on the site is considered an adjacent wetland and therefore under USACE jurisdiction. By letter of October 17, 2001 the District issued a preliminary jurisdictional determination regarding the wetlands on the property. On January 25, 2002 the District received property surveys of the delineated wetlands located on the First Baptist Church Panama City Beach property. By letter of April 9, 2002 the District issued an approved jurisdictional determination regarding the wetlands on the property.

**Summary of Decision:** I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated April 9, 2001.

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

**Reasons for the appeal as presented by the appellant:**

**Reason 1:** "First Baptist Church Panama City Beach has been unable to secure any information concerning the approval/disapproval process that has been promulgated by the [USACE]. Under

the U.S. Freedom of Information Act, we have requested copies of the precise current policy and regulations, as well as applicable U.S. Statutes, executive Orders, et al, which the Panama City Beach office has used to make its "Approved Jurisdictional Determination..." To date, that office has not responded with anything, except this form [Notification of Administrative Appeal Options and Process and Request for Appeal] for us to use."

**FINDING: This reason for appeal does not have merit.**

**ACTION: No action required.**

**DISCUSSION:** At the appeal conference, August 29, 2002, the District's Project Manager stated that the applicant's environmental consultant was advised of information relating to policy and regulations available on the USACE web site. They were also directed to specific individuals in the District's Regulatory Division and the District's Office of Counsel. In addition, in a telephone conversation record, on May 28, 2002 the District's Project Manager provided the USACE web address to the pastor, First Baptist Church Panama City Beach.

**Reason 2:** "We categorically reject jurisdiction of the ...[USACE] over our wetlands."

**FINDING: This reason for appeal does not have merit.**

**ACTION: No action required.**

**DISCUSSION:** At the appeal conference, August 29, 2002, the applicant's representatives stated that this position is "based on the SWANCC decision." See the discussion in Reason 4 below.

**Reason 3:** "We have received so many conflicting statements from the local office, that we do not really know what is the basis for their determination, and they have failed to inform us properly."

**FINDING: This reason for appeal does not have merit.**

**ACTION: No action required.**

**DISCUSSION:** By e-mail on April 14, 2001 the District's Project Manager's supervisor documented that a representative of First Baptist Church Panama City Beach visited the District's Panama City office and discussed the findings of April 11, 2001 regarding the site. The supervisor advised the representative that, "we...determined that the wetlands on the property to be subject to [USACE] jurisdiction and that a permit would be required." As noted above, the District responded on April 22, 2001 that a site inspection on April 16, 2001 revealed that the wetland on the site is considered an adjacent wetland and therefore under USACE jurisdiction. In an e-mail, May 31, 2001, the District's Project Manager's supervisor documented that a meeting was to be held on June 7, 2001 with representatives of First Baptist Church Panama City Beach to present their position that the wetland in question is isolated. He pointed out that the District's Project Manager "and I are of the opinion that the wetland in

question, is an adjacent wetland of the Gulf of Mexico.” In a memorandum, June 7, 2001, the District’s Project Manager documented a meeting, held that day, in which the applicant “presented aerial photos that they felt...defended their position that the wetland was not jurisdictional for [USACE]. [T]herefore[,] a permit to fill the wetland would not be needed.” By letter of October 17, 2001 the District issued a preliminary jurisdictional determination regarding the wetlands on the property stating, “the [USACE] jurisdiction line had been correctly flagged, and delineated the extent of [USACE] regulated wetlands on the site. The preliminary jurisdictional determination included a “Basis for Jurisdiction” that stated, “Property referenced...contains waters of the United States based on: ... The presence of wetlands as determined by application of the [USACE] Wetland Delineation Manual ...The wetlands are adjacent to navigable or interstate waters, or eventually drain into navigable or interstate waters through a tributary system that may include man-made conveyances such as ditches or channelized streams.” One of the footnotes in the Basis for Jurisdiction stated, “Wetlands separated from other waters of the [United States] by man-made dikes or barriers, natural river berms, beach dunes, etc. are “adjacent wetlands”.” Emphasis added. On January 25, 2002 the District received property surveys of the delineated wetlands located on the First Baptist Church Panama City Beach property. By letter of April 9, 2002 the District issued an approved jurisdictional determination regarding the wetlands on the property stating, “The survey...appears to accurately depict the location of the [USACE] jurisdiction lines on the parcel.”

At the appeal conference, August 29, 2002, the applicant’s representatives stated that their concern here is the use of the terms “berm or jumps, specifically 2 jumps.” These terms were apparently used in various meetings among representatives of the applicant and the District. The term “berm” used in the footnote noted above is taken from definitions at 33 CFR 328.3 (c), specifically from the definition of the term “adjacent” which states, “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.” Emphasis added. The term jump is simply used to deal with the phrase “Wetlands separated from other waters...by man-made dikes or barriers, ...berms, ...and the like.” An example is to “jump” or bridge from one wetland (or water of the United States) across an upland or non-jurisdictional area to another wetland (or water of the United States). See the discussion in Reason 4 below.

**Reason 4:** “Basically, our case is spelled out in the attached letter [April 19, 2002] to the Jacksonville District Corps of Engineers, Panama City Regulatory Office, with an attachment, which highlights the essence of the Supreme Court ruling on the case of the Solid Waste Agency of Northern Cook County (SWANCC) verses the...[USACE], ...In our humble opinion, our wetland is an isolated wetland, which does not, in any way, shape, form or fashion, represent any past, present, or future deleterious impact on the interstate commerce or transportation of the United States. As indicated by the U.S. Supreme Court’s decision, interstate commerce and interstate transportation are the only bases upon which the [USACE] can assume jurisdiction, in opposition to federalism and constitutional questions, with the State of Florida.”

**FINDING: This reason for appeal does not have merit.**

**ACTION: No action required.**

**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”<sup>1</sup> 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 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 is determined, based on SWANCC, the wetlands at issue are isolated and not subject to the Corps jurisdiction under §404 of the CWA.

Again, USACE regulation at 33 CFR 328.3 (c) states, “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.”

In a note in the administrative record the District’s Project Manager summarized several field visits made on April 11, 2001. One of those was the First Baptist Church Panama City Beach property documented as, “Wetland was determined to be adjacent. Water was flowing from [the] site, across [a] small berm constructed of broken concrete and sewer tile into [a] Stormwater pond. It appeared that [Stormwater] pond was built in wetlands. The driveway/entrance to Horizon South severed the connection [with] wetlands on [First Baptist Church Panama City Beach]. The wetland/open water east of the stormwater pond [] was draining into a culvert that went under Front Beach [R]oad and flowed into the Gulf of Mexico.”

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<sup>1</sup> 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.

At the site visit and appeal conference, August 29, 2002, the Appeal Review Officer observed that the “small berm constructed of broken concrete and sewer tile” constituted no more than scattered rubble and was not a barrier to the flow of water nor a separation from other waters of the United States. The Appeal Review Officer also observed that a box culvert, approximately five feet wide and possibly the same height, drained water from the “wetland/open water east of the stormwater pond” into the Gulf of Mexico.

**Information Received and its Disposition During the Appeal Review:**

The Jacksonville District furnished a copy of the administrative record.

A handwritten signature in black ink, appearing to read "Peter T. Madsen". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Peter T. Madsen  
Brigadier General, US Army  
Commanding