

ADMINISTRATIVE APPEAL DECISION

GREATER GULFPORT PROPERTIES, LLC., FILE NO. MSJ02-02535-T

MOBILE DISTRICT

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

Appellant Representatives: Mr. Donald E. Theriot.

Receipt of Request For Appeal (RFA): December 23, 2002.

Appeal Conference/Site Visit Date: October 16, 2003.

Background Information: The 183.59-acre undeveloped tract is owned by Mr. Richard P. Salloum. This tract is located between Interstate 10 and Landon Road in Harrison County, Mississippi. By letter dated November 12, 1997 from Dana R. Sanders, Sr., PhD, Mr. Salloum's consultant, the Mobile District (District) was requested to concur with a wetland identification/delineation. Dr. Sanders' report concluded that this property contained 110.13 acres of land that qualified as "wetlands" and "waters of the United States" pursuant to Section 404 of the Clean Water Act of 1977 (as amended) as shown in Figure 2, none of the property qualified as other waters, and all the property's wetlands were located above the headwaters for Section 404 permitting purposes. District staff conducted a site inspection on January 16, 1998. Based on the site inspection, soils data, aerial photographs, and the supplied wetland delineation map (Figure 2), the District determined that the wetland delineation map accurately depicted wetland areas located on the property. Dr. Sanders was informed by letter dated February 2, 1998 that approximately 60 percent of the property was wetlands (pine/shrub savannah) and that they were subject to the Corps jurisdiction under Section 404 of the Clean Water Act (Determination number MSJ97-04331-T). By letter dated June 20, 2002, Mr. Donald E. Theriot, attorney for Mr. Salloum, requested the District re-evaluate their February 2, 1998 jurisdiction based on the holding of the United States Court of Appeals for the 5th Circuit in *Rice v. Harken Exploration Co.*, 250 F. 3d 264 (2001). In response to this request, District staff conducted an additional site inspection on July 13, 2002. The District re-confirmed their wetlands determination with available information including a August 31, 2002 memorandum; July 31, 2002 inspection report; Corps aerial (IF) photographs; wetlands delineation map (verified by Corps); Soil Survey of Harrison County (June 1975); Gulfport North, Mississippi Quadrangle map; the current policy and criteria contained in the U.S. Army Corps of Engineers' Wetland Delineation Manual dated January 1987; and current guidance concerning recent Supreme Court decision on SWANCC. This re-confirmation and the supporting information were provided to Mr. Theriot by letter dated October 22, 2002.

Mr. Theriot submitted, via overnight mail received December 23, 2002, a RFA of the jurisdiction delineation for the 183.59 acre parcel located in Harrison County, MS., north of I-10 (Determination number MSJ97-04331-T, File Number MSJ02-02535-T). The appeal was based

on the January 9, 2001 United States Supreme Court decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) and decisions made by the Fifth Circuit Court of Appeals in Rice v. Harken Exploration Company, 250 F.3d 264 (5th Cir. 2001) (Rice). The SWANCC decision recognized limits on 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. The Fifth Circuit case involved alleged violations of the Oil Pollution Act (OPA). In this case, the Fifth Circuit interpreted the scope of "navigable waters" under the OPA.

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. Quoting from Riverside Bayview Homes, the Court in SWANCC 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 observed in SWANCC: "It was the significant nexus between the wetlands and navigable water that informed our reading of the CWA 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. A short discussion of the 5th Circuit cases of Rice and Needham occurs later in this Decision.

The property of interest is located at the extreme headwaters of the wetland system adjacent to Turkey Creek. The flows on site are described by Dr. Sanders as generally from the northwest to the southeast (page 2 November 10, 1997 correspondence). A topography map provided by Mr. Theriot via overnight mail dated September 15, 2003 confirmed Dr. Sander's observations. The north and west elevations of the wetland area are above the 25 foot contour. These contours fall south and easterly to elevations of 21 and 20 at the southeastern edge of the wetlands. The Soil Survey of Harrison County, MS (1975), Sheet 34, showed three intermittent tributaries. The three tributary locations correlate well with the lower contours identified on the topographic map.

There are several man-made features which cross this wetland system that have modified surface flow on site and at the southern boundary of this property. These man-made features involve drainage elements including ditches and culverts, and elevated areas including a dirt road, I-10 service road and I-10. These man-made features were constructed in or on "waters of the United States".

Regulations at 33 CFR 328.3(c) states, the term "adjacent" means bordering, contiguous, or neighboring. Wetlands artificially 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".

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.

The natural and man-made drainage features on site maintained a contiguous surface hydrological connection between the wetlands and navigable waters consistent with the historical wetland drainage. The topographic map showed two ditch and swale systems which intersected surface flows and routed the flow east to the ditch and culverts that go under the service road and I-10. It also showed a third ditch and swale system that directed surface water south to the ditch and culver system going under the service road and I-10. The Federal and State Departments of Transportation which designed I-10 and its' service road deliberately included a ditch and culvert system to maintain the surface flow of the wetland and intermittent tributaries.

The wetland, tributary system immediately south of the project and I-10 continues south in a contiguous wetland, tributary system which is adjacent to Turkey Creek. Flows follow the wetland, tributary system into Turkey Creek, then flow down Turkey Creek down stream through Bernard Bayou to Big Lake to Back Bay of Biloxi to Biloxi Bayou to Mississippi Sound to the Gulf of Mexico.

Summary of Decision: The District's administrative record showed that the wetlands on the Appellant's property are an adjacent wetland that is bordering or contiguous to a tributary or tributaries of navigable-in-fact waters. The Appellant's reasons for appeal, that essentially alleged that the wetlands are isolated and are not adjacent to navigable water, are not supported by the record.

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

Reasons for the appeal as presented by the appellant: The areas denoted as wetlands in the 1998 delineation are "isolated wetlands" not "adjacent" to any navigable waterway or any "open body" of water. The property has no wetlands because there is no surface water connection between the property and any navigable waterway. The small intermittent ditch drains less than 10 acres of the previously delineated wetlands based on topographic surveys.

Reason 1: There must be at least some surface connection between the alleged "wetland" and navigable water.

FINDING: This appeal reason does not have merit.

ACTION: No action required.

DISCUSSION: The District's administrative record contained adequate supporting documentation and information why 60 percent (113.10 acres) of the property was determined to be "waters of the United States". The inspection reports of January 16, 1998 and July 31, 2002 identified and confirmed the property's wetlands met the three parameter definition of wetlands required by the Corps of Engineers Wetland Delineation Manual dated 1987. They also concluded that the wetlands were adjacent to the navigable waters of Turkey Creek because of surface hydrological connections via drainage ditches, box culverts and other ditches and wetland areas southward to Turkey Creek.

The administrative record provided information that the property's wetlands were part of a large continuous wetland/tributary system that is contiguous to Turkey Creek, a portion of which is navigable. This position is consistent with the current definition of "water of the United States". The term "water of the United States" includes tributaries to navigable waters as well as adjacent wetlands. 33 C.F.R. § 328.3(a)(5) and (a)(7). "Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States." 65 Fed. Reg. 12823-12824 (March 9, 2000). Ditches may serve as jurisdictional surface water tributaries and hydrological connections for adjacent wetlands. See *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2003) (I-64 ditch serves as jurisdictional tributary and hydrological connection under CWA), *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (CWA jurisdiction includes wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay"); *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (CWA jurisdiction includes wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) (irrigation canals are tributaries to navigable waters, and are therefore jurisdictional under the CWA).

The administrative record demonstrates that the man-made structures of the service road and I-10 were not features that would render the wetland/tributary system on site nonadjacent to the wetland/tributary system which is contiguous to Turkey Creek. Therefore, I conclude that the District's administrative record leads to a reasonable conclusion that the wetlands in question are contiguous to a wetland/tributary system of navigable-in-fact water, and therefore are jurisdictional adjacent wetlands.

Reason 2: The property has no wetlands because there is no surface water connection between the property and any navigable waterway.

FINDING: This appeal reason does not have merit.

ACTION: No action is required.

DISCUSSION: Since SWANCC, decisions were handed down by the Fifth Circuit Court of Appeals in *Rice v. Harken Exploration Company*, 250 F.3d 264 (5th Cir. 2001) (*Rice*) and *United States v. Needham*, 364 F.3d 340 (5th Cir. 2003) (*Needham*). These decisions interpreted the scope of "navigable waters" under the Oil Pollution Act, though the Fifth Circuit determined that the definition of navigable waters in the OPA was coextensive with that of the CWA. These opinions state that a body of water is only subject to regulation as a navigable water "if the body of water is actually navigable or adjacent to an open body of navigable water." The Fifth Circuit further stated in *Needham* that "The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters."

The appellant is convinced, based on SWANCC, Rice, and Needham that the District failed to find a sufficient connection between 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.

The District staff's determination that the site's wetlands were jurisdictional adjacent wetlands because they were contiguous to a continuous wetland/tributary system with surface hydrological connections to navigable-in-fact waters was consistent with internal guidance, and supported by the administrative record. Corps internal guidance states that conclusions of the Fifth Circuit in Rice and Needham is nonbinding, *obiter dicta*, and is not an explanation of the governing law that is binding on the Government. Consequently, this decision does not need to address arguments that such language is contrary to the exercise of jurisdiction under these circumstances. Therefore, I conclude that the District's administrative record leads to a reasoned conclusion that the wetland is part of a contiguous wetland and that the wetland is adjacent to a tributary of navigable-in-fact water.

Reason 3: The small intermittent ditch drains less than 10 acres of the previously delineated wetlands based on topographic surveys.

FINDING: This appeal reason does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record includes numerous references that the site's surface water flows would include more than ten acres. The original wetland delineation by Dr. Sanders, the District's two visits and the field reports, and the Soils Survey of Harrison County, MS reflect a position that the flows are directed from the northwest to the southeast. The topographic map documents the higher elevations along the delineated wetland west and north edges. The topographic map illustrates how surface water would flow uninterrupted to the southern border and how the swale and drainage ditch systems collect surface water to the lowest elevation in the southeastern area. Therefore, I conclude that the District's administrative record leads to a reasonable conclusion that all the delineated wetlands are part of a contiguous wetland and that the wetland is adjacent to a tributary of navigable-in-fact water.

Information Received and its Disposition During the Appeal Review:

The Mobile District furnished a copy of the administrative record.

Mr. Theriot submitted, via overnight mail a letter dated September 15, 2003, with its enclosed preliminary drainage study and survey of the property. This survey demonstrates the continuity of the wetlands, the man-made swales, and man-made ditches and culverts which reconnect waters of the United States with other waters of the United States.

Mr. Theriot submitted via overnight mail a cover letter with enclosures regarding citations from the Federal Register and Code of Federal Regulations relating to the establishment of an ordinary high water mark in order that a non-navigable tributary be jurisdictional. Within this cover letter

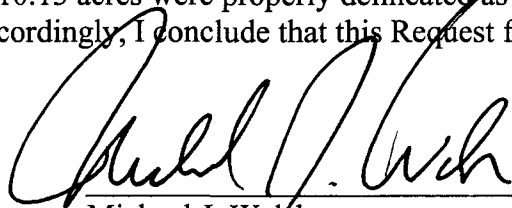
he provided what he considered to be the factual matters agreed to by the District and disputed factual matters. There were three issues of contention remaining: (1) wetlands must be contiguous to a navigable waters, as apposed to a non navigable tributary of a navigable water; (2) Whether eight of more instances of physical uplands between the property and Turkey Creek should be ignored in determining "adjacency" because they are man-made or arguably man-made, irrespective of the age of the man made structure; and (3) Whether all or only a portion of the property wetland acreage surface drains through the I-10 box culvert. These issues have been addressed by the District.

Mr. Theriot submitted via overnight mail a cover letter with an enclosure of a revised Third Supplemental Appeal. This supplement advised the appeal officer of the 5th Circuit, US v Needham, No. 02-30217, filed December 12, 2003. The appellant reasons that the wetlands on site are not adjacent truly adjacent to navigable waters. The import of the Needham decision is addressed above.

The administrative record is consistent with findings that the wetlands on the project site are adjacent to tributaries of navigable-in-fact waters and an open body of navigable water. The site-specific conditions of this delineation were adequately addressed by the District.

CONCLUSION: After reviewing and evaluating the administrative record provided by the Mobile District, I conclude that the District's determination to exercise jurisdiction under 33 CFR 328.3(a)(7) was not arbitrary or capricious, and was not contrary to applicable law, regulations, and guidance, and that there is sufficient information in the administrative record to support the District's determination that the 110.13 acres were properly delineated as adjacent wetlands and waters of the United States. Accordingly, I conclude that this Request for Appeal does not have merit.

(Date)



Michael J. Walsh
Colonel, EN
Commanding