ADMINISTRATIVE APPEAL DECISION
MR. NORBERTO AZQUETA
FILE NO. 200103634 (JF-DEB)
JACKSONVILLE DISTRICT

August 20, 2002

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

Appellant Representatives: Messer's Norberto Azqueta, Jr., Wade R. Byrd, Carlos R. Arellano, Greg Sawaka, and Ms Vivian Foy DeCosta

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 22 October 2001

Appeal Conference: 27 February 2002 **Site Visit Date:** 27 February 2002

Background Information: On 24 May 2001, Vivian Foy (DeCosta) of Treasure Coast Environmental Service (TCES), on behalf of her client Mr. Norberto Azqueta submitted a permit application and jurisdictional determination (JD) to the US Army Corps of Engineers, Jacksonville District's (SAJ) West Palm Beach office. Mr. Azqueta proposed to construct a 12-stall horse barn on Lot 10, Palm Beach Point, Section 29, Township 22 South, Range 41 East, Palm Beach County, Florida. TCES determined that the site did not contain areas subject to the Corps jurisdiction under Section 404 of the Clean Water Act. SAJ issued a determination of "no permit required" on 7 July 2001. However, by letter of 12 July 2001, SAJ informed TCES that it had received new information regarding the proposed project site. Based on the new information, SAJ determined that there was a high probability that the project site contained areas subject to the Corps jurisdiction and requested permission to perform an onsite field visit. SAJ informed TCES by letter, 30 July 2001, that its initial determination of 7 July 2001 was preliminary and should not be relied on to complete final plans for the project site.

In an August letter to Ms Foy (DeCosta), Mr. Azqueta gave his permission for the Corps to access his property to perform a jurisdictional determination. SAJ's West Palm Beach staff conducted an onsite visit on 7 September 2001. It was determined that the site did contain wetlands and that these wetlands were not isolated but adjacent and therefore subject to the Corps jurisdiction under §404 of the Clean Water Act. Mr. Azqueta was informed of SAJ's findings in a letter, 1 October 2001.

In a faxed "note" to the SAJ's Project Manager, Ms Foy stated that "Mr. Azqueta is entitled to a SWANC for this lot."

On 9 January 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 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 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 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 Court's decision in SWANCC did not eliminate the Corps authority to regulate adjacent wetlands.

The appellant feels, 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 determined that the reasons for the appeal are (1) do wetlands exist on the property and (2) if so, are these wetlands adjacent and therefore subject to the Corps jurisdiction under §404 of the Clean Water Act. SAJ determined that the site contains wetlands and that these wetlands are adjacent to existing drainage canals (ditches). For the wetlands to be considered adjacent, the drainage canal (ditch) must meet the criteria to be identified as waters of the United States. If a drainage ditch (canal) is constructed entirely in uplands, it is not a water of the United States unless it becomes tidal or otherwise extends the ordinary high water mark of existing Section 10 navigable waters. However if a ditch is excavated in waters of the United States, including wetlands, it remains a water of the United States, even if it is highly manipulated. The administrative record does not contain documentation to support SAJ's findings that neither the ACME Improvement District D-4 canal (ditch) nor the unnamed private drainage canal (ditch) are waters of the United States. For this reason, I find that the appellant's request for appeal has merit.

[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.

CESAD-CM-OR
SUBJECT: Appeal of Jurisdictional Determination Jacksonville District File No. 200103634 (JF-DEB) - Noberto Azqueta

Appeal Evaluation, Findings and Instructions to the SWJ District Engineer (DE): The reason for appeal is listed as presented by the appellant.

Reason 1: Substantial evidence & documentation, Lot 10 is not a wetland and not under US ACOE jurisdictional authority. Additional evidence: Hydric soils analysis, topographic survey showing elevations not consistent with wetland elevations in area. Isolation of lot from jurisdictional areas in Wellington.

FINDING: This reason for appeal has merit.

ACTION: As detailed in the discussion, the jurisdictional determination decision is remanded for reconsideration and, as appropriate, to provide additional documentation in the SAJ administrative record to support its decision.

DISCUSSION: The administrative record does not support the SAJ approved JD decision. The administrative record does not clearly document how the ACME Improvement District D-4 canal and the unnamed private drainage canal located at the east end of the appellants property meet the criteria establish under 33 CFR §328.3(a) to be identified as waters of the United States. Section 328.3(a) defines the term "waters of the United States". In addition, SAJ's position that the subject wetlands are adjacent to the drainage canals is not substantiated in the administrative record.

There is no supportive documentation in the administrative record to document that the ACME Improvement District D-4 Canal or the unnamed drainage canal is a "navigable" water or a tributary to a "navigable" water of the United States as discussed in the SWANCC and Riverside Bayview Homes decisions. In its 1 October 2001 approved JD letter, SAJ stated that "due to the proximity of the adjacent canal, the onsite wetlands are considered to be adjacent, and therefore, [under] jurisdiction...[of] the US Army Corps of Engineers." During the appeals conference, SAJ personnel did explain the district's policy that considers the drainage canal systems in Florida to be waters of the United States. Basically the policy is that all of these drainage systems were excavated out of wetlands and not uplands and that they eventually drain or flow into navigable or interstate waters. This policy is not explained anywhere in the administrative record and was unknown to the appellant and his consultant.

The US Corps of Engineers' regulations at 33 CFR 328.3(a) defines the term "waters of the United States." Section 328.3(c) defines the term "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. Once a water is determined to be a "water of the United States," §328.4 defines the limits of those waters. When adjacent non-tidal waters of the United States are present, the jurisdiction extends beyond the ordinary high water mark to the limits of the adjacent wetlands.

SAJ appropriately determined that portions of Mr. Azqueta's property met the three mandatory criteria to be identified as wetlands as required in Technical Report Y-87-1, the Corps of Engineers Wetlands Delineation Manual. For the Corps of Engineers to maintain jurisdiction, the wetlands must be adjacent to waters of the United States as defined under §328.3(a). The administrative record does not contain a Basis of Jurisdiction Determination form, however, it does contain an Inter-Office Memorandum, 21 November 2001, which explains the districts rationale for exerting jurisdiction over the wetlands located on Mr. Azqueta property. In the memo, the district concludes that "(1) the site exhibits disturbed conditions, which are not normal (i.e, fill, earthwork), (2) the surrounding canals dictate that the system is adjacent, and (3) based on the field data sheets completed by the Corps, and those submitted by the applicant, the site contains jurisdictional wetlands."

As discussed earlier, SAJ did not provide substantive documentation that the Acme Improvement District D-4 canal and/or the unnamed canal located at the east end of the property are waters of the United States. The SAJ's position that the subject wetlands are adjacent to a water of the United States is unsubstantiated. Further documentation in the administrative record is needed to confirm that the drainage canal system and the unnamed canal are waters of the United States and that the wetlands located on Mr. Azqueta property are adjacent to the canals.

CONCLUSION: For the reasons stated above, I find that the appellant's reason for appeal has merit.

PETER T. MADSEN
Brigadier General, USA
Commanding