

ADMINISTRATIVE APPEAL DECISION

FILE NO. 199905468 (JF-KO)

JACKSONVILLE DISTRICT

November 19, 2001

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

Appellant Representative: Mr. Edsel F. Matthews (attorney), Pensacola, Florida, on behalf of
Soundview Properties, Inc. (Jim Young).

Receipt of Request For Appeal (RFA): April 25, 2001.

Appeal Conference Date: July 12, 2001

Site Visit Date: July 12, 2001

Background Information: By letter dated December 21, 1999, Joe A. Edmisten, Inc. & Associates (Edmisten) submitted their wetland delineation of a 75-acre tract at the Soundview Properties, Inc. site on Santa Rosa Sound, east of Gulf Breeze, Santa Rosa County, Florida, along with supporting documentation, to Jacksonville District, U.S. Army Corps of Engineers (District). The site is located between Santa Rosa Sound on the south and U.S. Highway 98 on the north. The larger wetlands on the north end of the 75-acre site were once part of a continuous wetland through Rutledge soils (hydric soils, very poorly drained), but approximately 30-40 years ago the development of Smugglers' Cove severed the historic wetlands. Other developments to the west, and more than 2 roads on Soundview Properties have had an impact on historic wetlands to the west and south.

By letter dated March 30, 2001, the District provided an approved jurisdictional determination to the applicant, which in part stated, "...be advised that the only on-site wetland considered isolated and non-jurisdictional, pursuant to the January 9, 2001, U.S. Supreme Court decision, is the area bounded by flags G-131 through G-139. All other flagged on-site wetlands are considered contiguous and /or adjacent wetlands of Santa Rosa Sound and are subject to CE [Corps of Engineers] regulatory jurisdiction."

Summary of Decision: I find that the appeal has merit as follows: I find that (a) the District did not document a hydrological connection between the wetlands on the north end of Soundview Properties and Santa Rosa Sound. The District did not document the presence of an ordinary high water mark. In addition, (b) the District did not substantiate that the wetlands on the north end of Soundview Properties are adjacent to Santa Rosa Sound via the wetlands east or west of Soundview Properties. This matter is remanded to the District Engineer for reconsideration of the jurisdictional determination decision consistent with the instructions in this administrative appeal decision.

The District's March 30, 2001, decision regarding the subject jurisdictional determination was made immediately following the United States Supreme Court decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99 – 1178, (U.S.S.Ct, January 9, 2001) 2001 U.S. LEXIS 640. ("SWANCC"). The Court's ruling may have implications in the subject jurisdictional determination. Therefore, as the District re-evaluates the request for an approved jurisdiction determination in accordance with the instructions noted above, it should do so in light of the "SWANCC" ruling.

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

Reasons for the appeal as presented by the appellant: "Applicant agrees that [that] portion of [the] applicant's property in the southwest corner of applicant's ... site [is] within the jurisdiction of the Corps as jurisdictional wetlands (**inseparably bound up with the waters** of the United States). See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) at 134. However, for the reasons as hereinafter stated, we respectfully and adamantly disagree with the Corps' determination that all other flagged on-site wetlands, other than those bounded by flags G-131 through G-139, are subject to Corps regulatory jurisdiction."

"We respectfully submit the Army Corps of Engineers ...reliance of its approved jurisdictional determination on the Supreme Court case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.* in support of the subject jurisdictional determination, is sorely misplaced."

Reason 1: "In the case sub judice it is our adamant position, supported by clear, convincing and ample evidence, that the wetlands on the north end of the Soundview site are not "inseparably bound up with the waters of the United States, and therefore are isolated and not subject to the jurisdiction of the Corps. No hydrological connections from the northern wetlands of the applicant's property to the navigable body of water known as Santa Rosa Sound exists. The property on which the Smuggler's Cove subdivision has existed for many years, effectively blocks any hydrological connection from the north end of the subject site to the Santa Rosa Sound."

"Apparently, the Corps has some concern that stormwater from the applicant's Soundview Properties approximately 75 acre...site might enter raised storm-water grates and ditches on and through the Smuggler's Cove property, and thereafter enter a series of lakes on Smuggler's Cove, eventually proceeding south to the Sound. Applicant's ecological consultant, Dr. Joe A. Edmisten, has had much experience with the...site for the past ten years and as a result has acquired intimate knowledge of the...properties. It is Dr. Edmisten's sincere and adamant conclusion that no such system could or would take storm-water from such a large off-site area and normally design a system that would accommodate such flows and volumes."

"It is Dr. Edmisten's sincere opinion and conclusion that the Smuggler's Cove property has acted like a dam, isolating the northern wetlands situated on the applicant's Soundview site, from waters of the United States. Additionally, it is Dr. Edmisten's sincere opinion that high dry roads inside the applicant's approximately 75 acre site further isolate any wetlands on the north side of the site from the waters of the Sound."

FINDING: Reason 1 for the appeal has merit.

ACTION: The decision is remanded to the DE to reconsider and further document the decision regarding the evidence supporting a tributary connections that establishes jurisdiction under 33 CFR 328.3(a)(5) between the wetlands on Soundview Properties and Santa Rosa Sound. This reconsideration regarding hydrological connections should include, but is not limited to, visual evidence of drainage to Santa Rosa Sound, as well as evidence of the presence and extent of the ordinary high water mark.

The District's decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

DISCUSSION: The matter of a hydrological connection between the large wetlands on the north end of the site is discussed here. By letter dated May 3, 2000, the District informed the applicant's ecological consultant the property was inspected by District personnel on February 7, 2000, and re-inspected the flagged wetland lines on February 28, 2000, and noted "[t]he wetlands on the property are considered to be wetlands adjacent to Santa Rosa Sound." It was further noted that additional wetland lines exist on the property that have not been reviewed for accuracy...[t]hese include...wetland lines associated with old fill roads that cross the flagged wetland areas on the property...[i]f you desire to have the location of the flagged lines confirmed for future permitting purposes, it will be necessary to have the line surveyed and shown on the property survey."

By letter dated February 21, 2001, the applicant's ecological consultant referenced the February 28, 2000, inspection by the District and pointed out that the "approved line has been surveyed and the resulting survey was sent...for final approval...Since then, the Cook County decision regarding isolated wetlands has removed jurisdiction from certain isolated wetlands... We feel certain that the small wetland on the southeast corner near the water is clearly isolated and therefore not currently under the jurisdiction of...the COE [Corps of Engineers]...The larger wetlands on the northeast side of the 75-acre site were once part of a continuous wetland through Rutlege soils...but Smugglers' Cove...30-40 years ago severed any connections to the east and south. To the west, more than two roads have blocked any historic ties to the west and south. The only wetland that is clearly not isolated is the one on the southwest corner."

By email dated March 23, 2001, Mr. Clif Payne reported that District personnel inspected the site on March 14, 2001, and documented their findings as follows:

The purpose of the inspections was to determine which wetlands on the Young site would be considered contiguous versus isolated.

A determination was made that all wetlands located on the Young site would be considered contiguous except for a depressional wetland basically located in the center of the property approximately 250 north of the Shoreline of Santa Rosa Sound.

A ditch exists on the west boundary of Smugglers ['] Cove. The ditch extends approximately 1800 feet to the south of US 98. The ditch crosses both wetlands and uplands. The ditch appears to exhibit constant surface water flow or ponding and exhibits hydrophytic vegetation and anticipated hydric soils. The ditch appears to have been diverted to the west on to the Young parcel at 1800 feet south of US 98. Once on [the] Young parcel the ditch connects to a ditch on the east side of the fill road approx. 175' west of the east boundary of the Young Parcel. The fill road extends from US 98 to point approx[imately] 400' north of Santa Rosa Sound. The fill road has not been elevated sufficiently where it crosses wetlands for the road to lose wetland characteristics. The elevation of the fill road drops and allows connection to the ditch on the west side of the fill road. Surface water from the ditches then proceeds to the southeast and crosses back onto Smugglers ['] Cove and enters a large inlet drainage feature that then connects to Santa Rosa Sound.

Several drainage inlets have been constructed 5-10 feet within the west boundary of Smugglers ['] Cove to capture surface[]water flow in the wetlands to the west of Smugglers Cove. The inlets drain through subsurface culverts into ponds that have been excavated in the center of the Smugglers ['] Cove parcel. The ponds have been excavated in both historic uplands and wetlands. Each pond supports a wetland fringe. Drainage from the ponds enters Santa Rosa Sound beneath the public pier associated with the subdivision.

It should be noted that in some areas of Smugglers ['] Cove wetland characteristics continue to exist where historic wetlands crossed the parcel.

A culvert exists beneath the western fill road on the Young parcel. The fill road ...extends from US 98 to Santa Rosa Sound and occurs approx. 300 feet east of the west boundary of the Young Parcel. The subject culvert exists approx[imately] 100 feet south of US 98. The western terminus of the culvert is sub[ter]restrial. However; at the time of the inspection the eastern terminus was subsurface. The road is bound by ditches and is elevated approx[imately] 1-1.5 above adjacent wetland grade. Only the northern 300 feet of the road was inspected. Approx[imately] 300 feet south of US 98 the elevation of the road decreases which allows surface water from the ditches to converge on the west side of the road. Drainage from the road appears to continue to the south and west into drainage ditches that cross the adjacent parcel to the west and eventually connect to undisturbed wetlands which connect to Santa Rosa Sound.

By letter dated March 30, 2001, the District provided an approved jurisdictional determination to the applicant "...be advised that the only on-site wetland considered isolated and non-jurisdictional, pursuant to the January 9, 2001, U.S. Supreme Court decision, is the area bounded by flags G-131 through G-139. All other flagged on-site wetlands are considered contiguous and /or adjacent wetlands of Santa Rosa Sound and are subject to CE [Corps of Engineers] regulatory jurisdiction...In addition, any ditches that convey drainage from onsite

jurisdictional wetlands to Santa Rosa [Sound] are considered subject to CE regulatory jurisdiction. It is strongly suggested that the jurisdictional status of on-site wetland road crossings and on-site drainage ditches be determined and confirmed prior to initiating any on-site land disturbance activities.”

According to the Basis for Jurisdictional Determination in the approved jurisdictional determination the District stated, “property...contains waters of the United States based on...[t]he presence of wetlands as determined by application of the U.S. Army Corps of Engineers Wetland Delineation Manual...The wetlands are adjacent to navigable or interstate waters, or eventually drain or flow into navigable or interstate waters through a tributary system that may include man-made conveyances such as ditches or channelized streams...The presence of one or more tributaries (stream channels, man-made conveyances, lakes, ponds, rivers, etc.) that eventually drain or flow into navigable or interstate waters...Includes property below the ordinary high water mark of the tributary.”

The definition of “waters of the United States” as it applies to the jurisdictional limits of the authority of the Corps regulatory program is defined in 33 CFR Part 328. 33 CFR 328.3(a)(5) states that waters of the United States include: “Tributaries to waters identified in paragraphs (a)(1) through (4) of this section.” In addition, 33 CFR 328.4(c)(1) states, “In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark [OHWM].”

The preamble to the November 13, 1986 Final Rule, Regulatory Programs of the Corps of Engineers, FR Vol. 51, No. 219, Page 41217, further discussed the limits of jurisdiction as follows: “Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.”

The Federal Register / Vol. 65, No. 47/ Thursday, March 9, 2000 / Notices (page 12823-12824) states, “[d]rainage 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...District Engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHWM that may have developed in a drainage ditch.”

Regulatory Guidance Letter (RGL) 88-06, issued June 27, 1988 (now expired but still applicable), discussed the ordinary high water mark (OHWM) as “the physical (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWM is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel.”

(Note: Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.)

The most detailed information in the administrative record regarding possible hydrological connections is found in the March 23, 2001, email quoted above. That information describes three possible hydrological connection scenarios. One of these describes how “[s]everal drainage inlets have been constructed 5-10 feet within the west boundary of Smugglers [‘] Cove to capture surface[]water flow in the wetlands to the west of Smugglers [’] Cove.” The inlets drain through subsurface culverts into ponds that have been excavated in the center of the Smugglers [’] Cove parcel...Drainage from the ponds enters Santa Rosa Sound beneath the public pier associated with the subdivision.” Emphasis added.

At the site visit on July 12, 2001, the Appeal Review Officer observed that the drainage inlets were designed to receive storm water from the streets within Smugglers’ Cove. The top of each inlet was situated at an elevation lower than that of the street. A concrete flume sloped from the street to the opening at the top of each inlet. This inlet design was discussed on site and agreement was reached that the inlets were designed to receive drainage from the streets. Also discussed was the possibility of storm water leaving Soundview Properties by way of the drainage inlet structures. The top of the drainage structures were situated several inches above the ground and above the top of the drainage ditch immediately to the west that separates Smugglers’ Cove and Soundview Properties along the property line. It is possible that storm water from Soundview Properties could overtop the drainage inlets in Smugglers’ Cove and enter Santa Rosa Sound via the system of culverts and ponds within Smugglers’ Cove. However, the discharge or “capture” of storm water through the drainage inlets and its frequency were not documented.

The second suggested hydrological connection involves a possible discharge of storm water to the west. A fill road (western), located approximately 300 feet east of the west boundary of Soundview Properties, extends from U.S. Highway 98 to Santa Rosa Sound. As noted above, “[t]he road is bound by ditches” and “[o]nly the northern 300 feet of the road was inspected.” Approximately 100 feet south of U.S. Highway 98 a culvert connects the drainage ditches on the east and west sides of the road. Also, at a point approximately 300 feet south of the highway “the elevation of the road decreases which allows surface water from the ditches to converge on the west side of the road.” As noted above, “[d]rainage from the road appears to continue to the south and west into drainage ditches that cross the adjacent parcel to the west and eventually connect to undisturbed wetlands which connect to Santa Rosa Sound.” Emphasis added. The District did not document a hydrological connection to the south and west. The District did not conclude jurisdiction over the drainage ditches on the site, but rather advised the applicant “[i]t is strongly suggested that the jurisdictional status of on-site wetland road crossings and on-site drainage ditches be determined and confirmed prior to initiating any on-site land disturbance activities.”

The third suggested hydrological connection again involves the ditch on the west boundary of Smugglers’ Cove. At approximately 1800 feet south of U.S. Highway 98, the ditch is diverted to the west where it then connects to a ditch along a second fill road (eastern). As noted above, “[s]urface water from the ditches then proceeds to the southeast and crosses back onto Smugglers’ Cove and enters a large inlet feature which then connects to Santa Rosa Sound.”

At the site visit on July 12, 2001, the Appeal Review Officer observed that the ditch did not extend to Santa Rosa Sound. According to the March 23, 2001, email noted above, the fill road (eastern) extends to the south to a point approximately 400 feet north of Santa Rosa Sound. Near the end of the ditch, a segment the spoil mound that defined the east bank of the ditch had been removed. This breach in the spoil mound is in the vicinity of the "large inlet feature" noted above. The inlet feature is a concrete drainage inlet with an opening (unlike the drainage inlets mentioned above) on the side facing Soundview Properties. The breach and the inlet feature are separated by sandy upland area approximately 70 feet wide. This area constitutes a slight ridge only inches high in the middle. The bottom of the inlet feature opening is approximately two feet below the land surface on the adjoining Smugglers' Cove property. An eroded area extends approximately 10 feet west of the inlet feature, indicating that water has flowed into the inlet with enough velocity or duration to erode the sand. Smaller eroded areas, only inches deep and wide, lead away from the inlet and disappear with the slight increase in elevation of the low ridge that separates the inlet from the breach. The fact that the sandy area is upland was discussed in the field. It was concluded that the area could be filled to block any drainage that might come from the ditch and that no permit would be required. The District did not document a hydrological connection at this location. There is no defined channel. The District did not document the presence of an ordinary high water mark nor did the District document the frequency of a discharge from the site. That water may occasionally flow over the upland area is not sufficient evidence of a tributary connection to establish jurisdiction under 33 CFR Part 328.3(a)(5).

Reason 2: "Applicant agrees with the Corps' jurisdictional determination that the wetlands system on the southwest corner of the site is "inseparably bound-up with the waters of the United States" and will be considered the Corps' jurisdictional wetlands. All other wetlands of applicant's property should not be considered adjacent to navigable waters, nor inseparably bound-up with the waters of the United States, and therefore not subject to jurisdiction of the Corps. The "significant nexus" between the United States navigable waters and the applicant's wetlands on the north end of the site, required to give the Corps jurisdiction, is not present in this case." Emphasis added.

FINDING: Reason 2 for the appeal has merit.

ACTION: The decision is remanded to the DE to reconsider and further document the decision regarding the evidence supporting jurisdiction based on adjacency of the wetlands on the north end of Soundview Properties to Santa Rosa Sound.

This reconsideration should also consider the SWANCC decision, the Corps Chief Counsel memorandum of January 19, 2001, regarding the SWANCC decision, and any other Corps guidance regarding the SWANCC decision, which may have been issued subsequent to the District's approved jurisdictional determination.

DISCUSSION: As noted above, the District provided an approved jurisdictional determination to the applicant stating, "...be advised that the only on-site wetland considered isolated and non-jurisdictional, pursuant to the January 9, 2001, U.S. Supreme Court decision, is the area bounded by flags G-131 through G-139. All other flagged on-site wetlands are considered contiguous and

/or adjacent wetlands of Santa Rosa Sound and are subject to CE [Corps of Engineers] regulatory jurisdiction...” Emphasis added.

The Basis for Jurisdictional Determination included in the March 30, 2001, approved jurisdictional determination stated, “The wetlands are adjacent to navigable or interstate waters...” Emphasis added.

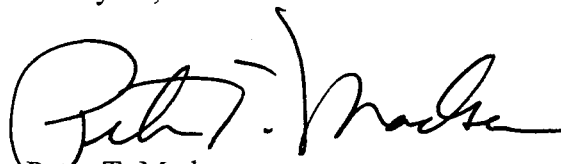
The definition of “waters of the United States” at 33 CFR 328.3(a) includes at (7) “Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.” In other words, a wetland cannot be adjacent to another wetland.

Regulations 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”.”

The development of Smugglers’ Cove approximately 30-40 years ago severed the larger wetlands on the north end side of the 75-acre Soundview Properties site from the large wetland, to the east, that is adjacent to a tributary that connects to Santa Rosa Sound. The District did not substantiate that the wetlands on the north end side of Soundview Properties are adjacent to Santa Rosa Sound via the wetlands west of Soundview Properties.

Information Received and its Disposition During the Appeal Review:

- 1) A copy of the Administrative Record.
- 2) A compact disc with digital photographs of the Soundview Properties site taken by the appellant’s environmental consultant the afternoon of July 12, 2001.



Peter T. Madsen
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Division Engineer