

ADMINISTRATIVE APPEAL DECISION

TAMPA ELECTRIC COMPANY

FILE NO. SAJ-2009-03096

JACKSONVILLE DISTRICT

21 JULY 2010

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the South Atlantic Division

Appellant: Tampa Electric Company

Date of Receipt of Request for Appeal: 25 February 2010

Acceptance of Request for Appeal: 1 March 2010

Appeal Conference: 16 April 2010

BACKGROUND

Tampa Electric Company (TECO) is appealing the Jacksonville District's (the District) decision to take jurisdiction over waters located in an area that TECO refers to as the mixing chamber. This mixing chamber is located within the Tampa Electric Company canal system, 3602 Port Sutton Road, Section 04, Township 30 South, Range 19 East, Tampa, Hillsborough County, Florida. On 23 December 2009, the District issued a Nationwide Permit (NWP) verification letter stating that proposed work to replace 404 linear feet of seawall and to rehabilitate 126.5 feet of rip-rap within the Bayside Power Station Discharge Flume with temporary impacts to 0.16 acres of wetlands was authorized under Nationwide Permits (NWP) 3 and 7. An approved jurisdictional determination (JD) was provided with the NWP verifications.

Submittal of the Request for Appeal (RFA) of the approved JD was delayed because the Appellant did not receive the NWP verification (and approved JD) from the District until 5 February 2010 even though it was authorized on 23 December 2009. Since there was a delay in receipt of the decision the start of the 60 day clock (33 CFR 331.5(a)) to submit a RFA for the appeal process was delayed as well.

Discussions in phone calls with the District and the Appellant as well as on our conference call revealed that two NWP verifications were issued by the District for the property in question. In addition to the 23 December 2009 NWP verification appealed here (SAJ-2009-03096(NW-ACR)), an earlier approved JD and NWP verification dated 8 December 2009 was issued by the

District which may have had different findings (SAJ-2009-02890 (NW-PW)).¹ It is the approved JD associated with the 23 December 2009 NWP verification which is the subject of this appeal.

SUMMARY OF DECISION

The appellant's request for appeal does not have merit. The District correctly applied the regulations and associated policies in determining that "waters of the United States" are present on the appellant's property.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The district provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. With the request for appeal, the Appellant provided documents containing its comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

APPELLANT'S STATED REASON FOR APPEAL

Appeal Reason 1: "The District was incorrect in asserting jurisdiction based on their application of the current regulatory criteria and associated guidance in identifying "waters of the United States.""

EVALUATION OF THE REASON FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reason 1: The District was incorrect in asserting jurisdiction based on their application of the current regulatory criteria and associated guidance in identifying "waters of the United States."

Finding: This reason for appeal does not have merit.

Discussion: The Appellant states that neither the state nor local agencies found the mixing chamber area to be jurisdictional under their regulations. They state that because the area known as the mixing chamber is used for industrial wastewater treatment, is part of the TECO treatment system, is concrete lined with sheet pile walls and because the other agencies only start their jurisdiction at the end of each discharge flume south of Port Sutton Road and not within the mixing chamber itself that the Corps jurisdiction should follow suit.

¹ The 8 December 2010 NWP verification indicated that an approved JD was attached, though none was. The Appellant believes that the approved JD associated with this earlier NWP verification differed on the assertion of jurisdiction over the mixing chamber area. This earlier approved JD is not included in the administrative record for this appeal.

The appellant states that they do not feel a clear rationale has been provided to them as to why the mixing chamber would be jurisdictional under Section 10 of the Rivers and Harbors act or Section 404 of the Clean Water Act. They state that the area is not a wetland and does not have any of the characteristics of wetlands as described in the Corps Wetland Delineation Manual nor do they think it is navigable due to concrete structures that are located just above the surface of the water.

The administrative record states that the area is subject to jurisdiction under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Section III (A) (1) of the Approved JD form dated 21 December 2009 states that "the TECO Canal is a traditionally navigable water system with a direct connection to Hillsborough Bay. The entire canal system is subject to the ebb and flow of the tide. The TECO canal exhibits a bridge, known as the Port Sutton Bridge, crossing over the northern portion of the canal. The TECO plant utilizes the north portion of the canal as a discharge flume. Within the north portion of the canal, the endangered manatee aggregate during manatee season. Both north and south of the bridge are considered Section 10 waterways due to the ability of tidal waters, mammals and essential fish habitat to access both portions of the canal. The bridge does not physically separate the canal or isolate the north or south portion."

The regulations define waters of the United States at 33 CFR 328.3 (a) as:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
- (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal

agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

The regulations define navigable waters of the United States at 33 CFR 329.4 as:

Those that are subject to the ebb and flow of the tide and/or are presently used or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

It is detailed on the Approved JD form dated 21 December 2009 in the administrative record that the waters on the Appellant's site are subject to the ebb and flow of the tide. The regulation states that waters have to be subject to the ebb and flow of the tide and/or be susceptible for use to transport interstate commerce; it does not require both.

33 CFR 329.12 (b) states that:

Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by 329.12 (a)(2)²) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

The area in the mixing chamber is subject to tidal action and therefore the District was correct in asserting jurisdiction over those waters using the mean high water mark as the limit of Corps jurisdiction.

The appellant believes that further support for their argument that the mixing chamber should not be jurisdictional is identified in 33 CFR 328.5 which they believe provides authority for the Corps to take into account man made changes affecting the limits of Waters of the United States.

33 CFR 328.5, Changes in limits of waters of the United States states:

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of

²In accordance with 33 CFR 329.12 (a)(2) "regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water."

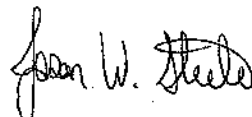
a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

The decision to change the limits of jurisdiction falls within the purview of the District Commander. The administrative record provides sufficient information to support the conclusion that, although man-made changes have been made in this area due to the operation of the TECO facility, the area is within the Corps jurisdiction because it is still subject to the ebb and flow of the tide (the boundaries of the waters have remained largely unchanged). Additionally, the area continues to provide significant habitat for protected fisheries resources and federally endangered species.

Action: No further action is required with regard to the appealed approved JD.³

CONCLUSION

I find that the District's administrative record contains substantial evidence to support its decision that the wetlands and waters on the appellant's property are subject to federal jurisdiction and regulation under Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. For the reasons stated above, the appeal does not have merit. The administrative appeals process for this permit action is hereby concluded.



JASON W. STEELE
Administrative Appeals Review Officer
South Atlantic Division

³ Presumably, the District's intent is for the second approved JD and NWP verification of 23 December 2010 to supercede the first, to the extent that there is any conflict between the two. It would be helpful for the District to expressly clarify its position in this regard and any impact on the work allowed and the jurisdiction at the TECO facility.