

ADMINISTRATIVE APPEAL DECISION

RAY M. FERNANDEZ; FILE NO. SAM-2008-0415-JBM

MOBILE DISTRICT

26 January 2009

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Ray M. Fernandez

Appellant's agents: Gary Cuevas, EnviroSouth

Date of Receipt of Request for Appeal: 27 May 2008

Date of Acceptance of Request for Appeal: 18 Aug 2008

Appeal Conference/Site Visit Date: 5 September 2008

SAD-ACCEPTED REASON FOR APPEAL:

SAD accepted the following reason for appeal as detailed by the agent in the attachment to the Request for Appeal dated 27 May 2008:

The Mobile District of the U.S. Army Corps of Engineers (the District) was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying "waters of the United States."

SUMMARY OF DECISION:

The appellant's request for appeal has merit. The administrative record does not support the District's determination that the tributary which the onsite wetlands abut is a relatively permanent water (RPW) subject to jurisdiction as a water of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344).

BACKGROUND INFORMATION:

Mr. Ray M. Fernandez is appealing the Mobile District's decision to take jurisdiction over wetlands on property located on Beatline Road in Long Beach, Harrison County, Mississippi.

In a letter dated 29 October 2007, Mr. Fernandez submitted a letter to the District requesting a jurisdictional determination (JD) for the 18 acre property he owns on Beatline Road in Long Beach, MS. Attached to Mr. Fernandez's JD request was a wetland assessment prepared by his wetland consultant EnviroSouth dated 18 October 2007. The wetland report from EnviroSouth stated that the site contains wetlands; however, they did not believe that the wetlands on site are subject to jurisdiction under Section 404 of the Clean Water Act (33 USC 1344) because they do not have a significant nexus to a traditionally navigable water. Mr. Fernandez's letter also stated that he did not believe the site contained jurisdictional wetlands or waters.

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On 5 May 2008 the District performed a site inspection of the subject property to determine if the wetlands on the site were subject to jurisdiction under Section 404 of the Clean Water Act (33 USC 1344). The District observed that the wetlands on Mr. Fernandez's site are part of a larger contiguous pine flatwoods wetlands system that is directly abutting a non-navigable, but relatively permanent water which is a tributary of a traditionally navigable waterway (TNW).

On 7 May 2008 the District issued a JD stating that the site does contain wetlands which are jurisdictional under Section 404 of the Clean Water Act (33 USC 1344) because they directly abut a RPW that flows directly or indirectly into Bayou Portage, which is a TNW.

On 18 June 2008, the District conducted a second site visit and reconfirmed its findings of the original site visit.

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 their comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

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

Finding: This reason for appeal has merit.

Discussion: The appellant stated in its Request for Appeal that the District's findings ignore the Supreme Courts Rapanos decision and that the site does not have a significant or substantial nexus to navigable waters of the United States. They also state that pine flatwood and pine savanna habitat are not likely to play an important role in the integrity of a true aquatic system comprising traditionally navigable water and that the site is not likely to have a relatively permanent high water mark and is occasionally wet due only to climatic events.

Although the wetlands on the property were not delineated, they are part of a contiguous wetland system that continues off of the site and directly abuts an unnamed tributary. The District has stated that the unnamed tributary is a RPW that flows directly or indirectly into two other RPW's before entering Bayou Portage, which is a TNW. The determination that the unnamed tributary is a RPW is not clearly supported in the administrative record. The approved JD form and field notes demonstrate that there is an ordinary high water mark in the tributary and that it contains flow, but it is not clear that the flow is present at a frequency, volume and duration to consider it a RPW that flows at least seasonally.

Based on the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 26, wetlands directly abutting RPW's that flow directly or indirectly into TNW's are jurisdictional under the Clean Water Act. As a matter of policy, field staff will include in the

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record any available information that documents the existence of a significant nexus for a wetland directly abutting an RPW that is not perennial.

The record does not contain a site specific significant nexus determination, nor is one necessary if it is clearly documented that the tributary is a RPW. Information is included in the administrative record including the approved JD form, NWI maps, soils maps, and aerial photographs as well as notes of the District's site visits, but they do not substantially demonstrate that the tributary is a RPW. Alternatively, the information contained in the record does not substantially support the existence of a significant nexus between the onsite wetlands and the tributary that they directly abut and Bayou Portage, the closest TNW.

Action: Regarding whether the unnamed tributary which the onsite wetland directly abuts is a RPW, the District should further analyze various resources such as soils maps and data, NWI maps, aerial photographs, personal communications and document them in the administrative record to determine and support the flow characteristics in the tributary. The District's documentation and research should include, but not be limited to talking to adjacent property owners and local Department of Transportation representatives to identify the tributary's hydrology, including groundwater levels, soil types, length of inundation and other information on the frequency, duration and volume of flow. The administrative record should be revised accordingly to reflect the additional information.

Should there be insufficient evidence to claim the unnamed tributary as a RPW, or should the District otherwise determine that it is advisable to document a significant nexus for the unnamed tributary and its adjacent wetlands, the specific connections should be documented between the onsite wetlands and the tributary that they directly abut (in combination with all of its adjacent wetlands) and Bayou Portage (the nearest TNW). The District should conduct an assessment and clearly portray its findings of the aquatic characteristics of, and functions performed by, the tributary and its adjacent wetlands, and establish whether they will or will not have a significant affect (more than speculative or insubstantial) on the chemical, physical and biological integrity of Bayou Portage. See U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, pages 55-56.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appeal has merit since the District's administrative record does not contain substantial evidence in support its decision that the wetlands are subject to federal jurisdiction and regulation as a water of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344). I am remanding the approved JD decision back to the district for reconsideration in light of this decision. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final JD.



Joseph Schroedel
Brigadier General, USA
Commanding