

## ADMINISTRATIVE APPEAL DECISION

FILE NUMBER MSJ00-00195-T

### MOBILE DISTRICT

**Review Officer:** James E. Gilmore, U.S. Army Corps of Engineers (USACE),  
Southwestern Division, Dallas, Texas.

**Appellant Representative:** Catherine Butterfield, Appellant and Dean Wilson, Attorney at  
Law.

**Receipt of Request For Appeal (RFA):** December 15, 2003.

**Appeal Conference Date:** N/A      **Site Visit Date:** March 30, 2004.

**Background Information:** The Mobile District's initial involvement with this action began in 1995 after the District received a request from Ms. Caryn Hanson for wetland determination for five sites located in Jackson County, Mississippi. One of the sites was a 15.96-acre tract owned by Ms. Catherine Butterfield. The District determined that approximately 65% (~10 acres) of the Butterfield tract contained wetlands that were subject to Section 404 of the Clean Water Act (CWA). By letter dated January 7, 2000, Ms. Butterfield stated that she disagreed with the District's 1995 determination and requested a new determination. The District issued a new determination on March 14, 2000. The District again determined that the site contain wetlands subject to the Corps jurisdiction. The District suggested that Ms. Butterfield hire a wetland consultant to determine the actual amount of wetlands located on her property and to help through the permit evaluation process. Ms. Butterfield hired Solutions Inc. to complete a wetland delineation of her property. Solutions Inc. submitted a preliminary wetlands delineation report to the District on October 9, 2001. Solutions Inc. determined that approximately ±9.86 acres of wetlands were located on the Butterfield tract. Solutions Inc. requested that the District concur with its findings that the wetlands located on the Butterfield tract "appear to have no direct surface water flow from" navigable water" to the property". The District responded to the Solutions Inc. request by issuing an Approved Jurisdictional Determination (JD) on November 15, 2001. The District determined that the wetlands were "contiguous" (i.e., adjacent) and therefore subject to Corps jurisdiction. Ms. Butterfield through her attorney, Dean Wilson, submitted a Request for Appeal (RFA) to the South Atlantic Division on January 11, 2002. The appeal was put in abeyance on March 28, 2003 because Mr. Wilson filed suit in the United States District Court prior to completing the Corps administrative appeal process. During the period this action was being heard by the Court, the District conducted two additional site visits on July 23 and September 3, 2003, respectively. The July 23, 2003 site visit was conducted to confirm that the wetlands located on the Butterfield tract met the criteria to identified as waters of the United States under 33 CFR 328.3 of the Corps regulations. The second visit, conducted on September 3, 2003, was an on-site meeting attended by Mr. Wilson, Solutions, Inc. and District staff. The purpose of the meeting was to demonstrate to the appellant's attorney and consultant

that a hydrological connection existed between the wetlands located on the Butterfield tract and Cypress Creek. Based on the information obtained during these two site visits, the District issued Ms. Butterfield a new approved JD on November 4, 2003. The District determined that the Butterfield site contained adjacent wetlands that are subject to Corps jurisdiction under §404 of the CWA.

Ms. Butterfield, through her attorney, again submitted a RFA on December 5, 2003. The RFA was based on the United States Supreme Court's January 9, 2001 decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC). This 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"<sup>1</sup> to assert CWA jurisdiction over isolated, non-navigable, intrastate waters that are not tributary or adjacent to navigable waters. The RFA was also based on decisions made by the Fifth Circuit Court of Appeals in Rice v. Harken Exploration Company, 250 F.3d 264 (5<sup>th</sup> Cir. 2001) (Rice) and United States v. Needham, 364 F.3d 340 (5<sup>th</sup> Cir. 2003) (Needham). These cases involved alleged violations of the Oil Pollution Act (OPA). In these cases 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 5<sup>th</sup> Circuit cases of Rice and Needham occurs later in this Decision.

**Summary of Decision:** The District's administrative record shows that the wetlands on the Appellant's property are an adjacent wetland that is contiguous to and part of a tributary system to navigable waters. The Appellant's reasons for appeal, which essentially allege that the wetlands are isolated, are not supported by the record.

**Reason 1:** "The Corps does not have jurisdiction under § 404 of the CWA for the following reasons: (a.) The wetlands are isolated, non-adjacent, non-navigable and intrastate in nature and have no substantial nexus to interstate commerce or to a navigable water of the United States. (b.) Cypress Creek and the unnamed drainage ditch to the west of the subject property are not navigable waters of the United States under 33 C.F.R. 328.3(a)(1) nor are they tributaries of a navigable water of the United States under 33 C.F.R. 328.3(a)(5). (c.) Intermittent, natural

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<sup>1</sup> 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.

streams and waterways are not jurisdictional waters under the CWA, according to Fifth Circuit law, and thus such intermittent streams are not “other waters” as anticipated under 33 C.F.R. 328.3(a)(3). As such, the wetlands on the subject property are not covered waters because “[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section” are non-jurisdictional under 33 C.F.R. 328.3(a)(7).<sup>2</sup> (d.) If there were any historical connection to any navigable water of the United States, such connection was severed by construction of Cook Road and construction of Interstate 10. (e.) The state of the law of the Fifth Circuit, through its interpretation and application of the SWANCC decision, clearly supports the appellant’s contention that the subject wetlands are non-jurisdictional, isolated, intrastate wetlands having no substantial connection to interstate commerce or to a navigable or otherwise covered body of water of the United States.”

**FINDING:** These reasons for appeal do not have merit.

**ACTION:** No action required.

**DISCUSSION:** The appellant describes the wetlands located on her property as “isolated, non-adjacent, non-navigable and intrastate in nature and have no substantial nexus to interstate commerce or to a navigable water of the United States.” She also stated that the construction of I-10 and Cook Road severed any hydrological connection, historical or otherwise, with any navigable waters of the United States. Regulations at 33 CFR 328.3(a)(7)(c) state, “the term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands’.” Although ‘road’ is not explicitly mentioned in the definition, it is a man-made barrier or obstruction separating portions of a once intact wetland adjacent to and contiguous with Cypress Creek.

In its November 4, 2003 JD letter, the District determined that the wetlands located on the Appellant’s property are contiguous, adjacent wetlands. As stated in that letter, “They are part of an extensive wetland that has an intermittent stream with a distinct ordinary high water mark within the wetland system that extends to and flows into Cypress Creek.” Although the wetland and intermittent stream within it have “been crossed by an interstate highway and a county road” before they flow into Cypress Creek, “both [crossings] have been culverted, maintaining the surface hydrologic connection ....” During the appeal site visit, District staff stated that a portion of Cypress Creek is tidal<sup>3</sup>. The Corps’ regulation defines navigable waters as “those waters 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”. By definition, that portion of Cypress Creek that is subject to the ebb and flow of the tide is a navigable water of the United States. Cypress Creek is a tributary to the Tchoutacabouffa River, also a navigable water of the United States, which flows into the Back Bay of Biloxi, and finally into Mississippi Sound.

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<sup>2</sup> The intent behind Reason 1.c is unclear, though it appears that the appellant is arguing that wetlands cannot be deemed adjacent wetlands in the Fifth Circuit if they are adjacent to intermittent waters.

<sup>3</sup> The tidal segment of Cypress Creek extends eastward approximately 1-mile from the confluence with the Tchoutacabouffa River to the Daisy Vestry Road Bridge.

The District's November 4, 2003 JD contains a Basis for Jurisdictional Determination form and Memorandums for File, which describe the types of waters located on the appellant's property and the hydrological connection between the Butterfield wetlands and Cypress Creek. Based on a review of the District's Basis of Jurisdictional Determination form, District staff determined that the type of waters of the United States found on the site are waters identified under § 328.3(a)(3)<sup>4</sup> and (a)(7). The Memorandum for File describes the hydrological connection between the Butterfield wetlands to Cypress Creek via a drainage way, which flows under I-10 and Cook Road. In addition, the record contains the District's November 15, 2001, approved JD that states "This determination was based upon information extrapolated from the Soil Survey of Jackson County, aerial photographs, field review of your wetland map, and current guidance concerning the recent Supreme Court decision." The record also includes a copy of the appellant's July 26, 2000, consultant's report, which states "Although Interstate 10 may be contributing to more frequent periods of inundation, the soil maps, topographic surveys, and an on-site inspection lead me to believe that the wetlands on the Butterfield property existed prior to Interstate 10 or the surrounding developments."

The District determined that a hydrologic connection exists between the Butterfield wetlands and Cypress Creek. On September 3, 2003, District staff met on site with the appellant's representatives. The purpose of the meeting was to trace the hydrologic connection from its source to Cypress Creek. The intermittent stream referred to by the District has been partially channelized and has the appearance of a man-made upland drainage ditch. However, the ditch was constructed through wetlands and is in all likelihood a consolidation of several wetland drainage ways that existed prior to the construction of I-10. Because the ditch replaced waters of the United States, it is then a water of the United States. Although the intermittent stream is not actually located on the appellant's property, the wetland it was constructed through is contiguous with the appellant's property. In the RFA, the appellant stated, "The fact the 'hydrologic connection has not been interrupted as there is a 4-foot by 8-foot concrete culvert under I-10 and two 3-foot by 5-foot oval concrete culverts under Cook Road' does not provide the substantial or significant nexus to interstate commerce or the proof that the wetlands are adjacent to navigable waters." Based on this statement, it appears that the appellant agrees with the District's findings that there is a hydrologic connection between the wetlands located on her property and Cypress Creek. This statement also appears to contradict part (d) of this reason for appeal, which stated "If there were any historical connection to any navigable water of the United States, such connection was served by the construction of Cook Road and I-10."

The District provided sufficient documentation that the wetlands are not isolated. At 33 CFR 330.2 the Corps regulations define the term "isolated waters" as non-tidal waters of the United States that are: 1) not part of a surface tributary system to interstate or navigable waters of the United States; and 2) not adjacent to such tributary water bodies. The District's basis for jurisdiction was that the wetland was adjacent because it is contiguous to a tributary system that eventually drains or flows into navigable waters (Cypress Creek and the Tchoutacabouffa

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<sup>4</sup> The administrative record does not address the relationship between the Butterfield wetlands and interstate or foreign commerce. Since there is no record of "formal project-specific Headquarters approval prior to asserting jurisdiction over such waters" pursuant to Appendix A of the Advance Notice of Proposed Rulemaking, 68 F.R. 1991 (January 15, 2003), this basis for jurisdiction cannot be sustained on the record.

River). Therefore, the wetlands located on the appellant's property are adjacent to a tributary of navigable waters and are not isolated. Because the instant wetlands meet the definition of waters of the United States under § 328.3 (a)(7) the nexus to navigable waters has been met.

Under part (c) and (e) of reason one, the appellant contends that "Intermittent, natural streams and waterways are not jurisdictional waters under the CWA, according to Fifth Circuit law, and thus such intermittent streams are not "other waters" as anticipated under 33 C.F.R. 328.3(a)(3)." Additionally, the appellant contends that the "state of the law of the Fifth Circuit" supports the appellant's claim that the wetlands located on her property are isolated, therefore, not subject to the Corps jurisdiction under the CWA. The appellant's reference to "Fifth Circuit Law" pertains to the Rice and Needham cases mentioned above.<sup>5</sup> Both of these cases involved potential violations of the Oil Pollution Act (OPA). 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." Corps internal guidance states that this and similar language in these Fifth Circuit opinions 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 the argument that such language is contrary to the exercise of jurisdiction under these circumstances.

**Reason 2:** "As the wetlands are not adjacent to any covered water of the United States, the Corps must show some other substantial nexus to interstate commerce. The administrative record is clearly devoid of any such showing and therefore the wetlands are non-jurisdictional wetlands."

**Findings:** This reason does not have merit

**Action:** No action required

**Discussion:** This reason for appeal was discussed under reason one. There is enough supporting documentation in the District's administrative record to support its determination that the wetlands located on the appellant's property meet the criteria to be identified as adjacent wetlands. Because the wetlands are adjacent to a tributary to navigable waters, no additional nexus to interstate commerce is necessary.

**Reason 3:** "The administrative record is devoid of any evidence of an actual discharge into any navigable water from the subject property that significantly or substantially impacts interstate or foreign commerce."

**Findings:** This reason for appeal does not have merit.

**Action:** No action required.

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<sup>5</sup> While this appeal was requested prior to the Fifth Circuit's decision in Needham, that decision was subsequently raised by the appellant's counsel as supplying clarifying information supporting her position in this appeal.

**Discussion:** This reason for appeal was discussed under reason one. The administrative record contains documentation of two site visits made by District staff. The purpose of the site visits was to trace the intermittent stream to Cypress Creek. The site visits were made on July 23, 2003 and September 3, 2003. The September 3, 2003 site visit included the appellant's attorney and wetland consultant. The District concluded that the Butterfield wetlands are part of a continuous wetland system. The intermittent stream that flows through them is apparently a ditch that replaced previous wetland drainage ways through the wetland, which discharges into Cypress Creek.

**Reason 4:** "Contrary to assertions by Corps personnel, the administrative record is devoid of any evidence that any water falling on the subject property flows west into the drainage ditch much less that such water actually gets to a navigable water."

**Findings:** This reason for appeal does not have merit.

**Action:** No action required.

**Discussion:** As previously discussed, the District documented site visits in which it traced the flow of water from the appellant's site to Cypress Creek. They took photographs of the water flowing west across the appellant's property to the intermittent stream which then flowed north into Cypress Creek.

**Information Received and its Disposition During the Appeal Review:**

The District provided a copy of the Administrative Record.

The appellant's attorney provided a notebook containing a copy of the RFA and supporting documentation, copies of the District's approved JD letters and copies of court decisions.

**Conclusion:** Based on my review of the administrative record, I have concluded 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. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

Date 2 June 04



Randal R. Castro  
Brigadier General, US Army  
Commanding