ADMINISTRATIVE APPEAL DECISION

CITY OF PORT ST. LUCIE, FLORIDA

FILE NUMBER 1987-1148

JACKSONVILLE DISTRICT

DATE: March 7, 2006

Review Officer: Arthur L. Middleton, Jr. (RO), US Army Corps of Engineers (Corps), South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. Donald Cooper, City Manager, and Mr. Walter B. England, P.E.

Receipt of Request For Appeal (RFA): July 8, 2004.

Appeal Conference Date: December 1, 2004.

Site Visit Date: December 1, 2004.

Background Information: The appellant, City of Port St. Lucie, is appealing the jurisdictional determination (JD) conducted by the Jacksonville District (District) regarding the City's A-2 pond. In 1979, the South Florida Water Management District (SFWMD) issued a Surface Water Management Permit, number 56-00332-S, for conceptual subdivision plans including the A-2 pond. In response to a request by the Ginn Company on April 29, 2002, the Jacksonville District made a jurisdictional determination for the Tesoro East section. The Ginn Company intended to develop this section and was in the process of purchasing the land. The Corps conducted a JD on August 6, 2002, and sent it to to the Ginn Company. The JD included the A-2 pond within the Corps' Clean Water Act (CWA) jurisdiction. The jurisdictional limits of the A-2 pond were determined to be "top of bank." On March 25, 2004, the Ginn Company requested the District reevaluate its jurisdictional determination and provide a "no permit required" letter for the placement of fill material in the A-2 pond. The District responded by letter dated May 12, 2004, stating, "we continue to consider the A-2 pond to be a water of the United States and there is no change to the final jurisdictional determination for Tesoro East dated August 6, 2002." The City received a copy of the May 12, 2004, letter and is appealing the jurisdictional determination.

Summary of Decision: I find that the appeal does not have merit. I find that the District properly evaluated and documented their approved jurisdictional determination dated May 12, 2004.

APPEAL EVALUATION, FINDINGS, and INSTRUCTIONS to the JACKSONVILLE DISTRICT ENGINEER (DE):

Reasons for the appeal are as presented by the appellant:

Reason 1: "33 CFR 328.3(a)(8) states in pertinent part that 'waste treatment systems, including treatment ponds designed to meet the requirements of the CWA [Clean Water Act] are not waters of the United States.' The City and/or Ginn are appealing the Corps' JD over the A-2 Pond because the A-2 Pond falls within the Section 328.3(a)(8) 'treatment pond exemption' set forth above and is therefore not a 'water of the United States.'"

FINDING: This reason for appeal does not have merit.

ACTION: No further action required.

DISCUSSION: The appellant relied on the exception for waste treatment systems in 33 CFR 328.3(a)(7) for the conclusion that the pond is not subject to the Corps' jurisdiction. The waste treatment system exception states that "waste treatment systems, including treatment ponds or lagoons designed to meet requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meets the criteria of this definition) are not waters of the United States."

The preamble to the Final Rule including this regulation in the Federal Register, 51 F.R. 41217 (November 13, 1986), helps clarify this issue,

> *Section 328.3: Definitions* . . . For clarification it should be noted that we generally do not consider the following waters [waste treatment systems] to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular water body within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

The appellant justifies the claim that the pond is a waste treatment pond and exempt from jurisdiction by: (a) noting that the pond was "designed subsequent to enactment of the CWA with the purpose of being part of a system that has a designed water quality treatment function"; (b) stating that the "pond was permitted by the South Florida Water Management District (SFWMD) in 1979 and is included as a treatment facility in the City's overall National Pollutant Discharge Elimination System (NPDES) stormwater permit"; and (c), noting that the pond provides water quality and attenuation functions.

The pond was constructed after the enactment of the CWA in 1969. In 1979, the SFWMD issued a Surface Water Management Permit No. 56-00332-S for "construction and operation of a water management system serving 9,450 acres ... and Ponds A-1 and A-2." The Surface Water Management Staff that reviewed the permit considered 10 factors, including suitability of land for proposed use, water quantity impacts, water quality impacts, environmental impacts, water conservation, flood protection, relief from rainstorm inconvenience, system maintainability, overall use of land with respect to water resource, and water management system with respect to feasible alternatives. The appellant later filed an application with the SFWMD for a modification of the 1979 permit, Surface Water Management Permit Application No. 040422-5. The April 22, 2004, Notice and attachments from the SFWMD state that this application was for modification of the system previously permitted.

The Jacksonville District reviewed this permit and determined that the A-2 pond was not designed as a wastewater treatment pond, but as a flood (surface water) control structure. As stated in their May 12, 2004 JD:

> The A-2 pond was not designed as a treatment pond, but as a flood control feature. Although we recognize that the A-2 pond does provide some water quality benefits, its main function is (and was, at the time of our previous jurisdictional determination) to attenuate and regulate flow prior to discharge into the river.

The A-2 pond, like many impoundments, will improve certain water quality functions by entrapping sediment. However, the fact that the A-2 pond serves a subsidiary water quality function does not automatically qualify the water as a waste treatment pond. The A-2 pond was designed as part of a surface water management system, and the SFWMD permit was issued for that purpose. Also, of the 10 factors considered by the SFWMD in issuing the permit, only one related to water quality, and none expressly mentioned waste treatment; most related to water management in terms of water quantity, flood protection, rainstorm management, and the like.

The appellant argues that the A-2 pond should be viewed as a waste treatment pond because it "is included as a treatment facility in the City's overall NPDES stormwater permit." The Jacksonville District stated that "the fact the pond is part of a permitted stormwater system does not change" its jurisdictional status (May 12, 2004 JD). The role or significance of the A-2 pond in Port St. Lucie's permitted stormwater system is unclear. The only evidence in the administrative record is a letter from the City of Port St. Lucie, Engineering, stating that the A-2 "pond is part of the City of Port St. Lucie's [Phase II Municipal Separate Storm Sewer Systems (MS4)] and is covered under this [NPDES] permit." The Florida State NPDES Rules state that a municipal separate storm sewer or MS4 "means a conveyance or system of conveyances like roads with stormwater systems, municipal streets, catch basins, curbs, gutters, ditches, constructed channels, or storm drains (Rule 62-624-200(8)). This definition, which indicates that the A-2 pond is part of a system of stormwater conveyances, fits with the predominant surface water management purpose of the SFWMD permit. The fact that water from the A-2 pond may ultimately flow into a point source or sources covered by a NPDES permit does not necessarily make it a water treatment pond within the meaning of 33 CFR 328.3(a)(7).

Finally, it should be noted that the administrative record suggests that the A-2 Pond, as initially constructed, displaced former waters of the U.S., including wetlands. It was created by impounding and excavating both wetlands and non-wetlands. The administrative record includes the soil survey of the area prior to construction of the pond. Soil types included in the pond area are Waveland-Lawnwood Complex, Jonathan Sand, Hobe Sand, and Salerno Sand. The Waveland-Lawnwood Complex is a hydric soil and Salerno Sand is a lower elevated soil with hydric inclusions. The survey also depicts the pond area with symbols indicating "wet spot." In addition, during the on-site conference on December 1, 2004, City Engineer Walter England, indicated that he believed the area had been a wetland based on a 1969 aerial photo showing standing water, and the fact that it would have been easier and more cost effective to construct a pond in a low-lying area. While this aspect of the A-2 Pond is not decisive for purposes of this

decision, it is a factor to be considered in determining whether a waste treatment system or pond, where one is determined to exist, is within the exception contained in 33 CFR 328.3(a)(7).

Reason 2: "It should be noted that in a JD dated 8/6/02, the Corps claimed the A-2 pond as a 'water of the United States.' In addition to the fact that this JD was not requested, the City of Port St. Lucie, the owner of the A-2 pond, was never provided a copy of the JD nor provided an opportunity to appeal the JD. Therefore, the 8/6/02 JD is procedurally invalid, and/or this appeal is not proper as to the 08/0602 JD since the City was not afforded appropriate due process. * * * The Corps inappropriately included this A-2 Pond within the 8/6/02 JD which involved another project."

FINDINGS: This reason for appeal does not have merit.

ACTION: No further action required.

DISCUSSION: In issuing the August 6, 2002, Jurisdictional Determination (JD) letter, the District acted on a request by the Ginn Company to verify jurisdictional wetlands on land "the applicant is in the process of purchasing." The aerial photo provided by the Ginn Company and verified by the District included the A-2 pond. However, the City did not sell the pond to the Ginn Company as it is a part of the City's overall storm water management, according to the city engineer.

Section 331.4 of 33 CFR provides that "affected parties will be notified in writing of a Corps decision on those activities that are eligible for an appeal." Section 331.2 states that approved jurisdictional determinations are appealable actions; a party with "the requisite legal interest in the land that is under jurisdictional review," such as the landowner, may appeal an approved JD (see 65 F.R. 16488 [March 28, 2000]). The City of Port St. Lucie, as proprietor of the A-2 Pond, did not request the August 6, 2002, jurisdictional determination nor does it appear that they were provided with notice or the opportunity to appeal the August 6, 2002, determination. However, the City was involved with the subsequent March 16, 2004 request that "the Corps re-evaluate its jurisdictional determination" for the A-2 Pond. As evidenced in the May 12, 2004, JD letter, the Corps agreed to perform that re-evaluation, and ended up confirming the original August 6, 2002, jurisdictional determination with regard to the A-2 Pond. The City, together with the Ginn Company, was provided the opportunity to appeal the May 12, 2004, determination and did so via the Request for Appeal that is the subject of this decision. The City has been allowed to revisit the August 6, 2002, determination, and any prejudice from a lack of notice or appeal opportunity at that time was effectively cured by the Corps' agreement to revisit that JD and the basis for it, and by this appeal.

Information Received and it's Disposition During the Appeal Review:

The District provided a copy of the Administrative Record.

The appellant provided a copy of an aerial photo from 1969 depicting the subject area.

CONCLUSION: After reviewing the information contained in the administrative record and information obtained at the site visit and meeting, I conclude there is substantial evidence in the administrative record to support the District's approved jurisdictional determination, and that this determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

24 March 2006
(Date)

Benjamin H. Butler, COL
FOR Michael J. Walsh
Brigadier General, US Army
Commanding