

ADMINISTRATIVE APPEAL DECISION

FILE NUMBER MSVO1-02312-T

MOBILE DISTRICT

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

Appellant Representative: Phillip Garcia, Appellant and Dean Wilson, Attorney at Law.

Receipt of Request For Appeal (RFA): December 19, 2003.

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

Background Information: The Mobile District's (District) initial involvement with this action began in June 2001 when District staff investigated an alleged unauthorized activity on Mr. Garcia's property. The alleged unauthorized activity involved land clearing and filling activities in wetlands located adjacent to Nicholson Avenue, Waveland, Hancock County, Mississippi. On July 6, 2001, the District issued a Cease and Desist Order to Mr. Garcia requesting that he voluntarily stop all unauthorized work on his property. Mr. Garcia complied with the District's Cease and Desist Order.

The District conducted three additional site visits on August 14, and September 3 and 19, 2003. The purpose of the site visits was to confirm that the wetlands located on the Garcia tract met the criteria to be identified as waters of the United States under §328.3 of the Corps regulations. Mr. Garcia's attorney, Dean Wilson, and wetland consultants Gary Cuevas and Billy Cullepper attended the second visit conducted on September 3, 2003, by District staff. The purpose of the second site meeting was to demonstrate to the appellant's attorney and consultant that a hydrological connection existed between the wetlands located on the Garcia tract and the Mississippi Sound.

Based on information obtained during its site visits, the District issued an Approved Jurisdictional Determination (JD) on November 12, 2003. The District determined that the wetlands on Mr. Garcia's property are "adjacent wetlands to two separate intermittent streams that drain into the Mississippi Sound and [Jourdan] River, respectively." The District stated that both intermittent streams had distinct ordinary high water marks within the extensive wetlands that are contiguous with the Garcia property."

Mr. Garcia through his attorney, Dean Wilson, submitted a Request for Appeal (RFA) to the South Atlantic Division on December 19, 2003. The appeal was based on the January 9, 2001 United States Supreme Court decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) and decisions made by the Fifth Circuit Court of Appeals in Rice v. Harken Exploration Company, 250 F.3d 264 (5th

Cir. 2001) (Rice) and United States v Needham, 364 F.3d 340 (5th Cir. 2003) (Needham). The SWANCC 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"¹ to assert CWA jurisdiction over isolated, non-navigable, intrastate waters that are not tributary or adjacent to navigable waters. The Fifth Circuit 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 5th 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 a tributary system to the navigable waters of the Jourdan River. 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.) The unnamed borrow pit and the unnamed drainage ditch to the south and west of the subject property and the unnamed drainage ditch to the east are not navigable waters of the United States under 33 C.F.R. 328.3(a)(1) nor are they adjacent to or tributaries of a navigable water of the United States under 33 C.F.R. 328.3(a)(5). (c.) Any intermittent, natural streams and waterways that may have been near the property are no longer present in any form and, even if these are found to still exist, 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).² (d.) If there were any historical connection to any navigable water of the United

¹ 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.

² 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.

States, such connection was severed by roads, railroads and other manmade construction and obstructions that removed any connectivity, if such connectivity ever existed. (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 his 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." As previously stated, the District's position is that the wetlands located on the Garcia property are adjacent to two intermittent streams that are tributaries to the Jourdan River and Mississippi Sound. 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'."

The District initially determined that the wetlands located on the Appellant's property are adjacent to an intermittent stream that is part of the tributary system of Mississippi Sound. The District found that water flowed from the appellant's property ("... there is an intermittent stream crossing the Garcia property ...") into the unnamed borrow pit located next to Mr. Garcia's property. Water then flowed out of the borrow pit through a wooded wetland across a vacant residential lot into a series of roadside drainage ditches that eventually flow into Mississippi Sound (the "intermittent stream ... has been altered in some areas by residential development and now flows in these areas through man-made ditches, culverts, along and under streets and a railroad."). The administrative record includes copies of a county soil survey map and Quad maps of the area. These maps indicate that at one time a natural drainage way flowed through the appellant's property into Mississippi Sound. However, a historic connection alone is not sufficient to establish a jurisdictional hydrologic relationship between the appellant's wetlands and Mississippi Sound. As stated in the District's approved JD, development of the area has caused substantial changes in the area. Section 328.5 of the Corps regulations addresses changes in the limits of waters of the United States. Under §328.5 it states that man-made changes may affect the limits of waters of the United States. In this case substantial permanent changes have been made to the landscape south and west of the appellant's property in the form of residential development. Although the District traced flow from the unnamed borrow pit to a series of road side drainage ditches, it did not substantiate that these ditches had replaced the natural drainage way.

During the September 3, 2003 site visit, it was confirmed that water also flowed north and east off the property into a drainage ditch located north of the Garcia property. The District

determined that this drainage ditch had been constructed through part of the same wetlands, under Nicholson Avenue into Watts Bayou and eventually into the Jourdan River.

The District's administrative record contains a Basis of Jurisdictional Determination form and Memorandums for File, which describe the types of waters located on the appellant's property. They also describe the hydrological connection between the Garcia wetlands and Mississippi Sound, and the hydrological connection between the Garcia wetlands and the Jourdan River. 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)³ and (a)(7). The Memorandum for File describes the hydrological connection between the Garcia wetlands to the Mississippi Sound Creek via an intermittent stream, which flows through a series of roadside drainage ditches. As stated earlier, there have been substantial, permanent changes to the landscape that have affected the limits of the waters of the United States. Also, there is not enough supporting documentation in the administrative record to support the District finding that the drainage ditches are actually an intermittent stream that makes up part of the Mississippi Sound tributary system.

The District determined that a hydrologic connection exist between the Garcia wetlands and the Jourdan River through Watts Bayou. On September 19, 2003, District staff conducted a third site visit to trace the hydrological connection between the appellant's property and the Jourdan River. The intermittent stream referred to by the District has been channelized and has the appearance of a man-made upland drainage ditch. However, the ditch was constructed through wetlands and appears to have been constructed along the "historic drainage way". Because the ditch was constructed through wetlands and replaced waters of the United States, it is then a water of the United States. Although the "channelized" intermittent stream is not actually located on the appellant's property, the wetland it was constructed through is contiguous with and part of the same wetland system as the wetlands on the appellant's property.⁴

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 a navigable water. The unnamed tributary constitutes a tributary connection to the Jourdan River, a navigable water. Therefore, the wetlands located on the Appellant's property are adjacent to a tributary to 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

³ The administrative record does not address the relationship between the Garcia 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.

⁴ The October 4, 2003 Memorandum's reference to "sheet flow" is understood to refer to the channelization of sheet flow within wetlands, as opposed to sheet flow over uplands which is not a sufficient hydrologic connection.

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 the 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.⁵ 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.

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 the Jourdan River and Mississippi Sound. The site visits were made on September 3 and 19, 2003. The September 3, 2003 site visit included the appellant’s attorney and wetland consultant. The District concluded that the Garcia wetlands are

⁵ 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 his position in this appeal.

part of a continuous wetland system. The intermittent stream that flows north and east through them discharges into Watts Bayou, and then the Jourdan River.

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 wetlands on the appellant's site through the intermittent tributary to the Jourdan River.

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 21 June 04



Randal R. Castro
Brigadier General, US Army
Commanding