

ADMINISTRATIVE APPEAL DECISION

FILE NO. 200106610

SAVANNAH DISTRICT

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE),
South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Gregg Howze, Inc. represented by Kern-Coleman & Co. LLC.
(KCC) and Environmental Services, Inc. (ESI)

Receipt of Request for Appeal (RFA): May 9, 2003¹.

Appeal Conference Date: September 19, 2003

Site Visit Date: September 19, 2003

Background Information: By letter dated May 25, 2001, Mr. Michael J. DeMell, of ESI, requested a jurisdictional determination for the wetlands on the 47-acre site located on the east side of State Route 21, across from McCall Road, near Rincon, in Effingham County, Georgia. The ESI submittal identified a wetland on this site that fulfilled the criteria set forth in the *Corps of Engineers Wetland Delineation Manual*; January 1987. However, it was ESI's opinion that this wetland was isolated, and therefore not within the US Army Corps of Engineers permitting authority under Section 404 of the Clean Water Act (CWA). Representatives of the Savannah District's Regulatory Branch visited the site on June 6, 2001 and August 22, 2001. Both site inspections resulted in the determination that this wetland is connected via a system of surface ditches, concrete pipe, and unnamed (i.e. Black Creek) tributaries to the Savannah River. The Savannah River is a navigable water of the US.

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their approved jurisdictional determination dated September 6, 2001 according to applicable laws, regulations and policy guidance.

Appeal Evaluation, Findings and Instructions to the Savannah District Engineer (DE):

Reason(s) for the appeal as presented by the appellant:

Reason: "It is the opinion of ESI and KCC that the ephemeral connection and man-made drainage structures cited by the Savannah District in this case, do not provide a surface connection to other jurisdictional waters of the United States." This Reason for Appeal is supported by the appellant in three specific statements listed in the discussion below.

¹ The original Request for Appeal, January 23, 2002, was received by the USACE South Atlantic Division and then withdrawn by the appellant. The appeal was resubmitted and contained hydrologic and hydraulic analysis for the record. A re-submittal of the Request for Appeal, May 8, 2003, was received by USACE South Atlantic Division on May 9, 2003.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: In the letter enclosed with and in support of the appeal of the approved jurisdictional determination the appellant's representative stated in support of the Reason for Appeal:

1. As determined within the report titled "Highway-21 Site, Rincon GA, Hydrologic and Hydraulic Analysis" the subject wetland would completely drain within 24 hours after the end of the 1, 2, 5, 10, and 25-year storm events. We believe this to be consistent with an ephemeral systems defined by the *Dictionary of Geologic Terms*, (3rd ed. 1984) "a stream which flows briefly in direct response to precipitation in the immediate vicinity, and whose channel is at all times above the water table". It is the opinion of ESI and KCC that the normal hydrologic regime of the subject wetland itself would not provide the volume or quantity of water needed for a jurisdictional connection to Black Creek via man-made drainage structures."

As noted above, there is no dispute that the 47-acre parcel contains an area of wetlands as defined by the USACE in accordance with the Technical Report Y-87-1, the Corps of Engineers Wetlands Delineation Manual. The appellant takes the position, based on SWANCC, that the wetlands at issue are isolated and not subject to the Corps jurisdiction under §404 of the CWA due to the fact that the surface connection between the subject wetland and the tributary of a navigable water is ephemeral.

In its Basis for Jurisdictional Determination enclosed with its March 27, 2003 letter, the District stated,

There is a small manmade ditch cut between the west side of the subject wetland area and the roadside ditch on the east side of State Route 21 (SR-21). Based on report titled "Highway-21 Site, Rincon, GA, Hydrologic and Hydraulic Analysis, provided on behalf of the property owner by KCC, this small ditch is ephemeral. Therefore, water can reasonably be expected to periodically discharge from the subject wetland through this ditch, during and after major storm events. Based on our site inspections, there are indicators of periodic water flow from the subject wetland through this ditch (i.e., high water mark, hydrophytic vegetation, water stained leaves, etc.). Therefore, this small ephemeral ditch is considered to be an adequate surface water connection between the subject wetland and the roadside ditch on the east side of SR-21.

The roadside ditch on the east side of SR-21 also has indicators (i.e., high water mark, hydrophytic vegetation, water stained leaves, etc.) that water periodically flows from the small manmade ditch that exits the west side of the subject wetland area, and into a culvert that runs beneath SR-21. From this culvert, water empties into the roadside ditch on the west side of SR-21 and flows southward and empties into a tributary of Black Creek, which is a tributary of the Savannah River, a navigable water of the US. On numerous occasions we have observed a continuous flow of water in the roadside ditch

on the west side of SR-21, from a point where the culvert underneath SR-21 intersects this ditch, to the point where it discharges in to the tributary of Black Creek.”

The Savannah District had previously identified flow in the ditch as intermittent in the Basis for Jurisdictional Determination enclosed with its November 28, 2001 letter. However, the March 27, 2003 informed Mr. Howze that it would

exert jurisdiction over manmade ditches that connect one wetland to another, regardless of whether they are ephemeral, intermittent or perennial, provided there is evidence that water occasionally flows in the ditch. We also consider all such manmade ditches to constitute an adequate surface water connection between otherwise isolated wetlands and navigable waters of the US [sic].

Ditches can serve as jurisdictional, tributary connections to render otherwise isolated wetlands adjacent. See *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2003)(I-64 ditch serves as jurisdictional tributary and hydrological connection under CWA), *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)(CWA jurisdiction includes wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay"); *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (CWA jurisdiction includes wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001)(irrigation canals are tributaries to navigable waters, and are therefore jurisdictional under the CWA).

“Tributaries that flow only intermittently” are clearly jurisdictional. *U.S. v. Eidson*, 108 F.3d 1336 (11th Cir. 1997). Care is not always taken to distinguish whether tributary connections are intermittent or ephemeral in a technical sense. For example, the District Court in *United States v. Newdunn*, 195 F. Supp. 2d 751, (E.D. Va. April 3, 2002), reversed, *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2003) did describe one link in the chain of surface connections as "ephemeral" (the eastern I-64 ditch), though the 4th Circuit in reversing the District Court and upholding jurisdiction based on the connection referred to the flow as “intermittent.” *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2003). The precise terminology applied may be less important than the actual linkage supplied between wetland and navigable waters by the ditch or culvert.

Appellant asserts that the subject wetlands would completely drain through the small manmade ditch within 24 hours after storm events. However, the Basis for Jurisdictional Determination attached to the Savannah District’s September 6, 2001 letter states:

During a second site inspection on August 22, 2001, water was observed flowing from the subject wetland area through the culvert and drainage ditch into the Black Creek tributary. The volume of this water was substantial (estimated at more than one cubic foot per second) despite the lack of rain in the area during the previous several days.

This calls into question appellant’s assertion of “24-hour drainage,” and its contention that the ditch is necessarily ephemeral and nonjurisdictional on this basis. The Savannah District also

noted that the small manmade ditch possesses an ordinary high water mark, and hydrophytic vegetation. In any event, the USACE has previously determined that ephemeral streams were subject to CWA jurisdiction. See 65 Fed. Reg. 12856-12857 (March 9, 2000). Here, the drainage system, including the small manmade ditch and culvert beneath the highway do provide a sufficient hydrological connection to the tributary of Black Creek.

2. “As stated within the “Notice of Appeal” submitted to your office on 23 January 2002, a key point that is consistent with every field visit (both the Savannah District and the consulting team) is that water has never been observed forming a contiguous connection from the wetlands on the subject property to the jurisdictional waters of the Black Creek tributary. Water has only been observed in the ditch that is west of Highway 21. Additionally a preliminary watershed study for the project area determined that the drainage structures associated with this property are responsible for draining approximately 0.5 square mile of residential and commercial development as well as Georgia Highway 21, McCall Road, and Goshen Road. It is the opinion of ESI and KCC that, although groundwater may be present year round in the section of ditch between McCall Road and Goshen Road (105 linear feet from the project site), this groundwater is not connected from the wetland on the subject property to Black Creek on a frequency and duration sufficient to provide a jurisdictional connection. Due to the size of the drainage basin and arrangement of the drainage structures within the drainage basin, it is most probable that water flow observed by the Savannah District is from a source other than the subject wetland.”

Regarding the “most probable” source of the water flow in the ditch west of highway 21, the Savannah District observed that “water periodically flows from the small manmade ditch ... [and] into the roadside ditch on the west side” of the highway. While the small manmade ditch is not likely the sole source of water in the roadside ditch, based on the administrative record, the Savannah District’s conclusion that the small ditch does contribute water periodically to the roadside ditch, and that both are ultimately tributary to Black Creek, is not arbitrary and capricious.

3. “As shown in the information attached to the “Notice of Appeal” submitted on 23 January 2003, and survey information attached to the report titled “Highway-21 Site, Rincon GA, Hydrologic and Hydraulic Analysis”, the man-made ditch and associated piping extend approximately 3,985 feet from the subject property to the jurisdictional water of Black Creek. It is the opinion of ESI and KCC that 3,030 linear feet of man-made, upland cut ditch and 955 linear feet of concrete pipe is an excessive extension of jurisdictional reach.”

As noted above, there is no dispute that the 47-acre parcel contains an area of wetlands as defined by the USACE in accordance with the Technical Report Y-87-1, the Corps of Engineers Wetlands Delineation Manual. There is nothing in the applicable laws, regulations and policy guidance that establish minimum or maximum distances that will be used to establish hydrologic connection or adjacency. However, even though rain-generated surface water must pass through miles of ditches and culverts before reaching navigable waters, there may still be a sufficient surface hydrological connection. See discussion of hydrological connections in *United States v. Newdunn*, 195 F. Supp. 2d 751, (E.D. Va. April 3, 2002), reversed, *Treacy v. Newdunn Assoc.*,

LLP, 344 F.3d 407, 415 (4th Cir. 2003). The subject wetland is still within the jurisdiction of the CWA by virtue of being contiguous to a surface tributary to navigable waters.

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

1) The Savannah District furnished a copy of the Administrative Record for the subject application.

Conclusion: After reviewing and evaluating the administrative record provided by the Savannah District, I conclude 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, and that there is sufficient information in the administrative record to support the District's decision that the wetland in question is adjacent and therefore a jurisdictional water of the United States, pursuant to Section 404 of the Clean Water Act. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

15 SEP 2004

(Date)



Michael J. Walsh
Colonel, US Army
Commanding