

ADMINISTRATIVE APPEAL DECISION

FILE NO. 81-2000-0364

CHARLESTON DISTRICT

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

Appellant Representative: Blanchard Investments, Inc. represented by Mary D. Shahid,
McNair Law Firm, P.A.

Receipt of Request For Appeal (RFA): September 14, 2001¹.

Appeal Conference Date: August 22, 2002. **Site Visit Date:** August 22, 2002.

Background Information: By letters of February 29, 2000 and April 30, 2001, Mr. Joe Blanchard, Blanchard Investments, Inc., requested a wetland determination for an 8.18-acre tract located between Chestnut Road and the Conway Bypass, Horry County, South Carolina. By letter dated July 17, 2001 the USACE Charleston District (District) determined “[t]he property in question contained 4.32 acres of federally defined jurisdictional freshwater wetlands or other waters of the United States...” In a memorandum enclosed with and in support of the appeal of the approved jurisdictional determination the appellant’s representative described the “Relevant Site Characteristics” as follows: “The wetland on the Blanchard property is bounded on the west by the Conway Bypass. On the other side of the Bypass, off-site, is a freshwater wetland system (Jones Big Swamp) that is located approximately 0.175 to 0.25 miles to the west of the site. A drainage swale is located along the western boundary of the property, running from north to south up gradient in both directions. After absorption in the swale, any surface water would appear to drain through Jones Big Swamp to the northwest, at an approximate distance of five miles, before reaching the Waccamaw River System. Photographs of the site...reveal that there is not standing or navigable water visible from the site.”

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 July 17, 2001 according to applicable laws, regulations and policy guidance.

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

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

¹ The original Request for Appeal, September 12, 2001, was received by the USACE South Atlantic Division on September 14, 2001. In the process of internal mail distribution the original submittal was misplaced. An inquiry by the appellant’s representative revealed the loss of the original Request for Appeal. A re-submittal of the Request for Appeal, May 1, 2002, was received by USACE South Atlantic Division on May 6, 2002.

Reason: “We appeal this jurisdictional determination on the basis that the whole wetlands system itself is “isolated” in that no hydrologic connections exist to the site or to any other adjacent wetland.”

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: In the memorandum enclosed with and in support of the appeal of the approved jurisdictional determination the appellant’s representative stated, “ 33 CFR 328.3 includes in its definition of waters of the United States “...(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section. ...(b) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach berms and the like are ‘adjacent wetlands.’”” The representative further states, “The United States Supreme Court has determined that the Congressional intent in the adoption of the Clean Water Act, 33 U.S.C. 1344(a) was “to regulate wetlands inseparably bound up with the ‘waters’ of the United States.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 88 L.Ed. 2d 419, 106 S. Ct. 455 (1985) [*Riverside Bayview Homes Inc.*]. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S. 159, 121 S. Ct. 675[] (2001) [(SWANCC)]. Therefore, the appropriate inquiry for a determination of adjacency and assertion of jurisdiction under the Clean Water Act is whether there is a “significant nexus between the wetlands and navigable waters.” SWANCC p. 168. There is not dispute between the parties that the 8.18 acre parcel contains an area of wetlands as defined by the [USACE]. The question presented in this appeal is whether the site characteristics of this parcel, and the surrounding land features, support the conclusion that this wetland is adjacent to waters of the United States.” The representative continues, “The wetland is contiguous to Conway By-pass, which is adjacent to Jones Big Swamp. Jones Big Swamp is not a navigable body of water. Jones Big Swamp eventually drains into navigable waters of the Waccamaw River system, but as described above, this occurs at a distance of five miles from the site.” Emphasis added.

On January 9, 2001 the US Supreme Court issued a decision, SWANCC. This decision recognized limits on the Corps’ jurisdiction under the Clean Water Act (CWA) to regulate isolated waters. Specifically, the Supreme Court struck down the use of the “Migratory Bird Rule”² to assert CWA jurisdiction over isolated, non-navigable, intrastate waters that are not tributary or adjacent to navigable waters or tributaries.

In its SWANCC decision, the Court did not overturn its earlier decision in the Riverside Bayview Homes case. In Riverside Bayview Homes, the Court held that the Corps had the authority to regulate wetlands adjacent to navigable waters. The Court 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 also found

² 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.

that “Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States.” The Court observed, “It was the significant nexus between the wetlands and navigable water that informed our reading of the CWA (Clean Water Act) 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.

The appellant’s representative also cited “[t]hree recent decisions by federal district courts to illustrate the Corps’ practice of relying on a drainage connection for adjacency.” The cases cited: *United States v. Rapanos*, 2002 U. S. Dist. 3957; *United States of America v. Lamplight Equestrian Center, Inc.*, 2002 U. S. Dist. Lexis 3694; and *U.S.A. v. Newdunn*, 2002 U. S. Dist Lexis 6985. After explaining these cases and pointing out the disparate decisions, the appellant’s representative stated, “The fact that courts reach opposite conclusions when reviewing these facts is illustrative of the inherent problems associated with using a drainage connection to establish adjacency, without consideration of other site characteristics such as distance to navigable waters.”

As noted above, there is not dispute that the 8.18-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*; the wetlands at issue are isolated and not subject to the Corps jurisdiction under §404 of the CWA due primarily to their distance to navigable waters.

The USACE’ regulations at 33 CFR 328.3(a) defines the term “waters of the United States.” Section 328.3(c) defines the term “adjacent”. The USACE in the 1977 regulations defined the term “adjacent” wetland. In the preamble to the 1977 regulations under Part 323 it states, “the landward limit of Federal jurisdiction under §404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of the aquatic system.” It further stated that “adjacent” means, “bordering, contiguous, or neighboring” and that the term includes “wetlands directly connected to other waters of the United States, or are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.” Emphasis added. Part 323.2(d) of the 1977 regulation and Part 328.3(c) of the 1986 Corps regulation defined “adjacent” to mean bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like. Once an area is determined to be a “water of the United States,” §328.4 defines the limits of those waters. When adjacent non-tidal waters of the United States are present, the jurisdiction extends beyond the ordinary high water mark to the limits of the adjacent wetlands.

The District appropriately determined that portions of Blanchard Investments, Inc.’s property met the three mandatory criteria to be identified as wetlands as required in Technical Report Y-87-1, the Corps of Engineers Wetlands Delineation Manual. For the Corps of Engineers to maintain jurisdiction, the wetlands must be adjacent to waters of the United States as defined under §328.3(a).

In its Basis of Approved Jurisdictional Determination, July 19, 2001, the District stated, "This jurisdictional determination meets the criteria set forth in the 1987 Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1), as it relates specifically to wetland areas (as opposed to others [sic] waters of the United States...Additionally, the area or areas covered under this jurisdictional determination meet the definition of "Waters of the United States" as defined in 33 CFR 328.3(a)...The following is a checklist of the type or types of "Waters of the United States" that fall within this jurisdictional determination...Wetlands adjacent to any of the above waters...This jurisdictional determination is also based in part on the following...Plat submitted by the applicant...Site Visit/Field Review...Consultant's data sheets...Review of aerial photographs...Review of soil maps...Review of National Wetlands Inventory maps".

In a report Freshwater Wetlands Delineation (Blanchard Property – Horry County, South Carolina), prepared by Coastal Science Associates, Inc., February 2000; the consultant stated, "The wetlands are isolated due to surrounding road improvements."

At the appeal conference District representatives used a series of United States Geological Survey quadrangle maps and aerial photographs, enhanced with overlaid information, to illustrate their review and evaluation of the site. They demonstrated that in their review they determined that prior to the construction of the Conway Bypass the wetland area in question was part of a larger jurisdictional wetland that had a direct surface connection with Jones Big Swamp, to the west, and eventually to the Waccamaw River. They demonstrated how the hydric soils in the area support their determination of a direct surface connection with Jones Big Swamp. The District issued Department of the Army authorization (Permit Number 93-2A-105-C) to the South Carolina Department of Transportation to place fill material in the jurisdictional wetlands for the construction of the Conway Bypass. It is the construction of this manmade structure that severed the wetland in question from the larger jurisdictional wetland area. The District representatives demonstrated that with the construction of the Conway Bypass the direct surface connection between the wetland in question and Jones Big Swamp is now rerouted through a roadside swale along the east side of the road and through a culvert under the Conway Bypass. The culvert empties into a ditch that leads to Jones Big Swamp. In addition, a ditch from the east converges where the roadside swale meets the culvert. Water that exits the culvert flows into a large ditch, and in District representatives' opinions, then empties into Jones Big Swamp. At the appeal conference a District representative stated, "My opinion is this: When the Conway bypass was built, it severed the tip end. The upper end of this tributary, surface tributary system...the area that we're talking about, the four plus acre wetland is still an adjacent wetland by virtue of being neighboring, whether it is connected or not...the fact that it's separated by a manmade barrier is not particularly relevant...it was all identified as jurisdictional wetland...we issued a permit to fill that wetland adjacent to the Blanchard site for the Conway Bypass. So, all of that was considered jurisdictional at that time so it's still considered jurisdictional. It's still an adjacent wetland. The sw[a]l[e]/ditch notwithstanding. Beyond that, we took a look at it to see if it was still connected. My opinion is that it is still connected by a drainage feature that runs from the wetland south along the eastside of the Conway Bypass and goes to a culvert about 600, 700 feet or so south of the southern property line, which then goes, apparently, into Jones Big Swamp through an upland cut ditch...it's an upland ditch...how far you'd have to go beyond the fence to the edge of the right-of-way to encounter the edge of the wetlands of Jones Big Swamp, I can't tell you but it's not, apparently not terribly far." When asked, "You're not

saying that there is an upland cut ditch that runs the width and breadth of the swamp and channelizes this water all the way to the Waccamaw River[?]", the District representative responded, "No, I'm just saying it conveys the waters from the site, down the roadside drainage feature, through that culvert, through the upland cut ditch, whatever distance onto this other property and that ditch empties that water into Jones Big Swamp; therefore, there is still a direct connection." Emphasis added. (Transcript of the appeal conference, pp 37-39).

When asked, "You're assuming that the ditch extends into the Jones Big Swamp?", the District representative stated, "Yes." When asked, "You didn't walk the length of the ditch though[?]", the District representative responded, "No. That's private property." (Transcript of the appeal conference, p 53).

The District's assumption that the ditch drains into the Jones Big Swamp is reasonable because of the subject site's proximity to the Jones Big Swamp as noted above by the appellant's representative, "The wetland on the Blanchard property is bounded on the west by the Conway Bypass. On the other side of the Bypass, off-site, is a freshwater wetland system (Jones Big Swamp) that is located approximately 0.175 [924 feet] to 0.25 [1320 feet] miles to the west of the site." At the site meeting, the review officer observed that the ditch in question is aligned from the west end of the culvert, that passes under the Conway Bypass, in a westerly direction. After passing beyond the highway right-of-way the ditch passes under a woods road, through a large culvert, and continues in a westerly direction. As noted above, after leaving the highway right-of-way, the ditch is located on private property. Standing in the highway right-of-way, observing the westerly direction of the ditch, the review officer did not see an end to the ditch.

There was also discussion about the ditch from the east that converges where the roadside swale meets the culvert. The District representative stated, "that's where it comes across. You can see the pond..." When asked, "Is it possible the ditch is a permitted structure or excavation?", the District representative responded, "No. I think it's been there for a long time...They utilized this existing ditch, tied into it, put a culvert under the...highway. They didn't want to cut off this guy's drainage anyway. This was a preexisting feature." (Transcript of the appeal conference, pp 53-56).

The District's representative added, "I wanted to clarify, when I'm saying it's adjacent, I'm not saying it's adjacent directly to Jones Big Swamp as a basis of jurisdiction. The basis of jurisdiction is that it's adjacent to the tributary to Jones Big Swamp. That it was originally a part of, that it was severed,...the connection was severed by Conway Bypass. So the connection is across Conway Bypass to the original surface tributary system, not...to Jones Big Swamp itself." (Transcript of the appeal conference, p 70).

In a Memorandum, May 11, 2001, Subject: Prohibition on the Development of Local Operating Procedures Addressing Jurisdictional Determinations in Light of the SWANCC Decision, Headquarters (HQ), USACE, issued the following guidance: "In connection with interagency efforts to address Clean Water Act jurisdiction related to the 'tributary' status of waters, and to the 'adjacent' status of wetlands, the agencies agreed that, pending the development of National Policy, Corps Districts would continue to base these determinations on the local practices that were in effect prior to the 9 January 2001 Supreme Court decision in Solid Waste Agency of

Northern Cook County v. U.S. Army Corps of Engineers (SWANCC). In light of this, and effective immediately, the Regulatory offices in all Major Subordinate Commands (MSC) and District Commands are prohibited from developing local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction, and from utilizing local practices that were not in effect prior to the SWANCC decision... The Court's decision in SWANCC effectively precludes the assertion of Section 404 jurisdiction over certain isolated waters. This has necessarily focussed increased attention on the geographic extent of Section 404 jurisdiction, and on the potential 'tributary' status of waters, and the potential 'adjacent' status of wetlands. However, these and other relevant considerations are the subjects of ongoing interagency and Administration-level coordination. We are imposing this prohibition on the development and/or implementation of new practices in order to avoid compounding existing inconsistencies among Districts, and to minimize complications affecting the development of national policy... Although MSC and District Commands must refrain from adopting new practices for determining the extent of Section 404 jurisdiction, the Headquarters Regulatory Branch can provide case-specific guidance to MSC and District Commands pending the promulgation of national policy.”

The definition of “waters of the United States” as it applies to the jurisdictional limits of the authority of the Corps regulatory program is defined in 33 CFR Part 328. 33 CFR 328.3(a)(5) states that waters of the United States include: “Tributaries to waters identified in paragraphs (a)(1) through (4) of this section.” In addition, 33 CFR 328.4(c)(1) states, “In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark [OHWM].”

The preamble to the November 13, 1986 Final Rule, Regulatory Programs of the Corps of Engineers, FR Vol. 51, No. 219, Page 41217, further discussed the limits of jurisdiction as follows: “Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.”

The Federal Register / Vol. 65, No. 47/ Thursday, March 9, 2000 / Notices (page 12823-12824) states, “[d]rainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States... District Engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHWM that may have developed in a drainage ditch.”

Regulatory Guidance Letter³ (RGL) 88-06, issued June 27, 1988 (now expired but still applicable), discussed the ordinary high water mark (OHWM) as “the physical (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWM is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel.”

³ Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.

Information Received and its Disposition During the Appeal Review:

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

2) The appellant furnished a certified copy of the transcript of the appeal conference held on August 22, 2002.

3) The appellant’s representative sent a letter, February 11, 2003, to South Atlantic Division which reviewed the steps in the appeal process to that point and noted that the appellant had not received notice of recommendation or a decision from the South Atlantic Division. The representative used quotes from the certified transcript of the appeal conference to reiterate the appellant’s point that the wetland in question is not adjacent and that there is no connection to navigable waters of the United States. The representative also noted that, “in January of this year [2003] the Department of the Army and the Environmental Protection Agency issued their...Guidance Document to assist regulatory agencies in light of the U.S. Supreme Court’s decision in...(SWANCC).” The representative stated, “This guidance is applicable to this jurisdictional appeal. Therefore...offer...supplemental arguments in response to the Department of the Army and Environmental Protection Agency’s Guidance.” The “Guidance” referred to is Federal Register/Vol. 68, No. 10/Wednesday, January 15, 2003/Proposed Rules – Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States”. This guidance is not applicable to this jurisdictional appeal because it was not available to the District prior to its approved jurisdictional determination for the wetland in question.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is sufficient information in the administrative record to support the District’s decision that the wetland in question is 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.

13 June 03
(Date)


Peter T. Madsen
Brigadier General, US Army
Commanding