

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

MR. MARTIN KNAPPE

FILE NUMBER 2006-32700-128

WILMINGTON DISTRICT

DATE: June 16, 2008

Review Officer: Michael F. Bell, US Army Corps of Engineers, South Atlantic Division

Appellant: Martin Knappe

Request for Appeal (RFA): January 4, 2008

Appeal Accepted: March 4, 2008

Appeal Conference/Site Visit: April 29, 2008

Summary of Decision: This appeal does not have merit. I find that the District evaluated and documented their approved jurisdictional determination according to applicable laws, regulations, and policy guidance. The administrative record does not support the Appellant's reason for appeal that the wetlands on the property are isolated and not adjacent to a navigable water.

Background Information: The Appellant's undeveloped property is located in Buxton Woods, on the outer banks of North Carolina, within the city limits of Buxton. Buxton Woods is located at the southern end of Hatteras Island, an actively moving barrier island. The development is in a back dunal zone that is generally a stable environment characterized by dunal ridges. These ridges transition across the project site and have created interdunal depressional areas, allowing for the formation of freshwater wetlands. Topographically, the site has little relief, varying from 1 to 6 feet above sea level with dunes oriented in a east-west direction. Drainage from the wetlands in Buxton Woods occurs through several wetland paths extending from interior interdunal spaces to the open waters and marshes surrounding Pamlico Sound.

The Appellant's property consists of four lots and is bounded by Flowers Ridge to the east, Ridge Trail on the north, and a ridge line parallel to Dippin Vat Road. The Appellant hired the consulting firm Environmental Professionals to delineate any possible wetlands on his property and they determined 1.08 acres of wetlands are jurisdictional. District Project Manager Thomas Steffens (PM) verbally confirmed the delineation on September 29, 2005. A formal written wetland jurisdictional

determination (JD) was sent to the Appellant on November 27, 2007. The Appellant disagreed with the District and appealed the JD to the South Atlantic Division Commander on January 4, 2008. The Division Commander accepted the appeal on March 4, 2008, and assigned the appeal to Review Officer Michael Bell (RO).

The reasons for appeal concern the scope of the Clean Water Act jurisdiction over wetlands. The RFA states that the wetlands on the property are isolated. Adjacent and isolated wetlands are the subject matter of the June 19, 2006, Supreme Court decision in the *Rapanos* and *Carabell* (*Rapanos*) cases. The decision states that the Corps may not regulate certain waters of the US unless a thorough significant nexus determination is made between the waters in question and a navigable water. The Wilmington District did not have guidance on how to implement the Supreme Court decision at the time of the verbal JD. The District received the *Rapanos* guidance on June 5, 2007. Since the appealed JD was conducted prior to the Supreme Court decision and subsequent Corps guidance, the Appellant had a choice to use either the June 5, 2007, guidance or the determination methods at the time of the verbal JD.

The RO spoke with the PM and asked him if the Appellant had the above options presented to him. The PM stated that the Appellant was advised by letter attached to the JD to contact him if he chose to have a *Rapanos* JD done and no contact was made. Therefore, a determination using the Guidance from the *Rapanos* Supreme Court Decision will not be part of this document.

Site Visit: On April 29, 2008, the RO conducted an on-site investigation with the Appellant and the PM. The Appellant's property is a depression wetland and is bounded by Flowers Ridge to the east, Ridge Trail road on the north, and a ridgeline parallel to Dippin Vat Road. The Appellant explained that he had owned the property for 35 years and the wetland drained after each rain event through the dunal ridge system and eventually into the Pamlico Sound. Ridge Trail road was constructed eight years ago with no culverts in one of these dunal ridges, which effectively isolated the wetlands on his property. The majority of the Appellant's property was inundated by recent heavy rains. The RO concluded the field investigation and the reasons for appeal were discussed in the field.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Wilmington District Commander

Reasons for appeal are transferred verbatim from the RFA

Appeal Reason I: The property is 4 or more lots from Peters Ditch, and is separated from Dippin Vat Road by a high ridge; therefore it is not adjacent to nor in the continuum of Peters Ditch as described on page 3 of 3 of the Jurisdictional letter. The delineation was performed in March 2005, by George Wood, Environmental Professionals, and confirmed by COE on 9/29/05. The 5 year period of active jurisdiction should start then and not on 11/27/08, (Para B Page 1 of 2). In early December 07, I walked over the plot, and found no standing water, as the water table was receded.

And:

Appeal Reason 2. The property is bounded by Flowers Ridge to the east, Ridge Trail on the north, and the ridge line parallel to Dipping Vat Road, which is partially on the tract. As Ridge Trail, built +/- 15 years ago has no culverts under it, preventing the flow of water through it to the other side, water, in wet weather, ponds on tract, and can only leave through evaporation and migration into the sand. This makes the width of the wetland area greater than it would otherwise be. The invert of the tract is toward the blocking road. The decayed organic matter on the surface of the eastern and western sides of the delineated wetland is only about 3/8" to 0" and does not hold much moisture. I understand that in the 1930's a ditch was dug to drain the properties on Flowers Ridge Road, but due to the erosion is now undefined.

FINDINGS: These reasons for appeal do not have merit.

ACTION: None required.

Discussion: During the on-site investigation, the Appellant agreed with the District's findings that the site contains wetlands that were identified by the Appellant's consultant and that the wetlands on his property historically drained into the Pamlico Sound before the construction of Ridge Trail (road). The construction of Ridge Trail blocked the historic hydrological drainage connection which inundated the Appellant's property. The Appellant believes the road now isolates the wetlands on his property from a traditional navigable water. The primary question presented in this appeal is whether the site characteristics in this parcel, and the surrounding land features, support the District's conclusion that this wetland is adjacent to navigable waters of the US. A secondary reason for appeal concerns the expiration date of the JD. However, the District appeared to determine correctly that the expiration date of the JD is five years after the date on the approved jurisdictional determination (JD Form).

The District contends that the wetlands on the property are adjacent to a broad continuum of wetlands that flow to the Pamlico Sound and that a road can not sever this connection. The District's JD Form includes a *Rational for the Basis of Jurisdiction* that states:

This site exhibits wetland criteria as described in the 1987 Corps Wetland Delineation Manual and is part of a broad continuum of wetlands abutting Peters Ditch, connected to Pamlico Sound.

The JD Form defines the term adjacent (connection) as:

[b]ordering, continuous, or neighboring. Wetlands separated from other waters of the US by man-made dikes or barriers, natural river berms, beach dunes, and the like are also not adjacent.

This definition is derived from 1986 Corps regulations at 33 CFR 328.3(a)(7)(c) which 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 the Pamlico Sound.

The subject of adjacency is initially addressed in the Corps of Engineers regulations for the Regulatory Program in 1977. In the preamble to the 1977 regulations under Part 327, it states:

The landward limit of Federal jurisdiction under Section 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 states that “adjacent” means “bordering, contiguous and neighboring” and that these terms include “wetlands directly connected to other waters of the United States, or are in proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.”

It is apparent that the intent of the above regulations are to ensure that a man-made structure can not isolate an adjacent wetland. Therefore, because the wetlands on the Appellant’s property meet the definition of waters of the US under 33 CFR 328.3(a)(7), they are adjacent wetlands.

During the on-site investigation, the Appellant also discussed whether the wetlands on his property have a significant nexus to navigable waters of the US. Since the *Rapanos* Supreme court guidance will not be a part of this decision, the Appellant referred to the SWANCC Supreme Court decision.

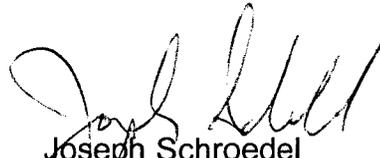
On January 9, 2001, the US Supreme Court issued a decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers* (Slip Opinion, No. 99-1178, October Term, 2000). This decision limited the Corps jurisdiction under the Clean Water Act (CWA) to regulate isolated waters. Specifically, the Supreme Court struck down the use of the “Migratory Bird Rule”¹ to assert CWA jurisdiction over isolated, non-navigable, interstate waters that are not tributary or adjacent to navigable waters or tributaries. The District’s adjacency decision was not based on the site being used or potentially being used by migratory birds.

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.

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. 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 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 Section 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 administrative record, the *Basis of Determination*, and the observations made during the site visit support the District’s determination that the wetlands on the Appellant’s property are adjacent to a navigable water of the US.

CONCLUSION: On the merits of this appeal, I have decided there is substantial evidence in the administrative record to support the Wilmington District’s jurisdictional determination. The District’s determination was not arbitrary, capricious, or an abuse of discretion 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.


Joseph Schroedel
Brigadier General, US Army
Commanding