

ADMINISTRATIVE APPEAL DECISION

FILE NUMBER 199607603 (JF-CP)

JACKSONVILLE DISTRICT

October 16, 2002

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

Appellant Representative: Dr. Joe Edmisten, Edmisten and Associates, on behalf of Perdido
Estates Subdivision (Classic Homes – Rick Faciane), Pensacola, Florida.

Receipt of Request For Appeal (RFA): August 20, 2001.

Appeal Conference Date: November 20, 2001. **Site Visit Date:** November 20, 2001.

Background Information: By letter dated January 31, 1997 the US Army Corps of Engineers, Jacksonville District (District) acknowledged receipt of a request for a jurisdictional determination on a parcel of approximately 169 acres, owned by Mr. Rick Faciane, west of Pensacola, Escambia County, Florida. The letter stated, “On January 29, 1997 the property was inspected and the jurisdictional boundary was verified to accurately represent the limit of waters of the United States. If you desire to have written confirmation...regarding the location of the wetlands under the regulatory jurisdiction of the [Corps of Engineers] on that portion of the parcel...send...copies of a property survey showing the location of the flagged line.” The property surveys with the jurisdictional lines indicated were submitted to the District’s Pensacola office on June 27, 1997. On July 8, 1997 the District received a notification that the property owner was proposing to fill 1/3 acre of wetlands under Nationwide Permit 26. On July 11, 1997, the District determined that the submitted survey did not appear to accurately depict the jurisdictional line. By letter of August 8, 1997 the District informed the applicant’s consultant that the jurisdictional lines have been adjusted and requested that the applicant provide plans to show the adjusted jurisdictional lines and any revised plans, then the application would be deemed complete. By letter of August 29, 1997 the District informed the applicant’s consultant that surveys submitted on August 19, 1997 accurately depict the location of the jurisdictional line. By letter of October 15, 1997 the District verified the use of Nationwide Permit 26 for development of the property. This included the development of a portion of the instant wetland. By letter of February 22, 2001 the applicant’s consultant submitted a map and notified the District that the wetland-flagged areas are isolated wetlands not under the jurisdiction of the US Army Corps of Engineers and that the property owner will be filling the isolated wetlands. By letter of August 7, 2001 the District issued an approved jurisdictional determination that specifically stated, “Private Parcel C...is considered Waters of the United States...Private Parcels B, D, E, F, and G are considered isolated wetlands and are not regulated by the [USACE].”

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, 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 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 §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 is determined, based on SWANCC, that the wetlands at issue are isolated and not subject to the Corps jurisdiction under §404 of the CWA.

Summary of Decision: I find that the appeal has merit as follows: I find that (a) the District did not document a hydrological connection between the instant wetlands and Garcon Swamp. In addition, (b) the District did not substantiate that the instant wetlands identified as Private Parcel C as compared to Private Parcels B, D, E, F, and G are adjacent to Garcon Swamp. This matter is remanded to the District Engineer for reconsideration of the jurisdictional determination decision consistent with the instructions in this administrative appeal decision.

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

Reason 1: “Our client, Classic Homes, had sought an opinion regarding a change in the Corps wetland delineation [in light] of the SWANCC Supreme Court decision. Earlier, we had delineated clearly 7 isolated wetlands for Classic Holmes in their Perdido Estates. The ... [7 Aug 01] letter ...(# 199607603 (JF-CP) concedes that 6 of 7 wetlands under reconsideration were truly isolated and therefore no longer under the jurisdiction of the Corps. It is our contention that Private Parcel C is isolated. There is at least 500 feet of upland to the north of Private Parcel C before reaching Garcon Swamp. In other appeals, the Corps representative handling the appeal has looked for ditches, creeks, and other hydrological connections. As you can see from the survey and aerial photography, the areas north of site “C” are upland. The

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.

Garcon Swamp to the north is widely separated from the isolated wetland in question, with no ditches or other possible connections.”

FINDING: This reason for appeal has merit.

ACTION: The decision is remanded to the DE to reconsider and further document the decision regarding the evidence supporting tributary connections that establish jurisdiction under 33 CFR 328.3(a)(5) between the wetlands identified as Private Parcel C and Garcon Swamp and to document the rationale as to why Private Parcel C is adjacent and Private Parcels B, D, E, F, and G are considered isolated.

The District’s decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

DISCUSSION: The approved jurisdictional determination, August 7, 2001, included a Basis for Jurisdiction that states, “Property...contains waters of the United States based on...[t]he presence of wetlands as determined by the [USACE] Wetland Delineation Manual...[t]he wetlands are adjacent to navigable or interstate waters, or eventually drain or flow into navigable or interstate waters through a tributary system that may include man-made conveyances such as ditches or channelized streams.”

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 Letter² (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.”

At the site visit on November 20, 2001 those attending reviewed maps and aerial photographs and then looked at the wetland site in question, Private Parcel C, and discussed why it was or was not isolated. The applicant’s consultant pointed out that there were not ditches or channels leaving the site. The District’s project manager indicated that in earlier trips to the site he observed that water drained west across lot 54 to a low area that drained north into the subdivision’s “private storm water retention/passive recreation area # 2” that runs east to west along or near the northern boundary of the subdivision and near the southern boundary of Garcon Swamp. Lot 54 has subsequently been filled and according to the project manager water now drains across the front of lot 54, along the street, and then into a ditch located between lots 54 and 53. This ditch is approximately 2 to 3 feet deep and runs south to north and empties into the storm water retention area noted above. Later in the site visit we observed that there is a connection between the eastern end of the storm water retention area and wetlands to the east and north.

An old jeep trail runs east and west along an apparent low ridge on the southern boundary of Garcon Swamp. The jeep trail is seen on aerial photographs and is indicated on National Wetlands Inventory maps and U.S. Geological Survey Perdido Bay Quadrangle maps. Those attending the site visit located and observed a ditch that had been excavated through the ridge upon which the jeep trail is located. This ditch is located at the western end of the storm water retention area, in the vicinity of where the ditch between lots 54 and 53 empties into the storm water retention area. This ditch was dry at the time of the site visit. This ditch runs out at grade in the vicinity of the western end of Garcon Swamp.

In the area immediately north of the wetland in question two jeep trails converged in this area and the land had been disturbed with some excavation efforts. Titi (*Cyrillia racemiflora* and/or *Cliftonia monophyla*) was present in the wetland in question as well as areas north of the wetland in question. During our discussions it was discovered that the National Wetlands Inventory maps used by the consultants depicted the wetland in question as being a distinct, separate, polygon. However on a newer draft National Wetlands Inventory map used by the USACE Project Manager, the wetland in question is included in a larger polygon that extends to the north, northwest. The polygon is identified as PFO4A. This nomenclature means the area is believed to be Palustrine, Forested, Needle-Leaved Evergreen, and Temporarily Flooded. The National Wetlands Inventory maps do not represent the final position regarding the USACE wetland jurisdiction. Often areas that appear as wetlands or non-wetlands must be ground truthed in order to make a determination regarding wetland status and/or USACE jurisdiction.

² Note: 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.

The administrative record does not support the assumption of a tributary connection between the instant wetland and Garcon Swamp. As noted above, the District's project manager indicated that in earlier trips to the site he observed that water drained west across lot 54 to a low area that drained north into the subdivision's "private storm water retention/passive recreation area # 2" that runs east to west along or near the northern boundary of the subdivision and near the southern boundary of Garcon Swamp. Lot 54 has subsequently been filled and according to the project manager water now drains across the front of lot 54, along the street, and then into a ditch located between lots 54 and 53. In a memorandum, June 15, 2001, it was noted, with regard to Private Parcel C, "this wetland could be classified as adjacent by jumping approximately 150 feet of uplands into a well defined wetland to the northwest. Based on present site conditions a direct hydrologic connection through a drainage easement to well defined wetlands to the northeast could be made. Approximately 70 feet to the east of this wetland and between lots 53 and 54...is a drainage easement that is approximately 20 feet in width, exhibits evidence of water flow, hydrophytic vegetation, and exhibits 2:1 side slopes. Water that existed within the wetland in question could flow in the grassed portion of the road right-of-way in to the drainage easement. This drainage easement connects to a stormwater swale located north of lots 39-53...The swale exhibits 3:1 side slopes, hydrophytic vegetation and evidence of standing water. The swale has no control structure as does a typical retention or detention pond and water entering the swale flows directly into [a] wetland located immediately to the north of lots 39-42..."

In the statements above, there is no evidence that water flows from the instant wetland to the drainage easement through a drainage ditch or other man-made conveyance. As stated above, prior to the filling of lot 54, "water drained west across lot 54 to a low area that drained north into the subdivision's "private storm water retention/passive recreation area..." There has been no mention of a ditch or channel (or related ordinary high water mark) through which the water may have flowed. Lot 54 was filled without the requirement for Department of the Army authorization. Therefore, it can be assumed that there were no jurisdictional areas on that lot. There is a ditch between lots 53 and 54, however, water must sheet flow "across the front of lot 54, along the street, and then into a ditch located between lots 54 and 53." The administrative record does not contain documentation of a tributary connection to Garcon Swamp.

As noted above, the Basis for Jurisdiction also states, "Property...contains waters of the United States based on...[t]he wetlands are adjacent to navigable or interstate waters..." Emphasis added.

Regulations at 33 CFR 328.3(c) states, "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 dunes and the like are "adjacent wetlands"."

The June 15, 2001 memorandum noted above, with regard to Private Parcel C, states, "this wetland could be classified as adjacent by jumping approximately 150 feet of uplands into a well defined wetland to the northwest. Private Parcels B, C, D, E, F, and G are all pockets of wetlands situated just south of Garcon Swamp. These wetlands are situated at varying distances from Garcon Swamp. Private Parcels C and G were both impacted by the placement of fill material for the construction of Terra Lake Circle that is oriented east to west and somewhat

parallel to the south side of Garcon Swamp. However, Private Parcel C is considered adjacent and Private Parcel G is considered isolated. There is no explanation in the administrative record as to why Private Parcels B, D, E, F, and G are not adjacent.

The administrative record does not provide an explanation of the jurisdictional nature of the “well defined wetland to the northwest” other than “wetland”. The definition of “waters of the United States” at 33 CFR 328.3(a) includes at (7) “Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.”

Information Received and its Disposition During the Appeal Review:

The District provided a copy of the Administrative Record.

A handwritten signature in black ink, appearing to read "Peter T. Madsen". The signature is fluid and cursive, with a large initial "P" and "M".

Peter T. Madsen
Brigadier General, US Army
Commanding