

ADMINISTRATIVE APPEAL DECISION
APPROVED JURISDICTIONAL DETERMINATION
FOR BACCARAT FREMONT DEVELOPERS

FILE NO. 23205S

SAN FRANCISCO DISTRICT

October 25, 2001

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers (USACE), South Pacific Division, San Francisco, California

Technical Assistant to Review Officer: Bruce Henderson, USACE, Los Angeles District, Ventura Field Office, Ventura, California

District Representative: Philip Shannin, USACE, San Francisco District, San Francisco, California

Appellant Representative: Michael Josselyn, Wetlands Research Associates, San Rafael, California

Receipt of Request For Appeal (RFA): July 9, 2001

Appeal Conference Date: September 5, 2001 **Site Visit Date:** September 5, 2001

Background Information: The project site is an approximately 32-acre, generally rectangular, parcel located in Fremont, Alameda County, California, near the San Francisco Bay. The site is separated from Alameda County Flood Control District (ACFCD) channels by approximately 250 feet of upland area on the west side and south sides of the property. The ACFCD channels connect to San Francisco Bay. Culverts with flap gates are present at several locations between the ACFCD channels and the wetlands. A culvert with a leaking flap gate connects with one wetland, which the District and the Appellant agreed was within Corps jurisdiction.

The District and the Appellant agree that there are wetlands on the project site. The District and the Appellant disagree as to whether all the wetlands on the project site are subject to the Corps jurisdiction as adjacent wetlands.

Summary of Decision: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding which wetlands on the project site are adjacent to jurisdictional waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

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

Reason 1: The Appellant asserts that the District did not identify sufficient hydrological, ecological, proximity, or interstate commerce connections to establish the wetlands at issue were subject to Corps jurisdiction as wetlands adjacent to waters of the United States. The Appellant believes these are isolated wetlands and should be evaluated pursuant to the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) (*SWANCC Decision*). As a matter of fact, the Appellant believes these areas would be outside Corps regulatory jurisdiction if evaluated as isolated wetlands.

FINDING: The appeal has merit

ACTION: The District is directed to reconsider its adjacency determination as described in detail in this Administrative Appeal Decision.

DISCUSSION: The District and Appellant estimate the 32-acre, generally rectangular, project site includes 7.66 acres of wetlands in six distinct delineated areas. Jurisdictional channels of the ACFCD are located approximately 250 feet west and south of the site. Considering the site as four quadrants the wetlands are distributed as described below.

In the southwest quadrant, about one half of the quadrant is covered by a single, large wetland area (separate acreage figures for each wetland were not available) described by points 1a, 6a, and 7a, in the “Delineation of Jurisdictional Wetlands and Waters of the United States, Mok Property, Fremont, California” by Wetlands Research Associates dated August 1997 (Delineation Report). This same wetland extends into a portion of the southeast quadrant. The District and the Appellant disagree on its jurisdictional status.

The northwest quadrant includes a wetland on the western edge of the site, described by point 4a in the Delineation Report, which receives water from a culvert with leaking flap gate. The District and the Appellant agreed this area was subject to Corps jurisdiction and it is not discussed further. The northwest quadrant also includes another small wetland, also on the western edge of the site, described by point 3 in the Delineation Report. The District and the Appellant disagree on its jurisdictional status.

The northeast quadrant contains a large wetland described by point 2a in the Delineation Report. Just west of this wetland, in the center of the project site, there are two additional small wetlands. One is described by point 5a in the Delineation Report and the other is not separately documented. These three wetlands, mapped as separate units, are located at a greater distance from the jurisdictional waters of ACFCD channels than the wetlands described in the previous two paragraphs. The District and the Appellant disagree on the jurisdictional status of these three wetlands.

Culverts with flap gates are present at several locations on a property located between the Appellant’s project site and the ACFCD channel. The Appellant does not own this

intervening property. On the Administrative Appeal site visit the Review Officer found these culverts had been recently blocked. The District is aware of this new information and will separately investigate whether any enforcement action is appropriate.

The District and the Appellant agree that the ACFCD channels are subject to Rivers and Harbors Act, Section 10 jurisdiction, and the Clean Water Act Section 404 jurisdiction. The Appellant's position is that the District's evaluation of adjacency is incorrect and should change as a result of the SWANCC decision, and the SWANCC decision's interpretation of *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985). The Appellant asserts the District should have evaluated whether a "significant nexus" existed between jurisdictional waters in the ACFCD channel and the areas the District identified as adjacent wetlands.

The Appellant claims the Corps did not establish sufficient hydrological, ecological, proximity, and interstate commerce connections between the jurisdictional waters and the supposedly adjacent wetlands for the Corps to establish regulatory jurisdiction. The Appellant believes that the wetland areas in question are isolated, not adjacent, wetlands, and if considered pursuant to the SWANCC decision, those areas would be outside Corps regulatory jurisdiction.

The Appellant believed his case was further supported by *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), which he cited as support that evidence of hydrological and ecological links between wetlands and the adjoining river were *necessary* to establish jurisdiction over adjacent waters, and that mere physical proximity was not enough.

The District's position is that the wetlands on the project site are within Corps jurisdiction because they are within 250 feet of the jurisdictional waters in the ACFCD flood control channels. In addition, the District asserts these areas would drain to the flood control channel if the man-made barriers were not present.

The Corps regulation regarding jurisdiction over wetlands adjacent to jurisdictional waters is defined at 33 CFR Part 328.4 (b) and 4 (c):

“(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

- (1) Extends to the high tide line, or
- (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

- (1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
- (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.”

The term adjacent is defined in the Corps regulations at 33 CFR 328.3 (c) as:

“(c) 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.””
[Emphasis added]

The adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or *that 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]

In the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Fed Reg Page 59113 (1991), the Corps discussed the validity of establishing a nationwide distance limit for adjacency. It was discussed as follows:

“Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural berms.”

A similar difficulty exists for Corps Districts in establishing a specific distance limit across variable geographic areas and site conditions.

The Joint Memorandum from Environmental Protection Agency General Counsel and Corps of Engineers Chief Counsel on the *SWANCC* decision dated January 19, 2001, concluded that the Supreme Court in *SWANCC*:

“...did not overrule the holding or rationale of *United States v. Riverside Bayview Homes...*”

The Corps Headquarters, Operations Division, Memorandum of May 11, 2001, prohibits Regulatory Offices in Major Subordinate Commands (MSCs, also called Divisions) and District Commands, from developing or utilizing new local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction, or from utilizing local practices that were not in effect prior to the January 9, 2001 *SWANCC* decision. This is in order to minimize complications affecting the development and promulgation of National Policy subsequent to *SWANCC* 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. In problematic situations, Districts can request case-specific guidance from Corps Headquarters Regulatory Branch.

The Appellant contends that the Supreme Court in its decision in *SWANCC*, modified its previous holding in the *Riverside Bayview Homes* decision. In the Appellant's view, after *SWANCC*, the Corps must find that there is a *significant nexus* between a jurisdictional water of the United States and the adjacent wetland in order for the Corps to assert jurisdiction under the Clean Water Act. Based on my review of these decisions and the guidance by our Headquarters, I conclude that the standard for determining adjacency has not been modified. Moreover, to the extent that Appellant relied on the Circuit Court's 1997 *Banks* opinion to provide further interpretation of the *SWANCC* decision, that reliance is misplaced because that decision predated *SWANCC*.

The District discussed its reasons for determining that the on-site wetlands were within Corps jurisdiction as adjacent wetlands as follows in its May 8, 2001, letter:

“Based upon the information provided and our knowledge of the area, we have determined that all wetlands on site are adjacent to a tidal flood control channel. This channel is located within 250 feet of the site's western and southern boundaries. Separation of these wetlands from the channel, by man-made barriers does not extinguish adjacency. ...Furthermore, the site's topography indicates that the water in the wetlands would flow into the channel in storm events, if not for the man made barriers.”

The District letter provided two reasons for its conclusion that these areas were within reasonable proximity of waters of the United States. The first of these reasons was that the wetlands on the project site were within 250 feet of the jurisdictional ACFC channels. The District did not provide any information on why the 250-foot distance was considered reasonable proximity for purposes of determining adjacency. The second factor the District relied on as was that if the man-made barriers were not in place, the wetlands would drain across the project site to the jurisdictional ACFC channels during storm events.

In regard to the first factor, I conclude the District has not sufficiently documented why a 250-foot distance should be considered within reasonable proximity to establish adjacency in this situation. The District's one page document “*Additional Factors To Consider When Making “Adjacency” Determinations*”, described several criteria including topographic connections, hydrologic connections, and ecologic connections which could be documented to assist in establishing adjacency. This document, although undated, is known to precede the *SWANCC* decision, and could have been used to assist the District in its determination. However, the factors described in that document were not addressed in any detail in this jurisdictional determination.

The second factor the District relied on was its determination that if the man-made barriers were not in place, the wetlands would drain across the project site to the jurisdictional ACFC channels during storm events. The Appellant countered that conclusion with the assertion that if the man-made restrictions were removed, that drainage would increase to such an extent in the southwestern portion of the site that the wetlands would disappear due to lack of sufficient wetland hydrology. The Appellant

also claims that parts of the site would not drain to San Francisco Bay whether the berms were in place or not. Furthermore, the Appellant claims that the site did not have wetlands prior to establishment of the ACFCD channel.

I regard as irrelevant both the District's and the Appellant's arguments regarding the second factor, what would happen if the berms were removed. Both positions are based on speculation as to future conditions that do not now exist. The Appellant's supporting information that few, if any, wetlands occurred on this site at some point in the past 50 years is also irrelevant.

I concur with the District's conclusion that the presence of a barrier does not necessarily extinguish adjacency. However, neither does the presence of such a barrier establish adjacency. As discussed above, the Administrative Record does not provide any details why the wetlands on this site were considered adjacent other than a statement of the distance between the wetlands and the nearest jurisdictional waters.

In addition, the District did not explain how some of the smaller, separately mapped, wetland areas in the interior of the site could be considered adjacent. The Corps regulations at 33 CFR Part 328.3 (a)(7) states that waters of the United States include:

“Wetlands adjacent to waters (*other than waters that are themselves wetlands*) identified in paragraphs (a) (1) – (6) of this section [waters of the United States] [Emphasis added].

It appears that the wetlands in the center of the site are closer to other wetlands than they are to the ACFCD channels. In order for these wetlands on the interior of the site to be considered jurisdictional, they must be directly adjacent to the ACFCD channels or they must form a “wetland continuum or complex” with other wetlands on the site. In such situations the entire complex can be considered an adjacent wetland. This situation was described, for purposes of determining which jurisdictional water a wetland was adjacent to, in the Preamble to the 1991 reissuance of the Corps Nationwide Permits 56 Fed Reg page 59113, 1991, as follows:

“In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous.

Although this guidance is not directly applicable to this situation as the project site wetlands are not contiguous with the ACFCD channel, it does support the approach of having a broad area of wetlands considered adjacent to a larger water body, such as the San Francisco Bay, provided that they can be considered part of a broad continuum of wetlands.

However, the only evidence that a broad continuum of wetlands existed here, was the District project manager's April 17, 2001 Memorandum To File, which stated that water collected during storms in wetlands in the center of the site would flow towards other wetlands on the site closer to the ACFCD channel. The Appellant disputes the assertion

that there would be sufficient precipitation to generate flow between the wetlands in the center of the site and those on the west and south edge of the site. I find that the District's conclusion, without further documentation regarding this approach, is insufficient to establish that the wetlands on the interior of this site are part of a complex and therefore adjacent for jurisdictional purposes.

I conclude the District's jurisdictional determination is not supported by substantial evidence in the Administrative Record, and remand this action to the District as required by 33 CFR Part 331.9 for reconsideration based on the instructions below.

The District must use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination that the wetland unit described by points 1a, 6a, and 7a; and the wetland unit described by point 3a, are within Corps jurisdiction as wetlands adjacent to the jurisdictional ACFCD flood control channel.

The District must also use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination that the wetland unit described by point 2a, the wetland unit described by point 5a, and the undescribed wetland unit mapped approximately 25 feet north of point 5a, are within Corps jurisdiction. These wetlands are in the interior of the project site. The District must further document why these distinctly mapped wetland on the interior of the site are directly adjacent to jurisdictional waters despite the distinctly mapped, intervening wetlands, or explain why these wetlands are adjacent as part of a complex or continuum of wetlands.

If the District finds that after applying its existing procedures, that it still lacks substantial evidence upon which to reach a conclusion, the District may seek case-specific guidance from Corps Headquarters Regulatory Branch as discussed in the Chief of Operations Division May 11, 2001 Memorandum. If upon reconsideration the District has substantial evidence that some of the wetlands areas should be considered isolated wetlands rather than adjacent wetlands, then the jurisdictional status of these areas should be reconsidered pursuant to the *SWANCC* decision.

Information Received and its Disposition During the Appeal Review: In addition to the Administrative Record, the following additional clarifying information was submitted during the appeal.

- 1) District Project Managers September 6, 2001 supplement clarifying statement regarding relevance to the jurisdictional determination of whether tidal action would reach the site if the current berms were removed.
- 2) Appellant's September 14, 2001 supplemental responses to questions asked at the Administrative Appeal conference.
- 3) District's Office of Counsel supplemental memo of September 28, 2001 regarding determination of adjacency.

- 4) District's Regulatory Branch undated "Additional Factors to Consider When Making "Adjacency" Determinations" sheet, and District Office of Counsel's 1995 memorandum regarding adjacency on the Dawson property submitted October 2, 2001.
- 5) Appellant's October 9, 2001 additional response to the District's interpretations of adjacency.

All these submittals and information were classified as clarifying information, and were considered during the review of this administrative appeal. Several culverts with flap gates on the intervening property between the Appellant's project site and the ACFC channel had been recently blocked. This was considered new information and provided to the District to investigate whether any enforcement action is appropriate.

Conclusion: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding which wetlands on the project site are adjacent to jurisdictional waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

original signed by Leonardo V. Flor, COL, EN, Dep Div Cdr for

Robert L. Davis
Colonel (P), Corps of Engineers
Division Engineer