

ADMINISTRATIVE APPEAL DECISION

**APPROVED JURISDICTIONAL DETERMINATION
FOR GOLDEN STATE DEVELOPERS**

FILE NO. 200100023

SACRAMENTO 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: Jane Hicks, USACE, San Francisco District, San Francisco, California

District Representative: Nancy Haley, USACE, Sacramento District, Sacramento, California

Appellant Representative: Karna Harrigfeld; Herum, Crabtree, Brown; Stockton, California

Receipt of Request For Appeal (RFA): July 24, 2001

Appeal Conference Date: September 11, 2001 **Site Visit Date:** September 11, 2001

Background Information: The project site is a rectangular, approximately 1,280 acre, parcel located just south of Tracy, San Joaquin County, California. The site is currently an undeveloped, grazed, California annual grassland, with agricultural land to the west, north, and east, and a commercial warehouse complex to the south. The Delta-Mendota Canal, a 100-foot wide, concrete-lined, non-jurisdictional, water supply canal, crosses the southwest corner of the site.

The District identified three jurisdictional areas on the project site: an intermittent stream, which is not in dispute, and two adjacent wetland areas. The adjacent wetlands are located approximately 1,950 feet and 3,400 feet from the intermittent stream. The District and the Appellant disagree as to whether 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 Sacramento 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 project site is a rectangular, approximately 1,280 acre, parcel located just south of Tracy, San Joaquin County, California, northeast of the intersection of Mountain Pass Parkway (formerly known as Patterson Pass Road) and Schulte Road, and is approximately 2 miles south of Interstate 205. The site is currently an undeveloped, grazed, California annual grassland, with agricultural land to the west, north, and east, and a commercial warehouse complex to the south. The Delta-Mendota Canal, a 100-foot wide, concrete-lined, non-jurisdictional, water supply canal, crosses the southwest corner of the site.

The District identified three jurisdictional areas in its approved Jurisdictional Determination, which was based on the Appellant's "Wetland Delineation, 1,280 +/- Acre Crossroads Business Center, San Joaquin County, California" dated April 2001 (Delineation Report).

An intermittent stream, labeled Stream W-1 in the Delineation Report, flows from southwest to northeast across about 1,400 feet of the project site, where it is blocked and impounded by the south levee of the Delta-Mendota Canal. A separate portion of Stream W-1 continues flowing north of the north levee of the Delta-Mendota Canal for approximately another 4,000 feet to the northern boundary of the project site. Stream W-1 receives natural runoff. A culvert from the paved commercial warehouse area south of the project site connects to Stream W-1 and adds stormwater runoff to the stream. The District and the Appellant agree that Stream W-1, totaling 2.56 acres on the project site, is within Corps jurisdiction as a water of the United States.

The Delineation Report also identified two wetland areas, one northwest and one southeast of Stream W-1. The District determined that Wetland EW-1, totaling 0.16 acre, and Wetland EW-2, totaling 0.07 acre, met the criteria to be designated as wetlands under the Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, US Army Engineer Waterways Experiment Station, Vicksburg, Mississippi, 1987 (Corps

Wetland Delineation Manual). The Appellant's Request for Appeal did not list the District's determination that these areas qualified as wetlands under the Corps Wetland Delineation Manual as a reason for appeal. However, the Appellant stated at the Appeal Conference that she thought the two wetlands were supported by artificial wetland hydrology. The District's position is that these wetland areas meet the criteria of the Corps Wetland Delineation Manual and are within Corps jurisdiction as wetlands adjacent to Stream W-1. The Appellant believes that these are isolated wetlands that are outside of Corps jurisdiction.

Wetland EW-1 is located in a very shallow, drainage near the western edge of the site, immediately south of the Delta-Mendota Canal. The Delta-Mendota Canal acts as an impoundment of the waters of Wetland EW-1. On the north side of the Delta-Mendota Canal, this drainage continues approximately another 3,400 feet north to an intersection with the jurisdictional drainage of Stream W-1. Except for the disputed wetland area, the District and the Appellant agree this shallow drainage has no other jurisdictional waters upstream of its intersection with Stream W-1.

Wetland EW-1 is within a drainage easement of the Delta-Mendota Canal. A small water flow of approximately 1 - 3 cubic feet per second was flowing to Wetland EW-1 from a partially closed flap gate on Delta-Mendota Canal during the Administrative Appeal site visit. The District stated that Wetland EW-1 was considered adjacent to Stream W-1 because it was located on a nonjurisdictional tributary upstream of the intersection with the Stream W-1 drainage. The distance between Wetland EW-1 and Stream W-1, following the nonjurisdictional tributary, is approximately 3,400 feet. Wetland EW-1 is about 2,000 feet northwest of the intersection of Stream W-1 and the Delta-Mendota Canal south levee. The District stated at the Appeal Conference that the basis for adjacency was the 3,400-foot distance between Wetland EW-1 and Stream W-1 along the nonjurisdictional tributary, not the 2,000-foot distance between EW-1 and W-1 along the Delta-Mendota Canal. Wetland EW-1 is located between the 185-foot and 190-foot contour lines. The Delineation Report map shows approximately 7-foot elevation rise between Wetland EW-1 and Stream W-1 along the Delta-Mendota Canal south levee.

Wetland EW-2 is located in a very shallow drainage near the south edge of the site at Schulte Road, and immediately south of the Delta-Mendota Canal. The Delta-Mendota Canal acts as an impoundment of the waters of Wetland EW-2. Culverts divert storm water runoff from nearby roads into Wetland EW-2. The drainage containing Wetland EW-2 continues northeast on the north side of the Delta-Mendota Canal. Except for the disputed wetland area, the District and the Appellant agree this shallow drainage has no other jurisdictional waters within the project site boundaries.

This nonjurisdictional drainage does not intersect Stream W-1, but diverges from it slightly to the northeast. This nonjurisdictional drainage extends approximately a 7,000-foot distance to the northeast as it traverses the project site. Wetland EW-2 is about 1,950 feet southeast of the intersection of Stream W-1 and the Delta-Mendota Canal south levee. Wetland EW-2 is located at approximately the 185 foot to 187 foot contour mark. The Delineation Report map shows approximately 5 foot elevation rise between

Wetland EW-2 and Stream W-1 along the Delta-Mendota Canal south levee. The District considers Wetland EW-2 to be adjacent to Stream W-1 based on this 1,950 foot lateral proximity. This is a different methodology than was used to determine adjacency for Wetland EW-1. The District discussed at the Appeal Site visit that with sufficient precipitation Wetland EW-2 could form a continuous surface water connection with Stream W-1. This is not discussed in the Administrative Record. The Appellant's position was that local precipitation would never be substantial enough to produce such an occurrence.

The Appellant considers Wetland EW-1 and Wetland EW-2 to be non-jurisdictional because that the District did not identify sufficient hydrological, ecological, proximity, or interstate commerce connections to establish these wetlands were subject to Corps jurisdiction as wetlands adjacent to waters of the United States. The Corps regulation regarding jurisdiction over wetlands adjacent to jurisdictional waters is defined at 33 CFR Part 328.4 (c):

(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 Appellant cited as support for her position *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985) (*Riverside Bayview Homes*) stating that *Riverside Bayview Homes* found:

“...the Corps had jurisdiction over wetlands if the wetlands are tributary to or actually abuts navigable waters, then they are considered adjacent and subject to Corps jurisdiction.”

The Appellant further states that since there is not a hydrological connection or other significant nexus between Wetland EW-1 or Wetland EW-2, and jurisdictional waters, these wetlands should not be considered subject to Corps jurisdiction as adjacent wetlands. The Appellant also cited *SWANCC* quoting *Riverside Bayview Homes* that:

“Jurisdiction also extends to adjacent wetlands where there is a “significant nexus” between the wetlands and [the] navigable waters.”

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.

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 cited the *SWANCC* decision as support for her conclusion that isolated waters are not subject to Corps jurisdiction. I agree that the *SWANCC* decision established that some isolated waters previously regulated by the Corps are no longer regulated as waters of the United States. I also agree with the Appellant's conclusion that *Borden Ranch v. US* *U.S. App. LEXIS 18364; 2001 Cal. Daily Op. Service 7056; 2001 Daily Journal DAR 8683*, August 15, 2001, applied *SWANCC* to show that some isolated waters in California did not have a sufficient nexus to interstate commerce to be regulated as waters of the United States. However neither the *SWANCC* decision nor *Borden Ranch v. US* are relevant unless a determination is made that the wetlands at issue here are not adjacent wetlands, but rather are isolated wetlands.

The Appellant also discussed *U.S. v. Wilson* 133 F. 3d 251 (4th Cir 1997). The Army Corps of Engineers and the Environmental Protection Agency do not follow *U.S. v. Wilson* outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina). The Army Corps of Engineers and the Environmental Protection Agency, on May 29, 1998, issued a joint guidance document entitled "Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. Wilson." As explained in that document and quoted below, that May 29, 1998 guidance document directs that Corps field offices outside the Fourth Circuit not follow *U.S. v. Wilson*. That guidance document explains the reasons for this as follows:

"The three-judge panel of the Court of Appeals that decided the [Wilson] case produced three separate written opinions. In reading the decision, it is important to remember that the three-judge panel produced legally binding holdings of law regarding only three matters: (1) the "criminal intent" that a judge and/or jury must find in order to convict any person of a criminal violation of the CWA, (2) whether the provision of the Corps regulation defining CWA jurisdiction over "isolated" water bodies (i.e., 33 CFR 328.3(a)(3)) is authorized by the CWA, and (3) the admissibility of expert testimony on legal interpretations. *The United States believes that the Fourth Circuit's holdings of law on the first two issues were incorrect, and we reserve the right to litigate these issues in other circuits. The Fourth Circuit's decision in the Wilson case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina). ...The focus of this memo is the issue of CWA jurisdiction.*"

"In addition to the three binding holdings of law noted above, *two judges set out their views in conflicting, nonbinding discussions of two additional matters: (1) whether the CWA authorizes the United States to assert jurisdiction over "adjacent" wetlands even if those wetlands do not have a direct or indirect surface connection to other waters of the United States, and (2) whether the CWA authorizes the United States to assert CWA jurisdiction over the "sidecasting" of dredged material into waters of the United States during ditching or dredging activities in waters of the U.S. Because no binding decisions were reached on these matters, the Corps and EPA will continue to assert jurisdiction over*

adjacent wetlands and sidecasting activities consistent with our existing regulations and guidance. We believe that the opinion of Judge Payne, one of the judges on the panel, reflects a sound understanding of those regulations.”

The Appellant believed the presence of the Delta-Mendota canal produced artificial wetland hydrology for Wetlands EW-1 and EW-2 because it functioned as an impoundment, and, in the case of EW-1, also directly provided water to the site.

The Corps regulations regarding jurisdiction of artificial waters was discussed in *U.S. v. Leslie Salt*, 896 F.2d 354 (9th Cir1990). In regard to a discussion about artificial waters in the Preamble to the Corps 1986 regulations (51 Fed. Reg. 41206 to 41217 (1986)), *U.S. v. Leslie Salt* stated:

“These comments show that the Corps intends to exempt from its jurisdiction only those artificially created waters which are currently being used for commercial purposes, and that even those [artificial] waters are subject to such jurisdiction on a “cases-by-case” basis of review.”

“ ”...courts have uniformly included artificially created waters in the Corps’ jurisdiction under the Clean Water Act and Rivers and Harbors Act.” “

“We reject the district court’s interpretation of the regulations as creating a distinction between artificial and natural waters.”

I conclude the District had sufficient information to conclude that Wetlands EW-1 and EW-2 met the wetland criteria of the Corps Wetland Delineation Manual, despite the potential effect of the Delta-Mendota canal on the hydrology of the site.

The District, without explanation, evaluated adjacency for Wetland EW-1 and Wetland EW-2 using different methods. The District determined Wetland EW-1 was adjacent to Stream W-1 based on the wetland being approximately 3,400 feet upstream on a nonjurisdictional tributary, and on the opposite of the Delta-Mendota Canal from an intersection with the jurisdictional Stream W-1. If the same approach was used for Wetland EW-2, it would have been determined adjacent based on being across the Delta-Mendota Canal, and at least 7,000 feet upstream from an intersection of a non-jurisdictional drainage, and the jurisdictional Stream W-1. However, the District determined Wetland EW-2 was adjacent to Stream W-1 based on a lateral distance of approximately 1,950 feet. The District did not discuss other factors that might have provided further evidence of adjacency such as hydrological or ecological factors.

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 did not discuss its specific criteria for determining adjacency in detail. Also, the District did not discuss why the methods to determine adjacency for Wetland EW-1 and Wetland

EW-2 were different. In absence of any supporting documentation, this difference appears to be arbitrary.

The District must use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination that the Wetland EW-1 and Wetland EW-2 are within Corps jurisdiction as wetlands adjacent to Stream W-1.

As part of this reconsideration, the District must document and apply a consistent methodology to determine whether Wetland EW-1 and Wetland EW-2 are adjacent wetlands, or explain why an inconsistent methodology is appropriate.

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) The Appellant provided followup information to several questions asked at the Administrative Appeal Review Conference in a September 21, 2001 letter.

This submittal was classified as clarifying information, and was considered during the review of this administrative appeal.

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