

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE BIGGERS PROPERTY**

Crested Butte, Colorado

Sacramento District File Number 200275257

December 19, 2003

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

District Representatives: Sue Nall, U.S. Army Corps of Engineers, Sacramento District, Colorado/Gunnison Basin Field Office. Grand Junction, Colorado.

Appellant Representative: Kent Crofts, IME Consulting, Yampa, Colorado

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): August 1, 2003

Appeal Meeting Date: October 9, 2003 **Site Visit Date:** October 9, 2003

Background Information: The Biggers Property, is a rectangular, 0.65 acre lot (Lot D-11) in the Skyland Subdivision, a residential development with golf course located about 2 miles southeast of Crested Butte, Colorado, and approximately 1 mile northeast of the Slate River. The Appellant and the District agree regarding the extent of wetlands present on the Biggers property, but disagree as to whether those wetlands are within CWA jurisdiction. There are small wetlands areas interspersed throughout the Skyland Subdivision between the developed residential lots and the golf course. The District believes that the wetlands on the Biggers Property are tributary to the Slate River, while the Appellant believes they are isolated wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction.

Summary of Decision: I have found that portions of the District's decision on the current approved jurisdictional determination (JD) for this action are not supported by substantial evidence in the administrative record. The District should reconsider its CWA JD for this action as described in this administrative appeal decision.

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

Reason 1: The Appellant asserts the Slate River should not be considered within CWA jurisdiction since the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) (*SWANCC Decision*), has reduced the extent of waters of the United States that are to be considered within CWA jurisdiction.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Corps CWA implementing regulations at 33 CFR 328.3 (a) (2) define interstate waters as within CWA jurisdiction and at 33 CFR 328.3 (a) (5) define tributaries to interstate waters as waters within CWA jurisdiction. The District determined the Slate River was within CWA jurisdiction under 33 CFR 328.3 (a) (5) because it is a tributary to the East River, which is a tributary to the Gunnison River, which is a tributary to the Colorado River, which is an interstate water.

The District and the Appellant agree that there is an ordinary high water mark (OHWM) on the Slate River where unnamed drainages that start in the Skyland Subdivision enter the river. (Note: The jurisdictional status of those drainages and whether water actually flows from the Biggers Property to the Slate River is discussed under Reason 2).

The Environmental Protection Agency/Department of the Army Joint Memorandum of January 15, 2003 (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” – Federal Register Vol 68, pages 1995 – 1998) (Joint Memorandum) provided guidance to the Corps on implementation of the SWANCC decision.

The Joint Memorandum directed that (Fed Reg Vol 68, page 1998):

“Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).“

The Corps regulations at 33 CFR 328.4 (c) identify the limits of jurisdiction in non-tidal waters of the United States as extending to the OHWM, except when adjacent wetlands are present, in which case CWA jurisdiction extends to the limit of the adjacent wetlands.

The District’s conclusion that the Slate River is within CWA jurisdiction is clearly consistent with Corps regulations at 33 CFR 328.3 (a) (2) and (a) (5) that define a tributary to an interstate water as a water within CWA jurisdiction.

Reason 2: The District’s administrative record does not support that there was a tributary connection within CWA jurisdiction between the Biggers property and the Slate River.

FINDING: The appeal had merit

ACTION: The District must reconsider its prior evaluation that a tributary connection within CWA jurisdiction exists between the Biggers property and the Slate River including collection of new information if needed, and consideration of the factors identified in this appeal decision.

DISCUSSION: As described under Reason 1 above, the District reasonably concluded that the Slate River was within CWA jurisdiction. The District has concluded that the wetlands on the Biggers property are within CWA jurisdiction because they are tributary to the Slate River. The connections that the District identified as the route of CWA jurisdictional tributary connections to the Slate River are described below. Those connections are described from downstream (from the Slate River) to upstream (to the Biggers property).

About 1.5 miles south of the Skyland Subdivision, an unnamed channel flows into the Slate River. This unnamed channel extends north from its junction with the Slate River for a distance of approximately 1.2 miles. At that point the channel splits into two branches (called the West channel and East channel for convenience in this appeal decision). Most of the flow into the channel below the junction comes from the East channel. The West and East channels both extend north approximately another 0.3 mile to the southern boundary of the Skyland Subdivision and are connected to the Skyland Subdivision by approximately 20-inch wide culverts under Brush Creek Road. The District asserts that both channels establish tributary connections within CWA jurisdiction between the Skyland Subdivision (and the Biggers property) and the Slate River, while the Appellant asserts that neither channel establishes a tributary connection within CWA jurisdiction.

The West channel ultimately connects to the Biggers property. The District and the Appellant agree that water from the Biggers property flows down the West channel and that some water from the Biggers property eventually reaches the Slate River. The District and the Appellant disagree as to whether the West channel is within CWA jurisdiction. The disagreements are predominantly regarding different regulatory interpretations of the following physical features: (1) The lack of an OHWM in the West channel in the area extending north from the junction of the West and East channels to Brush Creek Road, (2) that a portion of the West channel north of Brush Creek Road is contained within an underground 6-inch pipe for several hundred feet where it crosses under the Skyland Subdivision golf course, and (3) that water entering the 6-inch pipe described above must first flow by sheet flow across approximately 30 feet of grass golf course fairway where no OHWM is present, and (4) that upstream of the approximately 30 foot area of sheet flow on the golf course, another vegetated channel continues upstream to the Biggers property.

The District asserts that periodically a surface water connection extends between the wetlands and channels on the Biggers property and the Slate River. The Appellant does not dispute that such a connection occasionally occurs during peak flows, such as during the snowmelt. However the Appellant asserts that the evidence of a periodic surface

water connection is insufficient to establish a tributary connection within CWA jurisdiction.

The Corps regulations at 33 CFR 328.4 (c) identify the limits of jurisdiction in non-tidal waters of the United States as extending to the OHWM, except when adjacent wetlands are present, in which case it extends to the limit of the adjacent wetlands. The Joint Memorandum includes an evaluation of CWA jurisdictional issues including court decisions based on CWA Section 402 and Section 404 and states that (Fed Reg Vol 68, page 1997):

“A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4 (c) (1).”

Since the Joint Memorandum does not explicitly require a continuous OHWM in all cases, (and the Environmental Protection Agency’s definition of waters within CWA jurisdiction at 40 CFR 232.2 does not include any discussion of the presence or absence of an OHWM at all), it appears possible that the District could reasonably conclude in some cases that a tributary connection establishing CWA jurisdiction could exist without a continuous OHWM.

The Corps regulation regarding the use of an OHWM to establish CWA jurisdictional limits has not been rescinded. Therefore, the District should have specifically explained its basis for determining that a continuous tributary connection within CWA jurisdiction existed between the Biggers Property and the Slate River when it appears that there is no evidence of an OHWM for an area of approximately 0.3 mile on the West channel (extending north from its junction with the East channel to Brush Creek Road). The District should also have specifically explained its basis for determining that a continuous tributary connection within CWA jurisdiction existed between the Biggers Property and the Slate River in the area where the water from the Biggers property crosses the golf course fairway by sheet flow (no OHWM present) to enter the 6-inch drain pipe under the golf course fairway. However, these deficiencies would be harmless if the District had documented another basis of CWA jurisdiction.

The District stated that the East channel also served as a tributary within CWA jurisdiction connecting the wetlands on the Biggers property to the Slate River during certain flow levels. From its junction with the West channel, the East channel extends north approximately 0.3 mile to Brush Creek Road. North of Brush Creek Road, the East channel extends north to a pond (referred to for convenience in this appeal decision as the Fairway 2 Pond). A channel extends north from the Fairway 2 Pond to Decker Spring.

The administrative record identifies that Decker Spring produces approximately 86,000 – 700,000 gallons of water per day, much of which is intercepted for local water service to area residents. The District asserts that there is a continuous channel within CWA jurisdiction extending from Decker Spring, to the Fairway 2 Pond, and down the East

channel to the Slate River. The East channel and the Fairway 2 Pond are shown in an attachment to the District's Memo to File dated June 2, 2003 (page 45 of the administrative record). The Appellant asserts that any such connection is not within CWA jurisdiction because (1) the Fairway 2 Pond is an artificial ornamental pond exempt from CWA jurisdiction, (2) the water the District claims is from Decker Spring is actually the discharge from a local water treatment plant, and therefore is outside of CWA jurisdiction (Note: this information was considered new information and not considered further as part of this administrative appeal), and (3) even if the East channel was within CWA jurisdiction, due to topographic restrictions, the West channel cannot flow into the East channel at Brush Creek Road to form a tributary connection within CWA jurisdiction.

The District asserts that under high water conditions that some water from the West channel could flow into the East channel at Brush Creek Road. The District stated this could occur during high flow events when the West channel culvert at Brush Creek Road cannot convey all the water it receives from the West channel. Under such circumstances the District stated that the West channel would pond water upstream of the culvert, and such water would eventually back up and overflow into the East channel. The Appellant disputes this, noting that the Fairway 2 Pond and the East channel are several feet higher in elevation than the West channel. The Appellant asserts if water did begin to pond above the culvert in the West channel, it would simply flow south across Brush Creek Road well before it could pond to a sufficient depth to flow into the East channel.

I conclude the District insufficiently documented that there was a tributary connection between the Biggers property and the Slate River. The District should reconsider its determination regarding whether or not there is a tributary connection within CWA jurisdiction between the Biggers property and the Slate River including, but not limited to, consideration of the following: (a) does a continuous or discontinuous OHWM exist between the West channel exiting the Biggers property and the Slate River, (b) if a discontinuous OHWM exists between the Biggers property and the Slate River, explain why the District considered that sufficient evidence that a tributary within CWA jurisdiction was present, (c) If no OHWM is present, but the District still believes there is a tributary connection within CWA jurisdiction between the Biggers property and the Slate River, explain the basis for that conclusion, (d) consider the guidance in the January 15, 2003 Joint Memorandum regarding the *SWANCC* Decision, other federal court decisions concerning CWA jurisdiction, such as *United States v. Riverside Bayview* (U.S. 121, 106 S. Ct. 455) 1985, as well as federal court decisions on the subject issued after publication of the Joint Memorandum including, but not limited to *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) and the recent reversal of the federal district court decision by the Federal Appellate Court for the 6th Circuit in *United States v. Rapanos* 339 F.3d 447 (6th Cir. 2003), and (e) consider whether the wetlands on the Biggers property should be considered adjacent wetlands within CWA jurisdiction as part of a complex or continuum with other wetlands in the Skyland Subdivision. (Note: The administrative record for this action on pages 49 and 50 identified wetlands on several parcels within the Skyland Subdivision as part of a nationwide permit authorization issued on December 13, 1993).

If the District concludes that such a tributary connection to the Fairway 2 Pond exists that establishes CWA jurisdiction over the Biggers property, the District should address items (a) through (d) above for that tributary connection), and also consider whether the Fairway 2 Pond should be exempt from CWA jurisdiction as an artificial ornamental feature, or is appropriate to consider within CWA jurisdiction as an artificial or modified natural feature.

As part of the remand of this action, the District should consider any additional or new information the Appellant may provide on these subjects. District consideration of additional information from the Appellant as part of a remand of an approved JD by the South Pacific Division does not establish any additional administrative appeal rights for the Appellant.

If upon reconsideration the District concludes that the wetlands on the Biggers property should actually be classified as isolated wetlands, the District should review their CWA jurisdictional status in accordance with the procedures described for isolated waters in the Joint Memorandum.

Reason 3: The District's approved JD is arbitrary and capricious because it is inconsistent with past District jurisdictional decisions in the area that found that this property and similar areas were isolated waters or wetlands that were outside of CWA jurisdiction.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant's consultant has worked extensively on CWA Section 404 permitting and jurisdictional issues in Colorado. Based on his past experience and information gathered from the Corps of Engineers computer database of permitting actions by Freedom of Information Act requests, the Appellant's consultant determined that the District has previously identified that properties similar to the Biggers property in the Skyland Subdivision had previously been determined to contain isolated wetlands. The Appellant identified five Sacramento District files - numbers 199375279, 199575345, 199775205, 199975364, and 200275257 - as providing evidence that the District had previously identified isolated wetlands in the area and that the wetlands on the Biggers property should be considered isolated wetlands outside of CWA jurisdiction. The District's June 7, 2002 letter explained that it had reviewed the files identified by the Appellant and considered the wetlands on the Biggers property to be within CWA jurisdiction as the wetlands on the property were tributary to the Slate River. The District also acknowledged in its June 7, 2002 letter that prior to the SWANCC decision that it had used the term "isolated wetlands" inconsistent with the regulatory definition of that term.

The Review Officer reviewed the five files identified by the Appellant, and two additional files the Sacramento District identified as concerning similar actions in the area – Sacramento District file numbers 200075393 and 200275429. The Review Officer found that most physical conditions regarding the Biggers property are not in dispute, and the disagreements in this appeal are regarding the proper consideration of regulations, guidance, and federal court decisions regarding the CWA. None of these files provided specific information that could be used evaluate the reasonableness of the District’s interpretation of CWA guidance. The Appellant’s assertion that the files could be appropriately used to establish a CWA jurisdictional status of the wetlands on the Biggers property was unfounded.

In any case, even if the other properties in the vicinity of the Biggers property had previously been determined to contain isolated wetlands, it would be appropriate to use the most current information to determine whether the Biggers property was within CWA jurisdiction.

Reason 4: The Appellant asserted the District’s basis of jurisdiction determination did not meet the requirements of 33 CFR 331.2.

FINDING: This reason for appeal had merit

ACTION: The District will issue a revised statement of its basis for jurisdiction for the Biggers property after a reconsideration of the prior approved JD if it concludes that CWA jurisdiction exists on the property.

DISCUSSION: The Appellant asserts that the District’s basis of jurisdiction statement in the approved JD was flawed because it did not address all the factors identified in the Corps Regulatory Program regulations at 33 CFR 331.2 as possibly supporting an approved JD. I concluded in Reason 2 above that the District had insufficient documentation to reach some of its conclusions. The District did not provide details regarding its basis of jurisdiction for those items. The Appellant is correct that the prior approved JD provided an insufficient CWA basis of jurisdiction statement.

If upon reconsideration of this action, the District still concludes that all or part of the Biggers property is within CWA jurisdiction, the District is directed to expand its basis of CWA jurisdiction statement to include, as applicable, the indicators of a tributary connection and/or indicators of adjacency that establish CWA jurisdiction for the property.

The Corps regulations do not require that a District address every basis of jurisdiction in every approved JD. However, the intent in providing that material to an affected party requesting an approved JD is clearly for the District to summarize the supporting documentation regarding its decision. Since the District and the Appellant previously agreed during the administrative appeal on the extent of wetland areas on the Biggers property that met Corps 1987 Manual definition of wetland areas, if the District reissues a

revised approved JD, the discussion of the indicators that wetlands were present need only briefly restate the reasons the District concluded wetlands were present.

Reason 5: The District's approved JD was flawed because it did not respond to the Appellant's requests for guidance regarding the criteria applicable to the Corps regulatory definitions of tributaries, adjacent waters, or isolated waters.

FINDING: This reason for appeal did not have merit

ACTION: None required

DISCUSSION: The extent to which the District provided guidance to the Appellant regarding CWA requirements is not germane to the question of whether or not the District's conclusions regarding this approved JD were reasonable.

Information Received and its Disposition During the Appeal Review: The Appellant stated that he considered some of the District's information in the administrative record to be new information, because he had not seen it previously. The Review Officer found that the District did not submit new information as part of the administrative record, and that the materials the Appellant had not previously seen had been prepared for the District's internal documentation before the District issued its CWA JD. In addition to the Appellant's request for appeal and the administrative record of this action, the following materials were received during evaluation of this administrative appeal.

- 1) By e-mail of September 29, 2003, the District provided responses to the appeal meeting agenda draft questions provided to the District and the Appellant on September 18, 2003 by the Review Officer. This material was provided to the Appellant and considered during evaluation of the administrative appeal.
- 2) By e-mail of October 1, 2003, the Appellant's consultant provided responses to the appeal meeting agenda draft questions provided to the District and the Appellant on September 18, 2003 by the Review Officer. This material was provided to the District and considered during evaluation of the administrative appeal.
- 3) At the October 9, 2003 appeal meeting and site visit, the District submitted a Memorandum for Division and District Counsel dated March 15, 2002 from Martin R. Cohen, Assistant Chief Counsel for Litigation with the subject *Recent Northern District of Illinois Federal Decision Reviews Significant Post-SWANCC Case Law and Holds that "Water Need Not Flow In An Unbroken Line at All Times to Constitute a Sufficient Connection to Navigable Waters. (United States of America v. Lamplight Equestrian Center, Inc., No. 00 C6486 (N.D. Ill.)(Rebecca R. Pallmeyer, J.) March 8, 2002).* This material was provided to the Appellant. The more recent January 15,

2003 Joint Memorandum addresses the issues discussed in this memo, so this memo was not considered.

- 4) At the October 9, 2003 appeal meeting and site visit the District also submitted the United States Court of Appeals, Fourth Circuit's, decision in *Treacy and United States of America v. Newdunn*, 4th Cir (No. 02-1480) decided September 10, 2003, as well as several e-mails describing the recent *Treacy and United States of America v. Newdunn* decision, the *United States of America v. Deaton*, 4th Cir (No. 02-1442) federal court decision of June 12, 2003, another 4th Circuit decision in North Carolina that was not specified, and information on possible future rulemaking regarding the CWA. A copy of these materials was provided to the Appellant at the appeal meeting. These materials were determined to be clarifying information and considered in reaching the appeal decision for this action.
- 5) On October 20 2003 the Appellant submitted an e-mail regarding the additional material provided by the District at the Appeal meeting on October 9, 2003. The Appellant submitted responses to the District's October 9, 2003 submittal and additional material the Appellant considered clarifying information. This material was determined to be clarifying information with one exception, and was considered in reaching the appeal decision for this action. The exception was the Appellant's statement that the waters from Decker Spring are waste waters from an inefficient water treatment system currently being operated by the East River Water and Sanitation District. That information is considered new information and is not considered as part of this appeal decision in accordance with 33 CFR 331.7 (e)(6), which precludes the consideration of new information during an administrative appeal. However, I direct that this information regarding the waters from Decker Spring should be considered by the District during its reconsideration of this action.

Conclusion: I have found that portions of the District's decision on the current approved JD for this action are not supported by substantial evidence in the administrative record. The District should reconsider its CWA JD for this action as described in this administrative appeal decision. Should the District identify substantial evidence that CWA jurisdiction is present on all or part of the property, the District should issue a more thoroughly documented approved JD explaining that conclusion. Alternatively, the District should issue a revised approved JD explaining that no area of the property is within CWA jurisdiction.

original signed by Leonardo Flor, Colonel, EN for

Joseph Schroedel
Colonel (P) U.S. Army
Commanding