

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

CT WATERMAN PARK, LLC

FILE NUMBER 200500525

SACRAMENTO DISTRICT

DATE: October 30, 2007

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

Appellant Representatives: John Ferguson, Appellant, CT Waterman Park, LLC
John Valentine, Appellant, CT Reality
Diane Kindermann, Attorney, CT Waterman Park, LLC
Chuck Hughes, Consultant, Sycamore Environmental Consultants
Jeffery Little, Consultant, Sycamore Environmental Consultants
Trang Nguyen, CT Realty

Request for Appeal (RFA): January 24, 2007

Appeal Accepted: March 22, 2007

Appeal Conference/Site Visit: October 10, 2007

Summary of Decision: I find this appeal has merit. I find that the District did not properly evaluate or document their approved January 24, 2007, jurisdictional determination.

Background Information: The Appellants' property (Mosher Road) is located in the Sacramento Valley of California, within the City Limits of Elk Grove. The 76-acre property is triangular-shaped and bordered by Grant Line Road, Waterman Road, and Mosher Road. The property is dominated by annual and perennial grassland habitat with level topography. Upland soil series with hydric inclusions exist on the project site.

On December 2, 2004, the Appellants retained H.T. Harvey and Associates to conduct a wetland determination of the proposed site. The consultant (Patrick Boursier) determined the property contained regulated wetlands of the US. However, flood irrigation that ceased in 2003, supplied artificial hydrology for the wetlands [Record, page 0001]. The Consultant determined that the removal of the irrigation would cause the site to revert to uplands in time. [Record, page 0004] The Consultant also decided to conduct well monitoring to assist in the wetland determination and concluded the site

was not jurisdictional. The District received a request to concur with the consultants findings and responded by electronic mail dated January 3, 2005, stating that previously farmed wetlands are common in the area and requested a full delineation report to accurately determine if wetlands existed on the site.

H.T. Harvey and Associates conducted and supplied a wetland delineation report to the District on April 15, 2006. The report concluded that 0.25 acres of regulated wetlands existed on the 76 acre surveyed area. [Record, page 00040]

The District conducted an on-site investigation on May 31, 2006, and determined that areas designated on the consultant's map as 5, 6, 10, 11 and 12 were jurisdictional.

The District responded to the delineation report with a sent an electronic message to the Consultant asking for accurate mapping of the wetland delineation and total acreage. The District also wanted a statement declaring data sample points 5, 6, 10, 11, and 12, to be wetland areas that met the three criteria for inclusion in the wetland total. These areas are in addition to the 0.25 acres. The District required "paired upland data points and supporting data sheets to demonstrate how these boundaries were determined". [Record, page 000147] The message also correctly stated that the hydrologic monitoring protocol was flawed.

By letter dated December 12, 2006, the Appellants presented the additional mapped wetland sites to the District (5, 6, 10, 11, and 12.) However, the letter stated that none of the additional wetlands areas exhibit the necessary field characteristics of hydric soils, wetland hydrology, and hydrophytic vegetation. The Consultant requested the District consider these wetland areas isolated. [Record, page 000153] The District accepted the wetland determination on January 24, 2007, stating the submitted drawing of December 7, 2006, constitute the accepted wetland delineation of the site.

The Appellants decided to seek further peer review and retained another consultant, Sycamore Environmental Consultants, Inc., who determined the site contained no jurisdictional waters of the US. The Appellants also retained the law firm of Abbott & Kindermann LLP, to appeal the jurisdictional determination (JD) to the South Pacific Division Commander. The Division Commander accepted the appeal on May 18, 2007, and assigned the appeal to Appeal Review Officer Michael Bell of the South Atlantic Division.

One reason for appeal concerned the scope of the Clean Water Act jurisdiction over wetlands. The RFA stated that certain wetlands on the property might be 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 Sacramento District did not have guidance on how to implement the Supreme Court decision at the time of the Request for Appeal. The District received *Rapanos* guidance on June 5, 2007. Since this appeal arrived during the period between the Supreme

Court decision and the guidance issued by headquarters, the Appellant had a choice to use either the new June 5, 2007, guidance or the determination methods at the time of the appeal.

The RO spoke with Jeff Little of Sycamore Environmental on August 15, 2007, and presented the above options to him. The Appellants chose to use the jurisdictional determination procedures and guidance at the time of the JD determination. Therefore, a determination using the Guidance from the *Rapanos* Supreme Court Decision will not be part of this document. Mr. Little confirmed this commitment by electronic mail dated September 17, 2007.

Site Visit: On October 10, 2007, the RO conducted an on-site investigation with the appeal conference participants listed below to discuss the permit area and surrounding environment. During the site visit, the RO found that the subject area appeared to be “dry” farmland that had been leveled and disced. The site did not appear to be the saturated site that was shown in the Appellants’ March 30, 1995, *Mosher Road Property Identification of Waters of the US*. The attendees explained to the RO that vernal pools were dry during the fall and that discing was not a violation of the Clean Water Act. A mosaic of annual and perennial grassland dominates the level topography. An irrigation ditch extends from Waterman Road to Grant Line Road, splitting the property.

The RO concluded the field investigation and the attendees adjourned to the US Natural Resource Conservation Service office in Elk Grove, California, for the appeal conference.

Appeal Conference Participants: Michael Bell
John Valentine and John Ferguson, Appellants
Mike Finan, Lisa Clay and Paul Maniccia,
Sacramento District,
Diane Kindermann, Chuck Hughes, Jeffery Little
and Trang Nguyen, Appellant Representatives
Jeannette Owen with the City of Elk Grove

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE)

*** The Appeal Reasons below are transferred verbatim from the RFA**

Appeal Reason I: The District’s determination of “wetlands” and “tributaries” was based on an analysis that is not consistent with the Corps’ regulations and policies for the characterization of “wetlands and “tributaries” of waters of the US.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: The Appellants spent a great deal of time discussing the terms “tributary” and “adjacency” during the appeal conference and in the RFA. The RFA states:

Section 404 CWA jurisdiction can be exerted over wetlands under 33 CFR part 328.3(a)(7) where wetlands are “adjacent” to other waters of the U.S. Wetlands may additionally be defined as waters of the U.S. under 33 CFR part 328.3(a)(3). Wetlands are not defined as “tributary” to other waters of the U.S. under 33 CFR part 328.3(a)(7) or 33 CFR part 328.(a)(5).

In addition, a subsection of 33 CFR part 328.3(a)(7) states that “those wetlands adjacent to other wetlands” are not adjacent.

The basic premise the Appellants desired to prove during the appeal process was that the wetlands were not jurisdictional by definition. The District used the term “**wetland drainage**” in describing the aquatic link between the seasonal wetlands on the site and the Sacramento River, a navigable water of the US. The District also used the term “**tributary system**” in describing the aquatic link between the project site and a navigable water. [emphasis added] This language is from the District’s May 31, 2006, *Basis for Jurisdiction*, contained in the JD. [Record, page 000166]

The *Basis for Jurisdiction* states:

The wetland consultant for this project has provided a wetland delineation map for this site that includes eight (8) seasonal wetland features and a **wetland drainage** surrounding the property. The wetlands on site appear to meet the three-parameter test and according to the consultant’s drainage map dated June 6, 2006, flow into **wetland drainage** which flow into two (2) off-site stormwater detention basins (See January 16, 2007, Memorandum for Record). The water flows on the southern portion of this property drain into the detention basin located on the Weyerhaeuser site drains into Deer Creek, the Cosumnes River and finally drains into the Sacramento River. The water flows on the northern portion of the property drain into the Hudson detention basin located north of the property. The Hudson detention basin discharges water flows into Elk Grove Creek, which flows into Stone Lakes and into the Sacramento River. The site was used as a dairy farm since 1939 and prior to that, it was used as a vineyard and orchard. The wetland consultant determined the waters on this site are isolated because they drain into (2) detention basins and he determined those basins do not drain into other waters. This conclusion is not correct because the detention basins are part of a **tributary system** that drains into the Sacramento River. [emphasis added]

The District clearly used the terms wetland drainage and tributary system to describe the aquatic connection between the seasonal wetlands and the Sacramento River. The use of these terms describes the function of the drainage system. The District closely followed the March 30, 1988 guidance issued by Corps Headquarters regarding adjacent wetlands. That guidance states “...proximity by itself is not sufficient to

determine that a wetland is adjacent to a waterway.” It also stated, “There should also be some hydrological relationship between the waterway and the wetland.” In addition to discussing proximity, the guidance also discussed the use of historic hydrological connections to determine adjacency. The guidance states that historic connections should not be used unless the connection was eliminated by an unauthorized activity, or the intervening area is a berm, dike, or other narrow landscape feature suggested by the definition for adjacent. No mention is made of how to designate the wetland connections where wetland swales or tributaries are involved.

Appeal Reason 2: The District claimed CWA jurisdiction inconsistent with the procedures outlined in the 1987 “Corps of Engineers Wetlands Delineation Manual” Technical Report Y-87-1 (1987 Manual).

FINDINGS: This reason for appeal has merit

ACTION: The information contained in the administrative record provided by the District does not support the District’s approved Jurisdictional Determination. However, if wetlands exist on the site, they are connected to a navigable water of the US. This matter is returned to the Sacramento District to supplement and/or reconsider the decision.

Discussion: The Appellants stated in the RFA and at the appeal conference that the District used inconsistent procedures from the *1987 Corps of Engineers Wetlands Delineation Manual* (Manual) to determine that the subject property contained regulated wetlands. The District did not evaluate the property using the three parameter “typical” approach, and did not provide evidence that hydric soils and wetland hydrology existed in the vernal pool wetlands. The site was a dry farmed field during the site investigation; therefore, the administrative record was used to determine if the site contained wetland characteristics.

The Districts *Basis for Jurisdiction* states:

The wetland consultant for this project has provided a wetland delineation map for this site that includes eight (8) seasonal wetland features and a wetland drainage surrounding the property. The wetlands on site appear to meet the **three-parameter test** and according to the consultant’s drainage map dated June 6, 2006, flow into wetland drainage which flow into two (2) off-site stormwater detention basins.... [emphasis added]

The Appellants initial consultant provided a wetland determination dated April 15, 2006. Routine Wetland Determination Data Forms accompanied the report with a wetland delineation map. The District visited the site and made notes on the data sheets and vague notations on the consultant’s delineation map. [Record, page 000134]. By electronic mail dated November 6, 2006, the District determined that data points 5, 6, 10, 11, and 12, met criteria to be considered waters of the US. The Appellants were

directed to provide shared upland and wetland data points and provide supporting data sheets to demonstrate how these revised boundaries were determined.

The Appellants sent the District a letter and map dated December 12, 2006, with the extra wetland areas delineated on the map. No new data sheets were attached to the letter as required by the District. The Appellants also disagreed with the new delineation. The District accepted this delineation as the approved wetland JD.

The District provided guidance on wetland delineations on October 1, 2003, that states:

If a wetland delineation does not comply with either the Minimum Standards or the Corps manual, the applicant or agent will be notified by the District of any shortcomings in a timely manner. It is then incumbent on the applicant or agent to revise the delineation and resubmit it to the District for verification.

In addition, RGL 90-06¹ states:

When making wetlands jurisdictional delineations it is very important to have complete and accurate documentation which substantiates the Corps decision (e.g., data sheets, etc). **Documentation must allow a reasonably accurate replication of the delineation at a future date.** In this regard, documentation will normally include information such as **data sheets**, maps, sketches, and in some cases surveys. [emphasis added]

Since the District did not receive the required information and could not replicate the delineation in question with the information provided by the Appellants or with the current information in the administrative record; this reason for appeal has merit. No new data sheets exist in the administrative record.

Appeal Reason 3: The District made a JD over an irrigated pasture, a man-made environment with manipulated hydrology. The conclusion was inconsistent with the procedures identified in the District's "Irrigated" Wetlands Policy (Army Corps of Engineers, Regulatory Branch Memorandum 2003-29004 No. CESPCK-CO-R (1145), October 1, 2003).

FINDINGS: This reason for appeal has merit

ACTION: The information contained in the administrative record provided by the District does not support the approved Jurisdictional Determination. This matter is returned to the Sacramento District to supplement and/or reconsider the decision.

Discussion: The RFA states that the District used the presence of hydrophytic vegetation as evidence that hydrology persisted on the Property. Long-term irrigation practices can maintain hydrophytic vegetation solely as a result of irrigation. The District's local policy for "Irrigated" wetlands policy recommends that irrigation cease for

¹ This RGL is officially expired, but still offers useful guidance under these circumstances.

two or more growing seasons to evaluate whether irrigation is sustaining wetland vegetation.

The District's March 13, 2007, *Irrigated Wetland* policy applies to jurisdictional determinations within the Sacramento District for wetlands in areas that are irrigated through artificial sources of water. The policy further states:

To determine whether an artificially irrigated wetland is jurisdictional (i.e., a "water of the U.S.") and therefore subject to regulation under the CWA, the Corps must first determine whether the irrigated wetland meets the criteria contained in the *1987 Corps of Engineers Wetland Delineation Manual*....

As stated in Appeal Reason 3, since the Appellants did not provide the requested data sheets to the District, a wetland determination could not be finalized. Therefore, this reason for appeal has merit.

Appeal Reason 4: The District incorrectly considered a plant not on the 1988 Wetland Plant list as facultative (FAC).

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: The RFA states that the District changed the wetland indicator status of *Lolium multiflorum* on two data sheets from "non-indicator" to "facultative." The District historically considered *L. multiflorum* as facultative. The Appellants stated in the appeal conference that the use of the facultative designation for *L. multiflorum* is inconsistent with the 1987 Manual Part III Hydrophytic Vegetation, Paragraph 35.a., Note and the On-Line Edition, "User Notes."

District representatives addressed this issue at the appeal conference. The District described the process of how plants and associated indicator status were included in May 1988 plant list. The plant list used a ryegrass species as representative of several types of ryegrass. The indicator status of those species is facultative.

The Districts' decision to change the wetland indicator status of *L. multiflorum* from "non-indicator" to "facultative" appears to be consistent and not arbitrary.

Appeal Reason 5: The District claimed that "wetlands" were jurisdictional because they were adjacent to waters of the US, but based jurisdiction on the "wetlands" having a tributary connection to waters of the US.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed for Appeal Reason 1 addressed the topic of tributaries and adjacency.

Appeal Reason 6: The District did not correctly evaluate how “wetlands” on the property, which are more remote from navigable waters, have a significant nexus to navigable waters of the US.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: The Appellants’ RFA states that a hydrologic connection does not exist between the seasonal wetlands and a navigable water of the US. The water from the seasonal wetlands does not flow to the drainage features then to a navigable water. During the on-site investigation, the site was “dry farmed” and the wetlands were not present. However, according to the appeal site participants and the administrative record, soils on the site with hydric inclusions fill with water in the spring then discharge into the ditches during periods of high flow. Saturated conditions were observed by the Appellants initial consultant and by the Corps Project Manager, William Ness. Unfortunately, neither party attended the site visit or appeal conference.

As discussed in Appeal Reason 5, Corps Headquarters guidance states “...proximity by itself is not sufficient to determine that a wetland is adjacent to a waterway.” It also stated, “There should also be some hydrological relationship between the waterway and the wetland.” In addition to discussing proximity, the guidance also discussed the use of historic hydrological connections to determine adjacency. The guidance states that historic connections should not be used unless the connection was eliminated by an unauthorized activity, or the intervening area is a berm, dike, or other narrow landscape feature suggested by the definition for adjacent.

The Appellants also discuss whether remote seasonal wetlands 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 Appellants 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 CWA to regulate isolated waters. Specifically, the Supreme Court struck down the use of the “Migratory Bird Rule”² to assert CWA jurisdiction over isolated, non-

² 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.

navigable, interstate 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 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.

Nothing in the May 31, 2006, approved Jurisdictional Determination suggests that the scientific methods or data used to determine the connection between the seasonal wetlands and a navigable water of the US was in error.

The administrative record, the *Basis of Determination*, and the observations made during the site visit support the District’s determination that the seasonal wetlands are adjacent to a navigable water of the US. The only question remains is the total acreage of the seasonal wetlands.

Appeal Reason 7: The District did not explain how a potential tributary connection constitutes presence of a significant nexus to navigable waters of the U.S.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed for Appeal Reasons 5 and 6 addressed the topic of adjacency.

CONCLUSION: As my final decision on the merits of the appeal, I conclude the information contained in the administrative record provided by the Sacramento District does not support the District's approved Jurisdictional Determination. I hereby return this matter to the Sacramento District to supplement and/or reconsider the decision.

Original Signed

John R. McMahon
Brigadier General, US Army
Commanding