

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT APPROVED JURISDICTIONAL DETERMINATION
SWENSON PROPERTY
SPANISH FORK, UTAH
SACRAMENTO DISTRICT APPROVED JURISDICTIONAL
DETERMINATION #200550291**

13 April 2006

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

Appellant: Lyle Swenson

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

Receipt of Request For Appeal: October 6, 2005

Appeal Meeting and Site Visit Date: December 14, 2005

Summary of Decision: I found the administrative record for this action does not sufficiently document the U.S. Army Corps of Engineers, Sacramento District's (District) determination that the wetlands on the Swenson property are adjacent to Utah Lake. The District must conduct additional evaluations to either further document or modify this determination as identified in this administrative appeal decision.

Background Information: The approximately 10 acre Swenson property is located at 2290 North 200 East, Spanish Fork, Utah. The Corps identified 4.24 acres of waters within Clean Water Act jurisdiction on this property. The Appellant and the District agree on the boundaries of the wetland areas on the property, which were defined in accordance with the Corps 1987 Wetland Delineation Manual (WDM). The Appellant and the District also agree that surface waters are contained within the property boundaries and that there are no tributary connections within CWA jurisdiction that extend from Utah Lake, or any other area within CWA jurisdiction, onto this property. The District's position is that the wetlands on this property are adjacent wetlands within CWA jurisdiction, and specifically that these wetlands are part of a large complex of wetlands that is adjacent to Utah Lake.

The Appellant disagreed with the District's position and appealed. The Appellant's position is that the wetlands on this property are not adjacent wetlands. The Appellant's position is that the wetland areas on this property are isolated wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction.

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

Reason 1: The wetlands on the Swenson property should be considered isolated wetlands that are outside of CWA jurisdiction, not adjacent wetlands within CWA jurisdiction.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider and further document or modify its jurisdictional determination that the wetlands on the Swenson property are within CWA jurisdiction as adjacent wetlands as described in more detail at the end of the discussion section below.

DISCUSSION: The Appellant followed the methods used in the Corps 1987 WDM to delineate approximately 4.24 acres of wetlands on the 10 acre property. The District agreed with the Appellant's determination of the extent of wetlands on the property. The District and the Appellant disagreed regarding the sources of wetland hydrology for the property, and whether there was sufficient evidence to establish that the wetlands on the property were within Clean Water Act (CWA) jurisdiction as adjacent wetlands.

By a September 9, 2005 jurisdictional determination letter, CWA jurisdictional determination basis of jurisdiction form and supporting documentation, the District determined that the wetlands on the Appellant's property were jurisdictional because they were part of a complex of wetlands adjacent to Utah Lake. The District's Memo to File dated September 9, 2005 further documenting its findings states that:

“Wetland complex boundaries were determined based on National Wetland Inventory Maps. Mapping indicates an obvious linear wetland complex feature to the north of Spanish Fork City and to the SW of Utah Lake. Lyle Swenson's property, and the wetlands delineated within his property, lie within the wetland continuum.”

The Corps regulations at 33 CFR 328.4 (c) (2) establishes the limits of CWA jurisdiction in non-tidal waters with adjacent wetlands as:

“(c) (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.”

The Corps regulations at 33 CFR 328.3 (c) defines adjacent wetlands 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”.”

The wetland 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.*”
[italics added for emphasis]

The Corps has not established a national standard regarding a maximum distance limit for reasonable proximity between adjacent wetlands and the waters to which they are adjacent. This is discussed in the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Fed Reg Page 59113 (1991), which states that:

“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.”

and that:

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

The District and the Appellant agreed that the wetlands on the property did not have a surface water connection to Utah Lake. Since this was the case, in order to support a determination that the wetlands on the Swenson property were within CWA jurisdiction, the District needed to reasonably document in the administrative record a basis for concluding that the wetlands were within CWA jurisdiction, such as being part of a continuum of wetlands within reasonable proximity of an area with CWA jurisdiction. The District’s existing administrative record does not sufficiently document that conclusion.

The National Wetland Inventory (NWI) map included with the administrative record shows a number of wetland areas identified as wetlands on the U.S. Fish and Wildlife Service, NWI maps interspersed with upland areas between the Swenson property and Utah Lake. The WDM and the NWI use different definitions to identify wetland areas. The WDM defines a wetland more narrowly than the NWI.

The WDM, page 3, on-line edition describes the relationship between the WDM’s methodology to identifying and delineating wetlands, and the methodology used for the NWI as follows:

“Consideration should be given to the relationship between the technical guideline for wetlands [Corps WDM] and the classification system developed for the Fish

and Wildlife Service (FWS), U.S. Department of the Interior, by Cowardin et al. (1979). The FWS classification system was developed as a basis for identifying, classifying, and mapping wetlands, other special aquatic sites, and deepwater aquatic habitats. Using this classification system, the National Wetland Inventory (NWI) is mapping the wetlands, other special aquatic sites, and deepwater aquatic habitats of the United States...The technical guideline for wetlands as presented in the [WDM] manual includes most, but not all, wetlands identified in the FWS system.”

The relevant difference between the Corps WDM and the FWS system used in NWI mapping in this instance is described on WDM page 3:

“The FWS system requires that a positive indicator of wetlands be present for any one of the three parameters, while the technical guideline for wetlands [WDM] requires that a positive wetland indicator be present for each parameter (vegetation, soils, and hydrology), except in limited instances identified in the manual.”

Most NWI maps were developed in the 1980’s through interpretation of aerial photography to produce the maps. Since the NWI maps were developed using a different and broader criteria for the definition of a wetland than is used by the Corps in the WDM, the wetlands shown on the NWI maps may not be considered to necessarily represent the extent of wetlands that would be identified using the Corps WDM, unless additional documentation is provided to support this conclusion. In addition, not all wetland areas shown on NWI maps that do meet the Corps WDM requirements to be classified as wetlands are necessarily within CWA jurisdiction. Only those wetlands that are adjacent to waters determined to be within CWA jurisdiction are within CWA jurisdiction.

The District determined the boundary of the complex of wetlands adjacent to Utah Lake in the vicinity of the Appellant’s project by plotting the outer boundary of wetlands in the general vicinity of Utah Lake on the NWI map, and considering all wetlands between the boundary line and Utah Lake as being part of a complex of wetlands within CWA jurisdiction. As plotted, this wetland complex boundary included wetlands contiguous and bordering Utah Lake, as well as wetlands located as far as approximately 3.5 miles from the lake. The District’s administrative record does not sufficiently document that the wetlands identified on the NWI maps are areas that meet the Corps definition of wetlands in the WDM, or that such areas are within CWA jurisdiction as part of a complex of wetlands adjacent to Utah Lake. The District concluded that its determination that the Swenson property was within CWA jurisdiction was supported by hydrology information. The Appellant and the District confirmed at the administrative appeal meeting that they agree there is no evidence of a surface water connection by which water leaves the Appellant’s property and eventually flows into Utah Lake. The Appellant and the District disagree regarding some sources of wetland hydrology for the property.

The Appellant concluded that the sources of wetland hydrology for the wetlands on the property were direct precipitation, surface flow from the surrounding uplands, surface discharge of groundwater at the base of the Interstate 15 overpass on the east side of the property, discharge from a buried spring, and irrigation return flow.

The District agreed that the sources of hydrology described by the Appellant were among the sources of hydrology that were present on the property. The District also stated that it believed high groundwater associated with Utah Lake – located approximately 2.5 miles away, groundwater from precipitation onto the site, and groundwater fed by precipitation in the mountains east of the property also provided some of the hydrology for the project. However, the District stated that it did not have conclusive information about whether fluctuating high groundwater associated with Utah Lake was contributing to the presence of wetland hydrology on the property.

The District considered the 1995 Utah Department of Natural Resources Technical Publication 111, *Hydrology and simulation of groundwater flow in southern Utah and Goshen Valleys, Utah* (Utah Publication 111) as evidence that groundwater was moving from the mountains to Utah Lake. The District also stated that Utah Publication 111 showed a hydrologic connection between groundwater areas that were confined by relatively impermeable clay layers, and other unconfined groundwater areas that readily connected groundwater to surface water. The South Pacific Division staff reviewed these general conclusions and found them to be reasonable, and these general conclusions were not disputed by the Appellant. However, the District did not establish that the presence of a regional groundwater pattern of flow of water from the mountains east of the property, to Utah Lake west of the property, was relevant to the determination of Clean Water Act jurisdiction for this property.

The WDM, page 10, defines areas having wetland hydrology as having the following characteristics:

“Hydrology. The area is inundated either permanently or periodically at mean water depths equal to or less than 6.6 ft, or the soil is saturated to the surface at some point during the growing season of the prevalent vegetation.”

The WDM page 28 further defines wetland hydrology as follows:

“The term “wetland hydrology” encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface at some time during the growing season. Areas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and reducing conditions, respectively. Such characteristics are usually present in areas that are inundated or have soils that are saturated to the surface for sufficient duration to develop hydric soils and support vegetation typically adapted for life in periodically anaerobic soils conditions. Hydrology is often the least exact of the parameters, and indicators of wetland hydrology are sometimes difficult to find in the field.

However, it is essential to establish that a wetland area is periodically inundated or has saturated soils during the growing season. “

The District did not establish that Utah Publication 111 provides information that there are extensive areas of wetland hydrology (i.e. areas inundated either permanently or periodically at mean water depths equal to or less than 6.6 ft, or with the soil is saturated to the surface for a sufficient time period during the growing season) between the Appellant’s property and Utah Lake. While Utah Publication 111 mentions that there are some connections between surface water and groundwater, the publication primarily discusses the characteristics of groundwater many feet below the surface. The characteristics of such groundwater areas are not directly relevant to a determination of whether or not extensive areas of wetland hydrology are present at the surface between the Appellant’s property and Utah Lake during the growing season. If extensive areas meeting the Corps definition of wetland hydrology were identified between Utah Lake and the Swenson property, this would provide information supporting the District’s conclusion that a continuum of wetlands adjacent to Utah Lake was present.

The District’s September 9, 2005 Memo to File for this action also stated that:

“The Corps determined in a February 2005 Appeal Decision for a Jurisdictional Determination, that it has jurisdiction over “a continuum of adjacent wetlands neighboring the Great Salt Lake”. Similar to the wetlands in that case, we believe the subject wetlands in this determination are part of an overall mosaic of wetlands adjacent to Utah Lake and as such, are inseparably ecologically associated with Utah Lake.”

The Corps regulations preclude the use of administrative appeal decisions as precedents for other Corps decisions because Corps decisions depend on the facts, circumstances, and physical conditions specific to a project and site being evaluated. The Corps regulation at 33 CFR 331.7 (f) states that:

“...an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential value. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other permit application.”

The administrative record is unclear as to the exact weight the District placed on the prior February 2005 South Pacific Division administrative appeal decision in reaching its conclusion regarding the CWA jurisdictional determination of the Swenson property. The Corps regulations do not allow a district to use a previous administrative appeal decision as precedent or as a basis for evaluation of other permit applications. The District’s CWA jurisdictional determination should not have cited a prior appeal decision as part of its basis for concluding the Swenson property was within CWA jurisdictional determination. Also, the District did not explain its statement in its Memorandum for Record that the wetlands on the Swenson property are “...inseparably ecologically associated with Utah Lake.” The Corps regulations do not specifically identify

ecological associations as a part of a determination as to whether or not a wetland is within CWA jurisdiction. Therefore more specific justification of that approach must be provided before it can be considered as a basis for concluding an area is within CWA jurisdiction as an adjacent wetland.

I conclude the administrative record for this action did not sufficiently document that the wetlands on the Swenson property are within CWA jurisdiction as part of a continuum of wetlands adjacent to Utah Lake. The District must reconsider its decision as to whether or not the wetlands on the Swenson property are within CWA jurisdiction. As part of that reconsideration the District must prepare a Memorandum for Record that includes consideration of the following factors below in reaching its determination regarding the CWA jurisdictional status of the Swenson property. These items are as follows:

1. Conduct additional evaluation of the area between the Swenson property and Utah Lake shown on the NWI maps as wetlands, which the District considered as wetlands that would meet the definition of wetlands in accordance with the Corps 1987 WDM as part of a continuum of wetlands. Develop further documentation as to whether these areas meet the definition in accordance with the WDM, and are sufficiently interrelated to be considered a continuum of wetlands.
2. Consider the extent the area previously identified as part of a continuum of wetlands between the Swenson property and Utah Lake that would meet the criteria for wetland hydrology in accordance with the WDM (i.e. is there evidence of a continuum of areas meeting the Corps wetland hydrology parameter between the Swenson property and Utah Lake, even if some of those areas do not exhibit all three parameters to establish the presence of wetlands in accordance with the WDM). As part of this evaluation, consider the elevation difference between the Swenson property and Utah Lake.
3. Consider the relative density of wetland and upland areas in the areas the District previously identified as a continuum of wetlands within CWA jurisdiction between the Swenson property and Utah Lake. (i.e. does the area considered to be part of a continuum of wetlands in the District's prior jurisdictional determination, consist primarily wetland or upland areas?). As part of that determination, consider whether the distance between the Swenson property wetlands and other wetlands is sufficiently large so as to make the Swenson property isolated from other wetland areas, rather than part of a continuum of adjacent wetlands.
4. If the District concludes that the Swenson property is an isolated wetland, rather than an adjacent wetland, review the Environmental Protection Agency (EPA)/Department of the Army Joint Memorandum of January 15, 2003 issued jointly by the General Counsel of the EPA and the General Counsel of Department of the Army, (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) and then consider whether there is a sufficient connection between the wetlands on the Swenson

property and interstate commerce to assert CWA jurisdiction as an intrastate, isolated, non-navigable water in accordance with 33 CFR 328.3 (a) (3). If the District concludes there is an appropriate basis for asserting CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3), then the District must seek project-specific formal Corps headquarters approval prior to asserting CWA jurisdiction, as required by the Joint Memorandum.

The Swenson property is approximately 2.5 miles from the shoreline of Utah Lake, and areas between the property and the shoreline are primarily in private ownership. Therefore, the ability to conduct on-site evaluations of the areas between the Swenson property and Utah Lake may be limited. This administrative appeal decision does not mandate the exact manner in which the considerations above will be evaluated, nor does it require that extensive field investigations be conducted. However, in order to assert CWA jurisdiction over the Swenson property, the District must provide a clearly documented basis that the property is within CWA jurisdiction.

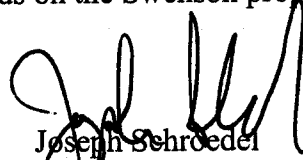
Information Received and its Disposition During the Appeal Review: The Division evaluated this appeal based on the Appellant's request for appeal, the District's administrative record, clarification of the administrative record at the appeal conference including the Review Officer's appeal meeting summary, and the following submittals:

Additional materials submitted or discussed at the appeal meeting that were not previously provided to the Appeal Review Officer as part of the administrative record:

1. The Appeal Review Officer requested and was provided a copy of the description of the Benjamin Soil Series, the soil series that is mapped for the project site on the soils map that was previously included in the administrative record. As both the Appellant and the District acknowledged that they had access to this information prior to the District's Clean Water Act jurisdictional determination for this property, this information was considered clarifying information.
2. The Appellant provided an aerial photograph of the project vicinity that covered a more extensive area surrounding the project site than the photograph the Appellant included with his wetland delineation. This photograph was considered clarifying information.
3. The Appellant stated that he had well data for the property but agreed that he had not submitted that data to the District and so that data was new information. The Appeal Officer stated that the Army Corps of Engineers regulations did not allow for consideration of new information during an administrative appeal. The Appellant acknowledged that the well data has not been submitted to the District and the well data was not discussed further.

Conclusion: I conclude that the District did not sufficiently document its conclusion that the wetlands on the Swenson property are within CWA jurisdiction as adjacent wetlands.

The District must conduct further evaluation of the CWA jurisdictional status of the Swenson property including at least the additional evaluations described in this appeal decision. The District must consider those additional evaluations in reaching a CWA jurisdictional determination for the wetlands on the Swenson property.



Joseph Schroedel
Brigadier General, U. S Army
Commanding