

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 19 November 2002**

ADMINISTRATIVE APPEAL DECISION

DANIEL M. MEEHAN, NEW YORK DISTRICT FILE NO. 2002-00023-YN

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Daniel M. Meehan

Appellant's Agent: Joshua H. Heintz, Devorsetz Stinziano Gilberti Heintz & Smith, P.C.

Date of Receipt of Request for Appeal: 25 September 2002

Date of Acceptance of Request for Appeal: 16 October 2002

Site Visit Date: 29 October 2002

HQNAD-ACCEPTED REASON FOR APPEAL:

The appellant contends that an approximate 1.7-acre wetland area within a 10-acre project site is not adjacent to a navigable water of the United States. The appellant also contends that, pursuant to Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 172 (2001); United States v. Rapanos, 2002 WL 373332 (21 February 2002); and United States of America v. Newdunn Associates, et. al., 195 F. Supp. 2d 751 (3 April 2002), this alleged isolated wetland area is not within federal jurisdiction for purposes of the Clean Water Act.

BACKGROUND INFORMATION:

On 31 July 2002, the Corps' New York District issued an approved Department of the Army jurisdictional determination for the proposed development of approximately 10 acres of an overall 27-acre parcel of land. A portion of the site fronts on U.S. Route 20 and New York State Route 28 in the Village of Richfield Springs, Town of Richfield, Otsego County, New York. The appellant's environmental consultant performed a delineation of the extent of wetlands on the site on 29 January 2002, and found that wetlands exist on approximately 1.7 acres of the site. New York District staff performed a site inspection on 7 June 2002, found the wetland delineation to be accurate, and verified same in a 31 July 2002 approved jurisdictional determination letter. The letter also stated that the 1.7-acre area was considered a jurisdictional water of the United States based upon: 1) the presence of wetlands based upon criteria established in the 1987 Corps of Engineers Wetland Delineation Manual; 2) the presence of a defined water body which is part of a tributary system; and/or 3) the fact that the site includes property below the ordinary high water mark as determined by known gage data or by shelving; changes in soil character; destruction of terrestrial vegetation; the presence of litter or debris; or other characteristics of the surrounding area.

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The property has elevations ranging from approximately 1,440 feet above mean sea level at its apex, with a moderate slope downward to approximately 1,340 feet above mean sea level near the road. The appellant contends that upslope drainage was historically directed to the east, i.e. away from the site. However, the site to the east, which formerly contained a small golf course, was filled approximately 40 years ago and as a result upslope drainage was redirected downhill along Cary Park Road, a local north-south road which forms much of the eastern boundary of the property, and eventually onto the site, according to the appellant. The appellant indicated that approximately 20 years ago, the State of New York excavated an open drainage way through a portion of the 10-acre project site in order to alleviate frequent flooding and wintertime ice buildup at the base of Cary Park Road. This open drainage way is culverted under U.S. Route 20/New York State Route 28, then proceeds in generally a southwesterly direction along and behind an automobile service business named Chuck's Towing. This drainage way then has a dual confluence with a roadside drainage way which runs southward along Otsego County Route 25-A, and a smaller drainage way which runs westward from a nearby residential property. The combined drainage is culverted under Route 25-A, then continues in a more natural setting to an intersection with Trout Brook. The 1.7-acre scrub-shrub wetland area is adjacent to both sides of the drainage way.

Both the appellant and the district agree that the drainage way conveys water into Trout Brook. Trout Brook empties into Canadarago Lake, an impoundment formed by the Cooperstown Dam. Water leaving the lake is directed into Oaks Creek, a tributary of the Susquehanna River, which at a downstream location becomes a navigable water of the United States as defined at 33 CFR 329.4. However, the appellant contends that the wetland area in question is not adjacent to navigable waters of the United States, and that historical data proves it is hydrologically isolated.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The New York District provided a copy of their complete administrative record, which was reviewed and considered in the appeal review process along with the results of the 29 October 2002 joint site inspection. During the site inspection, the appellant's agent provided a site plan depicting the current proposal for development of the site. This was accepted as clarifying information in accordance with 33 CFR 331.7 (f), since the administrative record contained a previous development plan that has become outdated.

On 30 October 2002, the appellant's attorney submitted additional information to this office. This information included an aerial photograph of Chuck's Towing from approximately 20 years ago, and a ground-level photograph from approximately 40 years ago showing that the Chuck's Towing property then consisted of a flat, empty parcel of land. Also included was a copy of a brochure from the proposed developer, Windsor Companies, portraying developmental projects they have undertaken in other communities, and a copy of the decision made by the U.S. District Court, Eastern District of Virginia in the Newdunn case. This submittal was also accepted as clarifying information in accordance with 33 CFR 331.7 (f).

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SUMMARY OF DECISION:

The Appellant's RFA has merit, because there is insufficient documentation and information in the administrative record's decision making in support of New York District's determination that the drainage way and the 1.7-acre on-site wetland area are jurisdictional for purposes of the Clean Water Act.

INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: New York District is to reevaluate its jurisdictional determination in this matter, and completely document whether, and how, the drainage way and the 1.7-acre on-site wetland area are jurisdictional under the Clean Water Act.

Appeal Decision Findings: The head of navigability of the Susquehanna River is approximately 20 miles or more downstream of the site. The appellant's attorney interprets decisions made in the cases of Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers, 531 U.S. 159, 172 (2001); United States v. Rapanos, 2002 WL 373332 (21 February 2002); and United States of America v. Newdunn Associates, et. al., 195 F. Supp. 2d 751 (3 April 2002), as limiting Clean Water Act jurisdiction solely to navigable waters and wetlands either abutting navigable waters or having a significant nexus to navigable waters.

The appellant's environmental consultant contends that whatever wetlands may have originally existed on the site were isolated prior to excavation of the drainage way, that there are no wetlands or waterbodies leading to the site, and that the drainage way creates an artificial connection to Trout Brook. Furthermore, the consultant believes that neither the on-site wetland nor the drainage way have an ordinary high water mark, and the drainage way does not connect two waterbodies which each have ordinary high water marks, thus neither should be jurisdictional under the Clean Water Act. The consultant placed the following exhibits in New York District's administrative record in support of this contention:

- U.S. Geological Service topographic map, Richfield Springs quadrangle (1943)
- New York State Department of Environmental Conservation Freshwater Wetland Map (1988)
- U.S. Department of Agriculture Natural Resource Conservation Service Soil Survey Map, provided by Otsego County Soil and Water District (GIS mapping)
- New York State Department of State Stream Classification Map (1995)
- Federal Emergency Management Agency Floodplain Map (1986)
- Aerial photographs of the site from 1936, 1960 and 1973 (provided by Otsego County Soil and Water District) and 1997 (provided via Microsoft Terraserver)

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The attorney's interpretation of the holding in the SWANCC case is erroneous. In the SWANCC case, the Supreme Court narrowly confined its ruling to invalidating that portion of the Corps' regulations pertaining to an assertion of Clean Water Act jurisdiction in isolated waters based upon the so called "Migratory Bird Rule." In its opinion, the Court specifically declined to interfere with the holding in United States v. Riverside-Bayview Homes, Inc., 474 U.S. 121 (1985). Thus, Riverside-Bayview continues to support the Corps' assertion of CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, all tributaries upstream to their highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

Since the decision in the SWANCC case, several courts have rejected the attorney's broad interpretation of that ruling. In United States v. Interstate General Co., 152 F.Supp. 2d 843 (D. Md. 12 June 2001), the Court stated that [T]he SWANCC case is a narrow holding in that only 33 CFR 328.3(a)(3)...is invalid pursuant to a lack of congressional intent...Because the Supreme Court only reviewed 33 CFR 328.3(a)(3), it would be improper for this Court to extend the SWANCC Court's ruling any farther than they clearly intended (Id. at 847). The Fourth Circuit upheld the District Court's decision in the Interstate General case in an unpublished opinion dated 2 July 2002. In U.S. v. Krilich, 152 F. Supp. 2d 983 (N.D. Ill., 21 June 2001), the Court stated that "cases subsequent to SWANCC have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters (Id. at 992). In Colvin v. United States, 181 F. Supp. 2d 1050 (C.D. Cal., 28 December 2001), the Court stated that "[T]he SWANCC Court did not invalidate other Corps interpretations (i.e. non-Migratory Bird Rule interpretations) of navigable waters, including all traditional navigable waters, all interstate waters, all tributaries to navigable or interstate waters, all wetlands adjacent to any and all of such waters, and all waters that are subject to the ebb and flow of the tide" (Id. at 1055). In the Lamplight case, the Court concluded that SWANCC did not limit Corps jurisdiction under the Act to navigable waters and wetlands adjacent to navigable waters (2002 WL 360652 (N.D.Ill. 8 March 2002)).

The United States does not accept the district courts' decisions in the Newdunn and Rapanos cases and has appealed these decisions to their respective circuit courts. These cases do not create a binding precedent on the Corps of Engineers and are in conflict with other district court decisions.

The approved jurisdictional determination issued by New York District on 31 July 2002 states "...this site has been determined to contain jurisdictional waters of the United States based on: the presence of wetlands determined by the occurrence of hydrophytic vegetation, hydric soils and wetland hydrology according to criteria established in the 1987 "Corps of Engineers Wetlands Delineation Manual", Technical Report Y-87-1 that are either adjacent to or part of a tributary system; the presence of a defined water body (e.g. stream channel, lake, pond, river, etc.) which is part of a tributary system; *and/or* that the location includes property below the ordinary high water mark, high tide line or mean high water mark of a water body as determined by known gage data or by the presence of physical markings including, but not limited to, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter or debris of other characteristics of the surrounding area." (emphasis added)

