

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 24 June 2003**

ADMINISTRATIVE APPEAL DECISION

E. TETZ & SONS, INC. & CONCRETE PROPERTIES,
NEW YORK DISTRICT FILE NO. 2000-00117-YS

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

Appellant: E. Tetz & Sons, Inc. & Concrete Properties

Appellant's Agent: Rosemary Stack, Esq., Attorney at Law

Date of Receipt of Request for Appeal: 24 December 2002

Date of Acceptance of Request for Appeal: 3 January 2003

Appeal Conference/Site Visit Dates: 28 March 2003 and 13 June 2003

APPELLANT'S STATED REASONS FOR APPEAL:

The 3.83-acre on-site wetland area should not be considered jurisdictional under the Clean Water Act for the following reasons:

- (a) The wetland is purportedly not adjacent to any jurisdictional waters of the United States;
- (b) The catch basin and culvert to which the site eventually drains are man-made and purportedly not subject to jurisdiction by the Corps of Engineers;
- (c) The wetland is upstream of the ordinary high water mark of the nearest waterbody, namely, an intermittent stream south of Crystal Run Road, and the ordinary high water mark of said stream is purportedly the upstream limit of the jurisdictional waters of the United States;
- (d) The wetland purportedly has no significant nexus to a navigable water, as the Hudson River (the navigable water into which the aforementioned intermittent stream drains) is over 45 miles distant from the site.

BACKGROUND INFORMATION:

On 15 April 1998, a resident of the Town of Walkill, Orange County, New York contacted the New York District, Corps of Engineers via telephone to allege that jurisdictional landclearing activities were occurring in waters of the United States on an adjacent 10.93-acre parcel of land owned by the appellant. A preliminary investigation by the district on 21 April 1998 confirmed that the site was being cleared, and that Federally regulated wetlands were being impacted. The applicant was verbally advised that the proposed site development required a

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Department of the Army permit, was directed to perform no further work on the site, and was informed that a delineation of the extent of jurisdictional waters of the United States would be necessary. This verbal directive was followed by a written Cease & Desist Order from the district, dated 24 April 1998.

The applicant responded in an 11 May 1998 letter, indicating they would retain a consultant to investigate the wetlands issue before proceeding with site plan approval by local authorities. A wetland delineation report was submitted to the district on 12 August 1999, and a site visit involving the district and the consultant for the purpose of verifying the report's findings was conducted on 1 September 1999. On 13 October 1999, the New York District issued an approved jurisdictional determination and rescinded the Cease & Desist Order, but noted that any additional impacts to the 3.83-acre wetland area would require advance written project-specific authorization from the district office. This approved jurisdictional determination was issued at a time when only permit denials and proffered permits were appealable actions under the Administrative Appeal Process for the Regulatory Program of the Corps of Engineers.

On 19 January 2000, the district received a Pre-Construction Notification from the applicant requesting authorization to fill approximately 2.36 acres of the 3.83-acre wetland area to facilitate construction of an asphalt plant. The applicant concurrently proposed to create three acres of new wetlands at a nearby, off-site property as compensatory mitigation for the proposed filling activities. The district authorized the proposal under then-existing Nationwide General Permit No. 26 on 6 June 2000. However, this authorization expired on 11 February 2002, with no new work having been undertaken. Although the applicant had valid Department of the Army authorization, they were unable to commence the project in a timely fashion because the New York State Department of Environmental Conservation had not issued the requisite permits pursuant to the State Environmental Quality Review Act.

By letter dated 26 February 2002, a newly-retained environmental consultant requested that the district revisit the approved jurisdictional determination in light of the United States Supreme Court ruling in the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers case, No. 99-1178 ("SWANCC case"). The consultant presented several pieces of information supporting their contention that the 3.83-acre wetland area is hydrologically isolated and not within Federal jurisdiction. In response to this request, the district reinspected the site along with the consultant on 6 June 2002. In a letter dated 25 October 2002, the district stated, "...the wetlands located on the Tetz property flow into waters of the United States, ...are considered to be a part of a tributary system and are also considered to be waters of the United States."

The request for appeal, dated 25 October 2002, was signed by the agent on 23 December 2002, and was received in HQNAD on 24 December 2002, thereby meeting the 60-day requirement prescribed in 33 CFR §331.5 (a)(1).

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 28 March and 13 June 2003 site inspections. The complete administrative record included both the enforcement and permitting phases of the project.

During the first appeal conference, the consultant submitted meteorological data from a reporting station in Binghamton, New York showing that in excess of two inches of rain fell at said reporting station during 5-6 June 2002. The consultant submitted this data to support their contention the project area received appreciable precipitation immediately prior to and/or during the 6 June 2002 site reinspection by the district. The consultant suggested that this substantial precipitation event caused extensive runoff to enter the various drainage courses described in this memorandum, thereby potentially distorting the district's positive findings regarding the presence of wetland hydrology in the project vicinity. Immediately subsequent to the conference, the appellant's attorney faxed a signed deposition from Mr. Edward Tetz, founder and former partner of E. Tetz & Sons, Inc., in which he provides his personal historical perspective regarding past land usage of the site in question.

The meteorological information and the deposition assist in interpreting, clarifying and/or explaining issues and information contained in the administrative record for this appeal, and are therefore accepted as clarifying information in accordance with 33 CFR §331.7 (f).

SUMMARY OF DECISION:

The Appellant's Request for Appeal does not have merit, because the administrative record and current Regulatory policies support New York District's determination that the 3.83-acre on-site wetland area is jurisdictional for purposes of the Clean Water Act.

EVALUATION OF THE REASONS FOR APPEAL AND HQNAD APPEAL DECISION FINDINGS:

First Accepted Reason for Appeal: The on-site wetland is purportedly not adjacent to any jurisdictional waters of the United States.

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Does Not Have Merit: The appellant's environmental consultant submitted historic and latter-day information in a 26 February 2002 letter to the district, contending that a variety of circumstances collectively demonstrate that the 3.83-acre wetland is isolated and is not adjacent to any jurisdictional waters of the United States. Among the cited informational sources are: 1) a 1991 New York State Department of Transportation topographic map, and 2) a 1995 New York State Department of State Stream Classification Map, both of which indicate the closest mapped tributary stream is several hundred feet east of the project site; 3) a 1987 New York State Department of Environmental Conservation Freshwater Wetlands Map and 4) a 1984 U.S. Fish & Wildlife Service National Wetlands Inventory Map, both of which do not

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indicate the presence of mapped wetlands on the site; 5) a 1975 U.S. Natural Resource Conservation Service Soil Survey Map of Orange County, which does not indicate the presence of any mapped hydric soil series on the site; and 6) a 1986 Federal Emergency Management Agency (now known as Emergency Preparedness & Response Secretariat, U.S. Department of Homeland Security) Flood Insurance Rate Map, which indicates the site is in Zone C, defined as areas with minimal flooding.

The environmental consultant also submitted copies of aerial photographs dated 24 June 1963; 13 August 1971; 9 August 1975; and 3 April 1991, and concludes that these photographs do not show evidence of the wetland area having been historically or currently connected to any mapped streams. The consultant also submitted a current topographic survey of the wetland area and adjacent parcel that is currently used as a concrete facility. This topographic information, verified on-site by the district, indicates that drainage flows into the culvert from both a grassed upland slope and the easternmost portion of the wetland itself. The culvert outlets on the south side of Crystal Run Road, directly into an intermittent stream which the consultant contends is the upstream jurisdictional limits of waters of the United States in the project vicinity. Both the district and the appellant agree that the intermittent stream is a tributary of the Hudson River.

The district's Basis for Jurisdictional Determination indicates that the site in question contains one or more tributaries of waters of the United States as identified in 33 CFR §328.3 (a)(1-4), and that the site contains wetlands according to the criteria established in the 1987 "Corps of Engineers Wetland Delineation Manual", Technical Report Y-87-1, which are adjacent to waters of the United States. The wetland area in question is itself part of a surface water tributary system. Drainage enters the site from a culvert beneath Crotty Road, and then continues across the project site, emptying into the culvert as described above. The district has asserted Clean Water Act jurisdiction over the wetland area on the basis of it being part of a surface water tributary system

On 15 January 2003, the Corps of Engineers and the US Environmental Protection Agency issued a Joint Memorandum, Appendix A of the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States", published in the Federal Register on 15 January 2003 (68 FR 1991-1998), providing clarifying guidance regarding the US Supreme Court's decision in the SWANCC case. The guidance is relevant to this matter since the appellant contends that, pursuant to the SWANCC case, the wetland area in question should not be regulated under the Clean Water Act. The guidance states that field staff should continue to assert jurisdiction over traditional navigable waters and, generally speaking, their tributary systems and adjacent wetlands. HQNAD finds that the district has sufficiently documented that the 3.83-acre wetland area is itself adjacent to a tributary system of a navigable waterbody, namely the Hudson River, and is therefore jurisdictional for purposes of the Clean Water Act.

Second Accepted Reason for Appeal: The catch basin and culvert to which the site drains are purportedly man-made and not subject to jurisdiction by the Corps of Engineers.

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Determination on the Merits of This Reason for Appeal--This Reason for Appeal Does Not Have Merit: In accordance with the Joint Memorandum, waters with manmade features such as ditches, culverts, pipes, storm sewers, or similar manmade conveyances are jurisdictional provided they are parts of overall tributary systems. As stated in the preceding section, the district has sufficiently demonstrated in its administrative record that the wetland area in question is part of a surface tributary system to a navigable water of the United States, and is therefore jurisdictional under the Clean Water Act

Third Accepted Reason for Appeal: The wetland is upstream of the ordinary high water mark of the nearest waterbody, namely, an intermittent stream south of Crystal Run Road, and the ordinary high water mark of said stream is purportedly the upstream limit of the jurisdictional waters of the United States.

Determination on the Merits of This Reason For Appeal—This Reason for Appeal Does Not Have Merit: The Joint Memorandum clarifies the role of the ordinary high water mark in jurisdictional determinations, in that it ascribes the *lateral* limits of jurisdiction in non-tidal waters to the ordinary high water mark, if there are no adjacent wetlands present. However, the Joint Memorandum indicates that jurisdiction may be appropriately ascribed upstream of the point where the ordinary high water mark is no longer perceptible, provided the wetland or waterbody is part of, or adjacent to, a surface tributary system of navigable waters.

Fourth Accepted Reason for Appeal: The wetland purportedly has no access to a navigable water, as the Hudson River is over 45 miles distant from the site.

Determination on the Merits of This Reason for Appeal--This Reason for Appeal Does Not Have Merit: 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 attorney also cites a previous administrative appeal ruling by HQNAD on the appeal of Mr. Daniel Meehan, issued on 19 November 2002. However, 33 CFR §331.7 (g) states that the division engineer's appeal decision has no other precedential effect, and expressly prohibits citation of a prior appeal decision in any other administrative appeal.

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.

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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)). Most recently, the Fourth Circuit upheld of the US Court of Appeals in United States of America v. James S. Deaton and Rebecca Deaton upheld Clean Water Act jurisdiction for a wetland area that is adjacent to, and drains into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and, eventually, Chesapeake Bay (United States v. Deaton, No. 02-1442, slip op. (4th Cir. 12 June 2003).

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 definition of navigable waters of the United States at 33 CFR 329.4 is same definition of waters of the United States that appears at 33 CFR §328.3 (a)(1); thus, all navigable waters of the United States are themselves defined as waters of the United States. In accordance with 33 CFR §328.3 (a)(5), all tributaries of navigable waters are also considered waters of the United States, upstream to their highest reaches.

