

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 25 July 2003**

ADMINISTRATIVE APPEAL DECISION

**FRANCIS C. WARRINGTON,
PHILADELPHIA DISTRICT FILE NO. 200201775-26**

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

Appellant: Francis C. Warrington

Appellant's Agent: Keith A. Onsdorff, Reed Smith law firm

Date of Receipt of Request for Appeal: 4 April 2003

Date of Acceptance of Request for Appeal: 22 May 2003

Appeal Conference/Site Visit Date: 29 May 2003

APPELLANT'S STATED REASONS FOR APPEAL:

The on-site wetlands are entirely isolated, intrastate and non-navigable, and that these wetlands should not be considered jurisdictional under the Clean Water Act pursuant to the ruling of the United States Supreme Court in the matter of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers 531 U.S. 159 (2001) ("SWANCC case").

BACKGROUND INFORMATION:

On 27 August 2002, the Philadelphia District, Corps of Engineers received a request from James C. McCulley IV, Environmental Consultants, Inc. for a determination of the extent of Department of the Army jurisdiction on an approximate 115.3-acre site in Sussex County, Delaware. The site is generally bounded by undeveloped properties to its north and south, Old Landing Road (County Road 274) on its west, and White Oak Creek, a tributary of Rehoboth Bay, on its east. The consultant performed the delineation and compiled supporting data during April, June and July, 2002, and determined that four separate wetland areas exist on the site, identified as follows:

- a) Wetland "A"—a 3.85-acre isolated wetland wholly contained within an existing wooded area in the northwest portion of the site.
- b) Wetland "B"—a total of 11.31 acres of tidal and wooded wetlands within the property boundaries, adjacent to White Oak Creek.

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- c) Wetland "C"—a 9.26-acre isolated wetland wholly contained within an existing wooded area in the southwest portion of the site. However, the consultant states elsewhere in their report that Wetland "C" "...appears to drain into a storm drain system and ditches and eventually to Arnell Creek to the west. This drainage appears to be artificial and created to drain this isolated depression."
- d) Wetland "D"—a 0.18-acre wetland within the same wooded area as Wetland "C", located near the center of the site.

The Philadelphia District's Memorandum for the Record dated 17 January 2003 indicates that a district representative performed a site inspection on 11 November 2002 and found "...Federally regulated isolated and non-isolated wetlands present on this property." During the inspection, the district verified the accuracy of the consultant's delineation of the four wetland areas. However, the district presented conflicting conclusions in their Memorandum for the Record. Paragraphs 4 a) and 4 d) state that Wetland Areas "A" and "D" are both isolated, with no surface water connection to waters of the United States, whereas Paragraph 5 states that Wetland Areas "A" and "C" are isolated. The district also states that Wetland Areas "A" and "C" are adjacent to White Oak Creek, as they are part of the Lower Coastal Plain Surface Water Tributary System. The district issued its approved jurisdictional determination on 6 February 2003.

The Request for Appeal Form, also dated 6 February 2003, was signed by the consultant in their capacity as the agent for the appellant on 27 March 2003, and was received in HQNAD on 4 April 2003, thereby meeting the 60-day requirement prescribed in 33 CFR §331.5 (a)(1). The request for appeal was initially judged to be incomplete. By CENAD-CM-O letter dated 29 April 2003, the agent was asked to indicate a specific reason for appeal of the approved jurisdictional determination. On 19 May 2003, the appellant's attorney provided a supplemental request for appeal, which was found to be complete on 22 May 2003.

It should be noted that the original request for appeal claimed that Wetland Areas "A", "C" and "D" were isolated and not adjacent to navigable waters or waters of the United States. The supplemental request for appeal claimed that the wetland situated within the entire 115.3-acre tract were isolated, intrastate and non-navigable, and therefore not subject to regulation pursuant to the SWANCC case.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

- a) The Philadelphia District provided a copy of their administrative record, which was reviewed and considered in the appeal review process along with the results of the 29 May 2003 site inspection and appeal conference.
- b) The agent, in a 10 June 2003 letter, responded to a jurisdictional issue raised during the site inspection/appeal conference. The disposition of this matter is indicated in a subsequent section of this decision memorandum.

SUMMARY OF DECISION:

The appellant's Request for Appeal has merit, because the Philadelphia District's administrative record does not sufficiently document their rationale for determining that two isolated wetland areas on the property are jurisdictional for purposes of the Clean Water Act. Additionally, the district presents conflicting information and conclusions in the Memorandum for the Record supporting their jurisdictional determination.

INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: Philadelphia District is to clarify the jurisdictional status of Wetland Areas "A", "C" and "D", specifically, which of these wetland areas are jurisdictional and for what reason(s). Additionally, the district must fully explain its rationale for its adjacency determination for the isolated wetlands on this property, on the basis of their being part of the Lower Coastal Plain Surface Water Tributary System.

Appeal Decision Findings: As stated previously in this decision memorandum, Philadelphia District's Memorandum for the Record first identifies Wetland Areas "A" and "D" as being isolated, then later indicates Wetland Areas "A" and "C" are isolated. This discrepancy must be resolved in the administrative record. The district's administrative record adequately demonstrates that Wetland Area "B" is adjacent to White Oak Creek, a portion of which is tidal at the project site, and is therefore jurisdictional for purposes of the Clean Water Act.

Paragraph Five of the Memorandum for the Record also contains inconsistent and confusing language in that two depressional wetland areas on the site are described as being "...isolated with no surface water connection to waters of the United States", but "...adjacent to White Oak Creek as they are part of the Lower Coastal Plain Surface Water Tributary System." The district presents no rationale to explain this apparent dichotomy, nor does it define what exactly comprises this "system". Although the district verbally explained during the site inspection their rationale for their determination of adjacency of these isolated, depressional wetlands, the rationale is not sufficiently documented in the administrative record.

The term "adjacent" is defined in 33 CFR §328.3 (c) as meaning bordering, contiguous or neighboring, and that 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 only information the district presents in the administrative record is a portion of the United States Geological Survey map of the project site showing the wetland areas as being 1,000 feet and 350 feet, respectively, from White Oak Creek. This level of information is insufficient to demonstrate adjacency.

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

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this matter since the agent contends that, pursuant to the SWANCC case, the wetland areas on this property should not be regulated under the Clean Water Act. The guidance states neither the US Environmental Protection Agency nor the Corps of Engineers will assert Clean Water Act jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting jurisdiction rests upon any of the factors listed in the "Migratory Bird Rule" at 51 FR 41217 (1986). Formal project-specific approval is required from Corps Headquarters for assertion of jurisdiction over isolated, non-navigable, intrastate waters based upon other grounds listed in 33 CFR §328.3 (a)(3)(i-iii). Isolated, intrastate waters that fall within the definition of traditional navigable waters remain jurisdictional for purposes of the Clean Water Act.

In a 10 June 2003 letter, the agent indicates he is unaware of any statute, regulation or published guidance that has legally adopted the district's position with regard to the Lower Coastal Plain Tributary System, or afforded the regulated community notice thereof. Additionally, the agent characterizes such assertion of jurisdiction as being *ad hoc* and not previously advanced by the district. The agency requested that this office allow an additional 30 days to allow submission of additional information if this office proceeds with review of this appeal while applying this "unpromulgated proposition." In light of the decision set forth herein, it does not appear necessary to consider the agent's request.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by Philadelphia District, I conclude that there is insufficient and conflicting information therein to support their determination regarding portions of the site that are jurisdictional under the Clean Water Act. I hereby remand this matter to the district for additional analysis as prescribed within this decision memorandum.

RECOMMENDED: _____ /s/
JAMES W. HAGGERTY
NAD Regulatory Appeals Review Officer

CONCUR: _____ /s/
LEONARD E. KOTKIEWICZ
Acting Chief of Operations - HQNAD

APPROVED: _____ /s/
MERDITH W. B. TEMPLE
BG, USA
Commanding