

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 25 January 2002**

ADMINISTRATIVE APPEAL DECISION

MR. JOHN F. KUPFER, NORFOLK DISTRICT FILE NO. 00-R2533

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

Appellant: John F. Kupfer, The Franciscus Company, Inc.

Appellant's Representatives: George H. Bangs, Environmental Scientist, Stokes Environmental Associates, Ltd., Norfolk, VA; Marina Liacouras Phillips, Attorney at Law, Kaufman & Canoles Attorneys and Counselors at Law, Norfolk, VA

Date of Receipt of Request for Appeal (RFA): 23 March 2001

Date of Acceptance of RFA: 11 April 2001

Site Visit Date: 25 September 2001

HQNAD-ACCEPTED REASON FOR APPEAL:

The Agent states an isolated, depressional eight-acre wetland area does not currently extend to a connection with other waters of the United States, and it is impossible to confirm that the historic neighboring wetlands had an actual physical connection to the subject property. Further, the Agent believes that this wetland area constitutes isolated wetlands as defined by the facts of the Wilson case (United States v. Wilson, 12/23/97, No. 96-4488 (L), 4th Circuit) and supported by the facts in the SWANCC decision.

BACKGROUND INFORMATION:

On 27 November 2000, Mr. George H. Bangs of Stokes Environmental Associates, Ltd. the Appellant's Agent, requested a Department of the Army jurisdictional determination (JD) from the Corps Norfolk District (District), in conjunction with a project proposed for an approximate 62-acre site by a joint developmental venture known as University Square Associates. Mr. Kupfer is general manager of The Franciscus Company, Inc., one of the parties in the joint venture.

The site in question is located along U.S. Route 17 (Carrolton Boulevard) and Virginia Route 662 in Isle of Wight County, Virginia. After a site visit on 4 January 2001, the District issued an Approved JD on 25 January 2001. The RFA was received on 23 March 2001 and North Atlantic Division accepted the appeal for consideration on 16 April 2001.

CENAD-CM-O

**John F. Kupfer Appeal Decision
Norfolk District File No. 00-R2533**

Mr. Bangs requested appeal of a portion of the Approved JD in light of the U.S. Supreme Court decision in the case of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, Case No. 99-1178, dated January 9, 2001 (SWANCC decision). In the SWANCC decision, the Supreme Court determined that isolated waters, whose sole nexus to interstate commerce is use by migratory birds, are not within Corps of Engineers jurisdiction under Section 404 of the Clean Water Act. As part of the approved JD, the District indicated that a currently isolated eight-acre wetland area on the site was separated from other wetlands by man-made barriers, i.e. roadways, and that this area was appropriately considered to be adjacent wetlands within Corps jurisdiction in accordance with 33 CFR §328.3 (a). The delineation of a separate wetland area on the site along a tributary of Ragged Island Creek is not part of this appeal.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSTION:

The Norfolk District provided a copy of the administrative record, which included their basis of the JD, aerial photography and maps of the area in question. This information was considered in the appeal review process.

By letter of 24 September 2001, the Agent submitted new information, not in the District's administrative record, in support of the appeal. This information was not considered in the appeal review process because it is prohibited in accordance with the preamble discussion in the Administrative Appeal Process Regulations (33 CFR §320, 326 & 331, 65 FR 16487, published in the Federal Register on 28 March 2000). Once an Appellant or Agent appeals an Approved JD, no new information can be submitted.

An Appeals Conference and subsequent site inspection were held on 25 September 2001, the results of which were considered in this process.

SUMMARY OF DECISION:

The Appellant's RFA has merit. There is insufficient documentation in the District's administrative record to support its contention that the eight-acre wetland area is appropriately considered to be adjacent to a tributary water of the United States.

INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION AND APPEAL DECISION FINDINGS:

Action: This jurisdictional determination is remanded to the District Commander for re-evaluation within the context of the following findings, and using all available information, including any new information the Appellant chooses to provide.

CENAD-CM-O

John F. Kupfer Appeal Decision

Norfolk District File No. 00-R2533

Appeal Decision Findings Discussion: This is an extremely difficult JD case because of previous disturbances on and adjacent to the site, including construction of Routes 17 and 662 many years ago and mechanized landclearing of the eight-acre area on the site approximately nine years ago. The basic question which must be addressed is whether this eight-acre area is currently a jurisdictional wetland. This entails findings that the area is first a wetland, and that the area is a water of the United States. The definition of waters of the United States is found at 33 CFR §328.3 (a). Part 328.3 (a)(7) states that wetlands adjacent to waters of the United States are themselves waters of the United States. Conversely, wetlands that are adjacent to other wetlands are *not* waters of the United States, and therefore are not jurisdictional, unless those adjacent wetlands are themselves adjacent to waters of the United States.

The RFA did not question the accuracy of the delineation of the eight-acre wetland area. Rather, it contends that this wetland area is isolated, lacks a nexus to interstate commerce, and is therefore not under the jurisdiction of the Corps because of the Supreme Court decision in the SWANCC decision. In the RFA, Mr. Bangs states: “The absence of [an] existing physical connection to other waters of the U.S. is confirmed in a letter from the U.S. Army Corps of Engineers, Norfolk District dated January 25, 2001 by confirming the wetland line as flagged in the field. The revised delineation line determined during the site visit, January 3, 2001, does not connect to other waters of the U.S.... The available evidence is not sufficient to removed [sic] a reasonable doubt as to such connection.”

Although there is agreement that the eight-acre area is a wetland, it must meet the definition of waters of the United States to be considered jurisdictional. In essence, it must be adjacent to either a tidal or interstate waterbody, or contain a nexus to interstate commerce. The 25 September 2001 site inspection confirmed that the eight-acre area is hydrologically isolated, and it could not be determined that the area meets the criteria to be considered adjacent to waters of the United States. Therefore, it could not be immediately considered to be a jurisdictional wetland based upon the inspection.

An additional complicating factor in this determination is whether this eight-acre area is a remnant of a larger wetland complex that may have historically existed in the project vicinity prior to construction of Routes 17 and 662, or whether the area developed wetland characteristics as a direct result of the mechanized landclearing. It is evident that the area has clearly exhibited wetland conditions in recent times, as confirmed by the 1994 United States Fish & Wildlife Service National Wetland Inventory mapping of the site. However, a 1986 United States Geological Service map (Benns Church, VA quadrangle) does not show any wetlands or watercourses in the eight-acre area, whereas an excerpt from the Isle of Wight County Soil Survey dated September, 1986 indicated the presence of a hydric soil unit in the eight-acre area. These and other available sources of information must be carefully assessed by the District Commander to determine whether a jurisdictional wetland has existed historically on the site, or whether the existing wetland is adjacent to waters of the United States.

Overall, the administrative record does not adequately support the District’s contention that the disturbed eight-acre area is adjacent to waters of the United States. The administrative record

CENAD-CM-O
John F. Kupfer Appeal Decision
Norfolk District File No. 00-R2533

suggests the District presumes that the wetland area was part of a larger remnant wetland which formerly existed to road construction. However, it is conceded that either no direct hydrologic connection currently exists between the eight-acre area and the remnant wetland which *may* have existed, or that it is too difficult to locate. There is insufficient demonstration that a connection or adjacency definitively existed in the past. Another point is that the District appears to have relied solely upon the county soil mapping to conclude the eight-acre area was an adjacent wetland because a continuum of hydric soils existed on the site, continuing downgradient under the roadways to the aforementioned tributaries of Creer Creek and Ragged Island Creek. This information is useful as part of an overall consideration of historic information pertaining to this parcel, but does not in and of itself demonstrate the presence of hydrophytic vegetation and the presence of wetland hydrology. Evidence of all three factors is necessary in order to allow the District to determine that the eight-acre parcel was historically an adjacent wetland, in accordance with the 1987 *Corps of Engineers Wetland Delineation Manual*.

OVERALL CONCLUSION:

After reviewing and evaluating information provided by the Appellant, the District's administrative record, and information gathered at the site visit and from other sources, I conclude that this Request For Appeal has merit for the reasons that are provided in the discussion above. I hereby remand this matter to the Norfolk District Commander for re-evaluation.

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

CONCUR: _____ /s/
THOMAS M. CREAMER
Chief of Operations - HQNAD

APPROVED: _____ /s/
M. STEPHEN RHOADES
Brigadier General, USA
Division Engineer