

ADMINISTRATIVE APPEAL DECISION

GREENFIELD HOMES; FILE NO. 2003-01972(1)

BUFFALO DISTRICT

DECEMBER 29, 2005

Review Officer: Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Richard O. Bargabos, Vice President and Member of Greenfield Homes, LLC

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Appeal Meeting and Site Visit Date: June 1, 2005

Background Information: Terrestrial Environmental Specialists Inc. (TES) submitted a request for an approved jurisdictional determination (JD) to the Buffalo District (District) on August 6, 2003. The request included a wetland delineation report and was submitted on behalf of Greenfield Homes, LLC. (appellant) and pertained to a property located north of New York State (NYS) Routes 370 and 31 and east of United States (U.S.) Route 690 in the Town of Lysander, Onondaga County, New York.

According to the wetland delineation report submitted by TES, the property is approximately 147 acres and is bordered by residential development to the east, residential development and agricultural land to the north and south, and U.S. Route 690 to the west. The property is comprised of deciduous forest, shrub, and open field uplands and deciduous forest, shrub, and emergent wetlands. One intermittent stream originates in the western portion of the property and eventually enters the Seneca River, a navigable water of the U.S. The site has undergone disturbance due to logging and borrow pit activities. Three parallel electrical transmission lines pass over the site.

TES identified three wetland areas using the methods described in the 1987 Corps of Engineers Wetland Delineation Manual. Wetland 1 is located in the western portion of the site, is 3.89 acres in size, and is associated with the intermittent stream as described above. Wetland 2 is located in the north central portion of the property and is 1.63 acres in size. TES reported that wetland 2 receives surface water from adjacent uplands and may discharge into wetland 3 via a "weakly defined ephemeral drainage." Wetland 3 is located in the northeast corner of the site and is approximately 18.04 acres in size. TES concluded that wetlands 2 and 3 were isolated because they did not have a defined outlet.

The District responded with an approved JD letter on October 7, 2003 in which it concluded that wetland 1 was a water of the U.S. and wetlands 2 and 3 were isolated waters and not waters of

the U.S. The District based its findings on a review of its administrative record and a site visit. The appellant did not appeal this approved JD.

The State of New York, Office of the Attorney General (NYOAG) submitted their intention to file a citizen suit against the Corps and the U.S. Environmental Protection Agency (USEPA) in a letter dated November 15, 2004. The NYOAG alleged that the District's determination that wetland 3 was not a water of the U.S. was erroneous and urged the District to reconsider and vacate its determination that wetland 3 was isolated. The NYOAG had performed a site visit on November 1, 2004 in which it placed a floating object in a pipe at the southwestern edge of wetland 3. The NYOAG confirmed that the floating object traveled through the pipe and discharged from the other end of the pipe into an open stream ravine that flows into the Seneca River. The District proceeded to verify the accuracy of the information submitted by the NYOAG and re-evaluate its JD.

The District informed the appellant in a letter dated November 17, 2004, that it was re-evaluating its approved JD dated October 7, 2003. The District stated its decision to re-evaluate its approved JD was based on additional information that indicated that wetland 3 may be jurisdictional.

On January 19, 2005, the District notified the appellant that it had completed the re-evaluation of its original approved JD based on new information and a site visit on December 13, 2004. The District determined that wetlands 2 and 3 are waters of the U.S. due to the connection between the wetlands and a tributary system of the Seneca River. The January 19, 2005, approved JD superseded the October 7, 2003 approved JD and conveyed appeal rights to the appellant.

The appellant disagrees that wetlands 2 and 3 are waters of the U.S. and on March 14, 2005, submitted a Request for Appeal (RFA).

Summary of Decision: I find that the District's administrative record supports its conclusion that wetlands regulated under the Clean Water Act (CWA) are present on the appellant's property. This appeal does not have merit.

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

Appellant's Reason for Appeal:

Reason 1: The Army Corps has no authority to reverse its original determination under 33 C.F.R. 329.14(a) since its reversal determination reflects no changed rules of interpretation on the law.

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion: The appellant bases this reason for appeal on Corps regulations found at 33 CFR 329.14(a) (see RFA, pg 2). The appellant further clarified this reason for appeal during the appeals meeting, by stating that the District's action of reversing its initial JD violated the spirit of a contract.

Corps regulations at 33 CFR 320.1(a)(6) authorize the District to make jurisdictional determinations regarding the applicability of the CWA or the Rivers and Harbors Act of 1899 to activities or tracts of land. Corps regulations at 33 CFR 329 specifically define the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers under the Rivers and Harbors Act of 1899 and do not apply to authorities under the CWA which are defined at 33 CFR Parts 323 and 328. The District's JD was based solely on CWA jurisdiction in this instance. Therefore, this reason for appeal does not have merit.

During the appeal meeting the appellant asserted that the District's initial approved JD letter (October 7, 2003) did not contain language informing the appellant that the approved JD was valid for a period of time (i.e. 5 years) unless new information warranted revision of the determination before the expiration date. The appellant asserts that without this "disclaimer," the approved JD was unequivocal, and in essence, a contract without expiration. The appellant concluded that the District's action to reverse this JD was equivalent to violating the spirit of the contract. However, the appellant also stated his understanding that the approved JD is not a contract during the appeals meeting.

Corps regulations at 33 CFR 331 define an approved JD as an appealable action, which may be superseded by another JD based on new information or a final JD that results from a JD remanded to the District on appeal. Multiple Corps Regulatory Guidance Letters (RGL) also address the authority of the Corps to change JDs based on new information (see RGL 90-06, 94-01, and 05-02). Each cited RGL also directs the District to include a written statement notifying the applicant of this authority. The fact that the District neglected to include this written statement in either of their JDs appear harmless, as this disclaimer would not have impacted the District's rationale for asserting jurisdiction in the instant JD being appealed.

Approved JDs are not absolute contracts according to the regulations. In addition, the guidance discussed above does not prohibit the District from issuing subsequent JDs that are contrary to prior JDs. Therefore, this reason for appeal has no merit.

Reason 2: The Army Corps is equitably estopped from reversing its original determination which Greenfield Homes, LLC relied upon to its detriment.

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion:

Equitable estoppel is a defensive legal doctrine preventing one party from taking unfair advantage of another when through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. The appellant asserts that it relied on the District's original determination of no jurisdiction over wetland 3 and that the District's reconsideration of that decision, and ultimate reversal, is improper. The District's original determination was called into question by the State of New York. The District was obligated to evaluate the New York assertion, verify its accuracy, compare it with the District's findings, and determine whether this information was new. The District determined that the information was indeed new and warranted a reconsideration of the JD. Based on the Corps' RGLs noted in Reason 1, the District issued a new JD that superseded the previous JD. The Appellant knew of the assertions made by the State of New York, and knew that the District would consider seriously the new information.

There is nothing in the record to suggest that the District acted in a manner to make false representation of, or conceal, material facts. There is also no evidence to suggest that the District intentionally made false representations. Nor is there any evidence that the appellant was induced to take an action based on the District's action that caused some injury to it.

The overarching principle of the United States federal government is to serve its citizens. The underlining intention of any action taken by a federal agency is to serve the interests of the people. Therefore, a federal agency is charged to always make true representations. The District acted within its authority under the Clean Water Act, in the interests of national water quality, and thus answered its charge to serve the nation's citizens when it reversed its JD. The District is the subject matter expert when acting within its role as a federal action agency charged with protecting the nation's waters under Section 404 of the Clean Water Act. The principles of equitable estoppel do not apply to the government as prohibiting a government from reversing its decision, particularly when the larger interests of the nation could outweigh those of an individual party. Therefore, this reason for appeal has no merit.

Reason 3: Even if the Army Corps had the authority to and is not equitably estopped from reversing its original determination, its reversal determination was improper under the standard set by *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“SWANCC”).

Finding: This reason for appeal has no merit.

Action: No action required.

Discussion: The appellant asserts that the District incorrectly applied the facts of law in making their approved JD. The appellant states the following in making his argument (see RFA, pg 7):

What is required under the CWA as stated in *SWANCC*...is a “significant nexus” between the wetlands and “navigable waters”. [citation removed] Accordingly, the Army Corps Reversal Determination was improper under the standard set forth by the Supreme Court in *SWANCC* which redefined the limits of the Army Corps’ jurisdiction under the CWA.

In *SWANCC*, the United States Supreme Court addressed Corps jurisdictional regulatory provisions in construing the CWA term “waters of the United States.” The Supreme Court in *SWANCC* held that use of “isolated” non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. 531 U.S. at 166-174. The *SWANCC* decision did not cast doubt on the validity of the Corps regulations governing “adjacent wetlands,” which the Supreme Court upheld in *United States v. Riverside Bayview*, 474 U.S. 121 (1985). The Corps’ regulations that assert authority over discharges of pollutants into wetlands “adjacent” to other waters within the purview of the CWA are based on an interpretation of the statute that is reasonable and consistent with the Commerce Clause. The Corps does not exercise CWA permitting authority over discharges into “adjacent wetlands” merely because of geographical occurrence, but rather because these wetlands as a class have significant functional relationships – including hydrological connections – with the waters to which they are adjacent.

One way to determine the presence of a significant functional relationship between wetlands that are adjacent to other waters under the CWA is to observe the presence of an Ordinary High Water Mark (OHWM). Corps regulations at 33 CFR 328.3(e) define ordinary high water mark as:

...that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

The District substantiated the presence of an OHWM by documenting its observance of flowing water through discreet conveyances (i.e. channels, culvert, pipes, gully). This is an appropriate method of considering the hydrological characteristics of the area.

Corps regulations at 328.3(a)(7) define the term adjacent as bordering, contiguous, or neighboring. The District substantiated that wetlands 2 and 3 were adjacent to the Seneca River by documenting the presence of an uninterrupted OHWM between these wetlands and the Seneca River.

The District documented the presence of water, flowing from the wetlands in question to the Seneca River, in its Site Inspection notes from December 14, 2004. The District documented a surface water connection between wetland 2 and wetland 3 via “a discreet sinuous channel with flowing water connecting the two wetlands.” The District also documented a surface water connection from wetland 3 to the Seneca River via water flowing from wetland 3 in a channel, entering into a storm water drain system (culvert, pipes, and outfall), and then discharging into an open natural tributary channel that flowed into the Seneca River.

The District’s administrative record adequately documents a significant functional relationship by showing the presence of a surface water connection between the wetlands on the appellant’s property and the Seneca River. Therefore, this reason for appeal has no merit.

The appellant also asserts that the District’s initial approved JD (October 7, 2003) in which it determined the absence of a water of the U.S. on the site was correct (RFA, pg 7):

The Army Corps’ original determination was proper under *SWANCC* as it fully considered all of the relevant information concerning wetlands 2 and 3, including evidence of a hydrological connection, and concluded that no significant nexus exists between wetlands 2 and 3 and the Seneca River, a navigable water under the CWA.

The initial approved JD dated October 7, 2003 has been superseded by the new approved JD dated January 19, 2005. Corps regulations at 331.5(b)(7) state that a previously approved JD that has been superseded by another approved JD is not an appealable action. Therefore, this reason for appeal has no merit.

The appellant also asserts that the hydrological connection between wetlands 2 and 3 and the Seneca River was established using an 18-inch underground storm sewer pipe which is part of a 40-year old municipal storm sewer or waste treatment system. The appellant states that the hydrological connection at issue qualifies as a “waste treatment system” which are not waters of the U.S. under the CWA and cites USEPA regulations at 40 CFR 122.

USEPA regulations at 40 CFR 122 (a)(1-3) state:

The regulatory provisions contained in this part... implement the National Pollutant Discharge Elimination System (NPDES) Program under sections 318, 402, and 405 of the Clean Water Act (CWA) (Public Law 92-500, as amended, 33 U.S.C. 1251 et seq.)

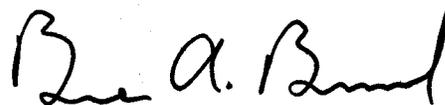
These provisions cover basic EPA permitting requirements...

These provisions also establish the requirements for public participation in EPA and State permit issuance and enforcement and related variance proceedings, and in the approval of State NPDES programs.

The Corps of Engineers is authorized to regulate the discharge of fill materials into waters of the U.S. pursuant to section 404 of the CWA (33 U.S.C. 1344) (hereinafter referred to as Section 404). USEPA regulations at 40 CFR 122 do not apply to Section 404. Corps Regulations at 328.3(a) define waters of the U.S. as it applies to the jurisdictional limits of the authority of the Corps under Section 404 (see also 33 CFR 328.1). Corps regulations state that waste treatment systems are not waters of the United States (see 328.3(a)(7)). This statement directly applies to waters that otherwise meet the definitions of wetlands under 328.3(a)(7).

The appellant acknowledged that the pipe was “clearly designed to collect and convey storm water” in his RFA. The District describes the pipe as part of a storm water drainage system and there is nothing in the administrative record to suggest that the pipe is part of a waste treatment system. Therefore, this reason for appeal has no merit.

Overall Conclusion: I find that the District’s administrative record supports its decision that wetlands regulated under the CWA are present on the appellant’s property. For the reasons stated above, the appeal does not have merit.



Bruce A. Berwick
Brigadier General, U.S. Army
Division Engineer