

ADMINISTRATIVE APPEAL DECISION

PYRAMID COMPANIES, FILE NUMBER 200200909(0)

BUFFALO DISTRICT

OCTOBER 16, 2003

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division (in support of Great Lakes & Ohio River Division Engineer)

Appellant: Pyramid Companies

Appellant's Agent: B. Laing Associates

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

Receipt of Request for Appeal: 23 September 2002

Appeal Meeting/Site Visit Date: 1 July 2003

Background Information:

During approximately October 2001, the Buffalo District (District) received verbal notification that the subject site was being considered for development by Pyramid Companies, who owns an adjacent site comprising the Pyramid Ithaca Mall. The District notified Pyramid Companies that, prior to development of the site, the District should be contacted to determine if the development would result in impacts to regulated waters of the United States.

The 10-acre site, located in the Village of Lansing, Tompkins County, New York, is generally bounded on the north by Oakcrest Road, a two-lane local thoroughfare; on the east by an adjacent undeveloped parcel of land; on the west by a small apartment house and firehouse; and on the south by an existing YMCA facility and a Target store which is part of the existing mall. Historical information indicates the site was graded in 1976, approximately concurrent with construction of the mall, to allow for future commercial development, and the southwesternmost portion of the site has been the repository of miscellaneous fill on multiple occasions since 1976. The site is approximately one mile from Cayuga Lake, which is a navigable water of the United States pursuant to Section 10 of the Rivers & Harbors Act of 1899.

In January 2002, the District received a wetland delineation report from Pyramid Companies' environmental consultant, along with a request for a determination of Department of the Army jurisdiction. The initial submission was judged to be incomplete. Additional information was submitted by the consultant as part of an informational package dated 26 April 2002. The District determined that this submittal

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completed the jurisdictional determination request, and conducted a site inspection with the consultant on 29 May 2002.

The consultant's original report identified four areas on the property as drainage ditches/depressions, one of which was subsequently judged to not be on the 10-acre property. In the 26 April 2002 submittal, the three remaining areas were referred to as Wetland "A", Wetland "B" and Wetland "C". The latter two areas were delineated by the consultant as being small, separated drainage depressions while Wetland "A" generally traverses the middle of the site in an east-west direction, with a small parallel "finger" wetland extending across much of the southwestern portion of the site. In both the January and April submittals, the consultant contended that these areas should not be jurisdictional for purposes of the Clean Water Act because they have no significant nexus to a navigable waterbody.

Information Received During the Appeal Review and its Disposition:

The District provided a copy of its entire administrative record, which was considered during the appeal review process along with the results of the 1 July 2003 appeal site visit.

During the appeal meeting held on 1 July 2003, the environmental consultant provided the following information:

- 1) An excerpt of the U.S. Department of the Interior Geological Survey (USGS), Ithaca East Quadrangle, showing the site in question;
- 2) A portion of the U.S. Department of the Interior Fish & Wildlife Service National Wetlands Inventory map, with the approximate site boundaries superimposed;
- 3) A portion of the 1961 Soil Survey Series of Tompkins County, New York, indicating that the average growing season in the project vicinity is approximately 146 days in length. This information was taken together with Table 5 of the 1987 Corps of Engineers Wetland Delineation Manual (page 36) by the consultant to indicate that an area must be inundated or saturated for 19 days during the growing season to meet the hydrology criteria set forth in the manual to enable an area to be classified as a wetland. A duration of nineteen days equates to 13% of the growing season.
- 4) A copy of Page 6 of the Supreme Court decision in the SWANCC case, indicating that "It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*." The thrust of the appeal is that the consultant believes this decision should be interpreted as meaning that a water of the United States must have a "significant nexus" to navigable waters to be considered jurisdictional under the Clean Water Act. He also provided a copy of a Webster's Dictionary definition of "significant".

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5) A copy of a portion of a New York State drainage map, dated 15 January 1967, based upon the Ithaca East Quadrangle, showing the courses of substantial streams in the project area.

This information serves to assist in interpreting, clarifying and/or explaining issues and information contained in the administrative record of this request for appeal, and is therefore accepted as clarifying information in accordance with 33 CFR §331.7 (f).

Appellant's Reason For Appeal:

The three delineated wetland areas on the property have no "significant nexus" to interstate waters, and, in accordance with the United States Supreme Court decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, No. 99-1178 (SWANCC), should be considered non-jurisdictional by the Corps of Engineers for purposes of Section 404 of the Clean Water Act.

Summary of Decision:

The appellant's Request for Appeal does not have merit. The district's administrative record sufficiently demonstrates that the on-site wetlands are part of a surface tributary system of a navigable water of the United States.

Discussion:

The appellant's consultant interprets decisions made in the cases of SWANCC, 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.

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 consultant'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

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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 United States v. Lamplight Equestrian Center, Inc., No. 00-6486, the Court concluded that SWANCC did not limit Corps jurisdiction under the Clean Water 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 the U.S. Court of Appeals in United States of America v. James S. Deaton and Rebecca Deaton (No. 02-1442, slip op. 4th Cir. 12 June 2003) regarding 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. The environmental setting in the present case closely parallels that in the Deaton case.

The United States has appealed the district courts' decisions in the Newdunn and Rapanos cases 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.

On 15 January 2003, the Corps of Engineers and the U.S. 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 (68 FR 1991-1998), providing clarifying guidance regarding the U.S. 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. The district's administrative record contains sufficient documentation to lead to a conclusion that all three wetland areas on the property are adjacent to a surface tributary system of Cayuga Lake.

The definition of "navigable waters of the United States" at 33 CFR 329.4 is the 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.

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Conclusion:

After reviewing and evaluating the entirety of the administrative record provided by the Buffalo District, and the information submitted in support of the appellant's request for appeal, I find that this Request For Appeal does not have merit. There is sufficient information in the District's administrative record to support their determination that the 3.83-acre onsite wetland areas (wetland areas "A", "B" and "C") are jurisdictional under the Clean Water Act. Further, the district's decision is in accordance with currently applicable policy.

FOR THE COMMANDER:


SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes & Ohio River Division