

ADMINISTRATIVE APPEAL DECISION

CARL LUNDSTROM; FILE NO. 200101163

CHICAGO DISTRICT

OCTOBER 4, 2002

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Ms. Sheila Deely, Gardner, Carton & Douglas, Chicago, Illinois.

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

Receipt of Request For Appeal (RFA): November 30, 2001.

Site Visit: February 15, 2002

Background Information: The 283-acre site is located west of Haligus Road and north of Woodbine (or Zimmerman) Lane in Lakewood, McHenry County, Illinois. Most of the site is in agricultural production and is bordered by agricultural fields. On August 9, 2001, Gardner, Carton & Douglas (GC&D) submitted to the Chicago District (District) a wetland delineation report dated May 14, 2001, prepared by V3 Consultants, on behalf of the appellant for review and written concurrence. The report identified 15 wetland areas totaling 34.94 acres, a pond and a portion of the Kishwaukee River that crosses the southeastern corner of the site.

District staff performed a site visit on October 12, 2001 and determined that the site contains "waters of the U.S.". In a jurisdictional determination (JD) letter dated October 15, 2001 to the appellant, the District noted that wetland "area 11 has a historic stream connection that is currently conveyed through a pipe into the Kishwaukee River, an interstate waterway". The Kishwaukee River is a tributary of the Rock River, an interstate waterway and tributary of the Mississippi River. Wetland area 11 is a 30.68-acre emergent-forested wetland complex in the central portion of the site. The Natural Resources Conservation Service (NRCS) identified a portion of this wetland area, 3.3 acres, as a farmed wetland (FW). Wetland area 11 is identified on the U.S. Fish & Wildlife Service National Wetland Inventory map and the McHenry County Wetland Map. The District's approved JD pertained only to wetland area 11 and a JD decision on the remaining delineated wetlands and waters was deferred till another site visit by the District could be performed.

GC&D have appealed this determination to the Division office. In a December 28, 2001 letter to the appellant, I was delegated the authority to serve as both the Review Officer

and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Information Received and its Disposition during the Appeal Review:

Information received from the Appellant:

- As part of its November 29, 2001 RFA, the appellant supplied a copy of an October 2, 2001 affidavit by a District employee concerning an unrelated matter.
- Following the February 15, 2002 appeal site visit, V3 Consultants submitted a 4-page document entitled "Historic Stream Clarification" dated February 22, 2002. A 1925 U.S. Geological Survey (USGS) map of the site and a February 20, 2002 flow path analysis were attached.

Information received from the District:

In addition to the administrative record, the District provided copies of U.S. Government court documents dated November 20, 2001 in the district court case *U.S. v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N. Dist. Ill. March 8, 2002).

- "United States' Response to Defendant's Motion to Supplement its Rule 56.1(a) Response and Statement of Additional Facts"
- "United States' Reply to Lamplight's Supplemental Rule 56.1(a) Statement in Support of its Motion for Summary Judgement and in Response to Plaintiff's Statement of Additional Facts"

These items were categorized as clarifying information.

Reasons for Appeal (condensed and paraphrased by the RO):

Appeal Reason 1: The appellant alleges "The wetland at issue does not border or neighbor a navigable water or its tributary, nor is it contiguous to a navigable water or its tributary." 33 CFR 328.3(c)

Appeal Reason 2: The appellant alleges the wetlands are isolated based on Corps regulations at 33 CFR 330.2(e) and that "An existing underground pipe, especially an underground drain tile, no matter what it replaced historically, does not qualify as a surface tributary system."

Appeal Reason 3: The appellant asserts the alleged historical connection is refuted by site conditions . . . "There is a two-foot rise in elevation between the Kishwaukee River and the southern boundary of the largest on-site wetland (Area 11)."

Appeal Reason 4: The appellant asserts that the alleged historical connection predates the Clean Water Act (CWA) and alleges the CWA "cannot be applied retroactively to revive historical and altered circumstances as a basis for jurisdiction."

Appeal Reason 5: The appellant alleges the Army Corps of Engineers has not announced a policy on use of historical information nor does the Chicago District have a consistent policy on historical information and its use concerning jurisdiction.

Appeal Reason 6: The appellant alleges that the Kishwaukee River is not an interstate water nor is it navigable in fact pursuant to 33 CFR 328.3(a)(1).

Appeal Reason 7: The appellant alleges that under *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) (“*SWANCC*”), “the wetland must be ‘inseparably bound up with a navigable water,’ or have a ‘significant nexus to navigable waters’” to be regulated under Section 404 of the CWA.

Notwithstanding the alleged underground pipe connection, the appellant asserts that the District makes no finding that would meet this standard with respect to the Kishwaukee River.

Summary of Decision: Appeal reasons 1, 2 and 6 have merit and the approved JD is remanded back to the district to correct errors, reconsider its JD decision as necessary, and include sufficient documentation to support its JD.

Appeal Decision and Instructions to the Chicago District Commander (DE):

Appeal Reason 1: The appellant alleges “The wetland at issue does not border or neighbor a navigable water or its tributary, nor is it contiguous to a navigable water or its tributary.” 33 CFR 328.3(c)

Finding: This appeal reason has merit.

Action: The district’s administrative record does not adequately address this issue. The district shall correct its findings, reconsider its JD decision as necessary, and include sufficient documentation to support its JD.

Discussion:

The district’s administrative record does not adequately address this issue. As indicated in the background section, the district’s approved JD letter stated that the site contains waters of the U.S. and that wetland “area 11 has a historic stream connection that is currently conveyed through a pipe into the Kishwaukee River, an interstate waterway”. This is consistent with the district’s site visit comments, dated October 30, 2001. The district’s basis of jurisdiction also indicated the parcel contains interstate waters pursuant to 33 CFR 328.3(a)(2) and contains a wetland that is bordering, contiguous or neighboring other interstate waters pursuant to 33 CFR 328.3(a)(7).

However, there is nothing in the administrative record to support how the wetland is considered to be bordering, contiguous or neighboring other interstate waters pursuant to 33 CFR 328.3(a)(7). Furthermore, the district has indicated that an error was made when it identified the Kishwaukee River as an interstate waterway. Although the Kishwaukee

River does flow west into an interstate, navigable waterway, the Rock River, it is not an interstate waterway.

The district shall correct its findings, reconsider its JD decision as necessary, and include sufficient documentation to support its JD.

Appeal Reason 2: The appellant alleges the wetlands are isolated based on Corps regulations at 33 CFR 330.2(e) and that “An existing underground pipe, especially an underground drain tile, no matter what it replaced historically, does not qualify as a surface tributary system.”

Finding: This appeal reason has merit.

Action: The district shall correct its findings, reconsider its JD decision as necessary, and include sufficient documentation to support its JD.

Discussion:

Man-made alterations to natural tributaries do not necessarily negate Corps jurisdiction under the CWA. A natural stream that is confined to a pipe, or replaced by a series of pipes in essentially the same location, does still function as a connection between upstream and downstream waters and remains a part of the surface tributary system. Even though waters of a wetland or a stream flow underground, particularly through a pipe, those waters still remain within the jurisdiction of the CWA. “The fact that an underground pipeline conveys the water from one point to the other does not create a hydrological disconnect...” *California Sportfishing Protection Alliance v. Diablo Grande, Inc.* (E.D. Cal., March 21, 2002). Relying upon a 1940 USGS Quad map, the district’s administrative record and the appeal site visit support the district’s conclusion that a historic stream connection is currently conveyed through a pipe into the Kishwaukee River. However, as stated in the discussion for appeal reason 1, the district did not adequately address the issue of how the wetland is considered to be bordering, contiguous, or neighboring other interstate waters, or in the alternative, that the wetland is not isolated because it does not fit within the definition found in 33 CFR 330.2(e).

The district shall correct its findings, reconsider its JD decision as necessary, and include sufficient documentation to support its JD.

Appeal Reason 3: The appellant asserts the alleged historical connection is refuted by site conditions . . . “There is a two-foot rise in elevation between the Kishwaukee River and the southern boundary of the largest on-site wetland (Area 11).”

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

In support of their claim that current site elevations preclude a surface hydrologic connection between wetland area 11 and the Kishwaukee River, the appellant submitted a April 20, 2001 topographic survey with a 1-foot contour interval, an August 7, 2001 memorandum by V3 Consultants on the "Clarification of Historical Connection Issues" (incorrectly cited by the appellant in the RFA as being dated November 6, 2001), and a February 22, 2002 "Historic Stream Clarification" by V3 Consultants that included a 1925 USGS map of the site and a February 20, 2002 flow path analysis.

Long-term farming practices have been applied to this site and have altered the surface topography to an unknown degree. There has been no definitive documentation provided by the District or the appellant on what the site topography was at the time of the 1925 and 1940 USGS mapping. Woodbine (Zimmerman) Road is present on the 1925 USGS map and active farming is apparent on the District's 1939 aerial photograph.

In an August 9, 2001 letter to the district, GC&D states that "The property has been hydrologically altered by drain tiles, certain of which may drain toward the Kishwaukee River . . .". On page 13 of the May 14, 2001 wetland delineation report by V3 Consultants, wetland area 11 is discussed. The consulting firm wrote:

The hydrology within this wetland has been altered, as demonstrated by three broken drainage tiles observed during the site visit. Two of the damaged drainage tiles are located at the southern end of the wetland. The third is located in the north-central portion of the complex. Although partially failing, resulting in several "blowouts", these tiles still function and water was observed flowing through each of the points where tiles were exposed.

The direction of water flow was not noted.

As indicated in the discussion for appeal reason 2, the district's JD is based on a finding that an underground pipe that replaced an historic intermittent tributary currently conveys wetland hydrology to the Kishwaukee River. The appellant has not presented evidence to the contrary. I find that the district's administrative record supports its decision with regard to the pipe conveying wetland hydrology to the Kishwaukee River.

Appeal Reason 4: The appellant asserts that the alleged historical connection predates the Clean Water Act (CWA) and alleges the CWA "cannot be applied retroactively to revive historical and altered circumstances as a basis for jurisdiction."

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

On most sites, present-day topography is expected to differ from what was mapped on the early USGS maps. Natural disasters, farming and forestry practices, and other man-

induced development activities will alter landscapes significantly. Nevertheless, the practice of consulting historical maps and utilizing them as a reference when making jurisdictional determinations is not an arbitrary and capricious action on the part of the District. There is no reason to limit the review of mapped data to post-Clean Water Act (CWA) material. Much of the field work, mapping and publication of resources and aerial photographs commonly utilized by the Corps and consultants alike, particularly soil surveys, pre-date the CWA. Certainly, historical maps should not be the sole basis for a jurisdictional determination. Present day drainage characteristics and topography must also be considered. However, historical mapping and other resources provide a vital tool in understanding both the past and present environmental conditions of a site.

Appeal Reason 5: The appellant alleges the Army Corps of Engineers has not announced a policy on use of historical information nor does the Chicago District have a consistent policy on historical information and its use concerning jurisdiction.

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

The appellant believes that the Chicago District's use of historical information is irrational, arbitrary and capricious and not in accordance with law. This assertion is based on an affidavit that was executed as part of the litigation in *U.S. v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N. Dist. Ill. March 8, 2002). In that affidavit, a District employee stated "When the Corps determines whether a wetland is jurisdictionally protected under the Clean Water Act, it assesses the current state of the wetlands, rather than the property's historical use."

Counsel for the appellant made this same allegation in the *Lamplight* case and the U.S. Government's response to the claim is part of the court record (see "United States' Response to Defendant's Motion to Supplement its Rule 56.1(a) Response and Statement of Additional Facts", dated November 20, 2001).

Courts generally give considerable deference to the methods and processes of federal agency decision making. Based on the lack of discussion of this issue in the *Lamplight* opinion, the Court did not appear to be concerned with the Corps' use of historical records to confirm observations made during routine site investigations. One could infer that the Corps' use of historical records in the course of making a jurisdictional determination was a non-issue for that Court.

The District employee's statement was made in the context of litigation in an unrelated case. The *Lamplight* case was an enforcement action in which the Lamplight Equestrian Center failed to obtain Corps' authorization to discharge fill into a wetland. In that case, the Government asserted that the employee does not have the authority to make rules or policy or speak for the Corps on the issue of jurisdiction and how it is determined. The

affidavit that contained the statement was a litigation position, not an indictment of the Corps' methods used to confirm and determine CWA jurisdiction or policy in this area.

The Government's response in the *Lamplight* case is applicable here: for the purpose of *determining* whether a wetland contains "waters of the United States," the Corps relies on the current state of the wetland, which is generally determined based on an on-site investigation. In the case of the Lundstrom parcel, the district visited the site and made some observations. The Corps may also look to historical maps and other records and material to *confirm* any on-site observations that a wetland contains "waters of the United States." This was done in this case to confirm that the pipe/tile line location, evidenced by areas of failure, was shown to be in the approximate same location as an historical stream. One way to confirm this observation (or refute it if appropriate) is through the use of historic maps and other documents. The appellant has not provided any information that would support its allegation that this practice is irrational, arbitrary, or capricious.

Appeal Reason 6: The appellant alleges that the Kishwaukee River is not an interstate water nor is it navigable in fact pursuant to 33 CFR 328.3(a)(1).

Finding: This appeal reason has merit.

Action: The district shall correct their findings and reconsider their JD decision as necessary.

Discussion:

As discussed under appeal reason 1, the district has indicated an error was made when it stated that the Kishwaukee River is an interstate waterway. The district shall correct their findings and reconsider their JD decision as necessary.

Appeal Reason 7: The appellant alleges that under *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("*SWANNC*"), "the wetland must be 'inseparably bound up with a navigable water,' or have a 'significant nexus to navigable waters'" to be regulated under Section 404 of the CWA. Notwithstanding the alleged underground pipe connection, the appellant asserts that the District makes no finding that would meet this standard with respect to the Kishwaukee River.

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

The appellant's representation of the holding in *SWANNC* is erroneous and creates an implication that was clearly not articulated or intended by the Court. The Supreme Court in *SWANNC* narrowly confined its ruling to invalidating that portion of the Corps'

regulations pertaining to an assertion of CWA jurisdiction based on 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, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

Since the *SWANNC* decision, several courts have rejected the appellant's broad interpretation of that ruling. In *United States v. Interstate General Co.*, 152 F.Supp. 2d 843 (D. Md. June 12, 2001), the Court stated that [T]he *SWANNC* 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 *SWANNC* 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 July 2, 2002. In *U.S. v. Krilich*, 152 F. Supp. 2d 983 (N.D.Ill., June 21, 2001), the Court stated that "cases subsequent to *SWANNC* 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., December 28, 2001), the Court stated that "[T]he *SWANNC* 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 *SWANNC* did not limit Corps jurisdiction under the Act to navigable waters and wetlands adjacent to navigable waters (2002 WL 360652 (N.D.Ill. March 8, 2002)).

The district adequately supported its findings concerning the underground pipe connection. On that basis, the *SWANNC* decision and its progeny are not applicable. However, to the extent that the district did not adequately address the issue of how the wetland is bordering, contiguous, or neighboring in the district's basis of jurisdiction, the issue will be remanded to the district for further evaluation.

Conclusion: For the reasons stated above, I conclude that this Request For Appeal has merit. The approved JD is remanded back to the district to correct errors, reconsider their JD decision as necessary, and include sufficient documentation to support their JD.

FOR THE COMMANDER:


SUZANNE L. CHUBB
Appeal Review Officer
Great Lakes & Ohio River Division