

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE KAHALA PROPERTY
CHAPOTON RAMSEY LIMITED PARTNERSHIP**

GALVESTON, GALVESTON COUNTY, TEXAS

ARMY CORPS OF ENGINEERS FILE NO. D-14079/01 & D-14079/02

GALVESTON DISTRICT

November 18, 2003

Review Officer: Mr. Andrew Commer, US Army Corps of Engineers, Southwestern Division, Dallas, Texas

District Representatives: Mr. Glenn Weitknecht, Mr. Andy Williams, and Mr. Casey Cutler, Galveston District Office, Texas

Appellant Representative: Mr. Bruce Reinhart, Kahala Development, Austin, Texas

Appellant Agents: Mr. Bradley I. Raffle, of Baker Botts L.L.P., Houston, Texas, and Mr. Brian Fairchild of SWCA Environmental Consultants, Houston, Texas

Authority: Clean Water Act (CWA), Section 404

Receipt of Request For Appeal (RFA) in SWD: May 8, 2003

Appeal Conference Date: August 14, 2003 **Site Visit Date:** August 14, 2003

Background Information: The project site is a 62-acre tract located southwest of Galveston, on Galveston Island, Texas. The property lies between the coastline of the Gulf of Mexico and FM Road 3005, approximately 1900 feet west of 8 Mile Road. Other than the beach, no other properties lie between this property and the Gulf of Mexico. The property is currently used for cattle grazing. The appellant holds a development option on the property with the current owner, Chapton/Ramsey Limited Partnership. The property includes portions of eight wetland depressions. The largest of these depressions is designated Wetland "C". The Appellant disputes Clean Water Act (CWA) jurisdiction over Wetland C.

On October 15, 2002 the Appellant, through their agent SWCA Environmental Consultants, requested a jurisdictional determination on the subject property. Galveston District (District) regulatory personnel conducted site inspections on November 7, 8, and 15, 2003. Based on the results of its site inspections, the District determined that the property contained wetlands that meet the three mandatory criteria of the US Army Corps of Engineers Wetland Delineation Manual. The District determined that the wetland located behind the dune line was an adjacent

wetland. In addition, the District identified two independent surface hydrologic connections between Wetland C and other waters of the United States. The first connection is a Texas Department of Transportation (TXDOT) drainage easement, through Sweetwater Lake, to West Bay (on the Gulf Intracoastal Waterway). The second connection flows through a series of drainage ditches, through an unnamed pond to the Gulf of Mexico. The Gulf of Mexico and West Bay are navigable waters of the United States. The District issued its preliminary determination on November 26, 2002.

By letter dated January 31, 2003, SWCA requested clarification of the jurisdictional status of wetlands located on the Kahala tract, specifically Wetland C. In particular, SWCA wanted to know if there was not a direct hydrologic surface connection from Wetland C to a navigable water of the United States, would Wetland C still be considered jurisdictional. The appellant based their request on information obtained during a telephone discussion with the District's Project Manager. During the January 27, 2003 telephone conference, SWCA was informed that one of the surface connections that connected Wetland C to the Gulf of Mexico had been filled and the connection no longer existed. In addition, SWCA felt that the remaining TXDOT drainage ditch was not jurisdictional because it was constructed through an upland. Therefore, SWCA opined it could be filled without a permit under Section 404 CWA and suggested that severing or disrupting this jurisdictional link would nullify the jurisdictional status of Wetland C. Consequently, SWCA requested clarification that the TXDOT ditch is the *only* jurisdictional link in light of Galveston District Policy 01-001. With this letter, SWCA also provided their assessment of the position of wetlands in relation to the dune line of the Gulf of Mexico shore. They contend that Wetland C is part of a second line of wetlands positioned from the gulf shore. As such they argue that Wetland C is separated from the Gulf of Mexico by two barriers, the first barrier being the dune line immediately landward of the shore and the second barrier being an upland area between Wetland D and Wetland C. Consequently, SWCA requested clarification on whether Wetland C would be considered non-jurisdictional based on the two-barrier rule or proximity criteria alone, disregarding the existence of the surface hydrologic connection through the TXDOT drainage ditch to the north.

The District responded to SWCA on March 10, 2003 and determined that all the wetlands located on the property are adjacent to the Gulf of Mexico (Case No. D-14079/01). The District stated that a natural beach dune constitutes the only barrier separating the wetlands from the Gulf of Mexico. The District provided this determination as an approved jurisdictional determination subject to appeal. It is this determination that the Appellant seeks to appeal.

On March 31, 2003, during the 60-day period allowed for applicants to consider their option to appeal, the landowner's agent, Mr. Brad Raffle of Baker Botts LLP, submitted a request for reconsideration citing three specific observations. First, the agent asserted that two barriers lie between Wetland C and the Gulf of Mexico and provided elevation data analysis as supporting evidence. Second, the agent asserted there is no hydrologic nexus between Wetland C and the Gulf of Mexico to support a finding of adjacency. Citing Fifth Circuit Court opinion in *Rice v. Harken Exploration*, the agent argued that Corps jurisdiction is limited to wetlands that are adjacent to an open body of navigable water and Wetland C is a significant distance from the mean high tide line of the Gulf and has no hydrologic connection. Lastly, the agent asserted that the TXDOT drainage ditch constructed through uplands does not constitute a jurisdictional

wetland or water and does not provide a significant hydrologic connection. The agent contends the landowner may pursue abandonment and relocation of this ditch, thereby intending to permanently sever this connection.

On August 13, 2003, at 0800 hours, a site meeting was held on the location of the subject property. All of the parties listed above were in attendance. Following the site meeting, at approximately 1000 hours, the parties gathered at the Galveston Chamber of Commerce office for clarifying questions and discussion of the pertinent issues. This meeting concluded at approximately 1130 hours.

Summary of Decision: I conclude the administrative record for this action supports the District's conclusion that the wetland on the Appellant's property is within CWA jurisdiction. The appeal does not have merit.

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

Reason 1: The Appellant asserts that two barriers lie between the Gulf of Mexico and Wetland C. The Appellant attributes the dune line as the first barrier and describes an upland area between Wetland D (closest to the Gulf) and Wetland C as the second barrier.

FINDING: This appeal reason does not have merit.

ACTION: None required.

DISCUSSION: The Appellant and the District agree that the dune line provides a distinct barrier between the waters of the Gulf and the wetlands on the project site. The top of this dune line varies in elevation between 8 feet to 11 feet above sea level. The subject property is between 3 feet and 8 feet above sea level. As support for asserting the presence of a second barrier, the Appellant submitted an aerial photograph depicting three lines of non-continuous wetlands positioned roughly parallel to the dune line. Wetland C lies on the second line. The Appellant also submitted spot-elevation survey data for 6 profile transects across the property. The transects were set perpendicular to the dune line. The Appellant selected a data point for each transect from the area lying between Wetland C and Wetland D. Assembling these data points into a new transect, the Appellant asserts that there is an upland ridge (Profile 7) between Wetland C and Wetland D that provides a second physical barrier.

The land on the lee side (landward) of the dune has slight undulating irregularities without any prominent features other than the water holding depressions identified in the record as wetlands. Such irregularities are normal in a dune-derived landscape. Although the land surface contains undulations, there is no visually perceptible continuous upland ridge observable on the property. The Appellant's survey along Profile 7 consists of spot elevations and demonstrates that there is measurable variation in the topography. However, it does not provide a continuous survey along the depicted ridge to demonstrate that the elevation is constant.

During the site inspection, the parties traveled the length of the ridgeline. Depressional areas inundated with water were crossed several times along the ridgeline revealing the elevational

variation present along this line. To be effective, barriers must be distinct, controlling, and uninterrupted. Furthermore, barriers are only effective to their lowest point in elevation. Galveston District Policy 01-001 states that a barrier must be of sufficient height to eliminate surface water connections. Only when two such barriers are present is adjacency eliminated. The Appellant has provided no information that establishes the lowest control point or points along the depicted ridge line (Profile 7) and therefore has not established that the depicted ridge rises to sufficient height throughout its course to constitute a barrier.

Hydrology that influences wetland formation is not a respecter of property lines. An assessment of the completeness of a barrier must also consider the off-site reach of the barrier and hydrologic influences in the locale. While the three wetland lines depicted by the Appellant run roughly parallel to the coast line, these lines eventually intersect the dune line to the northeast of the subject property. As such the second line of wetlands depicted by the Appellant becomes the first line of wetlands from the Gulf 1000 feet northeast of the tract. Galveston District Policy 01-001 states that the normal rule and practice has been to consider the first swale of wetlands/waters immediately behind the first line of dunes to be adjacent to the Gulf of Mexico and wetlands behind the second swale to be isolated. With the slightly oblique alignment of these swales to the coastline, this situation does not fit the norm and must be evaluated carefully.

Consequently, I find the appellant fails to demonstrate this upland ridge is: a) present, b) controlling, and c) uninterrupted. I find that with regard to barriers between Wetland C and the Gulf of Mexico, there is not more than one barrier.

Reason 2: The Appellant asserts that there is no hydrologic nexus between Wetland C and the Gulf of Mexico that would support a finding of adjacency. The Appellant cites the Fifth Circuit opinion in *Rice vs. Harken Exploration* (250 F.3d 264 (5th Cir.2001)) as limiting the Corps of Engineers jurisdiction to wetlands that are “adjacent to an open body of navigable water”. The Appellant asserts that Wetland C is a significant distance from the mean high tide line of the Gulf of Mexico and there is no hydrologic connection between Wetland C and the Gulf.

FINDING: This appeal reason does not have merit.

ACTION: None required.

DISCUSSION: It is clear that the primary dune line parallel to the Gulf of Mexico provides a distinct barrier between coastal waters and wetlands on the tract. The dune line recedes in elevation to the northeast and the effective height (lowest point) of this barrier off of the subject property has not been determined. This barrier is of sufficient height to restrict the Gulf of Mexico from directly contributing surface water except in extreme events. However, this does not disqualify adjacency. The definition of adjacency does not require the presence of a direct hydrologic connection. The definition of adjacency clearly states that “wetlands separated from other waters of the U.S. by man-made dikes or barriers ... are adjacent”.

Within the tract, Wetland C is located approximately 800 feet from the mean high tide line of the Gulf of Mexico. Historically, wetland C drained to the east-northeast through an unnamed tributary directly to the Gulf of Mexico, total pathway less than one-half mile. The Appellant

and the District recognize and agree this connection was severed by unrelated filling activity in the east end of Wetland C off of the subject property. However, proximity is not a function of distance alone, but should consider the size and dynamics of the primary jurisdictional water. 800 feet is not a significant or excluding distance from open gulf to disqualify or exclude an adjacent hydrologic relationship.

The obiter dictum observations of the Court in *Harken Exploration* relate to the jurisdictional reach of the Oil Pollution Act (OPA) of 1990 and do not circumscribe the definition of “waters of the United States” subject to Clean Water Act provisions. The various discharges examined under the *Harken Exploration* case were all onto dry land. The Plaintiffs sought remedy based on the implied hydrologic connection between groundwater contaminated by oil production discharges onto land and projected downstream impacts in surface waters, which ultimately flowed to navigable waters.

Reason 3: The Appellant asserts the Texas Department of Transportation drainage ditch that extends from the northwest side of the tract (across FM 3005) and connects to Wetland C was excavated through upland habitat and does not constitute a jurisdictional wetland or waterway. Although the Appellant acknowledges this ditch provides a surface hydrology connection, he asserts that this ditch does not provide a “significant hydrologic connection” between Wetland C and the wetlands and sloughs that lie north of the property across FM 3005. He asserts this ditch does not comprise the kind of open body of navigable water the Fifth Circuit referred to in *Harken Exploration*.

FINDING: This appeal reason does not have merit.

ACTION: None required.

DISCUSSION: A review of the administrative record indicates that the District refers to the drainage ditch as a surface hydrological connection in its “preliminary jurisdictional determination”. A preliminary jurisdictional determination is a document issued by a district to indicate that waters of the United States **may** be located on a parcel or indicates the approximate location of waters of the United States on a parcel. A preliminary jurisdiction is advisory and cannot be appealed. While the District initially identified conveyance of water through this surface water connection as one of two connections from Wetland C to navigable waters, the District, in its approved jurisdictional determination did not identify the drainage ditch as a source of jurisdiction. The District based its assertion of jurisdiction over Wetland C because it met the criteria identified under Section 328.3(c) and Galveston Policy 01-001 as an adjacent wetland.

Filling or relocating the TXDOT ditch could eliminate any direct surface water connection between Wetland C and any navigable waters of the United States. However, this would not eliminate the Corps jurisdiction over Wetland C. Wetland C which has been determined to be adjacent to the Gulf of Mexico in accordance with the one barrier rule of Galveston District Policy 01-001. This ditch is not the sole jurisdictional link to Wetland C. Therefore, actions in the ditch to sever a jurisdictional connection would not serve to isolate the site.

Reason 4: The Appellant challenges the substantive and procedural validity of Galveston District Policy 01-001. According to the Appellant, as a substantive statement of agency policy, this document should have been preceded by formal notice and comment rulemaking. The Appellant believes the Policy is: a) inconsistent with 33 CFR 323.2(d) which makes no reference to a two barrier rule, and b) inconsistent with the Fifth Circuit Decision in *Harken Exploration*.

FINDING: This appeal reason does not have merit.

ACTION: None required.

DISCUSSION: The challenge of the procedural validity of Galveston District Policy 01-001 is a legal challenge rather than a factual challenge. Therefore, it is outside the scope of this administrative review under the Regulatory Administrative Appeal Program.

The Appellant's reference to 33 CFR 323.2(d) is inappropriate. This section defines the term "discharge of dredged material". The term "waters of the United States" is defined at 33 CFR 328.3(a) and includes "wetlands adjacent to" such waters. The term "adjacent" is defined at 33 CFR 328.3(c). The formative elements for a two barrier rule are found in the definition of adjacency and the exception statement in 33 CFR 328.3(a)(7), "Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section."

Information Received and its Disposition During the Appeal Review:

- 1) Following the Appeal meeting, the Appellant provided a letter (dated August 25, 2003) to clarify their perspective that this appeal deal exclusively with the alleged adjacency of Wetland C to the Gulf of Mexico and not the connectivity to West Bay through the TXDOT drainage ditch. The Appellant cites the District determination letters of March 10, 2003 and May 14, 2003 wherein is stated that the wetlands on the property are separated from the Gulf of Mexico by only one natural beach dune and therefore are adjacent. These letters do not mention the TXDOT ditch.
- 2) The District provided a response (dated August 28, 2003) to the Appellant's letter. The District notes that in earlier communication, specifically the SWCA letter of January 31, 2003, Appellant representatives accepted the drainage ditch connection as a valid connection for jurisdictional purposes. The Appellant's agent requested verification that this TXDOT ditch was the only jurisdictional link and specifically requested a determination of adjacency *assuming* the ditch connection did not exist. The District replied with their letter dated March 10, 2003 clarifying that the wetlands on the tract were considered adjacent to the Gulf of Mexico.
- 3) The Appellant provided an unsolicited response to this letter (dated September 8, 2003) emphasizing that his own March 31, 2003 letter to the District clearly communicated that the Appellant does not accept that the TXDOT drainage ditch provides a jurisdictional nexus to Wetland C, and in fact expressly disputes this point. He asserts that to allow such an issue to be considered would deny his client due process and is neither fair nor lawful.

These letters were considered in this decision. The issue of the TXDOT drainage ditch is intertwined in the administrative record and in the Appellant's information and cannot be considered "new information" to exclude from consideration in the appeal process. The appeal process is to consider whether the District Engineer's decision was supported by accurate and sufficient information. The District Engineer's fundamental decision in this matter is that CWA jurisdiction extends onto this tract of property and includes Wetland C. The administrative record indicates that the District found two reasons to exert jurisdiction on the tract, first by the surface water connection to West Bay and second, by adjacency to the Gulf of Mexico. While early communication to the Appellant first recognized the obvious surface water connection through the drainage ditch, when requested by the Appellant to provide a determination disregarding the presence of the ditch, the District determined the wetlands on the tract also satisfy the adjacency criteria of regulations and Galveston District Policy 01-001. As discussed above, this finding was appropriate.

Conclusion: I conclude the administrative record for this action supports the District's conclusion that Wetland C on the Appellant's property is within CWA jurisdiction. The appeal does not have merit.

19 Nov 43
(Date)



ROBERT CREAR
Brigadier General, USA
Commander