

ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT (CWA)
PA Waterfront, L.P.
Mustang Island, Texas
Galveston District Approved Jurisdictional Determination
File Number SWG-2008-00430

22 June 2009

Review Officer: John Davidson, U.S. Army Corps of Engineers (Corps), Southwestern Division, Dallas, Texas

Appellant Representatives: Jeff Pollack – HDR Engineering, Inc.
Joe Moake – HDR Engineering, Inc.

District Representatives: Reagan Richter - Regulatory Project Manager
Lloyd Mullins – Corpus Christi Regulatory Field Office Supervisor

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: Unknown, request dated 17 September 2008

Appeal Meeting and Site Visit Date: 19 March 2009

Summary of Decision: This request for appeal of the approved jurisdictional determination is without merit. The conclusion that the wetlands are adjacent to traditional navigable waters (TNWs), the Gulf of Mexico and Corpus Christi Bay, is supported by substantial evidence in the administrative record. The jurisdictional determination is in accordance with applicable laws, regulations and policy guidance. The District's determination is not arbitrary, capricious or an abuse of discretion and is not plainly contrary to applicable law or policy.

Background Information: The subject property is a 99-acre tract located east of State Highway 361, approximately 4 miles south of Port Aransas, on Mustang Island, in Nueces County, Texas. The property is located on a barrier island of the Gulf of Mexico. The property is generally flat and lies between the Gulf of Mexico and State Highway 361. The tract abuts the Gulf of Mexico and is approximately 3,000 feet east of Corpus Christi Bay. The tract contains eight (8) wetlands that total approximately 7.4 acres. Bay-ward of the tract is State Highway 361 and undeveloped property with wetlands contiguous to a tidal waterbody, Corpus Christi Bay.

The appellant requested a jurisdictional determination on the subject property on 31 March 2008. The Galveston District issued an approved jurisdictional determination stating that the property contains wetlands that are adjacent to the Gulf of Mexico and Corpus Christi Bay on 10 September 2008. HDR Engineering, Inc., submitted a request for appeal dated 17 September

2008 on behalf of PA Waterfront, L.P. appealing the approved jurisdictional determination citing the following reasons for appeal:

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

REASON FOR APPEAL 1: The wetlands are neither in close proximity to, nor connected to, nearby TNWs by a surface water connection such as a stream, continuous wetland systems, ditches, or other water courses during normal expected flows or predictable flood events, and therefore, are not adjacent.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Corps' regulations define "waters of the United States" in 33 CFR 328.3(a)(7) as "wetlands adjacent to waters identified in paragraphs (a)(1)-(6) of this section." 33 CFR 328.3(a)(1) states that waters of the United States means "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." The Gulf of Mexico and Corpus Christi Bay, the nearest waters to the subject wetland, meet the definition in 33 CFR 328.3(a)(1), and therefore qualify as waters of the United States. The Corps' regulations (33 CFR 329.4) define navigable waters as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce". The Gulf of Mexico and Corpus Christi Bay also meet this definition and which further classifies them as navigable waters of the United States. Current Corps/Environmental Protection Agency (EPA) joint guidance, titled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (5 June 2007, revised 2 December 2008) (hereafter referenced as the "2 December 2008 Memorandum") defines TNW as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Therefore, the Gulf of Mexico and Corpus Christi Bay are TNWs. The 2 December 2008 Memorandum states the agencies (EPA and Corps) will continue to assert jurisdiction over TNWs.

The 2 December 2008 Memorandum further states that the agencies (EPA and Corps) will continue to assert jurisdiction over wetlands that are adjacent to TNWs and that finding a continuous surface connection is not required to establish adjacency under this definition. It provides:

"The regulations define 'adjacent' as follows: 'The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands'. Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-

made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.”

Regarding the first criterion for adjacency, the subject wetlands do not border and are not contiguous with the Gulf of Mexico or Corpus Christi Bay; and there is no surface or shallow sub-surface hydrologic connection to jurisdictional waters documented as such in the administrative record. However, the Soil Survey of Nueces County, Texas, maps the soils in the project area as Mustang fine sand and Coastal dunes. The Mustang fine sand extends from the project site to Corpus Christi Bay. The area between the wetlands located in the Mustang fine sand soil and the Gulf of Mexico is mapped as coastal dunes. Both the Mustang fine sand and coastal dunes soils have a soil texture of fine sand at least 50 inches deep below the soil surface. The permeability of the Mustang fine sand is 2-3 inches/hour in the upper 30 inches and the coastal dunes has a permeability of 5-10 inches/hour. Additionally, the EPA and Corps Headquarters authored a memorandum for file SWG-2007-1623 that stated interdunal wetlands located 1,400 to 3,100 feet from the Gulf of Mexico or Corpus Christi Bay were adjacent due to proximity and subsurface flow. The wetlands that were the subject of SWG-2007-1623 are located on Mustang Island, approximately 1.5 miles northeast of the wetland subject to this appeal. Based on the proximity of the wetland to the Gulf of Mexico and Corpus Christi Bay and the permeability of the soil between the wetland and the bay, it is possible that water from the wetlands can enter the Gulf of Mexico or Corpus Christi Bay through a shallow subsurface connection.

Concerning the second criterion for adjacency, since the wetland is physically separated from the Gulf of Mexico by beach dunes, it meets this criterion for adjacency. The wetland is also physically separated from Corpus Christi Bay by uplands. The phrase “and the like” indicates that “man-made dikes or barriers, natural river berms, [and] beach dunes” are merely examples of the types of physical structures or manmade barriers that may result in separation from jurisdictional waters, and are not exhaustive. It is not required that the structure separating the wetland match one of these specific examples for a neighboring wetland to be adjacent. In this case, natural uplands separate the wetlands from Corpus Christi Bay. During the site visit, only one continuous beach dune between the wetlands and the Gulf was observed. Some areas may have had two dunes, but the second dune was broken and not continuous. The identified beach dunes separating the wetlands from the Gulf of Mexico and the identified natural upland

separating the wetland from the Corpus Christi Bay are sufficient reasons for determining that the wetland is adjacent to both TNWs.

Finally, with respect to the third criterion for adjacency, wetlands are adjacent where their proximity to jurisdictional water is reasonably close. Because there is a scientific basis for the inference that such wetlands have an ecological interconnection with jurisdictional waters, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the EPA and Corps Headquarters' memorandum for file SWG-2007-1623, discussed previously, it was determined that wetlands 1,400 to 3,100 feet from waters of the United States are in close proximity. In this case, the wetlands are located approximately 1,000 to 1,900 feet from the Gulf of Mexico and approximately 3,000 to 4,000 feet from Corpus Christi Bay and, therefore, are in close geographic proximity to both TNWs. When Corps personnel completed the jurisdictional determination form, they indicated that the rationale for determining the wetland to be adjacent was its close proximity to two different TNWs. The identified close geographic proximity is sufficient for a finding of adjacency under the third criterion of the 2 December 2008 Memorandum.

REASON FOR APPEAL 2: The wetlands are separated from the nearest TNWs by two barriers which, according to Galveston District Policy 01-001 concerning Adjacent/Isolated Criteria, would mean that the wetlands would be isolated.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: As discussed previously, when applying the definition of adjacent, the regulations state that wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands. While some areas have two dunes, only one continuous dune was observed between the wetlands and the Gulf of Mexico. Additionally, no barriers were observed between the wetlands and the bay. Furthermore, the regulations use plurality when describing dikes, barriers, berms, and dunes. This leads to the conclusion that two barriers may be present and the wetlands could still be adjacent. The Galveston District Policy 01-001 was published on 13 February 2001. Since that time, the EPA and Corps Headquarters formulated new Clean Water Act Jurisdiction guidance on 5 June 2007, revised on 2 December 2008, following the U.S. Supreme Court's decision in *Rapanos v. United States and Carabell v. United States*. The latest guidance was disseminated to all EPA regions and Corps districts for use in determining jurisdiction under the Clean Water Act and to implement the U.S. Supreme Court decision and create consistency throughout the nation. Previous guidance on Clean Water Act jurisdiction that conflicts with the 5 June 2007 guidance, as revised on 2 December 2008, is no longer effective.

Information Received During the Appeal Review and Its Disposition: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal conference. Information which was received during and

after the appeal conference was considered to the extent it clarified information in the existing administrative record. New information was not considered in the appeal.

Conclusion: As my final decision on the merits of the appeal, I conclude that substantial evidence exists in the administrative record to support the jurisdictional determination, which is in accordance with applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.



Kendall P. Cox
Brigadier General, US Army
Commanding