

ADMINISTRATIVE APPEAL DECISION
MR. TED DAHL
APPROVED JURISDICTIONAL DETERMINATION
GALVESTON DISTRICT
FILE NO. SWG-2010-00764
14 JANUARY 2011

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers, Southwestern Division (SWD)

Appellant/Applicant: Mr. Ted Dahl

Authority: Section 404, Clean Water Act; Section 10, Rivers and Harbors Act of 1899

Date Request for Appeal received: 20 October 2010

Approved Jurisdictional Determination Appeal Meeting and Site Visit Date: 8 December 2010

Summary of Appeal Decision: Mr. Ted Dahl is appealing a Galveston District (SWG) approved jurisdictional determination (JD) for property in the city of Surfside Beach, Texas. He submitted two reasons for appeal: (1) SWG committed a procedural error by conducting unauthorized sampling outside the flagged area, and (2) the ponds located on lots 38 and 39 do not have a direct surface connection with a water of the U.S. and are not adjacent to a water of the U.S. Accordingly, the appellant believes SWG incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction. For reasons detailed in this document, the first reason for appeal does not have merit and the second reason for appeal is premature. The final decision on jurisdiction is the District Engineer's approved JD letter, dated 28 September 2010.

Background Information: The property in question is located north of the intersection of County Road 257 and Gulf Park Court in Surfside Beach, Brazoria County, Texas. Mr. Dahl requested a JD of an approximately 50-foot by 350-foot flagged area by letter dated 16 August 2010, which SWG received on 18 August 2010. This letter included a map that illustrated the approximate location of the flagged area. After his initial request, Mr. Dahl requested by phone that SWG expand its JD to include three ponds located on adjacent lots 38 and 39. Mr. Dahl did not provide any location regarding the three ponds beyond the map included in his 16 August 2010 letter, which illustrated the lot locations. SWG conducted a site visit on 2 September 2010 and issued an approved JD by letter dated 28 September 2010. The letter stated the 50-foot by 350-foot area contained a wetland that was, "...adjacent to Oyster Creek, a navigable water of the United States, and is subject to Section 404 of the Clean Water Act." In addition, the letter stated that the three ponds located on lots 38 and 39 were part of a complex of, "...intertidal estuarine ponds...subject to both Section 404 [of the Clean Water Act] and Section 10 of the Rivers and Harbors Act of 1899."

Mr. Dahl submitted a complete Request for Appeal (RFA) form, dated 17 October 2010, which was received by SWD on 20 October 2010. Mr. Dahl was informed, by letter dated 5 November 2010, that his RFA was accepted.

Information Received and its Disposal During the Appeal

33 C.F.R. § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the Administrative Record (AR) to address the reasons for appeal cited by the appellant. The AR is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to SWD. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

1. SWG provided a copy of the AR to the RO and Mr. Dahl. The RO received his copy on 18 November 2010. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 29 September 2010.¹
2. An appeal meeting/site visit was held on 8 December 2010. During the meeting, it was discovered that the ponds the appellant wished to be included in the approved JD were not those identified in SWG's approved JD. During the appeal meeting, the appellant did concur with SWG's jurisdictional assessment of the ponds included in the approved JD; however, he still desired an approved JD of the three ponds on lots 38 and 39. The ponds included in the SWG approved JD were not visited during the appeal site visit as they were not the ponds the appellant wished to be included in the approved JD. The RO indicated during the appeal meeting that he would determine if this was new information and inform everyone of the determination. The RO contacted the appellant on 17 December 2010 and informed him that the pond location was indeed new information. The appellant's options at this point were either to withdraw the new information and continue with the appeal, or not withdraw the information. In the latter, the appeal would be withdrawn and the new information sent to the District for reconsideration. The District would then either reissue the approved JD or

¹ It should be noted that, after receiving SWG's approved JD letter, the appellant requested a copy of the NAO/NAP form to replace his missing copy. SWG incorrectly re-dated the form for 26 October 2010, the date the form was resent to the appellant. The original form with the correct date of 29 September 2010 was obviously located by the appellant as it was included in the RFA. A copy of the form with the incorrect date is located in the AR attached to SWG's 28 September 2010 approved JD letter. A copy of the form with the correct date is not located in the AR, but in the RFA received by the Division Engineer. The original form and SWG's JD letter do not have the same date due to an administrative error.

issue a new, approved JD, either of which would be appealable.² The appellant requested to withdraw this information and proceed with the appeal.

3. On 21 December 2010, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics and site visit to Mr. Dahl and SWG for review and comment. By email dated the same day, Mr. Dahl responded with one comment, that the MFR state, "...that during the site examination, the vegetation that the Corps sampled outside the flagged area was obviously different than the vegetation inside the flagged area." Mr. Dahl clarified during a telephone conversation on 28 December 2010 that he was referring to both SWG's initial site examination as well as that conducted during the appeal meeting. The differences in vegetation observed during SWG's initial site visit are the subject of this appeal and are discussed below. Because the purpose of the appeal meeting and site visit was to clarify information in the administrative record, the conditions of the site at the time of the appeal site visit are not relevant to the appeal and have no bearing on the appeal decision. SWG responded via email dated 27 December 2010 that it did not have any comments on the draft MFR. The final MFR was supplied to Mr. Dahl and SWG via email on 28 December 2010. A copy of the final MFR can be found in Appendix A.

Appellant's Reasons for Appeal

- 1. The District committed a procedural error by conducting unauthorized sampling outside the flagged area.**

FINDING: This reason for appeal does not have merit.

DISCUSSION: Use of the 1987 Corps Wetland Delineation Manual³ (1987 manual) is required to identify and delineate wetlands potentially subject to regulation under Section 404 of the Clean Water Act.⁴ In addition, regional supplements were developed by the Corps for use with the 1987 manual in order to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures.⁵ In this case, the site associated with this appeal falls within the applicable region of the Atlantic and Gulf Coastal Plain regional supplement (Supplement).⁶

The 1987 manual and the Supplement both outline procedures for conducting wetland delineations in atypical situations such as where vegetation was altered or removed. The 1987 manual indicates utilization of adjacent vegetation is one potential source of evidence to determine if hydrophytic vegetation occurred in an area prior to alteration. The manual states:

² 33 CFR §331.6(c)

³ Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

⁴ "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.

⁵ U.S. Army Corps of Engineers. 2008. *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region*, ed. J.S. Wakeley, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-08-30. Vicksburg, MS: U.S. Army Engineer Research and Development Center: 1-2.

⁶ Supplement, p. 3-5.

Circumstantial evidence of the type of plant communities that previously occurred may sometimes be obtained by examining the vegetation in adjacent areas. If adjacent areas have the same topographic position, soils, and hydrology as the altered area, the plant community types on the altered area were probably similar to those of the adjacent areas.⁷

The procedures outlined in the Supplement's section on problematic hydrophytic vegetation all describe utilizing an un-impacted site with similar soils and hydrology as the impacted site with the conclusion that the same plant community would exist on the impacted site in the absence of the impact.⁸

SWG indicated on both wetland determination data forms, A1 and A2 in the AR, that the vegetation was significantly disturbed by mowing and normal circumstances⁹ did not exist at either location. SWG further documented on data forms A1 and A2 that the sample plots were modified to include the adjacent un-mown community, and clarified during the 8 December 2010 appeal meeting that these modified sites included areas with similar topographic position, hydrology, and soils as that found within the flagged area. SWG concluded on data forms A1 and A2 that both locations met the hydrophytic vegetation criteria, and the sampled areas were within a wetland. SWG indicated on the approved JD form attached to its 16 September 2010 memorandum to the file¹⁰ that wetland A1 is bordering and contiguous with Oyster Creek, a traditional navigable water subject to the daily tide, and is therefore subject to jurisdiction under Section 404 of the Clean Water Act¹¹. Therefore, the AR supports the finding that SWG followed correct procedure to determine that the flagged area contains wetlands subject to Section 404 of the Clean Water Act.

ACTION: No action required.

2. The ponds located on lots 38 and 39 do not have a direct surface connection with a water of the U.S. and are not adjacent to a water of the U.S. Accordingly, the Galveston District has incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction.

FINDING: This reason for appeal is premature.

⁷ 1987 manual, p. 76 (d)

⁸ Supplement, p. 115-121.

⁹ Regulatory Guidance Letter 90-7 (26 Sep 90) states the determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation."

¹⁰ SWG clarified during the 8 December 2010 appeal meeting that wetland determination forms A1 and A2 are both associated with Wetland A1 identified in the approved JD form. SWG further clarified that the approved JD form was for Wetland A1 and not pond 1 and that the reference to Christmas Bay in Section IV.B. was a typographical error that should have been Oyster Creek.

¹¹ In accordance with the Rapanos guidance: Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007. Revised guidance released December 2, 2008.

DISCUSSION: As previously stated, it was discovered during the appeal meeting that the ponds the appellant wished to be included in the approved JD were not those identified in SWG's approved JD. During the appeal meeting, the appellant did concur with SWG's determination with respect to the ponds which were included in the approved JD. The appellant had indicated that he will request a JD for his three ponds which are outside of the scope of this appeal at a later time. As the scope of the appellant's RFA cannot include a determination that has yet to be made, this reason for appeal is premature.

ACTION: No action required.

Conclusion: For the reasons stated above, I conclude that this RFA does not have merit. There is substantial documentation in the administrative record to support SWG's jurisdictional determination. The final decision on jurisdiction in this case is the Galveston District Engineer's jurisdictional determination dated 28 September 2010.

14 Jan 11

Date

Thomas W. Kula

Thomas W. Kula
Colonel, US Army
Commanding

APPENDIX A

**Appeal Meeting/Site visit
Final Memorandum for Record
28 December 2010**

MEMORANDUM FOR RECORD

SUBJECT: Notes of 8 December 2010 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

1. An appeal meeting was held on 8 December 2010 at the U.S. Fish and Wildlife office in Brazoria, Texas. The meeting, which began at approximately 0930 hours, was regarding property owned by Mr. Ted Dahl located north of County Road 257 in Surfside Beach, Brazoria County, Texas. A copy of the sign in sheet can be found in Appendix A. The following is a list of attendees:

Mr. Elliott Carman – Regulatory Appeals Review Officer, Southwestern Division, U.S. Army Corps of Engineers

Mr. Ted Dahl – President, Spring Branch Wildlife Preserve (Appellant)

Ms. Tina Dahl – Vice President, Spring Branch Wildlife Preserve

Mr. Tim Hootman – Legal representative for the Appellant

Mr. Flynt Houston – Project Manager, Compliance Section, Regulatory Branch, Galveston District, U.S. Army Corps of Engineers

Mr. John Davidson – Acting Compliance Section Chief, Regulatory Branch, U.S. Army Corps of Engineers

2. Introductions and Opening Remarks

a. The RO read an opening statement (Appendix B) that explained the appeal meeting's purpose was to assist the RO in summarizing and clarifying both the appellant's request for appeal and the district's rationale for decision.

b. The appellant indicated they believed the Corps acted outside the limits of access by sampling outside the flagged area and that the ponds located on lots 38 and 39 have no direct surface connection to any water of the U.S.

c. The district indicated the flagged area was mown at the time of the jurisdictional determination making plant identification problematic; therefore, the district modified the two sample plots to include adjacent, unmown area. In addition, the district indicated they reviewed aerial photographs which depicted the ponds on lots 38 and 39 to be adjacent to Oyster Creek, a navigable water of the U.S.

CESWD-PD-O

SUBJECT: Notes of 8 December 2010 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

3. Reasons for Appeal

a. The appellant confirmed that the reasons for appeal listed below were accurate:

(1) The District committed a procedural error by conducting unauthorized sampling outside the flagged area (as described in Mr. Dahl's original JD request letter dated 16 August 2010).

(2) The ponds located on lots 38 and 39 do not have a direct surface connection with a water of the U.S. and are not adjacent to a water of the U.S. Accordingly, the Galveston District has incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction.

4. Administrative Record

a. The district provided the following comments and/or responses relative to the AR:

(1) A location point was illustrated on the USGS topographic map, the 1995 DOQQ, and the 2010 NAIP because the district did not have electronic location information to illustrate the flagged area boundaries.

(2) A GPS was used to record the location of two data points within the flagged area as well as illustrate the location on the 2010 NAIP/NWI map.

(3) Because the flagged area had been mown, a 30 foot modified plot, which included the adjacent un-mown area with similar topographic position, hydrology, and soils, was utilized to complete the vegetation section of wetland determination data forms A1 and A2.

(4) Total cover of all species in a stratum can exceed 100% as per the procedure for selecting dominant species by the 50/20 rule.

(5) The dominance test included in the vegetation section of wetland determination data form A1 should have resulted in 100% instead of 67% (2 of 2 and not 2 of 3).

(6) Data for wetland determination data form A2 was taken approximately 50 feet north of that for wetland determination data form A1. Data for both forms was collected while standing inside the flagged area.

(7) The "yes" boxes for presence of hydrophytic vegetation, hydric soils, and wetland hydrology in the summary of findings were accidentally left unchecked on wetland determination data form A2.

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SUBJECT: Notes of 8 December 2010 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

(8) The “yes” box was left unchecked for the “water table present” selection in the field observation component of wetland determination data form A2’s hydrology section. This was done because the previous weeks’ rainfall could not be ruled out as a factor for water being present at 13 inches in the pit.

(9) Uplands were present within the flagged area near the road; however, a data point was not taken as the district was responding to the appellant’s request for a determination (wetland present/absence) and not a delineation (wetland boundaries).

(10) The JD form attached to the 16 September 2010 memo to the file should be for the wetland associated with wetland determination data forms A1 and A2 and not the ponds.

(11) The reference to Christmas Bay in section IV.B of the JD form was a typo and should have been Oyster Creek.

(12) The appeal form included with the request for appeal (RFA) and the district’s JD letter dated 28 September 2010 did not have the same date due to an administrative error. The appeal form included in the RFA did not have the same date or name as the form attached to the district’s JD letter dated 28 September 2010 as it was re-dated/named when resent to the appellant at his request to replace his missing copy.

b. The appellant indicated the AR was complete without any additions. The district indicated the AR was complete to the best of their knowledge.

5. Points for Clarification

a. Appellant indicated the request to expand the JD to include the ponds was made after he had jurisdiction concerns about the ponds on lots 38 and 39. The appellant was ok with the Corps going outside the flagged area to conduct the pond component of the JD. Additional maps illustrating pond location were not provided with the request.

b. The district’s JD included an intertidal pond complex; however, it was discovered that the ponds the appellant wished to be included in the JD were actually southwest of those identified in the district’s JD. The appellant agreed with the district’s determination of the ponds included in the JD, but requested a JD of the three ponds on lots 38 and 39.

6. Conclusion and site visit

The appeal meeting concluded at 1045 hours followed by a site visit specific to the flagged area. The ponds included in the appeal were not visited as they were not the ponds the appellant wished to be included in the JD.

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SUBJECT: Notes of 8 December 2010 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

7. Review

On 21 December 2010, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics and site visit to Mr. Dahl and SWG for review and comment. By email dated the same day, Mr. Dahl responded with one comment, that the MFR state, "...that during the site examination, the vegetation that the Corps sampled outside the flagged area was obviously different than the vegetation inside the flagged area." Mr. Dahl clarified during a telephone conversation on 28 December 2010 that he was referring to both SWG's initial site examination as well as that conducted during the appeal meeting. The differences in vegetation observed during SWG's initial site visit are the subject of this appeal and will be discussed as part of the appeal decision. Because the purpose of the appeal meeting and site visit is to clarify information in the administrative record, the conditions of the site at the time of the appeal site visit are irrelevant to the appeal and have no bearing on the appeal decision. SWG responded via email dated 27 December 2010 that it did not have any comments on the draft MFR.



Elliott Carman
Administrative Appeals Review Officer

SIGN IN SHEET



**US Army Corps
of Engineers**
Southwestern Division

PROJECT NAME/NUMBER: Mr. Ted Dahl (SWG-2010-00764)

DATE: December 8, 2010

	NAME (Printed)	ORGANIZATION	PHONE NUMBER
1	ELSON CANNON	USACE	469-728-1567
2	TED DAHL	SWUP	832-419-7378
3	TRADAN	SWUP	832-355-5887
4	Tim Hutchinson	Lawyer for Dah	713-247-2546
5	M. Flynt Houston	SWC	409-766-3936
6	John Davidson	USACE	409-766-3933
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APPENDIX B – REVIEW OFFICER OPENING STATEMENT

DAHL JURISDICTIONAL DETERMINATION APPEAL MEETING – 8 DEC 2010 OPENING COMMENTS

I would like to make a few opening remarks. After that, I will ask if Mr. Dahl if he would like to make an opening statement. I will then ask the District if they would like to make an opening statement.

I am here today to ensure that I fully understand the appellant's reasons for appeal and the rationale for how the District reached their decision and how/where they documented their decision process. By the end of this meeting, I need to be confident that I can fully explain both perspectives to the Division Engineer and answer any of his questions regarding the merits of the appellant's reasons for appeal.

It is the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient. The administrative appeal process is a one level appeal to the Division Engineer. The Division Engineer may delegate authority or responsibility to an appeal Review Officer. In this case, this responsibility has been delegated to me.

It is my job to assist the Division Engineer in reaching and documenting a decision on the merits of the appeal. Thus, **this is the Division Engineers meeting, and I am facilitating this meeting on his behalf.** The appeal process provides an independent review of the administrative record to verify that: the record provides an adequate and reasonable basis supporting the Galveston District Engineer's decision, facts or analysis essential to the Districts Engineer's decision have not been omitted from the administrative record, and all relevant requirements of law, regulation, and officially promulgated Corps policy guidance have been satisfied.

The purpose of today's meeting is to gather information for the Division Engineer's decision, but **no decision regarding this appeal case will be made today.**

As RO, I will seek clarification of issues of the administrative record in order to hear and fully consider all relevant issues and facts. As participants in this appeal meeting, you have the opportunity to interpret, clarify, or explain issues and information contained in the record.

Issues not identified in the administrative record by the date of the Notification of Administrative Appeal Options and Process form (September 29, 2010) may not be raised or discussed.

This appeal meeting is an informal administrative meeting. As such, this is not a legal forum and rules of evidence do not apply. I would like to allow an open forum with the appellant and the District speaking directly to each other, but I reserve the right to terminate all questioning of other parties. In that case, I will then ask that all comments, statements and clarifications be directed directly to me.