

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

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 and Section 10 of the Rivers and Harbors Act of 1899

Date Request for Appeal Received: 25 January 2012

Approved Jurisdictional Determination Appeal Meeting: 29 March 2012

Summary of Appeal Decision: Mr. Ted Dahl (appellant) is appealing a Galveston District (SWG) approved jurisdictional determination (AJD) for four ponds located within his property in Surfside, Brazoria County, Texas. The appellant submitted three reasons for appeal: 1) The ponds do not have a direct surface connection to waters of the U.S. and are therefore isolated, 2) Pond four is not subject to the ebb and flow of the tide, and 3) the ponds lack a significant nexus to a traditionally navigable water (TNW). Accordingly, the appellant believes SWG incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction. For reasons detailed in this document, these three reasons for appeal have merit. The AJD is remanded to SWG for reconsideration and reevaluation.

Background Information: The property in question is located north of County Road 257 and Driftwood Court in Surfside, Brazoria County, Texas. The appellant requested an AJD for four ponds within the tract by email dated 19 December 2010, and at SWG's request, via letter dated 23 December 2010, received by SWG on 27 December 2010. SWG conducted a site visit on 31 October 2011 and issued an AJD, by letter dated 14 December 2011, which stated that, "...the four ponds are part of a continuous wetland complex that abuts tidal waters of the United States..." and are "...subject to Section 404 of the Clean Water Act." The letter also stated that, "...Pond Four is subject to the ebb and flow of the daily tide and is therefore also subject to Section 10 of the Rivers and Harbors Act."¹

The appellant submitted a complete Request for Appeal (RFA), dated 20 January 2012, which was received by SWD on 25 January 2012. The appellant was informed, by letter dated 31 January 2012, that his RFA was accepted.

¹ Administrative Record (AR) page 25.

Information Received and its Disposal During the Appeal

33 CFR § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this AJD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding AJDs, 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 as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 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 CFR § 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 the appellant in response to a letter from the RO dated 31 January 2012.² The RO received his copy on 6 February 2012. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 14 December 2011.
2. An appeal meeting was held via teleconference on 29 March 2012. The appeal meeting followed the agenda provided to SWG and the appellant by the RO via email on 19 March 2012.
3. On 12 April 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the appellant and SWG with a request that they review and provide comment by 19 April 2012. In an email response dated 17 April 2012, SWG stated that Section 2.c. (the district's opening statement) was missing their discussion regarding federal regulation definitions for tidal waters including the high tide line. While the appellant indicated via telephone conversation on 19 April 2012 that he did not have any comments on the draft MFR, he did provide one comment via email dated 22 April 2012 regarding section 5.a. of the final MFR.³
4. The final MFR was supplied to the appellant and SWG via email on 20 April 2012. The district's clarifying remark was included in section 8 of the final MFR. The appellant's comment received on 22 April 2012 is provided via footnote below as it was received after

² This letter was sent to the appellant informing him that his RFA had been accepted. In addition, by copy of the letter, the RO requested that SWG provide copies of the AR directly to the appellant as well as the RO.

³ The appellant provided the following statement via email dated 22 April 2012 regarding section 5.a. of the final MFR, "I reviewed the MFR and I was slightly misquoted in your Points For Clarification 5(a). In that regard, you stated that I had never observed the tide reach pond four. While this is true, you failed to mention that my observations of the tidal level was made at high tide. This may seem like a small discrepancy, but it should be made clear that my observations were made at high tide and the tide did not reach pond four, or any of the four ponds."

the MFR was finalized. A copy of the final MFR is included as Attachment A to this decision document.

Appellant's Reasons for Appeal

- 1. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the ponds do not have a direct surface connection to waters of the U.S. and are therefore isolated.**

FINDING: This reason for appeal has merit.

DISCUSSION: Administrative Appeals Process Regulations at 33 CFR § 328.3(c) state that, "...adjacent means bordering, contiguous, or neighboring." It further states that, "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" Revised *Rapanos*⁴ guidance issued by the U.S. Army Corps of Engineers (Corps) in 2008 further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.⁵

SWG indicates in multiple locations in the AR that the four ponds within the appellant's property are part of a larger wetland complex that abuts⁶ Oyster Creek (a TNW), and concludes this wetland complex meets the definition of an adjacent wetland per 33 CFR § 328.3(c).⁷ While SWG estimates the size of the wetland complex to be approximately five acres,⁸ they provide neither a written description nor an illustration that estimates its location and boundaries relative to the ponds and the TNW. Therefore, SWG did not adequately support their conclusion that the ponds are part of a larger wetland complex that is adjacent to Oyster Creek, a TNW.

ACTION: SWG should further document for the record the location and boundaries of the wetland complex relative to the ponds and the TNW in order to establish whether the ponds are part of this wetland complex, and if so, whether the wetland complex is bordering, contiguous, or neighboring (adjacent to) a water of the U.S. The administrative record should be revised accordingly to document and reflect the actual proximities and this analysis.

- 2. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, pond four is not subject to the ebb and flow of the tide.**

⁴ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

⁵ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, p. 5-6.

⁶ "Abut" is a form of adjacency that is defined on page 7 of the *Rapanos* guidance as "...not separated by uplands, a berm, dike, or similar feature."

⁷ AR pages 14, 16, 18, and 24.

⁸ AR page 16.

FINDING: This reason for appeal has merit.

DISCUSSION: Section 10 of the Rivers and Harbors Act of 1899 gives the Corps the authority to regulate work in or affecting navigable waters of the United States.⁹ Navigable waters of the United States are defined in 33 CFR § 329.4 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 regulations also state in 33 CFR § 329.12(a)(2) that regulatory jurisdiction in coastal areas, “...extends to the line on the shore reached by the plane of the mean (average) high water.” It further states that this line can be precisely determined, “...by survey with reference to the available tidal datum...” or by “...less precise methods, such as observation of the ‘apparent shoreline’ which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation...”

In their Memorandum for the File, dated 3 November 2011, SWG states that “Pond 4 is directly connected to a larger intertidal complex to the west and is subject to the daily tide.”¹⁰ SWG clarified during the 29 March 2012 appeal meeting that this connection is provided through a cut that extends from the northwest side of pond four to the intertidal complex to the west which is shown on the U.S. Fish and Wildlife Service’s National Wetlands Inventory map as E2USN.¹¹

This information establishes the potential for the tide to reach pond four. However, the AR does not support SWG’s assertion that pond four is subject to the ebb and flow of the daily tide because the AR lacks data (obtained by either precise or less precise methods) that establishes the plane of the mean high water relative to the pond. Therefore, SWG did not adequately support their conclusion that pond four is subject to the ebb and flow of the tide.

ACTION: SWG should further analyze and document for the record the location of the plane of the mean high water relative to pond four to determine if pond four is subject to the ebb and flow of the daily tide. The administrative record should be revised accordingly to document and reflect the factual data and this analysis.

3. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the ponds lack a significant nexus to a traditionally navigable water.

FINDING: This reason for appeal has merit.

DISCUSSION: In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,¹² the Environmental Protection Agency (EPA) and the Corps, in coordination with the Office of Management and Budget and the President’s Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by

⁹ 33 CFR § 320.2(b).

¹⁰ AR page 14.

¹¹ The U.S. Fish and Wildlife Service’s National Wetlands Inventory map is found on AR page 9. The U.S. Fish and Wildlife Service defines E2USN as estuarine, intertidal, unconsolidated shore, regularly flooded.

¹² Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

the AR. The two agencies issued joint revised *Rapanos* guidance on 2 December 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.¹³

The *Rapanos* guidance requires the application of two new standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW. Consequently, the agencies may assert jurisdiction over every water body that is not a relatively permanent water if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary.

As previously discussed, SWG indicates in multiple locations in the AR that the four ponds within the appellant's property are part of a larger wetland complex that abuts Oyster Creek (a TNW), and concludes this wetland complex meets the definition of an adjacent wetland per 33 CFR § 328.3(c).¹⁴ As indicated above, the plurality opinion described in the *Rapanos* guidance recognizes jurisdiction in this circumstance (a wetland adjacent to a TNW) without the need for a significant nexus analysis.

SWG correctly followed the *Rapanos* guidance as well as the *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook*¹⁵ (Guidebook) by indicating in Section II.B.1.a. of the AJD form that wetlands adjacent to TNWs are present within the review area as well as by completing Sections III.A.1. and III.A.2. for TNWs and wetlands adjacent to TNWs.¹⁶ However,

¹³ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. 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.

¹⁴ AR pages 14, 16, 18, and 24.

¹⁵ The Guidebook was issued on June 1, 2007, as Regulatory National Standard Operating Procedures for conducting an AJD and documenting practices to support an AJD. Information on *Rapanos* may be found at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>.

¹⁶ AR page 18.

because SWG failed to support in the AR their conclusion that the four ponds are part of a wetland complex that is adjacent to a TNW, use of the plurality standard to determine jurisdiction in this circumstance is premature. Therefore, SWG did not adequately support their conclusion that jurisdiction is recognized on the wetland complex, where SWG asserts the four ponds are located, without the need for a significant nexus analysis.

ACTION: SWG should first respond to the action associated with the first reason for appeal to determine if the ponds are part of the wetland complex, and if so, if that complex is adjacent to a water of the U.S. SWG should then follow the *Rapanos* guidance to determine if regulatory jurisdiction is recognized over the four ponds without the need for a significant nexus analysis, or if a significant nexus analysis is necessary in order to determine jurisdiction. If it is determined that a significant nexus analysis is necessary, SWG should document for the record whether there exists a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW. The significant nexus determination should contain a fact specific analysis of the functions aquatic features within the relevant reach provide and should elaborate on why the nexus between these features (including the on-site ponds) and the TNW is or is not significant, as well as why it is or is not more than speculative or insubstantial. The analysis should focus on how the functions performed by the aquatic features (including the onsite ponds) effect the physical, chemical and/or biological integrity of the TNW. The administrative record should be revised accordingly to document and reflect the factual data and this analysis.

Conclusion: For the reasons stated above, I have determined the reasons for appeal have merit. The AJD is remanded to SWG for reconsideration and reevaluation based on comments detailed above. The final Corps decision on jurisdiction in this case will be the Galveston District Engineer's decision made pursuant to my remand.

22 MAY 2012

Date



Thomas W. Kula
Brigadier General, US Army
Commanding

ATTACHMENT A

Appeal Meeting
Final Memorandum for Record
20 April 2012



Reply to
Attention of:

DEPARTMENT OF THE ARMY
SOUTHWESTERN DIVISION, CORPS OF ENGINEERS
1100 COMMERCE STREET, SUITE 831
DALLAS, TEXAS 75242-1317

CESWD-PD-O

20 April 2012

MEMORANDUM FOR RECORD

SUBJECT: Notes of 29 March 2012 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl.

1. An appeal meeting was held via teleconference on 29 March 2012 at 0900 regarding property owned by Mr. Ted Dahl located north of the intersection of County Road 257 and Driftwood Court in Surfside, Brazoria County, Texas. The meeting followed the agenda provided to the Galveston District (the district) and the appellant by the Southwestern Division review officer (RO) via email on 19 March 2012. A copy of the agenda can be found in Appendix A. The following is a list of participants:

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

Mr. Ted Dahl – the appellant

Mr. M. Flynt Houston – Regulatory Specialist, Compliance Section, Galveston District, U.S. Army Corps of Engineers

Mr. John Davidson – Team Leader, Compliance Section, Galveston District, U.S. Army Corps of Engineers

Mr. Kenny Jaynes – Compliance Section Chief, Galveston District, U.S. Army Corps of Engineers

2. Introductions and Opening Remarks

a. The RO read an opening statement 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 their decision.

b. The appellant did not provide an opening statement.

CESWD-PD-O

SUBJECT: Notes of 29 March 2012 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

c. As part of their opening statement, the district discussed the U.S. Army Corps of Engineers' authority under Sections 10 of the Rivers and Harbors Act (Section 10) and 404 of the Clean Water Act (Section 404). They then provided definitions of Sections 10 and 404 waters as well as how to delineate their limits. Furthermore, the district provided definitions for "adjacent" and "isolated." Finally, the district concluded that the ponds within the property are part of a larger wetland complex that abuts a traditionally navigable water (TNW) and are therefore subject to Section 404 and that pond four is subject to the ebb and flow of the tide and is therefore also subject to Section 10¹.

3. Reasons for Appeal

a. The appellant confirmed that the reasons for appeal listed below were accurate. The appellant also clarified that he believed pond four was not subject to the ebb and flow of the daily tide which the RO indicated was captured in reason "2" below.

(1) The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the ponds within his property do not have a direct surface connection to waters of the U.S. and are therefore isolated.

(2) The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes that pond four within his property is not subject to the ebb and flow of the tide.

(3) The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the ponds within his property lack a significant nexus to a traditionally navigable water.

4. Administrative Record

a. The district provided a summary of the contents of the administrative record (AR) and all parties confirmed they received the same contents.

¹ In an email dated 17 April 2012, SWG stated Section 2.c of this MFR (the district's opening statement) was missing their discussion regarding federal regulation definitions for tidal waters, including the high tide line. SWG provided a copy of the concluding paragraph of their opening statement which they read during the appeal meeting. This paragraph reads as follows, "The district concluded that the aquatic resources (wetland/ponds) on the property are located below the high tide line and adjacent (more specifically abutting) to tidal waters, specifically an extension of the Gulf InterCoastal Waterway labeled as Oyster Creek Cut. A portion of the site also includes aquatic resources that are affected by the ebb and flow of the tidal exchange of Oyster Creek Cut. As such, the aquatic resources on this site are subject to federal regulation under Section 404 of the Clean Water Act. It should also be noted that a portion of the aquatic resources (ponds/wetlands) on the site are also affected by the ebb and flow of the tide, classifying them as "navigable waters of the U.S." and making them subject to federal regulation under Section 10 of the Rivers and Harbors Act of 1899."

CESWD-PD-O

SUBJECT: Notes of 29 March 2012 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

b. The district clarified that the AR contains Mr. Dahl's 19 October 2010 email requesting an approved jurisdictional determination (AJD), but not the district's reply requesting that the appellant submit a hard copy of his request.

c. The district and appellant were asked if there was anything that should be in the AR, but was not (was the AR complete).

(1) The appellant asked if the district had any aerial photographs that demonstrated tidal influence. The RO indicated this would be addressed later in the points for clarification section of the agenda. The appellant concurred.

(2) The district indicated that the AR was complete with the exception of the missing email referenced in Section 4.b. of this memorandum for record (MFR).

5. Points for Clarification

a. The appellant indicated that he has never observed the tide reach pond four. He also suggested that the large distance between tidal waters and the pond (which he indicated was visible on a Google Maps aerial) as well as the two to three foot elevation difference between the pond and tidal waters demonstrates that the tide cannot reach the pond. The appellant indicated that he did not know if the Google Map aerial was illustrating high or low tide, nor did he know the elevation of his property relative to sea level.

b. The district clarified that the four ponds within the subject property are part of a larger wetland complex that abuts Oyster Creek, a TNW.

c. The district clarified that they use aerials to assist them in determining possible locations of water prior to visiting a site. Furthermore, they indicated open water and dark signatures indicative of wetlands are visible on the 2010 and 1995 aerials (AR pages 6 and 7 respectively). Finally, they indicated the dark signatures indicate cooler areas that suggest possible wetland hydrology.

d. The district clarified that the intertidal area is labeled on the National Wetlands Inventory map (AR page 9) as E2EM1N and illustrated as the transparent-white area within the property. They then defined E2EM1N as estuarine, intertidal, emergent, persistent, regularly flooded.

e. The district clarified that the ponds are open water with fringe wetlands, and part of a larger, approximately five acre wetland complex. The district indicated they did not illustrate this larger wetland complex in the AR, but described it on AR pages 14, paragraph 4; 16, sections II.B.1.a and b; 18 section III.A.2.; and 24, section IV.B.

CESWD-PD-O

SUBJECT: Notes of 29 March 2012 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

f. The district clarified that the data point referenced on paragraph four of AR page 14 provides a characterization of the entire wetland complex.

g. The district clarified that pond four is an approximately 0.2-acre pond with a *Spartina alterniflora* (or smooth cordgrass – an intertidal, estuarine plant) marsh on its perimeter. They also stated that their high tide determination was a Section 10 and not a 404 determination and that it was not based on or supported by aerial photography, but field observations. While they did not actually observe the tide reaching the pond, the district did indicate they observed a cut on the northwest side of the pond (the district suggested this cut is visible on the aerial photograph found on AR 13). The district further indicated this cut serves as a direct hydrologic connection between pond four and Oyster Creek (a TNW) with water flowing from pond four into a large open water area to its west (labeled as E2USN on AR 9), then northeast and northwest through a canal on the west side of the open water area into Oyster Creek. The district stated the presence of a *Spartina* marsh proves that the pond is tidally influenced as *Spartina* is found in intertidal areas. Finally, the district believes that the elevation of the cut is the same as the *Spartina* marsh which also supports their belief that the tide can reach the pond.

h. The district clarified that the dates of the MFR (AR page 14) and AJD (AR page 16) differ due to the length of time it takes for internal review.

6. Other Questions/Comments

a. The appellant asked how impacts to the ponds would affect the wetlands. The district indicated they did not assess the functions of the ponds relative to the wetland complex for the AJD.

b. The appellant asserted that the ponds are independent of, and lack a connection to the larger wetland complex and should therefore be considered isolated. The appellant also questioned the presence of a nexus between the ponds and the larger wetland. The district asserted that the ponds are part of a larger wetland complex that abuts a TNW; therefore, the district stated a significant nexus determination was not required as a significant nexus is assumed in accordance with the Rapanos guidance.

7. Conclusion

a. The RO discussed the next steps in the appeal process including the memorandum for record as well as possible outcomes of the appeal process.

b. The appeal meeting concluded at approximately 1020. The appeal meeting was conducted via teleconference; therefore, a site visit was not conducted.

CESWD-PD-O

SUBJECT: Notes of 29 March 2012 appeal meeting for approved jurisdictional determination (file number SWG-2010-00764) by Mr. Ted Dahl

8. Review – On 12 April 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the appellant and SWD for review and comment.

a. In an email dated 17 April 2012, SWG stated Section 2.c of this MFR (the district's opening statement) was missing their discussion regarding federal regulation definitions for tidal waters, including the high tide line. SWG provided a copy of the concluding paragraph of their opening statement which they read during the appeal meeting. This paragraph is included in this MFR as a footnote to Section 2.c.

b. The appellant indicated via telephone conversation on 19 April 2012, that he did not have any comments on the draft MFR.

APPENDIX A – DAHL APPEAL MEETING AGENDA

File No: SWG-2010-00764
Informal Meeting Date: 29 March 2012 @ 0900
Location: Via Teleconference
Call in number: 888-675-2535
Access Code: 6246679
Security Code: 1234

Representing the Appellant: Mr. Ted Dahl (appellant), Ms. Tina Dahl (Vice President, Spring Branch Wildlife Preserve), and Mr. Todd Dahl (Vice President, Spring Branch Wildlife Preserve)

Representing the District: Mr. M. Flynt Houston (Regulatory Specialist, Compliance Section, Galveston District), Mr. John Davidson (Team Leader, Compliance Section, Galveston District), and Mr. Kenny Jaynes, Compliance Section Chief, Galveston District).

Representing the Division and facilitating the meeting: Mr. Elliott Carman, Administrative Appeal Review Officer (Southwestern Division)

AGENDA ITEMS

I. Introductions and Opening Remarks

- a. Introductions (ALL)
- b. RO opening statement
 - i. Goal of meeting is to:
 1. Summarize/clarify the Appellant's request for appeal (RFA) and
 2. Summarize/clarify the District's rationale for decision
- c. Appellant opening statement
- d. District opening statement

II. Reasons for Appeal

- a. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the ponds within his property do not have a direct surface connection to waters of the U.S. and are therefore isolated.
- b. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes that pond four within his property is not subject to the ebb and flow of the tide.
- c. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the ponds within his property lack a significant nexus to a traditionally navigable water.

III. Administrative Record (AR)

- a. Summary of AR contents (DISTRICT)
- b. Is AR complete? (Anything that should be in AR but isn't?)
 - i. RO
 1. AR 4, 3rd paragraph: indicates district requested that Mr. Dahl make his AJD request by mail. Where in the AR is the district's request?
 - i. Appellant
 - ii. District

APPENDIX A – CONTINUED

- c. Other questions about the AR (ALL)

IV. Points for Clarification

- a. Appellant
 - i. RFA states, “Our determinations taken at the site show that pond 4 is not subject to the ebb and flow.” Please clarify what these determinations are.
- b. District
 - i. AR 1 and 4: appellant’s AJD request was specific to the four ponds within these two parcels. Based on your information and field work, did it appear that there could be other potential WOUS’ on the property?
 - ii. AR 14, #3: states, “...aerial photographs depict...signatures indicative of wetlands.” Please clarify.
 - iii. AR 14, #3: States the NWI map (AR 9) illustrates intertidal area within the project area. Please clarify where this intertidal area is within the project area?
 - iv. AR 14, #4: indicates a sample point was taken on the fringe of pond one and this point represents a larger wetland complex. Is the entire pond actually a wetland or does the data point only characterize the wetland fridge of each of the ponds?
 - v. AR 14, #4: indicates the four ponds meet the definition of wetlands and are part of a larger wetland complex that abuts oyster creek. Where is this larger wetland complex identified/described (illustrated?) in the AR?
 - vi. AR 14, #4: Indicates that all four ponds are part of a large wetland complex, but only pond 4 is tidal? What was used to determine that pond 4 was tidal?
 - vii. AR 14, #4: indicates wetland that contains ponds 1-4 is 5 acres. Is this referring to the wetland complex or the cumulative sizes of all four ponds?
 - viii. AR 14 and 16: Please clarify why the dates are different on the MFR and the AJD form?
 - ix. AR 21, sec III.D.1: Indicates TNW is 0.02-acre. Please describe the relevant reach (review area). What TNW is 0.02-acre?

V. Other questions/comments

- a. Appellant
- b. District

VI. Concluding Remarks (RO)