

**ADMINISTRATIVE APPEAL DECISION
THE DOW CHEMICAL COMPANY
APPROVED JURISDICTIONAL DETERMINATION
GALVESTON DISTRICT
FILE NO. SWG-2009-01188**

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

Appellant/Applicant: The Dow Chemical Company (Ms. Yvonne Samson, representative)

Authority: Section 404, Clean Water Act

Date Request for Appeal received: 7 March 2011

Approved Jurisdictional Determination Appeal Meeting and Site Visit Date: 13 April 2011

Summary of Appeal Decision: The Dow Chemical Company (appellant) is appealing a Galveston District (SWG) approved jurisdictional determination (JD) for property in Freeport, Brazoria County, Texas. The appellant submitted two reasons for appeal: 1) the on-site wetland lacks a direct hydrologic connection to a water of the United States (U.S.) and should therefore be considered isolated and 2) the on-site wetland lacks a significant nexus to a traditionally navigable water. 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 has merit. The JD is remanded to Galveston District for reconsideration and reevaluation.

Background Information: The property in question is located on the north side of State Highway 332 northwest of its intersection with Farm-to-Market Road 523 in Freeport, Brazoria County, Texas. The appellant requested a JD of an approximately 35 acre tract by letter dated 15 December 2009, which SWG received on 16 December 2009. SWG conducted a site visit on 29 June 2010 and received additional information for consideration from the appellant on 14 and 27 September 2010. The district issued an approved JD, by letter dated 6 January 2011, which stated that the wetland within the site was, "...adjacent to East Union Bayou, a relatively permanent water of the United States," and had, "...a significant nexus to East Union Bayou, a traditionally navigable water downstream of the project site, and therefore, a water of the United States." Finally, the letter concluded that, "...East Union Bayou and all of its adjacent wetlands are waters of the United States and subject to Section 404 of the Clean Water Act."¹

¹ Administrative Record (AR) pages 197-198.

The appellant submitted a complete Request for Appeal (RFA) form, dated 3 March 2011, which was received by SWD on 7 March 2011. The appellant was informed, by letter dated 16 March 2011, that their RFA was accepted.²

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 the appellant. The RO received his copy on 23 March 2011. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 6 January 2011.
2. An appeal meeting/site visit was held on 13 April 2011 at the appellant's Oyster Creek Administrative Building in Freeport, Texas. During the meeting, the appellant utilized a PowerPoint presentation as part of their opening statement to summarize the basis for their request for appeal. An electronic copy of this presentation was sent to the RO and SWG via email on 14 April 2011 at the RO's request.³ In addition, SWG utilized a series of aerial photographs as part of their opening statement. An electronic copy of these aerial photographs were sent to the RO and the appellant via email on 14 April 2011 also at the RO's request.⁴

² 33 CFR 331.5(a) states, "The RFA must be received by the division engineer within 60 days of the date of the [appeal form]." RGL 06-01, section 3(a) clarifies that "day 1" is the date of the appeal form and "day 60" is the 60th calendar day after the date of the appeal form. RGL 06-01 section 3(a) also clarifies that, "when 'day 60' is a traditional non-working day (e.g., a holiday or weekend), the 60 day timeframe is extended to the next business day."

Therefore, day one in this case would be 6 January 2011 (the date of the appeal form) and day 60 would be Sunday, 6 March 2011. The appellant's RFA was received on Monday 7 March 2011, or day 61. Because day 60 fell on a traditional non-working day (e.g. a weekend), the 60 day timeframe was extended to the next business day which was 7 March 2011. Therefore, appellant's RFA should be considered timely in accordance with 33 CFR 331.5(a) and RGL 06-01.

³ A copy of the PowerPoint presentation was included as Appendix D in the appeal meeting final memorandum for record (MFR). A copy of the final MFR is included as Attachment A to this document.

⁴ Copies of the aerial photographs were included as Appendix E in the appeal meeting final MFR. A copy of the final MFR is included as Attachment A to this document.

3. On 2 May 2011, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics and site visit to the appellant and SWG for review and comment. In an email response dated 4 May 2011, SWG provided a single clarifying remark regarding section 5 part c of the draft MFR. In an email dated 5 May 2011, the appellant provided five clarifying remarks. The district's and appellant's remarks were included and addressed in section 8 (Review) of the final MFR which is included as an attachment (Attachment A) to this decision document.
4. The final MFR was supplied to the appellant and SWG via email on 10 May 2011. A copy of the final MFR can be found in Attachment A.

Appellant's Reasons for Appeal

1. **SWG incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction. More specifically, the on-site wetland lacks a direct hydrologic connection to a water of the U.S. and should therefore be considered isolated.**

FINDING: This reason for appeal does not have merit.

DISCUSSION: The appellant requested an approved JD by letter dated 15 December 2009. As part of this request, the appellant included a wetland delineation report dated 2 December 2009. The appellant indicated in section IV of their wetland delineation report, that the subject tract contained, "...a total of 35.06 acres of potential jurisdictional wetlands" and a 0.45-acre upland area along the site's southern boundary.⁵ The appellant supplied sections from a wetland delineation report previously conducted on an adjacent area as well as elevation data to SWG via letters dated 13 and 24 September 2010 (respectively), to demonstrate that flow within the site was to the southeast.⁶ While the appellant lacked elevation data for the tract immediately west of the subject property, they clarified during the appeal meeting that the combination of their own personal observations of the areas southeast and southwest of the subject property, the movement of rain water through the site, and existing elevation data supported their conclusion that water flows and collects in the southeast corner of the site. The appellant stated in their RFA that water leaves the site only during periods of heavy rainfall.⁷ Once it leaves the site, the appellant indicates that water flows through a series of unregulated drainage swales that lack an ordinary high water mark and into a roadside ditch opposite the highway from East Union Bayou. While the appellant did not identify where water flowed once it entered this roadside ditch, they did clarify in a statement associated with the appeal meeting that the, "...road side drainage opposite the highway from East Union Bayou would not necessarily have to end up in the East Union Bayou as it may collect in the roadside ditch and back up along FM523 or it may continue down Hwy 332 opposite East Union Bayou and never cross the highway (based on Google maps)." Finally, the appellant states in their RFA that the construction of Highway 332, the tank farm site, and other development around the area created a "new normal circumstance" that reflects

⁵ AR page 6.

⁶ AR pages 75-84.

⁷ The appellant clarified during the appeal meeting that they did not know the actual frequency at which water would leave the site, but did suggest that field conditions such as lack of a defined ordinary high water mark; the presence of small culverts that were mostly filled with sediment; and a vegetation change from lower, wetter areas demonstrate that water leaves the site very infrequently.

“...a direct separation of the subject tract wetland from any navigable water or a tributary to a navigable water...” Based on the above, the appellant believes the on-site wetland lacks a direct hydrologic connection to a water of the U.S. and should therefore be considered isolated.

Administrative Appeals Process Regulations at 33 C.F.R. 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* guidance issued by the 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.⁸

In their approved JD form, SWG documented that East Union Bayou is a relatively permanent water (RPW) that becomes a traditional navigable water (TNW) approximately 3.14 miles downstream of the subject property.⁹ SWG further cites a series of maps and aerial photographs in a memorandum for the file, dated 13 October 2010, to demonstrate that the on-site wetland was part of a larger, historic wetland that abutted East Union Bayou prior to the development of the area.¹⁰ In the same memorandum, SWG indicates that, “According to topographic maps, soil surveys, FEMA FIRM maps, and detailed elevation information supplied by DOW, water flows in the general direction of East Union Bayou.”¹¹ During the appeal meeting, SWG clarified that “in the general direction of East Union Bayou” meant that water flowed in both directions: towards the Shintech Canal southwest of the site as well as to the southeast as the appellant has asserted. SWG utilized a series of aerial photographs during the appeal meeting that illustrated sediment flowing west into the Shintech Canal to support their assertion that flow is also to the southwest.¹²

The appellant’s assertion that the on-site wetland is isolated stems from their belief that the wetland does not meet the *Rapanos* guidance criteria that a wetland is adjacent if there is an unbroken surface or shallow subsurface connection to jurisdictional waters. However, as noted above, this criteria is one of three listed in the *Rapanos* guidance and is not the sole requirement for the determination that a wetland area is adjacent. SWG states in their 13 October 2010 memorandum for the file that the on-site wetland, which was part of a larger continuous wetland system adjacent to East Union Bayou, is separated from East Union Bayou by a barrier (State Highway 332). They re-iterate this fact in Section III.B.2(i)(c) of their approved JD form.¹³ While it would have been helpful if SWG had addressed in the AR how their interpretation of the

⁸ 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.

⁹ AR pages 183 and 186.

¹⁰ AR pages 158–178.

¹¹ AR page 177.

¹² Copies of the aerial photographs are included as Appendix E in the appeal meeting final MFR. A copy of the final MFR is included as Attachment A to this document.

¹³ AR page 185. Section III.B.2(i)(c) of the approved JD form contains wetland adjacency determination information pertaining to characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW. In this case, SWG indicated, “The wetland is separated from East Union Bayou by State Highway 332.”

appellant's elevation data differed from the appellant, this information isn't necessary since SWG did not use an unbroken surface or shallow subsurface connection to jurisdictional waters to establish adjacency, but rather the physical separation of the wetland from jurisdictional waters by a man-made dike or barrier.

Therefore, SWG clearly documented in the AR that the on-site wetland is adjacent to East Union Bayou and they correctly applied law, regulation, guidance and/or policy in its determination of jurisdiction in this instance.

ACTION: No action required.

2. SWG incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction. More specifically, the on-site wetland lacks a significant nexus to a traditionally navigable water.

FINDING: This reason for appeal has merit.

DISCUSSION: In their RFA, the appellant states that the on-site wetland lacks a significant nexus to a TNW due to the lack of a hydrologic connection and that SWG's JD finding is speculative. Specifically, the appellant states:

The Dow Tract does not perform the function of the significant nexus standard example: the duration, frequency, and volume of flow to East Union Bayou is not affected by the presence of the Dow Tract by holding floodwaters and then releasing waters to tributaries in a more even and constant manner because there is no connection. The example of an area meeting a significant nexus standard is a wetland that enhances the receiving water by allowing a consistent flow which has been filtered of contaminants by flowing through a wetland system; this is not the case for the Dow Tract in question. Therefore, the JD did not demonstrate existence of a tributary with the adjacent wetlands collectively demonstrating a significant nexus with the traditional navigable waters (East Union Bayou).

As scientists dealing in both regulatory affairs and industry, we are required to provide documentation and data to support a case for everything we do. The jurisdictional call by the USACE in this matter appears to be made based upon speculative effects on the chemical, physical, and biological integrity of East Union Bayou, as well as possibly the assumption that water that potentially flows offsite through conveyances that possess a continuous surface connection, making them jurisdictional.

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,¹⁴ the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (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 the administrative

¹⁴ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

record. The agencies issued revised *Rapanos* guidance on 2 December 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.¹⁵

The *Rapanos* guidance requires the application of two new standards to support an agency JD for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over 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 RPW 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.

Implementation of the *Rapanos* decision requires the Corps to strive for more thoroughness and consistency in the documentation of jurisdictional determinations. To meet this requirement, the Corps now uses a standardized JD form. Instructions for completing the form are found in the *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook).¹⁶ The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions.

As discussed in the previous section, SWG clearly documented in the AR that the on-site wetland is adjacent to East Union Bayou, an RPW. Consequently, a significant nexus determination is required as per the *Rapanos* guidance. In this case, the Guidebook states:

[F]ield staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for

¹⁵ 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.

¹⁶ The Guidebook was issued on June 1, 2007 as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD. Information on *Rapanos* may be found at http://usace.army.mil/CECW/Pages/cecwo_reg.aspx.

important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.¹⁷

The Guidebook further states that:

[T]he evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.¹⁸

Specific factors considered by SWG for the significant nexus determination in this case are found in Section III.C of its approved JD Form.¹⁹ SWG states the relevant reach includes approximately 502 acres of adjacent wetlands (including the on-site wetland).²⁰ SWG the makes the following statements regarding the wetlands effect on the chemical, physical, or biological integrity of East Union Bayou (the downstream TNW):

Chemically these adjacent wetlands sequester pollutants and nutrients as well as add organic carbon to the downstream food webs. Physically these adjacent wetlands slow the velocity of the water thus reducing erosion, they temporarily store stormwater and reduce the effect of flooding downstream. These 502 acres of adjacent wetlands located within the relative reach serve as floodplain storage of the downstream TNW. Biologically these adjacent wetlands provide habitat and lifecycle support functions for various organisms both vertebrates and invertebrates.²¹

While SWG describes a number of general characteristics of the wetlands and tributary to which they are adjacent within the relevant reach, the AR does not contain a fact-specific analysis of how these factors constitute more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW (East Union Bayou).

ACTION: SWG should further analyze and 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 that the tributary (East Union Bayou) and its adjacent wetlands within the relevant reach provide and should elaborate on why the nexus between the tributary and its adjacent wetlands (including the on-site wetland) and the TNW is

¹⁷ Guidebook page 55.

¹⁸ Guidebook pages 55-56.

¹⁹ AR pages 186-187.

²⁰ AR page 186.

²¹ AR page 187.

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 tributary and its adjacent wetlands (including the onsite wetland) effects the physical, chemical and/or biological integrity of the TNW. The administrative record should be revised accordingly to reflect this analysis.

Conclusion: For the reasons stated above, I have determined the first reason for appeal does not have merit, while the second reason for appeal has merit. The jurisdictional determination is remanded to the Galveston District 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.

1 June 2011

Date

Thomas W. Kula

Thomas W. Kula
Brigadier General, US Army
Commanding

ATTACHMENT A

Appeal Meeting/Site visit
Final Memorandum for Record
09 May 2011



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

9 May 2011

MEMORANDUM FOR RECORD

SUBJECT: Notes of 13 April 2011 appeal meeting for approved jurisdictional determination (file number SWG-2009-01188) for The Dow Chemical Company

1. An appeal meeting was held on 13 April 2011 at the Dow Chemical Company's Oyster Creek Administrative Building in Freeport, Texas. The meeting, which began at approximately 0900 hours, was regarding property owned by The Dow Chemical Company located near State Highway 332 and Farm-to-Market Road 523 in Freeport, Brazoria County, Texas. Copies of the meeting agenda and sign in sheet can be found in Appendices A and B respectively. The following is a list of attendees:

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

Ms. Yvonne Samson – The Dow Chemical Company (representing the appellant)

Mr. Mark Larson – The Dow Chemical Company

Ms. Fran Falcon – The Dow Chemical Company

Mr. Bob Nailon – Cardno Entrix (Appellant's consultant)

Ms. Kristin Shivers – Project Manager, Compliance Section, Regulatory Branch, Galveston District, US Army Corps of Engineers

Mr. Kenny Jaynes – Compliance Section Chief, Regulatory Branch, Galveston District, US Army Corps of Engineers

Mr. John Davidson – Compliance Section Team Leader, Regulatory Branch, Galveston District, US Army Corps of Engineers

2. Introductions and Opening Remarks

a. The Review Officer (RO) read an opening statement (Appendix C) 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.

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b. The appellant utilized a PowerPoint presentation (Appendix D) to summarize the basis for their request for appeal. The RO requested that the appellant provide a copy of the PowerPoint presentation to the district as well as the RO.

c. The district provided a background discussion of the definition of waters of the United States as well as adjacency, a brief summary of the difference between adjacent and abutting relative to the Rapanos decision, a discussion of the classification of East Union Bayou, and how all of the previous factored into the district's approved jurisdictional determination decision. The district utilized a series of aerial photographs as part of their opening statement (Appendix E). Finally, the RO requested that the district provide a copy of these aerial photographs to the appellant and the RO.

3. Reasons for Appeal - The appellant confirmed that the following reason for their appeal was accurate: The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the on-site wetlands lack a direct hydrologic connection to a water of the US as well as a significant nexus to traditionally navigable water.

4. Administrative Record

a. The district provided a brief summary of the contents of the administrative record (AR). In addition, the district clarified that the aerial photograph on AR page 84 should be the attachment to the letter found on AR page 75. The district indicated they did not believe anything was missing from the AR.

b. The appellant clarified that the tract size reference on the data form found on AR page 16 (26-acres) was an error. The appellant's consultant was originally instructed that the subject property was 26-acres, but later informed of the actual size (approximately 35-acres). The delineation the consultant submitted to SWG did include the entire 35-acres. The appellant indicated they believed the AR was complete.

5. Points for Clarification

a. Flow direction (within the site)

(1) The appellant indicated they believe water flows to the southeast within the site. The appellant clarified that this conclusion was based on observations of the area southeast of the

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subject property, rainfall, and existing elevation data. The appellant also clarified that they had not made any observations of the area southwest of the subject property and could not obtain elevation data for the area to the west of the subject property (Shintech property) because they did not own the land.

(2) The district indicated that while they provided some information in the AR regarding the direction of flow within the site, they clarified that it was general in nature because they established wetland adjacency not by an unbroken surface or subsurface hydrologic connection, but by the physical separation of the wetlands from a water of the US by a barrier. The district also clarified that they believe water flows generally towards the south with some flow reaching the Shintech canal (to the west/southwest) as well as some reaching the southeast as the appellant has asserted. The district utilized various aerial photographs which showed what appeared to be sediment entering the Shintech canal to support this conclusion.

b. Flow direction (away from site)

(1) The appellant indicated they did not know the actual frequency at which water leaves the site, but did indicate it isn't often as evident by the conditions in the field such as lack of a defined ordinary high water mark; the presence of small culverts that were mostly filled with sediment; and a vegetation change from lower, wetter areas. The appellant also indicated that they did not identify where water flowed once it entered what they believed to be an unregulated ditch opposite the road from East Union Bayou.

(2) The district indicated some flow enters Shintech Canal to the west and other flow follows the same path as described by the appellant (to the southeast), but added that it would flow eventually into East Union Bayou.

c. Adjacency - The district clarified that while the dredging of the Shintech Canal effectively extended East Union Bayou's ordinary high water mark, they believe that the wetlands on site are adjacent to East Union Bayou and not the canal.

6. Other questions/comments

a. The appellant clarified that the statement found on AR pg 156 (that if previously permitted work had been conducted on the Shintech Property to the west, it would have isolated the

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wetlands on the subject property and thereby strengthen the appellant's argument that the subject property wetlands are in fact isolated) was a product of their lack of understanding of the concept of a physical barrier and adjacency. They also clarified that the comment found on AR pg 181 relative to coastal prairies was made in an effort to understand what the prairies were and if they had any bearing on the district's jurisdictional determination decision. Finally, the appellant did not understand how the district could utilize unregulated roadside ditches to establish jurisdiction on the wetlands. They also stated they felt the district didn't provide enough data to support their significant nexus determination, that the district used general statements without the backing of actual data which the appellant felt is consistent with science.

b. The district indicated that agencies (such as the Environmental Protection Agency) often ask how the floodplain relates to the aquatic resources within a subject property, so references to the floodplain relative to the subject property found on AR pg 177 were done to address this frequent concern.

7. Concluding remarks and site visit - The appeal meeting concluded at 1130 hours followed by a site visit. The subject property was observed as were drainages between the subject property and Shintech Canal to the west and the roadside ditch to the southeast of the subject property.

8. Review - On 2 May 2011, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics and site visit to The Dow Chemical Company and SWG for review and comment.

a. SWG suggested in an email response dated 4 May 2011, that the district would be more accurately represented in section 5 part c above by saying, "The district clarified that the dredging of the 'Shintech Canal' effectively extended East Union Bayou's ordinary high water mark, and as such, believe that the wetlands on the site are adjacent to East Union Bayou, which includes waters identified as the 'Shintech Canal'."

b. On 5 May 2011, The appellant responded with the following:

(1) "Dow would like to receive clarification on the file number. The initial Acknowledgement Receipt of our request had file number SWG-2009-01187. It was noted that the current correspondence references SWG-2009-0118. We would like clarification for the Dow records." As per the RO's request, SWG clarified via email dated 9 May 2011 that the

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correct file number was SWG-2009-01188.

- (2) The appellant requested to clarify section 5.a.1 above with, "Dow did make observations from the highway of the area where the roadside drainage ditch is located and is next to the Shintech canal. This was documented in a communication with the Corps with photos sent on September 24, 2010. It is true that Dow did not have access to the Shintech property to obtain additional elevation data."

- (3) The appellant wished to add the following statement regarding section 5.b.1 above: "Dow would like to include the statement made at the meeting that the road side drainage opposite the highway from East Union Bayou would not necessarily have to end up in the East Union Bayou as it may collect in the roadside ditch and back up along FM523 or it may continue down Hwy 332 opposite East Union Bayou and never cross the highway (based on Google maps)."

- (3) The appellant requested to clarify section 6.a above with the following statement: "Dow would like to clarify that the comments concerning isolated wetlands determination based on previously permitted work conducted was a question that during the meeting a statement by the Corps supported that this would have impacted the review of the subject tract, which is why Dow felt it had bearing on the case."

- (4) The appellant questioned the lack of information regarding the site visit in the section 7 above. In addition, they provided the following comment: "Dow noted from the site visit that there were no culverts connecting the Shintech property and the Dow subject tract. Also, the roadside drainage appeared to flow to the south, but there was not enough water to make a definitive determination. The structure at the Shintech canal was such that the concrete construction on the embankment was elevated and prevented routine drainage from the roadside ditch to the Shintech canal. There was discussion concerning the characteristics of the water in the Shintech canal and the absence of brackish indicators such as mussels on the road bridge piers and fresh water vegetation. On the subject track, the south east corner had a culvert which was mostly blocked. The inside corner of the property had vegetation indicative of wet areas, however the other side of the road, the culvert and drainage ditch did not present with wetland vegetation and indicated the lack of routine flow through the culvert. The pipeline corridor which would receive any infrequent drainage from that area showed to drain toward the roadside drainage ditch on the opposite side of the highway from the East Union Bayou." The RO

CESWD-PD-O

SUBJECT: Notes of 13 April 2011 appeal meeting for approved jurisdictional determination (file number SWG-2009-01188) for The Dow Chemical Company

provided the following response via email on 9 May 2011: "Regarding your comment below of the level of detail of the site visit section in the MFR (section 7)... The purpose of the appeal meeting/site visit is to give RO the opportunity to ask questions and the appellant and/or Corps representatives the opportunity to interpret, clarify, or explain particular issues in the administrative record (from 331.7(c); 331.7(d); 331.7(f)). For ease of documentation, I typically ask all my questions within the context of the appeal meeting and utilize the site visit as an opportunity to see what others have already seen/what is described in the AR. As a result, there's typically very little to summarize for the "site visit" section of the MFR. That being said, I will incorporate your comments into the MFR." Finally, the site conditions described in the AR will be used to assist in the appeal decision.

Elliott Carman
Administrative Appeals Review Officer

APPENDIX A: DOW APPEAL MEETING AGENDA

File No: SWG-2009-01188
Informal Meeting Date: 13 April 2011
Location: Dow Oyster Creek Administrative Building, OC-1120
POC is Ms. Yvonne Samson: office: 979-238-4814
cell: 979-236-1139

Representing the Appellant: Ms. Yvonne Samson (Dow water/wetland focal point), Mr. Mark Larson (Ms. Samson's backup), Mr. Bob Nailon (Dow's consultant), and possibly Ms. Julie Woodward (Dow Regulatory Affairs Leader) or Ms. Fran Falcon (EH&S Leveraged Delivery Leader).

Representing the District: Ms. Kristen Shivers (SWG project manager), Mr. Kenny Jaynes (Ms. Shivers' branch chief), and/or Mr. John Davidson (Ms. Shivers' team leader).

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. Reason for Appeal –

- a. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the on-site wetlands lack a direct hydrologic connection to a water of the US as well as a significant nexus to 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?)
 - Map referenced on AR pg 75 (letter to Corps dated 13 September)
 - i. Appellant
 - ii. District
- c. Other questions about the AR (ALL)

IV. Points for Clarification

- a. Flow direction (within the site)
 - i. Appellant
 - ii. District
- b. Flow path (away from site)
 - i. Appellant

APPENDIX A: DOW APPEAL MEETING AGENDA

- ii. District
- c. Adjacency
 - i. District

V. Other questions/comments

- a. Appellant
- b. District

VI. Concluding Remarks (RO)

VII. Site Visit

- a. Overall view of site
- b. Flow path from site

APPENDIX B: APPEAL MEETING SIGN IN SHEET



US Army Corps
of Engineers
Southwestern Division

SIGN IN SHEET

PROJECT NAME/NUMBER: The Dow Chemical Company - Freeport (SWG-2009-01188)

DATE: April 13, 2011

	NAME (Printed)	ORGANIZATION	PHONE NUMBER
1	ELLIOTT CARMAN	USACE	465-457-7861
2	Mark Larson	DOW	979-238-4811
3	Fran Falcon	DOW	979-238-9764
4	KIRSTIN SHIVERS	USACE	409-766-3991
5	Henry Jaynes	USACE	409 766-3985
6	Yvonne Samson	DOW	979-238-4814
7	John Davidson	USACE	409-766-3933
8	Bob Nailon	Cardno ENTRIX	(713) 662-1977
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APPENDIX C – REVIEW OFFICER OPENING STATEMENT

DOW JURISDICTIONAL DETERMINATION APPEAL MEETING – 13 APRIL 2011 OPENING COMMENTS

I would like to make a few opening remarks. After that, I will ask if Ms. Samson if she would like to make an opening statement on behalf of the Dow Chemical Company. 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.

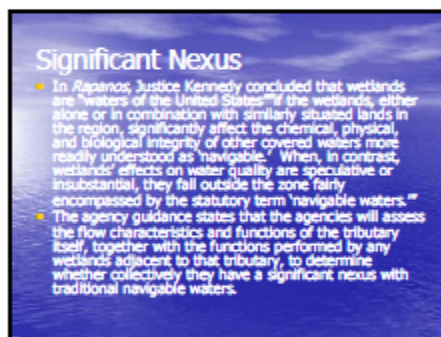
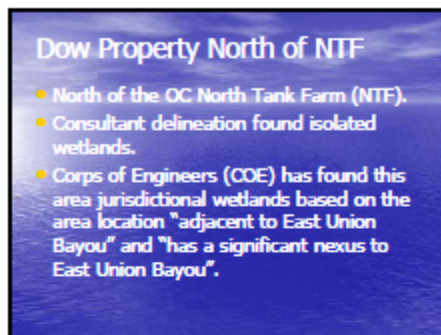
The purpose of today's meeting is to gather information for the Division Engineer's decision, but **no decision regarding this appeal case will be made today.**

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.

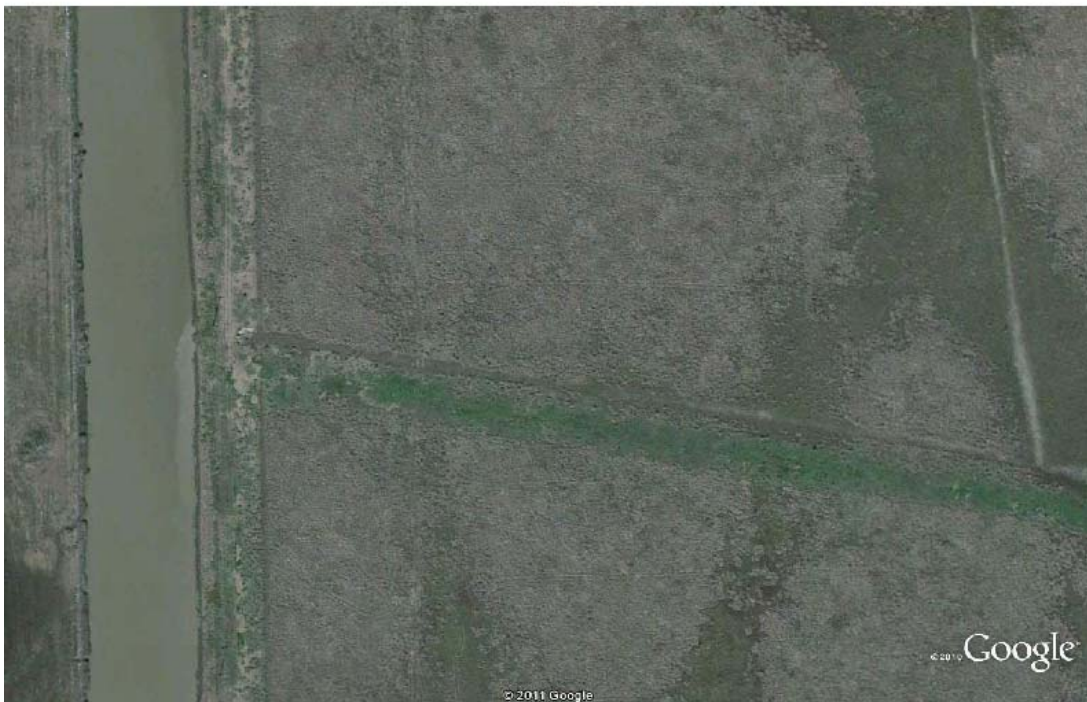
Issues not identified in the administrative record by the date of the Notification of Administrative Appeal Options and Process form (January 6, 2011) may not be raised or discussed.

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.

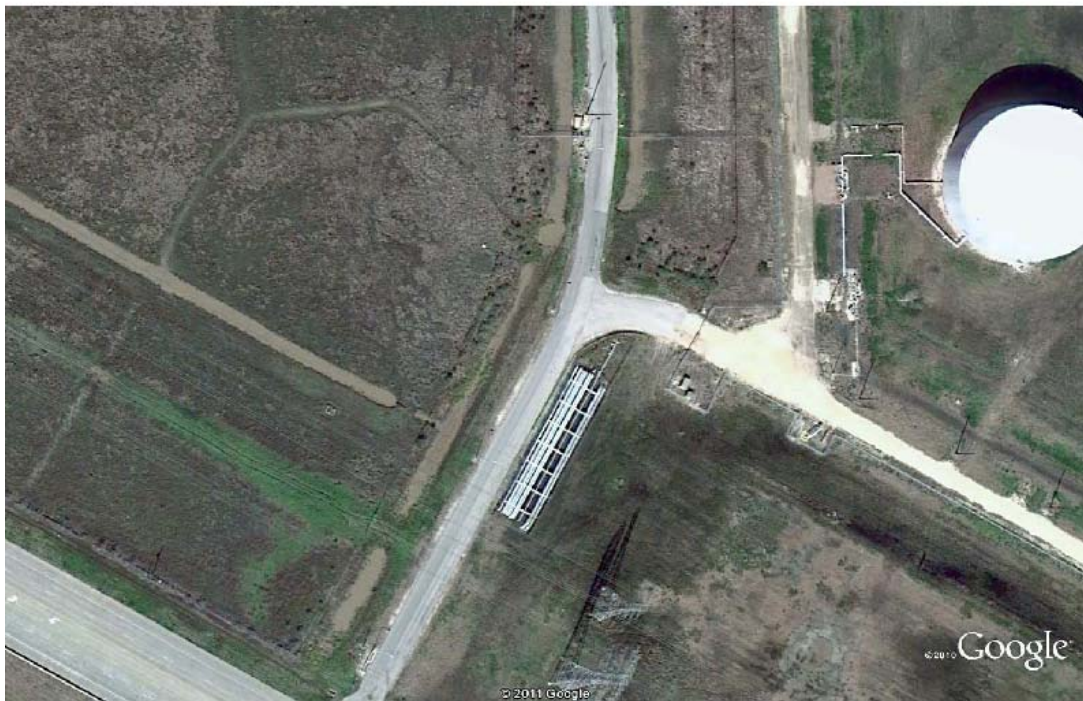
5/2/2011



APPENDIX E: DISTRICT'S OPENING STATEMENT AERIAL PHOTOGRAPHS



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