

**ADMINISTRATIVE APPEAL DECISION**  
**ROBERT F. FORD, JR.**  
**APPROVED JURISDICTIONAL DETERMINATION**  
**GALVESTON DISTRICT**  
**FILE NUMBER SWG-2003-00372**

**Review Officer (Acting):** James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

**Appellant:** Mr. Robert F. Ford, Jr., Beaumont, Texas

**District Representatives:** Mr. Kenny Jaynes, Ms. Emilee Stevens

**Authority:** Section 404 of the Clean Water Act (33 USC 1344)

**Receipt of Request for Appeal:** November 16, 2009

**Appeal Meeting and Site Visit Date:** January 29, 2010

**Summary of Decision:** Robert F. Ford, Jr. is appealing a U.S. Army Corps of Engineers jurisdictional determination (JD) made by Galveston District (SWG) for Crystal Lakes in Jefferson County, Texas. The Request for Appeal (RFA) asserts that SWG has incorrectly determined that the lakes are impounded and thus are waters of the United States and that the wetlands contained within the ring levees surrounding the lakes are jurisdictional. This appeal is determined to have no merit. The final decision on jurisdiction for Crystal Lakes is the SWG approved JD dated October 5, 2009.

**Background Information:** The subject area is Crystal Lakes, two waterbodies located near Fannett in Jefferson County, Texas. Crystal Lake East lies easterly of North Fork Taylor Bayou and consists of approximately 133 acres of open water and wetlands contained within a ring levee. Crystal Lake West lies westerly of North Fork Taylor Bayou and consists of approximately 157 acres of open water and wetlands contained within a ring levee. These two waterbodies were constructed in 1957 by Texas Gulf Sulphur Company to be used as water supply reservoirs for the sulphur mining process. According to information supplied by Mr. Robert F. Ford, Jr. (appellant), Texas Gulf Sulphur ceased operations in 1979 and the reservoirs have had no commercial use since that time. The appellant bought the property in 1998. By letter dated February 21, 2003, the appellant requested a Section 404 JD from SWG. By letter dated December 30, 2003,<sup>1</sup> SWG issued an approved JD which concluded that Crystal Lakes and their fringe wetlands are waters of the United States and subject to regulation pursuant to Section 404 of the Clean Water Act. According to standard procedure,<sup>2</sup> the approved JD was valid for five years. By letter dated June 23, 2009, the appellant requested a new JD for Crystal Lakes. SWG issued a new approved JD on October 5, 2009, and reaffirmed the previous determination that both lakes are subject to Clean Water Act Section 404 jurisdiction. The appellant submitted a complete Request for Appeal form to the Southwest Division office on

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<sup>1</sup> The December 30, 2003, letter incorrectly identified the county as Chambers County, Texas. A clarifying letter correctly identifying the county as Jefferson County, Texas, was issued on January 26, 2004.

<sup>2</sup> See Regulatory Guidance Letter issued May 23, 1994 (RGL-94-01).

November 19, 2009. The request was determined to be acceptable, and the appellant was notified by letter dated November 30, 2009. The appeal was assigned to the Mississippi Valley Division Review Officer (RO). An appeal conference and site visit was held by the RO on January 29, 2010.

**Information Received During the Appeal Review and Its Disposition:** 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 RO conducts an independent review of the administrative record to address the reasons for appeal cited by the appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form, which is October 5, 2009, in this case. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. 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 administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, 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 administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

This administrative appeal evaluation was based on the SWG administrative record, the appellant's Request for Appeal, and discussions at the appeal conference. The RO received a copy of the administrative record on November 12, 2009. An identical copy was sent to the appellant. Information which was received during the appeal conference on January 29, 2010, was considered to the extent it clarified information in the existing administrative record. A draft Memorandum for Record (MFR) summarizing the appeal conference and site visit was prepared on February 10, 2010, and a copy was furnished to SWG and the appellant for review and comment. A final MFR was prepared on February 23, 2010 (Appendix A).

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

**Reasons for Appeal:**

**1. The lakes are isolated without surface water or hydrologic connections to the surrounding area, and there is no physical relationship with a navigable water or surface tributary system.**

**Finding:** This reason for appeal does not have merit.

**Action:** No action is required.

**Discussion:** During the appeal conference on January 29, 2010, the appellant discussed this reason for appeal, reiterating his point that there is no hydrologic connection between Crystal Lakes and the surrounding area or between the lakes and North Fork Taylor Bayou. He did note the existence of an overflow pipe in each reservoir but explained that the pipe is above the



ordinary high water mark of each reservoir and is five feet above the outside water level in the east reservoir and eight feet above the outside water level in the west reservoir. The appellant further explained that he has owned the reservoir property since October of 1998, and in the intervening years, water from North Fork Taylor Bayou has never overtopped the reservoir levees.

SWG prepared a separate Approved Jurisdictional Determination Form (JD Form) for Crystal Lake East and Crystal Lake West. In Section II(B)(1)(a) of each form, SWG cited two reasons for asserting jurisdiction:

- (1) wetlands adjacent to TNWs;<sup>3</sup>
- (2) impoundments of jurisdictional waters.

SWG did not determine either lake to be isolated and determined that each lake consists of an area of open water and an area of wetlands.<sup>4</sup> The following comments are found in Section IV.B. of the JD Form for both lakes:

Crystal Lakes were created in 1957 in association with the Texas Gulf Sulphur Plant. The lakes were created for the primary purpose of making a water [intake] source for the sulphur plant. The 1928 U.S.G.S. quad map of Fannett, Texas, shows the area as "Seven Mile Swamp". The 1943 quad map depicts headwaters forming tributaries that flow into the North Fork of Taylor Bayou from both the east and west into the bayou and on the site where Crystal Lakes are now located. The 1962 quad map indicates that the location of Crystal Lakes is in the footprint of the tributaries that were located here in the 1943 quad map. The west "lake" is a partial impoundment of a tributary that was also rerouted to the northern side of the lake to later flow into North Fork. The North Fork of Taylor Bayou, a water of the U.S. under the authority of Section 10 of the Rivers and Harbors Act of 1899, dissects the site. The impounded tributary is then considered a relatively permanent water that flowed directly into a traditionally navigable water. The FEMA FIRM indicates that the "lake" of the eastern side of the North Fork is within the 100-year floodplain, as well as existing as an impoundment where two tributaries flowed into the North Fork. From comparing the 1995 infrared aerial photo of the site to the 2004 photo, it appears that the acreage of emergent and forested wetlands, especially in the eastern "lake", has increased. According to the memorandum to the file for the original determination, D-14432, the forested wetlands on the site are dominated with Cypress trees with watermarks and saturated soils, under normal conditions; also, the memorandum states the lakes have an ordinary high watermark, are stocked with bass, and drain structures are present. Since the condition of the site has reportedly remained undeveloped since the date of the original determination, and after examining the aerial imagery on Google Maps from November 2006, it appears there are no new physical circumstances on the site.

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<sup>3</sup> TNW = Traditional Navigable Water.

<sup>4</sup> Based on an examination of aerial photographs, SWG determined that Crystal Lake East consists of 91 acres of non-wetland waters and 42 acres of wetlands and that Crystal Lake West consists of 131 acres of non-wetland waters and 26 acres of wetlands.

According to regulations, all impoundments of waters of the U.S. are still considered waters of the U.S. Based on historical records these waters were at least in part resulting from the impounding waters of the U.S. and/or contain adjacent wetlands. As such, Crystal Lakes are waters of the United States subject to jurisdiction under Section 404 of the Clean Water Act.

Evaluation of SWG Reason (1) for Asserting Jurisdiction: Regulations at 33 C.F.R. 328.3(c) state that “wetlands separated from other waters of the United States by man-made dikes or barriers ...” are adjacent wetlands. The water of the United States in this case is North Fork Taylor Bayou, which SWG determined to be a traditional navigable water (TNW). In order to verify that the bayou is a TNW, the RO requested that SWG bring a copy of the list of navigable waters for the District. SWG provided a copy of the page from the List of Section 10 Waters<sup>5</sup> dated September 2, 1971, which lists North Fork Taylor Bayou. On that page, the navigable length of the bayou is shown as seven miles. The following statement is shown under the Remarks column: “Gulf Colorado & Santa Fe Railroad near Fannett, Texas; Trib. of Taylor Bayou” and is interpreted to indicate that the railroad is the upper extent of navigability. Examination of maps during the appeal conference confirmed that the railroad is upstream of the section of North Fork Taylor Bayou which passes between Crystal Lake East and Crystal Lake West. Wetlands inside of both lakes are separated from North Fork Taylor Bayou by the ring levees and associated man-made berms, thus meeting the definition of adjacency. The SWG conclusion that the wetlands are adjacent wetlands and thus are themselves waters of the United States seems reasonable.

Evaluation of SWG Reason (2) for Asserting Jurisdiction: An “impoundment” is one of the eight categories of “waters of the United States” found in regulations at 33 CFR § 328 *et seq.* Specifically, 33 CFR § 328.3(a)(4) states that such regulated waters include “[a]ll impoundments of waters otherwise defined as waters of the United States under this definition.” The regulatory definition of the term “impoundment” is found in 1977 regulations at 33 CFR 323.2(f)<sup>6</sup> and “means a standing body of open water created by artificially blocking or restricting flow of a river, stream or tidal area.” Even if part or nearly all of the flow from the previous channel on either side of North Fork Taylor Bayou was rerouted around the ring levees of the reservoirs, the previous channel itself no longer drains into the bayou and thus does not function as it did prior to levee construction. It is reasonable to conclude that the flow in the previous channel has been restricted which meets the definition of “impoundment.” In addition, flow in the forested areas now surrounded by ring levees formerly drained into the old tributary channel and ultimately entered North Fork Taylor Bayou. Since that flow now ponds within the ring levees and no longer enters the bayou, it is reasonable to conclude that the water volume from those forested areas which formerly entered the tributary and the bayou has now been impounded.

During the appeal conference, the appellant also suggested that the reservoirs are “isolated” and “perched” in the sense of the usage of those terms in a memorandum entitled *Adjacent/Isolated Criteria; Galveston District Policy Number 01-001*, dated February 13, 2001, by Fred L. Anthamatten (Anthamatten memo).<sup>7</sup> During the appeal conference, the RO asked SWG is the

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<sup>5</sup> Refers to Section 10 of the Rivers and Harbors Act of 1899 which prohibits the unauthorized obstruction or alteration of any navigable water of the United States.

<sup>6</sup> Federal Register, July 19, 1977, Vol. 42, No. 138, p. 37144.

<sup>7</sup> Appendix B



Anthamatten memo is still valid. SWG responded that the memo is used as guidance to aid regulators working in the field and remains valid except where it has been superseded by national guidance (e.g., Rapanos guidance).

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,<sup>8</sup> EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed a guidance memorandum (Rapanos guidance).<sup>9</sup> The Rapanos guidance requires the application of two new standards to support an agency JD for a particular water body. The first standard recognizes regulatory jurisdiction over a water body that is not a traditional navigable water (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) traditional navigable waters, (2) all wetlands adjacent to traditional navigable waters, (3) relatively permanent non-navigable tributaries of traditional navigable waters, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of traditional navigable waters. The second standard, for tributaries that are not relatively permanent, 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. The classes of water body 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.

Revised Rapanos guidance,<sup>10</sup> issued on 2 December 2008, further addressed adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow sub-surface 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.

It has already been established that North Fork Taylor Bayou is a TNW, since it is on SWG's list of Section 10 waters. SWG concluded that the tributaries which formerly flowed into North Fork Taylor Bayou from the east and west in the area now occupied by Crystal Lakes were relatively permanent waters which were impounded by construction of the ring levees. It has also been established that the wetlands within the ring levees meet the definition of adjacency. Based on the revised Rapanos guidance, these wetlands also appear to be "reasonably close" to a TNW.<sup>11</sup> SWG correctly applied the regulations and the Rapanos guidance in the determination of jurisdiction in this case.

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<sup>8</sup> Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

<sup>9</sup> 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.

<sup>10</sup> Grumbles and Woodley. 2008.

<sup>11</sup> The Rapanos guidance concept of "reasonably close" was introduced by SWG during the appeal conference. See Appendix A.

## **2. The tributaries were rerouted and are not impounded.**

**Finding:** This reason for appeal does not have merit.

**Action:** No action is required.

**Discussion:** The administrative record includes a copy of a 1943 topographic map which shows that prior to construction of the reservoirs, a surface tributary on the east and west side of North Fork Taylor Bayou passed through the area now occupied by each reservoir. SWG determined that these tributaries were impounded during reservoir construction. The appellant disagrees and asserts that the tributaries were not impounded but were rerouted around the outside of the ring levees.

The SWG conclusion that the tributaries were impounded is not contrary to law, regulation or officially promulgated policy guidance. See Reason for Appeal #1 above for a more detailed discussion.

## **3. The lakes do not meet any of the definitions of water of the United States found in 33 CFR 328.3(a).**

**Finding:** This reason for appeal does not have merit.

**Action:** No action is required.

**Discussion:** As discussed above, the area within the two reservoirs consists of open water and wetlands. The open water is an impoundment of a surface tributary and meets the definition of waters of the United States found at 33 CFR 328.3(a)(4). The wetlands are adjacent to North Fork Taylor Bayou, a traditional navigable water, and meet the definition of waters of the United States found at 33 CFR 328.3(a)(7).

## **4: The lakes have been surrounded by levees and removed from the wetland system for over 50 years, and the construction of the levees predates the Clean Water Act.**

**Finding:** The reason for appeal does not have merit.

**Action:** No action is required.

**Discussion:** Implementation of Clean Water Act Section 404 regulations included a “grandfather” provision for existing discharges of dredged or fill material in waters of the United States (for discharges prior to Section 404 phase-in dates; 33 CFR § 330.3(a)). SWG determined and the appellant agreed that at least part of the Crystal Lakes area was wetlands prior to construction of the levees. However, since construction of Crystal Lakes occurred in the late 1950’s, the “grandfather” provision of the regulations provides that the fill material used for construction of the ring levees was authorized by nationwide permits issued on July 19, 1977. While this “grandfather” provision applied to the fill material, it did not remove the area within the ring levees from jurisdiction provided the area continued to meet one of the definitions of waters of the United States.



Prior to construction of the two lakes, the entire area was forested (as seen on aerial photographs provided by the appellant at the appeal conference) and at least part of the area was forested wetlands. As discussed above, the open water now in Crystal Lakes is an impoundment of a surface tributary and meets the definition of waters of the United States found at 33 CFR 328.3(a)(4). The wetlands found in Crystal Lakes are adjacent to North Fork Taylor Bayou and meet the definition of waters of the United States found at 33 CFR 328.3(a)(7).

**Conclusion:** As my final decision on the merits of the appeal, I conclude that substantial evidence exists in the administrative record to support the JD, which is in accordance with applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. The final decision on jurisdiction for Crystal Lakes (File Number SWG-2003-00372) is the SWG approved JD dated October 5, 2009. This concludes the administrative appeal process.



Anthony C. Funkhouser  
Colonel, US Army  
Commanding





**APPENDIX A – MEMORADUM FOR RECORD  
FROM APPEAL CONFERENCE AND SITE VISIT**

## MEMORANDUM FOR RECORD

SUBJECT: Ford Jurisdictional Determination Appeal Conference and Site Visit, Galveston District (Corps File No. SWG-2003-00372), 29 Jan 2010

1. Appellant: Robert F. Ford, Jr.  
Location of Site: Crystal Lakes, near Fannett, Jefferson County, Texas
2. Review Officer: James B. Wiseman, Jr., Ph.D., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)
3. Participants: Mr. Robert F. Ford, Jr.      Appellant  
                  Mr. Kenny Jaynes            Galveston District (SWG)  
                  Ms. Emilee Stevens        SWG  
                  Dr. Wiseman                Administrative Appeals Review Officer (RO)

4. Conference Summary:

The RO met with Mr. Ford and representatives from SWG at NRCS offices in Anahuac, Texas on 29 January 2010. The meeting began at approximately 9:45 am. The RO made introductory remarks explaining the role of the RO and the reason for the meeting and site visit. The RO asked if any other attendees would like to make an opening statement.

Mr. Ford made an opening statement and began by supplying two aerial photographs of the Crystal Lakes site, one before construction of the reservoirs and one after construction. He explained the general topography of the area and the history of the reservoirs. He then focused his statement on his disagreement with SWG's use of the term "impoundment" to describe the reservoirs. Mr. Ford believes that neither of the two reservoirs are impoundments and that in both cases, water was diverted around the reservoir and not impounded, as he interprets the meaning of the term. He also stated that there is no hydrologic connection between the reservoirs and the surrounding area or between the reservoirs and North Fork Taylor Bayou. He did note the existence of an overflow pipe in each reservoir, but explained that the pipe is above the ordinary high water mark of each reservoir and is five feet above the outside water level in the east reservoir and eight feet above the outside water level in the west reservoir. Mr. Ford then suggested that the reservoirs are "perched" in the sense of the usage of that term in a memorandum entitled *Adjacent/Isolated Criteria, Galveston District Policy Number 01-001* dated 13 February 2001 by Fred L. Anthamatten (Anthamatten memo). Mr. Ford further explained that he has owned the reservoir property since October of 1998, and in the intervening years, water from North Fork Taylor Bayou has never overtopped the reservoir levees. Mr. Ford then concluded his opening statement by reiterating his assertion that since there is no hydrologic connection between the reservoirs and the surrounding area, the reservoirs should not be regulated as waters of the United States by the Corps of Engineers.

For the SWG opening statement, Mr. Jaynes showed the maps which had been requested by the RO, including 1928 and 1945 topographic maps. The 1945 map shows a surface tributary on



either side of North Fork Taylor Bayou running through the area currently occupied by the reservoirs. The 1928 map does not show drainage ditches at these locations, but the map is generally less detailed than subsequent topographic maps. The 1928 map does show that a portion of the site is identified as being located within an area labeled "Seven Mile Swamp". Mr. Jaynes then showed some of the other maps he brought including the county soil survey and the National Wetlands Inventory map.

The RO then asked if all the meeting participants considered the administrative record complete. All answered affirmatively.

All attendees then participated in a general discussion of the site. Mr. Ford agreed with SWG that prior to construction of the reservoir levees, wetlands were present in at least part of the area, but he did not agree that the area inside the reservoir levees is now jurisdictional since there is no "co-mingling" of waters between the reservoir and the surrounding area and bayou. The RO then asked SWG about the field notes from the 2003 jurisdictional determination (JD). Mr. Jaynes stated that "the field notes are memorialized in the site visit memo". The RO then asked Mr. Ford why he mentioned the Rapanos and Coeur Alaska court cases in his request for a new JD. He explained that he had talked to Mr. Bruce Bennett (a permit evaluation team leader at SWG) and that Mr. Bennett had suggested that Mr. Ford request a new JD and mentioned the two court cases. The new request for a JD was assigned to Ms. Emilee Stevens. Ms. Stevens explained that upon her receipt of the request, she examined aerial photographs and read the Coeur Alaska court case. Ms. Stevens did not go to the site, but since Mr. Jaynes had been to the site in 2003, she discussed the JD and the site with him. She then wrote a memorandum dated 6 August 2009 and wrote the new approved JD letter which reaffirmed the previous JD.

Prior to the appeal conference, the RO provided Mr. Ford and SWG with a list of questions about the administrative record to be discussed during the conference (Appendix A). Mr. Ford provided a written answer to his question (embedded under the question in Appendix A). SWG did not provide written answers, but offered answers during the conference:

- (Q1) The "and/or are" is a typographic error. It should have been just "and/or". The "and/or" comes from the assessment by SWG that the aquatic resource now known as Crystal Lakes were the result of (1) impounding surfaces tributary system(s) and (2) surrounding the "Seven Mile Swamp" adjacent wetlands.
- (Q2) The use of the term "partial" came from the 2003 memo's use of the term "in part".
- (Q3) The memo is used as guidance to aid regulators working in the field and remains valid except where it has been superseded by national guidance (e.g., Rapanos, SWANCC, etc.).
- (Q4)(a) The east lake is in the 100-year floodplain. The west lake is not. See flood zone map in administrative record.
- (Q4)(b) Reference to the 100-year floodplain is related to the reference in the 1977 regulations to "hydrologic cycles" and the regulation of wetlands that are part of an aquatic system and that have a shared surface hydrology during expected high flow.

The RO then asked SWG if they consider the location of a wetland in a 100-year floodplain to automatically constitute adjacency. Mr. Jaynes said that the floodplain map was used as a general tool but the presence of a wetland within a 100-years floodplain did not automatically imply that the wetland was adjacent to any particular water of the U.S.

The attendees then discussed the meaning of the term “impoundment”. Mr. Jaynes stated that SWG considers both lakes to be impoundments per the definition of the term in the 1977 regulations (§ 323.2(f)).<sup>1</sup> Mr. Ford countered that the water was re-routed and not impounded, and he referred to the definition of adjacent in the Anthamatten memo and stated that according to the memo, the lakes are perched and isolated. Mr. Ford also stated that another reason that the lakes should not be regulated is because the levees were built prior to passage of the Clean Water Act. Mr. Jaynes explained that parts of the Anthamatten memo had been superseded, particularly in the establishment of adjacency. Mr. Jaynes then explained the use of the term/concept of “reasonably close” by the national Rapanos guidance as one of the criteria to establish adjacency. Mr. Ford stated that SWG had never explained to him and that he had not seen anything in writing which stated that any part of the Anthamatten memo had been superseded. Mr. Jaynes also explained that the word “adjacent” is defined in 33 CFR 328.3(c) as bordering, contiguous, or neighboring and that wetlands separated from waters of the United States by man-made dikes or barriers are considered adjacent to those waters.

The RO asked if there were any more subjects that any of the attendees would like to discuss, and when no one suggested a new topic, the RO adjourned the conference at approximately 11:45 am.

5. Site Visit: The meeting attendees then drove to the site and began the site visit at approximately 12:30 pm. The site visit was held for the RO to get a familiarity with the general topography of the site and for the RO to view both reservoirs, the surrounding area and North Fork Taylor Bayou. The attendees observed the west lake from the southwestern corner of the lake near the old sulfur plant. Mr. Ford pointed out the relative elevation difference between the water level in the reservoir and the ditch on the outside. He also showed where he had installed a new “drop pipe” when the outfall in the west lake collapsed to allow water to get into the surface tributary. The group then drove to the access road which borders the east lake on the east and south sides. We observed that the surface tributary system led into the lake with a small pipe but the majority of the water from the area is now being rerouted around the lake. We then drove around the south edge of the lake and parked between the east lake and North Fork Taylor Bayou to observe both the east lake and the bayou. The site visit ended at approximately 1:20 pm.

6. On 10 Feb 10, a copy of the draft version of this MFR was forwarded to Mr. Ford and SWG for review and comment. By email on 11 Feb 10, Mr. Ford wrote that the draft memo “appears

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<sup>1</sup> From Federal Register, July 19, 1977 (Vol. 42, No. 138, p. 37144): The term “impoundment” means a standing body of open water created by artificially blocking or restricting flow of a river, stream, or tidal area.



to be comprehensive and accurate.” By email on 12 Feb 10, Mr. Jaynes of SWG suggested corrections and revisions to the memo and his suggestions have been incorporated into this final MFR.

James B. Wiseman, Jr., Ph.D.  
Administrative Appeals Review Officer

## **Appendix A**

### **Request for Clarifying Information and Questions for Appeal Conference**

**Robert F. Ford, Jr.**

**Galveston District Jurisdictional Determination**

**SWG-2003-00372**

#### **Request for Galveston District to Provide Clarifying Information:**

1. It is stated in the administrative record (AR) that North Fork Taylor Bayou is a navigable water of the United States and is included on Galveston District's list of navigable waters. Since the AR does not include a copy of this list, please bring copies of this list to the appeal conference.
2. Please bring the Fannett East and Fannett West quad maps to the meeting. Also, please bring recent aerial photos of the Crystal Lakes area and any other photos or maps you think would be useful in the conference.
3. The "Memorandum for the File" dated 6 August 2009 states that the "1943 quad map depicts headwaters forming tributaries that flow into the North Fork of Taylor Bayou from both the east and west". The copy of the 1943 map in the AR does not show tributaries on both sides of the bayou. Since the copy in the AR may be a poor reproduction, please bring the original 1943 map to the conference in order to verify the above statement quoted from the memo.

#### **Questions for Galveston District:**

1. In his "Memo to File" dated 24 December 2003, Mr. Jaynes stated that "... these waters were at least in part resulting from the impounding of waters of the U.S. and/or are contain 'adjacent' wetlands." Please clarify this statement, particularly with respect to the use of "and/or". Why was this distinction made?
2. In her "Memorandum for the File" dated 6 August 2009, Ms. Stevens stated that "[t]he west 'lake' is a partial impoundment of a tributary that was also rerouted to the northern side of the lake to later flow into the North Fork." Please explain the term "partial impoundment" and explain how a tributary can be both rerouted and impounded.
3. Is the Galveston District policy memo dated 13 February 2001 entitled "Adjacent/Isolated Criteria, Galveston District Policy Number 01-001" still valid?
4. Section III.A.2 of the Approved Jurisdictional Determination Form is used to summarize the rationale used to support the conclusion that a wetland is "adjacent". For this approved jurisdictional determination, two forms were completed, one for Crystal Lake West and one for Crystal Lake East. Each form has a different description in Section III.A.2. For Crystal Lake West, it is stated that "the water is a partial impoundment of a tributary to the North Fork of Taylor Bayou that was rerouted around the northern shore of the water." For Crystal Lake East, it is stated that "wetland areas lie within the 100-year floodplain of the North Fork of Taylor Bayou and are only separated for the TNW by a man-made berm."
  - a. Why are these descriptions different?
  - b. What is the significance of the 100-year floodplain?

## **Appendix A – continued**

### **Question for Mr. Ford:**

1. In the second argument in your Request for Appeal, you state that “the ‘impoundments’ ... lie outside of the reservoir levees and result from the construction of the reservoirs.” Please clarify this statement.

Written answer provided by Mr. Ford at the appeal meeting:

The tributaries referred to in Item 5 are drain ditches, one on each side of the bayou, flowing from higher ground to the bayou. When the reservoirs were constructed the ditches were interrupted by the levee construction but were rerouted to provide an adequate outlet for the necessary drainages around the reservoir on both the East and West sides of the bayou.

The flows of the tributaries have never been either prevented or impounded; and the flows still occur. Crystal Lakes have never received any water from either of these tributaries and have never impounded water from them. While impoundments of waters of the U.S. are considered waters of the U.S. there must be commingling of waters of the U.S. with any water claimed by the USACE to be waters of the U.S. That condition has never existed at Crystal Lakes.



**APPENDIX B – GALVESTON DISTRICT POLICY  
MEMORANDUM, NUMBER 01-001**

## MEMORANDUM FOR All SWG-PE-R Personnel

SUBJECT: Adjacent/Isolated Criteria, Galveston District Policy Number 01-001

1. **PURPOSE.** This document is to aid and guide jurisdictional determinations on whether an area is adjacent v. isolated in the context of the U.S. Army Corps of Engineers Regulatory Program. An additional benefit of this document is to establish a consolidated position on making adjacency determinations. This information is based on existing regulations, guidance memorandums, case studies and certain internal decisions and practices that have been in place for a number of years within the Galveston District. Please note that with any attempts at defining policy, that there may be specific unique situations in which this may not apply. These case-by-case situations should be closely evaluated and discussed, prior to any final determinations.

2. **BACKGROUND.** The term adjacent wetlands were first described and defined in the 1977 preamble 33 CFR 323.2(d) as "wetlands that directly connect to other waters of the U.S. or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions". Under the 1986 regulations under 33 CFR 328.3(c), "the term 'adjacent' means bordering, contiguous, or neighboring. 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". Since that time, limited guidance has been issued, which at times has created some difficulty in maintaining consistency. This document is an attempt to formulate a reasonable, consistent, and understandable method in evaluating and making determinations whether an area is adjacent or isolated.

3. **CRITERIA.** The following criteria are to be evaluated when determining whether an area is adjacent, or isolated, in the context of the Regulatory Program.

a. **PROXIMITY:** The actual physical closeness of a water to a navigable water, or water that is a part of a surface tributary system, is the overriding factor in determining adjacency. If a wetland/water is contiguous (touching) another water of the U.S., such as a surface tributary system, or if it is separated from other waters of the U.S. by a man-made dike or barrier, natural river berm, or beach

dune, it is "adjacent". Otherwise, it could be "isolated" if separated by more than one barrier (see c. below). Proximity should not be used alone, but in consideration with a hydrological connection. For example, it is possible, but not common; to have a water situated close to navigable water, and be isolated if it is "perched" and has no hydrologic connection. Hydrologic connections are addressed in more detail under "b." in this document.

b. **HYDROLOGICAL CONNECTIONS:** Relationships between navigable water, or a surface tributary system, **must** exist to be considered adjacent. Otherwise, the wetland is considered isolated. Examples of hydrologic connections include surface tributary systems, surface water connections such as a stream, continuous wetland system, ditch, or watercourse that carries water from a water body to navigable waters, or waters that are a part of a surface tributary system, during normal expected flows or predictable flood events.


It is reasonable to consider wetlands/waters that lie within the 100-year floodplain as adjacent. When considering the premise of the Clean Water Act, a hydrologic connection can exist during a flood event. The Federal Emergency Management Association (FEMA) maps show the 100-year and 500-year flood plains. The practice within the Galveston District has been to use the 100-year flood maps published by FEMA as a tool. Wetlands or waters that are located within a flood plain are hydrologically interrelated during flood events, which occur during a natural cycle within riverine systems, and are driven largely by rainfall, and not water of a tidal origin. However, it should be noted that sheet flow over land, outside a flood plain is not considered a sufficient hydrologic connection. In addition, since groundwater connections are extremely difficult to identify or verify, they have not been relied upon in making determinations of whether an area is adjacent/isolated.

Use of the 100-year flood plain has been viewed differently with respect to making determinations of adjacency on barrier islands and peninsulas along the coast. While the 100-year floodplain is calculated using the same basic numerical factors, areas within the 100-year floodplain on barrier islands are inundated by rising tidal



water during storm events. Our regulations make reference that the extent of our jurisdiction in coastal regions does not include areas that are inundated by storm surges, above the high tide line. With that distinction, and previous input from the Environmental Protection Agency, it is possible for wetlands or waters within the broader reaches of a barrier island to be isolated from other waters if they are not connected through a surface water connection to other waters. The normal rule, and practice, has been to consider the first swale of wetlands/waters immediately behind the first line of dunes to be adjacent to the Gulf of Mexico. Wetlands/waters behind the second line of swales are isolated, provided there are no surface water connections, even if within the flood plain; unless adjacency prevails from the bay side of an island or peninsula.

c. **TWO-BARRIER RULE:** When at least two natural or man-made upland barriers or berms separate a wetland/water from other waters of the U.S. it is isolated, not adjacent, even within floodplain situations. The rationale is that the two barriers of sufficient height would eliminate the necessary surface connection. A land feature, such as a man-made road or levee that is culverted to allow flow between areas is not considered a barrier. The key factor here is that the culvert should also be associated with an obvious watercourse, and not positioned to high so as to prevent normal or expected flow, or serve as a water control device.

  
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