ADMINISTRATIVE APPEAL DECISION
REVESSER, LLC.
APPROVED JURISDICTIONAL DETERMINATION
GALVESTON DISTRICT
FILE NO. SWG-2005-00522

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

Appellant/Applicant: Revesser, LLC.

Regulatory Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C §1344)

Date Acceptable Request for Appeal Received: 4 August 2014

Appeal Meeting: 22 October 2014

Summary of Appeal Decision: Revesser, LLC. (Appellant) is appealing a USACE Galveston District (District) approved jurisdictional determination (AJD) associated with property in Port Aransas, Nueces County, Texas. The Appellant submitted two reasons for appeal which asserted that the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the borrow pits were waters of the United States (U.S.) and the proposed bridges would have the effect of fill. For reasons detailed in this document, reason for appeal 1 has merit while reason for appeal 2 does not have merit. The AJD is remanded to the District for reconsideration.

Background Information: The Appellant's property is an approximately 264 acre tract located immediately west of the intersection of State Highway 361 and Mustang Boulevard in Port Aransas, Nueces County, Texas.[1] The District provided an AJD for the tract in 2004 that expired in 2009.[2] In response to the Appellant's request, the District provided a new AJD for the tract on 18 March 2010 that concluded all of the wetlands within the tract were waters of the U.S.; with some being subject to only Section 404 of the Clean Water Act (CWA) and others being subject to both Section 404 of the CWA and Section 10 of the Rivers and Harbors Act.[3] In a memorandum for record (MFR) associated with the 2010 AJD, the District noted that excavation had occurred within the northern portion of the site that affected certain specific on-site wetlands. The District concluded that while the excavation activities could change the wetland boundaries, for the purposes of the 2010 AJD, the wetland boundaries would remain unchanged, as five years had not elapsed since the excavation activity.[4] On 19 December 2013, the Appellant submitted a permit application to construct a canal subdivision that included several

[1] Administrative record (AR) page 205.
[2] AR page 722.
[3] AR page 724.
[4] AR pages 722-723.

proposed bridge crossings within the tract.[5] The District published a public notice for the proposed project on 28 January 2014.[6] The District received multiple comments in response to the public notice, including two consistent comments from multiple agencies asking the District to complete a jurisdictional determination on the excavated areas (borrow pits) as well as to make a determination regarding whether the proposed bridges would have the effect of fill.[7] In response, the District revisited their 2010 AJD and provided the Appellant a revised AJD on 4 June 2014. The 2014 AJD was specific to the excavated areas and concluded that the areas were abandoned, as sufficient time had passed since their last use, and were subject to section 404 of the CWA and therefore waters of the U.S.[8] The District's AJD transmittal letter dated 4 June 2014, also indicated the District had determined the proposed bridges would have the effect of fill, "...as they would significantly alter or eliminate aquatic functions and values of the special aquatic site located below them," and would therefore require a permit.[9]

The Appellant submitted a complete Request for Appeal (RFA), which was received by the Southwestern Division (Division) office on 4 August 2014. The Appellant was informed by letter dated 15 August 2014, that their RFA was accepted.

Information Received and its Disposition During the Appeal

Title 33 Code of Federal Regulations (CFR) § 331.3(a)(2) states that, upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to examine the reasons for appeal cited by the Appellant. The District's 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 the Division. 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 District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

A. The District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 4 June 2014.

B. An appeal meeting was held on 22 October 2014. The meeting followed the agenda provided to the District and the Appellant by the RO via email on 14 October 2014. During the appeal

[5] AR page 1.
[6] AR pages 270-311.
[7] AR pages 713 and 772.
[8] AR pages 868-869.
[9] AR page 868.

meeting, the District provided multiple documents to the appeal meeting participants. These documents are as follows:

i. The District provided a handout to both the RO and the Appellant that contained the District's written responses to the points for clarification contained in the appeal meeting agenda. The District's written responses were a written form of the verbal clarification provided during the appeal meeting and documented in the appeal meeting MFR. Therefore, the clarifying comments contained within the handout were used to help with the evaluation of this RFA.
ii. The District provided an updated AR index and table of contents to both the RO and the Appellant.[10] These documents list and describe the contents of the District's AR and were generated by the District in response to the RO's request for a copy of the AR. Because they were not present in the District's AR prior to their decision, they were not considered as part of the evaluation of this RFA.
iii. The District provided a handout that was comprised of legible copies of the four figures found on AR pages 727-730.[11] The figures included in this handout were not considered new information as they were merely better visual quality copies of information already present within the District's AR prior to their decision. Therefore, these figures were considered as part of the evaluation of this RFA.
iv. The District indicated they inadvertently omitted the Appellant's 8 August 2014 response to the District's request for additional information, dated 7 July 2014,[12] from the copies of the AR provided to the RO and the Appellant. The District provided a copy of the letter to the RO and the Appellant and stated that it did not contain any new information pertaining to the their ADJ.[13] Because the letter was received after the date of the District's decision, it was considered to be new information and was not considered as part of the evaluation of this RFA.
v. The District provided a copy of their 2004 AJD letter to the RO and the Appellant.[14] While the 2004 AJD was not included with the copy of the AR provided to the RO and the Appellant, the District did reference it in their AR. Additionally, the AJD originated from the District prior to the date of its most recent decision. Therefore, the 2004 AJD letter would not be considered new information and was considered as part of the evaluation of this RFA.
vi. The District provided a figure that illustrated the changes in jurisdiction as well as different naming conventions between the 2004, 2010, and current 2014 AJDs to the RO and the Appellant.[15] This figure, which was provided to the RO and the Appellant in response to a question by the RO, included information not specifically found in the District's AR specific to this action. Therefore, it was considered new information and was not considered as part of the evaluation of this RFA.

[10] These documents were referred to as "Attachment I, Sheets 1 through 3 of 3" in the appeal meeting MFR.
[11] This handout was referred to as "Attachment G, Sheets 1 through 4 of 4 in the appeal meeting MFR.
[12] The District's7 July 2014 request for additional information is found on AR pages 875-877.
[13] The Appellant's 8 August 2014 response letter was referred to as "Attachment H, Sheets 1 through 48 of 48" in the appeal meeting MFR.
[14] The 2004 AJD letter was referred to as "Attachment J, Sheets 1 through 7 of 7" in the appeal meeting MFR.
[15] This figure was referred to as "Attachment K" in the appeal meeting MFR.

vii. The District provided an updated version of the email found on AR pages 320-323 with discussion unrelated to the action under appeal redacted.[16] Because this email was included in the District's AR prior to the date of its decision, it was not considered new information. Therefore, it was considered as part of the evaluation of this RFA.

viii. The District provided a more legible copy of the data form found on AR pages 753-755 to the RO and the Appellant.[17] The data form was not considered new information as it was merely a better visual quality copy of the data form already present in the District's AR prior to their decision. Therefore, the data form was considered as part of the evaluation of this RFA.

C. On 27 January 2015, the RO forwarded, via email, a draft MFR summarizing the appeal meeting topics to the Appellant and the District for review and comment. In an email dated 30 January 2015, the District provided comments regarding sections 4.i. and 4.p. of the draft MFR. In an email dated 3 February 2015, the Appellant provided comments regarding sections 1, 4.b., and 4.e. of the draft MFR. Both the District's and Appellant's comments were incorporated into the final MFR which was provided to the Appellant and the District by the RO on 18 February 2015.

Evaluation of the Appellant's Reasons for Appeal

REASON 1: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that the borrow pits were waters of the United States.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the Appellant asserted that the excavated areas (borrow pits) were not abandoned as the Appellant never demonstrated an intent to abandon them. Additionally, the Appellant asserted that the District's five year rule of thumb to determine abandonment was not supported by current regulation, guidance, or policy. Consequently, the Appellant believes the borrow pits should not be considered waters of the U.S. [18]

As previously stated, the District provided an AJD for the Appellant's property in 2010 at the Appellant's request, as the original 2004 AJD had expired.[19] In the 2010 AJD, the District recognized the excavated areas, but declined to assert jurisdiction as five years had not elapsed since the last excavation activity.[20] In response to comments received associated with the public notice for the proposed project, the District revisited and provided a new AJD in 2014 specific to the excavated areas.[21]

[16] The email was referred to as "Attachment L, Sheets 1 through 3 of 3" in the appeal meeting MFR.
[17] The data form was referred to as "Attachment M, Sheets 1 through 3 of 3" in the appeal meeting MFR.
[18] Appellant's RFA dated 1 August 2014, pages 1-5.
[19] AR pages 722 and 724.
[20] AR pages 722-723.
[21] AR pages 868-869.

In the 2014 AJD, the District identified two different types of excavated features: 1) areas that were excavated out of wetlands previously identified as waters of the U.S. (referred to as Type 1 in the AJD), and 2) areas that were excavated out of uplands (referred to as Type 2 in the AJD).[22]

Regarding the Type 1 areas, the District indicated in the AR that the features were abandoned, as more than five years had elapsed since they were utilized as borrow areas. The District further stated that because normal circumstances had established as a result of the abandonment, excavation in these areas did not act to eliminate, but rather extend jurisdiction, "…to the elevation of the ordinary high water mark of the delineated wetland."[23] Therefore, the District concluded that the Type 1 areas were adjacent to both Corpus Christi Bay and the Gulf of Mexico and should be considered waters of the U.S.[24]

Regarding the Type 2 areas, the District indicated in the AR that they were also abandoned, as it had been greater than five years since they were utilized as borrow areas. Furthermore, the District stated that all the Type 2 areas had naturalized and normal circumstances had established since their abandonment, and that when reviewed together as a complex, the Type 2 areas collectively had greater than 5% vegetative cover and would therefore be classified as a wetland.[25] Finally, the District stated that the Type 2 areas were adjacent to both Corpus Christi Bay and the Gulf of Mexico and consequently, were considered waters of the U.S.[26]

Consistent in the District's AJD for both types of excavated areas was the District's determination that the areas were abandoned and normal circumstances were present, as greater than five years had passed since the excavated areas had been utilized. The District stated in their AR that sufficient time must pass for normal circumstances to be present and that, "sufficient time generally is referred to as 5 years and is based upon the Corps choosing to define 'normal circumstances' in a manner consistent with the definition used by the Soil Conservation Service..." Using this as a basis, the District then concluded that, "Once 5 years have lapsed from the last activity in the area, normal circumstances are established and the area is considered abandoned.[27] During the appeal meeting, the District also stated that other guidance, such as Regulatory Guidance Letters (RGL) 07-01 and 08-02, provide a historic rationale for the five year time frame associated with AJDs.[28] It should be noted, however, that this information was not included in the District's AR.

Considering regulation, guidance, and policy related to this reason for appeal, waters of the U.S., which are defined at 33 CFR § 328.3(a)(1), include adjacent wetlands. Wetlands are defined as, "…those areas that are inundated or saturated by surface or ground water at a frequency and

[22] AR pages 713-715 and 868-869.
[23] AR pages 714, 745, 752, and 868.
[24] AR pages 745 and 752.
[25] AR pages 715, 735, and 742. It should be noted that, as alluded to on AR page 869, the District's AJD determined the presence or absence of waters of the U.S. on the Appellant's property and did not delineate the actual boundaries of those waters of the U.S. Therefore, the limits of jurisdiction referred to in this case could only be conceptual in nature.
[26] AR pages 715, 735, 742, and 868-869.
[27] AR page 714.
[28] RGLs 07-01 and 08-02 address "Practices for Documenting Jurisdiction…" as well as "Jurisdictional Determinations" respectively. The RGLs indicate that an AJD is valid for five years unless new information warrants revision before the expiration date.

duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions [emphasis added]."[29]

"Normal circumstances" is determined based on an area's characteristics and use, both present and in the recent past,[30] and involves an evaluation of the extent and relative permanence as well as the purpose and cause of the physical alteration to the wetland.[31] For example, a feature that was formerly considered a wetland (and water of the U.S.), may no longer be considered a water of the U.S. subject to Corps' regulatory jurisdiction if that same feature experiences a change in use that is so extensive it ceases to exhibit wetland characteristics. Conversely, if that same feature is later abandoned (or left alone), it could, over time, redevelop characteristics such that it meets the definition of a wetland thereby restoring the Corps' regulatory jurisdiction.[32]

Considering work, such as excavation, in waters of the U.S., 33 CFR § 328.5 states that, "permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States... Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer."

Considering work, such as excavation, in uplands, the preamble to 33 CFR § 328.3 states that, "waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel..." are generally not considered to be waters of the U.S., "...unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the [U.S.]."[33]

Current regulation, guidance and/or policy does not define a specific length of time necessary to determine abandonment, but indicates that abandonment is determined once an area is left alone for sufficient duration such that new normal circumstances are established (not by intent as the Appellant asserted). It should be noted that RGL 90-07 defined abandonment as occurring after five years from the most recent activity when it stated that, "An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production." However, this RGL was specific to cropped wetlands and has since been rescinded.

Based on the above discussion, the District's decision to revisit the 2010 AJD prior to its expiration was consistent with the flexibility provided in existing guidance. Furthermore, the District was conceptually correct when it stated that excavation within a water of the U.S. could act to expand jurisdiction and that an area excavated in uplands, once abandoned, could become a water of the U.S. However, the District's alignment with the Soil Conservation Service's five year rule of thumb to determine abandonment of the excavated areas is not supported by current regulation, guidance or policy. Therefore, the District's AR does not support that the excavated

[29] 33 CFR § 328.3(b).
[30] RGL 86-09.
[31] Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. (1987 Manual).
[32] RGLS 86-09 and 82-02.
[33] 51 Federal Register 41206, at 41217 (1986). It should be noted that, while not regulation, the preamble does serve to clarify regulation.

features were abandoned, and therefore waters of the U.S. Consequently, this reason for appeal has merit.

ACTION: The District shall reconsider its AJD by utilizing existing applicable regulation, guidance, and policy (including those referenced in the discussion above) to determine whether the excavated areas should be considered waters of the U.S. The AR should be revised accordingly to document and reflect the additional factual data considered in this analysis. This documentation should include a revised AJD form that captures the rationale of the District's reconsidered decision.

REASON 2: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that the proposed bridges had the effect of fill.

FINDING: This reason for appeal does not have merit.

DISCUSSION: In the RFA, the Appellant stated that the bridges associated with the proposed project would be, "...pile-supported, elevated bridges to avoid fill related impacts."[34] The Appellant asserted that existing regulation and guidance create, "...a presumption that pile-supported bridges do not constitute the discharge of fill material..." and that the District's determination that the proposed bridges would have the effect of fill was summary in nature and lacked sufficient rationale or basis to rebut the presumption presented in existing regulation and guidance.[35] Therefore, the Appellant believes the proposed bridges are captured by what they refer to as the "general rule" and do not have the effect of fill.

The District's 4 June 2014, letter to the Appellant included an AJD that concluded the excavated areas within the Appellant's property were waters of the U.S. as well as a statement that the proposed bridges were determined to, "...have the functional use and effect of fill as they would significantly alter or eliminate aquatic functions and values of the special aquatic sites located below them."[36] The District's letter also stated that, "...the bridges (as <u>currently</u> proposed) <u>will be</u> evaluated as having a discharge...and <u>will require</u> a Section 404 [permit]...[emphasis added]."[37]

The District's letter transmitted only one completed action, the AJD, and clearly stated that the permitting process associated with the proposed action was ongoing (which is supported by the word choice and tense relative to the proposed bridges within the letter as well as the indication on the NAO/NAP form that the AJD was the only appealable action).[38] Therefore, the only appealable action in this case is the District's AJD.

An AJD is defined as a Corps document stating the presence or absence of waters of the U.S. on a parcel.[39] In other words, an AJD defines the aquatic resources within a particular site that are subject to Corps regulation. The appellant's assertion associated with this reason for appeal is

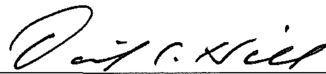
[34] Appellant's RFA dated 1 August 2014, page 6.
[35] Appellant's RFA dated 1 August 2014, pages 6-7.
[36] AR pages 868-869.
[37] AR page 868.
[38] AR page 871.
[39] 33 CFR § 331.2.

not challenging whether an aquatic feature is regulated (the District's AJD), but rather, the District's determination during an ongoing permitting process that an activity is regulated. The District's statement in the 4 June 2014, letter that the proposed bridges would have the effect of fill had no impact on the determination that the excavated areas are waters of the U.S. (the AJD). Therefore, because the AJD is presently the only appealable action and the Appellant's assertion is related to an ongoing permit process, this reason for appeal does not have merit.

ACTION: No action necessary.

Conclusion: For the reasons stated above, I have determined that reason for appeal 1 has merit and reason for appeal 2 does not have merit. The AJD is remanded to the Galveston District for reconsideration consistent with the discussion detailed above. The final USACE decision on jurisdiction in this case will be the Galveston District Engineer's decision made pursuant to this remand.

07/06/15
Date



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