

ADMINISTRATIVE APPEAL DECISION
MARIA RADEMACHER
APPROVED JURISDICTIONAL DETERMINATION
GALVESTON DISTRICT
FILE NO. SWG-2011-00591

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

Appellant/Applicant: Ms. Maria Rademacher

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

Date Acceptable Request for Appeal Received: 21 March 2014

Appeal Meeting: 15 May 2014

Summary of Appeal Decision: Ms. Maria Rademacher (appellant) is appealing a USACE Galveston District (District) approved jurisdictional determination (AJD) associated with property in Cypress, Harris County, Texas. The appellant submitted five reasons for appeal in which she asserted that the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands; omitted material fact; committed a procedural error; and incorrectly applied law, regulation, or officially promulgated policy when it determined that the wetland on her property was isolated, and therefore not a water of the United States (U.S.). For reasons detailed in this document, reasons for appeal 1, 3, and 5 have merit while reasons for appeal 2 and 4 do not have merit. The AJD is remanded to the District for reconsideration.

Background Information: The appellant's property is located at 12751 William Dowdell Drive in Cypress, Harris County, Texas. In response to a request for an AJD, the District conducted a site visit on 25 August 2011.¹ The District determined the appellant's wetland was isolated and not a water of the U.S. and initiated coordination with the EPA Regional Office as well as USACE headquarters (HQ) via email dated 23 September 2011² in accordance with the *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook*.³ On 11 October 2011, the EPA Regional Office notified the District via email that it was elevating the AJD to EPA HQ for further consideration.⁴ On 16 April 2013, EPA HQ informed USACE HQ that it did not object to the District's finding.⁵ Upon receipt of this determination, the District issued the AJD

¹ Administrative record (AR) pages 13-22.

² AR page 36.

³ The Guidebook was issued on 1 June 2007, as Regulatory National Standard Operating Procedures for conducting an AJD and documenting practices to support an AJD. In this case, the Guidebook required that the District coordinate the AJD with the EPA Regional Office and USACE HQ.

⁴ AR page 37.

⁵ AR pages 34-35.

dated 6 May 2013, that stated the appellant's wetland was, "...not a water of the United States subject to Section 404 of the Clean Water Act."⁶

The appellant submitted a complete Request for Appeal (RFA), which was received by the Southwestern Division (Division) office on 26 July 2013, and accepted by the Division via letter dated 2 August 2013. On 28 August 2013, the appellant requested to withdraw her appeal so the District could reconsider its AJD based on a change in conditions near her property. The appeal was officially withdrawn by letter dated 4 September 2014.

The District considered the change in conditions and provided a new AJD to the appellant on 3 March 2014, which again concluded that the appellant's wetland was not a water of the U.S.⁷ Finally, the appellant submitted a complete RFA, which was received by the Division office on 21 March 2014, and accepted via letter dated 27 March 2014.

Information Received and its Disposition During the Appeal

33 Code of Federal Regulations (CFR) § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this AJD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding AJDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's 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 their 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 3 March 2014.
- B. An appeal meeting was held on 15 May 2014. The meeting followed the agenda provided to the District and the appellant by the RO via email on 8 May 2014. During the appeal meeting, the appellant provided multiple documents to the appeal meeting participants. These items are as follows:

⁶ AR page 39.

⁷ AR pages 144-147.

- i. The appellant noted that an email exchange, which occurred between the appellant and the District on 20 and 21 August 2013, was missing from the District's AR. The email exchange was included as Appendix C to appeal meeting MFR. Because the email exchange occurred prior to 3 March 2014, and was not included in the AR due to a District error, it should be considered as part of the District's AR and consequently, part of the evaluation of this RFA.
 - ii. The appellant provided copies of four "historic and present day water flow maps" referenced in the appellant's RFA to the appeal meeting participants. These figures, which were included as Appendix D to the appeal meeting MFR, included NWI and elevation data as well as the present day path of water from the appellant's site overlaid on a USGS topographic map and various aerial photographs. The appellant previously provided three of the four figures to the District as part of the investigation for an alleged violation on the adjacent property to the north, but not specifically for this action. While the District did not receive the four figures specifically for this action, the information contained within each figure was available to, and, based on the contents of the AR, considered by the District. Therefore, the four figures should not be considered new information, and consequently, were considered as part of the evaluation of this RFA.
 - iii. The appellant provided a copy of their 2002 septic system permit to all appeal meeting participants. This permit, which was included as Appendix E to the appeal meeting MFR, was not previously provided to the District; however, the District was aware of, discussed, and included photographs of the septic sprinkler system in their AR. Therefore, this would not be considered new information, and consequently, was considered as part of the evaluation of this RFA.
 - iv. The appellant provided copies of selected pages of the District's enforcement report associated with the adjacent property to the north of the appellant's property to all appeal meeting participants. These pages, which were included as Appendix F to the appeal meeting MFR, included wetland sample point data as well as the location of a wetland near Cypress Creek. While the information was not created for this action, it did originate from the District and therefore would not be considered new information. As a result, the pages were considered as part of the evaluation of this RFA.
- C. On 21 May 2014, the RO forwarded, via email, a draft MFR summarizing the appeal meeting topics to the appellant and the District with a request that they review and provide comments by 28 May 2014. In an email dated 22 May 2014, the appellant responded regarding section 5.i. of the draft MFR that, "These 'pages' from the District's 2008 enforcement report did not just illustrate the location of the wetland, but as I stated at the meeting, these pages from their own report clearly proves that the District never sampled within this area to determine if it indeed was a wetland." The District did not provide any comments to the draft MFR.
- D. In an email dated 22 May 2014, the District provided the RO (at the RO's request) a copy of the long range rainfall data worksheet for the appellant's area the District referenced during the appeal meeting. The District indicated they did not include this worksheet in their AR, but was information they routinely used to make wetland determinations. Additionally, the District provided a copy of a long range rainfall data worksheet in the same email for the date

of the aerial photo on which the NWI map was based for the appellant's property. The District indicated the NWI rainfall data was not in their AR prior to their decision. The RO provided both worksheets, which were included in Appendix G to the appeal meeting MFR, to the appellant via email dated 28 May 2014. While the long range rainfall data for the appellant's area used by the District was publicly available information, the District's AR lacked any reference that it had been considered as part of their decision. Additionally, the long range rainfall data for the NWI map was not included in the District's AR prior to 3 March 2014. Therefore, both worksheets should be considered new information and were not considered as part of the evaluation of this RFA.

- E. The RO supplied the final MFR to the appellant and the District via e-mail on 30 May 2014. The appellant's comments were included in section 7 of the final MFR.

Appellant's Reasons for Appeal

REASON 1: The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not stake the boundaries of the wetland.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant stated that the District, "...did not stake the boundaries of the wetland, as is required and stated in the Atlantic-Gulf Coastal Plain Region Supplement." During the appeal meeting, the appellant further stated that if the District had followed the process correctly and flagged the wetland's boundaries, the District would have observed its actual shape which proved that it was not isolated. Finally, the District indicated during the appeal meeting that they did not flag the wetland boundaries because the appellant did not request a delineation.

An AJD is defined at 33 CFR § 331.2 as, "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." While not regulation, the preamble to 33 CFR § 331.2 clarifies that the document stating the presence or absence of waters of the U.S. on a parcel is a "determination," while a written statement and map identifying the limits of waters of the U.S. on a parcel is a "delineation." Regulatory Guidance Letter 08-02, sections 2(a) and 2(a)(1) together state, "The Corps will provide ... an [AJD] to any landowner, permit applicant, or other 'affected party' when a landowner, permit applicant, or other 'affected party' requests an [AJD] by name or otherwise requests an official jurisdictional determination, whether or not it is referred to as an 'approved JD.'" To summarize, a district should provide either a determination or a delineation based on the type of AJD an applicant requests.

The appellant did not specify the type of AJD requested in the initial request letter, dated 29 June 2011, which stated, "Please consider this an official request for the Corps of Engineers to conduct a jurisdictional determination to see if any waters of the United States (including

adjacent wetlands) are located on my property...”⁸ The appellant did reference a “wetland determination” in an email sent to the District prior to the issuance of the District’s first AJD, dated 6 May 2013,⁹ and again in an email, dated 9 September 2013, prior to the issuance of the District’s second AJD dated 3 March 2014.¹⁰ However, the appellant did not appear to understand the distinction between a determination and a delineation when she referenced both concepts, separately as well as within the same paragraph, in the original RFA dated 23 July 2013.¹¹ There is no evidence in the District’s AR that the District ever sought clarification of the type of AJD request the appellant made, even after receipt and consideration of the first RFA that contained references to both concepts.

Based on the appellant’s original RFA and the clarification provided by the appellant during the appeal meeting, the appellant’s intent appears to have been to receive an AJD that delineated the wetland boundaries. The references to a determination are brief while the delineation references are expanded. For example, the appellant stated regarding a determination that, “Corps officer Nicholas Laskowski was scheduled to conduct a wetland determination on the Rademacher property.” Alternatively, the appellant stated regarding a delineation that, “Protocol was not followed by Corps officers according to the Corps of Engineer’s 1987 Wetland Delineation Manual (1987 manual) and the Atlantic-Gulf Coastal Plain Region Supplement,” as well as, “The issue is that Mr. Houston did not follow protocol and stake the boundaries of the wetland as is required and stated in the Atlantic-Gulf Coastal Plain Region Supplement.” Therefore, the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not identify the boundaries of the wetland in response to a request to do so. Consequently, this reason for appeal has merit.

It should be noted that the appellant’s delineation request mentioned staking the wetland boundaries; however, the 1987 manual indicates that flagging to delineate the wetland boundary is part of the procedure for delineating properties greater than five acres in size.¹² The appellant’s property was documented as approximately 3.3-acres.¹³ Therefore, the 1987 manual specifies that for properties of this size, the wetland boundary is not demarcated by flagging, but rather by illustrating the boundary on a basemap.¹⁴

ACTION: Consistent with the intent of the appellant’s request, the District shall provide a delineation of the aquatic features within the appellant’s property as part of a revised AJD. This delineation will follow the procedures as outlined in the 1987 wetland delineation manual and associated regional supplement, and will be clearly documented in the District’s AR.

⁸ AR page 1.

⁹ AR page 5.

¹⁰ AR page 66.

¹¹ This RFA was an appeal of the District’s original AJD dated 6 May 2013. This appeal was later withdrawn as discussed in the “background information” section of this decision document. The RFA contained several, separate references to both concepts with multiple uses of the phrase “wetland determination” as well as to the 1987 wetland delineation manual and regional supplement. In addition, the RFA had one instance where both concepts were referenced in the same paragraph which stated, “...the wetland boundaries should have been staked at the time of the wetland determination.”

¹² Environmental Laboratory. (1987). “Corps of Engineers Wetlands Delineation Manual,” Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

¹³ AR page 144.

¹⁴ Environmental Laboratory. (1987). “Corps of Engineers Wetlands Delineation Manual,” Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

REASON 2: The District omitted material fact when they failed to consider the impact of the drought on hydrology as part of their jurisdictional determination.

FINDING: This reason for appeal does not have merit.

DISCUSSION: In the RFA, the appellant stated, that “[The District] could not find subsurface water in the Rademacher wetlands; this was due to the severe droughts that affected Cypress, Texas,” and, “It is reasonable to assume that the JD was decided upon the usage of false indicators, simply because the hydrology was not there.” During the appeal conference, the appellant clarified that she did not believe the District considered the impact the drought had on wetland hydrology as well as the connection between the wetland and Cypress Creek.

The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* recommends that districts, "...include all documents and materials directly or indirectly considered by the decision-maker" within the AR.¹⁵ The District’s wetland data forms from their 25 August 2011 site visit indicated that the “Area is near 20 [inches] below annual rainfall.”¹⁶ Data forms prepared by EPA on 23 March 2011, and considered by the District, also stated that “Conditions are dry for this time of the year.”¹⁷ Finally, the District stated that the area was “...a little behind annual rainfall for the year” in a MFR associated with their 13 September 2013, site visit.¹⁸

It should be noted that despite these references, the District still concluded that the aquatic feature within the appellant’s property was a wetland that “...did possess...adequate hydrology at/or near the surface...”¹⁹ Furthermore, the District acknowledged the potential hydrologic connection between the wetland and Cypress Creek. However, it determined that this connection was not sufficient for the wetland to be considered a water of the U.S. (this is discussed further in Reason for Appeal 5 below). The District did not reach this conclusion based on the presence or absence of sufficient hydrology between the wetland and Cypress Creek, but on the connection not meeting either the definition of a water of the U.S., as defined in 33 CFR § 328.3, or being sufficient such that the wetland would be considered adjacent.²⁰

Therefore, inclusion of these references and discussion related to the drought in the District’s AR indicated the drought was considered by the District. Consequently, this reason for appeal does not have merit.

ACTION: No action required.

¹⁵ July 1, 2009. *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program*: Section 2: File Maintenance. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* provides a summary of current policies and procedures and should be used as day-to-day informal guidance by regulatory project managers as they implement the program.

¹⁶ AR pages 13 and 16.

¹⁷ AR pages 53 and 55.

¹⁸ AR page 73.

¹⁹ AR page 101.

²⁰ AR page 74.

REASON 3: The District omitted material fact when they failed to consider the entire wetland as illustrated on the National Wetland Inventory Map as part of their jurisdictional determination.

FINDING: This reason for appeal has merit.

DISCUSSION: The appellant asserted in the RFA that the wetland was part of the same, 5-acre wetland illustrated on the NWI map that encompassed portions of their property and the adjacent property to the north. The appellant further asserted that the District never sampled within this area to determine if it indeed was a wetland.

The District documented two sample points during their 25 August 2011 site visit.²¹ These sample points, one of which met all three criteria for being considered a wetland, were both located outside the wetland area illustrated on the NWI map.²² The District indicated in a memorandum for the file, dated 14 September 2011, that “Several additional soil pits were dug in the northern portion of the tract to examine if hydric soil criteria would be met,” and concluded that “These soil samples failed to meet hydric soils criteria and represent conditions for the majority of the site.”²³ Beyond this reference in the AR, the District did not document any other information (such as their location) regarding these sample points. Therefore, it is not possible to determine if any of these sample points were located within the area illustrated as a wetland on the NWI map.

The District documented an additional five sample points, two of which met the three wetland criteria, during a subsequent field visit on 13 September 2013.²⁴ Additionally, the District illustrated on an aerial photograph, found on AR page 76, the location of seven sample locations associated with the same site visit, and at least three of these locations appeared to be within or near the area illustrated as a wetland on the NWI map.²⁵ However, not all the location names on the aerial photograph match those on the data forms, and corresponding data forms for some of the locations that may be within or near the NWI wetland area could not be found within the District’s AR. Finally, the aerial photograph on AR page 76 lacked a proper scale or other reference point such that it could be compared to other maps, such as that found on AR page 113, to determine a more precise location of the data points relative to the NWI wetland area.

In a memorandum for the file associated with the 13 September 2013 site visit, the District stated that, “...NWI maps are done on aerial photos and are commonly inaccurate.”²⁶ The District further noted in the same memo that,

There is a disclaimer on these maps that states: “that federal, state, and local agencies with jurisdiction on wetlands may define wetlands differ[ent] than used in this inventory. There is no attempt in design or products of this inventory to define limits of proprietary

²¹ AR pages 13-18.

²² AR page 21.

²³ AR page 32.

²⁴ AR pages 75, 75a, 77-83, and 89-92.

²⁵ This estimate was accomplished by comparing the information found on AR pages 76 and 113.

²⁶ AR page 74.

jurisdiction of any other agency or to establish limits of establish geographical scope of regulatory programs of government agencies.”²⁷

The District’s AR does not support this statement, as the AR lacks accurate documentation of the location of the wetland sample points within the NWI wetland. Therefore, the District’s AR does not support that it considered the entire wetland as illustrated on the NWI map. Consequently, this reason for appeal has merit.

ACTION: The District shall further analyze and document for the record its assessment of the wetland illustrated within the NWI map as part of its response to the action associated with reason for appeal 1 above. The administrative record should be documented accordingly to reflect this analysis.

REASON 4: The District committed a procedural error during its investigation of an alleged violation on an adjacent property.

FINDING: This reason for appeal does not have merit.

DISCUSSION: In the RFA, the appellant stated “The [District] did NOT ever conduct a proper wetland determination on the Callegari property according to protocol.” The appellant is referring here to the District’s investigation of an alleged violation on the Callegari property, which is the adjacent property to the north of the appellant’s property.

An affected party is defined in 33 CFR § 331.2 as, “...a permit applicant, landowner, a lease, easement or option holder (i.e. an individual who has an identifiable and substantial legal interest in the property) who has received an [AJD], permit denial, or has declined a proffered individual permit.”

Based on the information included in the District’s AR as well as the appellant’s RFA, the appellant has neither an identifiable or substantial legal interest in the adjacent property to the north, nor did they receive an AJD associated with the adjacent property to the north. Therefore, the appellant does not meet the definition of an affected party and, consequently, does not have the right to appeal an action associated with the adjacent party to the north.²⁸ Accordingly, this reason for appeal does not have merit.

ACTION: No action necessary.

REASON 5: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that the appellant’s wetland was isolated, and therefore, not a water of the U.S.²⁹

²⁷ AR page 109.

²⁸ It should be noted that the RO indicated during the appeal meeting that this reason for appeal was outside the scope of the appeal process and not an acceptable reason for appeal. To clarify, because the appellant does not meet the definition of an affected party for the adjacent property to the north, this reason for appeal is outside the scope of the appeal process for this appeal, and consequently, not an acceptable reason for appeal.

²⁹ This reason for appeal was previously captured in the appeal meeting MFR as, “The District omitted material fact when they failed to consider a newly installed culvert, which the appellant asserts provides a direct connection between the wetland and

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant asserted water flowed from their property east into the main neighborhood ditch, and then northward through a newly installed drainage pipe on the adjacent property to the north, and then into Cypress Creek. The appellant asserted that this drainage pipe created a direct connection between their wetland and Cypress Creek. Consequently, the appellant believed that their wetland should be considered a water of the U.S.

Regulation at 33 CFR § 328.3(a)(7) indicates waters of the U.S. include adjacent wetlands. 33 CFR § 328.3(c) defines adjacent as, "...bordering, contiguous, or neighboring," and that, "Wetlands separated from other waters of the United States 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.³⁰

In the AR, the District stated that the appellant's wetland was above the 100-year floodplain³¹ and was:

...not adjacent to and does not have a confined hydrologic surface connection or a known subsurface connection with any water of the United States. The wetland is not and could not be used by interstate or foreign travelers for recreational or other purposes, are not or would not be used for industrial purposes by industries in interstate commerce, and are not or could not be used to take fish or shellfish sold in interstate or foreign commerce. No other nexus to interstate commerce is known.³²

The District further indicated that the appellant's alleged surface connection between their wetland and Cypress Creek was not a water of the U.S. as it was not tidal, did not extend the plain of ordinary high water of the nearest water of the U.S, or did not replace a water of the U.S.³³ Therefore, the District concluded that the appellant's wetland was not adjacent because the hydrologic connection between it and Cypress Creek was not a water of the U.S.

This rationale is not consistent with the 2008 *Rapanos* guidance which does not specify that the "unbroken surface or shallow subsurface connection to jurisdictional waters" must be a water of the U.S. Therefore, this reason for appeal has merit.

Cypress Creek, as part of their jurisdictional determination.." The reason was changed in this decision document to more accurately reflect the appellant's concern as documented in their RFA.

³⁰ 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.

³¹ AR page 32.

³² AR page 33.

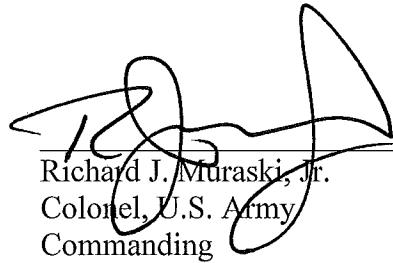
³³ AR page 73.

ACTION: In conjunction with the responses to the actions associated with reason for appeal 1 and 3 above, the District shall further analyze and document for the record whether the alleged surface connection between the appellant's wetland and Cypress Creek satisfies the adjacency criteria in relevant regulation, guidance, and policy. The administrative record should be documented accordingly to reflect this analysis.

Conclusion: For the reasons stated above, I have determined reasons for appeal 1, 3, and 5 have merit, while reasons for appeal 2 and 4 do 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.

9 June, 2014

Date



Richard J. Muraski, Jr.
Colonel, U.S. Army
Commanding