

ADMINISTRATIVE APPEAL DECISION

**Tammany Holding Corporation
File No. 20-020-1717
New Orleans District
March 6, 2003**

Review Officer (RO): Martha S. Chieply, U.S. Army Corps of Engineers (USACE), Mississippi Valley Division

Appellant/Applicant: Mr. Robert Torres, Tammany Holding Corporation

Appellant's Representative: Mr. Stanley Millan of Jones, Walker, Waechter, Poitevent, Carrère & Denègre L.L.P. (Jones and Walker)

Authority: Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899

Receipt of Request For Appeal (RFA): November 15, 2002

Appeal Conference and Site Visit Dates: January 13, 2003

Background Information: On behalf of Appellant, by letter dated March 21, 2002, Bayou Cajun Environmental Soil and Wetlands Services, Inc. provided delineation data to the New Orleans District (MVN), and requested a jurisdictional determination for the undeveloped portion of Lakeshore Estates Phase II. The 1,626-acre property is located east of Interstate 10 and contiguous to Lake Pontchartrain. The property consists largely of former lacustrine and/or coastal fringe wetlands that are now separated from Lake Pontchartrain by a levee. Ground surface elevations across most of the site are below the level of Lake Pontchartrain. A system of ditches and a pumping station evacuate rainfall that accumulates in the closed basin.

On August 29, 2002, Appellant applied for a permit for Lakeshore Estates Phase II. The MVN issued a jurisdictional determination (JD) letter dated September 19, 2002. The MVN determined that the property contained wetlands and was subject to the Corps of Engineers jurisdiction. The MVN found that the data provided by the Appellant was insufficient to support Appellant's contention that only approximately 10 percent of the property contained wetlands. The MVN found that substantially more of the property contained wetlands. Lake Pontchartrain and

the East Diversion Canal were determined to be navigable waterways and subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act. The JD included a map of the property, a Basis for Jurisdictional Determination form, the Combined Notification of Appeal Process (NAP)/RFA form, and a copy of a Wetlands Regulatory Assistance Program (WRAP) report dated August 27, 2002.

On 15 November 2002, on behalf of Tammany Holding Corporation, Mr. Millan submitted a completed RFA. The RFA was received in my office within the requisite 60-day time period, and was accepted.

Summary of Appeal Decision: The appeal has partial merit. The administrative record supports the MVN finding that navigable waters are present, and that there are wetlands adjacent to these navigable waters. Additional documentation is needed regarding the MVN finding that the canals and drainage ditches located within the interior of the property are tributaries that eventually drain or flow into navigable or interstate waters. The appeal is remanded on that finding alone.

In his appeal, the Appellant alleges that the wetlands are isolated and/or that the MVN misapplied the law and regulations. These allegations are unsubstantiated and are without merit.

Information Received and Its Disposition During the Appeal Review:

1. The MVN provided a copy of the administrative record. Pursuant to 33 C.F.R. Section 331.7(f), the basis of a decision regarding the JD is limited to information contained in the administrative record by the date of the NAP form. The NAP for Tammany Holding is dated September 19, 2002. Review of the administrative record revealed a memorandum from the MVN dated September 16, 2002 (item 30 of the administrative record). This memorandum contained two amendments dated September 24, 2002. Based on their dates, these amendments are new information. As new information, the amendments were not given any weight or consideration by the RO. No other new information was found in the administrative record or considered by the RO.

2. The RO provided the MVN and the Appellant a list of questions to be answered in the appeal conference. All responses are found in the January 13, 2003 verbatim record of

the administrative appeal conference. This list of questions is Exhibit 1 in the record of the appeal conference.

3. During the appeal conference, the RO provided two flowcharts to the MVN and Appellant describing the administrative appeal process. The flowcharts are Exhibit 2 in the record of the appeal conference.

4. During the appeal conference, except for question no. 13, the MVN provided a written response to the RO's questions. The MVN written response is considered clarifying information and is Exhibit 3 in the record of the appeal conference.

5. During the appeal conference, the MVN also provided a copy of a 1995 color infrared photograph no. ACC04866 FR 1344. The photograph is considered clarifying information and is Exhibit 4 in the record of the appeal conference.

6. During the appeal conference, the Appellant provided a property map entitled "Lakeshore Estates Tammany Holding" that depicted points where digital photographs were taken by the RO during the site visit. The map and corresponding digital photographs are considered clarifying information and are Exhibit 5 in the record of the appeal conference.

7. During the appeal conference, the Appellant provided a written response to the RO's questions. The written response is considered clarifying information and is Exhibit 6 in the record of the appeal conference.

8. During the appeal conference, the Appellant provided a series of documents:

a. A State/Local Concern Determination from the Louisiana Department of Natural Resources on Application No. P20021241, September 13, 2002.

b. A letter from Krebs, LaSalle, LeMieux (KLL) Consultants, Inc., September 11, 2002, to Mr. Rocky Hinds, Department of Natural Resources, Coastal Management Division, containing the following enclosures:

(1) Department of the Army Permit Application, August 29, 2002, signed by Robert Torres, Sr. (Applicant) and Shelby P. LaSalle, Jr. (Agent).

(2) An undated, unsigned narrative prepared by KLL Consultants.

(3) A letter from the Louisiana Department of Natural Resources letter to Tammany Holding Company, January 9, 1998.

(4) A delineation report prepared by Mr. Arville Touchet, Bayou Cajun Environmental Soil and Wetland Services Inc., May 6, 2002.

(5) A letter from KLL Consultants to Mr. Roger Swindler, March 17, 1998.

(6) A letter from the Federal Emergency Management Agency to Mr. Kevin Davis, St. Tammany Parish President, August 8, 2002.

(7) A collection of documents denominated as exhibits which consists of two vicinity maps; Exhibit No. 1, "Physical Features and Topographic Map"; Exhibit No. 2, "Conceptual Map"; Exhibit No. 2A, "Lakeshore Estates PUD"; Exhibit No. 3, "Drainage Map"; Exhibit No. 4, "Typical Cross Section Map"; and, Exhibit Nos. 5, 7, 8, 9, 10, 11, and 12, which are cross sections.

(8) An unsigned, undated document entitled "Water Quality Improvements." The document enclosed an undated memorandum from the United States Environmental Protection Agency.

(9) An undated document entitled "Adjacent Property Owners."

The above listed materials are Exhibit 7 in the record of the appeal conference and are considered clarifying information.

9. During the appeal conference, the Appellant provided a drawing entitled "Conceptual Section." This document is considered clarifying information and is Exhibit 8 in the record of the appeal conference.

10. During the appeal conference, the Appellant provided an undated letter, from the MVN Operations Division, Eastern Evaluation Section, to Senator Mary L. Landrieu. This letter was transmitted by facsimile to KLL Consultants on

January 10, 2003. The letter is considered clarifying information and is Exhibit 9 in the record of the appeal conference.

11. The Appellant provided eleven documents, which are Exhibit 10 in the record of the appeal conference:

a. A document entitled "Extract from Tammany Holding Corporation Administrative Record #20-020-1717 on Other J.D.'S Considered by Corps."

b. A copy of the decision in Save Our Wetlands, Inc. v. Col. William Conner, 2000 U.S. Dist. LEXIS 10496 (E.D. La, 2000); 31 ELR 20010.

c. A Department of the Army Permit Evaluation and Decision Document (Applicant Tammany Holding Company, Application No. 19-980-1347), New Orleans District (CEMVN-OD-SE), signed on September 3, 1998.

d. A letter from Jones and Walker to Ms. Kathleen Bradley, October 25, 2002, requesting agency records under the Freedom of Information Act.

e. A letter from Jones and Walker to Ms. Kathleen Bradley, November 7, 2002, requesting agency records under the Freedom of Information Act.

f. A letter from Ms. Kathleen Bradley to Stanley A. Millan, November 12, 2002. The MVN letter provided documents in response to his Freedom of Information requests dated September 19, 2002 and November 7, 2002.

g. A second copy of the Appellant's written response to the RO's questions, with a "Questions For Applicant" supplement.

h. A topographic map entitled "Northshore."

Documents a through h, above, were considered clarifying information and were considered by the RO.

i. A July 21, 1999 letter from the MVN to Mr. Carlos Calix. The letter is an MVN JD for property identified as the 2.5-acre portion of parcel 3-A fronting on I-10 of the Oak Harbor East development (Corps account number 199903216).

j. A May 19, 1997 letter from MVN to Mr. Phil Salvaggio. The letter is a MVN JD for property identified as Parcel 3-D (Corps Account No. 199703084).

k. A letter from the MVN to Felicia L. Patron, March 25, 1997. The letter is an MVN JD for property identified as the 5.7-acre site of a proposed park and ride facility (Corps account number 199702357).

At the appeal conference, the MVN reviewed documents i through k, and stated that it did not consider the letters in its JD determination. Therefore, the letters are new information and were not given any weight or consideration by the RO.

12. The Appellant provided five documents that are Exhibit 11 in the record of the appeal conference:

a. A copy of a topographic map entitled "Northshore," on which were noted the locations of four MVN JDs.

b. A letter from the New Orleans District to Mr. Carlos A. Calix, November 28, 2001. The letter is an MVN JD for property identified as the Eden Isle/Oak Harbor East I-10 Interchange (Corps account number 20-020-0124).

c. A letter from the MVN to Felicia L. Patron, March 25, 1997. The letter is an MVN JD for property identified as the 5.7-acre site of a proposed park and ride facility (Corps account number 199702357).

d. A letter from the MVN to Phil Salvaggio, May 19, 1997. The letter is an MVN JD letter for property identified as Parcel 3-D (Corps account number 199703084).

e. A July 21, 1999 letter from the MVN to Mr. Carlos Calix. The letter is an MVN JD for property identified as the 2.5-acre portion of parcel 3-A fronting on I-10 of the Oak Harbor East development (Corps account number 199903216).

The MVN reviewed the listed documents and stated that it did not consider any of the five documents in its JD determination. Therefore, the five documents are new information, and were not given any weight or consideration by the RO.

13. The Appellant provided a 46-minute video entitled "Driving Tour of Lakeshore Estates" dated January 10, 2003. The visual portion of the video is considered clarifying information and was considered by the RO. The video is Exhibit 12 in the record of the appeal conference.

Copies of all information received during the appeal conference were provided to the Appellant and the MVN.

Three Reasons for Appeal as Presented by Appellant:

Appellant's Reason 1: The jurisdictional determination, including the Corps' finding of adjacency of wetlands to waters of the United States, involves an incorrect application of law, regulation or policy.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record contains sufficient evidence that the MVN reasonably applied current Corps policy, regulations, and law to the facts at hand in the JD.

In its RFA, on page 3, Appellant asserts:

Corps regulations overbroadly define "adjacent" as "bordering, continuous or neighboring...[w]etlands separated from other waters of the United States by man-made dikes, natural river berms, beach dunes and the like are adjacent wetlands. However, the court in Solid Waste Agency Of North Cook County ("SWANNC")v. United States Army Corps of Engineers, 121 S.Ct 675 (2001), defined these types of adjacent waters more narrowly than the Corps regulations. The court in interpreting its prior Riverside Bayview Homes decision, stated that the adjacent to open water requirements of wetlands jurisdiction under the Clean Water Act, includes ". . . wetlands that actually abutted a navigable waterway" (emphasis added). Id. At 680. Thus, to the extent that the Corps of Engineers jurisdictional determination in this case regulates wetlands, we submit the New Orleans district has at least incorrectly applied law if not regulation as well.

Subsequent to the SWANNC decision, the Corps maintains CWA jurisdiction over traditional navigable waters; interstate waters; tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems; and, over all wetlands adjacent to any and all of those waters. In SWANCC, the Supreme Court confined its ruling to assertion of CWA jurisdiction based on the "Migratory Bird Rule." SWANCC did not change the Corps definition of "adjacent."

The administrative record contains sufficient information that the MVN reasonably applied the law, regulations, and policy including 33 C.F.R. 328.3(c) regarding "adjacency." This reason for appeal does not have merit.

Appellant's Reason 1A: Notwithstanding the Corps' determination, the alleged wetlands at Phase II of Lakeshore Estates are isolated and are not adjacent to navigable waters.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The administrative record contains sufficient evidence that the property contains wetlands and is adjacent to Lake Pontchartrain and East Diversion Canal, navigable waters of the United States. The MVN correctly asserted jurisdiction based on regulations found in 33 C.F.R. 328.3(a)(1) and (7).

There is sufficient documentation in the administrative record that the property contains wetlands. The consultant's delineation report provided two alternate conclusions regarding the extent of wetlands present within the leveed portions of the property. One conclusion was that the entire area is non-jurisdictional. The alternative conclusion was that only 172.5 acres (or 10.6 percent) of the property is jurisdictional. Subsequently, the MVN requested assistance with further evaluation of the site through the WRAP. The August 27, 2002 WRAP report documented that wetlands are located within the interior of the property, and suggested that the extent of wetlands is more than was indicated in the Appellant's consultant's report.

In support of its findings that the wetlands are adjacent to Lake Pontchartrain, the MVN provided infrared photographs in the administrative record that showed that the property is located next to Lake Pontchartrain and East Diversion Canal. These

wetlands are separated from Lake Pontchartrain and East Diversion Canal by a man-made levee.

Two factors are considered when determining adjacency: actual proximity of the wetlands to the waterway, and hydrologic connections between the wetland and waterway. 33 C.F.R. 328.3(a)(7)(c) states:

The term "adjacent" means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are "adjacent wetlands".

The levee separating the wetlands from Lake Pontchartrain and East Diversion Canal is a man-made barrier or obstruction, which separates portions of a once intact coastal wetland and/or waterway. Therefore the wetlands are adjacent to Lake Pontchartrain and East Diversion Canal.

The Appellant asserts that the MVN did not follow the guidance detailed in the Environmental Protection Agency and Corps of Engineers policy memorandum dated January 19, 2001 concerning "other waters" as defined in 33 C.F.R. 328.3(a)(3).¹ However, the MVN basis for jurisdiction was based on 33 C.F.R. 328.3(a)(1) and (7); not 33 C.F.R. 328.3(a)(3). Therefore, the portion of the Corps 2001 policy memorandum is not applicable to the case at hand.

The Appellant also asserts that the current MVN JD is inconsistent with prior evaluations. The Appellant referred to four documents that contain statements that the wetlands or wetlands on surrounding properties are isolated.² Appellant

¹ 33 C.F.R. 328.3(a)(3) is intended to cover waters that are not covered by the other subsections of 33 C.F.R. 328.3(a). The attachment to the January 19, 2001 policy memorandum, paragraph 5 (c), directed districts to analyze on a case-by-case basis those situations involving the 33 C.F.R. 328.3(a)(3) waters.

² The four documents are: 1) an attachment to the permit application subheading Wetland Quality that referenced a Environmental Impact Study for the I-10 Eden Isles Interchange; 2) a February 13-14, 2002 report by Mr. Touchet; 3) a letter dated March 17, 1998, from KLL; and 4) a copy of the decision in Save Our Wetlands, Inc. v. Col. William Conner.

asserts that the use of the word "isolated" in these documents shows the inconsistency.

SWANCC and other court rulings have created a lexicon of terms with specific meanings relating to Corps jurisdictional issues. "SWANCC wetlands," "other waters of the United States," "adjacent", and "isolated" are examples. However, although it is a term of art used in describing CWA jurisdiction, the word "isolated" has other meanings. At the appeals conference, the MVN clarified that its use of the word "isolated" in certain documents was not intended as a determination of CWA jurisdiction. For example, in some instances, the word "isolated" referred to how a particular drainage was separated ("isolated") from surrounding watersheds. This is a reasonable explanation, and does not support the Appellant's claim that the MVN inconsistently applied law, regulation, or policy. This reason for appeal does not have merit.

Appellant's Reason 1B: Notwithstanding the Corps' determination, (i) the mere presence of navigable waters or alleged tributaries or (ii) drainage of alleged wetlands through a so-called tributary system that may include man-made conveyances such as drainage ditches, are not a sufficient interstate commerce nexus to regulate these otherwise isolated wetlands.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Regarding reason 1B(i), the Appellant asserts that the use of the word "presence" on the standardized form for "Basis for Jurisdictional Determination" is an attempt to change the regulatory criteria for establishing CWA jurisdiction. The allegation is that the use of the word "presence" changes the jurisdictional criteria from "adjacent" wetlands. He also asserts that this new test is not justified in case law or 33 C.F.R. 328-329.

Reading the form in context, each place the word "presence" is used, it clearly means "existence." For example, the sentence "The presence of wetlands determined by the occurrence of hydrophytic vegetation, hydric soils and wetlands hydrology." clearly means that wetlands have been determined to exist based on these characteristics. Under 33 C.F.R. 328.4, the MVN is

required to determine the presence or absence of "waters of the United States" in order to determine the limits of jurisdiction.

In the administrative record, it is clear that the test used by the MVN to determine jurisdiction was the adjacency of wetlands not the mere presence of wetlands. Appellant's consultant's delineation report included a map outlining property boundaries with a white line. The outlined property included portions of Lake Pontchartrain, East Diversion Canal, and the leveed portion of the property. It is a matter of public knowledge that Lake Pontchartrain and portions of East Diversion Canal are navigable waters of the United States.

The MVN JD identified wetlands within the leveed portion of the Appellant's property. The MVN referred to the definition found in 33 C.F.R. 328.3(a)(7) that the subject wetlands were "Wetlands adjacent to waters (other than waters that are themselves wetlands)...." The MVN JD did not specifically delineate the geographic extent of wetlands or other waters of the United States within the leveed portion of the property. But, the MVN followed regulatory criteria by providing documentation that waters of the United States exist on the property and those areas correspond to jurisdictional definitions in Corps regulations. This reason for appeal does not have merit.

Appellant's Reason 1C: Notwithstanding the Corp's determination, the presence of certain man-made conveyances, like impounded drainage ditches and drainage canals at Lakeshore Estates, do not legally constitute a tributary subject to regulation under the Clean Water Act, as a water of the United States.

FINDING: This reason for appeal has partial merit.

ACTION: As detailed below, the MVN JD is remanded for reconsideration of this reason alone. Additional documentation is needed to support the original MVN finding that the canals and drainage ditches located within the property are tributaries that eventually drain or flow into navigable or interstate waters.

DISCUSSION: The documentation regarding the tributary connection (from the internal drainage ditches/canals to the navigable waters of the United States) is inadequate. Appellant alleges that drainage ditches located within the property are

non-navigable and impounded from Lake Pontchartrain by a forced drainage and dike system. He asserts that, other than when man-made drainage systems and pump are activated, there is no direct surface connection between the man-made ditches and Lake Pontchartrain on a routine basis. Other than the JD Basis Jurisdictional Determination form, there is no mention in the administrative record of tributaries, and how they are jurisdictional.

Although the WRAP report describes the property as having, "A system of ditches and a pumping station help to evacuate rainfall that accumulates in the closed basin.", the map attached to the JD does not show the internal canals and drainage ditches as "waters of the United States." A September 16, 2002 Memorandum For Information states: ". . . there are several drainage canals leading to a pump discharging into Lake Pontchartrain cross the site. . . ." But there is no further documentation of this statement in the administrative record. The only information supporting a tributary determination was the MVN comments received in the appeal conference:

. . . We have jurisdiction over the drainage system in there as waters of the United States. The canals were dug through wetlands, and they remain - - they were waters of the United States prior to any portion of the property being impacted by the pumping station. They were waters of the United States when they were dug, or they were dug through wetlands which were waters of the United States." *(pages 34 and 35 of verbatim record)*

Additional documentation is needed to document the MVN position that the drainage ditches and canals are jurisdictional. This reason for appeal has partial merit.

Appellant's Reason 2: Notwithstanding the Corps' determination, the Corps further did not and cannot legally make an alleged ordinary high water determination on Phase II of the Lakeshore Estates property.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant asserts that the MVN could not legally make an ordinary high water mark determination on the

property because there are no navigable waters within the leveed portion of the property.

An ordinary high water mark determination is made in more than one situation. It is used when determining the lateral extent of jurisdiction for tidal and non-tidal waters of the United States.

Lake Pontchartrain and East Diversion Canal are subject to tidal influence; however, the property within the levees is described as a closed system. There was no documentation showing that areas within the leveed property contain waters that are directly influenced by tides with "predictable rise and fall."³

The property is adjacent to Lake Pontchartrain and East Diversion Canal, and when adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands (33 C.F.R. 328.4(c)(2)). This reason for appeal does not have merit.

Appellant's Reason 3: As confirmed in a meeting with the Corps in New Orleans, the jurisdictional determination omits a further material fact that it does not consider that the Lakeshore Estates site has been lawfully leveed, pumped, ditched, and under local forced drainage system, since the 1920's as a constitution matter of State's rights.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Appellant asserts that the MVN failed to consider that the property is presently in "forced drainage." The appellant contends that the MVN did not consider "forced drainage" as the "normal circumstances" of the property. There is sufficient documentation that the JD did consider the present and recent use of the area in determining its "normal circumstances." The MVN JD determination, in the WRAP report,

³ 33 C.F.R. 328.3 (f) The term "tidal waters" measure those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

characterized the "normal circumstances" as a closed system that is leveed and pumped.

The intent under Section 404 of the CWA is to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. Regulatory Guidance Letter 86-09 states, "'Normal circumstances' are determined on the basis of an area's characteristic and use, at present and in the recent past."

The MVN stated that the historical normal circumstance of the property without the effect of forced drainage would be a tidal marsh or part of Lake Pontchartrain, both supported by a surface water system. The current "normal" circumstance is described in the WRAP report as a closed system that has been subject to extensive hydrologic alteration and with limited hydrologic inputs.

The WRAP report noted that the 1987 Corps of Engineer Wetlands Delineation Manual (Corps Manual) provides added flexibility for sites that are disturbed by man's activities, such as hydrologic alteration and agriculture management. Paragraph 38 in the Corps Manual also states, "the mere presence of drainage structures in an area is not sufficient basis for concluding that a hydric soil has been drained; such areas may continue to have wetland hydrology."

This reason for appeal does not have merit.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reasons 1, 1A, 1B, 2, and 3 do not have merit. Appellant's Reason 1C has partial merit, and the appeal is remanded on that reason alone. The final Corps decision will be the District Engineer's decision made pursuant to my remand of Reason 1C of the appeal action.

Encl
(Conference Transcript)

/s/ signed
Don T. Riley
Brigadier General, U.S. Army
Division Engineer