

ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SPANISH LAKE RESTORATION LLC
FILE NO. MVN-2014-02134
NEW ORLEANS DISTRICT

Review Officer (RO): Mr. Thomas A. McCabe, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Appellant: Mr. Scott Nesbit of Natural Resource Professionals, LLC, on behalf of Spanish Lake Restoration LLC

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: March 9, 2015

Site Visit/Appeal Meeting: April 28, 2015

Summary: The Appellant is appealing an approved jurisdictional determination (AJD) completed by the New Orleans District (District). The AJD¹ concluded that the U.S. Army Corps of Engineers (Corps) has jurisdiction under Section 404 of the Clean Water Act (CWA) and does not have jurisdiction under Section 10 of the Rivers and Harbors Act (RHA). The Appellant claims, however, that the District should have Section 10 RHA authority over the site due to the fact that they consider Bayou Braud to be navigable water of the United States. Also, the Appellant objects to the District's determination that the existing oil/gas roads through the site are considered non-wetlands, and outside of Corps jurisdiction.

For reasons detailed in this document, the District's decision is not supported by the Administrative Record (AR). As a result, the Appellant's reasons for appeal are found to have merit. The AJD is remanded to the District for reconsideration.

Background Information: The 288.3-acre site is located in Section 7, T9S-R2E, and Section 12, T9S-R1E, Iberville Parish, Louisiana. The site is part of the Spanish Lake Restoration (SLR) wetland mitigation bank complex, which consists mainly of bottomland hardwood forests and Cypress/Tupelo Gum swamps. A portion of the St. Gabriel Oil and Gas field is located within SLR property and oil and gas operators are very active in this field.

¹ AR, pages 7-13.

The consultant for Spanish Lake Restoration LLC, Natural Resource Professionals, LLC (NRP), requested a Preliminary Jurisdictional Determination of the site by letter dated August 5, 2014. Along with the request letter, NRP provided a wetland data report², which included completed Atlantic and Gulf Coastal Plain Region data sheets, wetland maps, aerial photos, and photographs depicting current conditions from the site.

In September 2014, the District and NRP personnel conducted a site visit to observe field conditions at the site. As a result of this site visit, NRP agreed to provide the District with a hydrologic report for Bayou Braud along with surveyed cross sections of the access roads through the site. On October 30, 2014, the District conducted a field site visit investigation. On November 12, 2014, NRP provided the District with the surveyed road cross sections³ and informed the District that the hydrologic report was not obtainable.

An AJD, asserting jurisdiction for the wetlands and other waters of the U.S. under Section 404 of the CWA and not asserting jurisdiction under Section 10 of RHA, was provided to NRP by letter dated January 9, 2015.

On March 9, 2015, NRP submitted a completed Request for Appeal (RFA) to the MVD office. NRP, the Appellant, was informed, by letter dated March 23, 2015, that the RFA was acceptable as it met the criteria for appeal found in 33 CFR Part 331.5.

Information Received and Its Disposition During the Appeal

Review:

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 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 AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining

² AR, pages 20-57.

³ AR, pages 67-72.

whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. The District provided a copy of the AR by e-mail to the RO on April 2, 2015, and to the Appellant via an ftp website after a failed attempt to provide by e-mail. The AR is limited to information contained in the record on or before January 9, 2015, which is the date the District's AJD was provided.

2. As provided for in the Corps' Appeal Program regulations⁴, the RO held a site visit and informal appeal meeting on April 28, 2015. The appeal meeting topics were summarized and documented by the RO in a Memorandum For Record (MFR) that was provided to the Appellant and the District on April 30, 2015. Comments to the MFR, which were received from the District on May 1, 2015 and from the Appellant on May 4 and 7, 2015, were used to update the final MFR. Using the RFA and the clarifying discussions at the appeal meeting, the Appellant's reasons for appeal are summarized as follows:

Appeal Reason 1: The District incorrectly determined Bayou Braud to be a non-navigable water of the United States, therefore placing the site outside of RHA authority.

Appeal Reason 2: The District incorrectly determined that the existing oil/gas roads through the property were non-wetlands, and outside of Corps jurisdiction.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE NEW ORLEANS DISTRICT ENGINEER

Appeal Reason 1: The District incorrectly determined Bayou Braud to be a non-navigable water of the United States, therefore placing the site outside of RHA authority.

Finding: This reason for appeal has merit.

Action: The District should document for the record on the AJD form its conclusion that there are no navigable waters of the U.S. under Section 10 of the RHA within the property limits and

⁴ 33 CFR 331.7(c).

that an attenuation of flows prevents Section 10 jurisdiction from extending upstream to the site.

Discussion: The Appellant claimed in the RFA that Bayou Braud is navigable in fact, susceptible to use in the transport of commerce, and has been used as such in the past as well as in the present. The Appellant stated that Bayou Braud is used by fisherman, hunters, eco-tourists, and birdwatchers in this migratory bird habitat. To support their belief that Bayou Braud is navigable, the Appellant made reference to other District permit decisions and determinations made for Bayou Braud, and nearby waters of the United States. In addition, the Appellant also referenced a 1976 list of navigable waters located on the District's website that they thought stated that Bayou Manchac, Alligator Bayou (which Bayou Braud flows into) and "Tributaries of Bayou Manchac" were all recognized as tidally connected "navigable waters of the U.S."

Section 10 of the RHA gives the Corps the authority to regulate work in or affecting navigable waters of the United States. Navigable waters of the United States are defined in 33 CFR § 329.4 as "...those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."

During the appeals meeting, the District stated that its office had reviewed the property limits for both Section 10 and 404 jurisdictions and concluded on the AJD form that there are no navigable waters of the U.S. within RHA jurisdiction in the review area.⁵ The District's conclusion was based on the fact that it had reviewed the District's list of navigable waters⁶, which includes the waters designated in 1976. However, there is no citation on the AJD form or within the AR (other than from the Appellant) of the review of the District's list of navigable waters.

It is understood that it is common practice for Corps Districts to review their existing lists of navigable waters, and simply choose either "Are" or "Are no" in Section II.A. of the AJD form. In this case, however, the Appellant has sought to have jurisdiction asserted on the property due to the dual use of the

⁵ AR, page 7.

⁶ List of Navigable Waters of the United States within the New Orleans District; located on District's website.

property as a mitigation bank and for oil/gas production. Therefore, the District should cite on the AJD form in the "Additional Comments to Support JD" section that they reviewed the District's list of navigable waters. In addition, the District should also cite any other District navigability determinations and related permit actions within the vicinity. These citations are necessary to support the District's conclusion.

During the appeals meeting, the RO confirmed with the District and the Appellant that the review area did not include Bayou Braud. The District stated that Bayou Braud was not included on the District's list of navigable waters under Section 10 of the RHA. The District explained that the wording in a 2008 District permit letter⁷, referenced in the RFA by the Appellant, was confusing since it referred to three separate waters, only one of which (not Bayou Braud) was navigable. Discrepancies in the other permit actions that the Appellant had referenced as evidence for their claim of Section 10 authority for Bayou Braud were all refuted by the District.

In the RFA and at the appeals meeting, the Appellant referenced a February 2014 District decision that, based on 17 years of gauge data, the Ordinary High Water Mark (OHWM) for Bayou Manchac and Frog Bayou was around 9.5' and thus this OHWM elevation should be used at their site to assert RHA authority. The District stated that due to the fact that the subject site is located approximately 3 miles away from the nearest downstream gauge, an attenuation of flow prevents Section 10 jurisdiction, based on the OHWM of Bayou Manchac, from extending upstream all the way to the site. The District also stated that the OHWM of a stream could fall under Section 10 and/or Section 404. Specifically for this site, the District clarified that there could be an OHWM associated with Section 404 jurisdiction. Understanding that the Appellant sought to have jurisdiction asserted on the property, the District should have provided this information to the Appellant in their AJD letter dated January 9, 2015. The District should therefore update the AR to reflect this information, either on the AJD form or in a Memo to the File.

The Appellant acknowledged during the appeals meeting that the District had provided other Jurisdictional Determinations for the mitigation bank complex and that the District had never

⁷ MVN-2008-1808, MVN-2008-1811 and MVN-2008-1812.

asserted any Section 10 authority for Bayou Braud in any of those determinations.

Appeal Reason 2: The District incorrectly determined that the existing oil/gas roads through the property were non-wetlands, and outside of Corps jurisdiction.

Finding: This reason for appeal has merit.

Action: The District shall further analyze and document for the record its assessment of the site. The administrative record should be documented accordingly to reflect this analysis, and a revised AJD should be provided to the Appellant.

Discussion: The Appellant claimed in the RFA that no recognition was given to the fact that regular and ordinary inundations from Bayou Braud often completely cover the oil/gas roads of the site. The Appellant also stated that the District had made no mention in the AJD of the surveyed road elevation data provided to the District. The Appellant also claimed that during the site visit the District deemed the oil/gas roads to be "grandfathered" and otherwise exempt from regulation, although the AJD made no mention of this categorization.

During the appeals meeting, the Appellant stated that no access roads were needed to manage the site for mitigation bank purposes. The Appellant stated that the oil and gas roads within the basin were constructed in the 1950-1960s. According to the Appellant, the oil and gas field industry is active again in this basin and rock was being added to the old roads for access by trucks. The Appellant explained that by raising the road elevations, the roads effectively become levees that impact the aquatic environment by restricting the hydrology and flow of waters across/within the site.

According to the AR, the District evaluated the subject site using:

- A U.S. Geological Survey Atlas and map
- Aerial photography spanning multiple the years 1998-2012
- U.S. Department of Agriculture, Natural Resources Conservation Service web soils data
- Light Detection and Ranging (LIDAR) imagery
- The consultant-provided wetland delineation report, which included Atlantic and Gulf Coastal Plain Region data sheets, wetland maps, and photos from the site.

On October 30, 2014, the District also conducted an on-site evaluation.

After a field site visit in September 2014 with District personnel, NRP agreed to provide a hydrologic report for Bayou Braud along with surveyed cross sections of the oil/gas access roads. NRP provided the surveyed cross sections of the access roads by email to the District on November 12, 2014, but did not provide the requested hydrologic report. There is no mention in the AR that the District reviewed the provided survey data. During the appeals meeting, however, the District explained that the data had been reviewed but that the hydrologic report was needed to correlate with the surveyed road cross sections. The District should update the AR to document its review of the survey data to include its basis of the data's insufficiency.

During the appeals meeting, the District stated that the oil and gas roads construction was "grandfathered" and authorized by the Nationwide permits of 1977. The District stated that the oil and gas roads were determined to be non-wetlands and that normal maintenance was allowed as long as the footprint was not expanded outward into the adjacent wetlands. The District should update the AR to document its analysis and conclusion for the non-wetland determination of the oil/gas roads.

During the appeals meeting, the RO clarified with the District the legend and symbols used in its AJD maps on pages 5-6 of the AR. The District utilized and altered the consultant-provided maps from the wetland data report to make the District's AJD maps. The RO pointed out to the District that the AJD maps were confusing. The District's AJD maps should be labeled and marked to better distinguish between jurisdictional and non-jurisdictional areas and, if possible, use symbols instead of colors.

Corps districts are required to ensure that the information in the AR adequately supports any jurisdictional determination. To the maximum extent practicable, the AR shall explain the rationale for the determination and disclose the data and information relied upon. If applicable, the AR should also explain what data or information received greater or lesser weight and what professional judgment or assumptions were used in reaching the determination. All pertinent documentation and analyses for a given jurisdictional determination shall be

adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA and RHA jurisdiction. Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.

After a review of the AR, the RO determined that the AR and AJD are insufficient and should be updated to include the previously mentioned information in this document as well as the items that follow. The District should clarify if the National Wetlands Inventory Map⁸ in the AR was reviewed, since the Supporting Data Section of the AJD form did not reflect this. The AR and AJD should be updated to state why and where the District disagreed with the consultant's wetland data report and data sheets. The District referenced the data sheets in the AJD form as supporting data, but neither indicated whether or not it concurred with the consultant-provided data sheets nor provided any additional data sheets of its own.

Conclusion: For the reasons stated above, I have determined the reasons for appeal have merit. The AJD is remanded to the District for reconsideration and reevaluation. This concludes the Administrative Appeal Process. The District shall, upon completion of the reevaluation, provide its final decision to the Division Engineer and Appellant.

8 JUN '15

Date



Michael C. Wehr
Major General, U.S. Army
Division Commander

⁸ AR, Page 66.