

**ADMINISTRATIVE APPEAL DECISION**  
**CLEAN WATER ACT (CWA)**  
Ed Dallas Property  
**Fort Walton Beach, Florida**  
Jacksonville District Approved Jurisdictional Determination  
File Number SAJ-2008-1752

April 11, 2009

**Review Officer:** John Davidson, U.S. Army Corps of Engineers (Corps), Southwestern Division, Dallas, Texas

**Appellant Representatives:** Ed Dallas - Appellant  
Doug Dallas, Bio Resources, LLC – environmental consultant  
Todd Wilkinson, Environmental Services, Inc. – environmental consultant

**District Representatives:** Mary Hartshorn - Regulatory Project Manager  
Clif Payne – Section Chief, Pensacola Regulatory Office  
Holly Millsap – Regulatory Project Manager

**Authority:** Clean Water Act (33 USC 1344)

**Receipt of Request for Appeal:** 5 November 2008

**Appeal Meeting and Site Visit Date:** 21 January 2009

**Summary of Decision:** This request for appeal of the approved jurisdictional determination is without merit. The conclusion that the wetland is adjacent to a Traditional Navigable Water, Choctawhatchee Bay, is supported by substantial evidence in the administrative record. The jurisdictional determination is in accordance with applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy.

**Background Information:** The Ed Dallas property is a 0.569-acre lot located at 44 Bay Drive in Fort Walton Beach, Okaloosa County, Florida. The property is also known as Lot 8, Block 8, Resub. of Block 8, Elliott's Point, Section 18, Township 2 South, Range 23 West. The property is located 36 feet from Choctawhatchee Bay at its closest corner with the center of the lot being, Latitude 30°24'24" N, Longitude 86°35'17" W. The topography of the site is generally flat and slopes gently to the south, toward Choctawhatchee Bay. The southern portion of the lot is developed with a single family

residence and the northern portion is undeveloped with a depressional herbaceous wetland being present. The lot is in a developed subdivision. Immediately north and east of the project site are paved roads. Immediately southwest of the project site are single family residences.

The applicant proposed to construct a second single family residence on the lot that would impact the wetland and submitted a Department of the Army permit that the Jacksonville District received on 6 May 2008. The District requested additional information on 20 August 2008 to make the permit application complete. After receiving the request, Bio Resources, LLC, Mr. Ed Dallas' consultant, submitted a letter to the Corps stating that the Corps had indicated they will assert jurisdiction over the wetland on the lot and requested a copy of the Jurisdictional Determination form that supports the jurisdictional call. On 2 October 2008, the Jacksonville District issued an approved jurisdictional determination stating that the lot contains waters of the United States subject to regulation by the Corps. Bio Resources, LLC, by request for appeal dated 31 October 2008 that the South Atlantic Division received on 5 December 2008 and on behalf of Mr. Ed Dallas, appealed the approved jurisdictional determination, citing the reasons for appeal that follow:

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

**REASON FOR APPEAL 1:** We do not believe the wetland to be "adjacent" according to 33 CFR 328.3(8)(c) which defines adjacent as: "bordering, contiguous, or neighboring. 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'." The wetland is inarguably not bordering or contiguous with the TNW (Traditional Navigable Water). The question resides in the definition of "neighboring." The wetland is not separated "by man-made dikes or barriers, natural river berms, beach dunes and the like" rather it is separated by a broad gently sloping area of upland cultivated grass and a very narrow strip of unvegetated sand. As stated in the Evaluation, our observations show no evidence of any surface hydrologic connection to the TNW (Choctawhatchee Bay).

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

**ACTION:** No action is required.

**DISCUSSION:** The Corps' regulations define "waters of the United States" in 33 CFR 328.3(a), one of which (33 CFR 328.3(a)(7)) is "wetlands adjacent to waters identified in paragraphs (a)(1)-(6) of this section." The first definition of waters of the United States (33 CFR 328.3(a)(1)) is "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Choctawhatchee Bay, the nearest water to the subject wetland, meets the definition in 33 CFR 328.3(a)(1), and therefore is a water of the United States. The Corps' regulations (33 CFR 329.4) define navigable waters 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”. Choctawhatchee Bay also meets this definition and is also a navigable water of the United States. The Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (6 June 2007, revised 2 December 2008) (“2 December 2008 Memorandum”) defines TNW as “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” It states the agencies (EPA and Corps) will continue to assert jurisdiction over traditional navigable waters. Therefore, Choctawhatchee Bay is jurisdictional as a TNW.

The 2 December 2008 Memorandum also states that the agencies (EPA and Corps) will continue to assert jurisdiction over wetlands that are adjacent to traditional navigable waters, and that finding a continuous surface connection is not required to establish adjacency under this definition. The 2 December 2008 Memorandum further provides

The regulations define "adjacent" as follows: "The term adjacent means bordering, contiguous, or neighboring. 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. Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters . This hydrologic connection may be intermittent . Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters . Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements . Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

Regarding the first criterion, the subject wetland does not border and is not contiguous with Choctawhatchee Bay; there is no surface or shallow sub-surface hydrologic connection to jurisdictional waters documented as such in the administrative record. However, the Soil Survey of Okaloosa County, Florida maps the soils in the project area as Resota sand 0 to 5% slopes. Also, the area between the wetland and Choctawhatchee

Bay is mapped as Leon sand. Both the Resota sand and the Leon sand have a soil texture of sand to 80 inches below the soil surface. The permeability of the Resota sand is very rapid and the permeability of the Leon sand is rapid in the surface layer and subsurface layer and moderate or moderately rapid in the subsoil. Additionally, Bio Resources, LLC's wetland and stream evaluation dated 19 November 2007 states "water that enters the wetland leaves by evapotranspiration and subsurface percolation". Based on the proximity of the wetland to Choctawhatchee Bay and the permeability of the soil between the wetland and the bay, it is possible that water from the wetland can enter the bay through a shallow subsurface connection.

Regarding the second criterion, the phrase "and the like" indicates that "man-made dikes or barriers, natural river berms, [and] beach dunes" are merely examples of the types of physical structures or manmade barriers that may result in separation from jurisdictional waters, and are not exhaustive. It is not required that the structure separating the wetland match one of these specific examples for a neighboring wetland to be adjacent. In this case, the manmade barrier separating the wetland from Choctawhatchee Bay is a residential lawn. At the appeal conference, the Project Manager stated that a 1951 aerial photo shows that the wetland in question was connected (contiguous) with the bay. This photo was not part of the original jurisdictional determination being appealed.

Regarding the third criterion, wetlands are adjacent where their proximity to a jurisdictional water is reasonably close. Because there is a scientific basis for the inference that such wetlands have an ecological interconnection with jurisdictional waters, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In this case, the wetland is in close geographic proximity - 217 feet - to Choctawhatchee Bay, the nearest TNW. When Corps personnel completed the jurisdictional determination form, they stated that the rationale for determining the wetland to be adjacent was the wetland's location 217 feet from Choctawhatchee Bay, and that the wetland is adjacent by the definition of adjacency in accordance with 33 CFR328.(c). The identified close geographic proximity is sufficient for a finding of adjacency under the third criterion of the 2 December 2008 Memorandum.

**REASON FOR APPEAL 2:** We have previously stated that the city storm drains intercept runoff from nearby roads except in instances during which the drains are clogged and malfunctioning or during exceptionally high rainfall events. In fact the city storm system in this area drains directly to the bay with no treatment. Therefore, interception and/or treatment of storm water runoff by the project wetland should not be used as justification for determining "adjacency."

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

**ACTION:** No action is required.

**DISCUSSION:** The District, in the approved jurisdictional determination form under the rationale for calling the wetland adjacent to a TNW, stated "The wetlands are adjacent to

Choctawhatchee Bay by the definition of adjacencies in accordance with 33 CFR Part 328.3(8)(c).” The District also stated in that section that “In addition, stormwater enters the wetlands on site from adjacent roadways during rain events. Therefore, the wetlands are holding & treating stormwater that would otherwise drain untreated to the bay.”

Although they mentioned that the wetland holds and treats stormwater, the District did not call the wetland adjacent to a TNW based on this factor. In fact, when a wetland is determined to be adjacent to a TNW, a significant nexus determination is not required to be performed. In any event, while the jurisdictional determination does not meet the standard for determining a significant nexus, the Rapanos decision did not affect the scope of jurisdiction over wetlands that are adjacent to navigable waters because at least five justices of the Supreme Court agreed that such wetlands are “waters of the United States,” as stated in the 2 December 2008 Memorandum.

**REASON FOR APPEAL 3:** Previous assertions of jurisdiction over physically separated wetlands based on “adjacency” to TNWs (see Memorandums regarding SAS-2007-670-JP and TNW SAC-2007-657-1JT) rely on the proximity of project wetlands to an “interdunal wetland system” – essentially Wetland A (physically isolated) is adjacent to Wetland B that is adjacent to Wetland C which abuts TNW and all wetlands are jurisdictional. The Bay Drive project wetland is exceptionally small and not in any way associated with an “interdunal system” or a single beach or dune. The areas around the wetland are urbanized with no proximity to tidally influenced or abutting jurisdictional wetlands. In fact several nearby parcels include armored/riprapped approaches to the bay. The project site is not located in or near any other natural hydrologic network.

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

**ACTION:** No action is required.

**DISCUSSION:** Both the memorandums referenced by the appellant concern wetlands in undeveloped areas on barrier islands or barrier peninsulas along the Atlantic Ocean. The appellant’s wetland is not on a barrier island or peninsula and is located in a well developed existing single family housing subdivision. Most natural aspects of the area around the subject wetland in this appeal were removed years ago during the development of the City of Fort Walton Beach and now there is a residential lawn between the wetland and Choctawhatchee Bay. The land slopes from the wetland downward to the bay. Although the definition of adjacent gives examples of wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like, as noted above, a dike or berm or dune, man-made or natural, is not required for a neighboring wetland to be adjacent. The wetland on the appellant’s property is in close geographic proximity to Choctawhatchee Bay.

**Information Received and its Disposition During the Appeal Review:** The administrative appeal was evaluated based on the District’s administrative record, the Appellant’s Request for Appeal, and discussions at the appeal meeting. Information which was received during and after the appeal conference was considered to the extent it

clarified information in the existing administrative record. New information was not considered in the appeal.

**Conclusion:** As my final decision on the merits of the appeal, I conclude substantial evidence exists in the administrative record to support the jurisdictional determination, which is in accordance with applicable laws, regulations and policy guidance. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. However, the District may elect to supplement the administrative record with the 1951 aerial photo referenced by the Project Manager. This concludes the Administrative Appeal Process.



Joseph Schroedel  
Brigadier General, US Army  
Commanding