ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
BELLE COMPANY/KENT RECYCLING- FILE NO. MVN-2010-01357-SY
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION
BELLE COMPANY/KENT RECYCLING SERVICS, LLC.
JURISDICTIONAL DETERMINATION
FILE NO. MVN-2010-01357-SY
NEW ORLEANS DISTRICT
JULY 26, 2011

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant: Belle Company, Kent Recycling Services, LLC.

Agent: Mr. John King, Brazeale, Sachse & Wilson, L.L.P.

Authority: Section 404, Clean Water Act

Receipt of Request for Appeal: 7 March 2011

Approved Jurisdictional Determination Appeal Meeting and Site Visit: 11 May 2011

Summary of Appeal Decision: Belle Company and Kent Recycling Services, LLC. (Appellant) are appealing a New Orleans District (MVN) approved jurisdictional determination (JD) for property in Assumption Parish, Louisiana. Mr. John King is acting as agent. Appellant submitted five general reasons for appeal: (1) All three wetland characteristics are not present; (2) The Corps has no jurisdiction over "prior-converted cropland" (PC); (3) The Natural Resources Conservation Service (NRCS) change in designation from PC to "commenced-converted" has no effect; (4) The Corps "change of use" policy regarding PC is not effective; and (5) MVN misapplied the Rapanos guidance. Portions of the first and fifth reasons for appeal have merit.

Background Information: The property in question (Belle site) is an approximately 240-acre tract located east of Louisiana Highway 70, about five miles south of Donaldsonville, in Sections 42 and 43, T12S-R15E, Assumption Parish, Louisiana.

MVN issued a JD letter for the Belle site on January 13, 2011 (Administrative Record (AR), p. 3-4). The JD map (AR, p. 5) shows most of the site to be classified as wetlands subject to Clean Water Act jurisdiction.

The Appellant submitted a completed Request for Appeal (RFA) form, dated and received March 4, 2011, to MVD appealing the MVN

jurisdictional determination. By letter dated March 7, 2011, Appellant was informed that the RFA was acceptable. The Appellant submitted a supplemental RFA on May 9, 2011.

Information Received and its Disposal During the Appeal:

33 C.F.R. § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this jurisdictional determination. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding jurisdictional determinations, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. 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 administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVN provided a copy of the Administrative Record (AR) to the Review Officer (RO) and to the Appellant. The RO received his copy on April 1, 2011. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is January 13, 2011.

2. An appeal meeting and site visit was held on May 11, 2011.

3. A teleconference to review the supplemental RFA was held on June 2, 2011.

4. The RO prepared a draft Memorandum for Record (MFR) summarizing the meeting, site visit, and teleconference review of the supplemental RFA. Copies were supplied to the Appellant

and MVN on June 3, 2011 for review and comment. Responses were received via email on June 7, 2011. The comments received are in the final MFR dated June 8, 2011 (Appendix A).

Appellant's Reasons for Appeal

1. All Three Required Wetland Characteristics Are Not Present

1.1. All three wetland criteria are not present.

FINDING: This reason for appeal does not have merit.

DISCUSSION: In the RFA, the Appellant cites ¶26(c) of the 1987 Manual,[1] quoting that "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." However, that quote from the 1987 Manual is preceded by "[e]xcept in certain situations defined in this manual." The "Atypical Situations"[2] section of the 1987 Manual and the "Difficult Wetland Situations in the Atlantic and Gulf Coastal Plain" section of the regional supplement[3] to the 1987 Manual contain examples of situations where one or more wetland indicators may be missing and provide methods for wetland delineation in those situations. In particular, the regional manual states that "wetlands used for agriculture or silviculture often lack a natural plant community." Clearly, the 1987 Manual and the regional supplement recognize that all three wetland indicators are not always present in jurisdictional wetlands.

In this section of the RFA, the Appellant also states that the Corps had previously acknowledged that the Belle site is not wetlands, citing a July 16, 1984, letter from MVN. The Appellant states that the current JD by MVN fails to address that the Corps had previously determined that the property was non-wetlands in 1984. The 1984 letter has no status. Per Regulatory Guidance Letter 05-02 (RGL-05-02),[4] "all approved

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[1] Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.
[2] Ibid. p. 73-83.
[3] U.S. Army Corps of Engineers. 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), ed. J.S. Wakeley, Jr., R.W. Lichvar, and C.V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center. p. 112-143.
[4] U.S. Army Corps of Engineers. Regulatory Guidance Letter 05-02 - Expiration of Geographic Jurisdictional Determinations of Waters of the United States. June 14, 2005.

geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years", therefore the determination in the 1984 letter has expired.

ACTION: No action is required.

1.2. The Corps improperly used a reference site to make its determination.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The Appellant asserts that MVN should not have used a reference site, because such use is contrary to procedures in ¶71 of the Manual, quoting that they are only available "due to the effects of recent human disturbance or natural events." The Appellant then argues that the Belle site has been in agricultural use for 35 or more years, so these activities on the property are not recent. The Appellant makes other similar arguments and concludes that the use of ¶71 of the Manual by MVN is erroneous.

Regardless of the question of proper use of ¶71 of the Manual, it is the regional supplement, not the Manual, that provides the proper procedure in this case. The regional supplement recommends the use of a reference site to identify any wetland indicators missing on any site in question.[5] MVN noted on the data form for sample sites #2 and #3 (AR, p. 191-196) that the Belle site has problematic hydrophytic vegetation, which is defined in the regional supplement.[6] Accordingly, MVN sampled a reference site to verify the occurrence of hydrophytic vegetation.

The Appellant asserts that the off-site reference point chosen by the Corps is not representative of the subject property, since it is located in an adjacent area outside the berm and not under the influence of the pump. When asked during the supplemental RFA teleconference, MVN stated that the area which includes the reference site had been subject to drainage by a pump two years prior, and that the vegetation reflected those earlier conditions, particularly the woody vegetation. Information about the previous location of the pump is in the record (AR, p. 51), and that location is shown in aerial photographs (AR, p. 53, 53-A). The reference site data form (AR, p. 188-190) shows hydrophytic vegetation in the shrub

[5] Ibid. p. 114.
[6] Ibid. p. 116.

stratum (woody plants 3-20 feet in height). Based on the record, the site chosen appears to be the most reasonable choice available to MVN, given the constraints of the location of the pump. The MVN assessment that the Belle site has hydrophytic vegetation appears valid.

ACTION: No action is required.

1.3. Pumping and farming the property create a normal hydrologic condition that the ground is not saturated.

FINDING: This reason for appeal has merit.

DISCUSSION: MVN conducted a field site visit on October 8, 2010. MVN included the following statement in the data form for sample site #2: "Soils between 4-20 inches were not saturated, but were plastic. Given the amount of moisture in the soil, it is fully anticipated that during periods of normal precipitation saturation in the upper 12 inches will be present." A similar statement was made for sample site #3, but the depth given was "6-24 inches." During the supplemental RFA teleconference, the Appellant's wetland delineation consultant suggested that the August precipitation of 9.94 inches (AR, p. 184) could account for the plasticity in the soil noted by MVN.

There is no reference to soil plasticity as related to soil saturation in the Manual, the regional supplement, or the manual of hydric soil indicators[7]. Under the provisions of the appeal regulations at 33 CFR §331.3(b)(2), the RO contacted Mr. Chris Noble, Corps lead soil scientist for development of the regional wetland delineation manuals, to help resolve the issue of whether soil plasticity can be an indicator of wetland hydrology. Mr. Noble stated that "there is no direct correlation between plasticity and potential saturation" and further stated that he is "very skeptical of the entire plasticity approach for wetland hydrology or hydric soils."[8]

MVN noted on both sample forms that "No precipitation was recorded at the two nearest climate stations for a period of 10 days prior to the site visit. Precipitation totals for September 2010 were 75% below average." MVN should have said that totals were 75% of normal, not below normal. Climate data

[7] United States Department of Agriculture, Natural Resources Conservation Service. 2010. *Field Indicators of Hydric Soils in the United States*, Version 7.0. L.M. Vasilas, G.W. Hurt, and C.V. Noble (eds.). USDA, NRCS, in cooperation with the National Technical Committee for Hydric Soils

[8] Chris V. Noble. U.S. Army Corps of Engineers Engineering Research and Development Center, Vicksburg, MS. Personal communication.

sheets (AR, p. 183) supplied by MVN from the National Oceanic and Atmospheric Administrative (NOAA) show that actual September 2010 precipitation (4.15 inches) was 75.6% of normal (5.49 inches). When contacted by the RO, MVN admitted that the notation on the JD form was misstated.

The Appellant disputes the assertion by MVN that antecedent precipitation was below normal. The Appellant states: "The rainfall in August and September, 2010, totaled 14.09 inches with 3.01 inches falling on September 26-27, 2010, just ten days prior to the site visit. AR, pp. 182-184. This rainfall total is 2.92 inches above normal for these two months." The NOAA data in the AR supports this statement. Rainfall in August and September 2010 was 14.09 inches. Normal precipitation for that time period is 11.17 inches (AR, p. 183-184), a difference of 2.98 inches.[9]

The AR also supports the statement made by MVN. September 26th and 27th are actually the 11th and 12th days prior to October 10th, the day of the site visit, so the MVN statement that there was no precipitation at the site for the 10 days prior to the site visit is correct.

However, neither MVN nor the Appellant are using the Corps recommended methodology to assess antecedent precipitation prior to the site visit. In order to determine hydrology in agricultural areas, the regional supplement recommends[10] using NRCS hydrology tools[11] which, among other things, requires an analysis of the three month period prior to the site visit to assess antecedent precipitation.

ACTION: MVN shall reexamine the hydrology of the Belle site, and if antecedent precipitation is assessed, NRCS hydrology tools recommended by the regional supplement should be used.

1.4. Vegetation is not present as no observed species is dominant.

FINDING: This reason for appeal does not have merit.

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[9] The difference of 0.06 inches from the amount stated by the Appellant is considered inconsequential and was likely a simple error in arithmetic.
[10] U.S. Army Corps of Engineers, p. 115.
[11] USDA Natural Resources Conservation Service. 1997. Hydrology tools for wetland determination. Chapter 19, Engineering Field Handbook. Fort Worth, TX: U.S. Department of Agriculture.

DISCUSSION: MVN determined that the Belle site has problematic hydrophytic vegetation. The regional supplement describes a number of alternate sampling methods for problematic hydrophytic vegetation, including the use of a reference site.[12] See above discussion of the reference site.

ACTION: No action is required.

1.5. Hydric soils are not present, because they do not meet the definition, which requires saturation.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The wetland delineation process, as set forth in the Manual, assesses the presence or absence of hydric soils using field indictors,[13] not the definition of hydric soils. MVN found the soils on the Belle site met the F3 hydric soil indicator (depleted matrix).

ACTION: No action is required.

1.6. The Corps only used two on-site reference points to establish jurisdiction instead of the requirements in the Manual.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant states that the Manual (¶65, Steps 18-19) requires a minimum of three on-site sample points, and there is no evidence that this procedure was followed. The Appellant is correct. The Manual states that Steps 18 and 19 be followed "when an area is greater than 5 acres in size or appears to be highly diverse with respect to vegetation."[14] Steps 18 and 19 require the establishment of a baseline and a minimum of three sample sites. The Belle site is 240+ acres, and MVN sampled only two locations. When asked during the teleconference, MVN replied that due to the homogeneity of the site, only two sample points were needed. The Manual does not allow for this flexibility.

ACTION: MVN must resample the Belle site using at least three sample points, as required by the Manual.

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[12] U.S. Army Corps of Engineers, p. 116-123.
[13] Environmental Laboratory, p. 24-28.
[14] Ibid. p. 55.

2. The Corps Has No Jurisdiction Over Prior Converted Croplands
3. The Later Change to Commenced Converted Does Not Change the Result
4. The "Change In Use" Policy Is Not Effective

FINDING: These three reasons for appeal are considered together. These reasons for appeal do not have merit.

DISCUSSION: The Appellant states that the Corps has no jurisdiction over the Belle site, because the Natural Resources Conservation Service (NRCS) has determined that the site is prior converted cropland (PC). The Appellant cites the definition of PC found in Corps regulations as published in the Federal Register on August 25, 1993.[15] Corps regulations at 33 CFR §328.3(a)(8) state that "waters of the United States do not include prior converted cropland."

However, the administrative record contains a 2003 letter from NRCS which indicates that the Belle site is not classified as PC but is designated as having the "Commenced Conversion" (CC) exemption (AR, p. 18-22). MVN discusses this classification in Section IV.B of the Approved Jurisdictional Determination Form (JD Form; AR, p. 12). MVN states "CC farmlands are not given the same recognition." The Appellant disputes this statement, saying that by relying on the CC designation, MVN ignores its own determination dated February 25, 1991 (AR, p. 214) and Corps regulations. This objection by the Appellant is not valid. The 1991 determination has no status. See discussion of RGL-05-02 above.

The Appellant also states that regardless of the NRCS designation, "applicable law treats commenced conversion cropland the same as prior-converted cropland." No reference to Corps of Engineers regulations is given to support this assertion in relation to Clean Water Act jurisdiction. The Appellant only cites a NRCS interim final rule in the 1996 *Federal Register*.[16] The CC classification is not referenced anywhere in Corps regulations or guidance documents, so the Appellant's conclusion that PC and CC have the same status for Clean Water Act purposes is without basis. There is nothing in Corps regulations to support the assertion that the CC designation is the same as a PC designation.

MVN takes the position that regardless of the question of PC versus CC, the property is being converted from an agricultural

[15] 58 Fed. Reg. 45031.
[16] 61 Fed. Reg. 47024.

use to a non-agricultural use, and the status of the Belle site should be determined using the 1987 Manual and the regional supplement (AR, p. 12). The Appellant disagrees with this conclusion by MVN, stating that "the Corps is barred from utilizing the so-called 'change in use' policy, as the policy is an unpromulgated rule. The Appellant further states that "the 'change in use' policy has already been set aside, and the Corps is barred from its use", citing the court case *New Hope Power Company v. United States Army Corps of Engineers (New Hope)*[17] and the "Stockton Rules" referenced in the court case.

The "Stockton Rules" are a reference to a memorandum[18] from Mr. Steve Stockton, Corps of Engineers Director of Civil Works, to the Commander of the South Atlantic Division in response to an issue paper written by Jacksonville District.[19] The issue paper refers to specific cases in south Florida. This memorandum is neither directed to nor does it apply to the Mississippi Valley Division or the New Orleans District, and there is nothing in the AR to indicate that MVN used the "Stockton Rules" during the JD process. Despite the statement by the court in *New Hope* that the "Corps has implemented and enforced the Stockton rules nationwide … and has issued additional memoranda supporting this policy," there has been no such national implementation, and no additional memoranda have been issued.

In fact, the national "change in use" policy was established four years prior to issuance of the "Stockton rules" in joint guidance issued by the Corps and NRCS in 2005.[20] This guidance was not addressed by the court in *New Hope*. Section III.A.6 of that guidance states: "A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable and a new wetland determination is required for Clean Water Act purposes." MVN acted in accordance with the joint guidance.

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[17] 746 F. Supp.2d 1272 (S.D. Fla. 2010).

[18] Stockton, Steven L. Memorandum for South Atlantic Division Commander. April 30, 2009.

[19] U.S. Army Corps of Engineers, Jacksonville District. Issue Paper Regarding 'Normal Circumstances' and Use of Section F, Atypical Situations, of the 1987 Wetland Delineation Manual for Jurisdictional Determinations in the Everglades Agricultural Area. January 2009.

[20] Joint Guidance From the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985. This guidance was issued via a memorandum signed by Bruce I. Knight, Chief, NRCS and George S. Dunlop, Deputy Assistant Secretary of the Army on February 25, 2005.

ACTION: MVN should clarify the AR by including a statement of whether or not the "Stockton Rules" were used while making the original JD. Even though there is nothing in the existing record to indicate whether the "Stockton Rules" were or were not used in the original JD, MVN is specifically prohibited from using the "Stockton Rules" during reconsideration of the JD in the remand.

5. The Corps Misapplied *Rapanos*[21] and the *Rapanos* Guidance[22]

FINDING: This reason for appeal has partial merit.

BACKGROUND: In 2007, as a result of the U.S. Supreme Court decision in *Rapanos*, EPA and the Corps developed a guidance memorandum to implement the court decision. The so-called *Rapanos* Guidance (Guidance), issued in 2007 and revised in 2008, requires the application of two standards to support an agency jurisdictional determination (JD) for a particular water body.

The first standard recognizes regulatory jurisdiction over traditional navigable waters (TNW) and their adjacent wetlands, water bodies that are not a TNW but that are relatively permanent (RPW),[23] and over wetlands adjacent to RPWs if the wetlands directly abut the water body.

The second standard, for tributaries that are not relatively permanent, requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW.

DISCUSSION: The Appellant asserts that even if the Belle site has wetlands, they are isolated and not subject to Corps jurisdiction, and that MVN has incorrectly applied the Guidance in its conclusion that the Belle site is adjacent to a TNW. On the JD Form (AR, p. 7), MVN states:

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[21] Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

[22] 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*. December 2, 2008. Original guidance released June 5, 2007.

[23] Flows year-round or at least seasonally.

> The subject wetlands are at the upper end of a vast wetland that abuts tidal waters; Bayou Verret, St. James Canal (in their lower reaches), Bayou Citamon, Lac Des Allemands, Lake Salvador, Barataria Bay and the Gulf of Mexico. Additionally, the wetlands in the lower part of the system are tidal and therefore part of the TNW by definition. An earthen berm surrounds the wetland on the subject property but man-made barriers do not sever adjacency (33 CFR §328.3(c)). The berm separates the subject wetland from the larger wetland described above that is transected by bayous, canals, and LA Highway 20 (with bridges/culverts allowing the free exchange of flow) and is contiguous with tidal wetland and waters than eventually drain to Lac des Allemands, Lake Salvador, Barataria Bay, and the Gulf of Mexico. Wind driven tides acting on these bodies affect the water levels in Bayou Verret in the immediate vicinity of the subject property.

The Appellant asserts that Bayou Verret and St. James Canal do not meet the definition of a TNW and quotes from the Guidance that TNWs are defined as waters that "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide."[24] The Appellant further states that Bayou Verret and St. James Canal have not been used in commerce in and around the Belle site, and that the two waterways are not tidal in proximity to the site.

MVN is not asserting that these water bodies are TNWs near the Belle site. MVN asserts that Bayou Verret and St. James Canal are tidal in their lower reaches, and thus that those reaches are TNWs by definition. The Guidance identifies tidal waters as TNWs.[25]

The question becomes whether or not the lower reaches of those water bodies and the others cited by MVN are actually subject to the ebb and flow of the tide, and if so, whether there are contiguous wetlands from the Belle site to these water bodies.

When asked by the RO during the supplemental RFA teleconference whether there was any information in the AR to support the tidal nature of the lower reaches of Bayou Verret, St. James Canal, and the other water bodies cited on the JD form, MVN stated that

[24] Ibid. p. 4-5.
[25] Ibid. p. 5.

the tidal nature of these water bodies is common knowledge. In the supplemental RFA, the Appellant asserts that the statements by MVN about the tidal nature of the cited water bodies are "conclusory" and "opinions" and that "the AR is devoid of facts to fully support this determination." The Appellant's assertion is correct.

The Appellant also argues that the Belle site is not adjacent to Bayou Verret or St. John Canal, because (1) "adjacency requires an unbroken surface or sub-surface connection, physical separation by man-made dikes, or reasonable close proximity such that there is an ecological connection with jurisdictional waters"[26] and (2) MVN's reliance on the fact that an earthen berm surrounds the Belle site and separates it from a larger wetland area that is transected by bayous and canals is incorrect.

The Appellant also states:

> The Corps also asserts jurisdiction based on its conclusion that the Property is a wetlands adjacent to relatively permit waterways that flow into traditional navigable waterways. The Corps identifies Comeaux Canal and Seatra Canal as the water bodies that flow past the Property. While these water bodies may be relatively permanent waterways that flow into traditional navigable waterways, the *Rapanos* Guidance defines adjacency in these instances to require a "continuous surface connection." *Rapanos* Guidance, p. 7. The Corps does not find that there is such a continuous surface connection. Instead, it relies on the presence of the earthen berm that surrounds the Property, which is not relevant when assessing adjacency to relatively permanent waterways that flow into traditional navigable waterways.

The Appellant is correct that a continuous surface connection is required to establish adjacency between a wetland and a RPW.[27] However, MVN does not argue that the Belle site is adjacent to a RPW, but that it is part of a larger wetland that abuts, and thus is adjacent to, a TNW. The Guidance specifically states that a continuous surface connection is not required to establish adjacency to a TNW.[28] MVN is also asserting that the wetlands on the Belle site are contiguous with the larger

[26] Ibid. Paraphrased from p. 5-6.
[27] Ibid. p. 7.
[28] Ibid. p. 5.

wetland area, and that the berm does not remove that contiguity. MVN cites Corps regulations at 33 CFR § 328.3(c) that define adjacency 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.'"

The logic behind MVN's assessment of adjacency is supported by Corps regulations and guidance. However, the factual determination is dependent on whether there is evidence in the administrative record to support the assertion that there are contiguous wetlands from the Belle site to a downstream TNW. MVN states that the area between the Belle site and the downstream water bodies is "transected by bayous, canals, and LA Highway 20 (with bridges/culverts allowing the free exchange of flow) and is contiguous with tidal wetland and waters that eventually drain" into tidal water bodies. However, there is nothing in the AR to support the MVN assertion that there are contiguous wetlands from the Belle site to a downstream TNW.

ACTION: MVN shall determine whether and document that (1) the lower reaches of Bayou Verret and St. James Canal are tidal, and (2) there are contiguous wetlands from the Belle site to the downstream TNW.

Conclusion: I find that two of the reasons for appeal cited by the Appellant have merit, and that one reason has partial merit. The approved jurisdictional determination dated January 13, 2011, is remanded to MVN for reconsideration based on comments detailed above. The final Corps decision will be the New Orleans District Engineer's decision made pursuant to my remand.

Michael J. Walsh
Major General, U.S. Army
Division Engineer

Appendix A

Appeal Meeting/Site Visit/Supplemental Teleconference Memorandum for Record

CEMVD-PD-KM 8 June 2011

MEMORANDUM FOR RECORD

SUBJECT: Belle Land/Kent Recycling Services Jurisdictional Determination Appeal Meeting, Site Visit and Supplemental Teleconference Assumption Parish, Louisiana, New Orleans District (Corps File Number, MVN 2010-01357-SY)

1. BACKGROUND:

Appellant: Belle Land/Kent Recycling Service (Agent: Mr. John King)
Location of Site: Assumption Parish, Louisiana
Location of Appeal Meeting: NRCS Offices, Donaldsonville, Louisiana
Date of Appeal Meeting/Site Visit: 11 May 2011
Date of Supplemental Teleconference: 2 June 2011

2. REVIEW OFFICER: James B. Wiseman, Jr., Ph.D., U.S. Army Corps of Engineers (USACE), Mississippi Valley Division (MVD)

3. APPEAL MEETING PARTICIPANTS :

Stephen Kent, Kent Recycling Service
Stephen Goff, Kent Recycling Service
John B. King, Breazeale, Sachse & Wilson, LLP
Dana R. Sanders, Sr., D.R. Sanders and Associates, Inc.
Rob Heffner, USACE, New Orleans District
Brian Oberlies, USACE, New Orleans District
Jim Wiseman, Review Officer, USACE, MVD

4. APPEAL MEETING SUMMARY:

a) The conference convened at approximately 10am with each participant briefly introducing himself.

b) Opening statements:

1) Review Officer
   i. See Appendix A.
   ii. The RO also stated that this meeting would cover the original RFA and not the supplemental RFA dated May 9, 2011. A teleconference was held on June 2, 2011, to review the supplemental RFA. See Section 6.
2) Mr. King (agent for appellants) – Mr. King summarized the reasons for appeal cited in the original Request for Appeal (RFA) and made other comments. Specifically, he mentioned:

i. The record and the facts do not support the jurisdictional determination, and that the record actually supports a non-wet determination.
ii. The normal circumstance is that the site is under pump.
iii. The soils are not saturated.
iv. The site had above average rainfall in the two months prior to data collection by MVN.
v. The wetland map included with the MVN JD is the same map included with the preliminary JD made by the consultant in 2009.
vi. There is no onsite data.
vii. The data was collected after the growing season.
viii. The change in use policy is not valid, and it should not have been referenced by MVN.
ix. The 1987 manual should not have been used, since the PC designation applies
x. For the sake of argument, if there are wetlands on the site, they are isolated.
xi. MVN did not properly base their JD on the Rapanos guidance.

3) New Orleans District (MVN) – Did not make an opening statement, but Mr. Heffner stated that the JD was field verified. Mr. King then mentioned the FOIA he submitted to MVN for the entire file. Even though the subject of the FOIA is beyond the scope of the appeal, the RO asked if MVN could check into the matter.

c) Administrative Record (AR) – The RO requested MVN to give a brief walk-through of the AR, so there would not be any confusion about its contents. Clarifications included:
1) MVN and Mr. Kent clarified that the Mr. Hartman mentioned in AR is the owner of Belle Land Company.
2) AR, p. 25-38 – Mr. Heffner stated that MVN refuted the wetland delineation by Land Management Group LLC.
3) AR, p. 51 – Mr. Oberlies clarified that this memo was drafted on 10/8/10, which is why that date appears elsewhere in the AR.
4) Clarified the location of Como Canal and Seatra Canal.

d) RO asked if anyone had any other questions or comments about anything in the AR.
1) Mr. King explained that both PC and CC designations by NRCS indicate a lack of wetland hydrology.
2) Mr. Kent expressed that the PC designation for the property is correct and that he does not agree with the MVN determination.
3) Dr. Sanders made the following statements:
i. All three wetland characteristics are not present on the property.
ii. The key to the JD is the determination of the current "normal circumstances" for the property.
iii. While the site is mapped as having Sharkey soils which are defined as frequently flooded hydric soil, the current normal circumstances for the property is not frequently flooded. He stated that this is due to:
1. Canals and ditches dug on the property.
2. The property has been farmed for a significant time.

3. The property is surrounded by a levee and is under the influence of a pump, which is the current normal circumstance.
4. While the 1987 manual allows the use of reference areas, MVN should not have gone outside of the leveed area.
5. The ultimate decision on jurisdiction is the presence of absence of wetland hydrology.
6. Sample #1 from the 2010 field visit was inappropriate as a reference site, since it was located outside of the berm. In addition, the Bruza sample site from 2004 had a different normal circumstance than the current site conditions.

4) The RO asked for additional clarification on the following:
   i. The location of the berm; MVN showed the berm on an aerial photograph and subsequently the berm was identified during the site visit.
   ii. The meaning of "plastic" from the MVN data forms. Mr. Heffner indicted that plastic, in this context, meant near saturation. He further stated that wetland hydrology was determined to be present on the data forms because it was the investigator's best professional judgment that the soil would be saturated under normal precipitation conditions.

e) Reasons for Appeal – The RO stated that the RFA was very detailed, and that he did not have any questions about the stated reasons for appeal.

f) The RO had previously sent a list of questions about the AR to MVN. See Appendix B for MVN responses. Most of the responses to these questions were reviewed during the meeting.

g) The RO then made a brief closing statement and the meeting ended at approximately 12:00 pm.

5. SITE VISIT – Beginning at approximately 12:15 pm, the participants observed and discussed the site. We observed locations of data points, the four corners of the subject property, and the location of the pump. The site visit concluded at approximately 12:45 pm.

6. SUPPLEMENTAL RFA TELECONFERENCE

a) The teleconference began at 1:30 pm on June 2, 2011. Participants were Mr. King, Mr. Goff, Dr. Sanders, Mr. Heffner, Mr. Oberlies and Dr. Wiseman.

b) The RO stated that the supplemental RFA did not introduce any new reasons for appeal, and that it only clarified and/or expounded upon the existing reasons. Mr. King agreed. The RO suggested they use the summary on page 2 as a guideline for the teleconference.

c) Topics
   1) Normal circumstances – The RO asked MVN if he correctly understood that it was their position that normal circumstances on the subject site were agricultural production and under the influence of a pump. MVN responded affirmatively.

2) Hydrology – The RO asked MVN if it was their position that the pumping did not sufficiently drain the subject site to remove wetland hydrology. MVN responded affirmatively. Mr. King and Dr. Sanders expressed their disagreement with the MVN assessment of hydrology, and Dr. Sanders stated that this was a key point.

3) Antecedent Precipitation – The RO stated that based on the recorded weather data, MVN was correct to say that there had been no rain in the 10 days prior to the field visit on 10/8/10, and that the previous month precipitation had been less than normal. The RO then stated that the appellant was also correct to state that precipitation in the preceding two months was 2.92 inches above normal. A general discussion of precipitation as related to the jurisdictional determination ensued, including the fact that August precipitation was much higher than normal, at 9.94 inches. Dr. Sanders stated that the August precipitation could account for the plasticity in the soil noted by MVN on the data sheets.

4) Vegetation – The RO asked MVN what they used to assess vegetation since the two samples inside the berm lacked dominant species. MVN said that they used the reference site (Sample #1). Mr. King and Dr. Sanders brought up the fact that Sample #1 was not a proper reference site, since it was taken in an area outside the berm and influence of the pump. MVN responded that the area had been under pump prior to the movement of the pump two years ago, and that the vegetation reflected those earlier conditions, particularly the woody vegetation. Mr. King and Dr. Sanders again questioned the validity of that sample point.

5) Number of Samples vs. 1987 Manual Requirements – Mr. King stated that two sample points are insufficient to support the determination on a 240 acre site. His supplemental RFA cites ¶65 of the manual and asserts that at least three sample sites should have been examined, one on each of three transects per Steps 18-21 in the manual. Mr. King also suggests that the choice of sample sites by MVN was subjective and biased the results. MVN stated that the manual allowed for fewer samples when the site is homogeneous. Mr. King disagreed with the MVN interpretation of the manual.

6) Impoundments – The RO asked MVN to explain their designation of the drains as impoundments. MVN explained that this was the category that fit best for the drains, since they were unvegetated and blocked by the berm. Mr. King disagreed with this explanation.

7) Prior-converted cropland status – The RO brought up the fact that the record contained a letter designating the subject site as CC, not PC. Mr. King reiterated his position that the property meets the definition of PC found in Corps regulations.

8) Application of Rapanos Guidance – The RO asked MVN to explain their interpretation of adjacency with regard to the subject site and downstream TNWs. Mr. King again asserted his interpretation that the MVN approach was an incorrect application of the guidance. The RO asked if the tidal nature of the downstream

TNWs was documented in the AR. MVN stated that while there was no documentation in the record, but that the tidal nature of Lac des Allemands and of the lower reaches of other bayous/stream cited in the record (Bayou Verret, Bayou St. John, etc.) were common knowledge. Mr. King reiterated his position that none of these waterbodies, whether tidal or not, are in close proximity to the subject site, as required by the guidance.

9) Other – The RO asked if anyone had anything else to add. Mr. Heffner stated that there were many instances in the 2009 data which showed that the subject site had wetland hydrology. Mr. King stated that the entire 2009 data set was not reliable, and that it cannot be used.

10) The RO thanked all for participating and the teleconference ended at approximately 2:20 pm.

7. REVIEW – The draft MFR was forwarded to Mr. King and MVN (Mr. Heffner and Mr. Oberlies) for review and comment on June 3, 2011. The following responses were received via email on June 7, 2011:

1) Mr. King

   a. No. 4.b.2.v: I think the point is that the Approved JD map is the same as the Preliminary JD map, which is flawed as there are significant data gaps between the Preliminary JD map and the consultant's map in the 2009 Report.

   b. No. 4.c.4: I think it's Comeaux Canal.

   c. No. 4.d.4.ii: Mr. Heffner also stated that the soil was not saturated.

   d. No. 6.c.3: We stated that the 2010 rainfall was 55 inches, very close to the average of 61 inches.

   e. No. 6.c.4: Last sentence should read: "Mr. King and Dr. Sanders again questioned the validity of that sample point for the reasons set forth in the appeal documents."

   f. No. 6.c.6: Last sentence should read: "Mr. King disagreed with this explanation, stating that the drains were created after the property was lawfully put to agricultural use and the drains were not derived from, or impoundments of, a water of the United States.

   g. No. 6.c.7: Last sentence should read: "Mr. King reiterated his position that the property meets the definition of PC found in the official promulgated regulation or guidance of the Corps and that the Corps' use of definitions that are not officially promulgated by the Corps is not proper."

2) MVN (Mr. Heffner)

a. 6.c.3). MVN made that point that if precipitation from August 6 and 18, is subtracted from the monthly total, August had a rainfall deficit of 2.98 inches.

b. 6.c.8). MVN pointed out that the subject properties in Rapanos were 11 and 20 miles from nearest TNW and this fact did not lead Justice Kennedy to conclude a that significant nexus could not exist.

c. 6.c.8) MVN stated the 2009 data set had 23 instances that documented the presence wetland hydrology, soils, and vegetation on the subject property.

James B. Wiseman, Jr.
Administrative Appeals Review Officer

Appendix A – Review Officer Opening Statement

BELLE-KENT JURISDICTIONAL DETERMINATION
APPEAL MEETING – 11 MAY 11
OPENING COMMENTS

I would like to make a few opening remarks. After that, I will ask if Mr. King if he or anyone else representing the appellant would like to make an opening statement. I will then ask the District if they would like to make an opening statement.

It is the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient. The administrative appeal process is a one level appeal to the Division Engineer. The Division Engineer may delegate authority or responsibility to an appeal Review Officer. In this case, this responsibility has been delegated to me.

It is my job to assist the Division Engineer in reaching and documenting a decision on the merits of the appeal. Thus, **this is the Division Engineers meeting, and I am facilitating this meeting on his behalf.** The appeal process provides an independent review of the administrative record to verify that:

- the record provides an adequate and reasonable basis supporting the New Orleans District Engineer's decision,
- facts or analysis essential to the Districts Engineer's decision have not been omitted from the administrative record, and
- all relevant requirements of law, regulation, and officially promulgated Corps policy guidance have been satisfied.

The purpose of today's meeting is to gather information for the Division Engineer's decision, but **no decision regarding this appeal case will be made today.**

As RO, I will seek clarification of issues of the administrative record in order to hear and fully consider all relevant issues and facts. As participants in this appeal meeting, you have the opportunity to interpret, clarify, or explain issues and information contained in the record.

Issues not identified in the administrative record by the date of the Notification of Administrative Appeal Options and Process form (January 13, 2011) may not be raised or discussed.

This appeal meeting is an informal administrative meeting. As such, this is not a legal forum and rules of evidence do not apply. I usually allow an open forum with the appellant and the District speaking directly to each other, but since this not a courtroom, I will not allow a line of questioning that I consider cross-examination.

I am here today to ensure that I fully understand the appellant's reasons for appeal and the rationale for how the District reached their decision and how/where they documented their decision process. By the end of this meeting, I need to be confident that I can fully explain both perspectives to the Division Engineer and answer any of his questions regarding the merits of the appellant's reasons for appeal.

Appendix B – MVN Reponses to RO Questions

Belle Company/Kent Recycling Services, LLC
Approved Jurisdictional Determination
Corps File Number MVN 2010-01357-SY
Appeal Meeting and Site Visit
May 11, 2011

Location: NRCS Field Office, 2274 Hwy 70, Donaldsonville, LA
Time: 10:00 am

Note: Per regulation at 33 CFR 331.7(e)(7), no verbatim transcript of the meeting will be made. The RO will take notes and produce a Memorandum for Record (MFR) summarizing the meeting. The MFR will be provided to the Appellant and to the District for review and comment.

Agenda

1. Opening Statements
• Review Officer
• Appellant (optional)
• New Orleans District (optional)

2. Review of Administrative Record (brief overview of contents)

3. Appellant's Reasons for Appeal (overview)
• All three wetland characteristics not present
• No Corps jurisdiction over Prior-Converted Cropland (PCC)
• NRCS change from PCC to Commenced Converted has no effect
• Change of use policy is not effective
• Corps misapplied Rapanos guidance

4. Questions for Corps about AR – The following questions will be discussed during the meeting. The Corps may provide written responses. If so, please bring a copy for the RO and the Appellant. This is a preliminary set of questions. The RO may have additional questions during the appeal meeting that are not listed here.

Q1• What are the actual site boundaries? Please be prepared to identify the boundaries on the photographs in the AR at p. 53 and p. 53A.
A. Map, marked 53B, will be distributed at 5/11/2011 Appeals Conference

Q2.• What are the beginning and ending dates of growing season (50% probability of 28°F air temperatures) in this area?
A. According to WETS STATION: Donaldsonville 4 SW, LA 2534 the Growing Season lasts from January 22 through December 29.

Q3.• Approved JD Form (AR, p. 6-12) o Three categories of waters are identified on the form – wetlands adjacent to TNW, RPW, and impoundment. It is stated that the unvegetated drains are the

impoundments. Please explain. What about the former catfish pond?

A. The unvegetated drains flow through jurisdictional wetlands and are blocked by a berm. Flow occurs when the tractor-driven pump is operating. The relic catfish pond was mapped as jurisdictional wetlands surrounded by a barrier rather than an impoundment because the manual's discussion regarding impoundments is aimed at identifying wetlands that may have been created by impounding waters. The manual uses: 1) road construction impounding water in a previously nonwetland area, thereby effecting vegetation and hydrology; and 2) wetlands that develop along reservoir shorelines as examples. The Corps' opinion is the berm was placed in wetlands to allow sufficient surface water to be held to raise catfish and did not result in the creation of wetlands as described in the manual. Our understanding is the catfish operation has been abandoned.

Q4. What is the TNW? Are you saying that the wetland on-site is contiguous with a larger wetland area that is adjacent to tidal waters? Please identify this area and explain how you considered adjacency (bring original aerial photos to the appeal meeting). Please be prepared to trace the drainage from the site to the downstream TNW.

A. Portions of Bayou Verret, St. James Canal, and the swamp are TNWs. Bayou Citamon and Bayou Chevreuil are TNWs for their entire length. These determinations are based on tidal influence and/or current or historical use for the transport of interstate commerce. The District's position is the wetlands are adjacent to the TNWs listed above. It is difficult to trace a single path since the wetlands are at the upper end of a large wetland system transected by numerous bayous and canals that intersect each other. The path will be dependent on water levels in the swamp and bayous. One potential pathway is Comeaux Canal to Bayou Verret to Pipeline Canal to St. James Canal to Bayou Citamon to Bayou Chevreuil to Vacherie Canal to Lake DesAllemands.

Q5. Which water is the RPW? How did you determine that it is an RPW and not a non-RPW?

A. The Comeaux Canal was determined to be an RPW based on personal observations during each site inspections (2004, 2010, and 2011). Additionally, water is visible in the canal on aerial photos taken in 1998, 2004, 2005, and 2008. Additional supporting information is USGS Quad Map depicting the canal as perennial and NRCS soil maps showing approximately 22000 linear feet of canal being upstream and flowing into the Comeaux Canal.

Q6. Please identify the berm mentioned in the form. Is the berm continuous, or are there gaps?

A. The subject property is completely surrounded by a manmade berm and drainage is facilitated by a tractor driven pump. There is a gap in the berm in the northeast corner of the eastern half of the property that is not a part of this determination.

Q7. Three field dates are cited: 10/11/10, 4/21/09, and 2/19/04 □ Confirm that the data form in the AR, p. 197-198 is from the 2/19/04 field visit mentioned in the JD form. Is this the same as the area identified as "2004 sample site" on the photo on p. 53 and p. 53A? Is it a reference site?

A. The data form in AR, p. 197-198 was the data form taken during the 2/19/04 site visit. It is the same data form identified as "2004 sample site" on the photo from p. 53 and p. 53A. The data was collected on the subject property and does not represent a reference site.

Q8. The data forms in the AR p. 188-196 are dated 10/8/10. Are these the forms for the date cited as 10/11/10?

A. Yes, the discrepancy is explained below in Q11.

Q10. Where are the data forms for the 4/21/09 field trip? Is this date related to the preliminary JD issued on 5/15/09 (AR, p. 56-57)?
A. No additional data was during the 4/21/09 field trip. The purpose of the inspection was to verify the consultants findings prior to issuing the jurisdictional determination dated 5/15/09.

Q11. Green sheet in AR (p. 15) mentions MFR written on 10/8/2010, but the memo in the AR (p. 51) is dated 10/11/2010. Please explain this difference.
A. The MFR was drafted on 10/8/2010. The draft was provided to R. Heffner and B. Gaspard, attendees of the 10/8/2010 field trip, for review and comment. It was finalized on 10/11/2010.

Q12. Earth Services data and map in AR (p. 65-178) – Is this the complete set of data sheets (for example, on cursory review, it appears that S-414 is missing data for vegetation and hydrology)? These data sheets appear to have multiple mistakes (for example, using genus only for vegetation and drawing a conclusion as to hydrophytic status). Was this data used for the preliminary JD (AR, p. 59)?
A. The AR contains all the data that was provided by the consultant. Only soils data was collected at 334 of the sample points to verify that hydric soils were present. Vegetation, soils, and hydrology were recorded at 38 sample points. Discounting the data sheets that do not identify to species, 19 of the 38 document the presence of hydrophytic vegetation. While the data supports the presence of wetlands, the final delineation map resulted from field observations and their correlation with LIDAR data.

Q13. Data Forms (AR, p. 188 – 196) o Are the three sample points in the forms the same as the locations identified in the photo on p. 53 and p. 53A?
A. Yes.

Q14. Please be prepared to explain your assessment of site hydrology, particularly in relation to saturation and soil plasticity. Explain you assessment of antecedent precipitation, and how that did or did not influence your site assessment.
A. Hydrology indicators are often the most transitory of wetland indicators. At the time of the October site inspection, the soil was very plastic, a characteristic resulting from soils with clayey textures being near saturation. Rainfall data collected at the two nearest weather stations (<6 miles away) indicated that no measurable rainfall had occurred within 10 days of the site visit. Additionally, September rainfall was approximately 75% of normal. These facts and best professional judgment led to the conclusion that the soil moisture present during the site inspection wasn't the result of a recent rainfall event and that soil saturation for sufficient duration to meet the hydrology criteria is present during the growing season in a normal year.

Q15. NWI classification PSS means palustrine scrub-shrub. What is the 1C subclass?
A. The NWI mapper identifies 3 types of wetlands on the property. In order of acreage they are: PEM1C (Palustrine Emergent, persistent, seasonally flooded), PFO1C (Palustrine Forested, Broad-leaved deciduous, seasonally flooded) and PSS1C (Palustrine Scrub Shrub, Broad-leaved deciduous, seasonally flooded). While none of the descriptions are accurate under the current use, PEM1C would have been a better choice. (maps provided)

Q16. For sample points 2 and 3, you show that vegetation is significantly disturbed, yet you indicate that normal circumstances exist. Please explain.

A. The normal circumstance is the property is in agriculture. The property had been recently harvested and disced in preparation for the next crop. There were scattered stems of native vegetation present but the site was largely bare of any vegetation. This seemed the most reasonable response.

Q17. For sample points 2 and 3, you determined that the vegetation was problematic and did not perform a dominance test. Did you examine the vegetation on an undisturbed reference area?

A. Yes, Sampling Point 1 (AR p 188) is a reference site located approximately 50 feet east of the subject property. Until 2-3 years ago, it had been under the same pumping regime as the subject property and the plant community that has developed over the past 5-10 years (based on the size of willows (Salix nigra) is expected to be similar to what would be found on the subject property.

Q17. In the Additional Comments section of the JD Form (AR, p. 12), you talk about the movement of the pump. What impact did that have on the hydrology of the site? Are the sample sites in a pumped area?

A. Movement of the pump appears to have made it possible to grow a harvestable crop of soybeans. Historical photos from December, 2008, show an unharvested crop. Sampling points 2 and 3 are on the subject property. Sampling Point 1 is in the area that was under pump until several years ago. While moving the pump has had some effect, it has not been great enough to remove hydrology from the site.

5. Additional Discussion/Clarification of the Administrative Record

6. Final Statements or Comments
- Appellant (optional)
- New Orleans District (optional)
- Review Officer

7. Site Visit – to be held immediately following the appeal meeting