ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
HEBERT LAND DEVELOPMENT- FILE NO. MVN-2010-01775-1-SQ
NEW ORLEANS DISTRICT

ADMINISTRATIVE APPEAL DECISION
HEBERT LAND DEVELOPMENT CORPORATION
APPROVED JURISDICTIONAL DETERMINATION
NEW ORLEANS DISTRICT
FILE NO. MVN-2010-01775-1-SQ

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

Appellant/Applicant: Hebert Land Development Corporation

Regulatory Authority: Section 404, Clean Water Act

Date Request for Appeal Received: 5 August 2011

Approved Jurisdictional Determination Appeal Meeting: 29 June 2012

Summary of Appeal Decision: The Hebert Land Development Corporation (appellant) is appealing a New Orleans District (District) approved jurisdictional determination (AJD) for a wetland located on property owned by the appellant in Livingston, Livingston Parish, Louisiana. The appellant submitted six reasons for appeal:

1. "These data forms are inadequate to establish that the area is a wetland, especially as drawn on the JD map."[1]

2. "The map associated with the JD is not accurate." The District altered the appellant s map by changing the eastern north/south oriented wetland into a "water of the U.S." that exits the property. The appellant asserts the wetland is entirely within the property and is adjacent and drains into a non-relatively permanent water (RPW) (a ditch) that is not a water of the U.S.

3. "The 'culvert underneath an old race track' does not provide the claimed hydrological connection." The appellant further asserts the culvert was buried before he exposed it so, at best, only minimal amounts of water can pass through it. Therefore, the appellant believes the onsite wetland should be considered isolated.

4. "The corps failed to consider the proper 'tributary.'" The appellant believes the District erred when it combined the north/south oriented ditch with Harrell's Lateral in its significant nexus evaluation and that the evaluation should be limited to the north/south oriented ditch and its adjacent wetlands.

5. "Sediments in the 'unnamed tributary/Harrell's Lateral' come from other sources." The appellant asserts that, at most, only insignificant amounts of sediments come from the property with most coming from the land surrounding the unnamed tributary/Harrell's Lateral.

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[1] This reason for appeal was included in the appellant's letter titled, "Supplement to Reasons for Appeal and Objections" received by the Mississippi Valley Division on 16 September 2011. Reasons for appeal 2 through 6 were included in the appellant's request for appeal dated 4 August 2011. These two letters are discussed further in the "Background Information" section on page 2 of this decision document.

6. "The wetlands, either on the property or in the area, do not have a "significant" nexus with the TNW."

Accordingly, the appellant believes the District incorrectly applied the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrectly applied law, regulation, or officially promulgated policy; and utilized incorrect data when it determined jurisdiction. For reasons detailed in this document, these six reasons for appeal have merit. The AJD is remanded to the District for reconsideration.

Background Information: The property is located west of Harrell's Lane and north of Cochise Drive in Section 9, Township 6 South, Range 3 East, Livingston Parish, Louisiana. The District issued an AJD dated 22 March 2011, which indicated that wetlands and other waters of the U.S. were present within the appellant's property.[2] The appellant transmitted new information by letter dated 19 May 2011, and requested that the District reconsider their AJD.[3] The District issued their reconsidered AJD on 19 July 2011, which reaffirmed their original determination that wetlands and other waters of the U.S. were present within the appellant's property.[4]

The appellant submitted a complete Request for Appeal (RFA) dated 4 August 2011, which was received by the Mississippi Valley Division (the Division) office on 5 August 2011. The appellant was informed, by letter dated 18 August 2011, that the RFA was accepted. On 16 September 2011, the Division received a letter with the same date from the appellant titled, "Supplement to Reasons for Appeal and Objections." The appellant indicated on page 1 of the letter that its purpose was to, "[C]larify several points in the original appeal." While this letter did contain one new reason for appeal not included in the appellant's original RFA letter dated 4 August 2011, it was received by the Division within 60 days of the date of the appeal form and the AJD. Therefore, it was considered as part of the appellant's RFA in accordance with 33 CFR §§ 331.2, 331.5(a)(1), 331.6(a), and 331.6(b).

Information Received and its Disposal During the Appeal

33 CFR § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this AJD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding AJDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation,

[2] AR page 68.
[3] AR pages 18-37.
[4] AR page 4.

clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposal is as follows:

1. The District provided a copy of the AR to the RO and the appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 19 July 2011. It should be noted that AR pages 1-3 were prepared by the District in response to the MVD RO's request for the AR (this request came after 19 July 2011).[5] As a result, AR pages 1-3 were not considered as part of the District's decision and consequently are not part of the District's AR. Therefore, they were not considered as part of the evaluation of this RFA.

2. An appeal meeting was held via teleconference on 29 June 2012.[6] The meeting followed the agenda provided to the District and the appellant by the Southwestern Division RO via email on 21 June 2012. During the appeal meeting, the District clarified that several documents in their AR were inadvertently omitted from the copies provided to the RO and the appellant. These documents are as follows:

a. The appellant indicated that the MVD RO had stated during the 22 November 2011 appeal meeting that AR pages 61 and 62 were unclear due to the lack of labeling and requested that the figures be labeled "similarly situated wetlands" and included as pages 61a and 62a in the AR. The District provided the revised figures to both the RO and the appellant via email dated 6 December 2011. These figures were considered as part of the evaluation of this RFA as they merely clarified information already present in the District's AR.

b. The District indicated they inadvertently omitted the odd numbered photos (3-29) associated with those on AR pages 38-55 due to a scanning error. The District indicated they would resend the photographs with numbers to both the RO and the appellant. The RO received the photos via emails dated 29 June and 2 July 2012. The appellant was copied on both emails. These photos were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision on 19 July 2011, but inadvertently omitted from the copies of the District's AR provided to the RO and the appellant due to an error.

c. The appellant noted that a topographic map he submitted to the District via mail and email in December 2010 was missing from the AR. The appellant indicated this map was stamped by a registered surveyor and was dated 16 December 2010. The RO asked the appellant to forward a copy of the map to the District and the RO. The RO also asked the District to confirm, upon receipt of the map, that they had received the map, and if so, why they did not include it in the copies of the AR provided to the RO and the appellant. The appellant provided, via email dated 29 June 2012, a copy of the map to the RO and the District. The District indicated via email dated 17 October 2012, that they had received the map and had inadvertently

[5] This appeal process was initially investigated by the MVD RO, Dr. Jim Wiseman. The action was reassigned to the SWD RO when Dr. Wiseman passed away on 7 December 2011. The SWD RO considered the documentation the MVD RO requested (the District's AR) as well as that prepared by the MVD RO; however, the SWD RO made his own independent evaluation of the facts and circumstances of this appeal.

[6] An initial appeal meeting was conducted on 22 November 2011 by the MVD RO. The SWD RO conducted a second appeal meeting on 29 June 2012 to give the RO the opportunity to ask clarifying questions regarding both the appellant's request for appeal and the District's rationale for their decision.

omitted it from the copies of the AR provided to the RO and the appellant due to similarity with another map already found in the AR. Because the map was provided to the District prior to 19 July 2011, it should be considered as part of the District's AR and consequently, as part of the evaluation of this RFA.

d. The appellant noted his final report, dated December 2010, was missing from his copy of the AR (the appellant included this report as exhibit C in his RFA dated 4 August 2011). The District indicated they received the report, but did not include it in their AR because it was not a basis for their decision. They further stated that they did not include any reference to the report in their AR because they believed the report was neither relevant nor useful as it did not include a wetland boundary map. Because the appellant provided this report to the District prior to 19 July 2011, it should be considered as part of the District's AR and consequently as part of the evaluation of this RFA.

e. The District indicated that they inadvertently omitted the location information for photos 7, 8, 10, and 17 on the figure on AR page 38. The RO asked the District to provide this information to the RO and the appellant. The District provided, via email dated 1 November 2012, a revised figure (AR page 38) that included the locations of these photos. The photo location information was considered as part of the evaluation of this RFA as the photos were present in the District's AR prior to the District's decision on 19 July 2011, but the location information was inadvertently omitted from the AR due to an error.

3. The appellant forwarded, via email dated 29 June 2012, five attachments that contained Darcy equation data which the appellant indicated would demonstrate an on-site culvert was capable of passing only minimal flow at best. The appellant confirmed, via email on 31 October 2012, that the Darcy equation data was submitted as part of his RFA and not prior to the District's decision. Therefore, it was not part of the District's AR. The appellant requested, via email dated 1 November 2012, to proceed with the appeal with the understanding that the Darcy equation data would not be considered as part of this appeal.[7] Therefore, the Darcy equation data was not considered as part of the evaluation of this RFA.

4. On 29 June 2012, the appellant forwarded an email dated 17 December 2010 to the RO and the District. In this 17 December 2010 email, the appellant accepted the District's offer to delineate the appellant's property and provided the District, via an attachment, the property boundary coordinates. Because this 17 December 2010 email was sent prior to 19 July 2011, it should be considered as part of the District's AR and consequently, part of the evaluation of this RFA.

5. On 14 November 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the appellant and the District with a request that they review and provide comments by close of business on 21 November 2012. In an email dated 19 November 2012, the District provided one comment regarding section 5.u. of the draft MFR. The RO requested, via email dated 17 December 2012, that the District clarify their comment.

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[7] Regulations governing the administrative appeal process (33 C.F.R. § 331 *et seq*) state that new information may not be considered in an appeal. The appellant may choose to either proceed with the appeal based on the administrative record without consideration of the new information, or revise the record to include the new information and have the case returned to the District for action.

The District provided a clarification the same day. In an email dated 21 November 2012, the appellant provided comments for sections 2.b., 3.a.(3), 3.b.(3), 4.e, 5.c., 5.e., 5.g., 5.h., 5.j., and 5.dd. of the draft MFR.

6. The RO supplied the final MFR to the appellant and the District via email on 16 January 2013. The District and appellant's comments were included in section 7 of the final MFR.

Appellant's Reasons for Appeal

Reason 1: The District incorrectly applied the current regulatory criteria and associated guidance for identifying and delineating wetlands. More specifically, the appellant asserts that, "These data forms are inadequate to establish that the area is a wetland, especially as drawn on the JD map."

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA supplement letter dated 16 September 2011, the appellant asserted that the District did not establish the minimum number of required transects and observation points along those transects to properly determine the wetland boundaries. The appellant then concluded that, "[T]the data forms are inadequate to establish that the area is a wetland, especially as drawn on the JD map." As previously stated, this reason was included in the appellant's "Supplement to Reasons for Appeal and Objections" letter dated 16 September 2011, and not in their original RFA dated 4 August 2011. However, the supplement letter was received by the Division within 60 days of the date of the appeal form. Therefore, this reason was considered as part of the appellant's RFA and is addressed below.

Wetlands are defined in 33 CFR § 328.3(b) as, "[T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The 1987 Corps Wetland Delineation Manual[8] (1987 Manual) further clarifies that wetlands are generally characterized by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology. Conversely, the 1987 Manual characterizes nonwetlands as having the presence of at least one of the following: 1) aerobic soils, 2) a prevalence of vegetation adapted for life in aerobic soils, and/or 3) hydrology that does not preclude the occurrence of plant species typically adapted for life in aerobic soil conditions.[9] Finally, the 1987 Manual identifies a wetland boundary as the interface between a wetland and a nonwetland.[10]

Use of the 1987 Manual is mandatory for the identification and delineation of wetlands potentially subject to regulation under Section 404 of the Clean Water Act.[11] In addition, regional supplements were developed by the Corps for use with the 1987 Manual in order to address regional wetland characteristics and improve the accuracy and efficiency of wetland

[8] Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.
[9] 1987 Manual pages 9-11.
[10] 1987 Manual pages 49 and 55.
[11] "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.

delineation procedures.[12] In this case, the site associated with this appeal falls within the applicable region of the Atlantic and Gulf Coastal Plain regional supplement (Supplement).[13]

Both the 1987 Manual and the Supplement indicate that a data form should be used to document the hydrology, vegetation, and soil characteristics for each community type within a site, or in the case of sites that are greater than five acres, for observation points within each community type along transects within a site.[14] Because the appellant's site is documented in the AR as being approximately 33 acres,[15] both the 1987 Manual and the Supplement direct the District to establish transects within the site and document the conditions at observation points within each community type along those transects.

Documents provided by both the appellant and the District that were considered as part of the evaluation of this RFA show that wetlands are present within the appellant's property. The District documented the conditions at four locations within the site on four wetland data forms, three of which met the three wetland criteria.[16] The appellant, in its "Wetland Data Report" dated December 2010, [17] documented ten locations within the site, of which only three met all three wetland criteria with one of those three being a re-sample of one of the District's wetland data points. Therefore, while the District did not address in the AR the information in the appellant's 2010 "Wetland Data Report" that was contrary to the District's conclusion, both the appellant and the District provided data sufficient to indicate a wetland is present in at least one location within the appellant's property.

The District identified two community types in their four wetland data forms: "wet hardwood flats" and "transitional zone." However, the locations of these four data points are difficult to determine due to the vague descriptions and duplicative coordinates provided on all four data forms.[18] During the 29 June 2012 appeal meeting, the District stated the location of each data point was included as part of the data form's name and that the duplicative coordinates on the four data forms were due to an error. The four data forms do contain general location information under the "sampling point" section such as "north end," "SW quad," "east side," and "low slope/transition,"[19] but this location information is general in nature and, without more precise coordinates or detailed written location description on the data form, is not sufficient to determine exactly where on the site the data was recorded and how that relates to the wetland boundaries illustrated on the District's AJD map. In addition to the lack of location information for these data points, the AR does not contain information regarding number and locations of any transects that were established on the site as part of the District's delineation. Therefore, the AR does not support that the District established the minimum number of required transects and observation points along those transects to properly determine the wetland boundaries.

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[12] 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, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center: 1-2.
[13] Supplement pages 3-5.
[14] 1987 Manual pages 41, 46, 48, 49, 53, 54, 57, and 60; Supplement page 17. The data form can be found in the Supplement, Appendices C and D.
[15] AR page 18.
[16] AR pages 100-111.
[17] This is the report noted in section 2.d. on page 4 of this decision document as missing from the District's AR. Because the appellant provided this report to the District prior to 19 July 2011, it was considered as part of the evaluation of this RFA.
[18] AR pages 100, 103, 106, and 109.
[19] AR pages 100, 103, 106, and 109.

ACTION: The District should follow the instructions in the 1987 Manual and the Supplement for sites greater than five acres to correctly identify and delineate wetlands associated with the appellant's property potentially subject to regulation under Section 404 of the Clean Water Act. The District should ensure that they clearly document in the AR the hydrology, vegetation, and soil characteristics at each observation point within each community type along each transect within the property. Furthermore, the District should clearly identify the location of each observation point within the AR. Additionally, the District should clearly state in the AR how they considered the information contained in the appellant's "Wetland Data Report," dated December 2010. Should this analysis result in a change in some aspect of the wetlands within the review area (i.e., size of the wetlands, their proximity to the non-RPW, or other), the District should reassess if regulatory jurisdiction extends to these wetland areas by following relevant regulations, guidance, and policy while considering these changes. The AR should be revised accordingly to document and reflect the additional factual data considered and this analysis.

Reason 2: "The District used incorrect data. More specifically, the appellant stated, "The map associated with the JD is not accurate," and that the District altered the appellant's map by changing the eastern north/south oriented wetland into a "water of the U.S." that exits the property. The appellant asserts the wetland is entirely within the property and is adjacent and drains into a non-relatively permanent water (a ditch) that is not a water of the U.S.

FINDING: This reason for appeal has merit.

In the RFA, the appellant notes that the District's AJD map[20] is, "[D]erived from or utilizes a topographic map provided to the District by [the appellant]." The appellant states that this topographic map, found on AR page 86 and included as Exhibit G in their RFA dated 4 August 2011, illustrates two, north/south oriented wetland swales on the property's southeast corner. The appellant asserts that the District removed, "[M]ost of the easternmost north-south [wetland] feature. . . " and incorrectly illustrated it as a stream that flows, "[O]ff-property and directly into the ditch that turns into Harrels Lateral." The appellant further asserts that this is a misrepresentation of their property as well as the alleged connection between the property and the perimeter ditch to the east. The appellant believes that water actually flows through the eastern, north/south wetland swale, then, "[T]turns to the east, proceeds to the perimeter ditch, and then to Harrels Lateral."[21]

During the 29 June 2012 appeal meeting, the District confirmed that they used the appellant's topographic map as a base map for their AJD map found on AR page 5. The District further stated that while they believe the wetland swales illustrated on the appellant's topographic map are waters of the U.S., they do not believe that the topographic map provided an accurate depiction of waters of the U.S. on the property. The District also indicated that the blue line illustrated on their AJD map represents a stream with an ordinary high water mark which they believe is the westernmost section of the unnamed tributary/Harrell's Lateral. The District indicated during the appeal meeting that the alignment of the eastern portion of the unnamed tributary/Harrell's Lateral is illustrated on the figure found on AR page 113, while the western

[20] The District's AJD map is located on AR page 5.
[21] The appellant referred to Figure 4 on AR page 29 as an illustration of this flow path. This figure is included in the appellant's report dated May 2011 which is included in their submittal to the District dated 19 May 2011.

portion of the feature is illustrated by the blue line shown on their AJD map.[22] The District stated they drew this portion of the feature on the appellant's topographic map by hand, and in doing so, they inadvertently covered up the eastern north/south oriented wetland swale. Finally, the District stated they did not map the location or alignment of the western portion of the unnamed tributary/Harrell's Lateral with a GPS relative to the appellant's property. Therefore, the District stated their AJD map may not be accurate in that the stream may actually meander on and off the appellant's property.

The District confused the AR when they created an AJD map that included components of the appellant's topographic map with which they disagreed. Furthermore, the District's AR lacks an accurate basis demonstrating the alignment of the unnamed tributary/Harrell's Lateral, especially the western portion directly associated with the appellant's property. Therefore, the AR does not support the size, orientation, and alignment of the features illustrated on their AJD map.

ACTION: The District should revise the AR to correctly illustrate the size and orientation of wetlands associated with this AJD request by following the instructions included in the action for the first reason for appeal. Additionally, the District should re-evaluate the location and alignment of the other waters of the U.S. (streams) to provide a more accurate representation of these features on their AJD map. Should this analysis result in a change in some aspect of the wetlands and other waters within the review area (i.e., size of the wetlands, their proximity to a the non-RPW, or other), the District should reassess if regulatory jurisdiction extends to these aquatic features by following relevant regulation, guidance, and policy while considering these changes. The AR should be revised accordingly to document and reflect the basis of this re-evaluation.

Reason 3: The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant stated, "The 'culvert underneath an old race track' does not provide the claimed hydrological connection." The appellant further asserted the culvert was buried before he exposed it so, at best, only minimal amounts of water can pass through it. Therefore, the appellant believes the onsite wetland should be considered isolated.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant states that the culvert the District used to establish adjacency between the on-site wetlands and the unnamed tributary/Harrell's Lateral was formerly buried. The appellant further states that they exposed the ends of the culvert and clarified during the 29 June 2012 appeal meeting that they did this in order to determine if it would be capable of draining runoff associated with their proposed project from the site. Additionally, the appellant states in their RFA that, "[T]he pipe itself is filled with dirt," and that there is an elevation rise downstream from the culvert. The appellant observes that, "[T]he invert (or bottom) of the pipe at its eastern end is lower than the ditch invert (the bottom of the ditch) and the top of the pipe is at the same elevation as the ditch invert." The appellant then concludes that, "The blockage of the pipe and its elevation means that the alleged hydrological connection simply does not exist," and that, "At the very least, the blockage and elevations

[22] The District provided this comment during the 29 June 2012 appeal meeting; however, the AR does not support it. This is discussed further in the discussion pertaining to the fourth reason for appeal in this decision document.

minimize flow to the extent that any flow from the Property to the 'unnamed tributary/Harrels Lateral' is completely insignificant for reasons that have nothing whatsoever [to do]with the assimilative capacity of the Property." Finally, the appellant stated during the appeal meeting that is unlikely that flow comes through the culvert at all, but if flow does move through the culvert, the appellant believes it is minimal at best.

Regulations at 33 CFR § 328.3(c) state that, "[A]djacent means bordering, contiguous, or neighboring." It further states that, "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" Revised *Rapanos*[23] guidance issued by the U.S. Army Corps of Engineers (Corps) in 2008 further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters. This hydrologic connection may be intermittent; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.[24]

The District states on their AJD form that the onsite wetland is, "[P]art of a larger wetland adjacent to the unnamed conveyance tributary/Harrels Lateral (non-RPW). . . ."[25] The District illustrates this larger wetland on AR pages 61, 61a, 62, and 62a, and indicates on the AJD form that adjacency between this wetland and the unnamed tributary/Harrell's Lateral is established by a discreet wetland hydrologic connection as well as an ecological connection.[26] While the District does not provide any further conclusions relative to the ecological connection in their AR, they do state that the, "[H]ydrological connection between this wetland and the unnamed conveyance tributary/Harrels Lateral is maintained via a culvert underneath an old race track on the eastern edge of the property."[27] The District acknowledged during the 29 June 2012 appeal meeting that they did not know the condition of the culvert prior to their site visits, but stated that they did observe sediment filled flow coming out of and around the exposed culvert during multiple site visits. This is documented on their AJD form where the District noted, "Flow through the culvert was directly observed by USACE during several site inspections in late 2010 and early 2011, and substantiated by indicators (wrack lines, sediment deposits, etc.) of flow remaining visible during a lengthy drought period in Summer 2011."[28] The District addressed the downstream elevation rise during an additional site inspection in June 2011 in which the District remarked, "Evidence of flow in the unnamed conveyance tributary/Harrels Lateral, including sediment deposits at 12-14" above the bottom of the lateral, indicates that flow gets past these high spots."[29]

The District's rationale in determining adjacency via an unbroken surface connection between the on-site wetland and the unnamed tributary/Harrell's lateral was consistent with regulation

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[23] Combined cases of *Rapanos v. United States* and *Carabell v. United States.* 126 S. Ct. 2208 (2006).
[24] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States,* p. 5-6.
[25] See section III.C.2.on AR page 10.
[26] See section III.B.2(i)(c) on AR page 9.
[27] See section III.C.2.on AR page 10.
[28] See section III.C.2.on AR page 10.
[29] See section III.C.2.on AR page 10.

and guidance and supported in the AR. Even the appellant acknowledged the potential of at least an intermittent connection between the onsite wetland and the unnamed tributary/Harrell's Lateral by stating in their RFA that, "[T]he blockage and elevations minimize flow. . ." and commenting during the appeal meeting that if flow does move through the culvert, it is minimal at best. However, because the District failed to correctly identify and delineate the wetlands associated with the appellant's property as well as correctly illustrate on their AJD map the size, orientation, and alignment of the other aquatic features associated with this AJD request, application of the adjacency criteria set forth in the regulations at 33 CFR § 328.3(c) and the revised *Rapanos* guidance in this circumstance is premature. Therefore, the District did not adequately support their conclusion that the on-site wetland is adjacent to the unnamed tributary/Harrell's Lateral by an unbroken surface hydrologic connection (the culvert).

ACTION: The District should first respond to the actions associated with the first two reasons for appeal to correctly identify the size and location of any on-site wetlands and their position relative to the other aquatic features associated with this AJD request, then determine if any wetlands meet the adjacency criteria set forth in applicable regulations, guidance, and policy. The AR should be revised accordingly to document and reflect the additional factual data considered in this analysis.

Reason 4: The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant asserts that, "The corps failed to consider the proper 'tributary.'" The appellant believes the District erred when it combined the north/south oriented ditch with Harrell's Lateral in its significant nexus evaluation and that the evaluation should be limited to the north/south oriented ditch and its adjacent wetlands.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant states that a pair of lower order streams or ditches run along the eastern perimeter of their property flowing south and north toward each other. The appellant further states that these two streams converge east of their property and eventually become a higher order stream, or Harrell's Lateral. Therefore, the appellant believes that the unnamed tributary/Harrell's Lateral is not one feature as the District asserts, but actually two different streams, the lower order unnamed tributary (or ditch) and the higher order Harrell's Lateral.

The appellant believes the District should have based their significance nexus determination solely on the southern, lower order unnamed tributary (ditch) instead of combining this unnamed tributary with Harrell's Lateral and then considering this combined feature as the basis of their significant nexus evaluation. The appellant further believes this error resulted in the Corps incorrectly considering flow from the wrong tributary as well as other wetlands as similarly situated. The appellant believes that the Corps' significant nexus determination should have considered only the flow at the downstream portion of the unnamed tributary (the point at which this lower order stream enters the higher order Harrell's Lateral) as well as only those wetlands adjacent to the unnamed tributary (ditch) located along the eastern property boundary and not those that were adjacent to Harrell's Lateral.

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,[30] the Environmental Protection Agency (EPA) and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the District's AR. The two agencies issued joint revised *Rapanos* guidance on 2 December 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.[31]

The *Rapanos* guidance requires the application of two new standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over traditionally navigable waters (TNWs) and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally")(RPW) and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" determination 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. Consequently, the agencies may assert jurisdiction over every water body that is not an RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to Clean Water Act jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary.

The *Rapanos* guidance defines a tributary as, "[T]the entire reach of the stream that is of the same order (i.e. from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." The guidance further indicates that a significant nexus determination is made by evaluating the flow characteristics of the tributary from the point where water is contributed to a higher order tributary together with the functions of all the wetlands adjacent to the tributary.

Implementation of the *Rapanos* decision requires the Corps to strive to be more thorough and consistent in documenting jurisdictional determinations. To meet this requirement, the Corps now uses a standardized AJD form. Instructions for completing the form are found in the *U.S. Army*

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

[31] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States.* Original guidance released June 5, 2007; revised guidance released December 2, 2008.

Corps of Engineers Jurisdictional Form Instructional Guidebook (Guidebook).[32] The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions.

In the AJD form, the District indicates that, "[W]etlands adjacent to non-RPW's that flow directly or indirectly into TNWs" are present within the review area.[33] As a result, the District was required in this case to conduct a significant nexus determination to determine whether waters and their adjacent wetlands were jurisdictional.

The District indicates in the AJD form that their significant nexus determination applies to the unnamed tributary/Harrell's Lateral and approximately 33-acres of adjacent wetlands. They further state the adjacent wetlands are comprised of two wetlands: a 28-acre wetland that is adjacent to, but not abutting the unnamed tributary/Harrell's Lateral as well as a 5-acre wetland downstream of the appellant's property that abuts the unnamed tributary/Harrell's Lateral.[34] The District also indicates that the larger, 28-acre wetland extends both on and off the appellant's property.[35]

The District illustrates the adjacent wetland areas on AR pages 61, 61a, 62, and 62a. The District commented during the 29 June 2012 appeal meeting that the eastern portion of the unnamed tributary/Harrell's Lateral is illustrated on AR pages 82 and 113, while the western portion is illustrated by the hand-drawn blue line shown on the figure on AR page 5. The District did admit during the appeal meeting that the figure on AR page 113, which was prepared for a previous AJD and for a different applicant, illustrates Harrell's Lateral as a feature that originates at Harrell's Lane and not at the appellant's property. The District stated that Livingston Parish considers Harrell's Lateral as originating at Harrell's Lane and that, prior to the appellant informing them of the Parish's designation, they believed that Harrell's Lateral extended all the way to the appellant's property. They stated this belief was based on their observation that the Lateral's dimensions are consistent both west and east of Harrell's Lane (which they stated during the appeal meeting is supported by the "general tributary characteristics" recorded on their AJD form).[36] The District further stated during the appeal meeting that the segment that flows north from Harrell's Lane has smaller dimensions than that which they designated as the unnamed tributary/Harrell's Lateral. Finally, the District indicated during the appeal meeting that they called the stream "unnamed conveyance tributary/Harrell's Lateral" solely to maintain consistency with the established naming conventions and that they still believe that the unnamed tributary/Harrell's Lateral is one feature and not two as the appellant asserts.

The rationale the District provided during the 29 June 2012 appeal meeting to support their assertion that the unnamed tributary/Harrell's Lateral is a single feature is not included in the AR. Therefore, the District did not adequately support their conclusion that the unnamed

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[32] The Guidebook was issued on June 1, 2007 as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD. Information on *Rapanos* may be found at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx.
[33] See section II.B.1.a. on AR page 6.
[34] See sections III.B.3.2 and III.C.2. on AR pages 10-11.
[35] See section III.B.3. on AR page 10.
[36] See section III.B.1(ii)(b) on AR page 8.

tributary and Harrell's Lateral are in fact a single feature upon with they could base their significant nexus determination.

ACTION: The District should revise the AR to clearly indicate the reach of the tributary upon which their significant nexus determination is based. The AR should provide a clear basis to support this conclusion along with a rationale to support the inclusion of wetlands as adjacent to this tributary. Should this analysis result in a change in the features which form the basis of the significant nexus determination (the tributary and number of adjacent wetlands), the District should conduct a new significant nexus analysis on the revised reach to determine whether there exists a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the downstream TNW. The AR should be revised accordingly to document and reflect the basis of this re-evaluation.

Reason 5: The District utilized incorrect data. More specifically, the appellant believes, "Sediments in the 'unnamed tributary/Harrell's Lateral' come from other sources." The appellant asserts that, at most, only insignificant amounts of sediments come from the property with most coming from the land surrounding the unnamed tributary/Harrell's Lateral.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the appellant asserts that the sediments the Corps observed in the unnamed tributary/Harrell's lateral did not come from their property, but rather other properties adjacent to the unnamed tributary/Harrell's Lateral. The appellant notes that developed properties north, south, and east of their property could contribute to the sediments as well as other properties adjacent to the Lateral that contain, "[A]ctive gardens and wildlife food plots that are regularly disced and cultivated." The appellant further states that sediments could not originate from their property because the hydrologic connection between the property and the Lateral is severely blocked. Finally, the appellant asserts that any sediments that could originate from their property would be, "[I]nsignificant, especially when compared to the amount of sediments originating from other sources."

As stated in the discussion for the fourth reason for appeal in this decision document, the District was required to conduct a significant nexus analysis to determine whether waters and their adjacent wetlands were jurisdictional. The District identified, in this case, the unnamed tributary/Harrell's Lateral and approximately 33-acres of adjacent wetlands as the basis of their significant nexus analysis. Therefore, the District should consider factors, such as the ability of the reach to transport or retain pollutants such as sediments, to determine whether the unnamed tributary/Harrell's Lateral and its adjacent wetlands had more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of Colyell Creek (identified by the District as the nearest downstream TNW).

The District states in the AR that their, "[S]ignificant nexus determination does not apply only to the property, but to the entire wetland on and off the property, as well as a small wetland downstream of the property."[37] This suggests that the District was considering the entire reach

[37] See section III.C.2. on AR page 10.

of the tributary and all wetlands adjacent to that tributary and not just the portion of the tributary and adjacent wetlands associated with the appellant's property. This would be consistent with the *Rapanos* guidance. However, nearly all of the District's references to sediment within the system are associated with the functions of the wetland on the appellant's property and do not include the downstream portion of the considered reach. For example, the District states, "Direct field observations indicated the presence of sediment deposits and organic carbon in the wetland and in the water flowing from the site . . . ." Additionally, the District states, "The presence of sediment deposits in the wetland demonstrates four functions accruing in the wetland that will affect the water quality of the TNW. . . ."[38]

The fact that the District was inconsistent in its consideration of this factor as it relates to their significant nexus determination is immaterial as the District did not clearly support the use of the unnamed tributary/Harrell's lateral as basis of their analysis as outlined in the discussion for the fourth reason for appeal. Therefore, discussion of factors such as sediments for this reach was premature.

ACTION: The District should first respond to the action associated with the fourth reason for appeal to correctly identify the tributary and adjacent wetlands that are the basis of their significant nexus analysis, then clearly describe the factors they considered such as the ability of the reach to transport or retain pollutants like sediments, to determine whether the tributary and its adjacent wetlands had more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of the nearest downstream TNW. The AR should be revised accordingly to document and reflect the additional factual data considered in this analysis.

Reason 6: The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant states that, "The wetlands, either on the property or in the area, do not have a "significant" nexus with the TNW."

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA dated 4 August 2011, the appellant states, "The Corps must assess the flow characteristics and functions of the tributary itself, together with the functions of the wetlands, to determine whether a significant nexus exists." The appellant also states, "[I]n addition to simply mentioning facts (e.g. wood ducks were in the area, or sediments were observed leaving the site), there must be an evaluation of the facts" and, "There is no rational basis for concluding that the 13.5 acres of wetlands on the Property (or even the 33 acres of alleged nearby wetlands) has anything more than a speculative or insubstantial affect on the chemical, physical, and biological integrity of a TNW 15-20 miles away."

As previously stated, the District indicates on the AJD form that, "wetlands adjacent to non-RPW's that flow directly or indirectly into TNWs" are present within the review area.[39] As a result, the District was required in this case to conduct a significant nexus analysis to determine whether waters and their adjacent wetlands were jurisdictional. The District indicates in the AJD form that their significant nexus analysis applies to the unnamed tributary/Harrell's Lateral and approximately 33-acres of adjacent wetlands. They further state the adjacent wetlands are

[38] See section IV.B. on AR page 13.
[39] See section II.B.1.a. on AR page 6.

comprised of two wetlands: a 28-acre wetland that is adjacent to, but not abutting the unnamed tributary/Harrell's Lateral as well as a 5-acre wetland downstream of the appellant's property that abuts the unnamed tributary/Harrell's Lateral.[40]

The Guidebook states the following regarding the significant nexus analysis:

> The field staff will assert jurisdiction over wetlands that do not directly abut an RPW where there is a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.4 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW. The significant nexus determination can be based on the wetland under review, in combination with all other wetlands adjacent to that tributary.[41]

The Guidebook further states that:

> [F]ield staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.[42]
>
> [T]he evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.[43]

Specific factors considered by the district for the significant nexus determination in this case are found in Sections III.B., III.C, and IV.B. of its AJD Form. The District the made the following statements regarding the wetlands' effects on the chemical, physical, or biological integrity of the downstream TNW:

> The unnamed conveyance tributary/Harrels Lateral has been channelized by Livingston Parish, thereby increasing flow rates and enhancing the ability of the

[40] See sectionsIII.B.3.2 and III.C.2. on AR pages 10-11.
[41] Guidebook page 56.
[42] Guidebook pages 55-56.
[43] Guidebook page 56.

> Lateral to carry sediments and particulates to West Colyell Creek.[44] In spite of increased flow rates due to work conducted on Harrels Lateral, the associated wetland system holds water back from the Lateral, thereby directly affecting the integrity of Harrels Lateral and West Colyell Creek (RPW) in a more positive respect. Pollutants in excess of the assimilative capacity of the Harrels Lateral and associated wetlands will eventually reach West Colyell Creek. Likewise, a portion of the pollutants in excess of the assimilative capacity of West Colyell Creek will eventually reach the TNW. The tributary and associated wetlands in the subject watershed can impact the TNW adversely or beneficially. To the extent that the wetland, similarly situated wetlands, and the tributary can withhold sediments, pollutants, carbon, and floodwater, this system collectively has a significant positive effect on the integrity of the TNW. Where portions of the system have been disturbed or removed, including channelization and clearing for development, the tributary and associated wetlands will have less beneficial effects on the TNW due to reduced system functionality.[45]

The District also states:

> The presence of sediment deposits in the wetland demonstrates four functions accruing in the wetland that will affect the water quality of the TNW: floodwater storage, sediment retention, pollution retention, and organic carbon transport. The duration [of wetland inundation] is long enough for silt and clay sediments and organic carbon to fall out of suspension and to be sequestered by the wetland. This would also substantiate flood storage in the wetland, which would directly affect the functionality of the unnamed conveyance tributary/Harrels Lateral and downstream waters, based on general flow characteristics and potential assimilative capacities of all. The wetland and the unnamed conveyance tributary/Harrels lateral would provide organic matter to food webs in West Colyell Creek and downstream waters. This is based on the observation of organic matter that would provide carbon to the system as well as food and substrate for aquatic insects in the wetland and Harrels lateral during periods of inundation. Observed sediment loading demonstrates a more than insubstantial or speculative impact on the integrity of waters downstream of the wetland, including the TNW. As stated earlier, the mere presence of these sediments in the water column and sediment deposits in the wetland substantiates functions accruing in the wetland with direct consequences for the integrity of the TNW.[46]

While the District describes a number of general characteristics of the wetland on the appellant's property, the AR does not contain a fact-specific analysis of how these factors constitute more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the downstream TNW (Colyell Creek). Furthermore, as stated in the discussion for the fourth reason for appeal, the District did not clearly support the use of the unnamed tributary/Harrell's lateral as basis of their significant nexus determination. Therefore, use of this reach as the basis of this determination is premature.

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[44] See section III.C.2. on AR page 10.
[45] See section III.C.2. on AR page 11.
[46] See section IV.B. on AR pages 13-14.

ACTION: The District should first respond to the action associated with the fourth and fifth reasons for appeal, then further analyze and document for the record whether there exists a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the downstream TNW. The significant nexus determination should contain a fact specific analysis of the functions that the tributary and its adjacent wetlands within the relevant reach provide and should elaborate on why the nexus between the tributary and its adjacent wetlands (including the on-site wetland) and the TNW is or is not significant, as well as why it is or is not more than speculative or insubstantial. The analysis should focus on how the functions performed by the tributary and its adjacent wetlands (including the onsite wetland) effects the physical, chemical and/or biological integrity of the downstream TNW. The AR should be revised accordingly to reflect this analysis.

Conclusion: For the reasons stated above, I have determined these six reasons for appeal have merit. The AJD is remanded to the New Orleans District for reconsideration consistent with comments detailed above. The final Corps decision on jurisdiction in this case will be the New Orleans District Engineer's decision made pursuant to my remand.

10 June, 2013
Date

John W. Peabody
Major General, U.S. Army
Division Engineer