ADMINISTRATIVE APPEAL DECISION
GARY C. LANDRIEU
JURISDICTIONAL DETERMINATION
FILE NO. MVN-2009-1686-SB-A
NEW ORLEANS DISTRICT
NOVEMBER 9, 2010

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

Appellant/Applicant: Gary C. Landrieu

Authority: Section 10, Rivers and Harbors Act of 1899; Section 404, Clean Water Act

Receipt of Request for Appeal: 26 July 2010

Approved Jurisdictional Determination Appeal Meeting and Site Visit: 14 September 2010

Summary of Appeal Decision: Mr. Gary Landrieu is appealing a New Orleans District (MVN) approved jurisdictional determination (JD) for property in Orleans Parish, Louisiana. He submitted two reasons for appeal: (1) MVN made a procedural error and omitted material facts while conducting the field work for the JD, and (2) MVN incorrectly applied law, regulation and policy used by the Corps to identify and delineate wetlands. The appellant's first reason for appeal has merit. The appellant's second reason for appeal does not have merit. Based on the first reason for appeal, the jurisdictional determination is being remanded to MVN for reconsideration and reevaluation. Instructions are provided in this decision document about the specific issues that must be addressed pursuant to the remand.

Background Information: The property in question is located north of U.S. Highway 90 on the west side of the Rigolets, a navigable channel connecting Lake Borne to Lake Ponchartrain, in Section 19, T10S-R15E, and Section 24, T10S-R14E, Orleans Parish, Louisiana. Over the years, parts of the property have been developed, including the construction of West Rigolets Lighthouse[1] in the 1830's. The area has been impacted by hurricanes over the years. All remaining structures, including the lighthouse, were destroyed by Hurricane Katrina in 2005.

[1] http://www.lighthousefriends.com/light.asp?ID=806

According to a permit database maintained by the State of Louisiana, Department of Natural Resources, Coastal Management Division,[2] Mr. Landrieu applied for a permit to dredge two of the canals on the property in 2007, but that application was withdrawn. He again applied to the state on April 8, 2009. MVN received a copy of this application on June 9, 2009. On August 14, 2009, MVN made a site inspection for purposes of conducting a jurisdictional determination. During the site inspection, as cited in a letter dated May 5, 2010,[3] MVN determined that "unauthorized dredging and deposition of fill material into waters of the U.S., including wetlands, has occurred on this property." In order to resolve the violation, MVN allowed Mr. Landrieu, at his request, to apply for an after-the-fact (ATF) permit for all existing work plus any additional work needed to complete the project. The letter of May 5, 2010, also served as an approved JD and included a map of the jurisdictional areas.[4]

Mr. Landrieu submitted a completed Request for Appeal (RFA) form, dated June 14, 2010, to the Mississippi Valley Division (MVD) office appealing the MVN jurisdictional determination. The request was received on June 16, 2010. By letter dated June 18, 2010, Mr. Landrieu was informed that his RFA could not be considered until he submitted and MVN accepted an ATF permit application (33 C.F.R. § 331.11). In the same letter, Mr. Landrieu was informed that once an ATF permit application was received, he would have to submit a new RFA with more appropriate reasons for appeal (other than simple disagreement with the JD). MVN received Mr. Landrieu's ATF permit application on June 23, 2010. By email on June 25, 2010, Mr. Landrieu was given until July 26, 2010, to submit a revised RFA. His revised RFA was received by MVD on July 26, 2010. Mr. Landrieu was informed that his RFA was acceptable by letter dated July 29, 2010.

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

[2] This information is based on an examination of the state database by Brad Guarisco of MVN. See email from Mr. Guarisco dated October 13, 2010.

[3] Administrative Record p.3-4 (AR 3-4).

[4] AR 5.

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 Mr. Landrieu. The RO received his copy on August 5, 2010. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is May 5, 2010.

2. Mr. Landrieu provided a DVD containing two photographs and two videos to the RO. These media files are not considered new information, since MVN had already been to the site (as depicted on the videos), and MVN was aware of the photographs. This information is considered clarifying for the purpose of interpreting the existing administrative record.

3. A site visit/appeal meeting was held on September 14, 2010. The RO prepared a draft Memorandum for Record (MFR) summarizing the meeting and site visit and supplied a copy to Mr. Landrieu and MVN on October 4, 2010 for comment. Via email from Mr. Landrieu on the same day, Mr. Landrieu expressed his agreement with the contents of the MFR. In an email dated October 13, 2010, Mr. Guarisco of MVN commented on part of Section 4(c)(4) of the draft MFR. He stated: "I double checked the State database. Mr. Landrieu never applied in 2008. He applied to the state on 4/23/2007 under P20070563 which was withdrawn due to lack of information supplied as stated in the record, and he applied to the state on 04/08/2009 under

P20090375, which we, the Corps, received on 06/09/2010." This information is not considered significant in relation to the current appeal, since it does not have any bearing on the jurisdictional determination in question. By email on October 14, 2010, Mr. Heffner stated that MVN did not have any further comments on the draft MFR. The final MFR may be found in Appendix A.

Appellant's Reasons for Appeal

1. New Orleans District made a procedural error and omitted material facts while collecting field data. Specifically on August 14, 2009, and February 18, 2010, they failed to take multiple, in-depth, soil and vegetation samples from various locations across the property, including the old road and other areas in question.

FINDING: This reason for appeal has merit. There is insufficient evidence in the AR to support the location of the wetland boundaries shown on the map included with the approved JD dated May 5, 2010.

DISCUSSION: MVN conducted site investigations on August 14, 2009, and on February 18, 2010, but only one data form was completed. The location of the corresponding sample site may be found on the photograph at AR 65. The data form, dated February 18, 2010, is found at AR 47-49. As explained by MVN during the appeal conference, this sample point is a reference site, i.e., an undisturbed site chosen to represent typical wetland conditions in nearby areas.[5] Characterization of a reference site is a technique often used to assess sites with man-made disturbance (*e.g.* unauthorized activities, agricultural areas).[6] Since only one data form was completed, the conclusion must be drawn that the reference site is intended to represent the total of 43.5 acres of wetlands found on the site.[7] There is no sample point which represents the 8.5 non-wetland acres identified by MVN on the site.

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[5] The data form itself does not indicate that the included data documents a reference site or that the data represents other locations on the project site.

[6] U. S. Army Corps of Engineers. 2008. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-08-30. Vicksburg, MS: U.S. Army Engineer Research and Development Center. p. 113.

[7] Based on information found in the Approved Jurisdictional Determination Form (AR 6-12).

MVN identified unauthorized activities on the project site at two locations: an area within and adjacent to (on both sides) the east-west canal, and an area north of the house (AR 5). The area south of the east-west ditch labeled on the MVN jurisdictional determination map[8] as "unauthorized activities" has been impacted by the deposition of dredged material over potential hydric soils. As a result, the correct application of the *Corps of Engineers Wetland Delineation Manual* (1987 Manual)[9] would have been to conclude that normal circumstances did not exist at this location.[10] Consequently, a determination should have been made that an atypical situation existed and the procedures outlined in Section F of the 1987 Manual should have been followed.[11]

In Section F, the investigator is directed to use *Data Form 3*[12] to describe the extent of the effects of unauthorized activity on the wetland parameter(s) (vegetation, soils, hydrology). *Data Form 3* includes fields to describe the type(s) of alteration, the effect(s) of the alteration, and the investigators' conclusion and description of the previous state of wetland parameter(s) prior to impact. MVN did not use *Data Form 3* or include elsewhere in the AR the data and information required by the form. The February 18, 2010, entry on the "pink sheet" (AR 17) does contain some non-specific information. For example: "Augured through around 3' of fill before hitting the natural ground in the violation area." The AR does not contain any information about the nature of the fill material in the "violation area" mentioned above, the hydric/non-hydric nature of the soils, or the characteristics of the hydrology of the underlying "natural ground". It is unclear how a single data form from an undisturbed reference site adequately represents this "violation area", especially since there were recent direct

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[8] AR 5.

[9] Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

[10] Sampling methods for identifying and delineating wetlands are mandated by the 1987 Manual. Section F identifies "atypical situations" where a determination has been made "that positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to the effects of recent human activities or natural events."

[11] Normal circumstances exist on a large portion of the project site, and standard procedures may be followed in those areas.

[12] Environmental Laboratory. Appendix B.

impacts (deposition of dredged material) to the "violation area" and similar impacts may have occurred multiple times over many years.[13]

The "pink sheet" also includes the following statement (AR 17):

> Walked where the old road once was. No question that a road used to be there; however, the road has since subsided and degraded back to the marsh elevation and receives tidal exchange. Hydrophytic vegetation present dominated by OBL and FACW. GPS'd fill placed by newly culverted area.

Assuming the "old road" refers to the area adjacent to the north-south canal on the west side,[14] it is once again unclear how the undisturbed reference site can adequately represent the vegetation, soil and hydrology of this area.[15] At least one sample site should have been located along this old road to document the impact of the old fill (dredged material, gravel, shells, etc.) and to assess the similarity and/or differences between the road area and the nearby undisturbed marsh immediately west of the old road. In addition, the reference on the "pink sheet" to vegetation dominated by OBL and FACW wet is anecdotal, since the actual plant species are not identified. A completed data form would have provided empirical data describing the vegetation, soils, and hydrology of the road area and as a result, MVN's assessment of the old road area as a wetland would have been more than an undocumented opinion.

ACTION: MVN should supplement the AR by assessing and documenting all three wetland parameters at more sample sites, particularly in areas that have been previously impacted by dredged and/or fill material, e.g., deposition areas adjacent to the east-west canal, the old road, and the area of unauthorized activity just north of the house. Where appropriate, MVN should use the "atypical" section of the 1987 Manual and *Data Form 3* to assess areas where normal circumstances do not exist.

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[13] As evidenced by historical aerial photographs (AR 50-62).

[14] There is an extensive historical record which shows that a lighthouse access road has existed through this area for many years (possibly since the lighthouse was built in the 1830's). The AR and the appellant's RFA include old photographs which show the road.

[15] The reference site is on the other side of the canal and is more than 800 feet away from the southern end of the old road.

2. The area occupied by the old road and the area adjacent to the east-west canal do not comply with the Corps' definition of wetlands. Accordingly, New Orleans District has incorrectly applied law, regulation and policy used by the Corps to identify and delineate wetlands. Specifically, (1) the land adjacent to the east-west canal is solid soil and is not subject to the ebb and flow of the tide, and (2) the old road is above the high water line, marked by solid vegetation and is topped with a pebble and shell surface.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The fact that an old road exists in an area does not, in and of itself, mean that an area is non-wetland. As long as the area meets the three criteria for a wetland, as defined at 33 CFR § 328.3(b) and detailed in the 1987 Manual and regional supplements,[16] its previous use is not relevant to jurisdiction.

While it is true that MVN did not adequately document the wetland status of the old road (and the approved JD is being remanded partially for that reason), when reconsidering the JD under remand, MVN may or may not determine the road to be wetland. The fact that the area has been a road for many years is not determinative one way or the other.

In addition, an area does not have to be subject to the ebb and flow of the tide in order to be a wetland. According to the regulations at 33 CFR § 328.4(a), there are three general types of jurisdictional areas: territorial seas, tidal waters of the United States, and non-tidal waters of the United States. Therefore, an area is not required to be tidal in order to be subject to Corps' jurisdiction.

Also, an area does not have to be within the high water mark in order to be considered a wetland subject to Corps' jurisdiction. The definition of "wetlands" includes areas saturated by ground water.[17] There is no requirement for an area to be inundated in order to be jurisdictional.

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[16] Per 33 C.F.R. 328.3(b), the term "wetlands" means those 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. According to the 1987 Manual, wetlands have a prevalence of hydrophytic vegetation, occur on hydric soils or soils with hydric characteristics, and have wetland hydrology.

[17] 33 C.F.R. § 328.3(b).

ACTION: No action is required.

Conclusion: I find that one of the reasons for appeal cited by Mr. Landrieu has merit. The approved jurisdictional determination dated May 5, 2010, 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
Memorandum for Record

CEMVD-PD-KM 15 Oct 2010

MEMORANDUM FOR RECORD

SUBJECT: Landrieu Jurisdictional Determination Appeal Conference and Site Visit, Orleans Parish, Louisiana, New Orleans District (Corps File Number, MVN 2009-01686-SB-A)

1. APPELLANT: Mr. Gary Landrieu
Location of Site: Orleans Parish, Louisiana
Date of Appeal Conference/Site Visit: 14 September 2010

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

3. PARTICIPANTS:

Mr. Gary Landrieu	Appellant
Mr. Rob Heffner	New Orleans District
Mr. Mike Windham	New Orleans District
Mr. Brad Guarisco	New Orleans District
Mr. Elliott Carman[18]	Administrative Appeal Review Officer (RO) Southwest Division
Dr. Wiseman	MVD RO

4. CONFERENCE SUMMARY:

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

b) Opening statements:

1) Review Officer – Due to laryngitis, the MVD RO asked the SWD RO to read an opening statement prepared by the MVD RO which explained the meeting purpose and goals (Appendix A).
2) Mr. Landrieu – Expressed his appreciation for opportunity to appeal. Indicated that he did not realize he needed a permit to discharge material in the areas where he discharged materials; expressed concern that this "small" project was getting so much attention relative to the bigger issues out there; and indicated economics is critical to his project.
3) New Orleans District (MVN) – Did not make an opening statement, but stated that the administrative record would stand on its own. Expressed to Mr. Landrieu that he was not being singled out as they were dealing with similar issues all across the District.

[18] Mr. Carman was recently selected to be the Review Officer for the Corps' Southwest Division Office. He attended the conference and site visit as an observer.

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 the contents.

1) AR 3-5 – JD letter and map
2) AR 6-14 – JD basis/appeals form
3) AR 15-17 – MVN explained this is the "pink sheet" which includes field notes, office notes, phone logs, etc.
4) AR 18-46 – Mr. Landrieu's application and JD request form. Mr. Landrieu indicated he supplied map on AR 18. He also indicated he originally applied back in 2007 with the state. MVN indicated the state eventually withdrew the project because they could not get info they needed from Mr. Landrieu. He applied again in 2008 with the state and the Corps indicated they received this application in 2009. District indicated a pre-app was not conducted, but MVN did meet with Mr. Landrieu to expedite permit processing. District indicated they found violation during August field work (8/14/09) and collected more data in February (2/18/10). They instructed Mr. Landrieu he needed to apply for JD after February field visit which is why application is dated after the JD data form (app dated 3/16/10). Application and JD request on AR 45-46 was received after C&D issued.
5) AR 47-49 – MVN indicated this is the only data form in the AR.
6) AR 50-65 – aerials photos and maps used to make determination
7) AR 66-91 – site visit photos; RO requested photo index map illustrating location/orientation of each photo.
8) AR 92-93 – SHPO report. MVN indicated the report is not releasable which is why it was redacted. District indicated the importance of the report was it indicated the lighthouse at the end of the road was only accessible by boat. Because of this, the report was part of their decision. MVD RO requested a copy of the SHPO report, but that he would check with Office of Counsel to ensure release was done properly.
9) AR 94-100 – Copy of relevant pages from Orleans Parish soil survey. MVN pointed out that mapped soils at the site were Clovelly muck, and referred to description on AR 98 which describes frequency of inundation and depth to groundwater.
10) AR 101-105 – AR 101 is email comments received from Mr. Landrieu in response to the C&D. MVN indicated the C&D was emailed to Mr. Landrieu on 9-1-09 to expedite the process and because a paper copy was not available to give him in the field on 8-14-09. MVD RO noted that page 2 of this email was missing from the AR. A copy of this page was sent to the RO which is now labeled 101a. A hard copy of this page was given to Mr. Landrieu at the meeting. MVD RO also indicated a copy of the C&D was also missing from the AR. Copy of the C&D was sent to the RO which is now labeled 101b. MVD RO emphasized that the C&D is not part of the JD appeal, but wanted to be sure this was not an issue, since the C&D was referenced in the email. MVD RO asked if the road shown on AR 103 was Hospital Road. Both MVN and Mr. Landrieu indicated it was.
11) AR 106-109 – MVN indicated this is a copy of an old JD completed in 1997 for the proposed new bridge across the Rigolets. Map 2 of 3 is missing from the AR because it depicted only open water with no wetlands.
12) AR 110-123 – MVN indicated AR 110 is a photo of the old lighthouse. AR 113-117 are Microsoft Bing aerial photographs. MVN contacted Bing to obtain dates for the aerials; Bing would not disclose.

d) RO asked if anything is missing from the AR.
   1) MVN indicated that there is tide gauge data that could be included.
   2) Mr. Landrieu stated that it was his opinion that the AR was complete.

e) RO asked if anyone had questions about anything in the AR.
   1) Mr. Landrieu indicated the 1996 Rigolets bridge JD showed the bridge was going through wetlands, and he didn't think you could get a permit for work in wetlands. MVN and RO both indicated permits are issued all the time for work in wetlands, usually with some sort of mitigation, but that a permit was not guaranteed.
   2) MVN – no questions

f) Reasons for Appeal.
   1) RO read a summary of what he considers Mr. Landrieu's two reasons for appeal, and asked if they were accurate.

      i. New Orleans District made a procedural error and omitted material facts while collecting field data. Specifically on 8/14/09 and 2/18/10, they failed to take multiple, in-depth, soil and vegetation samples from various locations across the property, including the old road and other areas in question.

      ii. The area occupied by the old road and the area adjacent to the east-west canal do not comply with the Corps' definition of wetlands. Accordingly, New Orleans District has incorrectly applied law, regulation and policy used by the Corps to identify and delineate wetlands. Specifically, (1) the land adjacent to the east-west canal is solid soil and is not subject to the ebb and flow of the tide, and (2) the old road is above the high water line, marked by solid vegetation and is topped with a pebble and shell surface.

   2) Mr. Landrieu indicated that the RO had accurately summarized the appeal reasons.

g) RO Questions about Specific Parts of the AR.
   1) Why is there is only one data form? – MVN indicated that they did take multiple points and AR 17 implies this with discussion of vegetation of "non-wet" areas. They did not take pits along the road because it was inundated during the investigation. District also said the same conditions were present across the entire site, but they also indicated that the AR (including data point) does not make this clear. District also said they were not questioning that the road was an old road. They were claiming that it had subsided and become wetland. Finally, they indicated they only walked approximately 100 yards past the old canal, and then used in-house resources along with field data to make their JD call. They felt that was adequate. District also indicated that the plot illustrated on AR 65 had 6-8" of standing water at time of field visit.
   2) LIDAR and 2' Contour Maps (AR 63-64) – RO observed that the boundaries illustrated on the LIDAR and 2' contour maps were very similar and that the contour map just indicated areas that were less than 2'. RO cautioned that areas mapped as less than 2' could be 0' or 1.99' and that it appeared that elevation increased along the

old road near end of the canal. District agreed and also indicated there could be some error on the 2' contour line, but that the JD did not extend to the end of the canal based on the map they were given by Mr. Landrieu. Mr. Landrieu indicated he had a new survey he could provide. RO indicated that future use of the new survey was between Mr. Landrieu and MVN. Since it was not part of the existing record, it could not be considered during the appeal.

3) TNW wetlands and mean high water mark – RO observed that wetlands were identified on AR 7 as TNW and asked if all wetlands were below mean high water mark. MVN indicated they were below OWHM and wetlands (including point of road on map) are subject to ebb/flow of tide. MVN indicated they used tide gauge data to determine mean high water. They brought only one copy of the data, and the RO requested they give it to the appellant and provide a copy to the RO later.
4) Old ORM Number – RO observed a different ORM # (#2009-01536-EPP) in the AR. District indicated this was number used by the Evaluation Section and that a new number was assigned the file was transferred to the Surveillance and Enforcement Section.
5) Fort Pike Lease Area – Mr. Landrieu indicated this area is leased from the State of Louisiana.
6) Video provided to the RO by Mr. Landrieu – RO pointed out that Mr. Landrieu referred to the videos as "new information," but that technically it was not new information, since MVN had been to the site and seen the area shown in the video.

h) The RO then asked if anyone would like to make any final statements or point out anything that had not previously been discussed.
    1) MVN stated that Section 10 jurisdiction extended to high water mark resulting from wind driven tides, not just the mean high tide line. They concluded that the entire area was not necessarily tidal, but that it was all subject to Section 10 jurisdiction and was a TNW.
    2) Mr. Landrieu indicated that he believed that just because its red on the LIDAR and below 2' contour line doesn't mean it's a wetland. MVN referenced soil discussion on AR 97, but did indicate they were not soil scientists and couldn't confirm it was mapped correctly.

5. SITE VISIT – Beginning at approximately 10:45am, the participants observed and discussed the site. We observed locations of data points, approximate location of 2' contour line, and the location where previous fill activity may have occurred. The RO asked MVN to show the location of sample sites and the location of other points of observation during their previous site visits. The appeal meeting and site visit concluded at approximately 11:15am.

6. REVIEW – On 4 Oct 2010, a draft of this MFR was forwarded to Mr. Landrieu and MVN for review and comment. By email dated the same day, Mr. Landrieu agreed that the contents of the MFR were accurate. In an email dated 13 Oct 2010, Mr. Guarisco of MVN commented on part of Section 4(c)(4) above. He stated: "I double checked the State database. Mr. Landrieu never applied in 2008. He applied to the state on 4/23/2007 under P20070563 which was withdrawn due to lack of information supplied as stated in the record, and he applied to the state on 04/08/2009 under P20090375, which we, the Corps, received on 06/09/2010." This information

is not considered significant in relation to the current appeal, since it does not have any bearing on the jurisdictional determination in question. By email on 10/14/2010, Mr. Heffner stated that MVN did not have any further comments on the draft MFR.

James B. Wiseman, Jr.
Administrative Appeals Review Officer