

**ADMINISTRATIVE APPEAL DECISION
P&L INVESTMENTS IX, LLC
APPROVED JURISDICTIONAL DETERMINATION
NEW ORLEANS DISTRICT
MVN-2013-01059-2-SD**

Division Engineer: Major General Kimberly A. Peeples, Mississippi Valley Division¹

Review Officer: Travis Morse, South Pacific Division

Appellant: John King, Breazeale Sachse & Wilson, LLP

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

Date Acceptable Request for Appeal Received: March 11, 2025

Date of Appeal Meeting: June 17, 2025

Summary of Appeal Decision: This appeal concerns an Approved Jurisdictional Determination (AJD) issued by the New Orleans District (District) on February 7, 2025, for an approximately 67.11-acre property owned by P&L Investments IX, LLC (Appellant) in St. Charles Parish, Louisiana. The District determined that certain aquatic resources on the property—specifically, Non-wetland water-1 (Cross Bayou Canal), Wetland-1, and Wetland-2—are Traditional Navigable Waters (TNWs) subject to regulatory authority under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (RHA).² The District's jurisdictional determination is primarily based on its determination that these aquatic resources are tidally influenced.

On March 11, 2025, the Mississippi Valley Division (MVD) received the Appellant's Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form. The Appellant challenges the District's decision, asserting that: (1) The District failed to adequately consider information presented by the Appellant, leading to factually incorrect conclusions regarding tidal influence and the operational status of the Cross Bayou Control Structure; and, (2) The AJD contradicts the Supreme Court's ruling in *Sackett v. EPA* and the ruling in *Lewis v. United States* by not requiring a continuous surface connection (CSC) for wetland jurisdiction.

The administrative record (AR) was reviewed for compliance with applicable policy, regulations, and guidance. For the reasons detailed below, the appeal is found to have merit regarding Reason for Appeal 1. The AR was found to be inadequate to support

¹ Pursuant to 33 CFR 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. While the Review Officer served to assist the Division Engineer in reaching and documenting the Division Engineer's decision, the Division Engineer made the final decision on the merits of this specific appeal. The District Engineer retains the final Corps decision-making authority for the approved jurisdictional determination.

² AR 002-010.

the AJD's jurisdictional findings, specifically lacking sufficient documentation of the District's considerations of the Appellant's submissions and a clear application of regulatory definitions to the current site conditions. Therefore, the AJD is remanded to the New Orleans District Engineer for reconsideration.

Information Received and its Disposition During the Appeal: The administrative appeal was evaluated based on the District's AR, the Appellant's Request for Appeal (RFA), and discussions at the appeal meeting with the Appellant and the District.

Pursuant to 33 CFR 331.2, the AR is limited to information contained in the record as of the date of the NAO/NAP form (February 7, 2025).³ No new information may be submitted to support an RFA.⁴ While new information cannot be added to the AR, the Review Officer (RO) may allow parties to interpret, clarify, or explain issues and information already contained within the AR to assist the Division Engineer. Such interpretations, clarifications, or explanations do not become part of the AR but may be used by the Division Engineer to determine whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.⁵

A general account of the timeline and information received during this appeal review is as follows:

- a. On April 3, 2025, MVD coordinated assistance from the South Pacific Division in reviewing the subject appeal.
- b. On April 7, 2025, MVD notified the Appellant that the 181-page RFA was complete and contained acceptable reasons for appeal. The notification also requested that the District provide identical copies of the AR to MVD and the Appellant.
- c. On April 17, 2025, 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 February 7, 2025.
- d. On June 17, 2025, a virtual, informal appeal meeting was held with the Appellant, District, and RO in attendance.
- e. On June 20, 2025, the RO provided a draft Appeal Meeting Memorandum for Record (MFR) to the Appellant and the District, summarizing the appeal meeting
- f. On July 3, 2025, both the Appellant and District provided edits to the Appeal Meeting MFR. The Appellant provided additional comment on July 7, 2025.

³ AR 011.

⁴ See 33 CFR 331.2.

⁵ See 33 CFR 331.7(f).

g. All comments on the draft Appeal Meeting MFR received from the District and the Appellant, were considered by, and included with, the final Appeal Meeting MFR, signed July 8, 2025.

Evaluation of the Appellant's Reason for Appeal, Findings, and Instructions to the District Engineer. The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation of its action, including a rational connection between the facts found and the decision made. The reasons for appeal below are based on the Appellant's RFA but have been rephrased for clarity.

Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer

REASON FOR APPEAL 1: The District failed to adequately consider, or actively ignored, information presented by P&L, leading to factually incorrect conclusions.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant contends that the District's assertion of jurisdiction, specifically the finding that the onsite aquatic resources are tidally influenced and thus subject to CWA and RHA jurisdiction, is flawed because the District did not adequately consider the information provided by the Appellant regarding the operational status of the Cross Bayou Control Structure. The Appellant argues that the continuous closure of this structure severs any tidal connection to Lake Pontchartrain, rendering the P&L property non-tidal and non-jurisdictional.

Jurisdiction for the U.S. Army Corps of Engineers (Corps) over "navigable waters of the United States" under the RHA and "waters of the United States" under the CWA requires adherence to 33 CFR parts 328 and 329, respectively.

Under the CWA, TNWs are defined at 33 CFR 328.3(a)(1) to include, but are not limited to, the "navigable waters of the United States" as defined under the RHA. A water body qualifies as a "navigable water of the United States" if it meets any of the tests in 33 CFR part 329.

33 CFR 329.4 states that "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." The "and/or" indicates that meeting at least one of these criteria is sufficient for navigability. Waters subject to the ebb and flow of the tide are automatically considered jurisdictional under both the CWA and RHA.

Tidal waters and federal jurisdiction in these areas are defined as ending "where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm."⁶ For CWA jurisdiction in tidal waters, the landward limit extends to the High

⁶ 33 CFR 328.3.

Tide Line (HTL).⁷ The HTL is "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide."⁸ For RHA jurisdiction in tidal areas, the primary determinant is the Mean High Water Line (MHWL), which is the average of high water heights observed over a 19-year period.⁹ Tidal wetlands are considered part of navigable waters only if they are subject to inundation by the mean high waters.

33 CFR 328.5 notes that man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified.

The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* instruct staff to provide supportive rationale in the AR, disclose the data and information relied upon, explain what data or information received greater or lesser weight, and detail professional judgment or assumptions used.¹⁰ Documentation must provide a comprehensible foundation for the decision, explain gaps in the AR, and include logical arguments to address inconsistent information.¹¹ The District is to document its findings contextually, note which specific aspects of a submittal are not relied upon, state the reason why any such aspects were not relied upon, address objections from the requestor, and "clearly document the reasons for reaching a contrary conclusion."¹²

The AR includes the AJD MFR,¹³ a Joint Permit Application,¹⁴ two prior Preliminary Jurisdictional Determinations (PJDs),¹⁵ an aquatic resource delineation report,¹⁶ and various correspondence and in-house resources.¹⁷ Notably, the Water Control Plan for Drainage Structures (WCP)¹⁸ is included as a key supporting document.

The District's MFR asserts that Wetland-1, Wetland-2, and Non-wetland water-1 (Cross Bayou Canal) are jurisdictional as TNWs under 33 CFR 328.3(a)(1) due to being tidally influenced.¹⁹ The MFR states these resources "have been previously determined to be tidally influenced" in two prior jurisdictional determinations. The MFR details the flowpath from the subject aquatic resources to Lake Pontchartrain, a TNW.²⁰ The AJD references the WCP, specifically Section 4-2(a) and Exhibit D, Section 3, stating that

⁷ 33 CFR 328.4.

⁸ 33 CFR 328.3(c)(3).

⁹ 33 CFR 329.12(a)(2).

¹⁰ See March 2025 *Standard Operating Procedures for the United States Army Corps of Engineers Regulatory Program*.

¹¹ See RGL 16-01; Questions and Answers for RGL 16-01, #8.

¹² See RGL 16-01; Questions and Answers for RGL 16-01, #8.

¹³ AR 005-010, 015-020.

¹⁴ AR 027-033.

¹⁵ AR 076-217.

¹⁶ AR 041-075.

¹⁷ AR 001, 024-025, 230-253, 328-335.

¹⁸ AR 254-327.

¹⁹ AR 006, 016.

²⁰ AR 006, 016.

the Cross Bayou Control Structure "will be kept open during normal hydrometeorological conditions except for inspection and maintenance,"²¹ implying consistent tidal exchange with Lake Pontchartrain.²² Lake Pontchartrain gage data²³ is referenced in the MFR to represent tidal water stage data.²⁴

However, the Appellant submitted information challenging this premise, arguing that the levee system and closed gates of the Cross Bayou Control Structure sever tidal influence and isolate the P&L property from Lake Pontchartrain (Appellant's May 6, 2024, letter,²⁵ and Sept. 22, 2023, letter²⁶). The Appellant's submission asserts that the gates "remain in a closed position" and "have been closed for at least two years," opened only "infrequently for testing purposes."²⁷ This assertion is supported by approximately 20 inspection reports documenting the Cross Bayou Control Structure as "Closed," and video and photo evidence provided by the Appellant.²⁸ The Appellant contends that this consistent, prolonged closure constitutes a permanent alteration of the hydrology, creating a non-tidal environment and severing the jurisdictional nexus.²⁹

The AR reveals that the District was aware of this conflicting information. The AR contains an internal tracking and documentation form, referred to as the "Pink Sheet," which is used to manage and record the progress of specific requests, showing what information was considered, who was involved, and the key steps taken from initial receipt to final determination. The Pink Sheet notes from October 28, 2024, confirm receipt of "video and photos from J. King depicting the Cross Bayou WCS as closed."³⁰ Furthermore, the Pink Sheet states, "If the WCSs were operated in compliance with the operation plan, it would allow for tidal exchange with the non-wetland waters outside of the levee system."³¹ This phrasing, also found in the MFR,³² suggests the District's awareness that the actual operation of the control structure might not align with the WCP's intended operation.

Despite this awareness, the AR does not contain a thorough investigation or analysis by the District to reconcile the Appellant's evidence of continuous gate closure with the District's assertion of tidal influence. The District's attempts to verify the operational status of the control structure were unsuccessful; a District botanist noted in the Pink Sheet³³ and emails³⁴ that he contacted a representative from the Pontchartrain Levee District and then the Hurricane Protection Manager for St. Charles Parish, Mr. Sam

²¹ AR 007, 017, 269, 325.

²² AR 006, 016.

²³ AR 253.

²⁴ AR 007, 017.

²⁵ AR 047-050.

²⁶ AR 051-056.

²⁷ AR 049.

²⁸ AR 025, 333-335.

²⁹ AR 049, 054-055.

³⁰ AR 025.

³¹ AR 025.

³² AR 007, 017.

³³ AR 025.

³⁴ AR 328-329.

Schoelle, but Mr. Schoelle "was unable to answer my question about the normal operation/operational plan for the [Cross Bayou Control Structure]. He will forward my email to the operators."³⁵ This indicates the District did not obtain definitive information to counter the Appellant's claims. The AR therefore proceeds with a jurisdictional finding based on the intended operation of the structure as outlined in the WCP, rather than a verified assessment of its actual operation.

The District's reliance on prior PJDs F (MVN-2008-01205-SZ and MVN-2013-01059-SY)³⁶ is also problematic. A PJD explicitly states that it "does not make an official determination of jurisdictional waters"³⁷ and is "not appealable."³⁸ To base an AJD, which is a definitive and appealable action, heavily on preliminary assessments is unsound, especially when those assessments predate or fail to address critical, material changes in site conditions like the alleged continuous closure of the control structure. The 2014 PJD, for example, states that a portion of the wetland "may be subject to Corps' jurisdiction," which is not a definitive finding.³⁹

Furthermore, the inclusion of Lake Pontchartrain Gage Data in the AR,⁴⁰ while generally relevant to regional hydrology, does not provide site-specific evidence of tidal influence on the P&L property if the Cross Bayou Control Structure's gates are indeed continuously closed. If the physical connection to the TNW is severed by the gates, the water level fluctuations in Lake Pontchartrain cannot logically convey tidal influence on the subject aquatic resources. The AR lacks an analysis that bridges this critical gap or explains the data's relevance considering the Appellant's claims of isolation.

The District's MFR states that it is "not to be used to make a report of findings to support a determination that the water is a navigable water of the United States" and that the District "must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA."⁴¹ This statement indicates an acknowledgment by the District of the need for a specific navigability determination for Section 10 jurisdiction, yet the AR does not contain or reference such a determination. The District stated that no study or determination of navigability was conducted or required for the AJD because the associated aquatic resources had previously been determined to be tidally influenced.⁴² This circular reasoning, without addressing the submitted information regarding the current operational realities of the control structure, fails to establish a jurisdictional basis.

³⁵ AR 025.

³⁶ AR 076-217.

³⁷ AR 082.

³⁸ AR 012, 022.

³⁹ AR 077.

⁴⁰ AR 253.

⁴¹ AR 007, 017, footnote 6.

⁴² AR 006, 016.

The Appellant also argues that the levee system⁴³ and the US Highway 61 Roadside Ditch⁴⁴ are man-made structures that sever any connection to TNWs,⁴⁵ citing an elevation difference of up to 1.5 feet.⁴⁶ While the MHWL defines the geographic limit of potential RHA jurisdiction in tidal wetlands, it is not reasonable to automatically infer that all areas are navigable waters where tidal flow is controlled by levees and gates. Thus, if the District cannot establish tidal influence, it is then incumbent upon them to prove navigation. Crucially, the AR contains no documentation of the HTL, nor does it provide evidence of either a relevant MHWL or past/present navigation for these specific aquatic resources.

In summary, the AR does not adequately support the District's assertion of tidal influence as a basis for jurisdiction. The District failed to reasonably address evidence presented by the Appellant regarding the actual operational status of the Cross Bayou Control Structure. The AJD's continued reliance on the intended operation outlined in the WCP, without verified assessment of actual conditions on the ground, coupled with its reliance on PJDs, means the AJD lacks adequate foundation. The District's determination of jurisdiction is not sufficiently documented, and there is conflicting information provided by the Appellant within the AR that was not adequately addressed.

ACTION: The District should revisit the jurisdictional determination, considering the actual, current impact of the Cross Bayou Control Structure on the jurisdictional status of the P&L property. Upon remand, the New Orleans District should take the following actions:

a. Conduct a thorough, objective investigation into the actual, current operating conditions of the Cross Bayou Control Structure, directly addressing and reconciling the Appellant's evidence of prolonged closure.⁴⁷

b. Analyze site-specific water gauge data from Cross Bayou Canal (in particular, gauges 85660 and 85661⁴⁸) to determine the extent to which tidal fluctuations currently reach the P&L property, considering the verified operation of the control structure. The District should include this analysis in the revised AR.

c. Identify and document the HTL and MHWL relative to the P&L property, based on current conditions.

d. Re-evaluate the jurisdictional basis for both RHA Section 10 and CWA Section 404, considering the new information gathered and verified, ensuring compliance with 33 CFR 328 and 329 for federal jurisdiction.

⁴³ AR 052.

⁴⁴ AR 053.

⁴⁵ AR 050, 056.

⁴⁶ AR 053.

⁴⁷ AR 025, 049, 328-335.

⁴⁸ AR 253.

e. Clearly document all findings, data, and analysis in a revised AJD. The AJD MFR must either provide a stronger justification for relying on the WCP despite the Appellant's evidence of gate closures, or explain why the presented evidence of gate closures does not negate tidal influence or federal jurisdiction. The AJD MFR must explicitly address the Appellant's evidence indicating the gates being closed.

f. Clearly document all necessary evaluations, and report all findings in detail; particularly where the District disagrees with information submitted by the Appellant.

REASON FOR APPEAL 2: The AJD contradicts *Sackett* and *Lewis*.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The Appellant claims the District's assertion of jurisdiction over wetlands on the P&L property contradicts the rulings in *Sackett v. EPA* and *Lewis v. United States*, arguing that a continuous surface connection (CSC) is required for wetland jurisdiction.

Sackett v. EPA, 598 U.S. 651, 143 S. Ct. 1322 (2023), established that for a wetland to be considered jurisdictional under the CWA as an "adjacent wetland" to a "relatively permanent body of water" (RPW) connected to TNWs, it must have a "continuous surface connection" (CSC). *Lewis v. United States*, 88 F.4th 1073 (5th Cir. 2023), reinforced this requirement.

33 CFR 328.3(a)(1) defines "waters of the United States" to include TNWs, which are those waters that (1) are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

The Appellant argues that the District improperly asserted jurisdiction by not requiring a CSC between the wetlands and Cross Bayou Canal, citing *Sackett* and *Lewis*.⁴⁹ The Appellant further contends that a 1.5-foot elevation difference and visual distinctions demonstrate a factual separation between the wetlands and Cross Bayou Canal, contradicting the District's finding of "no separation."⁵⁰ The AR contains the Appellant's core arguments, including a comprehensive explanation of the Appellant's reasoning and figures illustrating the property layout, levee system, and elevation changes.⁵¹

However, the District's jurisdictional assertion does not rely on the wetlands being "adjacent wetlands" requiring a CSC under the *Sackett* standard. Instead, the District bases its jurisdiction on the claim that the wetlands themselves, along with the non-wetland waters, qualify as TNWs under 33 CFR 328.3(a)(1) because they are subject to the ebb and flow of the tide.⁵² The MFR states that Wetland-1 and Wetland-2 have "no

⁴⁹ AR 047-050, 051-056.

⁵⁰ AR 050, 053, 056.

⁵¹ AR 051-056, 075.

⁵² AR 007, 017.

separation from Cross Bayou Canal (Non-wetland water-1)" and that Cross Bayou Canal is "tidally influenced."⁵³ In this instance, the District did not assert jurisdiction based on the features' proximity to a TNW; rather, it asserted that the onsite wetlands and non-wetland waters are themselves TNWs due to tidal influence. Therefore, a CSC to a separate TNW is not relevant to this specific jurisdictional claim.

While the Appellant provides evidence of an elevation difference and visual distinctions between the wetlands and Cross Bayou Canal,⁵⁴ these arguments regarding the CSC requirement established by *Sackett* and reinforced by *Lewis* are not applicable in light of the District's stated basis for jurisdiction. The AJD did not find the wetlands at the P&L property to be "adjacent" wetlands under a *Sackett*-like analysis; instead, they were determined to be tidal wetlands that are themselves TNWs.⁵⁵

ACTION: The District's handling of the AJD request did not constitute an abuse of discretion or a violation of any law, regulation, Executive Order, or officially promulgated Corps policy guidance with regard to the applicability of *Sackett* and *Lewis* to this case. No specific action is required regarding the application of *Sackett* or *Lewis* in this remand. The focus of the remand should remain on determining whether the record contains sufficient evidence to support the District's claim that the aquatic resources on the P&L property are tidally influenced, or otherwise subject to federal jurisdiction, as outlined in Reason for Appeal 1.

Conclusion: This AJD is remanded to the New Orleans District Engineer for further analysis and documentation in accordance with 33 CFR 331.10(b) for reconsideration. The remand is due to inadequate documentation and procedural compliance, as outlined under Reason for Appeal 1.

Therefore, the AJD for MVN-2013-01059-2-SD is remanded to the New Orleans District for further investigation and re-evaluation. The District should:

- a. Conduct a thorough, objective investigation into the actual, current operational status of the Cross Bayou Control Structure, directly addressing and reconciling the Appellant's evidence of prolonged closure.⁵⁶
- b. Analyze how the verified operational status impacts the hydrological connection and tidal influence on the subject aquatic resources, providing a detailed assessment of whether the conditions necessary for CWA and RHA jurisdiction (e.g., tidal influence) are presently met.

⁵³ AR 007, 017.

⁵⁴ AR 050, 053, 056.

⁵⁵ AR 007, 017.

⁵⁶ AR 025, 049, 328-335.

c. Re-evaluate the jurisdictional status of the aquatic resources based on this updated factual assessment, providing a reasoned explanation for its findings, independent of undue reliance on prior preliminary determinations.⁵⁷

d. Ensure all supporting data within the AR is clearly and logically connected to the final jurisdictional determination, with any apparent discrepancies or inconsistencies adequately explained and addressed.

12 September 2025

DATE

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Kimberly A. Peeples
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⁵⁷ AR 082.