

**ADMINISTRATIVE APPEAL DECISION
MOORE PARK
APPROVED JURISDICTIONAL DETERMINATION
NEW ORLEANS DISTRICT
MVN-2023-00587-1-SG**

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

Review Officer: Travis Morse, South Pacific Division

Appellant: Paul Rees, Moore Park 59

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

Date Acceptable Request for Appeal Received: October 18, 2024

Date of Appeal Meeting: February 13, 2025

Summary of Appeal Decision: This appeal is centered on whether a wetland has a sufficient connection to nearby waters – specifically Bayou Chinchuba and Lake Pontchartrain – to fall under federal jurisdiction pursuant to Section 404 of the Clean Water Act. This administrative review found the first reason for appeal, arguing the wetland was not directly connected to Bayou Chinchuba, lacked merit. Despite the Appellant’s evidence suggesting separation, the New Orleans District (District) presented data supporting a continuous wetland system extending to the bayou. However, the second reason for appeal, concerning the connection through roadside ditches, did have merit. The review found the District had not provided sufficient documentation to prove the ditches were “relatively permanent waters.” The third reason for appeal, challenging the regulations themselves post-*Sackett*, was deemed without merit as outside the scope of the administrative review process.

Background Information: On May 2, 2023, the Appellant submitted a request to the District to identify the extent of federally jurisdictional waters on a 21.69-acre property in St. Tammany Parish, Louisiana (Moore Park).² The District previously identified jurisdictional wetland at Moore Park on October 24, 2023, asserting that the wetland is adjacent to the Bayou Chinchuba system due to a Continuous Surface Connection (CSC).³ The Appellant disagreed with the District's assessment and, on May 28, 2024, requested reconsideration based on new information.⁴ The District subsequently

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 205, 289.

³ AR 189-200.

⁴ AR 021-052.

reassessed the jurisdictional status of the wetland, considering the new information, the original wetland delineation report, and a site inspection it performed on June 12, 2024.⁵ In this case, the District updated the Approved Jurisdictional Determination (AJD) on August 23, 2024, to reaffirm its initial determination that the Moore Park wetland is jurisdictional.⁶

On October 18, 2024, the Mississippi Valley Division (MVD) received a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form completed by the Appellant, challenging the AJD. The request for an administrative review of the action through the appeal process, as established in 33 CFR 331 outlining its reasons for appeal is collectively referred to as the Request for Appeal (RFA).

Information Received and its Disposition During the Appeal

The administrative appeal was evaluated based on the District's Administrative Record (AR), the Appellant's RFA, and discussions at the appeal meeting with the Appellant and the District. The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form (*i.e.*, August 23, 2024).⁷ Pursuant to 33 CFR 331.2, no new information may be submitted to support an RFA and, therefore, neither the Appellant nor the District may present new information during the appeal process.

To assist the Division Engineer in rendering a decision on the appeal, the parties may interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the 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, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

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

1. On October 18, 2024, MVD received the RFA consisting of a completed NAO/NAP form and 3-page letter.
2. On October 23, 2024, notice from MVD was provided to the Appellant accepting the RFA and stating that the RFA met the required criteria for an administrative appeal.
3. On October 23, 2024, MVD requested that the AR be provided to all parties no later than November 7, 2024.

⁵ AR 011.

⁶ AR 004-016.

⁷ AR 004-005.

4. On November 7, 2024, the District provided a copy of the AR to the Review Officer (RO) and the Appellant.
5. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is August 23, 2024.
6. On February 8, 2025, the Appellant notified the RO that information was missing from the AR.
7. On February 11, the District transmitted an amended AR to include 30 pages that had been inadvertently omitted from the original transfer.
8. On February 13, 2025, a site visit and informal appeal meeting was held.
9. On February 19, 2025, the District provided written responses to the list of questions provided at the appeal meeting.
10. On February 27, 2025, the RO provided a draft Memorandum for Record (MFR) to the Appellant and the District that summarized and documented the appeal meeting.
11. On February 28, 2025, the Appellant provided written responses to the list of questions provided at the appeal meeting.
12. Comments on the draft MFR received from the District and the Appellant, were used to update the final MFR, dated February 28, 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 for the 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 to clearly describe the findings that must be made regarding this appeal.

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

REASON FOR APPEAL 1: The AJD incorrectly states that the Moore Property wetland is contiguous with the Chinchuba Bayou.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The central disagreement revolves around the District's assertion that the Moore Property wetland has a CSC to Bayou Chinchuba, thereby meeting the criteria for an adjacent wetland under the Clean Water Act (CWA) (33 CFR 328.3(a)(7)).⁸ The District bases this assertion on the wetland being part of a larger

⁸ Cf. 2023 Revised Definition of Waters of the United States, 88 FR 61964 at 33 CFR 328.3(a)(4).

contiguous system extending west and abutting Bayou Chinchuba (a traditionally navigable water at its lower reaches) and having a CSC with the bayou.

The Appellant submitted evidence, including a floodplain model and visual documentation, to support their claim of separation.⁹ The AJD included standard documentation, including a wetland delineation map and a MFR.¹⁰

The Appellant contests the purported direct connection between the wetland and Bayou Chinchuba. As the District must demonstrate a valid CSC through at least one pathway to establish CWA jurisdiction over the Moore Park wetland, the alternative argument for jurisdiction based on a connection via offsite ditches is addressed in Reason for Appeal 2.

Consistent with *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (*Sackett*), adjacent wetlands are jurisdictional only if they have a CSC to a Relatively Permanent Water (RPW) or Traditional Navigable Water (TNW) (33 CFR 328.3(a)(7)). Even with intervening human-made structures, a wetland is considered a single unit if a hydrologic connection exists, demonstrable by culverts, subsurface connections, or indicators like similar soil types, plant communities, and hydric soils.¹¹ The District must synthesize evidence, including soil types, vegetation, and observed hydrologic flow, to justify this "one wetland" conclusion.¹² Jurisdiction is then assessed based on a CSC to a TNW, interstate water, territorial seas, or RPW tributary or impoundment.¹³ To confirm jurisdiction, the District must provide information on the connected water's jurisdictional status.¹⁴ In the case of a gravel road, the permeability of the structure and underlying

⁹ AR 020-052.

¹⁰ AR 004-042.

¹¹ AR 205-262. See also *Rapanos* guidance at 6; 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) at p. 138. Available at:

<https://usace.contentdm.oclc.org/utis/getfile/collection/p266001coll1/id/7594>.

¹² 88 FR 3094; Technical Support Document at 258. Available at

https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf.; and "Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436," available at:

<https://safe.menlosecurity.com/doc/docview/viewer/docNAE57CB69E7EBfd053f5e6c9191efd243200a6fc15cc5a3adb9073d9bbb7b03bb0c9d65cd430e>. Also see, AR 292-294.

¹³ Memorandums: *Subject: Traditional Navigable Water Determinations Under the Clean Water Act*, September 24, 2008, John Paul Woodley, Jr., and *Subject: Stand-Alone Traditional Navigable Water Determinations Under the Clean Water Act- Clarifying Guidance*, October 16, 2008, Steven L. Stockton. See List of Navigable Waters of the United States within the New Orleans District. Available at: <https://safe.menlosecurity.com/doc/docview/viewer/docN32FB4297EA7C5dd1a8c7ae0663c21e0e95ce73e43a3c81b6c0d6372312e48672d87104766f20>).

¹⁴ "The agencies consider the entire wetland to be "adjacent" if any part of the wetland is 'adjacent'." Joint Agency Memorandum to Re-evaluate jurisdiction for NWO-2003-60436, dated December 19, 2023 Available at: https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf. See also *Rapanos* guidance, note 2.

soils are considered, along with continued similar wetland function and presence of similar plant species, to establish a shallow subsurface hydrologic connection.¹⁵

The AR depicts the Moore Park wetland as a single unit that extends offsite, bisected by a gravel road approximately 15 feet wide near the western property boundary.¹⁶ The “one wetland” concept was applied to infer hydrologic connectivity through the road.¹⁷ This connectivity is supported by the MFR, which documents hydrologic connections and similarities in plant communities, slope, topography, soils, and hydrologic indicators between the divided portions of the wetland.¹⁸ The AR also contains photographic evidence of standing water and saturated soil at three road culverts, suggesting at least an intermittent hydrologic connection between the wetland areas east and west of the road.¹⁹

Despite the Appellant’s argument that the 3,800 foot distance and intervening features (roads and developed areas) prevent a CSC, the AR contains LiDAR and aerial photography,²⁰ and prior AJDs for some intervening properties that suggest a contiguous wetland extending to Bayou Chinchuba.²¹ The Appellant’s materials, combined with Natural Resource Conservation Service (NRCS) soil mapping²² and LiDAR elevation data,²³ indicate the potential extension of wetland hydrology, vegetation, and soils toward the bayou, supporting the District’s assertion of a larger, contiguous wetland system. The demonstrable presence of a CSC is more critical than the District’s ambiguous description of water “exchange” with Bayou Chinchuba, and this connection is adequately supported through the compiled data, albeit not conclusively.

While the District’s statement that Lake Pontchartrain and Bayou Chinchuba are TNWs is not supported by reference to a standalone TNW determination or navigability study, this is a harmless error since the District’s webpage identifies both waters in its list of navigable waters.²⁴

In summary, the Appellant’s arguments against the existence of a CSC between the onsite wetland and Bayou Chinchuba are not persuasive when weighed against the evidence presented in the AR. The combination of remote sensing data, prior AJDs,

¹⁵ 88 FR 3094. See also USEPA and Department of the Army. 2022. Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule at 258. Available at: https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf.

¹⁶ AR 006, 178, 191, 212-214, 318.

¹⁷ AR 010-011

¹⁸ AR 009-011.

¹⁹ *Id.*

²⁰ AR 092-095, 264, 266, 268.

²¹ AR 270-284.

²² AR 314-315.

²³ AR 210-211.

²⁴ See List of Navigable Waters of the United States within the New Orleans District (<https://safe.menlosecurity.com/doc/docview/viewer/docN32FB4297EA7C5dd1a8c7ae0663c21e0e95ce73e43a3c81b6c0d6372312e48672d87104766f20>).

and the Appellant's own submitted materials adequately support a continuous physical wetland connection and CSC between the Moore Property wetland and Bayou Chinchuba. Therefore, this reason for appeal is without merit.

ACTION: The District's jurisdictional determination, finding the Moore Property wetland extends to Bayou Chinchuba and thus is subject to CWA jurisdiction, is upheld. This decision is based on the finding that the District acted in accordance with applicable law, regulations, and officially promulgated Corps policy guidance at the time the jurisdictional determination was issued.

REASON FOR APPEAL 2: The District incorrectly treated a roadside ditch and culverts as part of a wetland system, linking them to the Moore Property despite the absence of relatively permanent flows or a continuous surface water connection.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant challenges the District's assertion of jurisdiction, arguing that the ditches are non-jurisdictional, and that the presence of a berm prevents a CSC to the Moore Property wetland. The Appellant cites *Sackett* and *Lewis* in support of this argument.²⁵ While the Appellant does not contest that the ditches eventually flow into TNWs, the central disagreement revolves around the ditches' RPW status and the existence of a CSC, a point contested due to the berm's presence. The District maintains the ditches are RPWs tributary to TNWs (Bayou Chinchuba and Lake Pontchartrain), rendering the adjacent wetland jurisdictional, and disputes the applicability of *Lewis* given the claimed RPW status, a claim the Appellant contests as insufficiently documented.²⁶

The CWA grants the Corps authority to regulate wetlands with a CSC to "waters of the United States." As clarified by *Sackett*, this connection must be relatively permanent and directly contribute to a navigable water.²⁷ *Lewis* reinforced this, finding that ditches and culverts do not automatically establish a CSC, and that the frequency, duration, and implications of observed flow must be considered.²⁸ Therefore, to assert jurisdiction in this case, the District must demonstrate a clear and unbroken CSC between the wetland and the ditches, unimpeded by the berm, and that the ditches are jurisdictional

²⁵ See *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), and *Lewis v. United States*, 88 F.4th 1073 (5th Cir. 2023).

²⁶ AR 010. See 33 CFR 328.3(a)(3). The U.S. Army Corps of Engineers will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), *i.e.*, tributaries that typically flow year-round or have continuous flow at least seasonally (*e.g.*, typically 3 months).

²⁷ *Sackett v. EPA* (2023); *Rapanos* guidance, p. 6-7. The *Rapanos* plurality uses phrases like continuous physical connection to describe the CSC requirement, *e.g.*, *Rapanos*, 547 U.S. at 747, 751 n.13, 755; See also 88 FR 3004 and 3095-96.

²⁸ *Lewis v. United States*, 88 F.4th 1073 (5th Cir. 2023).

RPWs.²⁹ Intermittent flow in the ditch does not necessarily establish a relatively permanent connection, and a berm can sever a CSC.

AJDs involving RPW tributaries require documentation of flow duration, Ordinary High Water Mark (OHWM) indicators, reach limits, flow characteristics, and surface connections. This documentation should be detailed enough to allow for replication of the analysis.³⁰ The District bears the burden of providing sufficient evidence to support the claimed RPW tributary status; simply labeling a ditch as such without adequate documentation is insufficient to establish jurisdiction.

For the purposes of determining jurisdiction, a tributary is defined as the entire reach of a stream of the same order, from the confluence of lower-order streams to the point where it enters a higher order stream.³¹ The method for assigning stream order is outlined in the *Rapanos* guidance and is used to identify the relevant reach of each tributary.³² This concept of assigning stream orders to identify stream reaches for purposes of assessing the jurisdictional status of tributaries was not affected by the decision in *Sackett*.³³

The AR acknowledges contradictory statements from the Appellant regarding a wetland connection to the ditches, with the Appellant later clarifying the nature and extent of these connections.³⁴ Neither the AR nor the Appellant's materials provide precise details regarding the berm's location, elevation, composition, or its potential impact on the hydrological connection between the wetland and the ditches. This lack of clarity hinders an understanding of the berm's significance in this case.

²⁹ 33 CFR 328.3(e). See Regulatory Guidance Letter 05-05, Ordinary High Water Mark and *Rapanos* guidance at footnote 24. See also 88 FR 3083.

³⁰ See, e.g., 2009 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program; RGL 05-05; *Rapanos* guidance, footnote 24.

³¹ *Rapanos* guidance at footnote 24. See also 88 FR 3086, “[t]o determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler stream 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; see Technical Support Document section IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream they connect to. Consistent with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (*i.e.*, the point the indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used.”

³² *Id.*

³³ The concept of how to identify tributary reaches for purposes of assessing tributaries was not affected by the decision in *Sackett*. See 27 September 2023 Joint Coordination Memorandum, “[b]ecause the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the January 18, 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the January 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the amended 2023 rule, generally remain relevant to implementing the amended 2023 rule.”

³⁴ AR 023-024, 317.

The District's determination of a CSC between the Moore Property wetland and the ditches appears to be based primarily on the presumed extension of onsite wetland characteristics (vegetation, soils, and hydrology) to offsite areas. The AR presents no evidence of a CSC to the northern ditch. For the southern roadside ditch, the District observes indicators of flow (sedimentation, water staining, wrack lines) and infers a connection to the wetland, but does not indicate that the physical indicators form an OHWM that physically touches the Moore Property wetland despite the Appellant's evidence of a "high and dry edge." The District's reliance on vegetation observations and extrapolated soil and hydrology data, while reasonable, does not address the berm's impact on the connection between the Moore Property wetland and the ditch.

Despite presenting antecedent precipitation tool tables, climate data, and on-the-ground observations, the AR lacks a clear logical discussion of how this data supports the classification of the ditch as a tributary, or how the presented data connects to a relatively permanent flow regime.³⁵ The level of documentation required to support an RPW determination will vary depending on the complexity of the site, the availability of data, and the presence of any conflicting evidence. However, in light of the Appellant's objections to the original AJD and the introduction of conflicting data, the burden of proof rested on the District to provide clear and convincing evidence to substantiate its claim of jurisdiction.

The AR presents information but does not adequately explain what that information means or how it adequately supports the District's conclusions. The MFR's omission of how data was considered, interpretations of data and results, and their connection to flow regime, in conjunction with the Appellant's claims that the ditch only flows in response to precipitation, precludes a definitive RPW determination in this specific case.

While the MFR identifies hydrologic indicators along the ditches, the AR fails to establish a clear and coherent connection between these observations, the methodology used to assess flow characteristics, and the ultimate determination of a relatively permanent flow regime. The absence of a defined reach further compounds this issue, making it impossible to assess the representativeness of the data and the overall flow characteristics. Therefore, this reason for appeal is with merit.

ACTION: As per the first reason for appeal, sufficient jurisdictional grounds exist independent of a CSC to an RPW ditch connection to a TNW. Therefore, rectifying the documentation deficiencies related to the ditches is not strictly necessary to uphold jurisdiction. Because the District documented a CSC to an RPW connection, the District should, as a best practice, add more detailed documentation to the record regarding the ditches' RPW status. This documentation should identify the relevant reach and provide a clear explanation of the methodology used and interpretations made, including the physical characteristics used to establish the OHWM for CWA jurisdiction, a flow regime

³⁵ See AR 008,009, 011,165,166,180,181,193,194. See *also* Regulatory Guidance Letter 05–05, Ordinary High Water Mark.

analysis, and an analysis of the berm's impact, if any, on the connectivity of the wetland to the ditches.

REASON FOR APPEAL 3: The regulations to implement the Clean Water Act after the ruling in *Sackett* improperly diminish the Supreme Court's decision and should not be followed.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The Appellant claims that the post-*Sackett* regulations improperly diminish the Supreme Court's decision. The District contends that it does not have the authority or scope of expertise to determine if regulations appropriately interpret Congress's intent or Supreme Court decisions.

The Appellant cites *Loper Bright Enterprises v. Raimondo*, arguing against the Corps' regulations. However, this ruling, which overturned the "Chevron deference," pertains to how courts should interpret agency rules, and is not a tool for directly challenging those rules.

Regulations defining "waters of the United States" are promulgated by the U.S. Environmental Protection Agency and the Office of the Assistant Secretary of the Army for Civil Works (33 CFR 328). Districts apply the regulations, guidance, and policy issued by these agencies in response to Congressional and judicial decisions.

This administrative appeal review is limited to determining whether the District's decision complies with existing laws, regulations, and official policy guidance. Therefore, the Appellant's argument regarding regulatory consistency with *Sackett*, the Corps' interpretation of *Sackett*, and the sufficiency of available regulations, guidance, or policy are not relevant to this appeal and are without merit.

ACTION: There is no evidence or reason to suggest that the District's handling of the AJD request constituted an abuse of discretion or was plainly contrary to any law, regulation, Executive Order, or officially promulgated Corps policy guidance.

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 due to inadequate documentation and procedural compliance, as outlined above in Reason for Appeal 2.

The District must thoroughly review its decision to ensure accurate and sufficient information and analysis are included in the AR to provide adequate basis for its determination. The District should follow applicable regulations, guidance, and policy, including 33 CFR parts 328 and RGL 05-05. The revised AR must contain detailed methodology, rationale, data sources, assumptions, and conclusions to support the District's final determination, which should be governed by the regulations effective at

the time of the AJD completion. The reconsideration will account for all relevant subsequent revised rules or guidance.

13 June 2025

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