

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
CHEVRON 250-FOOT CHANNEL
RICHMOND, CALIFORNIA
SAN FRANCISCO DISTRICT
FILE NUMBER SPN-2013-00204S**

DATE: March 5, 2018

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant Representative: Brad Rogers, Chevron (Appellant)

District Representative: Frances Malamud-Roam, U.S. Army Corps of Engineers, San Francisco District (District)

Authority: Rivers and Harbors Act of 1899 (RHA) (33 U.S.C. 401 et seq.)

Receipt of Request for Appeal: December 11, 2017

Appeal Meeting and Site Visit Date: April 24, 2018

Summary of Decision: Reasons for appeal 1, 3, and 4 of this Rivers and Harbors Act (RHA) jurisdictional determination do not have merit. Reason for appeal 2 of this RHA jurisdictional determination has merit. The District must reconsider its determination, as to whether the area, in which the 250-foot channel was constructed, was subject to jurisdiction, under the RHA, prior to the construction of the 250-foot channel, subsequent to construction of the 250-foot channel, and following the construction of the berm, which isolated the 250-foot channel.

Background Information: The Property is located 841 Chevron Way, City of Richmond, Contra Costa County, California, Latitude 37.94718° North, Longitude -122.387368° West.

For purposes of making the RHA jurisdictional determination, the District evaluated the site on October 11, 2017, using the Code of Federal Regulations (CFR) definitions of jurisdictional waters and supporting guidance.

The District's review included an office determination on October 11, 2017. The District determined that the nearest Traditional Navigable Water (TNW) into which the aquatic resource flows is San Pablo Bay. On October 11, 2017, the District made its RHA jurisdictional determination for the 250-foot channel on the Property.

The District determined that the 250-foot channel is presently used, has been used in the past, or may be susceptible for use to transport interstate or foreign commerce. The District concluded that the channel is an area that was constructed within Section 10 jurisdiction specifically for navigation and commerce.

The District further concluded that the 33.4 acre, 250-foot channel is still capable of supporting navigation. The District ultimately determined that the Corps would retain RHA jurisdiction, based on the legal principle of indelible navigability and that the only impediment for re-establishing navigation between the channel and Castro Cove and further in the San Pablo Bay is the existing berm on the northern end of the channel.

The District concluded that the 250-Channel is not subject to jurisdiction pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) (CWA), since it is currently part of a waste treatment system (as per 33 CFR 328.3(a)(8)).

The Appellant submitted a Request for Appeal (RFA) on December 8, 2017. The Appellant disagreed with the District's conclusion that the 250-foot channel on the Property is a waters of the United States, subject to jurisdiction under Section 10 of the Rivers and Harbors Act. The Appellant asserted that the District's decision is inconsistent legal precedent and Corps policy, relied on incorrect factual assertions, that the 250-foot channel has never been determined by the Corps to be a navigable water, and that any Corps jurisdiction, which may have existed, has been surrendered.

Appeal Evaluation, Findings and Instructions to the District Engineer (DE):

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL REVIEW:

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

REASON 1: The District's determination is inconsistent with binding legal precedent and Corps policy that RHA section 10 jurisdiction extends only to areas below mean high water ("MHW") in their natural, unobstructed state.

FINDING: This reason for appeal does not have merit.

ACTION: The District's decision is upheld and no further action is required.

DISCUSSION: In the RFA, the Appellant asserts that the District's determination is inconsistent with binding legal precedent and Corps policy that RHA section 10 jurisdiction extends only to areas below mean high water ("MHW") in their natural, unobstructed state – *i.e.* the double-lined sloughs that were below MHW at the time of the Channel's construction in the early 1900s.

The Appellant contends that, prior to development of the Refinery in the early 1900s, the current location of the 250-Foot Channel was comprised of tidal marsh and sloughs associated with

Castro Marsh. The Appellant suggests that the majority of this area was above MHW, with some double-sided sloughs below MHW, when the Channel was constructed with earthen berms and dredged to below MHW in the early 1900s as part of the early Refinery. According to Appellant, the Channel was used by ships unloading at the Refinery until the north berm was constructed in 1957, isolating the 250-Foot Channel from Castro Cove and the San Francisco Bay. Following construction of the north berm, the Channel was incorporated into the Refinery's waste treatment system. The Appellant also asserts that, since that time, the Channel has been surrounded by upland berms on all sides and is hydrologically isolated from Castro Cove and the Bay.

The Appellant argues that, pursuant to Corps policy and Ninth Circuit precedent, RHA section 10 jurisdiction would, at most, extend only to the double-lined sloughs below MHW at the time of the Channel's construction in 1902 (assuming that the Corps has not surrendered jurisdiction as discussed in Reason 4). In reaching this conclusion, the Appellant relies on a Ninth Circuit finding that RHA jurisdiction in the San Francisco Bay area generally applies "to all places covered by the ebb and flow of the tide to the [MHW] mark in its unobstructed, natural state." (*Leslie Salt Co. v. Froehelke*, 578 F.2d 742 (9th Cir. 1978)). Appellant also invokes 2014 Corps guidance emphasizing the importance of the natural MHW line in jurisdictional determinations. ("Legal Principles to Guide the AJD for the Redwood City Salt Plant"). That document (page 13) states, "the District has the burden of substantiating the location of any tidal waters that were below the MHW mark at the time the [obstructions] were constructed to assert RHA jurisdiction over those areas."

The Appellant argues that maps provided (Figure 2) demonstrate that the vast majority of the area was above MHW at the time the Channel was constructed and is not within RHA section 10 jurisdiction. The Appellant suggests that this argument undermines the District's conclusion that the entire 33.4-acre channel is jurisdictional because "[t]he channel is an area that was constructed within Section 10 jurisdiction."

The Appellant also asserts that the historic MHW maps (Figure 2) demonstrate that the District's RHA determination ignores the District's own 1983 Regulatory Functions policy for determining RHA jurisdiction behind dikes or levees, arguing that guidance provides that areas similar to the Channel are subject to RHA jurisdiction in specific circumstances that are not present in the 250-Foot Channel. In particular, the Appellant notes that the District's policy states that RHA jurisdiction applies to areas behind dikes only when all of the following criteria are met: (1) Area is presently at or below MHW; (2) Area was historically at or below MHW in its "unobstructed, natural state" (*i.e.*, the area was at or below MHW before the dikes were built); *and* (3) there is no evidence (elevation data) that the area was ever above MHW. The Appellant contends the maps show that the second and third criteria are not satisfied, and the District cannot therefore assert RHA section 10 jurisdiction over the entire Channel as a matter of its own policy. The Appellant further invokes a Corps document – January 9, 2014 "Legal Principles to Guide the AJD for the Redwood City Salt Plant," (and Supplement, March 25, 2014) – to suggest that a reviewing federal court would not uphold a finding of RHA jurisdiction by the Corps because the Appellant has relied on its own interpretation to conclude that only two of the three District criteria for RHA jurisdiction are met.

The District completed one AJD form for the Property. In Section II.A. of its AJD form and in the October 11, 2017, Memorandum for Record (MFR) supporting its AJD form, the District indicated that the Property contains “navigable waters of the U.S.” within RHA jurisdiction as defined by 33 C.F.R. Part 329. The District concluded, in both the AJD form and its MFR, that waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. The District stated that the Channel is an area that was constructed within Section 10 jurisdiction specifically for navigation and commerce. The District concluded that the 33.4 acre Channel is still capable of supporting navigation and that the Corps would retain RHA jurisdiction based on the legal principle of indelible navigability. Finally, the District concluded that the only impediment for re-establishing navigation between the channel and Castro Cove and then San Pablo Bay is the existing berm on the northern end of the channel.

In its May 15, 2013, JD Letter Report, the Appellant’s consultant indicated that the 250-Foot Channel is a remnant of the Refinery’s historic shipping channel and turning basin (Section 1, “History of the 250 Foot Channel). That report documents that the channel was excavated from intertidal marsh and bay mud between 1900 and 1920 and that the 250-Foot Channel was maintained as a ship channel until the 1950s to accommodate tanker ships from San Francisco Bay, through Castro Cove, and into the refinery. In the 1950’s, an earthen berm was constructed at its northern end, separating the channel from the navigable waters of Castro Cove and the San Francisco Bay.

RHA determinations are not limited to the natural or original condition of the waterbody; navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation (33 C.F.R. § 329.8). An artificial channel may constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States (33 C.F.R. § 329.8(a)(1)). The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (33 C.F.R. § 329.8(a)(2)).

The circumstances evaluated in the “Legal Principles to Guide the AJD for the Redwood City Salt Plant” document (and its subsequent supplement) are distinguishable from the facts in this case. In the case of the Redwood City Salt Plant, a Department of the Army permit was obtained prior to constructing the berm that separated the area in question from navigable waters and that berm was constructed before initiating the work that lowered the elevation on the landward side of the berm. Further, the advisory document itself limits its scope, stating, “the history of permit actions for the site distinguishes the western parcel from those cases in which courts found that jurisdiction has not been surrendered...” (Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant, Supplement, page 1). In the present case, the Appellant has described a history of the 250-foot Channel in which excavation of an area containing tidal sloughs below MHW resulted in a channel, specifically constructed and used for navigation, as envisioned in 33 C.F.R. § 329.8(a). The Appellant further described the later construction of a berm that isolated the Channel. Therefore, although the District must further

consider whether RHA jurisdiction exists over the 250-Foot Channel, as explained in response to Reason 2, below, the District's correctly concluded that a channel constructed within an area subject to RHA jurisdiction specifically for navigation and commerce would become subject to RHA jurisdiction. The District was also correct to conclude that construction of a berm, isolating such a channel, would not extinguish RHA jurisdiction.

REASON 2: The Channel is not jurisdictional under the legal principle of "indelible navigability" because it has never been determined by the Corps to be a navigable water.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider its decision as to whether the 250-foot channel is subject to RHA jurisdiction and properly document the basis for that decision.

DISCUSSION: In the RFA, the Appellant asserts that the channel is not jurisdictional under the legal principle of "indelible navigability" because it has never been determined by the Corps to be a navigable water. The Appellant referenced Corps regulations, at 33 C.F.R. § 329.4 – "[a] determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." The Appellant contends that, by the terms of the regulations, the principle of "indelible navigability" does not apply because the Channel has never been determined by the Corps to be a "navigable water" under the RHA. The Appellant highlights that the District did not point to any existing determination of navigability in its AJD as support for the application of the "indelible navigability" principle. The Appellant also notes that the Channel has never been included on the Corps' Listings of Navigable Waters in the South Pacific Division.

As indicated above, in Section II.A. of the AJD, the District checked the box indicating that the Channel is subject to RHA section 10 jurisdiction because "waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." The District further explained that the Channel was constructed "specifically for navigation and commerce" and "still capable of supporting navigation." The District concluded that the only impediment for re-establishing navigation between the channel and Castro Cove and then San Pablo Bay is the existing berm on the northern end of the channel. The District did not check the block indicating the presence of "waters subject to the ebb and flow of the tide" in Section II...A of its AJD form.

The definition of navigable waters of the United States includes both waters that are subject to the ebb and flow of the tide and waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce (33 C.F.R. § 329.4). Regulatory jurisdiction extends throughout waterbodies that are subject to tidal action (33 C.F.R. § 329.12(b)), but for waters that are not subject to tidal action, a determination of navigability is required to establish RHA jurisdiction (33 C.F.R. § 324.14(b)). Procedures defined in 33 C.F.R. § 329.14(b) require that a determination of navigability be made by the Division Engineer, based upon a report of findings prepared by the District Engineer forwarded to the Division Engineer and accompanied by an opinion of the district counsel.

According to the Appellant, as elaborated in Reason 1, the Channel was constructed by excavating in an area containing tidal sloughs below the MHW. The resulting channel, was specifically constructed and used for navigation, as contemplated in 33 C.F.R. § 329.8(a) and described by the District. The District, however, based its claim of jurisdiction on past use to transport interstate or foreign commerce, rather than on the 250-foot Channel having been constructed in an area subject to tidal action. Claiming jurisdiction based on past use to transport interstate or foreign commerce alone requires a determination of navigability by the Division Engineer. There is no indication in the AR that determination of navigability has ever been made by the Division Engineer, nor is there any indication that a report of findings has ever been prepared by the District Engineer that would support a determination that the Channel should be determined by the Division Engineer to be a “navigable water” under the RHA. As asserted by the Appellant, the principle of “indelible navigability” would not apply to the area that is not subject to the ebb and flow of the tide, for which a navigability determination has not been made by the Division Engineer.

The District must, therefore, reconsider its determination, as to whether the area in which the 250-foot channel was constructed, was subject to jurisdiction, under the RHA, prior to the construction of the 250-foot channel, subsequent to construction of the 250-foot channel, and following the construction of the berm that isolated the 250-foot channel. The District must document its evaluation and ensure that the AJD form, resulting from its reevaluation, supports its determination.

REASON 3: The Corps’ assertion of RHA jurisdiction relies on the incorrect factual assertion that the northern berm is the only impediment for re-establishing navigation between the Channel and Castro Cove.

FINDING: This reason for appeal does not have merit.

ACTION: The District’s decision is upheld and no further action is required.

DISCUSSION: In the RFA, the Appellant asserts that the District’s determination of RHA jurisdiction relies on an unsupported contention that the only impediment for re-establishing navigation is the existing northern berm. The Appellant asserts that the District failed to cite factual support for this statement. The Appellant cites its February 21, 2017 submission, which described the Channel’s use as part of the Refinery’s waste water effluent treatment system, to argue that history and use demonstrates there are impediments to re-establishing navigation in the Channel beyond simply removing the berm. The Appellant argues that the District’s application of “indelible navigability” to an industrial feature like the Channel, based on an assertion that removal of the berm would restore navigability, would cause extreme results. The Appellant states that doing so would set broad precedent for countless industrial features around San Francisco Bay, as well as areas behind levees and berms throughout the country.

As indicated above and as asserted by the Appellant, the District concluded that the only impediment for re-establishing navigation between the channel and Castro Cove and then San Pablo Bay is the existing berm on the northern end of the channel.

Pursuant to 33 C.F.R. § 329.9 (a), a waterbody that was navigable in its natural or improved state, or which was susceptible of reasonable improvement, as discussed in § 329.8(b), retains its character as “navigable in law” even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Further, an area remains subject to Federal authority once it attains the character of “navigable in law.”

The District concluded that the only impediment for re-establishing navigation between the channel and Castro Cove and then San Pablo Bay is the existing berm on the northern end of the channel (Section II.A of the District’s AJD form). The Appellant asserts that history and use demonstrates that there are other impediments to re-establishing navigation in the Channel other than simply removing the berm. Although the Appellant is correct that there are arguments against removing the berm, and there would certainly be a number of factors to consider and other actions required to remediate for the use and history of the 250-foot channel, the District correctly identified the berm as the only physical barrier to re-establishing navigation between the channel and Castro Cove.

REASON 4: Even if the Channel or a portion thereof was, at some point in time, subject to the Corps’ jurisdiction, the Corps has surrendered such jurisdiction because, for decades, the Corps has implicitly consented to Chevron’s encroachments on any perceived navigational servitude.

FINDING: This reason for appeal does not have merit.

ACTION: The District’s decision is upheld and no further action is required.

DISCUSSION: In the RFA, the Appellant asserts that, even if a small portion of the Channel could be jurisdictional under relevant case law and Corps policy, the Corps long ago surrendered the navigational servitude by voluntarily permitting encroachment thereupon. The Appellant cites *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), where the Third Circuit found that RHA section 10 gives the Corps authority to consent to encroachments upon the navigational servitude of the United States. The Appellant argues the Third Circuit concluded that express consent by permit clearly must be considered surrender of the federal servitude, but also that “Section 10 is silent as to the method of giving consent.” *Id.* at 610. The Appellant also states that the Ninth Circuit has recognized that it may be possible for the Corps to be estopped from exercising jurisdiction under the RHA. *See Froehlke*, 578 F.2d at 753 (finding “[The project proponent] . . . may contend that there has been a surrender by the Corps of its power under the [RHA] with respect to certain land below the MHW line.”). The Appellant applies this case law to argue that the Corps has surrendered jurisdiction over the Channel because, since the construction of the Channel in the early 1900s, the United States has allowed encroachment on any navigational servitude that may have existed.

Stoeco does not define a specific standard for surrender, rather the Court limits its finding of surrender to the specific circumstances presented – *i.e.* where tidal marshlands had become fast lands prior to a change in policy of the Army Corps of Engineers. 498 F.2d at 611. Subsequent to *Stoeco*, courts have confirmed that surrender of federal jurisdiction cannot be implied, it must be unmistakable. See *U.S. v. Cherokee Nation of Oklahoma*, 480 U.S. § 700 (1987) (noting that a surrender of navigational servitude constitutes the type of waiver of sovereign immunity that cannot be implied). Nonetheless, an explicit statement that the navigation servitude has been surrendered may not be required. See *U.S. v. 119.67 Acres of Land*, 663 F.2d 1328 (5th Cir. 1981) (holding that surrender resulted from voluntary stipulations made in connection with a federal condemnation action at the property).

Given the lack of a general rule and the significance of any waiver of federal sovereignty, the question of whether a surrender has been made is especially fact specific. The circumstances in the current appeal are similar to facts addressed in *U.S. v. Sasser*, 771 F. Supp. 720 (D.S.C. 1991). In *Sasser*, the Court considered the potential for surrender where a property owner had installed barriers and then alleged that the Corps' inaction for many years constituted acquiescence. *Id.* at 724. The Court held that such circumstances did not constitute surrender and further concluded that the defendant had failed to show that their reliance on the barriers *without inquiry* was reasonable. *Id.* The Appellant has similarly alleged circumstances that are inadequate to support waiver – simple inaction does not constitute acquiescence – and has failed to demonstrate that its own reliance without inquiry was reasonable.

CONCLUSION:

I conclude, therefore, that the Appellant's second reason for appeal has merit. The District must reconsider its determination as to whether the area in which the 250-foot channel was constructed was subject to jurisdiction, under the RHA, prior to the construction of the 250-foot channel, subsequent to construction of the 250-foot channel, and following the construction of the berm, which isolated the 250-foot channel. The District must also document its evaluation and ensure that the AJD form, resulting from its reevaluation, supports its determination. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not otherwise contrary to applicable law or policy. This concludes the Administrative Appeal Process.



Thomas J. Cavanaugh
Administrative Appeal Review Officer