ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SWALLOW TAIL, LLC- FILE NO. MVS-2011-475
ST. LOUIS DISTRICT

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4 March 2014

Review Officer: Tonya Acuff, U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant: Swallow Tail, LLC

Date of Receipt of Request for Appeal: 15 August 2012

Date of Acceptance of Request for Appeal: 5 September 2012

Appeal Meeting Date: 30 October 2012

ACCEPTED REASON FOR APPEAL:
The Mississippi Valley Division (MVD) accepted the Request for Appeal (RFA) by Swallow Tail, LLC (Appellant) dated 8 August 2012. The Appellant provided one overall reason for the appeal broken into 2 sub-reasons. This document addresses both reasons.

SUMMARY OF APPEAL DECISION:
Swallow Tail, LLC. (Appellant) is appealing a U.S. Army Corps of Engineers (USACE) approved jurisdictional determination (AJD) made by the St. Louis District (the District). The RFA asserts that the District misidentified areas within the property as wetlands when they should have been identified as streams. The Appellant alleges that the District did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site. The appeal is found to have partial merit. For reasons detailed in the decision, one of the two reasons for appeal has merit. The AJD is remanded to the District for reconsideration.

BACKGROUND INFORMATION:
Mr. David Flick, of Terra Technologies, represents the Appellant, Swallow Tail, LLC. Swallow Tail, LLC has proposed the construction of the Salt River wetland and stream mitigation bank. The proposed mitigation bank site is located in Sections 22 and 23, T-56N-R13, latitude 39.637632 and longitude -92.334487, in Middle Fork, MO. The subject property consists of approximately 104.65 acres of mostly farmed wetland areas, including some streams with limited forested riparian corridor.

On 27 April 2011, a jurisdictional delineation was submitted by Terra Technologies on behalf of the Appellant for review by the District. In their site delineation, Terra Technologies identified four intermittent streams, six ephemeral streams, one perennial stream, and twenty-six wetlands as being potential waters of the U.S.

On 19 June 2012, the District issued their AJD in which they concurred with Terra Technologies on all features with the exception of two: an intermittent tributary and an ephemeral tributary (identified as I-3 and E-5, respectively, in the Terra report). While the District agreed with Terra Technologies that these two features were waters of the U.S., the District disagreed with the classification of I-3 and E-5 as streams. The District classified these features as linear wetlands, citing the lack of an ordinary high-water mark[1] (OHWM) within the channels. The District also indicated that the two channels are known as a "remnant side channel" and were formed historically by flood events associated with the Middle Fork of the Salt River, not by ordinary rainfall events.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

1. The Appellant submitted their RFA dated 8 August 2012 which MVD received on 15 August 2012. MVD accepted the RFA by letter dated 11 September 2012.

2. The District provided a copy of the administrative record (AR) which was received on 26 September 2012. The information contained in the AR was reviewed and considered in the evaluation of this request for appeal.

3. The appeal meeting was held on 30 October 2012. The meeting followed the agenda provided by the Mississippi Valley Division Review Officer to both the District and the Appellant via email on 17 October 2012. Attendees included the Appellant's consultant and two staff members from the District. No new or clarifying information was introduced at the meeting.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

The Appellant alleges that the District did not correctly apply current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site. The following are specific reasons for appeal relating to the District's determination.

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[1] Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark (OHWM), 7 December 2005.

The Appellant's RFA states that the District's decision to classify I-3 and E-5 as part of remnant side-channel features associated with flooding of the Middle Fork of the Salt River, through the property and connecting back to the Middle Fork via intermittent tributary 4 (I-4), is based on the following premises:

- 1. Flow through E-5 and I-3 is not associated with ordinary high-water events which occur on a regular or frequent basis since the connection to the Middle Fork of the Salt River is above the OHWM of that river.

- 2. The physical ordinary high water indicators in E-5 and I-3 are in fact evidence of the drainage patterns wetland hydrology indicator.

Appeal Reason 1: The Appellant believes that Premise #1 is incorrect because ordinary high water events unassociated with the Middle Fork of the Salt River flow through E-5 and I-3.

Finding: This reason for appeal has merit.

Discussion: Several reasons were cited in the RFA for the disagreement with Premise #1.

The Appellant identified the drainage area of E-5 as approximately 39.55 acres (to the upstream limit) and that of I-3 as 48.87 acres (to the upstream limit) in both the AR[2] and RFA[3]. The Appellant further stated that drainage areas of this size are sufficient for the creation of ordinary high water marks despite the additional influence of occasional flood flows from the Middle Fork of the Salt River.

In an email[4] to the Appellant dated 28 March 2012, the District stated the basis for designating E-5 and I-3 as part of Wetland 17 (wetland hydrology indicators) were the soil types, vegetation, and hydrology found within the area. The correspondence outlined the criteria such as dimension, location, and landscape position of the wetland swales based on topography maps, historical land use, and hydrologic data for the area. The District also noted lack of a clear and

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[2] AR, Tab 3, Per email from Mr. Shane Staten, Terra Technologies, to Mr. Shawn Sullivan, St. Louis District, March 30, 2012.
[3] Appendix C, Drainage Area Figure.
[4] AR, Tab 3, Per email from Mr. Shawn Sullivan, St. Louis District, to Mr. Shane Staten, Terra Technologies, March 28, 2012, 2:12 PM.

undisputed OHWM within the area identified as E-5 and I-3 by the Appellant.

The Appellant states in the RFA that U.S. Geological Survey topographic area maps indicates ordinary high water flows through E-5 and I-3 based on the presence of the north-reaching fork of the long thin elevation 730 contour line in the center of the portion of the subject property. This same information was contained in the original jurisdictional determination request submitted to the District on 27 April 2011. The Appellant argues that since the north-reaching fork of the elevation 730 contour line is longer than the northwest-reaching fork, this is evidence that the ordinary high water flows from the uplands north of the subject property have had an equal, if not greater, influence on the creation of the flow path through E-5 and I-3 than flood flows from the Middle Fork of the Salt River. In addition, the Appellant contends that since the District acknowledged that E-4, which is located upstream of E-5 and I-3, transports ordinary high water flows from the uplands to the swale represented by the north-reaching fork elevation 730, then E-5 and I-3 should also receive and transport ordinary high water flows.

In Section III.B.1.ii.b[5] of the AJD form, the District agreed with the Appellant that E-4 was jurisdictional as an ephemeral stream channel and provided historical information in the form of aerial photography data and historical land use data. In Section III.B.1.ii.c[6], the District gave an account of the current physical condition of the channel and noted that the channel of E-4 contained bed and banks and an OHWM due to the presence of litter and debris.

Additionally, the District noted in Section III.B.1.ii.b[7] of the JD form that precipitation from E-4 flowed into a portion of Wetland 17. This portion of Wetland 17 did not exhibit evidence of a channel, but was rather a flat surface.

Corps regulations at 33 CFR § 328.3(e) define the term "ordinary high water mark" for purposes of Clean Water Act lateral jurisdiction as, "[T]hat line on the shore established by the fluctuations of water and indicated by physical characteristics

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[5] AR, AJD form labeled "MVS-2011-475_SNR_Ephemeral Tributary 4 and Wetlands 20 and 24-25", pg 3.
[6] AR, AJD form labeled "MVS-2011-475_SNR_Ephemeral Tributary 4 and Wetlands 20 and 24-25", pg 3.
[7] AR, AJD form labeled "MVS-2011-475_SNR_Ephemeral Tributary 4 and Wetlands 20 and 24-25", pg 3.

such as a clear, natural line impressed on the bank, shelving, changes in vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

The Appellant has tried to tie the indication of ordinary high water flow to the location of features on a topography map. An OHWM cannot be established by using a USGS topographic map. On a topographic map, intermittent streams are indicated by a blue dashed line followed by three dots. The site is located on the Clarence quadrangle map. There are no lines on this map indicating the presence of E-5 or I-3. However, there also is not a dashed line on the map indicating the presence of E-4, which the District agreed was intermittent.

In the RFA, the Appellant provided photographs of E-5 and I-3[8]. These are the same photographs provided in the jurisdictional assessment which was submitted to the District by Terra Technologies on 26 April 2011. Photograph #51 faces southeast showing ground water flow where E-5 ends and I-3 begins. Photograph #52 faces northwest showing ground water flow upstream of the confluence of I-3 and I-4. The definition of intermittent stream is a stream that "[H]as flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow."[9]

In Tab 3 of the AR, the Appellant sent an email to the District on 3 April 2012, requesting they consider the photos showing flow within the channel bottom of I-3 as evidence that seasonal flow existed in the channel, and not just during high flow events. The AR lacks evidence showing that the District considered this issue.

Action: In reconsidering the AJD, the District should review the information submitted by the Appellant in regard to the location and watershed size of E-5 and I-3, and document the AR accordingly. Additionally, the District should clearly state in the AR how they considered the information contained in the Appellant's "Jurisdictional Assessment". The AR should be revised accordingly to document and reflect the additional factual data considered in this analysis.

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[8] AR, Jurisdictional Assessment, Tab 11, Photos #51 and #52.

[9] Definition of Intermittent Stream as cited by Part 330; Nationwide Permit Program http://www.wetlands.com/coe/nwp3defin.htm

Appeal Reason 2: The Appellant believes that Premise #2 is incorrect because they believe that the District improperly applied the "drainage patterns" wetland hydrology indicator.

Finding: Premise #2 ties directly into Premise #1. Since Premise #1 has been found to have merit, a decision on Premise #2 cannot be made at this time.

Discussion: The Appellant contends that the District improperly used the Midwest Regional Supplement B10 "Drainage Pattern" indicator to designate E-5 and I-3 as linear wetlands rather than stream tributaries. The Appellant alleges that the B10 indicator was intended to be applied to areas where water is flowing over the ground, not within a channel. The Appellant also contends that E-5 and I-3 were too large to be considered as "flow patterns visible on the soil surface" as defined in the General Description sub-section of the indicator. Based on this, the Appellant argues that E-5 and I-3 should not be described as evidence of wetland drainage patterns, but rather as jurisdictional streams.

The District completed a desk jurisdictional determination on March 28, 2012, and conducted a site visit on August 24, 2012[10].

The District determined that E-5 and I-3 were linear wetlands based on information obtained by reviewing hydrologic soil group reports for Macon County, MO[11], evaluating flow events for the area, and reviewing the climate records database Global Historical Climatology Network (GHCN)- Daily Network.[12]

Additionally, the District concurred with the wetland delineation conducted by Terra Technologies which showed the identified the area as being a wetland.

In order to assist Corps field staff in completing the Approved Jurisdictional Determination Form ("JD form"), the Environmental

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[10] AR Tab 7. Site pictures taken by the U.S. Fish and Wildlife Service
AR Tab 8. Preapplication Consultation sheets and field notes taken onsite during site visit.

[11] AR, Tab 5. Hydrologic Soil Group- Macon County, MO, Natural Resources Conservation Service (NRCS)

[12] Global Historical Climatology Network (GHCN)-Daily is an integrated database of daily climate summaries from land surface stations across the globe. GHCN-Daily is comprised of daily climate records from numerous sources that have been integrated and subjected to a common suite of quality assurance reviews. The site can be accessed at http://www.ncdc.noaa.gov/oa/climate/ghcn-daily/.

Protection Agency and the U.S. Army Corps of Engineers developed the Guidebook[13]. The Engineer Research and Development Center (ERDC) was requested by Corps Headquarters to establish a Regional Supplement to assist Corps personnel in identifying and classifying proper wetland indicators based on regional factors. The Regional Supplement to the Corps of Engineers Wetland Delineation Manual, Midwest Region (Version 2.0), was published in August 2010. The guidance provided on page 88 of the Supplement gives a general description of the wetland hydrology Indicator B10 (Drainage Patterns):

> "This indicator consists of flow patterns visible on the soil surface or eroded into the soil, soil vegetation bent over in the direction of the flow, absence of leaf litter or woody debris due to flowing water, and similar evidence that water flowed across the ground surface."

The Supplement further states in the "Cautions and Users Notes" sub-section that:

> "Drainage patterns are usually seen in areas where water flows broadly over the surface and is not necessarily confined to a channel, such as in areas adjacent to streams, in seeps, and swales that convey water. Use caution in areas subject to high winds or affected by recent unusual flooding events, and in grassed waterways in upland agricultural areas."

While the regional supplement states that Districts should use caution in areas near streams, it does not preclude the use of this indicator by a District if all information has been taken into account.

Action: The District should first respond to the actions associated with the first reason for appeal in regard to reconsidering information submitted in the Appellant's jurisdictional assessment. If upon reconsideration of Premise #1, the District determines that the AJD should be revised, the District should also re-evaluate Premise #2.

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[13] The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* is used as the U.S. Army Corps of Engineers Regulatory Program Standard Operating Procedures for conducting an approved jurisdictional determination evaluation and as the documenting practices to support an approved jurisdictional determination. 2007 version.

CONCLUSION:

For the reasons stated above, I find that the Appellant's RFA has merit. The AJD is remanded to the St. Louis District for reconsideration consistent with the comments detailed above. The final Corps decision on jurisdiction in this case will be the St. Louis District Engineer's decision made pursuant to my remand.

FOR Peter A. DeLuca COL, EN
Brigadier General, U.S. Army
Division Commander