ADMINISTRATIVE APPEAL DECISION

CITY OF SALLISAW; File Number 12298

TULSA DISTRICT

15 September 2004

Acting Review Officer: Kenny Jaynes, U.S. Army Corps of Engineers, Southwestern Division, Galveston District, Texas

Appellant Representative: Bill Baker, Jim Hudgens, City of Sallisaw

Tulsa District Representatives: Marcus Ware, Andrew Commer

Permit Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 19 November 2003

Appeal Conference/Site Visit Date: 28 July 2004

Background Information: The Tulsa District (District) initially issued an approved jurisdictional determination (JD) to the City of Sallisaw (City) on 1 August 2002. However, the District failed to provide the City with the Notification of Administrative Appeal Options and Process and Request for Appeal forms. Because the City indicated that it would like to be given an opportunity to appeal the District's determination a second approved JD was issued on 14 November 2003. The District again determined that the approximate 30-acre tract contained waters of the United States that are subject to the Corps jurisdiction under Section 404 of the Clean Water Act. The project site is located in the southeast ¼ of Section 18, Township 11 North, Range 24 East, south of the City of Sallisaw and north of the Little Sallisaw Creek in Sequoyah County, Oklahoma.

The District's approved jurisdictional determination (file number 12298) stated:

> *"We have examined the property and concluded that the referenced property contains wetlands with the boundary as depicted in green and the unnamed tributary to Little Sallisaw Creek, shown in the blue in the enclosed map. The placement of fill material or heavy mechanized land clearing with the wetland boundary and in the unnamed tributary will require prior authorization from the U.S. Army Corp of Engineers (Corps) pursuant to Section 404 of the Clean Water Act."*

The appellant submitted a Request for Appeal on 19 November 2003.

Appeal Decision and Instructions to the Tulsa District Engineer:

Appeal Reason: *"On July 12, 2002 Corps personnel conducted an evaluation of property owned by the City of Sallisaw west of U.S. Highway 59 and north of Little Sallisaw Creek. The result of the examination is, in my judgment, in error. The City of Sallisaw has an outfall sanitary sewer line that runs east and west just inside the south property line of the subject property that corresponds to a portion of the area identified as "wetlands". The area along the easement is rutted from city personnel clearing and mowing the sanitary sewer line easement/right of way. If the ruts were repaired that area would drain and not retain water. The general topography of the area falls to the south toward Little Sallisaw Creek. Sheet flow of surface water during rainfall events follows that general direction and may be more pronounced in some areas due to vegetation and general contour of the land. However, I do not find any portion of the land that contains or resembles what could be defined an "unnamed tributary" to Little Sallisaw Creek. It is requested that this determination be rescinded."*

FINDING: This appeal does not have merit.

ACTION: No Action Required.

DISCUSSION: The appeal of this jurisdictional determination focuses on two primary issues:

1) The presence of wetlands on the site that exist under normal conditions
and
2) That a tributary to Little Sallisaw Creek exists within the project area.

Wetlands are defined as: *"Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."* The appellant expressed his belief that that the wetlands located on the site would not be present if the maintenance work on an existing sewer line had not occurred. The appellant's expressed belief is that this work affected the "normal circumstances" of the site. The Corps defined the term "*Normal circumstances*" in Regulatory Guidance Letters (RGL) 82-2, 86-9 and 90-07[1]. RGL 86-9 states that it is the Corps intention to regulate discharges of dredged or fill material in waters of the United State based on how those waters exist today, not how it may have existed in the past. The administrative record for this action contains sufficient documentation to support the District's determination that the site contains wetlands subject to the Corps jurisdiction. The District used both on and off site information/indicators to document its final decision. The District's field data shows that the site contained a predominance of hydrophytic vegetation, wetland soils, and sufficient hydrologic indicators to be classified as a wetland per the 1987

[1] RGL 90-7 was rescinded on 13 September 1993 and is no longer used as guidance since the guidance contained in that RGL has been superseded by regulation. However, it gives insight into the Corps thinking regarding "normal circumstances". 90-7 stated "The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation."

Corps Wetland Delineation Manual. The District used the U.S.G.S. map to determine that portions of the site are lower in landscape position and this map also indicated that an intermittent headwater traversed portions of the site. The National Wetland Inventory (NWI) Map also indicates that a headwater runs through the site and that some wetlands are present. The historical data (maps) and field indicators support the concept that waters of the U.S., including wetlands, were found on the site in the past and that the site still exhibits the mandatory field criteria to be classified as waters of the U.S. to this date.

The second reason the appellant expressed for this appeal is that the City could "***not find any portion of the land that contains or resembles what could be defined as an "unnamed tributary" to Little Sallisaw Creek.***" Federal regulation defines a surface tributary as a "***system that consist of either: a) defined channel or dendritic (tree-like, branching) arrangement of channels with adjacent wetlands, or b) part of a large continuum of water of wetlands***." This definition is further elaborated upon in other federal regulation, specifically, Section 330.2(e), paragraph 2, which states, "***A surface tributary system includes the waterbody itself, as well as any waters of the United States, including wetlands, that are adjacent to the waterbody***." As stated previously, the District determined that a headwater (surface tributary system as defined in regulation) flows through portions of the project site. They are part of a contiguous hydrologic connection to Little Sallisaw Creek.

CONCLUSION: After reviewing and evaluating the administrative record in accordance with federal regulations and guidance, I conclude that there is sufficient information in the administrative record to support the District's determination that waters of the United States, including wetlands and a surface tributary system, are located on the appellant's property. These waters are subject to the authority of the Clean Water Act. Accordingly, I conclude that this specific Request For Appeal does not have merit, and that no further action is needed for this jurisdictional appeal.

17 Sep 2001
(Date)

Jeffrey J. Dorko
Colonel, US Army
Commanding

Enclosure
Wetlands Determination