

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
GREAT SALT LAKE MINERALS PROPERTY
BOX ELDER COUNTY, UTAH
SACRAMENTO DISTRICT
FILE NUMBER SPK-200700121**

DATE: May 29, 2013

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

Appellant: Corey Milne, Great Salt Lake Minerals (Appellant)

District Representative: Jason Gipson, U.S. Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: April 20, 2012

Appeal Meeting and Site Visit Date: August 22, 2012

Summary of Decision: The reason for appeal of this Clean Water Act (CWA) jurisdictional determination does not have merit. The District's decision is upheld and no further action is required of the District.

Background Information: The Great Salt Lake Minerals Property (Property) is an approximately 7890-acre portion of Bear River Bay, located where the Bear River flows into the Great Salt Lake, near Ogden, in Box Elder County, Utah, at approximately Latitude 41.313 North, Longitude -112.314 West.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the September 7, 2011, "Great Salt Lake Mineral's Proposed Bear River Bay Expansion Evaporation Pond Vegetation Survey" drawing, prepared by Bio-West Environmental Consultants; the 1987 Wetland Delineation Manual (87 Manual); the Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance documents.

The District previously provided the Appellant with an Approved Jurisdictional Determination (AJD) on October 10, 2007, in response to a request from the Appellant's consultant, which included the May 2007, "Great Salt Lake Minerals Evaporations Ponds

Expansion Area Wetland Investigation, Box Elder Country, Utah.” Subsequently, the District received the October 2011, “Evidence of Sustained Submerged Aquatic Vegetation (SAV) Growth in Bear River Bay, Great Salt Lake, Utah” from The Coalition to Keep the Lake Great. This report, along with field visits on October 28, 2010 and July 18, 2011, resulted in the District’s conclusion that the October 10, 2007, AJD had been based on inaccurate information. On February 22, 2012, subsequent to reaching this conclusion, the District issued its revised AJD for the Property. The District concluded that the site contained 7880.4 acres of waters of the United States, including wetlands, within CWA jurisdiction.

The Appellant submitted a Request for Appeal (RFA) on April 20, 2012. While the Appellant did not disagree with the District’s determination that the waters on the Property are jurisdictional, the Appellant disagreed with the District’s conclusion that areas within those waters are wetlands and appealed that determination, citing the reason for appeal addressed in this appeal decision.

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 AR, the Appellant’s Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

REASON 1: The District did not consider the effects of normal hydrology. When Great Salt Lake levels are at or above its ordinary high water mark, the delineated area, under normal circumstances, would not support submerged aquatic vegetation, episodically flooded playa lakebed, or freshwater emergent marsh.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that, during Great Salt Lake (GSL) high water periods, it is likely that spiral ditch grass (*Ruppia cirrhosa*), the rooted aquatic bed vegetation that predominately covers the delineated area, would be eliminated. The Appellant stated that elevations of the delineated area are currently below the Corps-designated ordinary high water (OHW) level of the GSL (4,205 msl). The Appellant asserted that the Corps did not consider the effect of "normal" hydrology conditions. The Appellant indicated that during periods where the GSL water level is at or above OHW, waters have salinity levels many times greater than sea strength, and well beyond the salinity tolerance of spiral ditch grass. The AJD does not take into account that under normal hydrology conditions, rooted aquatic vegetation would not be present due to the significantly higher water and sediment salinity levels. When GSL levels are at or above OHW, the delineated area, under normal circumstances, would

not support submerged aquatic vegetation or episodically flooded playa lakebed or freshwater emergent marsh.

The District completed one AJD Form for the solar evaporation pond expansion area, within Bear River Bay.

In Section I.C of the AJD form, the District identified the Great Salt Lake as the nearest downstream Traditionally Navigable Water (TNW) and the nearest waterway. Section II.B.1.a of the AJD form indicates that the review area contains TNWs and wetlands adjacent to TNWs. Section II.B.1.b indicates that there are 72.9 acres of non-wetland waters and 7807.5 acres of wetlands in the review area.

Section III.A.1 indicates that the Great Salt Lake was determined to be a navigable water in a 1971 Supreme Court decision, because “the lake was used as a highway [for commerce] and that is the gist of the federal test.” *Utah v. U.S.*, 403 U.S. 9, 11. It is also indicated that a portion of the Property is considered to be part of the Great Salt Lake, since its below the ordinary high water mark (OHWM) of the Great Salt Lake. Section III.A.2 states that wetlands are located below the OHWM of the Great Salt Lake. The elevation of those areas determined to be wetlands in the Property ranges from 4197 to 4200 feet MSL.

In Section IV.B, the District described the Great Salt Lake as a dynamic playa lake that has historically ranged from 4191 to 4212 feet MSL. The District stated that, in 1986 the Lake level rose to its historic high of 4212 feet MSL. The District indicated that, at that time, Bear River Bay was inundated with highly saline water from the south arm that killed all vegetation. The District stated that the lake has reduced in elevation every year since. When the lake receded, Bear River Bay was a saline playa-like area. The District indicated that, subsequently, the salts have been flushed out and the bay has freshened and that, in most years, the Bear River Bay fills in the winter/spring and drains in the summer/fall with reduced flows from the Bear River. The District stated that a site visit was made in 2011, during which they confirmed the existence of emergent marsh and submerged aquatic vegetation (SAV).

The Corps regulations, at 33 CFR Parts 328 and 329, define “waters of the United States” and “navigable waters of the United States”, respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction. In addition, 33 CFR Part 331, Administrative Appeal Process, provides terms and definitions for jurisdictional determinations.

Procedures for making jurisdictional determinations for waters of the United States are further described in the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (MOA), dated 19 January 1989, later amended on 4 January 1993.

The 87 Manual states that the Corps of Engineers (*Federal Register* 1982) and the EPA (*Federal Register* 1980) jointly define wetlands 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 definition of wetlands in the 87 Manual contains the phrase "under normal circumstances," which was included because there are instances in which the vegetation in a wetland has been inadvertently or purposely removed or altered as a result of recent natural events or human activities. Other examples of human alterations that may affect wetlands are draining, ditching, levees, deposition of fill, irrigation, and impoundments. When such activities occur, an area may fail to meet the diagnostic criteria for a wetland. Likewise, positive hydric soil indicators may be absent in some recently created wetlands. In such cases, an alternative method must be employed in making wetland determinations.

Regulatory Guidance Letter (RGL) 90-7, dated September 26, 1990, "Clarification of the Phrase 'Normal Circumstances' as it pertains to Cropped Wetlands," indicates that "Normal circumstances" has been further defined as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation."

The 87 Manual, in Part IV, Section F, indicates that naturally occurring events may result in either creation or alteration of wetlands. For example, recent beaver dams may impound water, thereby resulting in a shift of hydrology and vegetation to wetlands. However, hydric soil indicators may not have developed due to insufficient time having passed to allow their development. Fire, avalanches, volcanic activity, and changing river courses are other examples. *NOTE: It is necessary to determine whether alterations to an area have resulted in changes that are now the "normal circumstances."* The relative permanence of the change and whether the area is now functioning as a wetland must be considered.

RGL 05-2, dated June 14, 2005, reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

A consideration of whether there has been a change in "normal circumstances" is, therefore, appropriate to areas where there has been a change resulting from human activity or a discrete event, rather than to areas where jurisdictional or wetland

boundaries vary as a result of environmental or climatic variation. In areas where jurisdictional or wetland boundaries shift as a result of environmental or climatic variation, revisiting jurisdictional determinations or wetland delineations after five years, when new information warrants revision, or when the District Engineer identifies specific areas that merit re-verification on a more frequent basis, as indicated in RGL 05-2, is appropriate.

CONCLUSION:

Since wetlands and other waters of the United States are affected over time by both natural and man-made activities, local changes in jurisdictional boundaries can be expected to occur. That is why jurisdictional determinations cannot remain valid for an indefinite period of time. In this case, the level of the Great Salt Lake has lowered as a result of several years of draught. During periods when the lake level is higher, high salinity levels of the water in lake would likely preclude vegetation as suggested by the Appellant. However, RGL 05-2 speaks to changing circumstances and revisiting areas more often that change frequently. It is uncertain whether lake level will rise, stay the same, or continue to fall in the near future. It is also uncertain if any future changes to lake level or the extent of wetlands, that may occur, would occur rapidly or gradually. Therefore, the District was reasonable in providing the Appellant with a jurisdictional determination that was valid for five years and the Appellant can request a new jurisdictional determination when the current one expires or if conditions on the Property change. However, if rapid changes in lake level or extent of wetlands are observed in the future, the District Engineer should consider whether jurisdictional determinations in this specific geographic area merit re-verification on a more frequent basis than every five years, as discussed in RGL 05-02.

I, therefore, conclude that this reason for appeal does not have merit. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process.

ORIGINAL SIGNED

Thomas J. Cavanaugh
Administrative Appeal Review Officer