Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016

Request for Additional Information: Case Study 5 and Supporting Documents

Case Study 5

1. Project Summary
   SPK#2014-01031
   The total project area is approximately 3,000 acres in size
   Due diligence efforts to determine agricultural operations to avoid WOTUS

2. Issue:
   a. Corps requires the inclusion of puddles resulting from vehicular disturbance that form after rain events in the middle of a dirt road used for farming practices.
   b. Corps requires the inclusion of erosional areas within existing agricultural roads as well as erosional areas that developed at the roads edge as a result of vehicle tires.
3. Supporting Information:
   Exhibit A – Aerial photograph showing dirt ranch roads used to access gas wells and cattle feeding stations.
   Exhibit B – Photos of representative puddles and erosional features in dirt roads that Corps asserted jurisdiction on.
   Exhibit C – Delineator's notes from site visit with regulator contained within an email

4. Details: Following the submission of the delineation of WOTUS on the entire 3000 acre ranch, a site visit with consultant and Corps regulator was conducted, resulting in the Corps attempting to take jurisdiction of additional features, including over 50 small depressions within dirt and gravel roads, as well as erosional features that developed at the roads edge. Notice water bottle in Exhibit B, picture A for scale. Additional pictures are features that the Corps requested be mapped as WOTUS. Despite, the lack of **any hydrological connection** and considering that many of the so called "wetlands" created in the roads were not present before the roads were established the Corps advised to include the features on the delineation map and label them as jurisdictional. There are over 6 miles of dirt and gravel roads on this ranch. Exhibit A is a focused area depicting representative examples wherein the Corps required the mapping of isolated WOTUS in dirt roads. The applicant disagreed with Corps and withdrew his delineation and request for jurisdictional determination. Exhibit C describes the delineator's notes from a site visit with the Corps regulator. Notable excerpts from these notes are the requirement to map farming roads as wetlands.

5. The agricultural project is suspended indefinitely.

Exhibit A

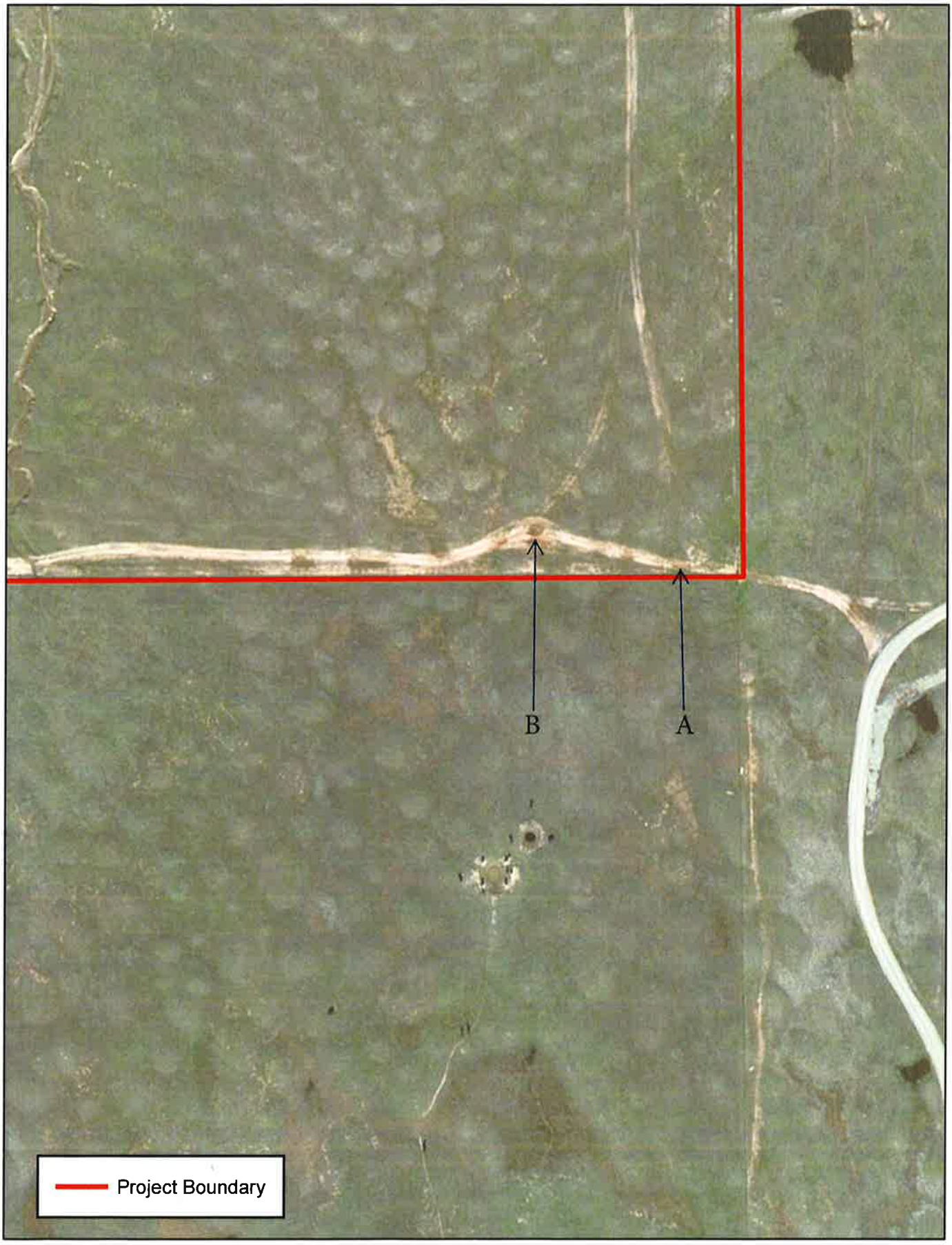

Exhibit A

Exhibit B

A.

B.

Exhibit B

Corps attempted to assert jurisdiction on most of the road side drainages that formed via erosion or were created to construct the road.

The Corps asserted jurisdiction claiming that sheet-flow was being conveyed in road-side swales even when they lacked bed, bank (ordinary high water mark) or maintained any hydrophytic vegetation (Case study 5).

Exhibit C

From: Jody Gallaway
To: Melissa Murphy
Cc: Kevin Sevier; Sam Rossi
Subject: RE: Brasil Corps Visit 4/15/2015
Date: Monday, April 20, 2015 3:25:56 PM

Thanks Melissa,
We are not going to map wetlands that can't be substantiated with data or reflect Matt's interpretation of OHWM. So when you map the new wetlands make sure that they can or could be substantiated with real data and not a magical wand. Also, when we make changes to the OHWM or extent of OW boundaries I want an explanation for **each** change.

Thanks,
Jody

From: Melissa Murphy
Sent: Monday, April 20, 2015 2:57 PM
To: Jody Gallaway
Cc: Kevin Sevier
Subject: Brasil Corps Visit 4/15/2015

Jody,

Here are the issues Matt Kelly has with the areas I visited with him:

- OHWM: He claims we are mapping the low flow channel instead of the "active floodplain." He says within the active floodplain, last year's erodium and other upland plants will be swept away therefore all the upland plants you see in these areas will be new growth from this year. He suggested we use a laser level and the "rack lines" from storm events to determine the OHWM. One drainage we mapped the width at 6 ft and he wants it to be 35 ft wide.
- Seeps: He claims there are jurisdictional seeps located on many of the hillslopes that need to be mapped and "are obvious in aerial photos." We visited two of these seeps, although hydric soils were present, one lacked hydrophytic vegetation and the other I did not recognize the plants (Elena might remember what the specific plants were better than me).
- OW and Swales Combined: He suggested we include OW polylines through the vernal swales we have already mapped that run downhill into larger drainages. Although the example swale he showed me (a feature we had already mapped as a vernal swale) had no indication of an OHWM, bed or bank (which is why it was mapped as a swale).
- Wetlands on Roads: On several occasions we mapped wetlands on either side of a dirt road, but did not include the road within the wetland. He wants the dirt roads mapped as wetlands as well, arguing that the only reason wetland vegetation is not present is because of the constant disturbance from vehicle traffic. He claimed he's had this debate with you many times before and low lying dirt roads between wetlands should always be mapped.
- Ridge Tops: At the time of the site visit, plants on the ridge tops were already desiccated and difficult to identify. Matt claims the vegetation found in some of the ridge top depressions is desiccated immature Psilocarphus and should be mapped as wetlands. Matt did not key out

questionalbe plants to determine their species, he simply relied on pictures to figure out what it was. As Elena pointed out, you can't positively identify unknown plants down to species without keying them out.