

Testimony for the Record  
Mr. Merlin Martin  
Martin Farms  
for the  
The Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water,  
and Wildlife  
Hearing on  
Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of  
Waters of the United States  
Tuesday, May 24, 2016

Mr. Merlin Martin appreciates the opportunity to present this testimony about his farm's experience with the U.S. Army Corps of Engineers regarding dredge and fill permitting under Clean Water Act Section 404. Although Mr. Martin has worked cooperatively with the agency on several matters where the agency has asserted jurisdiction over farm maintenance and development activities, those were protracted and expensive processes. Recently the agency has sought to expand its enforcement authority to areas of Martin Farms by using historical aerial photography (Google Earth images) as the main source of evidence of alleged violations. Mr. Martin hopes this testimony will educate the Committee about the Corps' activities with respect to farm development, generally, and specifically educate the Committee on the Corps' use of inconclusive Google Earth images and speculative assertions of significant nexus to reach far upstream from traditionally navigable waters to control farmers' development of their property.

### **Overview**

Mr. Merlin Martin owns and operates Martin Farms in and near Clayton, Hendricks County, Indiana. Mr. Martin grows corn, wheat, and soy on his property and has been in business since 1964. Martin Farms currently employs eleven people and is among the five largest farms in the state.

Since 2009, Martin Farms has been involved in several enforcement actions with the Corps regarding farm activities. In two instances, Martin Farms did not contest the agency's assertion of jurisdiction over farm ditches and wetlands. Martin Farms cooperated with the agency and has obtained after the fact (ATF) permits for those encapsulation and tree-clearing activities. These agency interactions and permitting activities have come at considerable costs. For example, the off-site mitigation for the alleged disturbance of approximately 1 acre of wetland and 1,374 linear feet stream cost approximately \$500,000.

In 2014, the Corps again contacted Martin Farms as a result of what the agency characterized as an anonymous tip that Martin Farms had cleared trees on farm property. Although Martin Farms continued to cooperate with the agency, allowing access and exchanging information, Martin Farms did not believe there had been any water, much less jurisdictional waters, on the identified parcel. At most, there had been a wash on the northernmost part of the parcel, which was tiled to provide outlet drainage for the eastern-adjacent farmland. There was no evidence of current or previous existence of ordinary high water mark, bed and banks or any other feature of a relatively permanent waterway on the parcel identified by the Corps. (The Corps did not allege

existence of any wetlands on the property.) The nearest relatively permanent waterway, a ditch called Mud Creek, was 1.5 river miles away from the site, and the nearest traditionally navigable water was over 100 river miles away.

Nevertheless, the Corps asserted that Martin Farms had encapsulated and graded approximately 2,660 linear feet of jurisdictional tributaries when it cleared trees and developed this parcel for farming. Although Martin Farms asked for more proof of jurisdiction, the Corps took the position that it was Martin Farms' responsibility to prove there had *not* been jurisdictional waters, not the agency's burden to prove conclusively that there *had* been.

Upon request, the Corps provided its approved jurisdictional determination (JD) to Martin Farms. The JD was based on a soil survey and several historic aerial photos (Google Earth) of the area before the trees were cleared. These documents are provided as Attachment 1. The JD's significant nexus analysis of how the alleged relatively permanent waterways impacted a traditionally navigable water was purely speculative. The JD is provided in Attachment 2.

In response, Martin Farms provided the affidavit of the contractor who had performed the work on the identified parcel. The contractor attested that tiling work on the northern part of the property was primarily done in 2007, more than 7 years before the 2015 allegation, and only a small amount of tiling work was done in 2013 when the trees were cleared in the northern portion of the parcel. The tree-clearing work was done on the southern end of the parcel in 2014. The contractor attested that in 2007 he tilled along an erosional feature (wash) in the northern part of the property, using an excavator among the trees, and in 2013 he cleared trees in the northern area of the parcel and finished tiling approximately 230 feet. The tree-clearing work was done in the southern area of the parcel in 2014; no tiles were installed. The contractor attested that he did not encounter any water on the parcel during the times he worked, and that there was no stream-like feature of any kind on the southern area of the parcel. The affidavit is provided in Attachment 3.

The Corps responded that the affidavit was incompatible with the existing evidence (i.e. the Google Earth photographs and soil survey). The agency did not explain why the affidavit did not refute existence of a stream in the southern part of the property. Regarding the northern part of the property, the Corps concluded that the description in the affidavit of an erosional feature (wash), in addition to the Google Earth images, actually supported the agency's assertion that an ephemeral stream had existed there. This is in apparent contradiction to Corps guidance that states that "swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent and short duration flow" are not typically jurisdictional<sup>1</sup>. The Corps response to the affidavit is provided in Attachment 4.

The letter from the district engineer rejecting the affidavit also indicated that the district engineer was giving Martin Farms an opportunity to appeal the JD without having to go through the ATF permitting application process. *See* Attachment 4. Martin Farms filed a request for appeal of the JD, but the division engineer's office would not accept the jurisdictional determination appeal without the ATF application. Martin Farms supplied this application in May 2016.

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<sup>1</sup> May 30, 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook at 16.

Martin Farms is in a Catch-22. It has been required to apply for a permit for farm development work it doesn't believe requires permitting, on land where the enforcing agency has provided no conclusive proof of jurisdiction. The agency has continued to press enforcement despite an affidavit regarding the state of the land at the time the work was done and only inconclusive Google Earth images to support the agency's position. This regulatory authority has been asserted under the existing definition of "waters of the United States". Martin Farms brings this to the Committee's attention in order to provide an example of what it believes is Corps over-reach into non-jurisdictional farm activities.

A more detailed timeline of the interactions between Martin Farms and the Corps follows. Mr. Martin would be happy to provide further information or answer questions as requested.

### **Detailed Timeline of Interactions between Martin Farms and the Corps of Engineers**

**2009-2012:** Mr. Martin's first encounter with the U.S. Army Corps of Engineers came in November 2009, when a neighbor reported activity on Mr. Martin's property. The reported activity consisted of approximately 500 linear feet of pipe added to an agricultural drainage ditch. The Corps performed a site visit and asked Mr. Martin to disclose all other encapsulation activity he had done on his farm in the past five years, which he did. Mr. Martin had encapsulated several portions of existing agricultural ditches. The encapsulation was necessary to provide field access, help alleviate flooding issues, and help prevent the continued loss of farmable land due to water erosion. After Mr. Martin made this disclosure, the agency alleged that much of the encapsulation activity Mr. Martin disclosed was performed on jurisdictional waters of the United States without required permitting. Mr. Martin cooperated with the Corps and the Indiana Department of Environmental Management (IDEM) to obtain an after-the-fact (ATF) permit for encapsulating a total of 1,410 linear feet of what were deemed by the Corps to be jurisdictional tributaries. Mr. Martin submitted the application for this ATF permit in February 2011.

As part of the permit application, Mr. Martin originally offered to install a native grass buffer on a total of 5,250 linear feet of stream on his property as mitigation for real or perceived impacts. This was a 3.7:1 ratio of mitigation to the alleged impact. The Corps did not accept this plan; instead, they required a forested buffer of at least 50 feet on each side of the stream in order for this proposal to be considered mitigation. This forested buffer would have been inconsistent with farm operations. A compromise proposal regarding the size of the forested buffer could not be reached, despite Martin Farms' efforts to propose a reasonable compromise that would allow the mitigation to take place on Martin Farms property. Ultimately, the Corps approved a mitigation plan where Martin Farms contracted with a local wetland development company to create 0.61 acre of forested wetlands. Approximate costs of mitigation were \$50,000, not including permitting and regulatory assistance.

**2012-2014:** The enforcement process that began in 2009 was drawing to a close in 2012 when an anonymous report to the agency was made, this time regarding tree-clearing activity on another area of Martin Farms. Martin Farms employees were instructed to cease and desist the tree-clearing activity, which they did. The Corps alleged that Martin Farms had mechanically

cleared and graded 0.939 acres of jurisdictional forested wetland and 1,374 linear feet of jurisdictional tributary. The Corps indicated they would not issue the pending permit for the encapsulation activity until the new alleged violation was resolved. Mr. Martin again worked with the agency to obtain an ATF permit for this work. When some issues regarding the scope of the jurisdictional determination of the area could not be worked out between the Corps and Martin Farms consultants, the matter was referred to EPA for enforcement. EPA issued a lengthy information request, which Mr. Martin answered in detail and at significant cost of preparation. A site visit with EPA, the Corps and IDEM personnel was conducted in June 2013. Ultimately, EPA determined not to pursue formal enforcement outside the ATF permitting process, but IDEM levied a fine. Mr. Martin entered an agreed order with IDEM, paid his fine, and completed the ATF permit application in May 2015.

As mitigation for this alleged impact, Martin Farms has contracted with the same local wetland development company to mitigate 1,789 linear feet of channel and to construct 3.76 acres of new forested wetland. The cost of this mitigation is approximately \$500,000.

**2014-Present:** In October 2014, the Corps contacted Mr. Martin about another anonymous tip that he had cleared trees on his property. This allegation is still ongoing with the agency. In short, the Corps is basing its assertion of jurisdiction on inconclusive historic aerial (Google Earth) photography and speculation about how the alleged waters, if they existed, may have influenced the transport of farm chemicals to the nearest traditionally navigable water, which is alleged to be over 100 river miles away.

1. October 2014 - The Site Visit: A site visit with personnel from the Corps, IDEM and American Structurepoint (Martin Farms' wetland consultant) was held in October 2014. The parties had trouble finding the area of allegation, as there was no sign of any disturbance of waters. They ultimately found the parcel, which had been cleared of trees.
2. March 2015 – The Cease and Desist Letter: In March 2015, the Corps issued a cease and-desist letter alleging Mr. Martin had encapsulated and graded approximately 2,669 linear feet of jurisdictional tributaries, without appropriate permitting. The Corps provided a 2014 Google Earth image of the property showing that clearing had taken place in the northern section of the property (the image was taken before the southern portion of the property was cleared). The Corps also provided a topographic map with the alleged tributaries drawn on. The topographic map did show some blue line tributaries in the area, but these were at least a mile from the alleged tributaries and were not connected to them.
3. April – September 2015 – Communications about Proof: Martin Farms provided responsive information to the cease-and-desist letter detailing that: (1) there was no jurisdictional waterway on the property; (2) the tiling (encapsulation) work was only done on the northern part of the property, and the majority of the tiling work was done in 2007, before the tree clearing and cultivation of the parcel and more than six years prior to the allegation. Therefore, this prior work was not subject to enforcement per the administrative procedures act statute of limitations; (3) at most, 230 feet of tiling work was done in 2013; and (4) the southern portion of the property did not contain any water, either, and no bed, banks or ordinary high

water mark (OHWM) features, and this area was not tiled before the trees were cleared and has not been tiled at all.

Martin Farms requested the Corps provide additional information regarding the basis for its jurisdictional determination. At that point, the only proof the Corps had produced of any jurisdictional features was the topo and a 2014 Google Earth aerial photograph of the parcel showing the northern portion having been cleared and pictures from the October 2014 site visit showing adjacent property.

The Corps responded that it believed the alleged tributaries had existed and were jurisdictional, and Martin Farms' information did not substantiate that jurisdictional tributaries had been absent. The Corps stated that without further information from Martin Farms substantiating that there were no jurisdictional tributaries, the agency would require ATF permitting or restoration of the property to its former state. Martin Farms responded by asserting that it was the Corps' burden to prove jurisdiction, and requesting to see the agency's jurisdictional determination.

4. September 2015 – the Jurisdictional Determination: The Corps responded with a jurisdictional determination (JD) that there had been relatively permanent waters (RPW) that flowed directly or indirectly into traditionally navigable waters (TNW) and there were also non-RPWs that flowed directly or indirectly into TNWs. The JD noted that the alleged “project waters” were 118.5 river miles from a TNW and 1.5 river miles from an RPW – Mud Creek, a blue line perennial RPW. The Corps must determine that there is a significant nexus between non-RPWs and a TNW when alleging Clean Water Act jurisdiction. The JD's significant nexus discussion was purely speculative, stating that the alleged intermittent tributaries would have had the capacity to carry pollutants from the adjacent crop fields 1.5 miles to the nearest relatively permanent waterway, and along the remaining 117 miles to impact the nearest traditionally navigable water. The significant nexus determination also speculated that before the area was cleared, its riparian zone would have filtered agricultural pollutants from entering the alleged tributaries which would have prevented these pollutants from entering the downstream waterway. The JD is provided as Attachment 2.

The Corps included several other historic aerial photographs with their JD, including a March 30, 2005 Google Earth image that the agency asserted demonstrated bed and banks features on the property. These images were the basis of the Corps' claim that there had been jurisdictional waterways prior to Martin Farms' work. These documents are provided as Attachment 1.

5. September 2015 - the Affidavit: In response to the Corps' information, Martin Farms provided an affidavit from Mr. Reuben Scott, the contractor hired to perform the work. See Attachment 3. This affidavit attests that at most there was an ephemeral erosional feature (a wash) *without* an ordinary high water mark where the JD alleges an intermittent tributary existed in the northern part of the property. The affidavit attests that there was no drainage feature at all in the southern area of the property, where the ephemeral tributaries were alleged to have existed. Furthermore, Mr. Scott attests that selective logging was done in the area in the early 2000's, and that log skidder tracks from the previous logging work were in evidence during the time he performed the agricultural improvements. Given this information, the aerial photographs of the areas allegedly containing the ephemeral tributaries are particularly suspect. Not only are

the Google Earth images difficult to decipher on their face, but also the evidence that logging skids were visible to Mr. Scott casts further doubt on the Google Earth images' demonstration of OHWM for the alleged ephemeral streams.

6. November 2015 – May 2016: The opportunity to appeal the JD: The District office of the Corps offered Mr. Martin the opportunity to appeal the approved JD via a November 19, 2015 letter. *See* Attachment 4. This letter presented the opportunity to appeal the JD as an alternative to submitting an ATF permit application. It provided separate timeframes for these actions, and discussed the required tolling agreement for the JD appeal without mentioning that an ATF permit must also be accepted before a JD can be appealed in an enforcement matter. Based on the language in the November 19, 2015 letter and upon review of the regulatory requirements for appealing a JD associated with an alleged unauthorized activity, Mr. Martin concluded the opportunity to appeal the JD was being offered under the “justice and fairness” exception in 33 C.F.R. § 331.11. Under this regulation, the district engineer may accept an appeal of the approved JD without an ATF permit application “if the district engineer determines that the interest of justice, fairness, and administrative efficiency would be served.”

In reliance on the November 19 letter, Mr. Martin did not begin putting together an ATF permit application. Instead, based on his belief that there were no jurisdictional waters at issue, he pursued the offered request for appeal (RFA) with the understanding that he would not be required to compile an ATF permit application while the merits of the JD that served as the basis for the ATF requirement were being reviewed.

Upon receipt of the RFA, Division Engineer's office contacted Martin Farms to relate that in fact an ATF permit application was required before the JD appeal could be processed. The representative from the Division Engineer's office noted that although the published regulation in 33. C.F.R. § 331.11 stated that the discretion was with the *district* engineer to make this decision, in fact the *division* engineer was the entity with that discretion and the District Engineer's November letter could not permit a JD appeal absent an ATF permit. In a February 2016 letter, Martin Farms requested the *Division* Engineer exercise its claimed discretion to accept the JD appeal absent an ATF permit, but the Division Engineer ultimately declined. By an April letter, the Division Engineer noted the JD appeal could not proceed without an ATF permit application. Martin Farms provided an ATF permit application within the provided 30-day timeframe, and the JD appeal is now ripe for review.

### **Conclusion**

As this testimony reveals, Martin Farms has been through a regulatory saga over the past seven years relating to farm maintenance and development activities. Although Martin Farms has not contested Corps jurisdiction in previous encounters for encapsulation of farm ditches and tree-clearing for farm development, in the current situation it believes the Corps has improperly alleged jurisdiction over tree-clearing and farm cultivation work without sufficient evidence. Inconclusive Google Earth images and speculation about potential impacts to traditionally navigable waters that are over 100 river miles away cannot and should not support regulatory enforcement actions by the agency over a farmer's development on his land.