U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION

Date: 5 March 2004

ADMINSTRATIVE APPEAL DECISION

IRVINE NATURE CENTER (GARRISON FOREST ROAD SITE)
BALTIMORE DISTRICT FILE NO. 02-63179-4

Review Officer: James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Irvine Nature Center

Date of Receipt of Request for Appeal: 31 October 2003

Date of Acceptance of Request for Appeal: 7 November 2003

Appeal Conference/Site Visit Date: 1 December 2003

APPELLANT'S STATED REASON FOR APPEAL:

An area on the southern portion of the approximate 116-acre project site identified as an "ephemeral channel" should not be considered a jurisdictional water of the United States, since the appellant contends that there is no hydrologic connection between said channel and other waters of the United States.

BACKGROUND INFORMATION:

In a submittal dated 25 March 2002, Mr. Jeffrey Wolinski, a consulting ecologist representing Irvine Nature Center, requested a determination of the extent of Department of the Army jurisdiction on an approximate 116-acre site at Owings Mills, Baltimore County, Maryland. Most of the central portion of the site consists of agricultural lands while peripheral areas of the site consist generally of forest, with hedgerows interspersed between farm fields. The appellant indicates the site has been used for agriculture for approximately the past century.

Wetlands were generally found along and adjacent to intact watercourses in the forested areas of the site. Also, a feature identified by both the consultant and the district as an ephemeral watercourse exists in the central portion of the site. The origin of the watercourse is on an adjacent upstream cemetery owned by the State of Maryland. The watercourse flows through a well-defined channel downslope for a distance of approximately 350 feet to a point where it encounters an at-grade road crossing. The watercourse becomes braided where it crosses the road, then merges, enters a less defined channel and continues downslope to a forested area adjacent to a hedgerow, approximately 400-500 feet from the road. The watercourse begins to lose its identity as it continues downslope toward the flatter portion of the site. The administrative record then offers differing representations of downstream conditions by both the appellant and the district. Some information suggests the ephemeral watercourse continues almost due eastward across an existing prior converted wetland to a confluence with an unnamed tributary of the North Branch of Jones Falls. Other information suggests the ephemeral watercourse takes a turn to the southeast and has a confluence with a second

unnamed tributary of the North Branch of Jones Falls near the southern property boundary. In contrast, other parts of the record suggest no connection is present; instead, the ephemeral watercourse loses its identity, and water flows downslope in an overland fashion through prior converted wetland area that is in active agricultural use, before entering one of the aforementioned unnamed tributaries. These conditions were found to exist on the site during the 1 December 2003 site inspection for the appeals conference.

On 5 September 2003, after a series of site inspections, the Baltimore District confirmed the delineation of wetlands and determined that the ephemeral watercourse is jurisdictional. The district subsequently indicated on the Jurisdictional Determination Verification Map that the downstream limit of jurisdiction in the ephemeral watercourse is separated from other jurisdictional areas by at least 600 feet of non-jurisdictional areas, consisting mostly of prior converted wetland in agricultural use. The appellant is appealing the district's determination that the ephemeral watercourse is jurisdictional for purposes of the Clean Water Act.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

a) The Baltimore District provided a copy of the administrative record, which was reviewed and considered in the appeal review process along with the results of the 1 December 2003 site inspection and appeal conference.

b) During the conference, the Baltimore District was requested to show their determination of the precise downstream limit of Clean Water Act jurisdiction in the ephemeral watercourse, in order to clarify the administrative record. This information was provided and considered as part of the appeal review process.

SUMMARY OF DECISION:

The appellant's Request for Appeal has merit, because the Baltimore District's determination that the ephemeral watercourse is jurisdictional under the Clean Water Act does not comport with current regulations and Regulatory Program guidance. At present, the record does not clearly and adequately support a finding that the ephemeral watercourse and an associated wetland area can be considered either adjacent to waters of the United States, part of a surface tributary system comprising such waters of the United States, or possessing a nexus to interstate commerce.

INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: The Baltimore District is to reassess its decision, applying the guidance set forth in the 30 March 1988 CECW-OR memorandum (enclosed) pertaining to adjacency, and must make a positive finding in one or more of the following three factors: 1) that the ephemeral channel and adjacent forested wetland (wetland area "W" on the Jurisdictional Determination Verification Map) are adjacent to waters of the United States; 2) that the ephemeral channel is

part of a surface tributary system comprising a continuum of waters of the United States; or 3) that the ephemeral channel and wetland area "W" are isolated but have a nexus to interstate commerce. Further, if the district selects a nexus to interstate commerce as a positive basis for jurisdiction, current procedures mandate prior approval from Headquarters, U.S. Army Corps of Engineers before an approved jurisdictional determination can be issued.

Appeal Decision Findings: According to the administrative record, the Baltimore District conducted inspections of the project site on 18 June 2002, 26 July 2002, 21 March 2003 and 28 April 2003. Documents supporting the district's jurisdictional determination consist of a Memorandum for the Record dated 25 July 2003 and a Basis for Jurisdictional Determination form dated 5 September 2003. The Memorandum for the Record discusses the ephemeral watercourse in detail, indicating that "…it is…lost further downstream where the elevation flattens out and the stream channel is disturbed and is unable to re-establish because of continual manipulation by farming practices... During a couple of our site visits, there was evidence of this stream channel trying to reestablish in the adjacent cultivated fields on either side of the historic channel to carry flow to the tributary that runs north to south. Based on these observations, it has been determined that, *although there is no existing Corps-regulated channel for a segment of this system* (emphasis added) because it has been continually disturbed, the upper part of this system is not isolated and is therefore subject to Corps jurisdiction." The administrative record contains photographs taken during the 21 March 2003 site inspection that bolsters the assertion regarding reestablishment of the stream channel. However, the 1 December 2003 site inspection confirmed the lack of a continuous Corps-regulated channel in the prior converted wetland area.

The District's Basis for Jurisdictional Determination Form states that the project site has been determined to contain jurisdictional waters of the Untied States based upon three factors. One factor cited by the district is that the site contains tributaries to waters of the United States; tributaries are themselves classified as waters of the United States in accordance with Title 33 of the Code of Federal Regulations, Part 328.3 (a)(5). A second factor is that the site contains wetlands according to the criteria established in the 1987 "Corps of Engineers Wetland Delineation Manual" which are adjacent to waters of the United States, thereby making the wetlands jurisdictional in accordance with Title 33 of the Code of Federal Regulations, Part 328.3 (a)(7). The third factor is that the site contains other waters such as intrastate lakes, rivers, and streams including intermittent streams, wet meadows, playa lakes or natural ponds containing a nexus to interstate commerce. However, the district did not specify the nexus to interstate commerce as listed in Title 33 of the Code of Federal Regulations, Part 328.3 (a)(3)(i-iii), and as such this basis for determination is unsupported.

In reviewing the District's Memorandum for the Record excerpted above, it is not clear under which basis the district has determined Clean Water Act jurisdiction for the ephemeral watercourse and wetland area "W" in question. The district uses the ambiguous term "not isolated" in their Memorandum for the Record dated 25 July 2003. In order for the ephemeral watercourse and wetland area "W" to be jurisdictional, these features would have to be determined to be part of a tributary system to waters of the United States, and/or adjacent to

waters of the United States, and/or possessing at least one nexus to interstate commerce as specified in Title 33 of the Code of Federal Regulations, Part 328.3 (a)(3)(i-iii).

The term "adjacent" is defined at Title 33 of the Code of Federal Regulations, Part 328.3 (c). Application of the term "adjacency" is the specific subject of a CECW-OR memorandum to the field issued 30 March 1988, copy attached. Paragraph 3 of the memorandum states that "…a determination of adjacency should not be based on historic connections unless the area of man-made fill is an unpermitted discharge occurring after the relevant phase-in date for jurisdiction, or unless the area is a berm, dike or other narrow upland landscape feature… If we take the broad-based view that any historic connection makes a wetland adjacent to another water, it could create substantial problems with trying to prove that the exact upland parcel now separating the wetland from another of the US was, indeed, filled. This position also fails to recognize that the wetland is currently functioning as an isolated wetland. Finally, a call of "adjacency" on a historic connection,…is apt to cause public confusion and complicate administration of the program." It should be noted in this case that ongoing farming activities, which are exempt from Clean Water Act regulation, have apparently caused the ephemeral watercourse and wetland area "W" to be severed from waters of the United States.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the Baltimore District, I conclude its determination that the ephemeral watercourse and subsequently the adjacent wetland area marked "W" are jurisdictional for purposes of the Clean Water Act does not presently comport with applicable regulations and guidance. I hereby recommend returning this matter to the Baltimore District for additional analysis as prescribed within this decision memorandum.

RECOMMENDED:_____/s/_____
JAMES W. HAGGERTY
NAD Administrative Appeals Review Officer

CONCUR:_____/s/_____
THOMAS M. CREAMER
Chief of Programs Support – HQNAD

APPROVED:_____/s/_____
MERDITH W.B. TEMPLE
Brigadier General, USA
Commanding