

**U.S. ARMY CORPS OF ENGINEERS  
NORTH ATLANTIC DIVISION**

Date: 5 March 2004

**ADMINISTRATIVE APPEAL DECISION**

CALDERA PROPERTIES, LP (BANKS FARM SITE)  
PHILADELPHIA DISTRICT FILE NO. 200201999-26

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

**Appellant:** Caldera Properties, LP

**Appellant's Agent:** Environmental Resources, Inc.

**Date of Receipt of Request for Appeal:** 22 October 2003

**Date of Acceptance of Request for Appeal:** 7 November 2003

**Appeal Conference/Site Visit Date:** 2 December 2003

**HQNAD-ACCEPTED REASONS FOR APPEAL:**

The following reasons for appeal, as enumerated in the agent's submittal of the Request for Appeal, were accepted for consideration by HQNAD:

- 1) Manmade, upland agricultural ditches on the site should not be considered jurisdictional under the Clean Water Act since these ditches lack an ordinary high water mark and have been in existence since prior to the 1972 Clean Water Act.
- 2) The Philadelphia District's assertion of jurisdiction over these ditches is inconsistent with the Final Rule for the Corps of Engineers Regulatory Program, published in the Federal Register on 13 November 1986 (51 FR 41206), and the Standard Operating Procedures for the Regulatory Program issued on 8 April 1999.

**BACKGROUND INFORMATION:**

On 8 October 2002, the Philadelphia District received a request for a determination of the extent of Department of the Army jurisdiction on an approximate 125-acre site identified on Tax Map 1-34-16, Parcels 40, 41.01 & 42, Baltimore Hundred, Sussex County, Delaware. The site consists of approximately 33 acres of agricultural fields and 92 acres of mixed hardwood and pine forest. An actively maintained system of drainage ditches is present within the agricultural lands, and parts of the ditch system extend into the forested areas of the site. Drainage from the site flows generally southward toward Beaver Dam Ditch, a tributary of Little Assawoman Bay. This embayment is subject to the ebb and flood of the tide, and is therefore considered to be waters of the United States in accordance with Title 33 of the Code of Federal Regulations ("33 CFR"), Part 328.3 (a)(1).

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The delineation identified that approximately 31.3 acres of forested wetlands exist on the site, with approximately 23.44 acres of wetlands determined by the agent to be isolated and not subject to Clean Water Act jurisdiction. The district conducted a joint site inspection with the agent on 1 April 2003 and found that approximately 18.5 of the 23.44 acres of wetlands were jurisdictional because they were either contiguous or adjacent to waters of the United States. The appellant did not appeal the district's findings regarding the extent of jurisdictional wetlands. Instead, the appeal is with respect to the district's determination that man-made upland agricultural drainage ditches on the site were jurisdictional, as set forth in the district's 22 August 2003 approved jurisdictional determination.

**INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

- a) The Philadelphia District provided a copy of the administrative record, which was reviewed and considered in the appeal review process along with the results of the 2 December 2003 site inspection and appeal conference.
- b) During the conference, the agent provided a four-page set of colorized plans showing jurisdictional features on the site. This was accepted as clarifying information in accordance with 33 CFR, Part 331.7 (e)(6) since an existing set of non-colorized plans was already in the administrative record.
- c) In a letter dated 26 November 2003, the agent requested that this office consider including an additional valid reason for appeal. The agent believes that the actions of the Philadelphia District in issuing a 3 July 2003 Technical Support document and new policy on 27 January 2003 purportedly constituted rulemaking, and was prohibited by Corps' directives stating that districts could not issue any new policy regarding the SWANCC decision. This is not an appealable action under the Corps' Administrative Appeal Process, since only approved jurisdictional determinations, declined proffered permits, and permit denials with prejudice are appealable actions.
- d) In a letter dated 15 December 2003, the appellant's attorney provided written comments to a draft CENAD-CM-O memorandum summarizing the conference and site visits. Portions of the letter were incorporated into the final memorandum to enhance its clarity.
- e) In a letter dated 18 December 2003, the appellant's attorney advised this office of the U.S. Court of Appeals decision *In re Needham*, 2003 U.S. App. LEXIS 25318 (5<sup>th</sup> Cir. Dec. 16, 2003), to bolster their previous interpretations of decisions made in the SWANCC case and *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed 2d 419 (1985), specifically regarding issues of isolated wetlands and use of the term adjacency. The information was considered as part of the decision on this request for appeal.

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**SUMMARY OF DECISION:**

The appellant's request for appeal does not have merit, because the administrative record and current Regulatory policies support Philadelphia District's determination that the agricultural ditches in question are jurisdictional under the Clean Water Act.

**EVALUATION OF THE REASONS FOR APPEAL/APPEAL DECISION FINDINGS:**

*First Accepted Reason for Appeal--* Manmade, upland agricultural ditches on the site should not be considered jurisdictional under the Clean Water Act since these ditches lack an ordinary high water mark and have been in existence since prior to the 1972 Clean Water Act.

*Second Accepted Reason for Appeal--*The Philadelphia District's assertion of jurisdiction over these ditches is inconsistent with the Final Rule for the Corps of Engineers Regulatory Program, published in the Federal Register on 13 November 1986 (51 FR 41206), and the Standard Operating Procedures for the Regulatory Program issued on 8 April 1999.

*Determination on the Merits of These Reasons for Appeal—these reasons for appeal do not have merit:* The agent relies heavily on discussions of jurisdictional treatment of drainage ditches in the Preamble to the 13 November 1986 Federal Register (51 FR 41206) and the 8 April 1999 Army Corps of Engineers Standard Operating Procedures for the Regulatory Program ("SOP"). The agent also stated a belief that a manmade stream which channelizes a natural watercourse but which does not possess an ordinary high water mark cannot be considered jurisdictional under the Clean Water Act. During the site inspection on the subject property, the agent showed examples of what he considers to be true, natural watercourses versus manmade ditches, and explained his position that the manmade ditches should not be considered regulated because they do not possess flowing water and evidence of an ordinary high water mark along with a stream bed and bank. Another factor the agent uses in his opinion is assessing jurisdiction is whether the conveyance is a connection between wetlands and/or streams, or essentially an artificial, man-made upland agricultural feature whose purpose is to convey surface or groundwater from one area to another. He also believes the district is in error in their finding that the sideslopes and bottom of the manmade ditches are the equivalent of the bed and bank of a natural watercourse.

The preamble discussion states that, generally, non-tidal drainage and irrigation ditches excavated on dry land are not considered to be waters of the United States. The SOP states that a drainage ditch excavated in uplands and/or located along a roadway, runway or railroad that only carries water from upland areas, is not considered jurisdictional, even if it supports hydrophytic vegetation. On the surface, the district's decision appears to be potentially at odds with these discussions. However, the preamble discussion and the SOP are not statutes or

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actual regulations, and their application is limited in instances where existing regulations, statutes and court decisions govern a Federal agency action. Additionally, the preamble also indicates that the Corps of Engineers and the U.S. Environmental Protection Agency reserve the right on a case-by-case basis to regulate the types of ditches described above.

The district documents their jurisdictional determination in a Memorandum for the Record dated 11 August 2003. HQNAD has reviewed this memorandum and its attachments and finds that it adequately supports the district's determination regarding the jurisdictional status of the ditch network under the Clean Water Act. The memorandum discusses how there is an undisrupted surface tributary connection between the jurisdictional ditches and Beaver Dam Ditch. It is consistent with the tenet set forth in the district's 3 July 2003 Technical Support Document that drainage and irrigation ditches are subject to Clean Water Act jurisdiction where they connect to other jurisdictional waters and function as tributaries to those waters. Tributaries to waters of the United States are themselves waters of the United States in accordance with 33 CFR, Part 328.3 (a)(5). Whether the ditches were or were not in existence prior to the Clean Water Act does not affect their current status as tributaries. Additionally, under current Corps policy, jurisdiction in tributaries that are waters of the United States extends to the upper reaches of the tributary system and the upstream limit of tributary jurisdiction is independent of the location where the ordinary high water mark is lost.

It should also be noted that the district's determination in this matter is consistent with present Regulatory Program policies, including the 15 January 2003 Joint Memorandum, Appendix A of the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (68 FR 1991), and several recent Federal court decisions, including but not limited to Headwaters v. Talent Irrigation District, 243 F. 3d 526, 534 (9<sup>th</sup> Cir. 2001). Additionally, the district's issuance of the Technical Support Document and the directive regarding drainage ditches do not constitute Federal agency rulemaking or issuance of guidance relative to the SWANCC decision. Although the agent correctly points out that the ditches are manmade and are located in uplands, they nonetheless constitute the upper reaches of the surface tributary system of Beaver Dam Ditch and have been appropriately determined to be jurisdictional by the district.

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**OVERALL CONCLUSION:**

After reviewing and evaluating the entirety of the administrative record provided by the Philadelphia District, I conclude its determination regarding the jurisdictional status of ditches on the property in question is adequately supported. I hereby find that the appellant's request for appeal does not have merit.

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

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