

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

Date: 5 March 2004

ADMINISTRATIVE APPEAL DECISION

CALDERA PROPERTIES, LP (SKIBA-CHANDLER SITE)
PHILADELPHIA DISTRICT FILE NO. 200201383-23

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 and subsequent correspondence, 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.
- 3) The Philadelphia District's assertion of jurisdiction over two wetland areas in the southern portion of the property is inconsistent with the United States Supreme Court's decision in the matter of Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC decision").

BACKGROUND INFORMATION:

On 16 July 2002, the Philadelphia District received a request for a determination of the extent of Department of the Army jurisdiction on an approximate 121-acre site identified on Tax Map 1-34-16, Parcels 22 & 23, Baltimore Hundred, Sussex County, Delaware. The vast majority of the site, with the exception of an approximate eight-acre forested area at the southern boundary of the site, consists of upland agricultural fields with hydrology controlled by a

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network of man-made drainage ditches. Drainage from the northern and central portions of the site flows northeastward toward Whites Creek, a tributary of Indian River Bay, while drainage from the southern portion of the site flows generally southward toward Beaver Dam Ditch, a tributary of Little Assawoman Bay. Both embayments are subject to the ebb and flood of the tide, and are 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).

Two wetland areas, measuring approximately 0.36 and 2.24 acres, were determined by the district to be jurisdictional because they are "neighboring" to waters of the United States. As indicated in 33 CFR, Part 328.3 (c), the term "adjacent" means bordering, contiguous, or neighboring; on the basis of the wetland areas being neighboring to waters of the United States, they are considered by the district to be jurisdictional under the Clean Water Act

On 8 November 2002, the district conducted a site inspection with the agent and documented the results of the inspection in an 11 November 2002 Memorandum for the Record. The memorandum confirmed and provided supporting documentation for a verbal statement made by the district project manager during the inspection that the wetland areas and the ditch network were not jurisdictional. The specific citations in the memorandum supporting the determination of non-jurisdiction were 33 CFR, Part 328.3 and the Regulatory Program Standard Operating Procedures dated 8 April 1999. Although the memorandum indicated the district would issue a letter "as soon as possible" stating that the Department of the Army has no regulatory authority over development of the property, no such letter was ever issued.

On 27 January 2003, the district implemented a new policy regarding regulation of drainage ditches. Under this new policy, the district now regulates discharges of dredged or fill material into all upland drainage ditches if they are connected hydrologically to a surface tributary system comprising waters of the United States, inasmuch as these ditches constitute discrete conveyances of water to downstream areas. The district apparently implemented this policy in response to recent trends in Federal court decisions affecting the Regulatory Program; many favorable decisions have upheld Clean Water Act jurisdiction along the entire length of surface tributary systems that comprise waters of the United States.

On 11 February 2003, the district verbally informed the agent of the change in policy, and requested a revised plan showing the ditch network and wetland areas as now being jurisdictional. The agent requested a second field inspection to discuss the matter prior to submission of the requested modified plan. The second site inspection occurred on 18 March 2003, and the district determined the majority of the ditch network was appropriately classified as jurisdictional waters of the United States under the new policy. The district also found the aforementioned wetland areas to be adjacent to waters of the United States and, therefore, also jurisdictional. After a delay in receipt by the district of a revised delineation plan, the district issued a final approved jurisdictional determination on 22 August 2003.

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It should be noted that on 3 July 2003, the district issued an internal technical support document discussing Clean Water Act jurisdiction over streams and ditches. This document serves as basically a compendium of existing regulations and district policies; it was not a guidance document or an officially promulgated set of rules or regulations. The technical support document is one of the enclosures to the district's 15 August 2003 Memorandum for the Record supporting their approved jurisdictional determination, along with a Basis for Jurisdictional Determination form.

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 colorized plan 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 non-colorized plan was already in the administrative record.
- c) In a letter dated 26 November 2003, the agent requested that this office consider including two additional valid reasons for appeal. The first is that the actions of the Philadelphia District in issuing the technical support document and new policy 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. The second is that the Philadelphia District's assertion of jurisdiction over the two wetland areas in the southern portion of the property is purportedly inconsistent with the SWANCC decision. We determined that this is a valid reason for appeal, and this was added as a third HQNAD-accepted reason for appeal.
- 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 (5th 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 neighboring Banks Farm site, 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 actual regulations, and their application is limited in instances where existing regulations,

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statutes and court decisions support 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 15 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 and the two wetland areas under the Clean Water Act. The memorandum discusses how there is an undisrupted surface tributary connection between the jurisdictional ditches and the headwaters of receiving streams, namely Whites Creek 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.

Third Accepted Reason for Appeal--The agent believes the Philadelphia District's assertion of jurisdiction over two wetland areas in the southern portion of the property is inconsistent with the United States Supreme Court's decision in the matter of Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S 159 (2001) ("SWANCC decision").

Determination on the Merits of This Reason for Appeal—*this reason for appeal does not have merit*: The district's 15 August 2003 decision memorandum states that each wetland area is "neighboring" a water of the United States by virtue of its proximity to a jurisdictional ditch, and as such are considered adjacent to waters of the United States in accordance with 33 CFR, Part 328.3 (c). The SWANCC decision therefore does not apply to these wetland areas, inasmuch as these wetlands are adjacent to waters of the United States and are themselves defined as waters of the United States in accordance with 33 CFR, Part 328.3 (a)(7).

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 (9th 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

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ditches are manmade and are located near the top of the drainage divide separating Whites Creek from Beaver Dam Ditch, they nonetheless constitute the upper reaches of the surface tributary systems of these two watersheds, and have been appropriately determined to be jurisdictional by the district.

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 and wetlands 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/
MIRDITH W.B. TEMPLE
Brigadier General, USA
Commanding