

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 24 September 2004**

ADMINISTRATIVE APPEAL DECISION

Frank Guarini,
NEW YORK DISTRICT FILE NO. 2004-00304-J2

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant: Frank Guarini

Appellant's Agent: Kevin J. Coakley, Connell Foley LLP, Kenneth Paul, EcolSciences, Inc.

Date of Receipt of Request for Appeal: 15 June 2004

Date of Acceptance of Request for Appeal:

Appeal Conference/Site Visit Date: N/A

APPELLANT'S STATED REASON FOR APPEAL:

1. The jurisdiction of the United States of America to regulate freshwater wetlands pursuant to Section 404 of the Clean Water Act is challenged in that the alleged wetlands are not adjacent to a navigable water body of the United States. The wetlands adjoin Penhorn Creek, which is a narrow, shallow non-navigable ditch, which collects storm water from a very small drainage area. The Property is approximately two miles from the nearest navigable body of water and is separated from such navigable body of water by a number of physical features including enclosed pipes, roadways, a tide gate and the like. The wetlands on the Property are not waters of the United States.
2. The assertion of jurisdiction under Section 10 of the Rivers and Harbors Act is challenged in that Penhorn Creek is not navigable. Tidal flow ended many years ago and does not support an assertion of jurisdiction under Section 10 of the Rivers and Harbors Act.

BACKGROUND INFORMATION:

On 6 November 2003, the New York District, Corps of Engineers received a request from EcolSciences, Inc. for a determination of the extent of Department of the Army jurisdiction on an approximate 91-acre site located in the Township of North Bergen and the Town of Secaucus, Hudson County, New Jersey. The site is generally rectangular in shape and is bordered to the north by wetlands and additional undeveloped areas, with an existing service road and New Jersey State Route 3 beyond, to the east by US Route 1 and 9, to the west by Penhorn Creek and to the south by an existing active railroad line, with commercial properties and Secaucus Road to the southwest. The site is undeveloped and primarily characterized by emergent wetlands.

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The site is located within the Hackensack River Drainage Basin and drains into Penhorn Creek, a tributary of the Hackensack River.

The New York District completed a site inspection on 1 April 2004 and determined that the appellant's original delineation needed to be modified to include sites located along the northeast property line. On 20 April 2004, the District received a copy of the modified delineation. The District determined that approximately 89-acres of jurisdictional waters of the United States exist on the site. The appellant is appealing the district's determination that the wetlands are subject to the Corps jurisdiction under the Clean Water Act and the Rivers and Harbors Act.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The New York District provided a copy of their administrative record, which was reviewed and considered in the appeal review.

SUMMARY OF DECISION:

The appellant's Request for Appeal does not have merit, because the New York District's administrative record sufficiently documents and supports the conclusion in its 5 May 2004 Basis for Jurisdictional Determination that the on-site wetland areas are adjacent to a navigable water of the United States. The record adequately supports the statement in the district's 5 May 2004 Memorandum for the Record that the wetland areas in question are part of a surface tributary system.

INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION/APPEAL DECISION FINDINGS:

Action: No Action Required.

Appeal Decision Findings: The New York District's administrative record contains three major internal documents: a Memorandum for the Record (MFR), dated 5 May 2004; a Basis for Jurisdictional Determination Memorandum, also dated 5 May 2004, which was an enclosure to the aforementioned MFR; and a Site Inspection Report dated 1 April 2004. In addition to these documents the record also contains a copy of the EcolSciences, Inc. Wetland Investigation Report dated 3 November 2003 and Wetlands Delineation Survey dated 13 April 2004. After reviewing the documents contained in the administrative record for this action it appears that the only difference between the District's documents and the EcolSciences, Inc. Wetland Investigation Report is the fact that the District considers Penhorn Creek a navigable water of the US and therefore subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act as well as Section 404 of the Clean Water Act.

The appellant's Wetland Investigation Report, under the Hydrology Section, states "The site contains many drainage ditches that drain into the Penhorn Creek located along the site's western border. Penhorn Creek flows in a southwesterly direction until its confluence with the

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Hackensack River approximately 1.7 miles southwest of the property.” The report concluded that the wetlands drained into Penhorn Creek, “a non-navigable tributary to the Hackensack River” and that it is “assumed for purposes of this report that the on-site wetlands and waters come under the jurisdiction of the Corps of Engineers in accordance with Section 404 of the Clean Water Act.”

The District’s Basis for Jurisdictional Determination Form states that the project site has been determined to contain jurisdictional waters of the United States based upon three factors. The first is that the site contains waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide in accordance with Title 33 of the Code of Federal Regulations, Part 328.3(a)(1). The second is that the site contains tributaries to waters of the United States, which 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). The third 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 (Part 328.3(a)(7)). In making this statement, the district asserts that all of the watercourses and wetlands on the site are waters of the United States, or are adjacent to waters of the United States and are therefore jurisdictional for purposes of the Clean Water Act. As previously stated, the District’s findings coincide with the findings contained in the EcolSciences report, with the exception that the District determined that Penhorn Creek was also subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act.

As previously stated, the appellant and the District agree that at one time Penhorn Creek was a tidal water. However, the appellant feels that Penhorn Creek is no longer tidal or navigable because tide gates have been installed within the creek. In its approved jurisdictional determination letter, the District stated that even though tide gates had been installed in Penhorn Creek, that did not negate the fact that the creek remained “navigable in law”. The District’s finding is consistent with § 329.9 and § 329.13. Section 329 defines Navigable Waters of the United States. Section 329.9 states: “Once having attained the character of ‘navigable in law’, the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action.” Section 329.13 states: “[a]n area will remain “navigable in law,” even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change.”

The District provided sufficient documentation that the wetlands are not isolated. At 33 CFR 330.2 the Corps regulations define the term “isolated waters” as non-tidal waters of the United States that are: 1) not part of a surface tributary system to interstate or navigable waters of the United States; and 2) not adjacent to such tributary water bodies. The District’s basis for jurisdiction was that the wetland was adjacent because it is part of a tributary system that eventually drains or flows into navigable waters (Penhorn Creek and the Hackensack River).

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Therefore, the wetlands located on the appellant's property are adjacent to a tributary of navigable waters and are not isolated. Because the instant wetlands meet the definition of waters of the United States under § 328.3 (a)(7) the nexus to navigable waters has been met.

OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the New York District, I conclude there is sufficient information to support its determination that the wetlands are jurisdictional for purposes of the Clean Water Act and Rivers and Harbors Act.

MERDITH W.B. TEMPLE
Brigadier General, US Army
Commanding