

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 31 July 2002**

ADMINISTRATIVE APPEAL DECISION

**INTERCOASTAL INDUSTRIAL PARK ASSOCIATES L.P.,
BALTIMORE DISTRICT FILE NO. 00-66420-16**

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

Appellant: Intercoastal Industrial Park Associates L.P.

Appellant’s Agent: Kevin M. McCarthy, McCarthy & Associates, Inc., Upper Marlboro, MD

Receipt of Request for Appeal (“RFA”): 21 May 2002

Date of Acceptance of RFA: 31 May 2002

Site Visit Date: 19 June 2002

HQNAD-ACCEPTED REASONS FOR APPEAL:

- 1) The wetland hydrology parameter, described in the *1987 Corps of Engineers Wetland Delineation Manual* (“the manual”), is allegedly not met in an additional wetland area near Baldwin Road as determined by the Corps’ Baltimore District (“the district”).
- 2) The district allegedly erred in its determination that two piped watercourses are considered jurisdictional waters of the United States.

BACKGROUND INFORMATION:

On 8 August 2000, the appellant’s agent submitted a request for a Department of the Army jurisdictional determination (“JD”) for the proposed development of an approximate 204-acre site near Monrovia, Frederick County, Maryland. The site consists almost entirely of fallow farmlands, with the exception of a hardwood forest along a stream corridor that generally traverses the northwest portion of the property, and a regional sewerage treatment plant of Frederick County near the southeast corner of the site. Access to the site is via Baldwin Road, which leads to interchanges with Maryland Route 75 and Interstate Route 70 east of the site.

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The agent performed a delineation of the extent of wetlands on the site on 10 and 16 February and 1 March 2000, and found that jurisdiction was generally confined to the aforementioned stream corridor except for a spring fed wetland, an abandoned farm pond, and a smaller pond which has silted into a level suitable for sustaining emergent wetland vegetation. Drainage from both the smaller pond and the spring fed wetland area is directed into subterranean pipes. The approximately 900 foot long, 36-inch diameter drainage pipe system leading from the spring fed wetland passes beneath the county sewerage treatment plant and outlets into an offsite natural stream channel along a CSX Railroad embankment. The second drainage pipe is approximately 750 feet in length, 48 inches in diameter and outlets into the same off-site stream channel. The off-site stream channel connects to Bush Creek via a 36-inch diameter culvert under the embankment.

The district conducted site inspections on 31 October and 8 December 2000; 4 April, 3 May, 28 June and 20 December 2001; and 2 April and 9 May 2002. On 16 February 2001, the agent provided a revised drawing including an extension of a jurisdictional stream corridor leading up to Baldwin Road, at the request of the district. As a result of subsequent inspections, the district identified an additional wetland area adjacent to the extended stream corridor, and included this wetland area along with the stream corridor, the abandoned pond, the smaller pond, and the spring-fed wetland in its 17 April 2001 JD letter. That letter also stated that the piped watercourses were still jurisdictional waters of the United States.

The agent submitted an informal appeal to the district on 2 May 2001, contesting the inclusion of the two piped watercourses and the additional wetland adjacent to the extended stream corridor. The district issued a revised JD letter on 20 May 2001 in which the extent of the extended stream corridor wetland was reduced in size. The district did not modify the aspect of the JD pertaining to the piped watercourses.

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The district provided a copy of the complete administrative record, which was considered in the appeal review process with the results of a 19 June 2002 site inspection. Along with the RFA and supporting information, the agent provided copies of correspondence between him and the district that outlined the basis for his argument against inclusion in the JD of the additional wetland area and the piped watercourses. The agent also provided a copy of rough field notes taken during his 7 May 2002 site inspection during which the Corps was not represented. The district also provided a copy of their 3 June 2002 memorandum for record which outlined a chronology of events associated with their review of this JD request. This was determined to be clarifying information and was considered in this decision in accordance with 33 CFR 331.7 (e)(6).

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SUMMARY OF DECISION:

The Appellant's RFA does not have merit, because information in the district's administrative record does not support the agent's allegation that the hydrology parameter as specified in the manual is not met in the extended stream corridor wetland. The Review Officer found insufficient basis as a result of a 19 June 2002 site inspection to refute the district's determination. Additionally, the district correctly determined that the piped watercourses are jurisdictional waters of the United States.

**INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION AND APPEAL
DECISION FINDINGS:**

Action: None necessary.

Appeal Decision Findings: This RFA pertains to two separate jurisdictional questions, namely the inclusion by the district of an additional wetland area near Baldwin Road which was not previously delineated by the agent, and the inclusion of two piped watercourses as jurisdictional waters of the United States. In a Basis for Jurisdictional Determination prepared to support the final JD issued on 20 May 2002, the district indicated that their JD was based on their finding of waters of the United States present at the site which are part of a tributary system to other waters of the United States, and the presence of wetlands at the site which are adjacent to waters of the United States. The district also stated that the presence of wetlands was determined by the 1987 manual and its supporting guidance, and the lateral extent of non-wetland waters of the United States was identified based upon the ordinary high water mark of the stream in question.

This office has reviewed the Routine Data Form prepared by the district and informal field notes supplied by the agent. There are differences in the data presentation by both parties which lead to opposite conclusions regarding the presence or absence of wetlands on this portion of the site. The district's Routine Data Form supports their contention that wetlands exist along the extended drainage corridor in the portion of the site near Baldwin Road, whereas the agent's field notes state a lack of either hydric soils or hydrophytic vegetation in the area in question. It is beyond the scope of the Corps of Engineers Administrative Appeals Process to adjudicate differences in professional judgment, such as those in the present case. As stated at 33 CFR 331.3 (a)(2), this office does not have the authority to make an approved JD. Additionally, 33 CFR 331.9 (b) precludes this office from substituting its judgment for the judgment of the district on this factual matter, provided the determination is supported by substantial evidence in the administrative record. HQNAD finds that such substantial evidence supporting the district's JD for this portion of the site is contained within the administrative record.

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During the site inspection, the agent theorized that the hydrology in this portion of the site appears to have been altered as compared to historic conditions. The drainage corridor in this portion of the site extends from a culvert which carries stormwater runoff from a portion of Interstate Route 70, which was constructed approximately 45 years ago. While this culvert is introducing additional surface water onto the site, the agent believes that this water flows at a velocity such that there is little, if any, retention within the wetland area before entering the stream corridor which forms much of the northwestern boundary of the site. As a result, the agent believes this portion of the site is becoming “drier” and may at some future point no longer support wetland conditions. He cites the presence of facultative upland understory plants as evidence of his argument. HQNAD finds this theory to be logical, and it may potentially occur. However, at the present time, the site conditions and information in the administrative record does not provide sufficient basis to mandate a reexamination of the district’s determination.

The second aspect of this RFA pertains to the district’s determination that two piped watercourses are still jurisdictional waters of the United States. The district notes that the 1953 and 1986 US Geological Survey topographic maps of the site along with the Frederick County Soil Survey show that these watercourses formerly existed as “blue-line” surface watercourses prior to their being piped and placed below the ground surface. During a 20 December 2001 site inspection, the district found flow and standing water at the inlet and outlet of the 36-inch diameter drainage pipe, and no flow at the inlet with standing water at the outlet of the 48-inch diameter drainage pipe. Although these watercourses are now piped, there is sufficient evidence in the administrative record to satisfactorily demonstrate that they formerly existed as surface waters.

As indicated previously, both streams outlet into a natural watercourse adjacent to a CSX Railroad embankment that is connected via a culvert under the embankment to Bush Creek, which empties into the Monocacy River, a tributary of the Potomac River. Consequently, these watercourses are tributaries of the Potomac River. Since the Potomac River is an interstate waterbody, it is considered to be a water of the United States in accordance with 33 CFR 328.3 (a)(2). All tributaries of the Potomac River, including Bush Creek and these two on-site tributaries, are also considered waters of the United States in accordance with 33 CFR 328.3 (a)(5). The fact that the watercourses are now piped does not extinguish their jurisdictional status as being waters of the United States. The length of piping and any past relocation of the watercourses from their original streambeds are not determinative factors with regard to their jurisdictional status.

Notwithstanding the jurisdictional status of these watercourses, it is duly noted that a Department of the Army permit would not be required for construction activities or placement of fill atop the pipes. Authorization would be necessary to pipe the watercourses if such work was currently proposed; it appears that the previous piping work was permissible under the Nationwide General Permit program, given its relatively limited extent.

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OVERALL CONCLUSION:

After reviewing and evaluating the entirety of the administrative record provided by the district, I conclude that district personnel utilized proper procedures to determine the presence of wetland soils, vegetation and hydrology within the delineated wetland areas, and that the administrative record adequately supports the district's approved JD. Additionally, the district is correct in its determination that the piped watercourses are jurisdictional waters of the United States. Accordingly, it is concluded that this RFA does not have merit for the reasons that are provided in the discussion above.

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

CONCUR: _____ /s/
THOMAS M. CREAMER
Chief of Operations - HQNAD

APPROVED: _____ /s/
M. STEPHEN RHOADES
Brigadier General, USA
Commanding