

**U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
DATE: 2 July 2002**

ADMINISTRATIVE APPEAL DECISION

**DEALE-CHURCHTON ROAD PARTNERSHIP,
BALTIMORE DISTRICT FILE NO. 01-61506-3**

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

Appellant: Deale-Churchton Road Partnership

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

Receipt of Request For Appeal (“RFA”): 1 April 2002

Date of Acceptance of RFA: 11 April 2002

Site Visit Date: 30 May 2002

HQNAD-ACCEPTED REASON FOR APPEAL:

The vegetation parameter, as well as the hydrology parameter, described in the *1987 Corps of Engineers Wetland Delineation Manual* (“the manual”) are allegedly not met in at least one portion of the 5.75-acre parcel.

BACKGROUND INFORMATION:

On 13 February 2002, the Corps’ Baltimore District (“the District”) issued a Department of the Army jurisdictional determination (“JD”) for the proposed development of an approximate 5.75-acre lot in Anne Arundel County, Maryland. The appellant’s environmental consultant performed a delineation of the extent of wetlands on the site on 16 October 2000, and found that approximately 85 to 90 percent of the site contained wetlands. The district determined the entire site contained wetlands based on a 15 May 2001 site inspection during which two Routine Wetland Determination Data Forms were prepared, and on a 9 January 2002 site inspection. The consultant also prepared two Routine Data forms as part of their wetland delineation report, and submitted a Comprehensive Vegetation Determination form compiled on 17 January 2002 as clarifying information in support of the RFA.

CENAD-CM-O
Deale-Churchton Road Partnership Appeal Decision
Baltimore District File No. 01-61506-3

INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The Baltimore District provided a copy of the complete administrative record, which was considered in the appeal review process along with the results of a 30 May 2002 site inspection. On 5 and 6 June 2002, the Review Officer contacted the district to seek clarification of specific informational items depicted on the Routine Data forms prepared by the district as part of their JD. Such contact is permissible under 33 CFR 331.7 (e)(6). The district responded to these requests on 6 and 10 June 2002.

SUMMARY OF DECISION:

The Appellant's RFA does not have merit, because information in the District's administrative record does not support the appellant's allegation that the vegetation and hydrology parameters as specified in the manual are not met in at least one location on the 5.75-acre site; and the Review Officer found insufficient basis as a result of a 30 May 2002 site inspection to refute the District's determination.

INSTRUCTION FOR SUBSEQUENT DISTRICT ACTION AND APPEAL DECISION FINDINGS:

Action: None necessary.

Appeal Decision Findings: The district conducted site inspections of the property on 15 May 2001 and 9 January 2002 and concluded that the entire parcel consisted of freshwater wetlands. In a Basis for Jurisdictional Determination dated 13 February 2002, the district indicated that their JD was based on their finding of the presence of wetlands at the site which are adjacent to waters of the United States, and that the presence of wetlands was determined by the 1987 manual and its supporting guidance.

This office has reviewed the Routine Data Forms prepared by the district and those prepared by the agent, along with the agent's Comprehensive Vegetation Determination Form. It is interesting to note that the data collected and presented by both parties differs, but supports their positions regarding the presence or absence of wetlands on the site. One of the agent's Routine Data Forms documents a lack of prevalence of hydrophytic vegetation and the absence of primary or secondary indicators of wetland hydrology on one small portion of the site. The agent's Comprehensive Vegetation Determination form also documents a lack of prevalence of hydrophytic vegetation. On the other hand, the district indicates the presence of hydric soils, a predominance of hydrophytic vegetation, and evidence of primary and secondary wetland hydrology indicators on both of their forms. One of the district's formal sampling points is within an area delineated by the appellant's consultant as being a wetland and the other is landward of the wetland boundary as delineated by the appellant's consultant. The district indicated similar

CENAD-CM-O
Deale-Churchton Road Partnership Appeal Decision
Baltimore District File No. 01-61506-3

conditions exist throughout the site, but that there is additional evidence of wetland hydrology as one proceeds westward, i.e. away from the road.

Another lack of agreement exists regarding the identification of a tree species on the site. The agent believes the species to be white oak (*Quercus alba*), whereas the district believes it to be cherrybark oak (*Quercus pagoda*). 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 is contained within the administrative record.

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 approximate 5.75-acre site, and that the administrative record adequately supports the district's approved JD. Accordingly, it is concluded that this Request For Appeal 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