



DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, NORTHWESTERN DIVISION  
PO BOX 2870  
PORTLAND OR 97208-2870

Program Support Division

Brian Paulsen  
Manager of Environmental Affairs  
Premium Standard Farms  
P.O. Box 194  
Highway 65 North  
Princeton, Missouri 64673

Dear Mr. Paulsen:

Reference your Request for Appeal regarding an Approved Jurisdictional Determination by the Kansas City District for Premium Standard Farm's property in Daviess County, Missouri.

After evaluating Premium Standard Farm's Request for Appeal and the District's Administrative Record, I have determined that the Record does not contain sufficient documentation/analysis to support a finding of CWA jurisdiction. The decision is being remanded to the District for further consideration.

The Division has the authority to determine the merits of appeals under 33 C.F.R. § 331.3(a)(2). However, the Division does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Please contact Mr. Ward Lenz, of the Kansas City District, at (816) 389-3835 with any questions regarding the reevaluation of their Jurisdictional Determination.

Copies of this document are being furnished to the Kansas City District. If you have any questions about the appeal decision, you may contact our RO, Mr. David Gesl, at (503) 808-3825.

Sincerely,

A handwritten signature in cursive script that reads "Lorelyn M. Rux".

LORELYN M. RUX  
Chief, Program Support Division  
Northwestern Division

Encl as stated



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CENWD-PDS

MEMORANDUM FOR: Commander, CENWK-DE, Kansas City District

SUBJECT: Decision on Appeal of an Approved Jurisdiction Determination for Premium Standard Farms (NWK-2008-00012)

1. Enclosed is a copy of my Administrative Appeal Decision for an Approved Jurisdictional Determination (JD) by your District for Premium Standard Farms, in Daviess County, Missouri. I have determined there is insufficient documentation/analysis in the record to support the District's finding that the subject property contains waters subject to regulation under the Clean Water Act. The JD is hereby remanded for reconsideration.
2. I encourage you to complete your review in an expeditious manner that satisfies the interests of the applicant and upholds our Regulatory responsibility to protect the public interest. Please provide me a copy of your final decision within 30 days.
4. Questions regarding this matter may be directed to Dave Gesl, NWD Appeals Review Officer, at (503) 808-3825. NWD regulatory and legal staffs are available for any assistance or further clarification that you may require.

LORELYN M. RUX  
Chief, Program Support Division

Encl as stated

**ADMINISTRATIVE APPEAL DECISION**  
**FILE NWK-2008-00012 (Premium Standard Farms)**  
**Kansas City DISTRICT (NWK)**  
**SECTION 404 AUTHORITY**  
**DATE:**

**Review Officer (RO):** David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

**Appellant:** Premium Standard Farms, LLC. (Appellant), represented by Brian Paulsen, Manager of Environmental Affairs.

**Receipt of Request For Appeal (RFA):** The RFA was initially received on August 11, 2008. The Appellant requested an appeal of an Approved Jurisdictional Determination (JD) by the Kansas City District (District). The initial submission of the RFA was not complete; the Appellant was notified, by letter dated August 22, 2008 that they must submit a copy of the first page of the Notification of Administrative Appeal Options and Process and Request for Appeal (NAP) form, and provide a specific reason(s) for appeal. The Appellant responded to that request by letter dated January 19, 2009, which was received January 26, 2009.

**Site Visit:** A site visit was held on July 8, 2009. The site visit was attended by Brian Paulsen, Manager of Environmental Affairs for Premium Standard Farms, Ward Lenz and Jon Miller of the District's Missouri State Regulatory Program Office, and Dave Gesl, the NWD RO. The observations/results of that Site Visit are incorporated in this document.

**Summary of Appeal Decision:** The Appellant is challenging the District's June 5, 2008 JD which concluded that the U.S. Army Corps of Engineers has Clean Water Act (CWA) jurisdiction over two waters located on a property in Daviess County, Missouri. The RFA challenged the JD on the general basis of watershed size, that the entire upstream watershed is located on the Appellant's property, that flow in the tributary is only during rain events, and that the reason for the "high water mark" is the presence of erodible soils and the steep slope of the waterbody. After review of the Administrative Record (AR) provided by the District, specifically the JD Form, and the site visit, it has been determined that the AR does not contain sufficient documentation/analysis to support a finding of CWA jurisdiction. The decision is being remanded to the District for further consideration and final action.

**Reason(s) for Appeal:** The Appellant challenged the JD on the general basis of watershed size, that the entire upstream watershed is located on the Appellant's property, and that flow in the tributary is only during rain events. It was also asserted that the reason for the "high water mark" is the presence of erodible soils and the steep slope of the waterbody.

### **Background Information:**

The AR was provided to NWD and the Appellant as part of the Appeal Review Process on March 16, 2009.

The property is located in Daviess County near Coffey, Missouri (Sec 4, T16N, R28W). The Appellant requested JDs for several (6) locations on the property on December 19, 2007. The Appellant was planning/investigating the potential construction of small impoundments on tributaries to Cyprus Creek to provide water for use on a livestock (hog) farm.

The District determined that two of the proposed impoundment sites are located on waters subject to CWA authority. The appellant was notified of the District's jurisdiction determination on June 10, 2008.

### ***Site Visit***

During July 8, 2009 site visit conversations, Brian Paulsen indicated one of the two sites where the District concluded there is CWA jurisdiction presented construction difficulties and it was unlikely the Appellant would pursue construction at that location.

The site visit took place within 24 hours after a rain event. Flow in both channels where the JD's were made was minimal, consisting of a series of small pools of water, most of which were connected by very small sub-channels of flowing water.

Water striders were observed in some of the pools during the visit, indicating that the pools are likely somewhat long term, rather than strictly ephemeral. Adult dragonflies were also seen patrolling the channels.

Both waters are first order tributaries. The channels are located in small ravines and are very well defined by scour marks and the absence of vegetation; there was a distinct vegetation and/or channel bed-bank break present. The channels consisted of silts and other fine sediment. It was clear the soils adjacent to the channel as well as nearby in the riparian zone are easily erodible.

Cypress Creek was observed at several points along a farm road as well as at a road crossing. Those viewpoints were downstream from the sites in question. In all cases, the Cypress Creek channel was approximately 15-30 feet or more wide and contained flowing water.

### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER (DE):**

**Finding:** The AR is not sufficient to support a finding that the tributaries are subject to CWA jurisdiction.

**Action:** Further evaluation, analysis, and documentation in the AR are required by the District regarding the CWA jurisdictional determination.

**Discussion:** The Appellant challenged the JD on the general basis of watershed size, that the entire upstream watershed is located on the Appellant's property, and that flow in the tributary is only during rain events. It was also asserted that the reason for the "high water mark" is the presence of erodible soils and the steep slope of the waterbody.

As a result of the *Rapanos* Supreme Court decision, the U.S. Environmental Protection Agency and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated 5 June 2007, and amended 2 December 2008 (Rapanos Guidance).<sup>1</sup> The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Rapanos Guidance provides a methodology to ensure CWA jurisdictional determinations are consistent with the Supreme Court decision in *Rapanos*.

The Corps and EPA assert jurisdiction over traditional navigable waters (TNW) and all wetlands adjacent to TNWs. CWA regulatory jurisdiction also includes relatively permanent waterbodies (RPW) that are not TNWs, if that waterbody flows year-round, or at least "seasonally", and wetland adjacent to such waterbodies, if the wetland directly abuts the waterbody.

In addition, the agencies may assert jurisdiction over a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. Waterbodies such as, (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; (2) wetlands adjacent to such tributaries; and, (3) wetlands that are adjacent to but that do not directly abut an RPW require a significant nexus determination.

Both Approved Jurisdictional Determination Forms (JD Form) prepared by the District indicate the tributaries are Non-RPW's that flow directly or indirectly into TNWs. As such, it is incumbent on the District to make a significant nexus determination (Part III.C. of the JD Form).

The JD Forms identify the waters in question as having intermittent but not seasonal flow. The nearest TNW was identified as the Grand River.

It appears the JD was based primarily on the observation of a discernable Ordinary High Water Mark (OHWM), the presence of water, bed and bank features, and influence of

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<sup>1</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (December 2, 2008), available at [http://www.epa.gov/owow/wetlands/pdf/CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf)

adjacent vegetation and soils. Additionally, the District relied upon the U.S. Geological Survey map, which shows both tributaries at the proposed dam sites as blue-line streams.

The Rapanos Guidance specifies that it is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Likewise it is not appropriate to determine significant nexus based on the factors identified by the Appellant in the RFA and supporting letters, those being that the tributary is confined to the Appellant's property and the relatively small size of the watershed. Size of the watershed is a physical factor that must be considered, however, it is not the determining factor for CWA jurisdiction. Property ownership is one of the factors considered in the decision whether to issue a permit for a proposed activity.<sup>2</sup> However, property ownership is not a factor in determining jurisdiction. The appellant's reasons for appeal, with respect to the size of the watershed and the ownership status, do not have merit.

The Appellant contends that the ordinary high water mark the District observed was the result of the highly erodible nature of the soils and slope of the stream. These characteristics could result in a high water mark created by a single event that is not a reliable indicator of the true physical characteristics of the water. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.<sup>3</sup> According to Corps Regulatory Guidance Letter 05-05 Guidance on Ordinary High Water Mark Identification, issued December 7, 2005, when making OHWM determinations, Districts should be careful to look at characteristics associated with ordinary high water events which occur on a regular or frequent basis. Further, that guidance indicates evidence resulting from extraordinary events, including major flooding, is not indicative of the OHWM. The onsite soils and slope of the channel on this property may be conducive to having a rare or infrequent erosion event confuse identification of an ordinary high water mark. However, there was no evidence during the RO's site visit, such as a relatively unusual number of vegetation piles or jams within or adjacent to the channel, that might indicate that the observed physical characteristics were the result of an unusual or infrequent event. The appellant's reason for appeal, with respect to the validity of the District's ordinary high water mark observation, does not have merit.

The Rapanos Guidance requires the evaluation of a tributaries nexus with a TNW in terms of the CWA's goals and purposes, that being "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". The Guidance states that the Corps will apply the significant nexus standard in a manner that restores and maintains *any* of these three attributes of TNW's."<sup>4</sup>

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<sup>2</sup> 33 C.F.R. § 320.4

<sup>3</sup> 22 C.F.R. § 328.3(e)

<sup>4</sup> Id., at n. 35

There are three basic elements required to make a significant nexus determination: 1) observations/data, 2) analysis, and 3) conclusions. In this case, the District completed both JD Forms by recording some observations, primarily regarding physical characteristics of both tributaries, but made no observations regarding chemical characteristics and did not provide any explanation regarding the finding these waters support habitat or provide aquatic/wildlife diversity. The JD form prompts recording this information in Part III.B.1(iii) and Part III.B.1(iv). The only analysis on the JD Forms concerning the significant nexus finding is the statement that the tributary “has the capacity to carry pollutants and flood waters to a TNW”. There was no entry in Section IV.B. Additional comments to support JD. That Section was included on the form, in part, for the purpose of documenting discussion/analysis to support the jurisdiction conclusion. It is crucial that any attribute (chemical, physical, biological) that is used to support the nexus finding be supported in the AR with observations, analysis, and conclusion(s).

The observations and analysis need to be sufficient to support that the effect between the tributary and the TNW is not speculative or insubstantial. The record must, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.

The AR fails to provide an adequate and reasonable basis supporting the JD and the decision must be remanded to the District for additional documentation and reconsideration.

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

The Division Engineer has the authority to hear the appeal of this JD.<sup>5</sup> However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or

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<sup>5</sup> 33 C.F.R. § 331.3(a) (2).

explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District provided a copy of the AR to the RO and the Appellant. This information was used in the Appeal Decision Process. The District also provided a Record Summary along with the AR. That document is considered clarifying information.

**OVERALL CONCLUSION:** After reviewing and evaluating the RFA, the District's AR, and the site visit, I find that the AR does not sufficiently support the District's JD's and the appeal has merit. We are remanding the appeal to the District.

**FOR THE COMMANDER:**



**LORELYN M. RUX**  
**Chief, Program Support Division**