



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

Program Support Division

14 November 2008

Mr. Jodey Odegard  
Land Development Project Coordinator  
Norris Homes  
2053 Fabian Drive  
Mercer Island, Washington 98040

Dear Mr. Odegard:

I have completed my review of the Request for Appeal, submitted by Norris Homes regarding the approved jurisdictional determination (JD) made by the Seattle District for the property located within the City of Covington, King County, Washington, File NWS- 2008-0241-NO. After evaluating the information provided in the Request for Appeal and the District's administrative record, I have determined that the appeal does not have merit.

Enclosed is a copy of the Administrative Appeal Decision which provides the details of my findings. A copy will be furnished to the Seattle District.

If you have any questions about the appeal decision, you may contact my Administrative Appeal Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

A handwritten signature in black ink that reads "Lorelyn M. Rux".

LORELYN M. RUX  
Chief, Program Support Division

Enclosure

**ADMINISTRATIVE APPEAL DECISION**  
**FILE NO. NWS-2008-0241-NO**  
**Norris Homes (Cedar Springs Park Apartments)**  
**SEATTLE DISTRICT (NWS)**  
**SECTION 404 AUTHORITY**  
**November 14, 2008**

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

**Appellant:** Norris Homes (Cedar Springs Park Apartments).

**Receipt of Request For Appeal (RFA):** June 23, 2008 (Encl 1)

**Site Visit:** A site visit and/or appeal meeting was not required to clarify the administrative record. There is sufficient information in the administrative record to reach a determination with respect to the merits of the appeal.

**Summary of Appeal Decision:** The Appellant is challenging the assertion by Seattle District (NWS) that the U.S. Army Corps of Engineers has jurisdiction over three water bodies located on a property the appellant is proposing to convert to an apartment complex. The waterbodies are hydrologically connected via surface waters and culvert(s) to each other, and to other waters offsite that eventually flow to the Green River, a traditionally navigable water of the United States. I find that the Appellant's reasons for appeal do not have merit. NWS' approved jurisdiction determination is affirmed.

**Background Information:**

A copy of the Administrative Record (AR) is attached for reference (Encl 2).

**History:**

14 Feb 2008 – NWS received the Joint Aquatic Resources Permit Application (JARPA).<sup>1</sup> This is the appropriate form to request authorization under Section 404 of the Clean Water Act, as well as for authorization(s) from the State of Washington.

22 Apr 2008 – NWS provided a copy of the approved Jurisdictional Determination Form (JD)<sup>2</sup> to Norris Homes.

23 June 2008 – Request for Appeal (RFA) received by NWD.

26 June 2008 – Pre-application meeting.<sup>3</sup>

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<sup>1</sup> AR at 206.

<sup>2</sup> AR at 158.

20 Aug 2008 - NWS provided AR to the appellant and the NWD Appeals Review Officer (RO).

The appellant is challenging a JD involving a 15.9 acre property located within the City of Covington, King County Washington. A location map and plan views showing the locations of ponds and wetlands on the site and the proposed development are attached (Encl 3a, 3b, and 3c). The appellant is proposing to convert a large portion of the property to an apartment complex.

An aerial photograph (date unknown) showing the project site and its relationship to the Green River (identified as the nearest traditional navigable water in the JD), Jenkins Creek (a tributary to Green River) and Cranmar Creek (a tributary to Jenkins Creek that crosses the subject property) is attached (Encl 4).

Ground photos showing the ponds in question, and associated culvert connections, outlets, connecting ditches, and inlet ditches are attached for reference (Encl 5).

According to the appellant, the property includes an existing single-family homesite within the northwestern portion of the site. The remainder of the parcel has been used and managed as livestock pasture for several decades and includes a number of outbuildings.

The site contains at least the following 4 aquatic areas:

Pond A (the primary focus of the RFA)-1.07 acres

Pond B-0.15 acres

Pond Z- 0.016 acres

Wetland A – 10+ acre corridor associated with the Cranmar Creek. The plan in the AR<sup>4</sup> indicates this is outside the area proposed to become the apartment complex.

A detailed description of the flow patterns, wetland character, historical land use is contained in the AR.<sup>5</sup> The following is obtained from those descriptions:

**Pond A-** Excavated within uplands sometime prior to the mid 1960s; receives water from Pond Z via culvert, seasonal surface water runoff from onsite and offsite, runoff from SE 272<sup>nd</sup> Street, and shallow groundwater; outlet formerly flowed into Pond B, currently flows offsite into a large wetland complex offsite that is associated with the Jenkins Creek Corridor; there have been instances where debris jams resulted in flow to Pond B and directly into the Jenkins Creek corridor; approximately 28% of the pond is an emergent vegetation fringe;

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<sup>3</sup> AR at 144.

<sup>4</sup> AR at 213.

<sup>5</sup> AR at 8-18.

formerly used for livestock pasture and watering; identified as having an overall high rating under wetland function and value assessment methods developed for the U.S. Army Corps of Engineers.<sup>6 7</sup>

**Pond B**-- Excavated within uplands sometime prior to the mid 1960s; receives water from a roadside ditch associated with SE 272<sup>nd</sup> Street, surface water from Pond Z via an excavated ditch along the northern boundary of the project site, surface water from Pond A, and potentially shallow groundwater; level controlled by an outlet structure and pipe that crosses under the roadway and into the Jenkins Creek corridor.

**Pond Z** – Excavated within uplands sometime prior to the mid 1960's; receives surface water runoff from the east, runoff from a ditch associated with SE 272<sup>nd</sup> Street, and shallow groundwater; level controlled by an outlet flowing into Pond A and a ditch leading to Pond B, outer edge seasonally flooded and dominated by emergent and shrub vegetation.

**Onsite ditches associated with the creation of ponds A, B, and Z**- Appear to have been excavated within uplands.

**Offsite Wetlands (Jenkins Creek Corridor)**—Located directly to the west of the northwestern corner of the project site; separated from the project site by an improved City of Covington roadway and adjacent land uses; meets the criteria for designation as a City of Covington Type F Stream and the associated wetland meets the criteria for Category 2 Wetland; rating pursuant to the Department of Ecology Wetland Rating Form identified this wetland as a potential City of Covington Category 1 Wetland.

**Cranmer Creek and Jenkins Creek**--Documented to provide habitats for coho salmon (*Oncorhynchus kisutch*), rainbow/steelhead trout (*Oncorhynchus mykiss*), and cutthroat trout (*Oncorhynchus clarkii*). Note: Jenkins Creek is located within a well vegetated wetland corridor located to the west of the project site. The main channel of Jenkins Creek is located approximately 160 feet to the west of the western boundary of the project site.<sup>8</sup>

As noted in the Appellant's Report, approximately 28% of Pond A is an emergent vegetation fringe. Review of the photos contained in the AR<sup>9</sup> (see Encl 5) indicates that there is additional area dominated by submersed aquatic vegetation. Aquatic features

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<sup>6</sup> Adamus, P.R, E.J. Clairain Jr., RD. Smith, and RE. Young. 1987. Wetland Evaluation Technique (WET); Volume II: Methodology, Operational Draft Technical Report Y-87, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Mississippi.

<sup>7</sup> Reppert, RT., W. Sigleo, E. Stakhiv, L. Messman, and C. Meyers. 1979. Wetland Values - Concepts and Methods for Wetland Evaluation. Research Report 79-R1, U.S. Army Corps of Engineers, Institute for Water Resources, Fort Belvoir, Virginia.

<sup>8</sup> AR at 180.

<sup>9</sup> AR at 6-8.

having at least 30% vegetative cover during the growing season of most years would be classified as a vegetated aquatic habitat or wetland.<sup>10</sup> The information in the record suggests that the ponds, particularly Pond A (the main focus of the appeal) may currently meet this standard and should be considered wetland.

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

In a letter attached to the RFA, the appellant assert that Ponds A, B, and Z are not regulated as waters of the United States, and that “these ponds were man made ponds used for farming and irrigation purposes.” The letter also indicates “our reasons for the appeal are mainly regarding Pond A.” The appeal can be divided into the following three main reasons: (1) the area(s) in question do not meet the Definition of Waters of the United States (33 C.F.R. pt. 328); (2) pending legislation has a bearing on the JD; and, (3) the waters in question are farm or stock ponds and are either not considered waters of the United States or are exempt from regulation.

**REASON 1.** The area(s) in question do not meet the Definition of Waters of the United States (33 C.F.R. pt. 328). The RFA defines this challenge as follows:

1. The ponds and outflow ditch had been previously created from uplands by excavation during the 1940s and the 1960s.
2. The Corps has adopted specific guidance that such intentionally created ponds are not defined as "wetlands."
3. As outlined in the Corps 33 C.F.R. pt 328 and other Corps Supplemental Information artificial bodies of water created by excavation or diking dry land to retain water are generally not considered "Waters of the US."

**Note:** The appellant was given the opportunity to identify the “specific guidance” and “other Corps Supplemental information” was being referred to in the RFA. The appellant’s representative responded to that opportunity via e-mail (Encl 6).

**Finding:** This reason for appeal does not have merit for the reasons contained in the Discussion Section below.

**Action:** No action is required by the District regarding this reason for appeal.

**Discussion:**

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<sup>10</sup> Cowardin, L.M., V. Carter, F.C. Golet, and E.T. LaRoe. 1979. Classification of Wetlands and Deepwater Habitats of the United States. Office of Biological Services, U.S. Fish and Wildlife Service, U.S. Department of the Interior, FWS/OBS-79/31, Appendix E.

The preamble language contained in the Final Rule for the Corps' Regulatory Program<sup>11</sup> states, "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States." The preamble then lists (a) Non-tidal drainage and irrigation ditches excavated on dry land, (c) Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, and (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

This preamble language is clear in allowing the District the discretion to consider those listed waters as "Waters of the United States."<sup>12</sup> The words "generally" and "reserves the right on a case-by case basis" do not establish an absolute standard, as suggested by the appellant.

However, it is reasonable to interpret that the preamble language establishes a rebuttable presumption that the listed waters are not Waters of the United States. The Rapanos decision and the subsequent guidance neither supersedes nor negates the regulatory definition of Waters of the United States<sup>13</sup> or the specific portion of the Preamble cited above. The Rapanos Guidance establishes a requirement, though, that a "significant nexus" determination be made to assert jurisdiction when considering wetlands adjacent to relatively permanent waters.<sup>14</sup> It is reasonable to conclude, therefore, that in finding a significant nexus between the waters in question and the nearest Traditionally Navigable Water, NWS did, in effect, properly rebut the presumption that the waters in question are within a category of waters generally not subject to regulation.

In conclusion, this reason for appeal does not have merit, as discussed above.

**REASON 2:** The RFA refers to the Clean Water Restoration Act of 2007, which the RFA identifies as pending legislation.<sup>15</sup> The RFA attributes significance to a listing in that proposed legislation of "natural ponds" as waters of the U.S., but not man made ponds or features.

**Finding:** This reason for appeal does not have merit for the reasons contained in the Discussion section below.

**Action:** No action is required by the District regarding this reason for appeal.

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<sup>11</sup> Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986)

<sup>12</sup> *Id.*

<sup>13</sup> 33 C.F.R. § 328.3.

<sup>14</sup> U.S. ARMY CORPS OF ENGINEERS, JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007), available at [http://www.usace.army.mil/cw/cecwo/reg/cwa\\_guide/cwa\\_guide.htm](http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm).

<sup>15</sup> H.R. 2421, 110<sup>th</sup> Cong. (2007) *see also* S. 1870, 110<sup>th</sup> Congress (2007)

**Discussion:** Pending legislation is neither controlling nor relevant to the District's JD and therefore, this reason for appeal does not have merit.

**REASON 3:** The waters in question are farm or stock ponds and are either not considered waters of the United States or are exempt from regulation.

**Finding:** This reason for appeal does not have merit for the reasons contained in the Discussion section below.

**Action:** No action is required by the District regarding this reason for appeal

**Discussion:**

Applicability of Section 404 of the Clean Water Act to discharges of dredged or fill material associated with normal farming is addressed in Section 404(f) of the Act.<sup>16</sup> That section states such discharges are not prohibited by or otherwise subject to regulation except where a discharge is "incidental to any activity having as its purpose of bringing an area of the navigable waters into a use to which it is not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced".<sup>17</sup>

In 1987, the Corps issued guidance that specifically discusses the exemption for construction or maintenance of farm or stock ponds.<sup>18</sup> That guidance and interpretation is relevant to this appeal. It states, "as noted in the legislative history for the 1977 amendments to the CWA, the exemptions do not apply to discharges that convert extensive areas of water to dry land or impede the circulation or reduce the reach or size of the water body."<sup>19</sup> Further, the guidance clarifies that maintenance which results in a use or purpose different (other than different farming or ranching operations) from the use or purpose following construction of the original pond shall be deemed a new use for the purpose determining if the exemption applies.<sup>20</sup>

In making its jurisdiction determination, NWS appears to have reasonably relied on the appellant's statements in the Joint Aquatic Resources Permits Application as well as the attached plans which clearly indicate the appellant's intent to eliminate the ponds as part of conversion of the site to an apartment complex. By virtue of the intended change in use of the ponds (e.g. elimination), it is not unreasonable for the District to conclude that the normal farming exemption(s) does not apply and that area is subject to Section 404 of the Clean Water Act.

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<sup>16</sup> 33 U.S.C. § 1344(f).

<sup>17</sup> 33 U.S.C. § 1344(f)(2).

<sup>18</sup> U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER 87-09: SUBJECT: SECTION 404 (f)(1)(c) EXEMPTION FOR CONSTRUCTION OR MAINTENANCE OF FARM OR STOCK PONDS (1987), available at <http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm>.

<sup>19</sup> *Id.* at ¶ 5.

<sup>20</sup> *Id.* at ¶ 7.

In conclusion, this reason for appeal does not have merit for the reasons discussed above. Discharges of fill that result in a conversion of the site from a farming activity to development is not an exempt activity.

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

The Division Engineer has the authority to hear the appeal of this JD.<sup>21</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 RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record 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 administrative record. Such interpretation, clarification, or explanation does not become part of the District's administrative record, 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 explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

NWS provided a copy of the administrative record to the RO and the Appellant. The administrative record contains a Memorandum for Record dated July 1, 2008, describing a meeting attended by NWS staff and the appellant and his representatives.<sup>22</sup> Although the AR is limited to information contained in the record by the date of the appealable action, which in this case was April 22, 2008, the memo does not introduce new information and therefore is deemed clarifying information. The July 1, 2008 memo did not weigh substantively in this decision.

**OVERALL CONCLUSION:** After reviewing and evaluating information provided by the appellant and the District's Administrative Record, I find that the reasons for appeal put forth by the Appellant do not have merit.

**FOR THE COMMANDER:**

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

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<sup>21</sup> 33 C.F.R. § 331.3(a)(2).

<sup>22</sup> AR at 144-147.