



## MEMORANDUM FOR 2006-436-FBV

**Subject:** Jurisdictional Determination (JD) over Badlands Landfill (2006-436-FBV), and clarification regarding the relevance of a break in the Ordinary High Water Mark (OHWM).

### Summary

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers agree that a break in the ordinary high water mark (OHWM) by itself is insufficient to isolate the upstream portion of a watercourse. Relevant factual considerations in these circumstances include presence of a channel both above and below the break in the OHWM. This interpretation is based on the Clean Water Act, the agencies' regulations and existing practice, and the case law, and consistent with the legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*.

The agencies' field staff have not reached agreement regarding presence of a channel below the break in the OHWM at the Badlands Landfill site. As a result, this elevation is being returned to the Los Angeles District and Region 9 for further fact-finding and discussion. Field and headquarters staff of both agencies have agreed to participate in a web-based meeting this week to discuss available data and resolve this and related factual questions.

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Brian Frazer, Chief  
Wetlands & Aquatic Resources Regulatory Branch  
U.S. Environmental Protection Agency

A handwritten signature in black ink, appearing to read "Russell L. Kaiser", written over a horizontal line.

Russell L. Kaiser, Senior Program Manager  
Regulatory Community of Practice  
U.S. Army Corps of Engineers

Date: Oct. 2, 2007

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