



MEMORANDUM TO DECLINE JURISDICTION FOR LRC-2009-00053

Subject: Declination of Jurisdiction Based on Lack of Adjacency and Interstate Commerce Connections for Jurisdictional Determination (JD) LRC-2009-00053

In accordance with the 2007 Memorandum, *Coordination on Jurisdictional Determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the SWANNC and Rapanos Supreme Court Decisions*, dated June 5, 2007, EPA HQ initiated joint HQ review of a proposed CWA declination of jurisdiction over two lakes in northern Illinois that was performed by the Chicago District. The District found that jurisdiction could not be supported based solely on links to interstate commerce under 33 CFR 328.3(a)(3).

EPA and Corps staff representing both program and counsel offices have reviewed available data on the lakes, and decided not to overturn the declination of jurisdiction for the site described in JD # LRC-2009-00053, dated June 2, 2009. This determination is consistent with the CWA, the agencies' regulations (including 33 C.F.R. Parts 328.3 and 329), relevant case law, and existing guidance, including 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 site in question includes intrastate, isolated, non-navigable waters for which the sole prospective basis for asserting jurisdiction was the actual or potential use of this area for interstate commerce, as defined in 33 CFR 328.3(a)(3). Based on a review of the information provided to Headquarters, at this time the Corps and EPA jointly concluded that that jurisdiction could not be supported based solely on links to interstate commerce under 33 CFR 328.3(a)(3).

Although we decline to assert jurisdiction over the lakes, we emphasize that this is a case-specific determination, and that it sets no policy or precedent with respect to any other situation, or with respect to the validity of the regulations at 328.3(a)(3). In completing its JD, the District should similarly advise the property owner, as appropriate, of the case-specific nature of this determination.

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Date:

8/14/09

Margaret Gaffney-Smith, Chief
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8/14/09