



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 27 2008

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Approval of Region VII Requested Special Case Designation for JD Numbers NWK-2007-1410 (Route 13 Bypass), NWK-2006-1014 (BNSF Intermodal), and NWK-2007-808 (Strother Road), and Disapproval of Special Case Designation for JD Number NWK-2007-1777 (Tiffany Squares)

FROM: Craig Hooks, Director
Office of Wetlands, Oceans, and Watersheds

TO: John B. Askew, Regional Administrator
Environmental Protection Agency Region VII

On February 13, 2008, the U.S. Environmental Protection Agency (EPA) Region VII proposed to designate as special cases the Missouri Department of Transportation (MoDOT) Route 13 East Loop Bypass (JD# NWK-2007-1410), the BNSF Gardner Intermodal Facility (JD # NWK-2006-1014), the MoDOT Strother Road (JD# NWK-2007-808), and Tiffany Squares (JD # NWK-2007-1777). All four sites are located within the Kansas City Corps District. This request is pursuant to the January 28, 2008, memorandum "Process for Coordinating Jurisdictional Determinations conducted Pursuant to Section 404 of the Clean Water Act in Light of the Rapanos and SWANCC Supreme Court Decisions," and the *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act*, dated January 19, 1989 ("Jurisdiction MOA"). Under the Jurisdiction MOA, EPA Headquarters approval or disapproval of your request is necessary.

Your request for special case approval indicated a number of policy and technical concerns regarding the Corps' draft jurisdictional determination (JDs) for these four sites. Specifically, the draft JDs did not consider as a traditional navigable water (TNW) those waters with current commercial recreational navigation when doing the significant nexus evaluations, instead considering in their analysis TNWs farther away. In addition, Kansas City appears to presume that first-order ephemeral waters are too small to have significant nexus to a TNW, and therefore as a class are non-jurisdictional. Although Region 7 agreed with the majority of draft JDs for waters associated with these sites, your special case request raised specific technical concerns for each of the identified four draft JDs. These concerns included, for example, data on the JD form that underestimated the length of stream reaches, failure of the draft JDs to consider or address available data from site visits, and mischaracterizations of ability of streams and associated wetlands to filter pollutants and otherwise affect the integrity of the downstream

TNWs. The likelihood that these policy and technical issues resulted in a draft JD inconsistent with the *Rapanos* Guidance seems particularly compelling for the Route 13 Bypass, BNSF Gardner Intermodal Facility, and Strother Road sites.

I hereby approve your requested special case designation for JD Numbers NWK-2007-1410 (Route 13 Bypass), NWK-2006-1014 (BNSF Intermodal), and NWK-2007-808 (Strother Road). I also disapprove special case designation for JD Number NWK-2007-1777 (Tiffany Squares). As a result, EPA Region VII will now be responsible for determining the scope of geographic jurisdiction under the Clean Water Act at the three particular sites designated as special cases. As you work to prepare that jurisdictional determinations, please have your staff coordinate with David Evans, Director of the Wetlands Division in my office, as well as with Karyn Wendelowski in the Office of General Counsel here at EPA Headquarters.

In addition, I am approving a policy special case for first-order ephemeral streams in Kansas City District, as well as for those waters in Kansas City District that are currently used for commercial recreational navigation and as a result may potentially be a traditional navigable water (TNW). Under the 1989 MOA, EPA Headquarters will clarify the policy regarding such waters, in consultation with the Corps. We believe that the June 2006 *Rapanos* Guidance indicates first-order ephemerals are jurisdictional where they have a significant nexus to a TNW, and should not be considered non-jurisdictional as a class. Similarly, Appendix D clarifies that waters currently subject to commercial recreational navigation could be considered a TNW. We anticipate resolving the policy special cases consistent with those documents, as well as any applicable statutory or regulatory provisions. As a result, pending resolution of the two policy special cases, EPA Region VII will be responsible for determining the jurisdictional status of such waters (first order ephemeral streams in Kansas City District, and waters in Kansas City District that currently have commercial recreational navigation).