MEMORANDUM TO DECLINE JURISDICTION FOR NWP-2007-617

Subject: Memorandum to Decline Jurisdiction of an Isolated Wetland Based on Lack of Adjacency and Interstate Commerce Connections to a Jurisdictional Water for Jurisdictional Determination NWP-2007-617.

Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are declining jurisdiction over a 0.028 acre wetland for jurisdictional determination (JD) NWP-2007-617. This JD is based on our finding that the wetland is isolated; it is not adjacent to a water of the U.S.; and it does not otherwise support links to interstate commerce. This determination is consistent with the Clean Water Act (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 ("Rapanos Guidance").*

I. Location

The project site for this JD encompasses approximately 7 acres and is located at 42.3305450° north latitude and 122.816959° west longitude in Medford, Oregon. The wetland, approximately 0.028 acre, is a remnant of an irrigation canal that once flowed south from the main canal into Lazy Creek, a relatively permanent water (RPW). This connection has been subsequently severed by development, including a network of roads and a neighboring orchard/winery to the north. Due to the development, the wetland is located within an enclosed and highly disturbed basin.

II. Jurisdictional Determination

The 0.028 acre wetland for jurisdictional determination NWP-2007-617 is non-jurisdictional because it is isolated and there are no potential links to interstate commerce; this wetland does not satisfy 33 CFR 328.3(a)(3) or (a)(7).

III. Basis for Determination[1]

EPA and Corps regulations define "waters of the United States" to include wetlands adjacent to other covered waters.[2] Under the regulations, a wetland is "adjacent" when it is "bordering, contiguous or neighboring" another water of the U.S.[3] The *Rapanos Guidance* states that finding a continuous surface connection is not required to establish adjacency under this definition.[4]

If it is determined that a wetland is not adjacent under 33 CFR 328.3(a)(7), it then becomes necessary to determine whether there is a potential link to interstate commerce under 33 CFR 328.3(a)(3).

A. Adjacency Determination

The 0.028 acre wetland is a remnant of an irrigation canal which historically flowed south from the main canal for 450 feet before discharging into Lazy Creek, an RPW. The irrigation canal was subsequently abandoned and the wetland is now separated from the creek by a four-lane road. The wetland is located within an enclosed and highly disturbed basin which supports mainly grasses with low diversity and structure.

The primary source of water for the subject wetland is precipitation, and under normal events the wetland receives direct precipitation as well as runoff from the highway. Due to the size and shape of the wetland, it is estimated the wetland provides limited short and long-term water storage (approximately 0.14 acre-feet).[5] Due to the size and shape of the basin, it is expected that water remains onsite; it does not appear that flow reaches Lazy Creek.

Additional flow may be localized due to irrigation water from the neighboring orchard/winery. It is expected that pollutant filtering and removal would be minimal due to the limited vegetation onsite and the limited potential for water storage. As there is limited potential for water storage, there is also minimal potential for groundwater recharge. Due to the limited size and nature of the onsite vegetation, the wetland is expected to provide minimal, if any, nutrient/detrital cycling and/or organic carbon exportation.

Species biodiversity is also expected to be extremely low. Due to the small size of the wetland, the disturbed nature of the vegetative community, and the wetland position within the landscape (bound by the highways), the wetland is expected to provide limited food, shelter, and reproduction opportunities for wildlife.

Based on an examination of a combination of factors, primarily related to the position in

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[1] The memorandum summarizes the evidence considered by the agencies in reaching this conclusion. Additional information regarding the determination is contained in the administrative record for this action.
[2] 33 C.F.R. 328.3(a)(7).
[3] 33 C.F.R. 328.3(c).
[4] See page 5 of the *Rapanos Guidance*.
[5] Assumed water depth for calculating water storage is 0.5-feet.

the landscape and other physical characteristics of the wetland in relation to the nearest jurisdictional water, the wetland is not adjacent (as defined by 33 CFR 328.3(c)) to Lazy Creek.

B. Interstate Commerce Determination

If it is determined that a wetland is not adjacent to a jurisdictional water, it then becomes necessary to determine whether there is a potential link to interstate commerce under 33 CFR 328.3(a)(3). Based upon the information in the project file, the wetland does not appear to support links to interstate commerce. Due to the location of the wetland and the nature of its low biological value, the wetland is not likely to support fish or wildlife species which in turn might provide for eco-based tourism.[6] Furthermore, the wetland does not currently support agricultural or other uses in interstate commerce. It is not likely that the wetland could be used for any interstate commerce purposes.

IV. Conclusion

The agencies have determined that the wetland for JD# NWP-2007-617 is not adjacent (as defined by 33 CFR 328.3(c)) to Lazy Creek. This finding is based upon an examination of a combination of factors, primarily related to the position in the landscape and other physical characteristics of the wetland in relation to the nearest jurisdictional water. Additionally, this wetland does not appear to support any links to interstate commerce under 33 CFR 328.3(a)(3).[7] Based on these findings,we have determined that the 0.028 acre wetland is non-jurisdictional because it is isolated and there are no potential links to interstate commerce; this wetland does not satisfy 33 C.F.R. § 328.3(a)(3) or (7).

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Date: 7 Feb 2008

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Date: 7 Feb 08

[6] Wetland and upland grasses support a disturbed community with low diversity and structure, and due to its small size and position within the landscape (bound by the highways), the wetland is expected to provide limited food, shelter, and reproduction opportunities for wildlife. Species biodiversity is expected to be extremely low. Common species may include insects, rodents, and passerines.

[7] 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).