



## MEMORANDUM TO DECLINE JURISDICTION FOR NWS-2007-945

**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 NWS-2007-945.

### Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are declining jurisdiction over wetland B for jurisdictional determination (JD) NWS-2007-945. 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. Jurisdictional Determination

Wetland B for jurisdictional determination NWS-2007-945 is non-jurisdictional because it is isolated and there are no existing or potential links to interstate commerce; this wetland does not satisfy 33 CFR 328.3(a)(3) or (a)(7).

### III. Basis for Determination<sup>1</sup>

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

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

<sup>1</sup>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.

<sup>2</sup>33 C.F.R. 328.3(a)(7).

<sup>3</sup>33 C.F.R. 328.3(c).

<sup>4</sup>See page 5 of the *Rapanos Guidance*.

CFR 328.3(a)(3).

**A. Adjacency Determination**

Wetland B is a 0.21 acre wetland located at 47.37° north latitude and 122.31° west longitude in Des Moines, Washington. The wetland is a small, shallow depressional, highly degraded wooded wetland located within a highly developed residential and commercial area. The wetland is approximately 320 feet west of McSorley Creek, a relatively permanent water (RPW). A very small (4-inch by 8-inch) relic ditch is located just east of the wetland, and a stormwater pond (excavated entirely in uplands) is located between the ditch and the RPW.

Based on the information provided in the JD Form, and information gathered during a site visit conducted on March 18, 2008, it appears that the wetland does not have a surface or shallow subsurface hydrologic connection to McSorley Creek. Based on the topography, any flow from wetland B would move east into the relic ditch. The ditch trends south approximately 300 feet, then terminates on a gentle (approximately four percent) east-facing slope. A second ditch originates approximately 150 feet down the slope and continues to a storm drain inlet that discharges to McSorley Creek, approximately 75 feet further to the east. Despite the area's having received forty percent more than the average monthly precipitation at the time of the site visit, there was no indication of recent flow in either ditch or on the slope between them. The stormwater pond, which was constructed in 2002 and has a surface elevation approximately 10 feet lower than the wetland, may have altered the wetland's hydrology and reduced surface flow from it.

The primary sources of water for the subject wetland are precipitation and runoff from a small area of developed or degraded uplands to the north and west. As described above, it appears that water that enters the wetland either infiltrates or evaporates. Due to the size, shape and very small drainage area of the wetland, it is estimated the wetland provides limited short and long-term water storage. It is expected that pollutant filtering and removal would be minimal due to the limited vegetation onsite and the limited potential for water storage. Due to the limited size and nature of the onsite vegetation, as well as the lack of a hydrologic connection to McSorley Creek (as discussed above), 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 heavily disturbed nature of the vegetative community, the wetland's position within the highly developed landscape, and the presence of larger, more natural habitats within 0.5 mile to the west, north and east, the wetland is expected to provide limited food, shelter, and reproduction opportunities for wildlife.

While there is a relatively short distance to the RPW, based on 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, the wetland is not adjacent (as defined by 33 CFR 328.3(c)) to McSorley 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 available, the wetland does not appear to have existing or potential links to interstate commerce. Due to the location of the wetland, its highly degraded nature and its low biological value, the wetland is not likely to support fish or wildlife species which in turn might provide for eco-based tourism. 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.

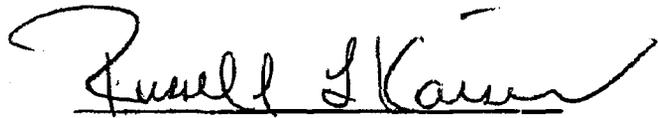
**IV. Conclusion**

The agencies have determined that wetland B for JD# NWS-2007-945 is not adjacent (as defined by 33 CFR 328.3(c)) to McSorley 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).<sup>5</sup> Based on these findings, we have determined that wetland B 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).



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

Date: 3 Apr 2008



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

Date: 2 Apr 2008

<sup>5</sup>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).