



## MEMORANDUM TO ASSERT JURISDICTION FOR POA-2007-1072

**Subject:** Assertion of Jurisdiction for Jurisdictional Determination POA-2007-1072

### Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are asserting jurisdiction over East Fork Duck Creek and its abutting wetlands for jurisdictional determination (JD) POA-2007-1072. This JD is based on our findings that East Fork Duck Creek is a relatively permanent water (RPW), and that the wetlands in this case directly abut it. This JD is consistent with the Clean Water Act, the agencies' regulations, relevant case law and the legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*.

### I. Introduction

Duck Creek is a small stream located on the east side of the Mendenhall Valley, in a suburban residential area within the City and Borough of Juneau, Alaska. It is about three miles long, drains about 1,000 acres, and generally includes the East and West Forks of Duck Creek and Duck Creek proper. The mouth of Duck Creek is an estuary subject to the ebb and flow of the tide, and therefore, is a traditional navigable water (TNW).<sup>1</sup>

The purpose of this joint decision memorandum is to determine the jurisdictional status of East Fork Duck Creek and its abutting wetlands. This JD involves a portion of the former main channel of the East Fork and wetlands abutting it, near latitude 58.384° North and longitude 134.574° West. A man-made waterway approximately 150 feet east of the site now conveys the majority of East Fork flow. The man-made waterway diverges from the former main channel approximately 650 feet upstream of the JD site, and then the two converge in a pond excavated from the channel, approximately 600 feet downstream of the site.

---

<sup>1</sup> Designation of the Duck Creek estuary as the nearest downstream TNW for purposes of this JD does not preclude the future determination of any TNW upstream of the Duck Creek estuary if additional information warrants such determination.

## II. Jurisdictional Determination

The channel that passes through the JD site is jurisdictional because it is part of an RPW. The wetlands on the site, which abut the RPW, are also jurisdictional.

## III. Basis for Determination<sup>2</sup>

### A. Relatively permanent waters

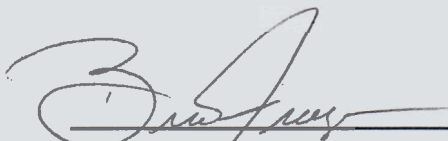
East Fork Duck Creek, an RPW (with continuous flow for most if not all months of the year), flows into Duck Creek proper, also an RPW, which flows into the Duck Creek estuary, a TNW. The channel that flows through the JD site is a part of the second order stream reach of East Fork Duck Creek, an RPW. Similar to oxbow and braided stream channels, which are treated as part of the same order tributary, the channel, therefore, is also part of the RPW.

### B. Wetlands with a continuous surface connection to RPW

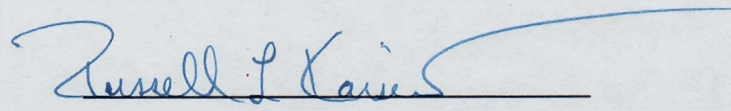
The administrative record, wetland data sheets and the JD form prepared by the Corps Alaska District, indicate the site includes approximately 0.1 acre of palustrine forested wetlands. These wetlands meet the agencies' regulatory definition of wetlands and they are not isolated wetlands. Likewise, they are not separated from East Fork Duck Creek by uplands, a berm, a dike, or any other similar feature. East Fork Duck Creek flows into and through these wetlands during wet weather. Thus, these wetlands are jurisdictional waters of the United States because they directly abut East Fork Duck Creek, which is an RPW.

## IV. Conclusion

East Fork Duck Creek, including the channel that flows through the JD site, is an RPW. Therefore, East Fork Duck Creek and its abutting wetlands, including those on the JD site, are jurisdictional waters of the United States.

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

Date: Sept. 7, 2007

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

Date: Sept 7-2007

<sup>2</sup> The evidence included in this memorandum is a summary of the evidence considered by the agencies in reaching this conclusion. Additional information regarding the determination is contained in the administrative record for this action.