



## MEMORANDUM TO ASSERT JURISDICTION FOR NWS-2007-749-CRS

**Subject:** Assertion of Jurisdiction for Jurisdictional Determination (JD) NWS-2007-749-CRS

### Summary

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are asserting jurisdiction over three wetlands (identified as Wetlands A, B, and C) adjacent to a non-relatively permanent water (RPW) for jurisdictional determination (JD) NWS-2007-749-CRS. This action is based on an evaluation of significant nexus between the wetlands and the East Fork Lewis River, a traditional navigable water (TNW), based on the statute, the agencies' regulations and the case law, and consistent with 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

The purpose of this memorandum is to document the presence of jurisdictional wetlands adjacent to a non-RPW located near Battle Ground, in Clark County, Washington. The site is located near 45-47-13.4° N latitude and 122-35-45.3° W longitude. Wetland A flows into a ditch (non-RPW), then into a second ditch that leads to an unnamed tributary of the East Fork Lewis River, a TNW, between 10 and 15 river miles downstream from the site. Wetlands B and C are approximately 100 and 300 feet from the non-RPW, respectively.

The Corps identified the lower three miles of the East Fork Lewis River as the TNW, based upon its designation under Section 10 of the Rivers and Harbors Act of 1899. Because the Corps found a significant nexus to this portion of the East Fork Lewis River, there is no need to determine whether a reach further upstream is a TNW for purposes of the significant nexus evaluation. However, the scope of a TNW is not limited to those waters constituting Section 10 waters.<sup>1</sup> Therefore, designation of the Section 10 portion of the East Fork Lewis River as the nearest TNW for purposes of this JD does not preclude the future determination of TNWs upstream if additional information warrants such determination.

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<sup>1</sup> See Appendix D of the Rapanos Guidance package.

## **II. Jurisdictional Determination**

The non-RPW and wetlands A, B, and C are jurisdictional, as they were determined to have a significant nexus to a downstream TNW.

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

### **A. Significant Nexus**

Evaluation of the non-RPW and adjacent wetlands A, B, and C in the review area demonstrate the wetlands have a significant nexus to a TNW. One of the site's wetlands (Wetland A) has a direct surface hydrologic connection to the non-RPW. The other two wetlands (Wetlands B and C) are approximately 100 and 300 feet away from the non-RPW, but are considered adjacent to the non-RPW. In a separate JD for Wetland A, the Corps concluded that Wetland A has a significant nexus to the downstream TNW. In making this determination, the Corps considered the flow and functions of the tributary, together with the functions performed by Wetlands B and C.

The agencies will consider the flow and functions of the tributary together with the functions performed by *all* wetlands adjacent to that tributary, to determine whether, collectively, they have a significant nexus with TNWs. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with TNWs, the tributary and all of its adjacent wetlands are jurisdictional. The Corps had previously concluded (in a separate JD) that Wetland A was jurisdictional, based upon the collective contribution of the non-RPW and all adjacent wetlands (Wetlands B and C) and their significant nexus to the downstream TNW. Therefore, the non-RPW and all three wetlands in the review area are jurisdictional waters of the U.S. because, when analyzed together, they have a significant nexus to a TNW. This determination applies to the wetland that has a direct hydrologic connection to the non-RPW (Wetland A), as well as to the other two wetlands that are adjacent to, but do not have a direct hydrologic connection to the non-RPW (Wetlands B and C).

The significant nexus evaluation demonstrates that the non-RPW and its adjacent wetlands impact the physical, chemical, and biological integrity of a downstream TNW. The non-RPW and its adjacent wetlands filter sediments, provide stormwater attenuation functions, maintain stream temperatures, and provide food chain support for anadromous fish populations and other aquatic species that use the East Fork Lewis River and its tributaries.

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<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.

#### IV. Conclusion

The non-RPW and its adjacent wetlands contribute to protecting and enhancing the chemical, physical and biological integrity of a downstream TNW. Therefore, wetlands A, B, and C are jurisdictional waters of the United States.



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Date: Oct. 2, 2007



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