



MEMORANDUM TO RE-EVALUATE JURISDICTION FOR NWS-2007-731

Subject: Memorandum on Adjacency and Traditional Navigable Water Determinations for Jurisdictional Determination NWS-2007-731

Summary

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have determined that the wetland for jurisdictional determination (JD) NWS-2007-731 is adjacent (as defined at 33 CFR 328.3(c)) to an unnamed creek, a relatively permanent water (RPW).¹ The agencies have also determined that the Cedar River is the closest traditional navigable water (TNW) for this JD.² The agencies are returning the JD to the district to re-evaluate whether the wetland is jurisdictional (as defined at 33 CFR 328.3(a)(7)) based upon a significant nexus evaluation in relation to the Cedar River, the TNW). 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 is located at 47°29'15.99" north latitude and 122°9'15.78" west longitude in Renton, King County, Washington. The property encompasses approximately 1.5 acre. The site is bound to the east by an unnamed creek ("creek"), to the north by NE 4th Street, to the west by residential and industrial development, and to the south by industrial development and undeveloped land. The subject wetland, a depressional low area on the site, is located approximately 55 feet to the west of the creek. The creek is a deeply incised tributary that supports relatively permanent water. The creek flows approximately 1,100 feet before entering a stormwater pond. It then flows approximately 1 mile before entering Maplewood Creek, which flows 0.75 mile before entering into the Cedar River, a TNW.

¹ This memorandum describes the agencies' determination that wetland C is adjacent as defined by 33 CFR 328.3(c) to Lincoln Creek, an RPW. Wetlands adjacent to, but not directly abutting an RPW, require a significant nexus analysis to determine whether the wetland is jurisdictional under 33 CFR 328.3(a)(7).

² This determination applies to the Cedar River beginning at mile 22 continuing downstream to the mouth of the River. This designation of the nearest TNW for purposes of this JD does not preclude the future determination for any portions upstream if additional information warrants such determination.

II. TNW Determination

The agencies have determined that Cedar River is the closest TNW for purposes of this JD. Collectively, the factors described below demonstrate that Cedar River is navigable-in-fact, resulting in its designation as a TNW for purposes of CWA jurisdictional determinations.

As stated in *Appendix D*: “when determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps district has determined that the water body is a navigable water of the United States pursuant to 33 CFR 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 CFR 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”³

To determine whether the Cedar River is a TNW, the agencies conducted a case-specific analysis to evaluate whether it is navigable-in-fact. The agencies have determined that the Cedar River is a TNW due to several factors:

- There is documented use of the Cedar River for navigation. The Cedar River is widely publicized as a popular location for canoeists and other paddlers to experience both flat and whitewater paddling.⁴ The physical characteristics also support a determination that the Cedar River is capable of navigation.⁵
- The Cedar River is accessible to the public through at least nine locations, including several identified canoe launch areas with parking spaces at miles 2.5, 15.3 and 22.⁶
- The Cedar River is located near conduits of interstate travel. It is easily accessible (within minutes) by Interstate 405 and I-5, two major roads through Bellevue and Seattle.
- The Cedar River supports water-body based attractions that are likely to be used by out-of-state travelers for commercial navigation. There is a boat rental facility located at the mouth of the Cedar River which advertises boating the Cedar River on their website.⁷

A combination of the factors above demonstrate Cedar River supports actual navigation and is susceptible to being used for commercial navigation, demonstrating that Cedar River is navigable-in-fact, resulting in its designation as a TNW for purposes of CWA jurisdictional determinations.

³Section 10 waters under the Rivers and Harbors Act of 1899 are only a subset of TNWs. As noted in Appendix D, traditional navigable, or “(a)(1) waters,” include, but are not limited to “navigable waters of the United States,” or Section 10 waters.

⁴A book titled Paddle Routes of Western Washington Guide Book and the website <http://www.trails.com/toptrails.asp?area=10718> names the Cedar River as one of the most popular flatwater paddling and canoeing spots in Washington.

⁵USGS field measurements indicate at river mile 1.6 an average river width of 97 ft, at river mile 20.4 an average width of 90 ft and at river mile 23.4 an average width of 94 feet.

⁶ <http://68.178.208.72/locations-directions/listings2.shtml>.

⁷ See, for example: <http://dnr.metrokc.gov/wlr/watersheds/cedrLKWA/cedar-river-public-access.htm>.

III. Adjacency Determination⁸

EPA and Corps regulations define “waters of the United States” to include wetlands adjacent to other covered waters.⁹ The regulations state: “The term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are ‘adjacent wetlands.’”¹⁰ The *Rapanos Guidance* states that finding a continuous surface connection is not required to establish adjacency under this definition.¹¹ This section describes the agencies’ determination that wetland C is adjacent as defined by 33 CFR 328.3(c) to Lincoln Creek, an RPW. Wetlands adjacent to, but not directly abutting an RPW, require a significant nexus analysis to determine whether the wetland is jurisdictional under 33 CFR 328.3(a)(7) (see Section IV below).

The 0.22 acre wetland is a minor depression situated on compacted fill material located approximately 55 feet west of the creek. The site is located approximately 5 feet above the elevation of the creek’s ordinary high water mark. The creek is deeply incised as a result of historic tributary excavation and straightening. There is a discrete berm located at the top of the bank, consisting of dredge spoil materials historically sidecast during maintenance activities. The site gently decreases in slope from east to west, from the high point at the top of the discrete berm down to the wetland, with the residential and industrial development situated at a slightly lower elevation than the project site.

The top wetland soil layer, which is approximately 8 inches in depth, consists of unstratified gravelly, sandy, loam material. Below the surface layer, the soil consists of highly compacted material, which includes construction debris from demolition of a previous site structure. Due to the shape and size of the wetland, the wetland is estimated to provide the potential for approximately 0.4 acre-feet of short and long-term water storage.¹²

Under normal circumstances, the primary source of water for the subject wetland is precipitation. Due to the local site conditions, the wetland receives direct precipitation and localized overland flow from the site. Overland flow is generally from east to west. It is expected that an overland flow connection occurs between the wetland and creek following large storm events, and that the wetland provides some floodwater storage benefits. Between the wetland and the creek, a 0.44 acre riparian habitat exists, which includes young alders and cottonwoods. Generally, these species require moist (partially hydric) soils to survive, which indicates that a shallow subsurface water connection likely occurs between the wetland and the creek.

A combination of the factors above, including close proximity, position in the landscape, and indicators of a potential shallow subsurface connection, support the determination that the

⁸ 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.

⁹ 33 C.F.R. 328.3(a)(7).

¹⁰ 33 C.F.R. 328.3(c).

¹¹ See page 5 of the *Rapanos Guidance*.

¹² Assumed water depth for calculating water storage is 8-inches.

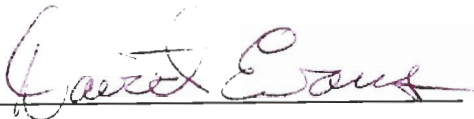
wetland is adjacent (as defined by 33 CFR 328.3(c)) to the unnamed creek. The fact that the wetland is separated from the other waters of the U.S. by a berm does not alter this determination, given that the agencies' regulations specify that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'"¹³

IV. Significant Nexus

The agencies are returning the JD to the district to re-evaluate whether the wetland is jurisdictional (under 33 CFR 328.3(a)(7)) based upon a significant nexus evaluation in relation to the Cedar River, the nearest TNW. The significant nexus evaluation should consider the flow and functions of the creek, along with the functions performed by the subject wetland and all other wetlands adjacent to the creek, to determine whether collectively they have a significant nexus to the Cedar River.

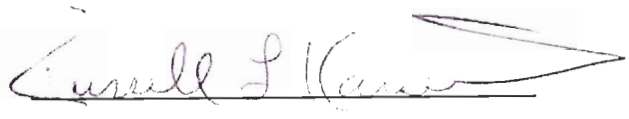
V. Conclusion

The wetland for JD# NWS-2007-731 is adjacent (as defined by 33 CFR 328.3(c)) to the unnamed creek. The Cedar River is the closest TNW for this JD. The agencies are returning the JD to the district to re-evaluate whether the wetland is jurisdictional (under 33 CFR 328.3(a)(7)) based upon a significant nexus evaluation in relation to the Cedar River, the nearest TNW.



David Evans, Director
Wetlands Division
U.S. Environmental Protection Agency

Date: 2-8-08



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

Date: 2-8-08