



MEMORANDUM TO RE-EVALUATE JURISDICTION FOR NWP-2007-428

Summary

For JD# NWP-2007-428, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have determined that “wetland A” and “wetland B” are one wetland. The agencies are returning the JD to the district to re-evaluate whether wetland A/B is jurisdictional.

This determination is consistent with the Clean Water Act (CWA) and the agencies’ regulations at 33 C.F.R. Parts 328.3 and 40 CFR 230.3. In making this determination, we have also utilized 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*”), and the *JD Form Instructional Guidebook*.¹

I. “Wetland A” and “Wetland B” Are One Wetland²

The JD site is located in Sherwood, Washington County, Oregon at 45.3657° North latitude and 122.8629° West longitude. “Wetland B” (0.28 acres) is separated by approximately 60 feet from “wetland A” (~1 acre) by a low, man-made berm. The berm was created over multiple years from plow patterns having pushed soil to the property boundary, and is believed to have been in place since approximately 1935. The two areas are functioning as one wetland, despite the presence of the berm.

Position in the landscape, similarities in plant communities and soils, and indicators of a shallow subsurface connection demonstrate that these two areas are in fact functioning as one wetland. They occupy the same swale that historically crossed the JD site from southwest to northeast.³ “Wetland B” slopes from south to north toward “wetland A,” with its north edge situated approximately 3.5 feet lower than its south end and one foot higher in elevation than “wetland A.” “Wetland A,” in turn, slopes down another 2.5 feet toward the drain tile located in its northeast corner. The area between “wetland A” and “wetland B” is dominated by hydrophytic vegetation, sharing several of

¹U.S. Army Corps of Engineers *Jurisdictional Determination Form Instructional Guidebook* (June 5, 2007).

² 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.

³ Delineation Report, page 2. The swale is also evident on the topographic map of wetlands A and B (Figure 7a of the Delineation Report).

the same dominant species as found in wetland areas A and B. Wetland areas A and B, as well as the area between them, also occupy the same hydric soil unit—Huberly silt loam—as mapped by the Natural Resources Conservation Service (NRCS) and confirmed by the wetland delineation.⁴ The NRCS describes these soils as occupying swales dissecting old alluvial terraces. Their 1982 Soil Survey of Washington County depicted the unnamed tributary extending upslope through and beyond the Huberly soil unit and wetland areas A and B.⁵ That channel is no longer evident on the JD site and there were no indicators of a surface hydrologic connection between wetland areas B and A at the time of the wetland delineation.⁶ However, the position of the wetland areas in the landscape, combined with the topography and soil at the site, provide indicators of a shallow subsurface connection between wetland areas B and A. These soils have a shallow water table at 0 to 18 inches, with a fragipan (i.e., dense, restrictive layer) at 20 to 30 inches below the surface. This soil structure, combined with the slope and topography, would direct movement of water from “wetland B” toward “wetland A.” The proximity, landscape position, vegetation, soils and hydrologic conditions, all indicate that “wetland B” is functioning as one wetland with “wetland A,” which we are identifying as “wetland A/B.”

II. Jurisdictional Determination

The agencies are returning the JD to the district to re-evaluate whether wetland A/B is jurisdictional. Based upon new information provided by the Regional office, it appears that wetland A/B has a hydrologic connection to a different, more northern tributary as shown on the attached map.⁷ The district should consider this information and re-evaluate whether wetland A/B is adjacent to the northern tributary. If the district determines that wetland A/B is adjacent, then it will need to conduct a significant nexus evaluation in relation to the Tualatin River, the nearest TNW, to determine if it is jurisdictional. The significant nexus evaluation should consider the flow and functions of the Cedar Creek tributary, along with the functions performed by wetland A/B, along with all other wetlands adjacent to the Cedar Creek tributary, to determine whether collectively they have a significant nexus to the chemical, physical and biological integrity of the Tualatin River.

⁴ Ibid., Appendix B, Data Points A1 through A4 and B1 through B17. The data forms for the delineation indicate that the soils in the area between wetlands A and B were of the same hue (i.e., 7.5YR) and value (i.e., 3) as those at the nearby wetland data points, and differed from them by only one level of chroma (i.e., 3 vs. 2). Texture for all was characterized as either loam or silt loam.

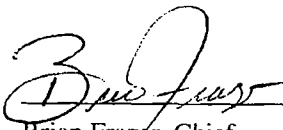
⁵ Ibid., Figure 6.

⁶ As described on page 8 of the Delineation Report, the delineation of wetlands A and B occurred at a time well below normal precipitation (i.e., 0.25 inch versus the 3.46-inch average for the preceding three-week period).

⁷ On February 19, 2008, Region 10 personnel confirmed during an on-site interview with the applicant's contractor that the clay drain tile associated with Wetland A/B conveyed flow in a different direction than originally described in the JD. The contractor confirmed the delineation consultant's description that, instead of draining from the southeast corner of Wetland A southeast toward Wetland D and the RPW it abuts, the pipe drained from the northeast corner of Wetland A to a different, more northerly tributary, as shown in the attached map. According to the delineation consultant, the northerly tributary flows at least three months per year; therefore, it appears that the tributary is also an RPW.

III. Conclusion

“Wetland A” and “Wetland B” are one wetland, and the presence of an artificial barrier (berm) does not sever the areas from functioning as one wetland. The agencies are returning the JD to the district to re-evaluate whether wetland A/B is jurisdictional.



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Date: 25 Feb '08



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