



## MEMORANDUM TO RE-EVALUATE JURISDICTION FOR NWS-2007-1706

**Subject:** Memorandum on Adjacency and TNW Determinations for Jurisdictional Determination (JD) NWS-2007-1706

### Summary

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have determined that wetland C is adjacent (as defined at 33 CFR 328.3(c)) to Lincoln Creek, a relatively permanent water (RPW), for JD# NWS-2007-1706.<sup>1</sup> The agencies have also determined that the Whatcom Creek Estuary is the closest traditional navigable water (TNW) for this JD. The agencies are returning the JD to the district to re-evaluate whether wetland C is jurisdictional (as defined at 33 CFR 328.3(a)(7)) based upon a significant nexus evaluation in relation to the Whatcom Creek Estuary.

This determination is consistent with the Clean Water Act (CWA) and the agencies' regulations at 33 C.F.R. Parts 328.3 and 329 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"), the *JD Form Instructional Guidebook*<sup>2</sup> and *Appendix D Regarding Waters that Qualify as Waters of the US Under Section (a)(1) of the Agencies' Regulations* ("Appendix D").

### I. Location

This JD involves one of three wetlands (wetland C) located on a 22-acre site in the City of Bellingham, Washington. The site is located at 48.7415° North latitude and 122.4652° West longitude. Site topography slopes from the northwest and eastern borders to a centrally located ravine that contains Lincoln Creek and a low area along the southern boundary. Wetlands A and B (totaling 10.11 acres) directly abut Lincoln Creek, an RPW, and were previously determined to be jurisdictional.<sup>3</sup> Wetland C (0.09 acre) is approximately 60 feet from Lincoln Creek on an east-facing slope approximately 8 feet in elevation above the Creek.

The immediate vicinity around the site is extensively developed for residential and commercial uses. The site is comprised primarily of forested areas adjacent to the creek trending to open grassy areas with shrub communities on the northwest and eastern sides. Lincoln Creek

<sup>1</sup> This memorandum describes the agencies' determination that wetland C is adjacent (bordering, contiguous, or neighboring) 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).

<sup>2</sup> *U.S. Army Corps of Engineers Jurisdictional Determination Form: Instructional Guidebook* (June 5, 2007).

<sup>3</sup> See JD Form 2 of 2 for Lincoln Creek and Wetlands A & B, NWS-2007-1706-NO.

flows north through culverts under developed properties and into Whatcom Creek approximately one mile downstream of the JD site. Whatcom Creek flows for approximately 1.2 miles more before entering Bellingham Bay.

## II. TNW Determination

The agencies have determined that the Whatcom Creek Estuary is the closest TNW for purposes of this JD because it is a "navigable water of the United States."<sup>4</sup> As stated in *Appendix D*: TNWs include, but are not limited to, "all of the 'navigable waters of the United States,' defined in 33 C.F.R. Part 329."<sup>5</sup> As defined in 33 C.F.R. §329.4, navigable waters of the United States include, but are not limited to, "those waters that are subject to the ebb and flow of the tide."

The National Wetland Inventory maps the lower 0.25 mile of the stream as sub-tidal estuary.<sup>6</sup> The lower 0.25 mile of Whatcom Creek is an estuary subject to the ebb and flow of the tide, meeting the definition of a TNW.

## III. Adjacency Determination<sup>7</sup>

EPA and Corps regulations define "waters of the United States" to include wetlands adjacent to other covered waters.<sup>8</sup> Under the regulations, a wetland is "adjacent" when it is "bordering, contiguous or neighboring" another water of the U.S.<sup>9</sup> The Rapanos guidance states that finding a continuous surface connection is not required to establish adjacency under this definition.<sup>10</sup>

Wetland C is in close proximity to Lincoln Creek. Wetland C is located approximately 60 feet away from Lincoln Creek, on an east-facing slope approximately 8 feet in elevation above the Creek. There are no indicators of a surface hydrologic connection between wetland C and Lincoln Creek. Above wetland C the slope steepens, topping out more than 30 feet higher at the edge of Interstate Highway 5, which borders the site to the west.

The position in the landscape and the soil types at the site provide indicators of a shallow subsurface connection between wetland C and Lincoln Creek. Natural Resources Conservation Service (NRCS) mapping depicts the soil beneath the area including Wetlands B, C, and a portion of A as Chuckanut (gravely loam)-Urban land complex, which NRCS characterizes as having moderately high to high transmissivity in its most restrictive layer. Mapping also depicts bedrock at 40 to 60 inches below the surface layer. Wetlands A, B, and C likely occupy unmapped inclusions of hydric soil—either Bellingham silty clay loam or Labounty silt loam, which comprise approximately four percent of the mapped unit. The NRCS describes Bellingham as having a water table at or near the surface from November through April, unless drained, and

<sup>4</sup> Designation of the Whatcom Creek Estuary as the nearest TNW for purposes of this JD does not preclude changing the determination of the extent of the nearest TNW if new information warrants such a change in determination.

<sup>5</sup> Section 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.

<sup>6</sup> See <http://wetlandsfws.er.usgs.gov>.

<sup>7</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.

<sup>8</sup> 33 C.F.R. 328.3(a)(7).

<sup>9</sup> 33 C.F.R. 328.3(e).

<sup>10</sup> See page 5 of the *Rapanos* Guidance.

characterizes Labounty as being ponded up to one foot in depth between November and May, unless artificially drained. The slope, along with the soil structure that would direct movement of water toward the Creek, indicates that wetland C releases any overland flow received from the highway and hillside above via overland or shallow subsurface flow to Lincoln Creek.

A combination of the factors above, including close proximity, position in the landscape, and indicators of a shallow subsurface connection, demonstrate that wetland C is adjacent (as defined by 33 CFR 328.3(c)) to Lincoln Creek.

#### IV. Significant Nexus

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

#### V. Conclusion

Wetland C is adjacent (as defined by 33 CFR 328.3(c)) to Lincoln Creek, based upon an examination of a combination of factors including close proximity, position in the landscape, and indicators of a shallow subsurface connection. The Whatcom Creek Estuary is the closest TNW for this JD. The agencies are returning the JD to the district to re-evaluate whether wetland C is jurisdictional (under 33 CFR 328.3(a)(7)) based upon a significant nexus evaluation in relation to the Whatcom Creek Estuary, the nearest TNW.



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