



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT
P.O. BOX 2946
PORTLAND, OR 97208-2946

CENWP-ODG

27 November 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ NWP-2022-491².

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2022-491

as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area). The review area is a 0.116-acre area of dry land. The review area consists entirely of a bare, landscaped area which directly abuts a concrete curb and impervious, asphalt roadway, a house with concrete foundation, and a small, manicured backyard that is separated from the review area by polyvinylchloride fencing. Soil within the review area, below approximately six inches of mulch and gravel fill, consists entirely of cobbly clay loam (10YR 3/2), a moderately well-drained soil type, and does not meet any hydric soil indicators. Surface water, high water table or saturation are not present. Further, no other wetland hydrology indicators are present. No vegetation is present within the review area and the bare ground surface consists of mulch, gravel fill and several decorative boulders. Hydrophytic vegetation indicators are not present. There is no hydrology present within the review area. No aquatic resources are present within the review area and therefore, there is no possibility of continuous surface connection to a TNW.

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
 - b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
 - c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
3. REVIEW AREA. The review area is a 0.116-acre area in the northern portion of a privately owned lot (Tax Lot 3605) located in Shady Cove, Jackson County, Oregon. Latitude/Longitude: 42.601769, -122.81735.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to the review area is the Rogue River. The Rogue River is approximately 1,091 aerial (straight) feet to the west of the review area. The

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2022-491

Rogue River has been determined to be a TNW from its confluence with the Illinois River (river mile 27.1) to Lost Creek Dam (river mile 157.5) by Portland District Corps of Engineers as described in the Section 404 Traditional Navigable Waters (TNWs) of the United States within the Portland District, Corps of Engineers Regulatory Boundary (dated 30 June 2008).⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no discrete flowpath from the review area to the Rogue River. Extreme precipitation could sheetflow from the review area to a roadside feature classified as a Riverine Intermittent Streambed Seasonally Flooded surface water feature, which is approximately 135 feet west of the review area. This feature drains into the Rogue River 0.62-mile to the southwest of the review area. There is no continuous surface connection from the review area to the nearby roadside feature or the Rogue River.
6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource,

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2022-491

including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

- a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹ N/A
- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Office (Desk) Determination. Date: 9 November 2023.

⁹ 88 FR 3004 (January 18, 2023)

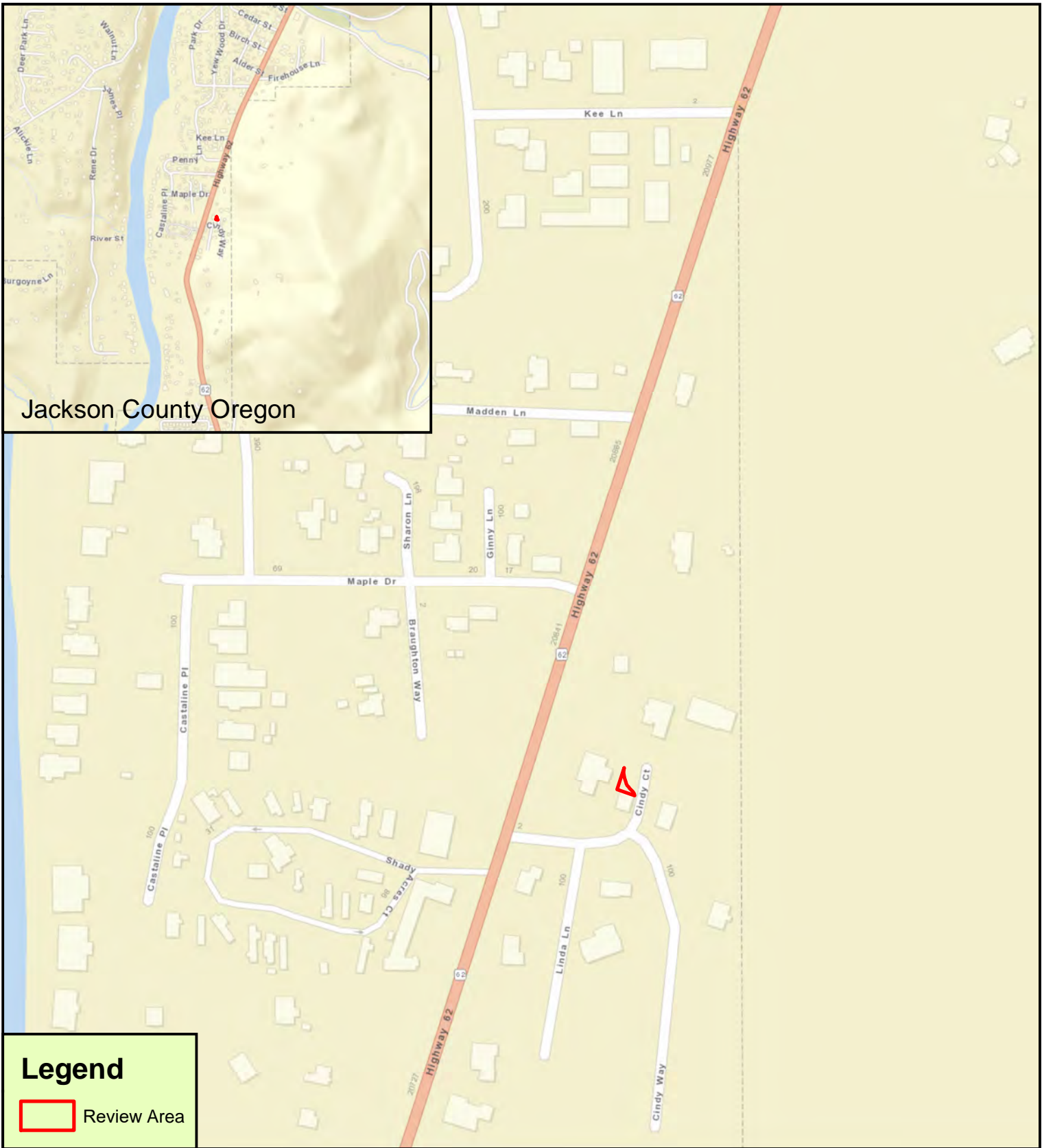
CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2022-491

- b. *Manzanita Hills Shady Cove, OR Wetland Determination* dated October 2022.
- c. U.S. Geological Survey map(s). United States Geological Survey TopoView, last accessed 9 November 2023. Cite scale & quad name: Shady Cove OR 1983; 2011; 2020.
- d. National wetlands inventory map(s). Cite name: United States Fish and Wildlife Service National Wetlands Inventory Mapper, last accessed 6 November 2023.
- e. Corps Portland District, Navigable Riverways within the State of Oregon, October 1993, last accessed 6 November 2023.
- f. Google Earth Pro, last accessed 9 November 2023.
- g. U.S. Geological Survey National Hydrography Dataset: National Regulatory Viewer, last accessed 8 November 2023.
- h. United States Department of Agriculture Natural Resources Conservation Service (NRCS) Soil Survey. Citation: NRCS Web Soil Survey, last accessed 6 November 2023.
- i. Federal Emergency Management Agency (FEMA), FEMA National Flood Hazard Layer: National Regulatory Viewer, last accessed 6 November 2023.

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.




Jackson County Oregon

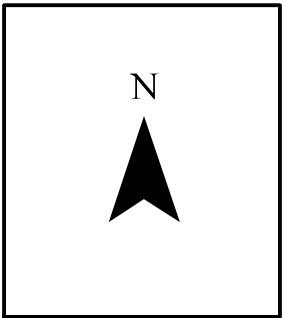
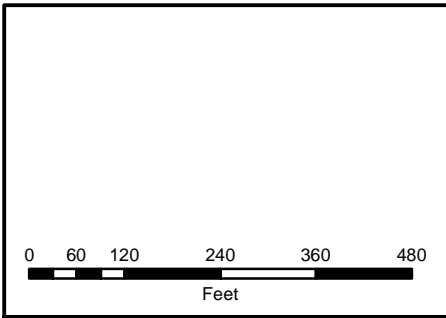
Legend

 Review Area



Manzanita Hills
Figure #: Vicinity
 Created By: M. Solus
 Created On: October 2022



Rabe Consulting



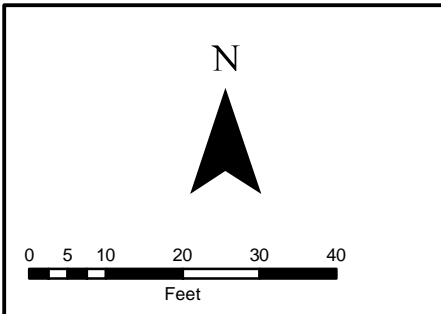


 Review Area
 Jackson County Taxlots

Manzanita Hills

Figure #6: Aerial

Created By: M. Solus
 Created On: October 2022



Data Source: National Agriculture Imagery Program (NAIP). Flown in Summer 2018. Reproduced by Rabe Consulting for the purpose of this document.