



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

CENWP-ODG

11 March 2024

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-2023-537²

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. 651, 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.

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

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland A, 8.13 acres, jurisdictional, Section 404
 - ii. Wetland B, .33 acre, non-jurisdictional
 - iii. Wetland C, .92 acre, jurisdictional, Section 404

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 composed of a 22.54-acre parcel (tax lot 300) at 2925 Stoltz Hill Road in Lebanon, Linn County, Oregon at Latitude/Longitude: 44.5156°, -122.9239° (Township 12 South, Range 2 West, Section 22B). The Review Area is currently vacant with a remnant homesite in the center of the site. The surrounding land consists of rural residences to the north, west, and south with residential subdivisions to the east. The site was likely used for pasture in the past and is currently mowed annually.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Aquatic resources within the Review Area are approximately 14.5 river miles from the Calapooia River (river mile (RM) 4) via the flowpath described in Section 5. The Calapooia River has been determined to be a TNW up to river mile 0.5 by Portland District Corps of Engineers as described in the October 1993 District list of Navigable Riverways within the State of Oregon. The aquatic resources are

12.1 aerial (straight) miles from the nearest TNW (Calapooia River at river mile (RM) 4)⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

Wetland C flows directly into Wetland A via an offsite 8-inch culvert. Wetland A abuts and shares a physical boundary with Oak Creek, a waterway that borders the Review Area. The surface water flowpath from Oak Creek flows northwest for approximately 14.5 miles before connecting to the Calapooia River at RM 4.

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, 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.

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.

- 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):

Wetland A is an 8.13 acre emergent and forested wetland located along the western boundary of the Review Area. Wetland A is part of the riparian area, shares a physical boundary with Oak Creek, and continues offsite to the north and south. Wetland A includes a shallow ditch that originates from a stormwater outfall at Fuji Lane (located on the east side, outside of the Review Area) and continues west across the site connecting to the riparian area of Oak Creek. The hydrology to Wetland A is from precipitation, groundwater hydrology, and overbank flooding from the creek. Field data for the delineation was recorded on 25 March 2021. The Corps Antecedent Precipitation Tool for the site data collection date shows that conditions were normal during the data collection. All sample plots within Wetland A meet wetland hydrology, vegetation, and soil indicator requirements. Wetland A abuts and drains into Oak Creek, maintaining a continuous surface connection. Oak Creek possess a streambed and streambanks. Oak Creek meets the relatively permanent standard, as it has continuously flowing water during certain times of the year and is connected to a TNW. Wetland A maintains a continuous surface connection to a relatively permanent tributary (Oak Creek) to a TNW. The Corps has determined Wetland A is a water of the U.S.

Wetland C is a 0.92 acre emergent and forested wetland located in the northeast corner of the Review Area. Wetland C is a broad swale that is hydrologically connected to Wetland A through an offsite 8-inch diameter culvert. The hydrology for Wetland C is from precipitation and ground water. Field data for the delineation was recorded on 25 March 2021. The Corps Antecedent Precipitation Tool for the site data collection date shows that conditions were normal at the time of the data collection. There was visible surface ponding in Wetland C at the time of field collection. All sample plots within Wetland C meet hydrology, vegetation, and soil indicator requirements. Wetland C has a continuous surface connection to Wetland A via culvert and gradual downward slope that is illustrated in the United States Geological Survey 3D Elevation Program Digital

Elevation Model layer of the Review Area. Wetland C maintains a continuous surface connection to Oak Creek via 8-inch culvert and Wetland A. Wetland C maintains a continuous surface connection to a relatively permanent tributary (Oak Creek), to a TNW. The Corps has determined Wetland C is a water of the U.S.

- a. 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).

Wetland B is a .33-acre emergent wetland located in the northeastern portion of the Review Area. The hydrology for Wetland B is from precipitation and groundwater. Field data for the delineation was taken 25 March 2021. The Corps Antecedent Precipitation Tool for the site data collection date shows that conditions were normal. All sample plots within Wetland B meet wetland hydrology, vegetation, and soil indicator requirements. Sample plots taken between Wetland B and Wetland C, (Sample plots: 7 and 9) did not have hydric soil or hydrology present. Based on a review of the Oregon Department of Mining and Minerals Industries (DOGAMI) contours and Light Detection and Ranging (LiDAR) data layer to assess topography within the Review Area, there are no discrete features present that would provide a continuous surface connection between Wetland B, to the other Wetlands within the Review Area, nor to Oak Creek. Wetland B does not exhibit a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water, therefore does not meet the adjacency criteria described in 33 CFR 328.3(a)(4). The Corps has determined Wetland B is not a water of the U.S.

⁹ 88 FR 3004 (January 18, 2023)

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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 7 February 2024
- b. Wetland Delineation Report for Single-Family Residential Linn County, 2925 Stoltz Hill Road, Lebanon, Linn County, Oregon, dated 6 June 2021
- c. Google Earth Pro, Aerial Imagery dated 15 May 2023, accessed on 9 February 2024
- d. United States Department of Agriculture Natural Resources Conservation Service (NRCS) Web Soil Survey, last accessed 9 February 2024
- e. Antecedent Precipitation Tool (USACE) software (v1.0.20) last accessed 9 February 2024
- f. Oregon Department of Mining and Minerals Industries (DOGAMI) Bare Earth Slope LiDAR: National Regulatory Viewer, last accessed 7 February 2024
- g. Federal Emergency Management Agency Flood Insurance Rate Map data, National Regulatory Viewer, last accessed 7 February 2024
- h. National Wetlands Inventory map: National Regulatory Viewer, last accessed 7 February 2024
- i. Local Wetland Inventory map; National Regulatory Viewer, last accessed 7 February 2024
- j. National Hydrology Dataset, National Regulatory Viewer, last accessed 7 February 2024
- k. Corps navigable waters' study: Corps EGIS, last accessed 7 February 2024
- l. USGS 3DEP Digital Elevation Model, National Regulatory Viewer, last accessed 9 February 2024

10. OTHER SUPPORTING INFORMATION.

The Review Area consists of the tax lot boundary along the northern, eastern, and southern boundaries. The border of the western boundary of the study area is the

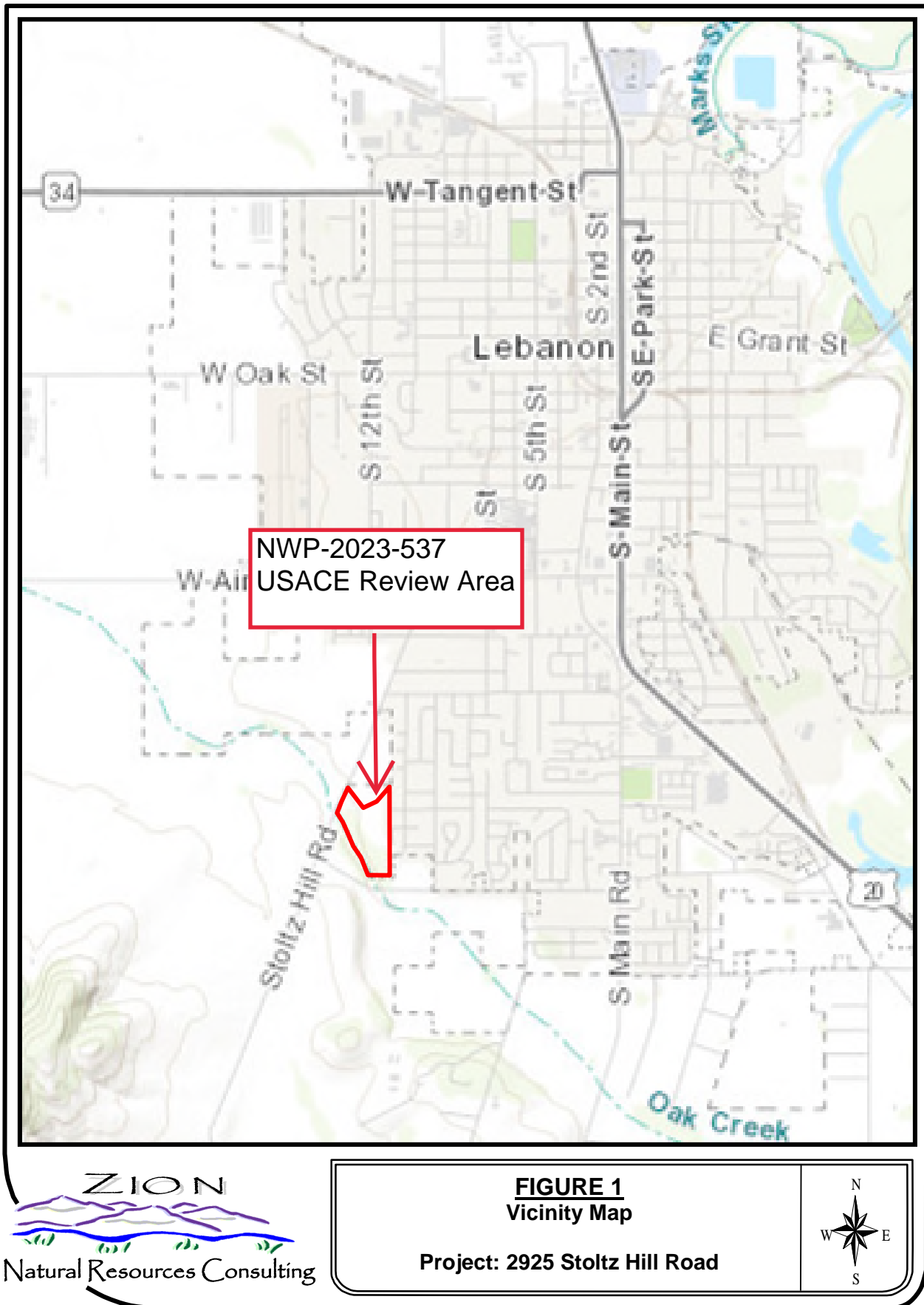
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top of bank of Oak Creek. Oak Creek is not within the Review Area and is not evaluated by this determination.

On 16 February 2024 the Corps submitted this AJD to EPA Region 10 and Corps Headquarters for review. EPA Region 10 and Corps Headquarters did not provide any response within the required timelines.

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.



NWP-2023-537
USACE Review Area

NWP-2023-537, Wetland
C, .92 acre, Water of the U.S.

NWP-2023-537,
Wetland B, .33 acre,
Non-water of the U.S.

NWP-2023-537,
Wetland A, 8.13 acres,
Water of the U.S.

