



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

CENWP-ODG

13 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-2022-460 (MFR 1 of 1).²

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.

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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. Stream 1, non-jurisdictional
 - ii. Wetland 1, non-jurisdictional

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 consists of three consecutive tax parcels (00114600, 00114593, and 00114637) that combined, measure approximately 5 acres, in Happy Valley, Clackamas County, Oregon. (Latitude/longitude: 45.442154°, -122.559875°)

The Review Area is situated on the southwestern slope of Mt. Scott and slopes to the southwest at a 6-10% grade and has remained in its present condition with no notable site alterations since the mid-sixties. The residence in the northern parcel was constructed in 1968, but the other parcels have remained forested throughout the years where no other landscape modifications are evident outside of mowed areas. The surrounding landscape has been subject to development, but the Review Area appears largely unchanged.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS

CONNECTED⁶. The nearest TNW is the Willamette River, located approximately 4 miles to the west (in a straight path). The Willamette River has been determined to be a TNW up to river mile 183.2 by the Portland District Corps of Engineers, as described in the October 1993 List of Navigable Riverways within the State of Oregon.

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

Stream 1 flows into the Review Area from the eastern boundary and terminates on the east side of Wetland 1. There is no discrete flow path exiting from Wetland 1 that would carry flow from Stream 1 beyond the wetland boundary. The topography of the Review Area gently slopes to the southwest. If flows were to extend beyond Wetland 1 from Stream 1, water would sheet flow in a southwest direction 1.3 miles before entering Phillips Creek. Phillips Creek flows 2.3 miles before converging with Kellogg Creek, which flows 1.3 miles before entering Kellogg Lake, where it then outfalls to the Willamette River, a TNW. Total flow path from the Review Area to the TNW is approximately 4.9 miles.

Wetland 1 is located in the southeast portion of the Review Area and is entirely contained within the Review Area. The wetland slopes moderately (5-6% grade) toward the west and is primarily supported hydrologically by Stream 1. Wetland 1 is located in a slight geographic depression that does not exhibit a discrete flow path or unbroken surficial connection visible on Oregon Department of Geology and Mineral Industries (DOGAMI) LiDAR imagery other than the feature carrying Stream 1 from the east. If flow were to leave Wetland 1, it would follow the sheet flow path described above for Stream 1 to Phillips Creek.

6. SECTION 10 JURISDICTIONAL WATERS: 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 10.⁷ N/A

⁶ 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.

⁷ 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.

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.
- 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).⁸ 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.,

⁸ 88 FR 3004 (January 18, 2023)

tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Stream 1: Stream 1 is approximately 2-3 feet wide and flows westerly into the Review Area for approximately 30 feet before terminating near the eastern Wetland 1 boundary. The predominate soil class in the Review Area is 14C (Cascade silt loam, stony substratum, 3 to 15 percent slopes), which is rated predominantly nonhydric (2% of map units rated as hydric) and is not prone to flooding or ponding. Ordinary high water mark (OHWM) indicators, such as defined bed and bank, scour and an unvegetated channel bottom were intermittent and generally more defined at the eastern end and upstream of the Review Area boundary but are no longer visible once it drains into Wetland 1. Surface water 1-2-inches deep was present at the eastern upstream end of Stream 1, and the streambed was partially vegetated by creeping buttercup at the time of the delineation (*Ranunculus repens*: Facultative). The topography of the Review Area slopes gently to the southwest towards SE Causey Ave, which runs the southern portion of the Review Area.

Prior to SE Causey Avenue being constructed in 2006, sheet flows would continue downslope following the southerly flow path; however, that connection appears to have been severed when the road was constructed, and no discrete channel is present beyond the extent of Wetland 1. No culvert or other conveyance that would carry Stream 1 offsite was identified at the southwest corner of the Review Area based on aerial and street imagery obtained from Google Earth (GE), and DOGAMI LiDAR imagery.

A wetland delineation was completed in April of 2016, and reverified after additional site visits were conducted on March 2 and 23, of 2021. Precipitation observed in all three months prior to the 2021 site visits were above the normal range of precipitation and yielded a condition score of 18, indicating wetter than normal hydrological conditions during delineation fieldwork.

The nearest U.S. Geological Survey (USGS) National Hydrograph Dataset (NHD) mapped waterway is an intermittent stream approximately 0.13 mile to the west, and no discrete channel is visible to connect flows from Stream 1 to this feature. Stream 1 does not extend offsite and therefore does not contribute surface flow to an (a)(1), (a)(2), or (a)(3) water. The Corps has determined Stream 1 is not a water of the U.S.

Wetland 1: Wetland 1 totaling 0.03 acre occurs entirely within the Review Area boundary along the eastern edge. Wetland 1 is a slope hydrogeomorphic (HGM) class with a Cowardin classification of temporarily flooded, palustrine emergent (PEMA). Wetland 1 hydrology is supported by a small, intermittent stream (Stream 1) that enters the Review Area from the east and terminates on the east side of the Wetland 1. The

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depth to the water table for the 14C soil series present is generally between 18-30-inches. Soil samples were taken to a depth of 16 inches where no water table was observed.

Wetland 1 slopes moderately (5-6% grade) toward the west. Upon review of DOGAMI LiDAR imagery, Wetland 1 is located in a shallow depression in the landscape with no visible surficial features that would convey flow offsite. There is no stormwater drain in the southwest corner of the Review Area where water could enter the stormwater system shown along SE Causey Avenue based on GE aerial and street view imagery, nor is there a discrete conveyance found on DOGAMI LiDAR imagery that shows a connection to the intermittent tributary located 200 feet to the west of the Review Area.

Wetland 1 does not exhibit a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water. The Corps has determined Wetland 1 is not a water of the U.S.

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. *Bullock Property Project Site Wetland and Other Waters Delineation Report*
Prepared by: Cascade Environmental Group, LLC dated December 2020.
 - b. U.S. Army Corps of Engineers Portland District list of Navigable Waters within the State of Oregon, accessed 2 February 2024.
 - c. U.S. Geological Survey (USGS) National Hydrograph Dataset, accessed online 2 February 2024.
 - d. Natural Resources Conservation Service Web Soil Survey, accessed online 2 and 5 February 2024.
 - e. U.S. Army Corps of Engineers Regulatory Viewer (Oregon), accessed online 2 and 5 February 2024.
 - f. Happy Valley Local Wetland Inventory (2007) provided by the applicant.
 - g. U.S. Fish and Wildlife Service, National Wetlands Inventory, Oregon Regulatory Viewer, accessed online 2 February 2024.
 - h. USGS 7.5 min topographic map, accessed online 2 February 2024.

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- i. Oregon Department of Mining and Minerals Industries Digital Terrain Model/Hillshade LiDAR, Oregon Regulatory Viewer, accessed online 2 February 2024.
- j. Google Earth aerial imagery, accessed online 2 February 2024.
- k. Final City of Happy Valley Steep Slopes and Natural Resource Overlay Zone Map, Version: Final Adopted Published: October 20, 2009, accessed online 2 February 2024.
- l. Desktop review of information completed on 13 and 14 of February 2024.

10. OTHER SUPPORTING INFORMATION. On February 15, 2024, we coordinated this JD with EPA Region 10. On March 1, 2024, the EPA concurred with our finding that Wetland 1 is not a water of the U.S.

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.

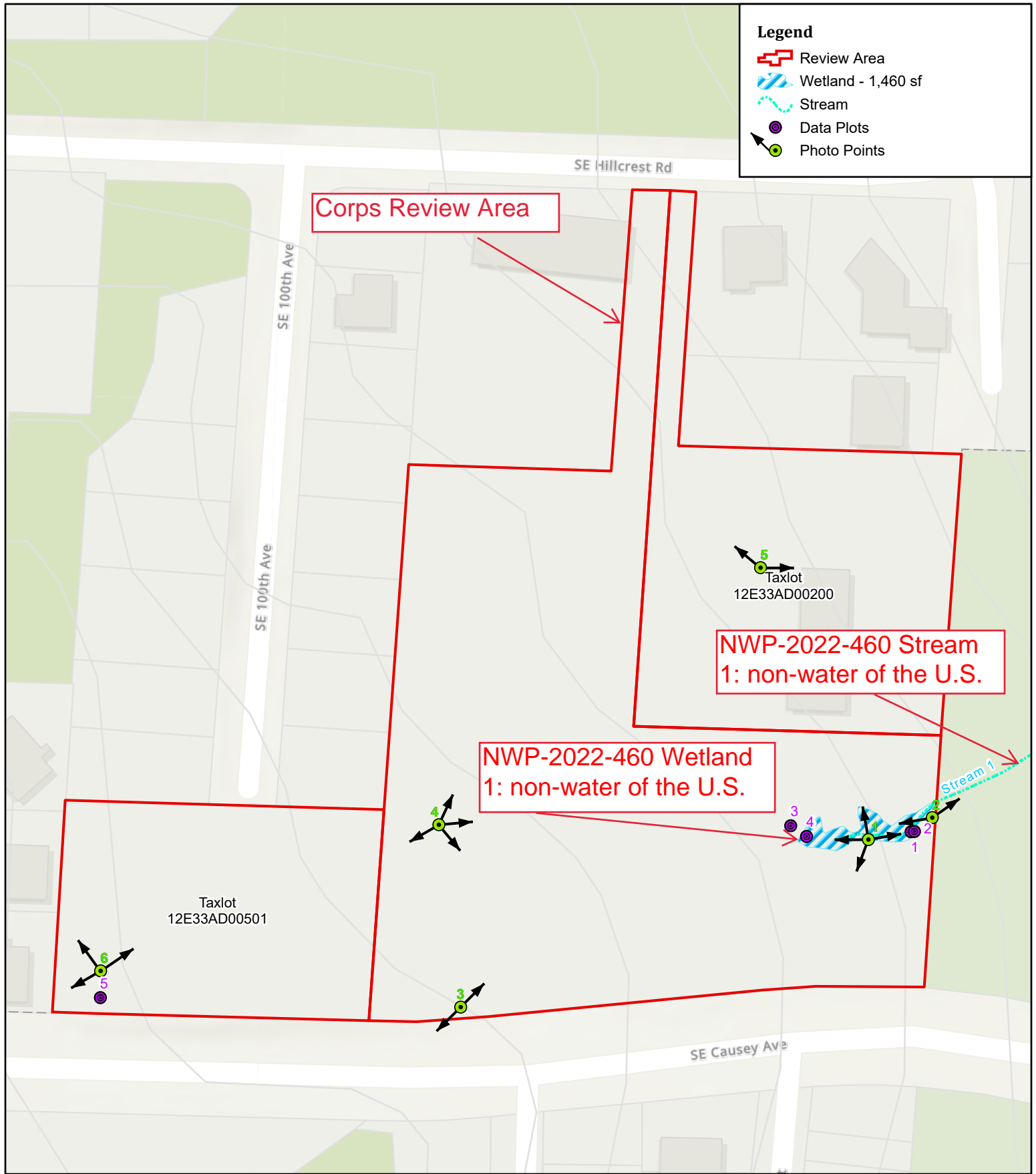


Figure 6. Wetland and Other Waters Boundary Map

Bullock Property Wetland Delineation Report