



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

CENWP-ODG

18 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) ,<sup>1</sup> [NWP-2023-600]<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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. Dodge Slough, jurisdictional, Section 404
  - ii. Wetland A, 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 is 4.9 acres in size and located in an unincorporated area of Benton County, Oregon at Latitude/Longitude: 44.291845°, -123.230017°.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup> The Willamette River is the nearest TNW to the subject aquatic resources. The Dodge Slough in the Review Area is approximately 4.2 river miles (3 aerial miles) south of the Willamette River. 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. The Dodge Slough enters the Willamette River near River Mile 154 at Latitude/Longitude: 44.2914°, -123.1953°

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<sup>6</sup> 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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Dodge Slough flows through the Review Area from east to west, then continues beyond the review area and flows north through agricultural lands for approximately 2.4 miles before draining to the Ingram Slough.

Ingram Slough flows approximately 1.5 miles in a generally northern direction before entering the Willamette River near river mile 154 at Latitude/Longitude: 44.332955°, -123.246160°. The combined flowpath from Dodge Slough through Ingram Slough and to a TNW is approximately 3.9 miles.

Wetland A in the Review Area has no flowpath or downstream connection to a TNW. Wetland A does not have a continuous surface connection to any (a)(1) waters.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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.

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<sup>7</sup> 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.

<sup>8</sup> 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.

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- 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):
  - i. Dodge Slough: Dodge Slough measures 275 linear feet (0.39-acre) and is a relatively permanent tributary to the Willamette River via the flowpath described above in Section 5. Dodge Slough is approximately 60 feet wide. During the September 15, 2023 Wetland Delineator's site visit, the Slough contained water approximately 5 feet deep. The Dodge Slough has a bed and bank with well-defined ordinary high water mark (OHWM) delineated at an approximate elevation of 284.5 feet above mean sea level within the Review Area. Site-specific physical field indicators included a distinct break in topography, a clear, natural line impressed on the bank, change in vegetation or lack of vegetation below the OHWM, and the presence of water lines on vegetation and bridge support beams. Floating vegetation including common duckweed (*Lemna minor*; OBL) was present within the onsite portion of the slough. Lesser amounts of willows and red osier dogwood (*Cornus alba*; FACW) were present below the OHWM but made up less than 25 percent of the active channel width within the slough. In addition to seasonal backwater flooding from the Willamette River, hydrology in Dodge Slough is supported by surface and groundwater flows from the adjacent agricultural fields. Based on Dodge Slough flowing indirectly into an (a)(1) water and meeting the relatively permanent standard, the Corps has determined Dodge slough is a Water of the U.S.
- 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

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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).<sup>9</sup> 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).

- i. Wetland A: Wetland A is a non-tidal, 0.01 acre palustrine forested wetland located in the southwestern portion of the study area, within a historic borrow pit on the west side of Dodge Island Road. Therefore, Wetland A belongs to the Depressional Hydrogeomorphic Class. Wetland A does not extend beyond the review area. The hydrology sources to Wetland A are primarily runoff from the adjacent upland, including road runoff from Dodge Island Road and Old River Road, and a seasonally high groundwater table. Vegetation within Wetland A is dominated by Oregon ash (*Fraxinus latifolia*; FACW), willow species (*Salix* spp.; assumed FACW), and climbing nightshade (*Solanum dulcamara*; FAC). Conditions within Wetland A were documented at Plot 3 in the wetland delineation conducted on September 15, 2023. Wetland A is situated in a lower elevation concave depression. The adjacent upland (Plot 4) is slightly higher in elevation, flat, and lacked hydric soils. Wetland A is not adjacent to an (a)(1) water or a relatively permanent tributary. Wetland A is not connected to an (a)(1) water or a relatively permanent tributary by a discrete feature and therefore does not have a continuous surface connection to a relatively permanent water. The Corps has determined Wetland A 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. Preliminary Office Desk Determination. Date: 10 January 2024.
- b. Dodge Island Road Bridge Replacement Wetland and Water Delineation Report, dated October 2023.
- c. Google Earth Pro aerial imagery, last accessed 10 January 2024.

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

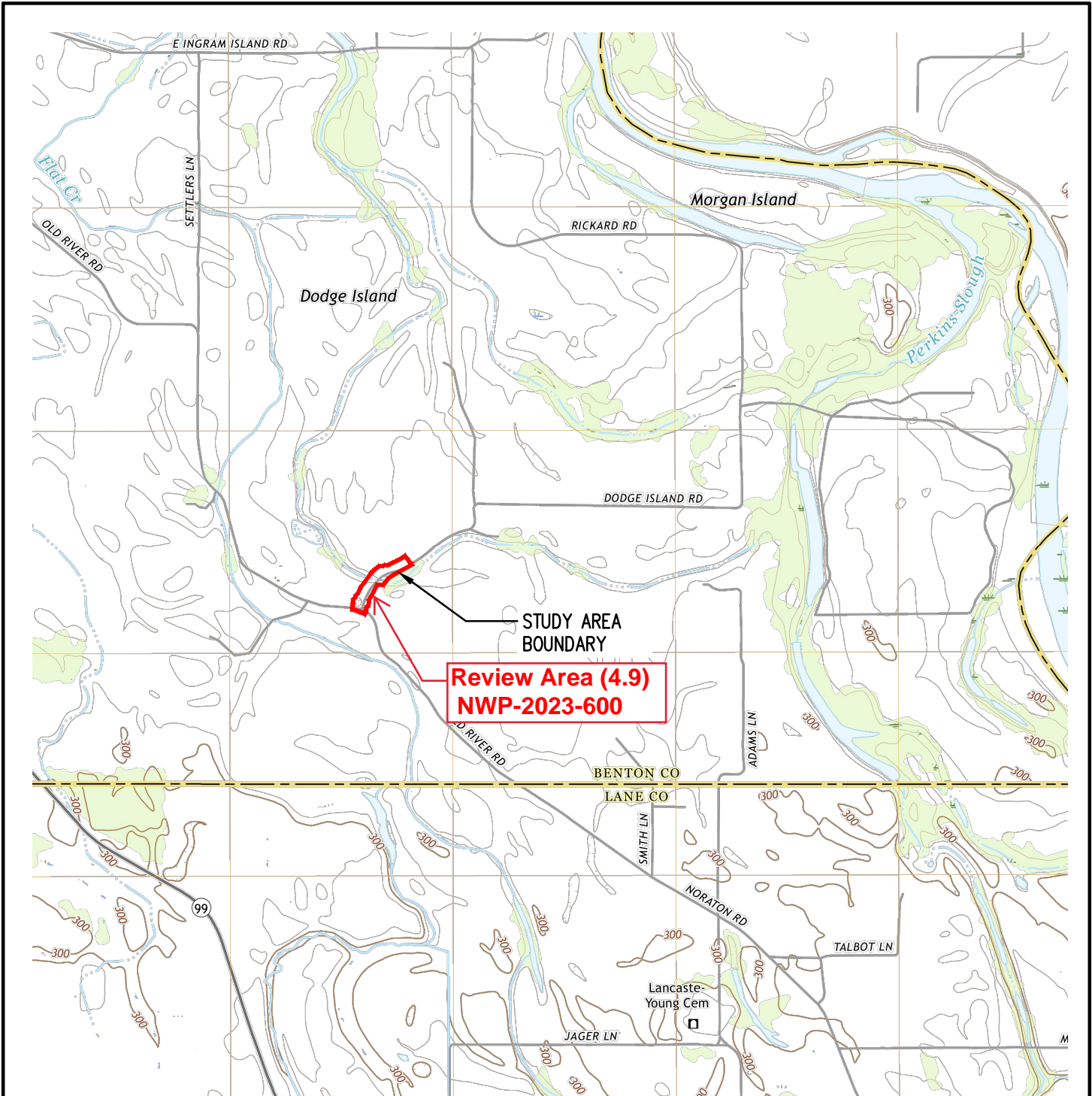
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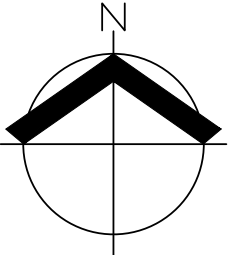
- d. Oregon Department of Mining and Minerals Industries (DOGAMI) Bare Earth Slope LiDAR: National Regulatory Viewer, last accessed 10 January 2024.
- e. National Hydrography Dataset Layer: National Regulatory Viewer, last accessed 10 January 2024.
- f. National Wetland Inventory Layer: National Regulatory Viewer, last accessed 8 January 2024.
- g. U.S. Army Corps of Engineers. Portland District list of Navigable Riverways within the State of Oregon. Date: October 1993. Accessed 10 January 2024.

10. OTHER SUPPORTING INFORMATION. On 13 February 2024, we coordinated this JD with EPA Region 10. On 28 February 2024, we received comments from EPA Region 10. On 4 March 2024, we responded with a notification of intent not to revise. As of 8 March 2024, EPA Region 10 did not provide a response within the required timelines.

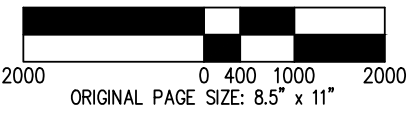
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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



USGS 7.5' TOPOGRAPHIC SERIES  
 QUADRANGLE: HARRISBURG, OR (2020)



SCALE: 1" = 2000 FEET



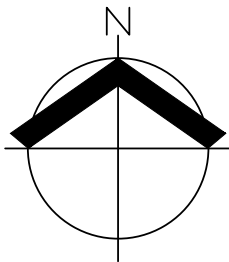
DATE: 10/13/2023

USGS VICINITY MAP DODGE ISLAND ROAD BRIDGE REPLACEMENT WETLAND AND WATER DELINEATION REPORT		<b>FIGURE 1</b>
AKS ENGINEERING & FORESTRY, LLC 12965 SW HERMAN RD, STE 100 TUALATIN, OR 97062 503.563.6151 WWW.AKS-ENG.COM		DRWN: GPM CHKD: RAS AKS JOB: 9247

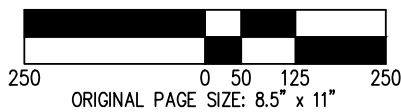




AERIAL DERIVED FROM NAIP SPRING 2022.



SCALE: 1" = 250 FEET



DATE: 10/13/2023

RECENT AERIAL MAP  
DODGE ISLAND ROAD BRIDGE REPLACEMENT WETLAND AND WATER DELINEATION REPORT

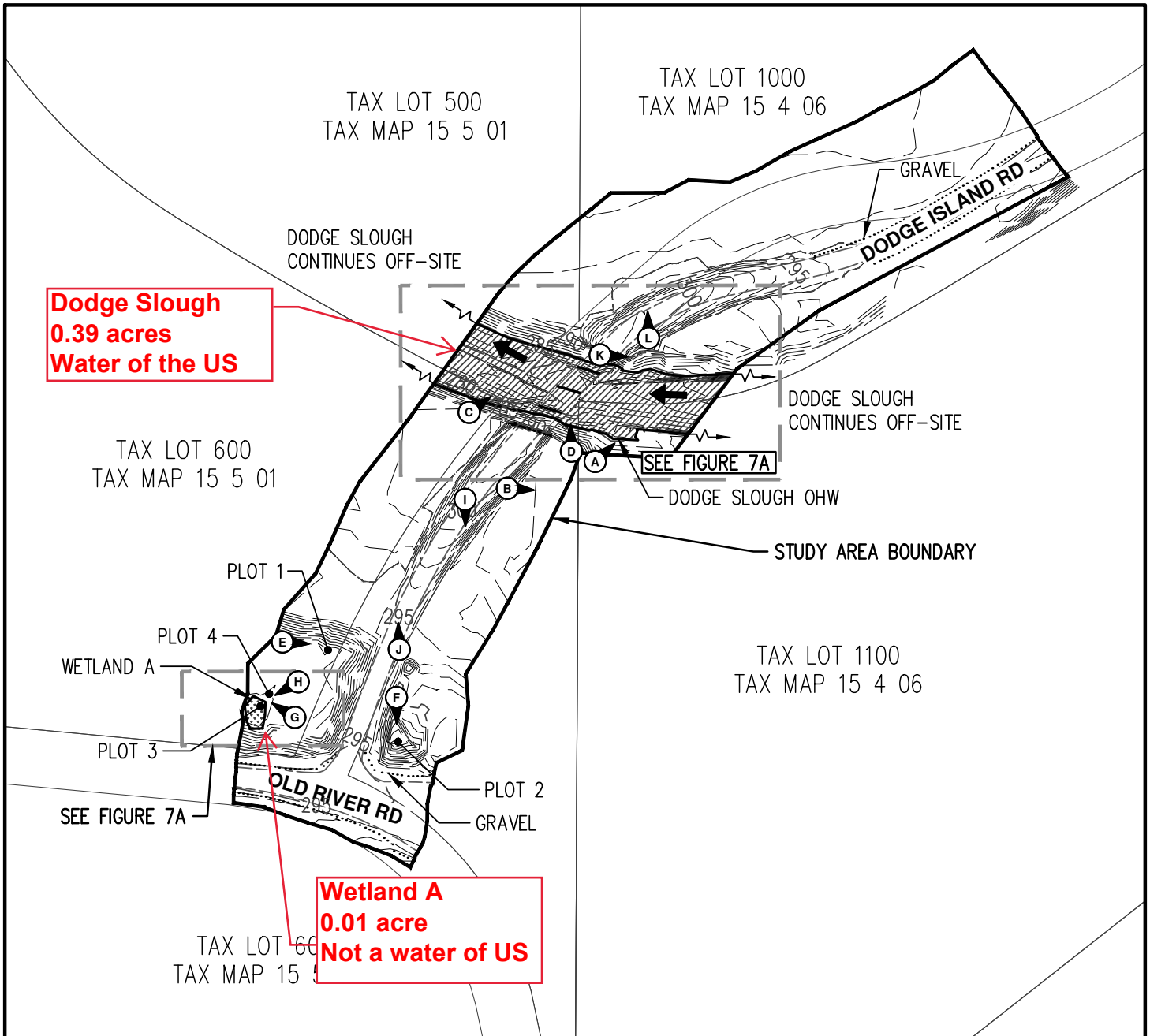
FIGURE  
**5**

AKS ENGINEERING & FORESTRY, LLC  
12965 SW HERMAN RD, STE 100  
TUALATIN, OR 97062  
503.563.6151 WWW.AKS-ENG.COM



DRWN: GPM  
CHKD: RAS  
AKS JOB:  
9247





**Dodge Slough  
0.39 acres  
Water of the US**

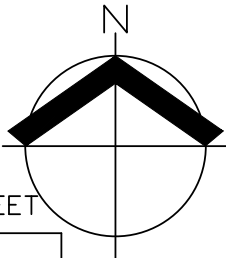
**Wetland A  
0.01 acre  
Not a water of US**

**LEGEND:**

TOTAL ON-SITE PFO/DEPRESSIONAL WETLAND A AREA:  
584 SF± (0.01 ACRES±)

TOTAL ON-SITE DODGE SLOUGH AREA:  
16,983 SF± (0.39 ACRES±) / 275 LF±

FLOW DIRECTION



SCALE: 1" = 150 FEET



ORIGINAL PAGE SIZE: 8.5" x 11"

PHOTO LOCATION AND ORIENTATION.

WETLAND AND WATER BOUNDARIES SHOWN WERE DELINEATED BY AKS ENGINEERING & FORESTRY, LLC ON SEPTEMBER 15, 2023, AND WERE PROFESSIONALLY LAND SURVEYED WITH SUBMETER ACCURACY BY AKS ON SEPTEMBER 15, 2023.

1-FOOT INTERVAL GROUND CONTOURS, EXISTING CONDITIONS, AND TREE SURVEY OF TREES >6" DBH DERIVED FROM AKS LAND SURVEY.

PROPERTY BOUNDARIES DERIVED FROM GIS DATABASE RESULTING IN ±5 FEET ACCURACY.

DATE: 10/13/2023

WETLAND AND WATERS DELINEATION OVERVIEW MAP DODGE ISLAND ROAD BRIDGE REPLACEMENT WETLAND AND WATER DELINEATION REPORT		FIGURE <b>7</b>
AKS ENGINEERING & FORESTRY, LLC 12965 SW HERMAN RD, STE 100 TUALATIN, OR 97062 503.563.6151 WWW.AKS-ENG.COM		DRWN: GPM CHKD: RAS AKS JOB: <b>9247</b>

