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

CENWP-ODG 4 April 2024

MEMORANDUM FOR RECORD

SUBJECT: U.S. Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; 88 FR 3004 (18 January 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023) ,[1] NWP-2018-126.[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 18 January 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 (18 January 2023) ("2023 Rule"). On 8 September 2023 the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", 88 FR 61964 (8 September 2023) 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. Tributary of Claggett Creek: 0.17 acre, 460 linear feet, jurisdictional

        ii. Wetland A: 0.24 acre, non-jurisdictional

        iii. Wetland B: 0.22 acre, non-jurisdictional

2. REFERENCES.

    a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule")

    b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023)

    c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

    d. Definition of Navigable Waters of the United States", 51 FR 41251 (13 November 1986)

3. REVIEW AREA.

The Review Area for this AJD consists of a total of 3.98 acres comprised of two individual parcels (tax lots 001001 and 001100 on tax map # 07S-02W-07BC), located at 4120 Fisher Road Northeast, in Section 7, Township 7 South, Range 2 West, Salem, Marion County, Oregon. The central coordinate of the Review Area is Latitude: 44.978042°, Longitude: -122.987311°. A map of the Review Area is enclosed (Enclosures 1).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[6]

   The nearest downstream TNW is the Willamette River. The Willamette River has been determined navigable under 33 CFR § 329.14. See *Navigable Riverways within the State of Oregon*, U.S. Army Corps of Engineers, October 1993.

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

   i. Tributary of Claggett Creek: This tributary flows northwest approximately 461 linear feet across the Review Area. The tributary then flows through a box culvert under Peter Lane Northeast. The tributary then flows approximately 400 linear feet northwest to a culvert that passes under Fisher Road Northeast. Upon existing the culvert, the tributary flows into Claggett Creek. Claggett Creek flows in a northwesterly direction approximately 8.86 stream miles and then flows into the Willamette River. The Corps reviewed the USGS Rain Drop Flow Path tool which depicts this flow path. The Corps also reviewed aerial photos of the Review Area overlayed with the DOGAMI LIDAR DTS Model Mosaic and the National Hydrography Dataset (NHD) flow line layer. Based on this review, the Corps was able to confirm this flow path.

   ii. Wetland A: Wetland A is located in the southeastern portion of the Review Area to the west of the tributary of Claggett Creek. Wetland A is a depressional wetland that is separated from the tributary via an upland break and a slight berm that is the result of the side cast of material performed during the previous channelization of the Tributary of Claggett Creek. The primary source of hydrology in Wetland A is precipitation which is internally drained. The applicant submitted wetland delineation reports dated February 2018 and December 2023. The 2018 delineation report noted that there is no direct surface connection between Wetland A and the Tributary of Claggett Creek. The 2023 delineation report also noted that there is no direct surface connection between Wetland A and the Tributary of Claggett Creek. The Corps also reviewed aerial photos of the Review Area overlayed with the DOGAMI LIDAR DTS Model Mosaic layer. Based on this review, the Corps could not identify a surface connection between Wetland A, the Tributary of

[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.

Claggett Creek, or any other tributary of the Willamette River. There is no flow path between Wetland A and the Tributary of Claggett Creek or any other traditionally navigable water.

iii. Wetland B: Wetland B is located in the southeastern portion of the Review Area to the east of the Tributary of Claggett Creek. Wetland B is a depressional wetland that is separated from the tributary via an upland break and a slight berm that is the result of the side cast of material performed during the previous channelization of the Tributary of Claggett Creek. The primary source of hydrology in Wetland B is precipitation which is internally drained. The applicant submitted wetland delineation reports dated February 2018 and December 2023. The 2018 delineation report noted that there is no direct surface connection between Wetland B and the Tributary of Claggett Creek. The 2023 delineation report also noted that there is no direct surface connection between Wetland B and the Tributary of Claggett Creek. The Corps also reviewed aerial photos of the Review Area overlayed with the DOGAMI LIDAR DTS Model Mosaic layer. Based on this review, the Corps could not identify a surface connection between Wetland B, the tributary of Claggett Creek, or any other tributary of the Willamette River. There is no flow path between Wetland B and the Tributary of Claggett Creek or any other traditionally navigable water.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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] There are no aquatic resources or other features within the Review Area that are jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899.

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 at 33 CFR § 328.3(a)(1) through (a)(5), consistent with the Supreme Court's decision in *Sackett*. List each aquatic

[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 § 329.14 to make a determination that a water is a navigable water of the United States subject to Section 10 of the RHA.

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- There are no such waters located within the Review Area.

b. The Territorial Seas (a)(1)(ii): N/A- There are no such waters located within the Review Area.

c. Interstate Waters (a)(1)(iii): N/A- There are no such waters located within the Review Area.

d. Impoundments (a)(2): N/A-There are no such waters located within the Review Area.

e. Tributaries (a)(3):

   i. Tributary of Claggett Creek: The Corps determined that this tributary meets the definition of waters of the United States. 33 CFR § 328.3(a)(3) states that tributaries of waters identified in 33 CFR § 328.3(a)(1) that are relatively permanent, standing or continuously flowing, are waters of the United States. Approximately 460 linear feet of this tributary flows through the Review Area. This tributary is a relatively permanent stream that flows into Claggett Creek 0.25 mile northwest of the Review Area. This tributary within the Review Area exhibits a manmade 1 to 2-foot-wide channel with an unvegetated bottom located 4 to 6 feet lower than the surrounding terraces. There are vegetated benches above the channel bottom that support a dominance of wetland species including *Agrostis capillaris*, *Phalaris arundinacea*, *Juncus effusus*, *Lotus corniculatus* and *Trifolium repens*. The tributary channel exhibits primary and secondary hydrology indicators including Surface Water (A1), High Water Table (A2), Saturation (A3), Sediment Deposits (B2), Drift Deposits (B3), Inundation Visible on Aerial Imagery (B7) and Geomorphic Position (D2). The Corps reviewed aerial photos of the Review Area contained in Exhibits 3.1 through 3.6 of the 2023 Delineation Report ranging in time from 2018 to 2023 and aerial photos of the Review Area contained in figures 6A-6G of the 2018 Delineation Report ranging in time from 1995 to

2018 which depicted visible water in the Tributary of Claggett Creek and the absence of vegetation within the visible channel. By email dated 18 March 2024 the applicant verified that the Tributary of Claggett Creek exhibits field indicators of relatively permanent flow. The Tributary of Claggett Creek exhibits clearly defined and continuous bed and banks across the entirety of the Review Area. There is substrate sorting, drift deposits, and recent alluvial deposits within the Tributary of Claggett Creek. There are geomorphic indicators of flow including drainage patterns in the Tributary of Claggett Creek. Open water was visible in the Tributary of Claggett Creek during site visits. The Tributary of Claggett Creek exhibits hydric soil indictors such as hydrogen sulfide odor and evidence of truncated hydric soils. In light of these facts, the Corps determined that this tributary meets the definition of waters of the United States consistent with 33 CFR § 328.3(a)(3).

f. Adjacent Wetlands (a)(4): N/A-There are no such waters located within the Review Area.

g. Additional Waters (a)(5): N/A-There are no such waters located within the Review Area.

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-No such resources are located within the Review Area.

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: The Corps determined that this non-tidal wetland is not a water of the United States because it does not meet the definition stated 33 CFR § 328.3(a)(1) and lacks a continuous surface connection to a 33 CFR § 328.3(a)(1) or (3) water. Wetland A is separated from the Tributary of

[9] 88 FR 3004 (18 January 2023)

Claggett Creek by an upland break and a slight berm that is the result of the side cast of material performed during the previous channelization of the Tributary of Claggett Creek. Wetland A's nearest boundary to the tributary is separated by 10 feet of subtle berm then 10 feet of drainage escarpment (45% slope) upland. The primary source of hydrology in Wetland A is precipitation which is internally drained. The applicant submitted wetland delineation reports dated February 2018 and December 2023. The 2018 delineation report noted that there is no direct surface connection between Wetland A and the tributary of Claggett Creek. The 2023 delineation report also noted that there is no direct surface connection between Wetland A and the tributary of Claggett Creek. By email dated 18 March 2024, the applicant further stated that at no point during the 2018 or 2023 delineation was water observed to overland flow from Wetland A into the tributary. No erosion, fill formation, or similar evidence was observed to suggest there is a surface connection between Wetland A and the Tributary of Claggett Creek. Furthermore, the Corps noted that there was no photo in the delineation report series of aerials from 1995 to 2023 where there was flow visible between Wetland A and the Tributary of Claggett Creek. There was no instance visible in the aerials where flow in the Tributary of Claggett Creek overflowed the defined banks or water from Wetland A flowed beyond its boundaries over the berm and into the Tributary of Claggett Creek. The Corps also reviewed aerial photos of the Review Area overlayed with the DOGAMI LIDAR DTS Model Mosaic layer. The berm which separates Wetland B and the Tributary of Claggett Creek is clearly visible in LIDAR imagery despite the vegetation which conceals the berm in satellite/aerial imagery. It is also noteworthy that there are no channels or erosional features visible in the LIDAR images that would suggest any flow leaves Wetland A and flows to the Tributary of Claggett Creek. Based on this review, the Corps could not identify a surface connection between Wetland A, the Tributary of Claggett Creek, or any other tributary of the Willamette River. There is no flow path between Wetland A and the Tributary of Claggett Creek or any other traditionally navigable water. Thus, the Corps determined that Wetland A does not meet the definition of adjacent described in 33 CFR § 328.3(c)(2) and is not a water of the United States.

ii. Wetland B: The Corps determined that this non-tidal wetland is not a water of the United States because it does not meet the definition stated 33 CFR § 328.3(a)(1) and lacks a continuous surface connection to a 33 CFR § 328.3(a)(1) or (3) water. Wetland B is separated from the Tributary of Claggett Creek by an upland break and a slight berm that is the result of the side cast of material performed during the previous channelization of the Tributary of Claggett Creek. Wetland B's nearest boundary to the Tributary of

Claggett Creek is separated by approximately 2 feet of subtle berm and 8 feet of drainage escarpment (45% slope) of upland is observed. T1-P2 was established within this spatially closest gap to document the well-drained uplands and lack of continuous surface connection. The primary source of hydrology in Wetland B is precipitation which is internally drained. The applicant submitted wetland delineation reports dated February 2018 and December 2023. The 2018 delineation report noted that there is no direct surface connection between Wetland B and the tributary of Claggett Creek. The 2023 delineation report also noted that there is no direct surface connection between Wetland B and the Tributary of Claggett Creek. By email dated 18 March 2024, the applicant further stated that at no point during the 2018 or 2023 delineation was water observed to overland flow from Wetland B into the tributary. No erosion, fill formation, or similar evidence was observed to suggest there is a surface connection between Wetland B and the Tributary of Claggett Creek. Furthermore, the Corps noted that there was no photo in the delineation report series of aerials from 1995 to 2023 where there was flow visible between Wetland B and the Tributary of Claggett Creek. There was no instance visible in the aerials where flow in the Tributary of Claggett Creek overflowed the defined banks or water from Wetland B flowed beyond its boundaries over the berm and into the Tributary of Claggett Creek. The Corps also reviewed aerial photos of the Review Area overlayed with the DOGAMI LIDAR DTS Model Mosaic layer. The berm which separates Wetland B and the Tributary of Claggett Creek is clearly visible in LIDAR imagery despite the vegetation which conceals the berm in satellite imagery. It is also noteworthy that there are no channels or erosional features visible in the LIDAR images that would suggest any flow leaves Wetland B and flows to the Tributary of Claggett Creek. Furthermore, the Corps reviewed Based on this review, the Corps could not identify a surface connection between Wetland B, the Tributary of Claggett Creek, or any other tributary of the Willamette River. There is no flow path between Wetland B and the tributary of Claggett Creek or any other traditionally navigable water. Thus, the Corps determined that Wetland B does not meet the definition of adjacent described in 33 CFR § 328.3(c)(2) and is not a water of the United States.

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 evaluation completed 22 February 2024

b. Navigable Riverways within the State of Oregon, U.S. Army Corps of Engineers, October 1993

c. Corps Portland District eGIS mapping tools accessed by Corps staff on 15 February 2024 and 22 February 2024; National Hydrography dataset, DOGAMI LiDAR

d. *Wetland/Waters Delineation for the 4120 Fisher Road NE Parcels City of Salem, Marion County, Oregon,* Terra Science Inc., February 2018

e. *Wetland and Waters Delineation Update 4120 Fisher Road NE Parcels City of Salem, Marion County, Oregon,* Swale Environmental, LLC, December 2023

f. NWP-2018-126: Stream Stats Report Latitude: 44.97791°, Longitude: -122.98727°, https://streamstats.usgs.gov/ss/, generated 15 February 2024

g. USGS Streamstats Raindrop Flow Path Tool Latitude: 44.97791°, Longitude: -122.98727°, https://streamstats.usgs.gov/ss/, generated 15 February 2024

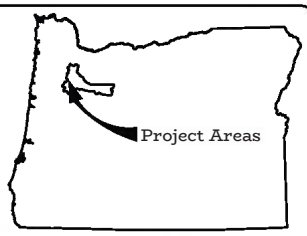
10. OTHER SUPPORTING INFORMATION. N/A.

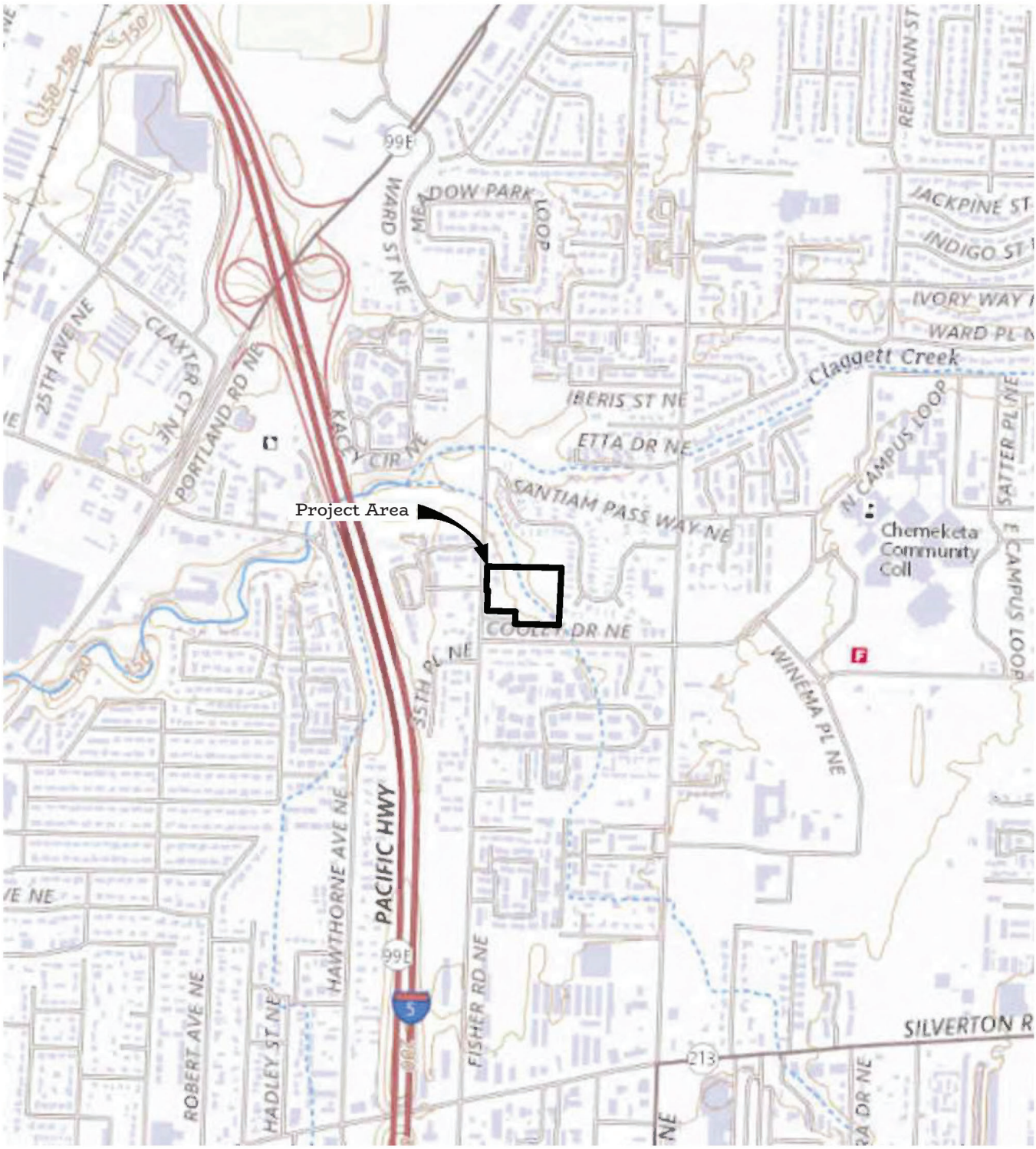
On 29 February 2024 the Corps submitted this AJD to EPA Region 10 Corps Headquarters for review. On 12 March 2024, EPA Region 10 requested additional information to complete its review of the draft AJD. By email dated 13 March 2024, the Corps provided the requested information. On 14 March 2024, EPA Region 10 provided initial comment on the draft AJD. On 20 March 2024, the Corps provided EPA Region 10 with a revised draft AJD. On 3 April 2024 EPA Region 10 concurred with our findings.

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.

Directions: Exit Interstate I-5 at Portland Road NE (Exit 258) and proceed north to Ward Drive NE and turn south (right); travel approximately 0.3-mile to Fisher Road NE and turn south (right). Project Area is located at 4120 Fisher Road NE. As private property, all site access must be coordinated with Applicant.

Coordinates: Centroid of the Project Area is approximated at 44.978042° North and -122.987311° West.





0 1000
Horizontal Scale (Feet)

SWALE ENVIRONMENTAL LLC

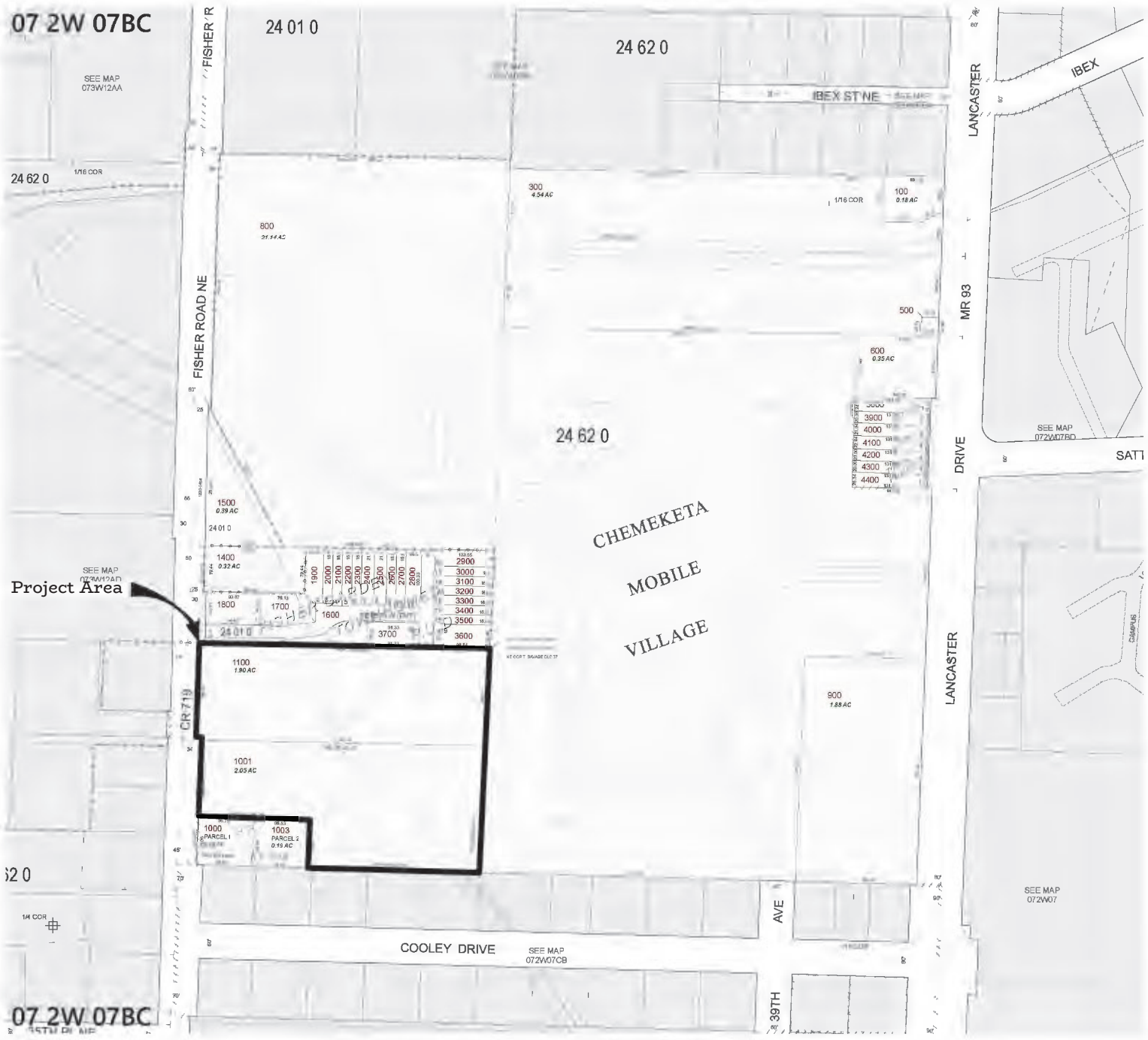
Wetland and Waters Delineation Update

4120 Fisher Road NE Parcels
City of Salem, Marion County, Oregon
(DSL WD#2018-0088 & USACE PJD NWP 2018-126)

EXHIBIT 1

U.S. Geological Survey National Map

NOTE: : The 3.98± acre project area consists of Tax lots 1001 and 1100 on County Assessor Map Township 07 South, Range 02 West, Section 07BC, Willamette Meridian. The Project Area is contained within City of Salem City Limits and is zoned as Multiple Family Residential 1 (RM1).



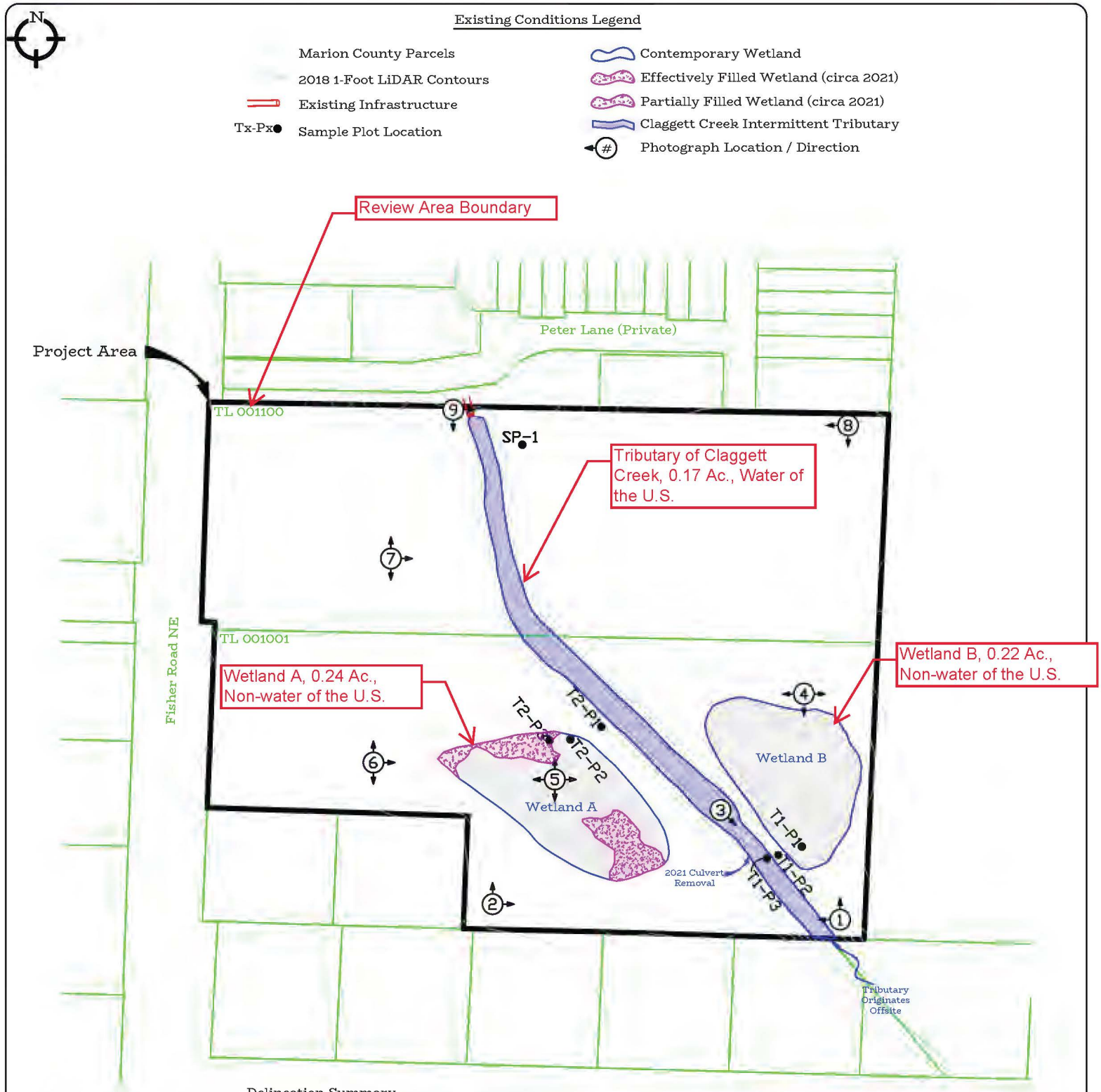
SWALE ENVIRONMENTAL LLC

Wetland and Waters Delineation Update

4120 Fisher Road NE Parcels
City of Salem, Marion County, Oregon
(DSL WD#2018-0088 & USACE PJD NWP 2018-126)

EXHIBIT 2

Marion County Assessor Map
07 2W 07BC



Delineation Summary

Feature	Acreage	Cowardin	Jurisdiction OHGM	USACE	DSL
Wetland A	0.22-acre	PEMEd	F	No	Yes
Wetland B	0.22-acre	PEMEd	F	No	Yes
Claggett Creek Tributary	0.17-acre	R4SBx	RFT	Yes	Yes

NOTE: Sample plot locations and updated Wetland / Water feature boundaries mapped using a Juniper Geode GNSS receiver and Mesa Tablet using ArcGIS Field Maps. Exhibit presented in the NAD 1983 State Plane Oregon North basis of bearings. Horizontal accuracy of feature boundaries and sample plot locations is less than 1 meter.

0 100
Horizontal Scale (Feet)

Adapted from DOGAMI LiDAR, Marion County, TSI, and Swale civil files.

SWALE ENVIRONMENTAL LLC

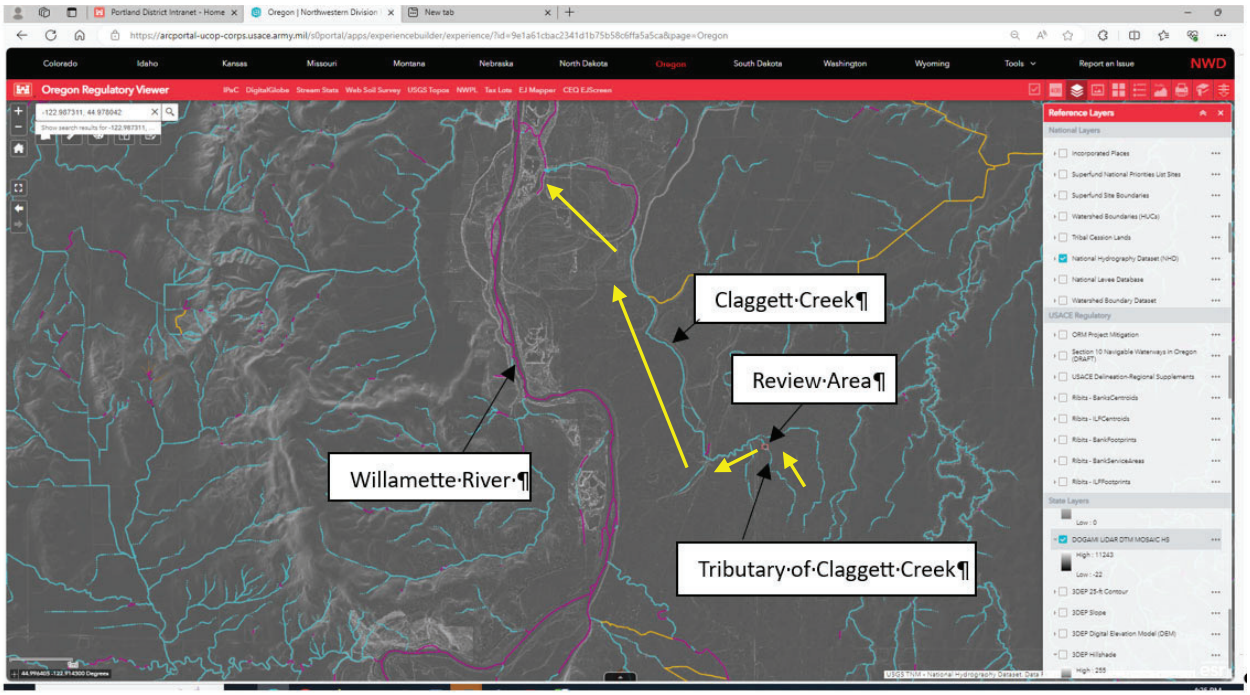
Wetland and Waters Delineation Update

4120 Fisher Road NE Parcels
City of Salem, Marion County, Oregon
(DSL WD#2018-0088 & USACE PJD NWP 2018-126)

EXHIBIT 4

Existing Site Conditions

Flow Path From Review Area to TNW



Flow Direction: →