



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

CENWP-ODG

05 April 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-2023-602].<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. 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. Size: 2.48 acres; Latitude: 45.497166; Longitude: -122.400719; City: Gresham; County: Multnomah; State: Oregon.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Sandy River. The Corps Portland District recognizes the Sandy River as a TNW to river mile 3.1 pursuant to the Corps Portland District October 1993 list of Navigable Riverways within the State of Oregon. Kelly Creek and the tributaries described in Section 5 below flow for approximately 4.29 miles before eventually connecting to the Sandy River at approximately river mile 2.71.<sup>6</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland 1 extends outside the Review Area to the northeast where it is drained by a roadside ditch (pink Stormwater\_Ditch in Flow Path map) that runs alongside SE 1<sup>st</sup> St for approximately 50 feet until it drains into a culvert for a stormwater drain (green Stormwater\_Lateral

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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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in Flow Path map). This ditch doesn't have relative permanent flow as evidenced by it having no discernible streambed and bank. Additionally, Google Street View shows flow only during February, while November, July, and August show the ditch having no flow, with StreamStats corroborating Google Street View by showing that eight months of the year experience on average 0.00 ft<sup>3</sup>/s flow. Google Street View also confirms that flow from Wetland 1 drains only to this ditch and that the ditch ends at the storm drain. Therefore all flow from Wetland 1 enters the storm drain. Flow continues and, once in the storm sewer, subsurface flow goes east down SE 1<sup>st</sup> St for 0.05 miles until NE Kane Dr, then flows north up NE Kane Dr for approximately 0.16 miles (red Stormwater\_Main in Flow Path map). Here the storm sewer outfalls from under NE Kane Dr and flows downslope via swale (identified in topographic map but have no imagery of) for approximately 100 feet until it enters a wetland abutting Kelly Creek. Flow then travels within the wetland for approximately 50 feet before entering Kelly Creek, which is listed as a perennial stream on the Corps RegViewer National Hydrography Dataset (NHD) and is connected to the Sandy River, a TNW. Kelly Creek flows from the wetland that the storm sewer indirectly outfalls to for approximately 1.6 miles until it discharges into Beaver Creek; Beaver Creek flows for approximately 2.78 miles and then discharges into Sandy River. The hydrologic surface connection of Beaver Creek is at approximately river mile 2.71 of Sandy River. The Corps Portland District recognizes the Sandy River as a TNW to river mile 3.1 as described in Section 4 above.

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

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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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“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).<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 1 is located in the northeastern quadrant of the Review Area within the bottom of a broad, shallow topographical depression. It encompasses 0.33 acres of the Review Area and extends offsite to the northeast. It was assessed as a slope HGM class with a Cowardin class of seasonally flooded,

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

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palustrine emergent (PEMC). Vegetation was dominated by reed canary grass (FACW) with a couple of willow shrubs. Soils samples met the Corps hydric soil indicator requirements for Depleted Matrix (F3) and Redox Dark Surface (F6). Soil texture was silt loam across the Review Area. Corps wetland hydrological indicator requirements at the wetland sample plots were met for High Water Table (A2) and Saturation (A3). Wetland 1 was bound onsite by gradually inclining slopes. Wetland 1 extends north of the Review Area where it is drained by a roadside ditch (outside Review Area). The flow path continues from there as described in Section 5 above. City storm sewer systems cannot serve as part of a continuous surface connection, therefore Wetland 1 does not meet the criteria described in 33 CFR 328.3(a)(4). The Corps has determined Wetland 1 is not adjacent to Kelly Creek, an RPW, and 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. Office (Desk) Determination. Date: 07 December 2023
  - b. *Jurisdictional Wetland Delineation Report For SE 1<sup>st</sup> Street*, Gresham, Multnomah County, Oregon, dated January 2021
  - c. Corps Portland District list of Navigable Riverways within the State of Oregon: Corps EGIS, last accessed 27 November 2023 and at [https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable\\_US\\_Waters\\_Oregon\\_1993.pdf](https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable_US_Waters_Oregon_1993.pdf)
  - d. National Wetland Inventory map(s). Citation: U.S. Fish and Wildlife Service (USFWS) Wetlands Mapper, last accessed 28 November 2023
  - e. Gresham Local Wetland Inventory. Citation: City of Gresham, last accessed 28 November 2023 and at <https://www.oregon.gov/dsl/ww/pages/inventories.aspx>
  - f. Antecedent Precipitation Tool (USACE) software (v1.0.20) accessed 27 November 2023.
  - g. Google Earth Pro, last accessed on 27 November 2023
  - h. Google Maps Streetview Imagery, last accessed on 27 November 2023

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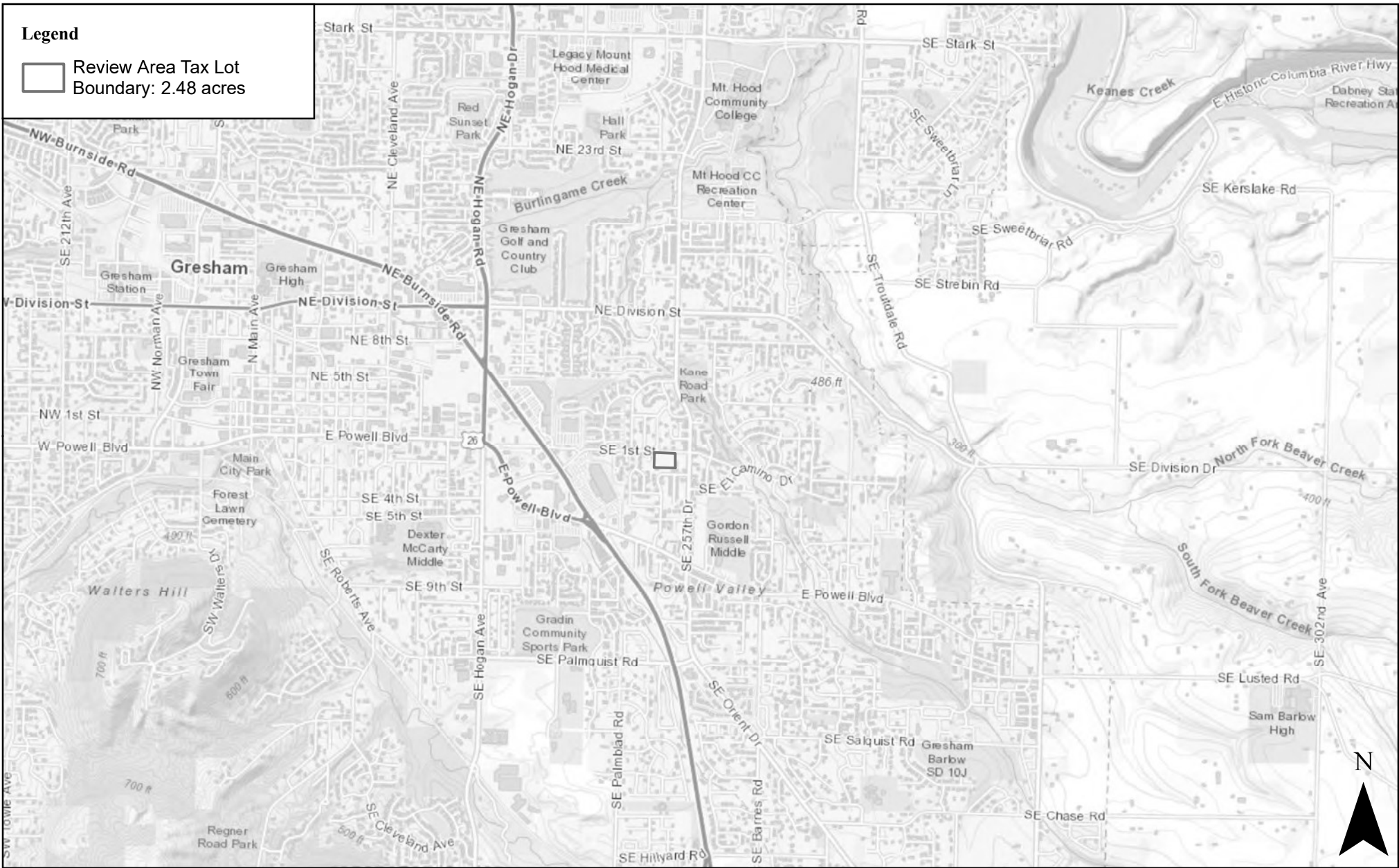
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- i. U.S. Geological Survey, 2023, National Hydrography Dataset (ver. USGS National Hydrography Dataset Best Resolution (NHD) for Hydrologic Unit (HU) 4 - 2001), last accessed 28 November 2023
- j. Oregon Department of Geology and Mineral Industries, 2021, Lidar Viewer, online at <https://gis.dogami.oregon.gov/maps/lidarviewer/>, last accessed on 24 November 2023.
- k. Gresham Stormwater System. Citation: City of Gresham, last accessed 27 November 2023 and at <https://portal.greshamoregon.gov/GreshamMap/>

10. OTHER SUPPORTING INFORMATION.

On 7 December 2023 we coordinated this JD with EPA Region 10 and Corps Headquarters. On 2 January 2024 EPA Region 10 elevated coordination to EPA and Corps Headquarters (HQ), and on 17 January 2024 was coordinated with Office of the Assistant Secretary of the Army (OASACW). On 19 March 2024 EPA HQ and OASACW provided a Joint Policy Memorandum on NWP-2023-602 and returned the draft approved JD to the Portland District for re-evaluation.

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.

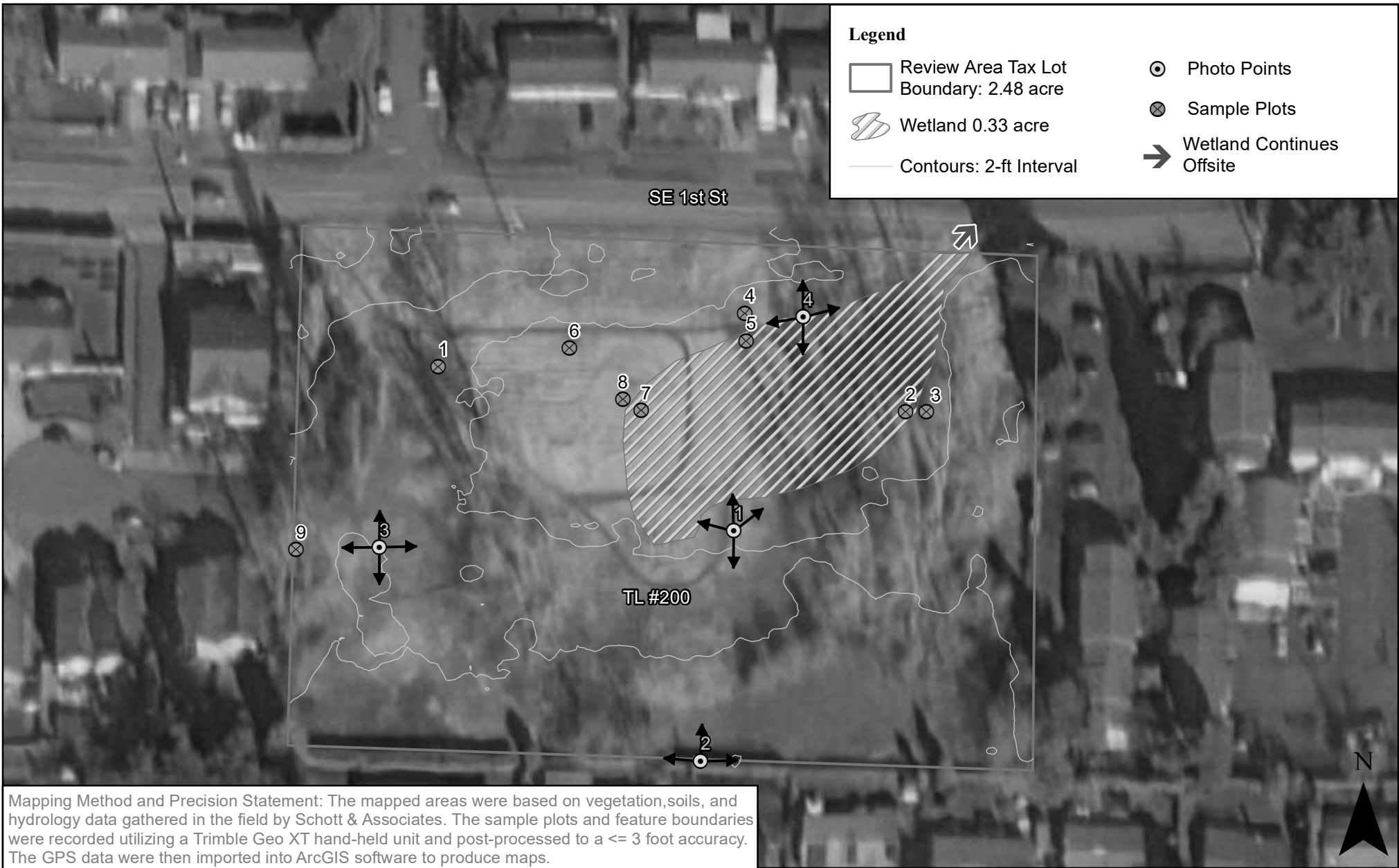


Date: 12/21/2020

Data Source: ESRI, 2020; Gresham GIS Dept., 2020

Figure 1. Location Map

SE 1st Street Project Site: S&A #2834





# Flow Path from Review Area to Kelly Creek



## Legend

Stormwater_Inlet	◆ Gresham
■ Gresham	● Other
■ Other	Stormwater_Lateral
Stormwater_Outlet	— 0
▲ Outlet	Stormwater_Ditch
Stormwater_Subsurface	— 0
◆ Gresham	Stormwater_Main
◆ Other	— 0
Stormwater_Manhole	— LWI_Streams
◆ Flow_Control	— Contour_5
	▨ Review Area
	▨ Wetlands

## Flow Path Description

1. Wetland 1 extends outside the Review Area to the northeast where it's drained by an off-site roadside ditch. The ditch runs alongside SE 1st St until it drains into a culvert for stormwater main. Flow then goes east until NE Kane Dr, then flows north.
2. Here the stormwater main outfalls from under NE Kane Dr and flows downslope via swale until it enters a wetland abutting Kelly Creek.
3. Flow then travels within the wetland for approximately 50 feet before entering Kelly Creek.

