



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

CENWP-ODG

9 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) ,¹ NWP-2023-334

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.² 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.³

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., 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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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: jurisdictional, Section 404
 - ii. Wetland 2: jurisdictional, Section 404
 - iii. Canoe Canal: 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 23.2 acres located at 44.05723° N, 123.07238° W in the city of Eugene, Lane County, Oregon. Two ponded wetlands and a slough are present within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Project wetlands and waters are approximately 0.32 river miles and 1,120 aerial (straight) feet from the Willamette River (at their closest point within Canoe Canal), which has been determined to be a TNW to river mile 183.2 by Portland District Corps of Engineers as described in the October 1993 District Navigable Waters List.⁵

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

⁵ 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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Wetland 1: Wetland 1 has a continuous surficial connection to the Canoe Canal, a Relatively Permanent Water (RPW) that flows into a tributary of the Willamette River. Wetland 1 is situated between Wetland 2 and the Canoe Canal. Wetland 1 is connected to both the Canoe Canal and Wetland 2 through two, separate corrugated pipes. Water flows into Wetland 1 through the pipe connected from Wetland 2 to the east. Water flows out of Wetland 1 into the Canoe Canal through a metal pipe to the west. Water flows out of the Canoe Canal into the Q Street Canal to the west through a large corrugated metal pipe. The Q Street Canal flows directly into to the Willamette River. Combined flow path from the outlet of Wetland 1 to the Willamette River is approximately 2,806 feet (0.53-mile) .

Wetland 2: Wetland 2 has a continuous surficial connection to the Canoe Canal, a RPW that flows into a tributary of the Willamette River. Water flows out of Wetland 2 directly into Canoe Canal through a pipe to the southeast. Water also flows out of Wetland 2 into Wetland 1 through a pipe to the east, then into Canoe Canal through the pipe on the east side of Wetland 1. Canoe Canal flows into the Q Street Canal. The Q Street Canal flows into the Willamette River. Combined flow path from the southeast outlet of Wetland 2 to the Willamette River is approximately 4,793 feet (0.91-mile).

Canoe Canal: Canoe Canal flows into the Q Street Canal, a RPW that flows into the Willamette River. The Canoe Canal receives flow from the Patterson Slough to the east, which receives hydrology directly from the Willamette River. Water flows out of the Canoe Canal through a large metal pipe into the Q Street Canal. The Q Street Canal flows into the Willamette River approximately 1,770 feet (0.34-mile) downstream (southwest) of the Canoe Canal outlet.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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.

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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
 - a. Tributaries (a)(3): Canoe Canal is a 2.23-acre, riverine tributary of the Willamette River, further classified as R2UBH (Riverine, Lower Perennial, Unconsolidated Bottom, Permanently Flooded) according to the USFWS Classification of Wetlands and Deepwater Habitats of the United States (Cowardin Classification System). The ordinary high-water mark (OHWM) boundary was determined based on physical characteristics including changes in bed and bank, presence of litter and debris along the shoreline, and the elevation at which terrestrial vegetation terminates. Refer to Section 5 above for flow path information. The northwest boundary of the Review Area is where Canoe Canal drains into Q Street Canal. Canoe Canal originates from Patterson Slough approximately 0.56-mile east of the Review Area. Flow was confirmed in the channel during the August 2, 2021 onsite delineation. The Corps' Antecedent Precipitation Tool (APT) assessed conditions for the site on August 2, 2021 as normal, and weather conditions during the visit on August 2, 2021 were similar in precipitation and temperature. This demonstrates that Canoe Canal carries flow more than in direct response to precipitation events. Canoe Canal meets the criteria described in 33 CFR 328.3(a)(3) and is a water of the U.S.
 - b. Adjacent Wetlands (a)(4):
Wetland 1 is a 0.386-acre, depressional wetland further classified as PUB3Hx (Palustrine Unconsolidated Bottom, Mud, Permanently Flooded, Excavated).

Refer to Section 5 above for flow path information. The primary sources of hydrology for Wetland 1 are flow from Wetland 2, direct precipitation and surface runoff. Surface water and visible inundation are present in Wetland 1. During the delineation on August 2, 2021 approximately three feet of ponded water existed at Sample Point 1. Soil color from 0-12 inches is 60-percent classified as 10 YR 3/2 and 40-percent classified as 10 YR 5/8. Soil color from 12-18 inches is classified as 10YR 3/2. Sandy Redox (S5), a hydric soil indicator, is present. Hydrophytic vegetation is present in Wetland 1. Vegetation is mowed to the edge of the wetland. Herbaceous vegetation along the perimeter of the wetland includes creeping spike rush (*Eleocharis palustris*), sedge (*Cyperus* spp.), bird's-foot trefoil (*Lotus corniculatus*), and meadow foxtail (*Alopecurus pratensis*). Woody shrubs appear to have been planted along the perimeter of the wetland feature, including sitka willow (*Salix sitchensis*), balsam poplar (*Populus balsamifera*), and Himalayan blackberry (*Rubus armeniacus*). Wetland 1 maintains a continuous surface connection to an (a)(3) water, the Canoe Canal, through a metal drainage pipe. Wetland 1 meets the criteria of 33 CFR 328.3(a)(4) and is a water of the U.S.

Wetland 2 is a 0.650-acre, depressional wetland further classified as PUB3Hx. Refer to Section 5 above for flow path information. No inlet to Wetland 2 was detected. The primary source of hydrology for Wetland 2 is direct precipitation and surface runoff. During the delineation on August 2, 2021 approximately three feet of ponded water existed at Sample Point 3. Surface water and visible inundation are present in Wetland 2. Hydric Soil is present in Wetland 2. Soil from 0-5 inches is classified as 10 YR 3/1. Soil from 5 to 18 inches is 60-percent classified as 10 YR 3/2 and 40-percent classified as 10 YR 5/8. Hydrophytic vegetation is present in Wetland 2. S5, a hydric soil indicator, is present in Wetland 2 soils. Vegetation is mowed to edge of the wetland. Herbaceous vegetation along the margins of Wetland 2 primarily includes smallfruit bulrush (*Scirpus microcarpus*), bird's-foot trefoil, orange jewelweed (*Impatiens capensis*). Woody shrubs along the margins include sitka willow, beaked hazelnut (*Corylus cornuta*), and Himalayan blackberry. Wetland 2 maintains a continuous surface connection to an (a)(3) water, the Canoe Canal, through a metal drainage pipe (directly) and through Wetland 1. Wetland 2 meets the criteria of 33 CFR 328.3(a)(4) and is a water of the U.S.

c. 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

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

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 Determination, Corps Portland District Regulatory Staff. Date: 25February 2024.
- b. U.S. Fish and Wildlife Service, National Wetlands Inventory, NWD Oregon Regulatory Viewer. Accessed November 18, 2023.
- c. MO Moshofsky Project Wetland Delineation Report dated June 1, 2023.
- d. U.S. Army Corps of Engineers Portland District list of Navigable Riverways within the State of Oregon accessed by Corps staff on September 15, 2023, from: https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable_US_Waters_Oregon_1993.pdf
- e. Local Wetland Inventory, Oregon Explorer Web Application Map Viewer. Accessed December 20, 2023.
- f. Historic Aerials Web Application. Accessed December 20, 2023.
- g. Google Earth Pro Aerial Imagery. Accessed November 24, 2023.
- h. United States Department of Agriculture Web Soil Survey Web Application. Accessed November 18, 2023.

10. OTHER SUPPORTING INFORMATION.

⁸ 88 FR 3004 (January 18, 2023)

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On 14 March 2024 the Corps submitted this AJD to EPA Region 10 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.



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Figure 1
Site Vicinity Map

Wetland Delineation Report
 City of Eugene

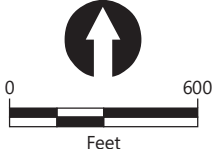


LEGEND:

-  Review Area
-  Parcel Boundary
-  Review Area Parcel Boundary

NOTES:

1. Basemap acquired from Esri ArcGIS Online.
2. Tax parcel data acquired from City of Eugene at: <https://services3.arcgis.com>

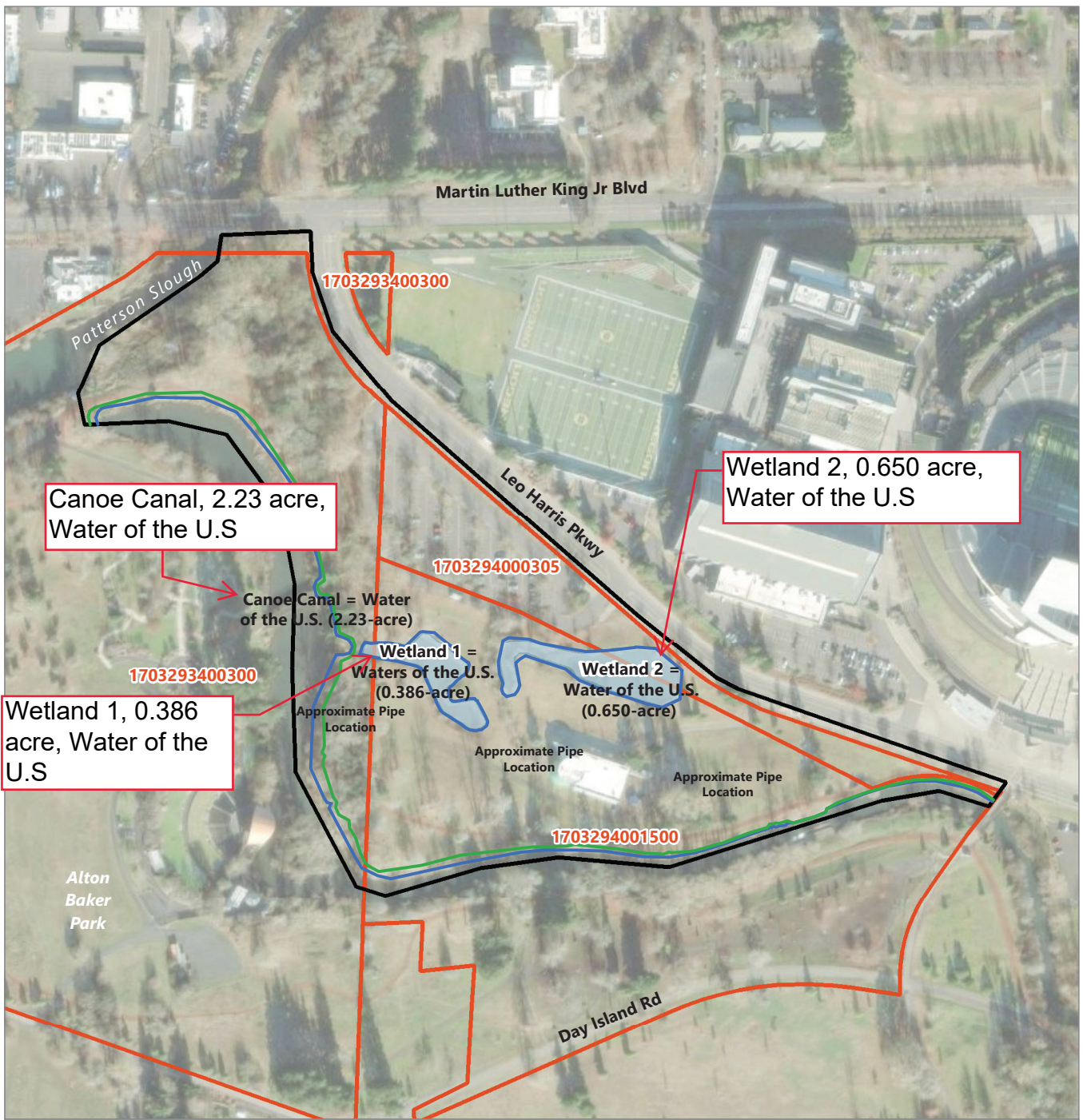


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Figure 2
Tax Parcel Map

Wetland Delineation Report
 City of Eugene



LEGEND:

- Review Area
- Review Area Parcel Boundary
- Delineated Wetland Ordinary High
- Water Mark Top of Bank

NOTES:

1. Basemap acquired from Esri ArcGIS Online.
2. Wetland boundary and data plot locations were surveyed by Anchor QEA using a Trimble Geo 7x handheld DGPS unit that provides approximately submeter accuracy following differential correction.

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Feet

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Figure 6
Wetland and Other Waters Delineation Overview Map

Wetland Delineation Report
 City of Eugene