



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

CENWP-ODG

24 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-2023-183.²

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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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.

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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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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 A, 0.011 acre, non-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 4.4 acres and is located at the northwest corner of NW Civic Drive and NW 13th Street, Gresham, Multnomah County, Oregon. Latitude/Longitude: 45.507405°, -122.441937°.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Wetland A within the Review Area is approximately 8.44 river miles from the Columbia River via the flowpath described in Section 5. The Columbia River has been determined to be a TNW by Portland District Corps of Engineers as described in the October 1993 District list of Navigable Riverways within the State of Oregon. Wetland A is approximately 3.7 aerial (straight) miles south of the nearest TNW (Columbia River).

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland A within the Review Area flows via municipal stormwater systems to Fairview Creek then on to the TNW. Wetland A slopes west to meet a grated municipal stormwater inlet within the Review Area. The lateral stormwater conveyance flows beyond the Review Area to the west for approximately 0.83-mile where multiple stormwater laterals drain into the city's storm sewer system detention facilities before it reaches the outfall that eventually connects to Fairview Creek on NW Birdsdale Avenue. Fairview Creek flows in a northerly direction for approximately 3.2 miles to Fairview Lake, which discharges flow west for approximately 2.95 miles to the Columbia Slough Natural Area. From the Columbia Slough Natural Area, waters flow north for approximately

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0.81-mile to the Columbia River at River Mile 118. The combined flowpath from Wetland A to a TNW is approximately 7.29 miles.

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
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):

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.

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

Wetland A is a non-tidal, 0.011-acre, mixed Palustrine Emergent and Palustrine Scrub-Shrub wetland with a Flats Hydrogeomorphic classification. Wetland A is located in the southwest corner of the Review Area in a slight depression from the surrounding landscape. Topography is gently hummocky and sloping west to meet a grated municipal stormwater inlet within the Review Area. The soils within Wetland A met the hydric soil indicator Redox Dark Surface (F6), and are mapped as Aloha silt loam. Sample plot (SP-1) was recorded within Wetland A to document the wetland condition. Vegetation was composed of 15% bare ground and 85% vegetative cover consisting of reed canary grass (*Phalaris arundinacea*) (facultative wet), smallfruited bulrush (*Juncus effusus*) (facultative wet) and creeping buttercup (*Ranunculus repens*) (facultative). The nearest mapped perennial stream is Fairview Creek, approximately 1.14 miles west from Wetland A. The primary source of hydrology for Wetland A is precipitation. Hydrology at SP-1 was met due to High Water Table (A2) and Saturation (A3). Wetland A drains into a grated inlet and flows laterally through the city’s underground storm sewer system in the flowpath described above in Section 5. Because this storm sewer system cannot serve as part of a continuous surface connection, the other aspects of the flowpath do not need to be evaluated to determine if they can serve as part of a continuous surface connection to a relatively permanent water, Fairview Creek. Based on the lack of a continuous surface connection to jurisdictional waters, the Corps has determined Wetland A is not a water of the U.S.

⁸ 88 FR 3004 (January 18, 2023)

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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 (Desktop) Determination. Preliminary Determination Date: 19 January 2024
 - b. U.S. Army Corps of Engineers Portland District list of Navigable Riverways within the State of Oregon. Accessed 19 January 2024
 - c. SWCA Environmental Consultants; Wetland Determination and Delineation Report No. 70594.01 (79431). Dated April 2023 (Field visit: 16 February 2023)
 - d. U.S. Geological Survey map(s). United States Geological Survey TopoView, last accessed. Cite scale & quad name: Oregon Vancouver 1951, 1968, and Camas Washington 1975; 24K
 - e. Aerial and site photographs provided in the wetland delineation noted above.
 - f. Oregon Department of Geology and Mineral Industries, LiDAR, Corps National Regulatory Viewer last accessed 16 January 2024
 - g. United States Department of Agriculture and National Resource Conservation Service, Hydric Soil Class Corps National Regulatory Viewer last accessed 16 January 2024
 - h. United States Fish and Wildlife Service. National Wetlands Inventory accessed on Corps National Regulatory Viewer, last accessed 16 January 2024
 - i. Oregon Department of State Lands' approved Local Wetlands Inventories. Corps National Regulatory Viewer, last accessed 16 January 2024
 - j. Oregon Department of Forestry and Oregon Department of Fish & Wildlife, Local Rivers and Streams, Corps National Regulatory Viewer last accessed 16 January 2024
 - k. City of Gresham Stormwater Utility EGIS last accessed 16 January 2024
Website: <https://portal.greshamoregon.gov/GreshamMap/>
10. OTHER SUPPORTING INFORMATION. "On 19 January 2024 we coordinated this JD with EPA Region 10. On 15 April 2024 the EPA concurred with our findings.

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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.

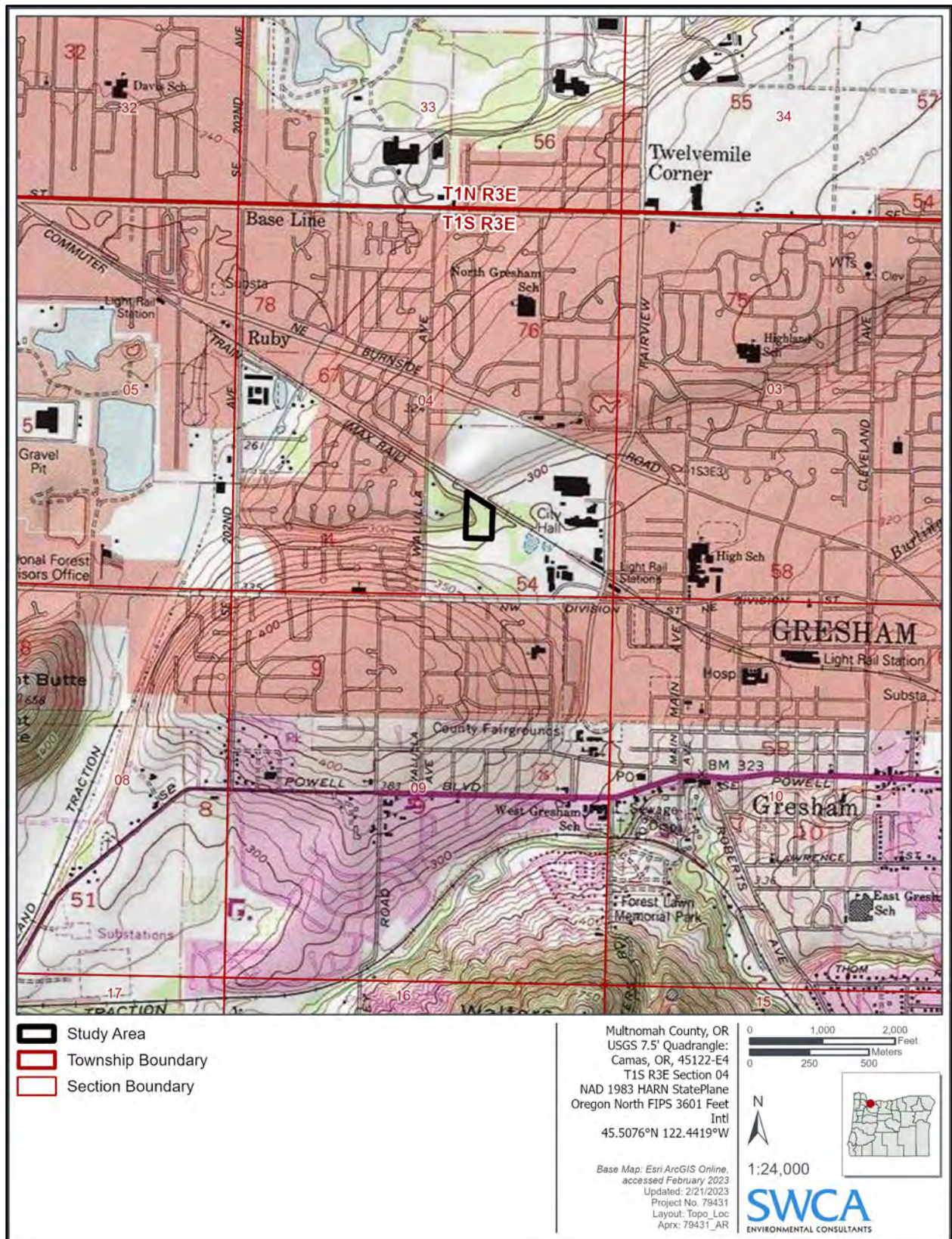


Figure 1. Site location map.



Figure 6. Delineation and photo point map with contours from LiDAR.