



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

CENWP-ODG

16 May 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-2023-375]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,

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.

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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, Section 404, 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)
- d. "Navigable Riverways within the State of Oregon", U.S. Army Corps of Engineers (October 1993)
- e. "Memorandum on NWP-2023-602", United States Environmental Protection Agency and Office of the Assistant Secretary of the Army (19 March 2024)

3. REVIEW AREA. The Review Area is 0.95-acre in size and is comprised of Tax Lots 11400, 11200, 10900, 11000 located north and west of the intersection of East 34th Avenue and Hilyard St in Eugene, Lane County, Oregon at Latitude/Longitude: 44.020620°, -123.082031°.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Based on the flow path from the Review Area, the nearest downstream TNW is the Willamette River approximately 37 river miles and 27 linear miles north of the review area at river mile (RM) 149 at Norwood Island near Monroe, Oregon. In linear miles, the closest portion of the Willamette River designated as a TNW is immediately downstream of RM 183 approximately 2.15 linear miles north of the Review Area. The Portland District Corps of Engineers recognizes the Willamette River as a TNW to RM 183.2 pursuant to the Portland District's 1993 Navigable Waters List within the State of Oregon.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland 1 flows into a storm drain catch basin located in the approximate center of Wetland 1. Water from Wetland 1 collects in this storm drain catch basin and enters a sediment basin where the water percolates through a filtration system and discharges into the soil and water table surrounding the basin.

If the sediment catch basin did not exist, water from Wetland 1 would likely flow north via overland sheet flow in a non-discrete manner approximately 0.04-mile northeast into a roadside ditch and storm drain line along the western side of Hilyard Street. This subsurface storm drain is part of the City of Eugene's municipal storm sewer system. Flow would then continue approximately 0.01-mile north in the municipal storm sewer system before emptying into Amazon Creek. Amazon Creek flows generally to the north for approximately 22 river miles before entering the Long Tom River. The Long Tom River flows generally to the north for approximately 15 miles before entering the Willamette River near River Mile 149, the nearest (a)(1) TNW.

The combined flow path from the Review Area to a TNW is approximately 37 river miles and 27 straight-line 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

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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“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).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 1: Wetland 1 is a 0.13-acre seasonally saturated/flooded palustrine emergent (PEME) wetland with a Flats hydrogeomorphic classification. Wetland 1 is located in the approximate center of the Review Area. Vegetation within Wetland 1 meets the dominance test and is dominated by meadow foxtail

⁸ 88 FR 3004 (January 18, 2023)

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(*Alopecurus pratensis*; FAC), colonial bentgrass (*Agrostis capillaris*; FAC), and tall fescue (*Schedonorus arundinaceus*; FAC) along with scattered meadow buttercup (*Ranunculus acris*; FAC) and a few patches of awl-fruited sedge (*Carex stipata*; OBL) and slender rush (*Juncus tenuis*; FAC). Hydrology is provided by precipitation, and surface runoff from adjacent streets and upgradient areas west of the Review Area. Wetland 1 met hydric soil indicators for Redox Dark Surface (F6).

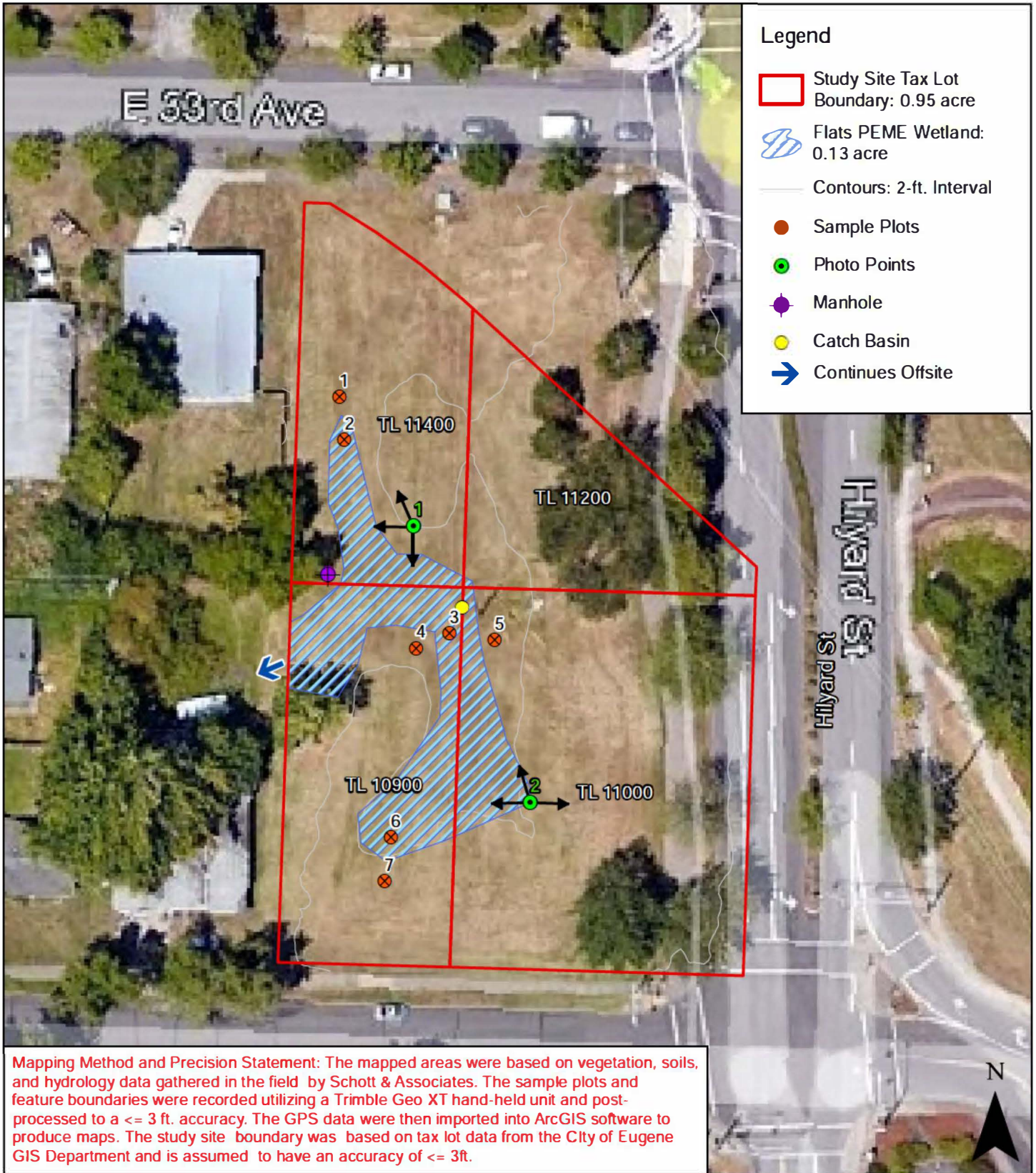
The Corps determined that Wetland 1 is not a water of the United States. No continuous surface connection exists between Wetland 1 and any jurisdictional water. 33 CFR § 328.3(a)(4)(ii) states that wetlands adjacent to waters identified in paragraph (a)(3) of 33 CFR § 328.3 with a continuous surface connection to an (a)(3) water are waters of the United States. According to 33 CFR § 328.3(c)(2), adjacent means having a continuous surface connection. The Corps determined that Wetland 1 lacks a continuous surface connection to any jurisdictional water. The Project Manager and the City of Eugene Public Works Department representatives went onsite to examine the catch basin in Wetland 1 and identified that no discrete conveyance exists between the catch basin and any other storm drainage lines or Amazon Creek. The Public Works Department stated that water in the catch basin only percolates through a sediment basin and discharges into the surrounding soil and water table. If any water in Wetland 1 did not enter the storm catch basin, water would flow from Wetland 1 via non-discrete overland sheet flow for 0.04-mile and enter the City of Eugene subsurface municipal storm sewer system. The Corps reviewed City of Eugene storm sewer drainage maps which show multiple inputs to the municipal storm sewer system along the western side of Hilyard Street and on either side of 33rd Avenue which lay along any flow path of water from Wetland 1 to the TNW. Conversations with City of Eugene Public Works Department confirmed the Corps' flow path analysis through the subsurface storm sewer system. Subsurface flow through the municipal storm sewer system from this site would not serve as a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water. In addition, any non-discrete sheet flow from Wetland 1 north to the sewer system would not serve as a continuous surface connection to the TNW. Therefore, Wetland 1 does not meet the criteria described in 33 CFR 328.3(a)(4) 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 evaluation completed 15 May 2024

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- b. Jurisdictional Wetland Delineation Report for Hilyard Street T18S, R3W, Section 8, Tax Lots 10900, 11000, 11200, 11400 Eugene, Lane County, Oregon prepared by Kim Cartwright, Schott & Associates, Inc. on behalf of Jackie Dowell City of Eugene Planning and Development Department dated June 2023.
 - c. Phone Call with City of Eugene Public Works Department 22 March 2024.
 - d. On 19 March 2024, EPA HQ and OASACW provided *Memorandum on NWP-2023-602* stating that subsurface flow through a city's storm sewer system does not qualify as a continuous surface connection to meet the definition of "adjacent" provided in 33 CFR 328.3(c)(2).
 - e. U.S. Army Corps of Engineers Oregon Regulatory Viewer map data accessed 2 February 2024; 12 March 2024; and 12 April 2024.
 - f. USGS 3D Elevation Program (3DEP) Bare Earth Digital Elevation Model (DEM) accessed 12 March 2024.
 - g. Google Earth Pro accessed 12 March 2024.
 - h. City of Eugene Public Utilities access 12 March 2024 from <https://mapping.eugene-or.gov/datasets/Eugene-PWE::eugene-storm-lines-hub/explore?location=44.020374%2C-123.081506%2C18.35>
10. OTHER SUPPORTING INFORMATION. On 25 April 2024, we coordinated this JD with EPA Region 10 and Corps HQs. On 9 May 2024 the EPA 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.



Date: 8/15/2023

Data Source: ESRI, 2023; City of Eugene GIS Dept, 2022; DOGAMI, 2009

Figure 6. Wetland Delineation Map

Hilyard Street Project Site: S&A # 3066

