



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT
4735 EAST MARGINAL WAY, SOUTH BLDG 1202
SEATTLE, WA 98134-2388

CENWS-Seattle District

May 7, 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 NWS-2023-122

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 IWSa is non-jurisdictional
 - ii. Wetland IWSb s 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 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is located south of South 188th street in the SeaTac area of King County, Washington Latitude / Longitude: 47.434546, - 122.310078. Exact Review Area is shown on the AJD Review Figures.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Puget Sound located approximately 2.05 miles to the west. The Puget Sound is a listed on the Navigable Waters of the United States in Washington State list dated December 31, 2008.⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Hydrology within the review area does not flow out and connect downstream to a TNW.

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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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): N/A
 - g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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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- 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).

The wetlands within the review area are located within a similar area and share a similar flow path. For purposes of determining whether a wetland is “adjacent,” artificial structures do not divide a wetland if a hydrologic connection is maintained between the divided portions of the wetland. Rather, the wetland is treated as one wetland. Wetland ISDWa and ISWb are separated by a road. The wetlands possess similar vegetation and based upon the hydric soil samples taken within the road prism during a site visit conducted February 28, 2024, the Corps is evaluating Wetland ISWa and ISWb as one wetland due to the wetlands maintaining a shallow subsurface hydrologic connection through the road. Wetland ISWa is 0.78 acre and Wetland ISWb is 0.54 acre, for a combined total of 1.32 acres. The wetlands with the review area do not abut a jurisdictional tributary or impoundment nor are they separated by a natural berm, bank, or dune. The wetlands do not outflow into discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. According to the SeaTac Storm water infrastructure layer there are no roadside ditches or stormwater intakes within the property. The nearest known tributary, Des Moines Creek, is approximately 0.24 miles southwest of the review area and separated from the project site by an undeveloped forested area and IWS Lagoon 3. Hydrology on the site stems from a high ground-water table, precipitation, and stormwater from the residential development to the north of the project site. Wetland IWSa and Wetland IWSb lie entirely within Natural Resources Conservation Service’s mapped Urban land complex soil series, which has no hydric rating by NRCS. The wetlands within the review area are not located within a floodplain. Wetlands ISWa and ISWb are both completely within the review area. Outside of the Review Area is Wetland 28, which lacks connection to Wetlands ISWa and ISWb and thus will be treated as two separate features. Wetland 28 is separated by a gravel road and large

⁸ 88 FR 3004 (January 18, 2023)

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gravel fill parking feature with no hydrologic connection. The separation is XX linear feet as measured by Google Earth. There is a stormwater inlet 0.2 miles away from the wetlands which is separated by a gravel road and parking area. The wetlands do not have a continuous surface water connection to an a(1) through a(3) water and are not waters 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. Final 2022 Wetland Redelineation Report: Planned Lagoon 3 Snow Storage Facility dated July 2022.
 - b. Updated Wetland ISWb Wetland Rating Summary dated 14 April 2023.
 - c. Seatac Stormwater Infrastructure PublicGIS accessed 28 March 2024.
 - d. Natural Resource Conservation Service Web Soil Survey accessed 10 April 2024.
 - e. United States Geological Survey Topoviewer 2023 topographic map accessed 28 March 2024.
 - f. City of SeaTac Wetlands and Streams Dataset accessed 28 March 2024.

10. OTHER SUPPORTING INFORMATION.

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.

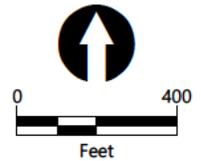


LEGEND:

-  Study Area
-  King County Tax Parcel

NOTE:

1. Aerial imagery: King County, 2021



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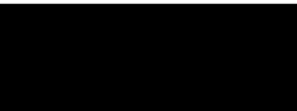


Figure 1
Project Vicinity/ Study Area

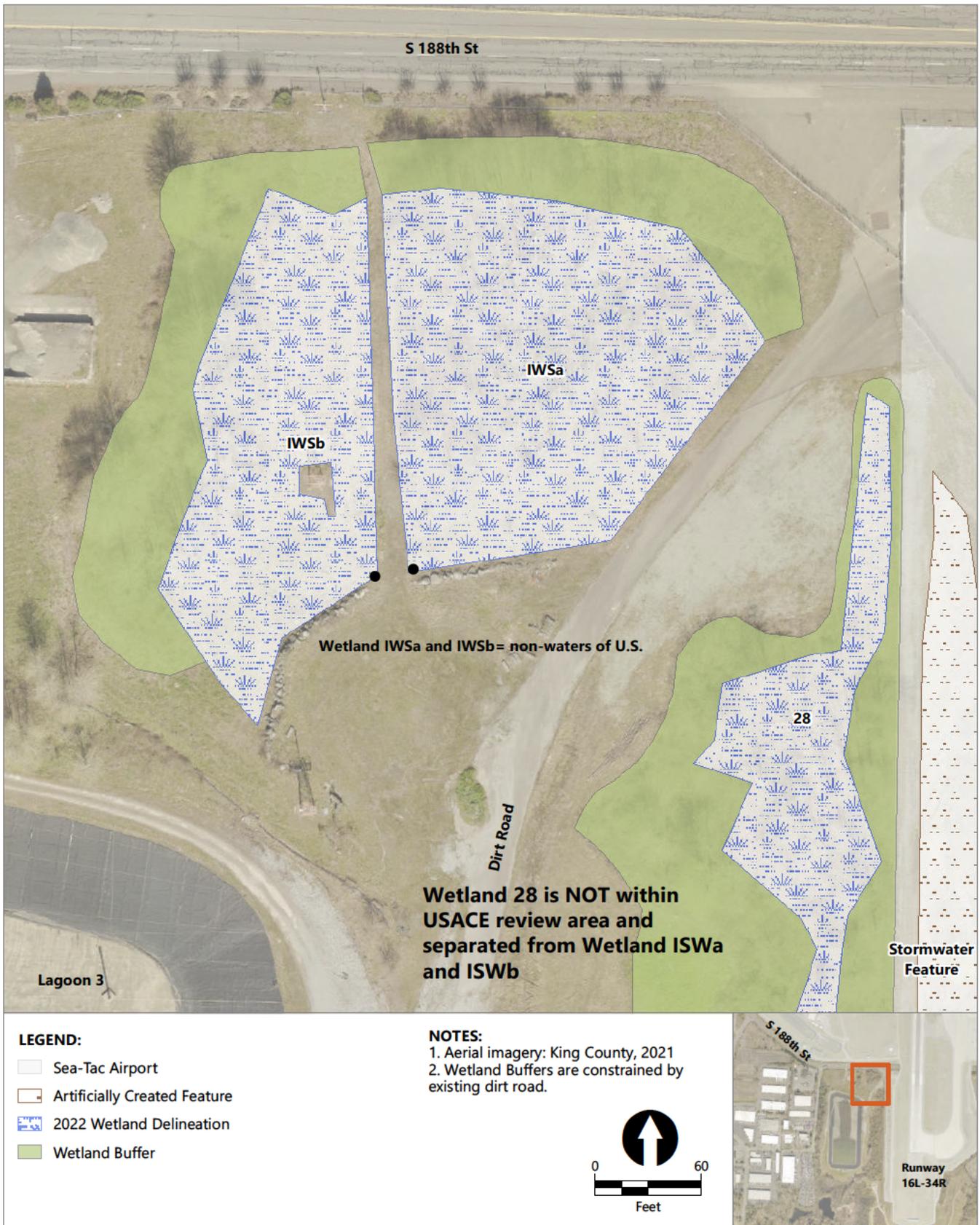


March 28, 2024

Wetlands

- | | | |
|--|---|--|
|  Estuarine and Marine Deepwater |  Freshwater Emergent Wetland |  Lake |
|  Estuarine and Marine Wetland |  Freshwater Forested/Shrub Wetland |  Other |
| |  Freshwater Pond |  Riverine |

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.



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Figure 2
2022 Wetland Delineation Results