



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

July 1, 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-2023-672.

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.

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2023-672

- 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, non-jurisdictional
 - ii. Wetland B, non-jurisdictional
 - iii. Wetland C, non-jurisdictional
 - iv. Wetland D, non-jurisdictional
 - v. Swale 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. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The 12.5-acre review area is located at Tacoma, Pierce County Washington Lat: 47.185894; Long: -122.419994. The review area consists of undeveloped areas and three single family residences with multiple outbuildings. Most of the undeveloped portions of the review area are characterized by heavily grazed pasture grasses. Sparse canopy cover of Douglas-fir and red alder is present in the northern and southern portions of the pasture. Forested areas with dense understory vegetation are present in the east and southwestern portions of the review area.. The review area is bounded by McKinley Avenue East to the west, residential property to the south, railroad to the east, and commercial development to the north.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Thea Foss Waterway, approximately 3.8 miles north and downstream, which is part of the Puget Sound. The Puget Sound is listed as a navigable waterway on the Navigable Waters of the United States in Washington State list dated December 31, 2008.

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2023-672

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland B drains west through Swale 1 to a catch basin that drains to adjacent stormwater infrastructure. This infrastructure extends north approximately 3.8 miles and outfalls to the Thea Foss Waterway.
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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.

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).⁷ 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: Wetland A is a 27,670 SF depressional palustrine emergent wetland. Portions of the wetland flood occasionally. The nearest known tributary, an unnamed ditch, is approximately 2,300 linear feet east of the wetland. The wetland is separated from the tributary by roads, commercial development and residential development. There is no evidence of a discrete conveyance outlet within Wetland A. The soils are mapped by the USDA Web Soil Survey as Urban land-Kapowsin complex, 0 to 5 percent slopes. Urban land-Kapowsin complex is not on the national hydric soils list, but does contain minor components that are on the hydric soils list. Wetland A does not abut, is not separated by a natural berm or bank, or connected via a discrete conveyance to an (a)(1), (a)(2) or (a)(3) water. Therefore, Wetland A does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

Wetland B: Wetland B is a 22,253 SF depressional palustrine forested wetland. Portions of the wetland flood seasonally. The nearest known tributary, an unnamed ditch, is approximately 2,200 linear feet east of the wetland. The wetland is separated from the tributary by roads, commercial development and residential development. Swale 1, which was determined to have non-RPW flow below, flows west from Wetland B to a catch basin. This catch basin drains to city stormwater infrastructure that extends north approximately 3.8 miles to the Thea Foss waterway. There are multiple inlets to this stormwater infrastructure

⁷ 88 FR 3004 (January 18, 2023)

between the review area and the outlet to the Thea Foss waterway. Subsurface flow through the city's storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection. The soils are mapped by the USDA Web Soil Survey as Urban land-Kapowsin complex, 0 to 5 percent slopes. Urban land-Kapowsin complex is not on the national hydric soils list, but does contain minor components that are on the hydric soils list. Wetland B does not abut, is not separated by a natural berm or bank, or connected via a discrete conveyance to an (a)(1), (a)(2) or (a)(3) water. Therefore, Wetland B does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

Wetland C: Wetland C is a 3,111 SF depressional palustrine emergent wetland. Portions of the wetland flood seasonally. The nearest known tributary, an unnamed ditch, is approximately 2,500 linear feet east of the wetland. The wetland is separated from the tributary by roads, commercial development and residential development. There is no evidence of a discrete conveyance outlet within Wetland C. The soils are mapped by the USDA Web Soil Survey as Urban land-Kapowsin complex, 0 to 5 percent slopes. Urban land-Kapowsin complex is not on the national hydric soils list, but does contain minor components that are on the hydric soils list. Wetland C does not abut, is not separated by a natural berm or bank, or connected via a discrete conveyance to an (a)(1), (a)(2) or (a)(3) water. Therefore, Wetland C does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

Wetland D: Wetland D is a 1,016 SF slope palustrine emergent wetland. Portions of the wetland flood occasionally. The nearest known tributary, an unnamed ditch, is approximately 2,700 linear feet east of the wetland. The wetland is separated from the tributary by roads, commercial development and residential development. There is no evidence of a discrete conveyance outlet within Wetland A. The soils are mapped by the USDA Web Soil Survey as Urban land-Kapowsin complex, 0 to 5 percent slopes. Urban land-Kapowsin complex is not on the national hydric soils list, but does contain minor components that are on the hydric soils list. Wetland D does not abut, is not separated by a natural berm or bank, or connected via a discrete conveyance to an (a)(1), (a)(2) or (a)(3) water. Therefore, Wetland D does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

Swale 1: Swale 1 flows northwest 175 feet from Wetland B to a catch basin. This catch basin drains to stormwater infrastructure that extends north approximately 3.8 miles to the Thea Foss waterway. Swale 1 does not have a defined bed and bank and no ordinary high water mark indicators have been observed. Swale 1 is fully vegetated with mixed grasses and other herbaceous species. Swale 1 is

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2023-672

approximately 1 foot wide. The Corps observed shallow water flowing in Swale 1 during a site visit on 11 December 2023; however, according to the antecedent precipitation tool, there were wetter than normal conditions at this site on this day. Additionally, according to the weather station at the Port of Tacoma, there was 5.7 inches of rain during the 10 days preceding the Corps' site visit. Flowing water within Swale 1 was not reported by Wetland Resources, Inc during other site visits. Swale 1 is not mapped by NHD or USGS. No standing or flowing water is visible in Swale 1 in any Google Earth or Pierce County aerial imagery. Based on the above information, Swale 1 only experiences flowing or standing water in direct response to precipitation. The Corps has determined that Swale 1 indirectly connects downstream to a TNW, but does not meet the relatively permanent standard.

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. USGS TopoView accessed on 6/5/24 at <https://ngmndb.usgs.gov/topoview/viewer/#4/40.01/-100.06>
 - b. National Wetland Inventory accessed on 6/5/24 at <https://www.fws.gov/program/national-wetlands-inventory/wetlandsmapper>
 - c. USDA Web Soil Survey accessed on 6/5/24 at <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>
 - d. Wetland Resources, Inc. (June, 2024). Revised Delienation Report for the Sager Family Homes – East McKinley Ave.
 - e. Tacoma Surfacewater Network accessed on 6/5/24 at <https://hub.arcgis.com/maps/tacoma::surfacewater-network-tacoma/explore?location=47.239972%2C-122.455000%2C13.14>
 - f. USGS National Hydrography Dataset accessed on 6/5/24 at https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus_HR/MapServer

10. OTHER SUPPORTING INFORMATION. N/A

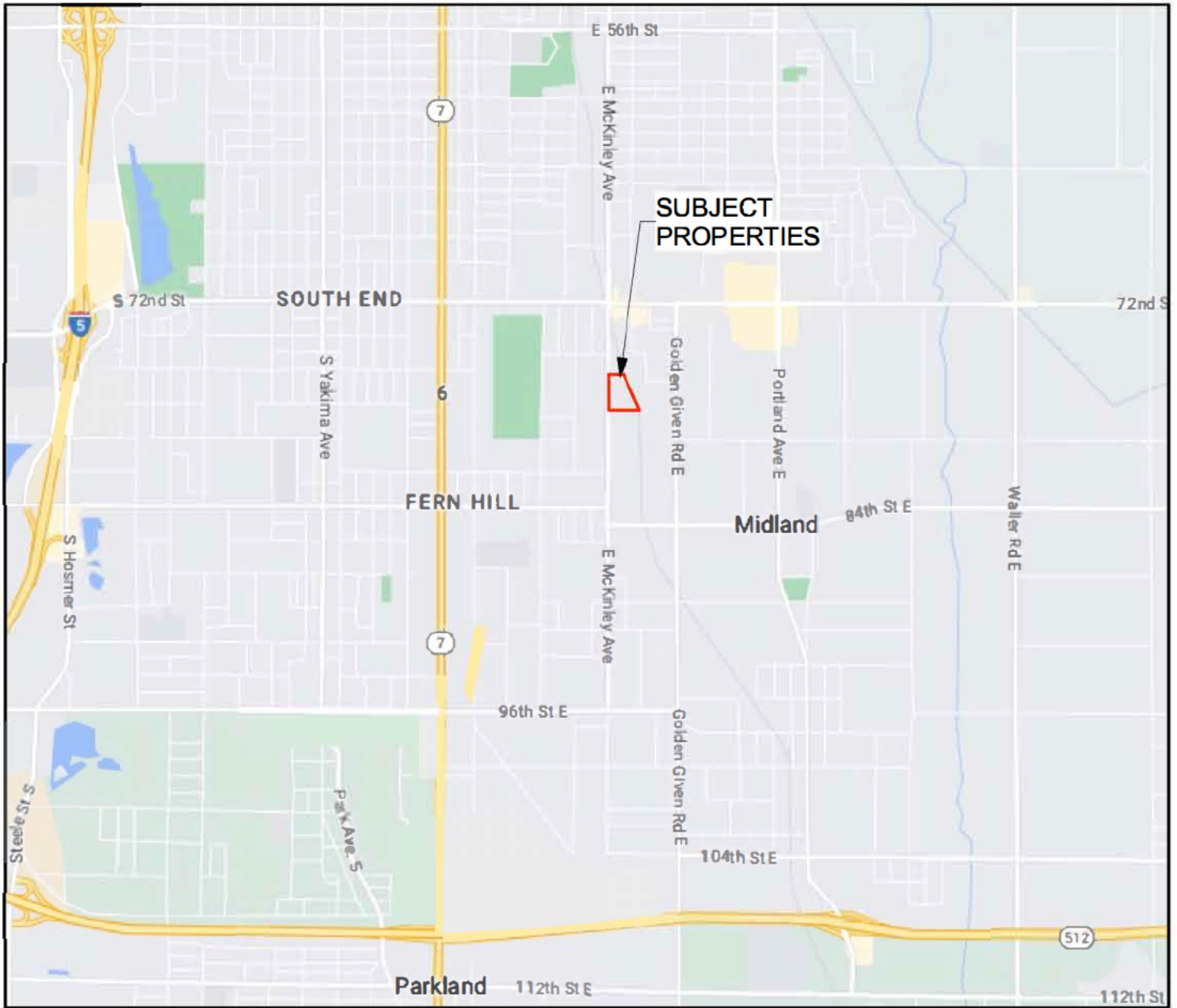
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement

CENWS

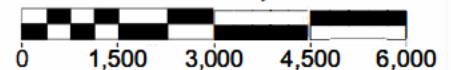
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2023-672

additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

**FIGURE 1: REGIONAL VICINITY MAP
SAGER FAMILY HOMES - E MCKINLEY AVE
PORTION OF SECTION 27, TOWNSHIP 20N, RANGE 3E, W.M.**



Scale 1" = 3,000'



Corps Reference NWS-2023-672

Applicant: [REDACTED]

Date: May 28, 2024

Address: 7803 & 7809 E McKinley Ave
Tacoma, WA 98404

Parcel #s: 0320273050 & 0320273105

Lat/Long: 47.186000°N, -122.419891°W

WRIA: 10 - Puyallup-White

City:



County: Pierce

State: Washington

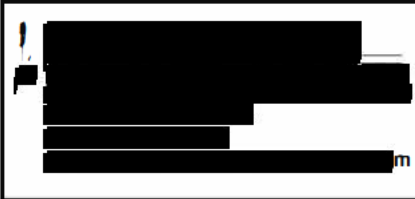
CRITICAL AREAS MAP
SAGER FAMILY HOMES - E MCKINLEY AVE
PORTION OF SECTION 7, TOWNSHIP 20N, RANGE 3E, W.M.




LEGEND

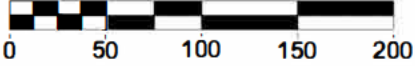
	REVISED WETLAND BOUNDARIES
	FIRST SUBMITTAL WETLAND BOUNDARIES

Corps Reference NWS-2023-672
Applicant: Sager Family Homes





Scale 1" = 100'



0 50 100 150 200

Critical Areas Map
Sager Family Homes - E McKinley Ave
Unincorporated Pierce County

