



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

23 September 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) ,<sup>1</sup> NWS-2024-176.

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.<sup>2</sup> 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.<sup>3</sup>

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

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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. Swale 1, non-jurisdictional
  - ii. Wetland A/B, non-jurisdictional
  - iii. Wetland C, jurisdictional, Section 404
  - iv. Wetland H, non-jurisdictional
  - v. Wetland I, non-jurisdictional
  - vi. Wetland J, non-jurisdictional
  - vii. Wetland K, 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 1.3-acre review area is located at Bellingham, Whatcom County, Washington Lat: 48.790337; Long: -122.516860. The review area consists of undeveloped grassy and forested areas. Two single family residences were previously located in the southern portion of the site, but were demolished between 2014 and 2020. The review area is bounded by Pacific Highway to the south, a Costco parking lot to the east, an auto repair shop and parking lot to the west, and a gravelled, undeveloped lot to the north.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Nooksack River, approximately 9 miles downstream. The Nooksack River is listed as a navigable waterway on the Navigable Waters of the United States in Washington State list dated December 31, 2008.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Ditch 1 is located outside of, but along the southern border of the AJD review area. Ditch 1 provides a hydrologic flow path from aquatic resources in the review area. The flow path and relative permanence for surface water in Ditch 1 outside of the review is described as follows:

Ditch 1 flows approximately 0.3 miles northwest along the north side of Pacific Highway. Whatcom County aerial imagery and 2013 LiDAR from the Department of Natural Resources indicate that Ditch 1 outlets into palustrine forested wetland that extends approximately 0.2 miles northwest to Bear Creek. Bear Creek flows approximately 3.5 miles north to Silver Creek. Silver Creek flows approximately 5 miles west to the Nooksack River which then flows approximately 2 miles south to Bellingham Bay.

During Corps site visits on February 26, 2024 and March 26, 2024, standing water was observed in Ditch 1. According to the antecedent precipitation tool, there were wetter than normal conditions during both site visits. Ditch 1 is approximately 5-ft wide and 1-ft deep and is vegetated with reed canary grass (*Phalaris arundinacea* – FACW), slough sedge (*Carex obnupta* – OBL), and soft rush (*Juncus effusus* – FACW). Observed ordinary high water mark (OHWM) indicators included a topographic break and staining along the banks. Surface water is visible in Ditch 1 in aerial imagery from Whatcom County (2019 and 2022) and Google Earth (April 2024). Ditch 1 is not mapped by NHD or USGS, but Bear Creek is mapped northwest of the review area. Ditch 1 experiences flowing or standing water continuously during certain times of the year that is more than only a short duration in direct response to precipitation. Ditch 1 sustains flows through a combination of runoff and an elevated groundwater table. The Corps has determined that Ditch 1 meets the relatively permanent standard and indirectly connects downstream to a TNW.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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

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<sup>5</sup> 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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>6</sup> 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):
    - a. Wetland C: Wetland C is a 1,720 square foot palustrine emergent and scrub/shrub depressional wetland located in the southwest corner of the review area. As documented in the 2024 revised delineation report, Wetland C directly abuts and therefore has a continuous surface water connection to Ditch 1. Wetland C is adjacent to Ditch 1, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland C meets the definition of an (a)(4) adjacent wetland and is a water of the United States.
  - g. Additional Waters (a)(5): N/A

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<sup>6</sup> 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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## 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).<sup>7</sup>
  - a. Swale 1: Swale 1 is an approximately 80-foot long upland swale that conveys water from Wetland A/B to Wetland D. During Corps site visits on February 26, 2024 and March 26, 2024, water was not observed in Swale 1. According to the antecedent precipitation tool, there were wetter than normal conditions during both site visits. Mixed grasses and Himalayan Blackberry grow densely within and above the swale. No OHWM indicators were observed in Swale 1. The Corps has determined that Swale 1 does not meet the relatively permanent standard; and is an excluded feature per 33 CFR 328.3(b)(8).
- 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).
  - a. Wetland A/B: Wetland A/B is an 81,821 square foot palustrine emergent and scrub/shrub slope and depressionnal wetland located in the northeastern portion of the review area. Wetland A/B outlets to Wetland D through Swale 1. During a Corps site visit on June 13 2024, no channelized outlet was observed from Wetland D. The soil within and around Wetland A/B is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland A/B is not abutting, 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/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.

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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- b. Wetland H: Wetland H is a 1,186 square foot palustrine scrub/shrub depressional wetland located in the southwest portion of the review area. Wetland H is located approximately 330 feet north of Ditch 1. During Corps site visits on February 26, 2024 and March 26, 2024, no channelized outlet from Wetland H to Ditch 1 or other wetlands within the review area was observed. The soil within and around Wetland H is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland H is not abutting, 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 H 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.
- c. Wetland I: Wetland I is a 3,096 square foot palustrine emergent depressional wetland located in the south central portion of the review area. Wetland I is located approximately 210 feet north of Ditch 1. During Corps site visits on February 26, 2024 and March 26, 2024, no channelized outlet from Wetland I to Ditch 1 or other wetlands within the review area was observed. The soil within and around Wetland I is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland I is not abutting, 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 K 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.
- d. Wetland J: Wetland J is a 406 square foot palustrine emergent depressional wetland in the southeastern portion of the review area. Wetland J is located approximately 160 feet northeast of Ditch 1. During Corps site visits on February 26, 2024 and March 26, 2024, no channelized outlet from Wetland J to Ditch 1 or other wetlands within the review area was observed. The soil within and around Wetland J is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland J is not abutting, 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 J does not have a continuous surface

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connection to an (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

- e. Wetland K: Wetland K is a 1,093 square foot palustrine emergent depressional wetland located in the south central portion of the review area. Wetland K is located approximately 140 feet north of Ditch 1. During Corps site visits on February 26, 2024 and March 26, 2024, no channelized outlet from Wetland K to Ditch 1 or other wetlands within the review area was observed. The soil within and around Wetland K is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland K is not abutting, 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 K 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.

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. Site visits conducted on February 26, March 26, and June 13 2024
- b. "Revised Critical Areas Report: Wetlands & Habitat Conservation Areas for 4054 and 4072 Pacific Highway" by Miller Environmental dated August 20, 2024.
- c. USGS TopoView accessed on 9/10/24 at <https://ngmdb.usgs.gov/topoview/viewer/#15/48.7969/-122.5169>
- d. National Wetland Inventory accessed on 9/10/24 at <https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper>
- e. Washington DNR LiDAR Portal accessed on 9/10/24 at <https://lidarportal.dnr.wa.gov/>
- f. USGS National Hydrography Dataset accessed on 9/10/24 at [https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus\\_HR/MapServer](https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus_HR/MapServer)
- g. USDA Web Soils Survey accessed on 9/10/24 at <https://websoilsurvey.nrcs.usda.gov/app>

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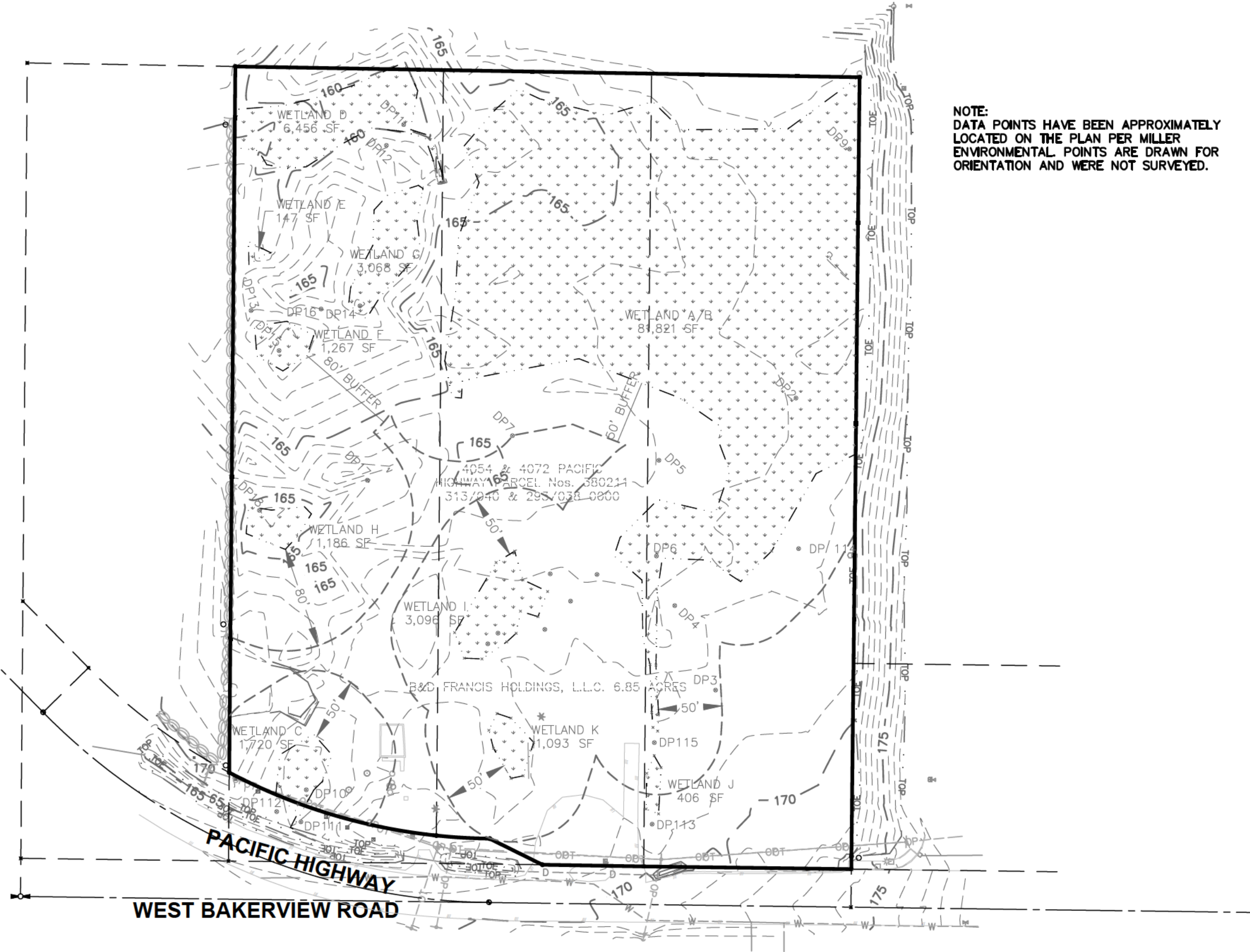
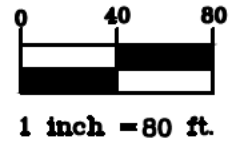
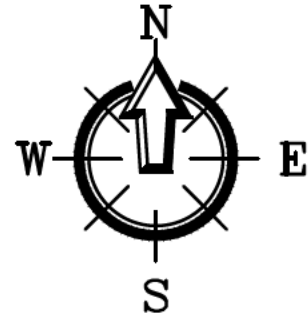
- h. Bellingham City IQ Online Map accessed on 9/10/24 at <https://cob.org/services/maps/online-mapping>

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







NOTE:  
DATA POINTS HAVE BEEN APPROXIMATELY  
LOCATED ON THE PLAN PER MILLER  
ENVIRONMENTAL. POINTS ARE DRAWN FOR  
ORIENTATION AND WERE NOT SURVEYED.

SHEET CONTENTS

**EXISTING CONDITIONS**

DATE	AUGUST 2024
JOB #	23200
DRAWING #	23200WT1.DWG
SHEET NAME	W1

