



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

6 November 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-2024-441

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. Swale 1, non-jurisdictional
 - ii. Wetland D18A, non-jurisdictional
 - iii. Wetland D18B, non-jurisdictional
 - iv. Wetland D18C, non-jurisdictional
 - v. Wetland D18D, 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 acre review area is located at Bellingham, Whatcom County, Washington (Lat: 48.7852: Long: -122.5284). The review area consists of undeveloped grassy and forested areas that slope gradually to the southeast. The review area is bounded by Sound Way to the west, Airport Drive to the east, and commercial development to the north. A ditch, Ditch 1, flows southwest outside of, but adjacent to the southwestern review area boundary.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Bellingham Bay, approximately one miles southwest and downstream. Bellingham Bay is a part of the Puget Sound which is listed as a navigable waterway on the Navigable Waters of the United States in Washington State list dated December 31, 2008.⁵

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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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no flowpath from the subject aquatic resources to a TNW, the territorial seas, or interstate waters. The nearest known tributary is Ditch 1, approximately 10 feet southeast of the review area. Ditch 1 flows southwest approximately 0.25 miles along Airport Drive and flows into the Alderwood stormwater pond. The Alderwood stormwater pond outlets to Alderwood Creek. Alderwood Creek flows approximately 0.75 miles to Bellingham Bay.
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.

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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- 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).

Swale 1: Swale 1 is an approximately 107 foot long upland swale that conveys water from Wetland D18A to Wetland D18B. No water was observed in the swale during a Corps site visit on 24 June 2024 or during site visits conducted by the project agent (Jacobs) in May 2023 and on 17 July and 24 September 2024. No ordinary high water mark indicators were observed in Swale 1. Swale 1 does not have a defined bed and bank. The entire swale is vegetated with emergent vegetation including, but not limited to, tansy (*Tanacetum vulgare* - FACU), oxeye daisy (*Leucanthemum vulgare* - FACU), creeping buttercup (*Ranunculus repens* - FAC), velvet grass (*Holcus lanatus* - FAC), and other mixed grasses. Although surface water is visible in Swale 1 in Whatcom County aerial imagery from 2022 (the exact date of this imagery is not known), no other aerial images from Google Earth or Whatcom County show surface water in the swale. Swale 1 flows into Wetland D18B which does not have an outlet. The Corps has determined that Swale 1 does not meet the relatively permanent standard and does not connect downstream to an (a)(1) or (2) water and is therefore not a water of the US.

⁸ 88 FR 3004 (January 18, 2023)

Wetland D18A: Wetland D18A is a 0.33 acre palustrine emergent depressional wetland in the northwestern portion of the review area. Wetland D18A outlets to Wetland D18B through Swale 1. Wetland D18B does not have an outlet. The soil within and around Wetland D18A is mapped by the USDA Web Soil Survey as Urban land-Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained and Bellingham undrained). Wetland D18A is located approximately 150 feet northwest of Ditch 1. Wetland D18A is not located within a floodplain. Wetland D18A 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 D18A 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 D18B: Wetland D18B is a 0.01 acre palustrine scrub shrub depressional wetland. In the eastern portion of the review area. Wetland D18B does not have an outlet. The soil within and around Wetland D18B is mapped by the USDA Web Soil Survey as Urban land-Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained and Bellingham undrained). Wetland D18B is located approximately 50 feet northwest of Ditch 1. Wetland D18B is not located within a floodplain. Wetland D18B 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 D18B 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 D18C: Wetland D18B is a 0.0006 acre palustrine scrub shrub depressional wetland. In the southeastern portion of the review area. Wetland D18C does not have an outlet. The soil within and around Wetland D18C is mapped by the USDA Web Soil Survey as Urban land-Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained and Bellingham undrained). Wetland D18C is located approximately 20 feet northwest of Ditch 1. Wetland D18C is not located within a floodplain. Wetland D18C 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 D18C 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 D18D: Wetland D18D is a 0.01 acre palustrine scrub shrub depressional wetland. In the southeastern portion of the review area. Wetland D18D does not have an outlet. The soil within and around Wetland D18D is mapped by the USDA Web Soil Survey as Urban land-Whatcom-Labounty silt loams which are

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not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained and Bellingham undrained). Wetland D18D is located approximately 20 feet northwest of Ditch 1. Wetland D18D is not located within a floodplain. Wetland D18D 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 D18D 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 visit on 24 June 2024
 - b. "2023 Wetland Delineation at Bellingham International Airport Development Area D18" dated 18 March 2024 by Jacobs
 - c. "Addendum: 2024 Supplemental Wetland Delineation at Bellingham International Airport Development Area D18" dated 23 October 2024 by Jacobs
 - d. USGS TopoView accessed on 10/28/24 at <https://ngmdb.usgs.gov/topoview/viewer/>
 - e. National Wetland Inventory accessed on 10/28/24 at <https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper>
 - f. Washington DNR LiDAR Portal accessed on 10/28/24 at <https://lidarportal.dnr.wa.gov/>
 - g. USGS National Hydrography Dataset accessed on 10/28/24 at https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus_HR/MapServer
 - h. USDA Web Soils Survey accessed on 10/28/24 at <https://websoilsurvey.nrcs.usda.gov/app>
 - i. Bellingham City IQ Online Map accessed on 10/28/24 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

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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
Development Area D18

- Development Area
- Parcel
- Ditch

Wetlands

- Jacobs Delineated Boundary
- Verified Delineated Boundary
- DEA Delineated Wetlands (1998)

- Wetland Buffer

All wetland buffers have a 50-foot width from the wetland boundary.

