



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

November 6, 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-2024-595

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 A, 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 4.4 acre review area is located at Bellingham, Whatcom County Washington (Lat: 48.787 Long: -122.463). The review area consists of undeveloped areas and a single family residence, associated outbuildings, and driveway. A small gravel parking lot is also located within the southwestern corner of the review area. Most of the undeveloped portions of the review area are characterized by mowed grasses. Western red cedar (*Thuja plicata*), red alder (*Alnus rubra*), and black cottonwood (*Populus balsamifera*) with an understory of Himalayan blackberry (*Rubus armeniacus*), snowberry (*Symphoricarpos albus*), mixed grasses and creeping buttercup (*Ranunculus repens*) are located along the northern and eastern review area boundaries. The review area slopes down from northeast to southwest. The review area is bounded by an apartment complex to the south, James Street to the west, undeveloped forest to the north, and a single family residence to the east. A ditch flows south along the western review area boundary; this ditch is located outside of the review area. No previous jurisdictional determinations have been completed for this site.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Bellingham Bay, approximately 3.4 miles west and downstream, which is part of the Puget Sound. The Puget Sound is listed as a navigable

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waterway 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. During extreme precipitation events, surface water may sheet-flow across uplands out of Wetland A to a catch basin and drain tile that appear to outlet west to the ditch along the eastern edge of James Street. This ditch flows south approximately 285 feet and into a stormwater pipe that flows west approximately 45 feet under James Street then south approximately 500 feet, and outlets to Baker Creek. Baker Creek flows approximately 1.8 miles southwest into Squalicum Creek. Squalicum Creek flows approximately 1.4 miles southwest into 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.

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.

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.

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 A: Wetland A is a 10,570 square foot palustrine emergent slope wetland. Wetland A is seasonally saturated. The nearest known tributaries are Baker Creek, located approximately 460 feet southeast of the wetland, and a ditch along the east side of James Street, located approximately 280 feet west of the wetland. Wetland A is separated from Baker Creek by forested slopes and residential development. Wetland A is separated from the roadside ditch by a single family residence. There is no evidence of a discrete conveyance outlet from Wetland A. Wetland A is not located within a floodplain. Soils within Wetland

⁸ 88 FR 3004 (January 18, 2023)

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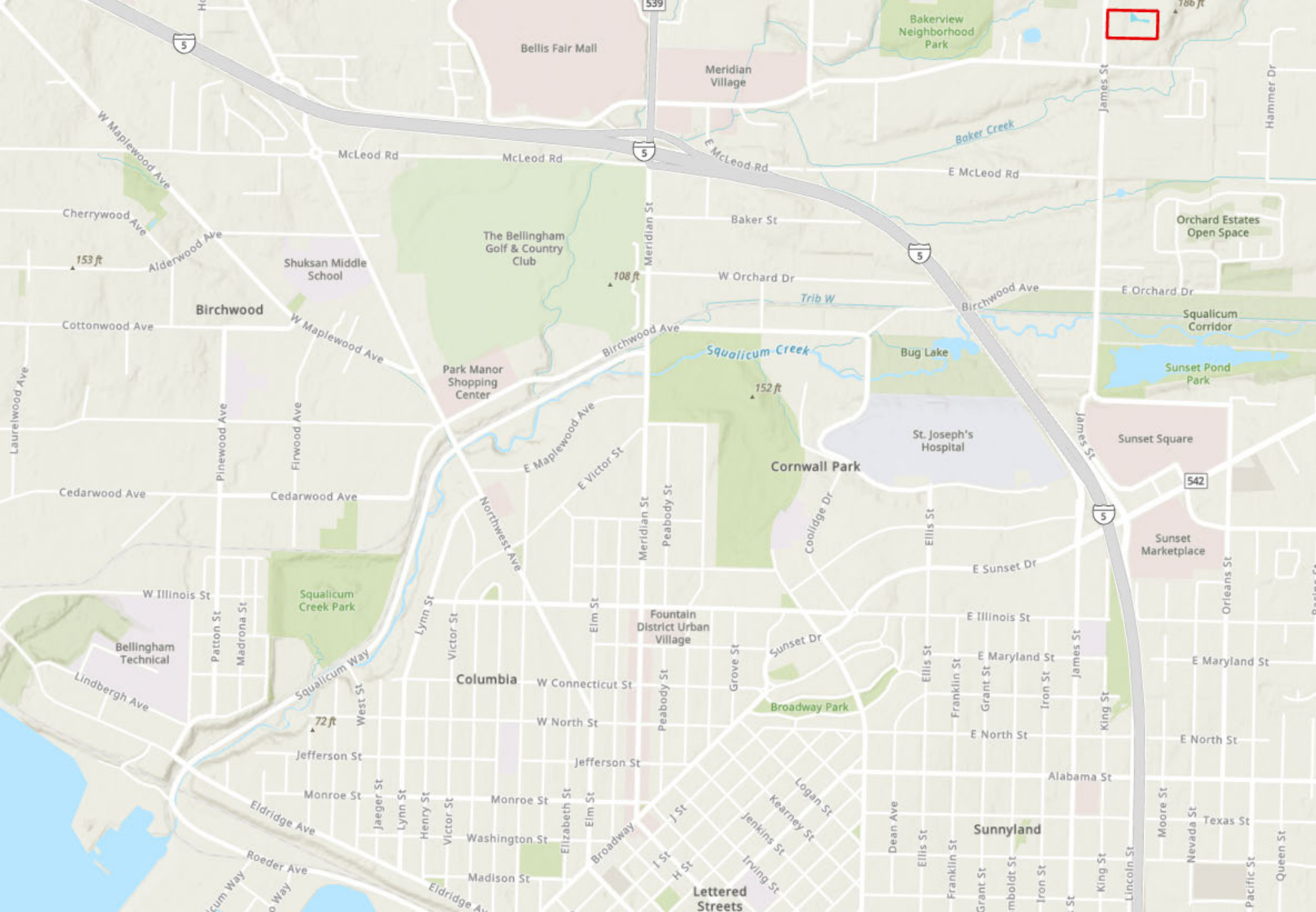
A are mapped by the USDA Web Soil Survey as Whatcom silt loam and Nati Loam. Both soils are not on the national hydric soils list, but do contain minor components that are on the hydric soils list. Wetland A does not abut, is not separated by a natural berm or bank, or connected via a discrete conveyance 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

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. *Wetland and Fish and Wildlife Habitat Assessment Filippini – South Parcel* dated July 1, 2024 by Soundview Consultants LLC.
- b. *Technical Memorandum* dated July 11, 2024 by Soundview Consultants LLC.
- c. Bellingham CityIQ accessed on 10/17/24 at <https://maps.cob.org/geviewer/Html5Viewer/Index.html?viewer=cityiq>
- d. National Hydrography Dataset accessed on 10/17/24 at https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus_HR/MapServer
- e. Site visit on 10/17/24

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.



AJD REVIEW AREA EXHIBIT



4040 & 4048 JAMES ST
BELLINGHAM, WA 98226

WHATCOM COUNTY PARCEL NUMBERS:
3803170414820000 & 3803170325290000

DATE: 7/10/2024

JOB: 2365.0001

BY: DLS

SCALE: 1" = 90'

FIGURE NO: 2.