

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

16 June 2025

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-2019-742²

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.³ 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.⁴

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),⁵ the 2023 Rule as amended,

¹While 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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

- 1. SUMMARY OF CONCLUSIONS.
 - 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. Ditch A, jurisdictional, Section 404
 - ii. Ditch C, jurisdictional, Section 404
 - iii. Wetland A, jurisdictional, Section 404
- 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. 651, 143 S. Ct. 1322 (2023)
 - d. "Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of 'Continuous Surface Connection' Under The Definition Of "Waters Of The United States" Under The Clean Water Act" (March 12, 2025)
- 3. REVIEW AREA. The 1.3 acre review area is located at 210 East Horton Road, Bellingham, Washington (48.808096, -122.480450). A single family residence, paved and gravel driveways and multiple small outbuilding are located within the review area. Undeveloped portions of the review area are characterized primarily by herbaceous vegetation although a mixed deciduous and evergreen forested is located in the southeastern corner of the review area. The review area is bounded by East Horton Road to the south, undeveloped forested wetland to the west, undeveloped emergent wetland to the north, and forested wetland to the east. No previous AJDs have been completed at the site.

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- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Bellingham Bay, approximate 3.6 miles southwest and 4.3 miles downstream of the review area. 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, 2008.⁶
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Ditch A flows northwest and southwest approximately 185 feet into Ditch C. Ditch C flows approximately 195 feet south, approximately 40 feet west and then south into a culvert under East Horton Road. Ditch C then flows approximately 265 feet east and drains into a 250-foot-long culvert. Ditch C flows out of the culvert and approximately 133 feet east into Spring Creek. Spring Creek flows approximately 2 miles south to Baker Creek. Baker Creek flows approximately 0.7 miles southwest to Squalicum Creek. Squalicum Creek flows approximately 1.3 miles southwest to Bellingham Bay.
- 6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ 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.

⁷ 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.

⁸ 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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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):

Ditch A: Ditch A flows approximately 185 feet through the northwestern portion of the review area. Ditch A flows northwest from near the southwest corner of a shed structure and then southwest where it joins with Ditch B (located outside of the review area) and flows into Ditch C. Ditch A is a first order tributary according to the Strahler method (see Sheet 2 of Enclosure 1).

Water is visible in Ditch A in Whatcom County aerial imagery from 2016, 2019 and 2022 (the dates of these aerials are not known). Water is visible in Google Earth aerial imagery on 30 April 2025 and 30 April 2024. According to the Antecedent Precipitation Tool (APT), there were normal precipitation conditions at the site on those dates; however, the drought index in the area was mild on 30 April 2025 and moderate on 30 April 2205. According to data collected at Bellingham International Airport, there was 0.31 inches of precipitation in the area in the two days prior to 30 April 2025. According to data collected at Bellingham International Airport, there was 1.39 inches of precipitation in the area in the ten days prior to 30 April 2024 occurring from 24 April through 28 April 2025.

Ditch A is characterized by a well-defined channel with distinct bed and banks. Ditch A is vegetated with reed canary grass (*Phalaris arundinacea* – FACW), American brook lime (*Veronica americana* – OBL), Awlfruit sedge (*Carex stipata* – OBL), creeping buttercup (*Ranunculus repens* – FAC) and lady's thumb (*Persicaria maculosa* – FACW). Drift deposits, bent vegetation, and water staining were observed within Ditch A during a Corps site visit on 9 June 2025. During the site visit on 9 June 2025, no surface water was observed in Ditch A. According to the Antecedent Precipitation Tool (APT), there were drier than normal precipitation conditions at the site on this date during the dry season. There was no rain in the nine days prior to the site visit, but there was 0.32 inches of rain on 31 May 2025. During a site visit on 8 February 2024, surface water was observed in Ditch A. According to the Antecedent Precipitation Tool (APT), there were normal precipitation conditions at the site on this date. According to data collected at Bellingham International Airport, there was 0.38 inches of precipitation in the area in the ten days prior to 8 February 2024 occurring on 1 January 2024 though 8 February 2024. There was 0.06 in of rain on the day of the site visit.

Ditch A is intermittent according to the Streamflow Duration Assessment Method for the Pacific Northwest. Based on the above information, Ditch A is characterized by flowing or standing water continuously during certain times of the year and not only in a short duration in direct response to precipitation. The Corps has determined that Ditch A meets the relatively permanent standard and indirectly connects downstream to a TNW (Bellingham Bay) and is therefore a water of the U.S.

Ditch C: Ditch C begins at the confluence of Ditch A and Ditch B (located outside of Corps Review Area) and is a second order tributary per the Strahler method (see Sheet 2 of Enclosure 1). Ditch C flows approximately 195 feet south, approximately 40 feet west and then south into a culvert under East Horton Road. Ditch C then flows approximately 265 feet east and drains into a 250-footlong culvert. Ditch C flows out of the culvert and approximately 133 feet east into Spring Creek. See description of downstream flowpath in Section 5 above.

Water is visible in Ditch C in Whatcom County aerial imagery from 2013, 2016, 2019 and 2022 (the dates of these aerials is not known). Water is visible in Google Earth aerial imagery on 30 April 2025 and 30 April 2024. According to the Antecedent Precipitation Tool (APT), there were normal precipitation conditions at the site on those dates; however, the drought index in the area was mild on 30 April 2025 and moderate on 30 April 2205. According to data collected at Bellingham International Airport, there was 0.31 inches of precipitation in the area in the two days prior to 30 April 2025. According to data collected at Bellingham International Airport, there was 1.39 inches of precipitation in the area in the ten days prior to 30 April 2024 occurring from 24 April through 28 April 2025.

Ditch C is characterized by a well-defined channel with distinct bed and banks. Ditch C is vegetated with reed canary grass (*Phalaris arundinacea* – FACW), American brook lime (*Veronica americana* – OBL), Awlfruit sedge (*Carex stipata* – OBL), and small fruited bulrush (*Scirpus microcarpus* – OBL). Drift deposits, bent vegetation, and water staining were observed within Ditch C during a site visit on 9 June 2025. During the site visit on 9 June 2025, no surface water was observed in Ditch A. According to the Antecedent Precipitation Tool (APT), there were drier than normal precipitation conditions at the site on this date during the dry season. There was no rain in the nine days prior to the site visit, but there was 0.32 inches of rain on 31 May 2025

During a site visit on 8 February 2024, surface water was observed in Ditch C. According to the Antecedent Precipitation Tool (APT), there were normal precipitation conditions at the site on this date. According to data collected at Bellingham International Airport, there was 0.38 inches of precipitation in the area in the ten days prior to 8 February 2024 occurring on 1 January 2024 though 8 February 2024. There was 0.06 in of rain on the day of the site visit.

During a drive by site visit on 5 May 2025, surface water was observed flowing in Ditch C towards Spring Creek. According to the Antecedent Precipitation Tool (APT), there were normal precipitation conditions at the site on this date. According to data collected at Bellingham International Airport, there was 0.56 inches of precipitation in the area in the ten days prior to 5 May 2025 occurring from 28 April 2025 though 2 May 2025.

Ditch C is intermittent according to the Streamflow Duration Assessment Method for the Pacific Northwest. Based on the above information, Ditch C is characterized by flowing or standing water continuously during certain times of the year and not only in a short duration in direct response to precipitation. The Corps has determined that Ditch C meets the relatively permanent standard and indirectly connects downstream to a TNW (Bellingham Bay) and is therefore a water of the U.S.

f. Adjacent Wetlands (a)(4):

Wetland A: Wetland A, a palustrine emergent depressional wetland, is approximately 0.27 acres within the review area, but extends west, north and east outside of the review area. Wetland A drains to and abuts Ditches A and C, both relatively permanent tributaries as documented above. Based on this, the Corps has determined that Wetland A has a continuous surface connection to an (a)(3) tributary and therefore meets the definition of an (a)(4) adjacent wetland and is a water of the U.S.

- g. Additional Waters (a)(5): N/A
- 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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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).⁹ 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). N/A
- 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 on 8 February 2024, 5 May 2025, and 9 June 2025.
 - b. Critical Areas Assessment & Mitigation Plan. NW Ecological Services. April 2016.
 - c. Wetland Impact Assessment & Mitigation Plan. NW Ecological Services. August 2019.
 - d. Wetland Delineation Report. B&A Inc. 27 June 2023.
 - e. USGS TopoView accessed on 6/9/2025 at: https://ngmdb.usgs.gov/topoview/viewer/#4/40.01/-100.06
 - f. Google Earth accessed on 6/9/2025 at: https://earth.google.com/web/search/210+East+Horton+Road,+Bellingham,+WA/ @48.80834346,-122.48034753,65.75786331a,160.96709484d,35y,0h,0t,0r/data=CpsBGmUSXw olMHg1NDg1YTRiMzQ0MDQ5ZGM3OjB4M2E4ZTg4Y2lxMzMzZmNhNBITzaylg GdIQCFGa1bHu55ewCokMjEwIEVhc3QgSG9ydG9uIFJvYWQsIEJIbGxpbmdoY W0sIFdBGAIgASImCiQJ839SCD13SEARUWAidQV3SEAZ6nRu-72sXsAh1T-MUhetXsAqBggBEgAYAUICCAFCAggASg01 ARAA

⁹ 88 FR 3004 (January 18, 2023)

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- g. DNR LiDAR Portal accessed on 6/9/2025 at: https://lidarportal.dnr.wa.gov/
- h. Whatcom Parcel Map accessed on 6/9/2025 at: <u>https://www.arcgis.com/apps/webappviewer/index.html?id=f2f8eaa500b04f54948</u> <u>c680bb280129f</u>
- i. Bellingham City IQ accessed on 6/9/2025 at: https://maps.cob.org/geviewer/Html5Viewer/Index.html?viewer=cityiq

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.





