



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

15 April 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-2023-55²

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,

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 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. Drainage 1, 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)

3. REVIEW AREA. The approximately 2.5 acre review area is located at Kirkland, King County, Washington (47.6686, -122.20374). The review area is characterized by single family residential development. Drainage 1 flows west through the central portion of the review area. The review area is bounded by single family residential development to the north and south, State Street to the east, and 1st Street South to the west.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Lake Washington, approximately 600 feet west of the review area. Lake Washington 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. Drainage 1 flows 700 feet west through the central portion of the review area. Drainage 1 then flows through a 100-

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.

foot-long culvert under 1st Street South. Drainage 1 then continues to flow in an open channel south and west 170 feet and into an underground stormwater infrastructure. Water flows through this infrastructure west 230 feet under Lake Street South and outlets to Lake Washington.

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 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):

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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Drainage 1: Drainage 1 flows west 700 feet through the central portion of the review area. Drainage 1 typically ranges from 4 to 8 feet wide, with a bank approximately 2 to 4 feet tall and a grade of 5 to 15%. The Streamflow Duration Assessment Method indicates that flow in Drainage 1 is intermittent. Ordinary high water indicators within Drainage 1 include a defined bed and bank, an unvegetated channel, changes in character of sediment, and lack of leaf litter in the channel. According to a memo by Wetland Resources Environmental Consulting and dated 18 June 2024, during a site visit on 6 June 2024, there was surface flow through the entire reach of Drainage 1 through the review area. According to WETS data collected at the Seattle Sand Point Weather Station, there were slightly wetter than normal conditions at the site on this date and there was 1.1 inches of rain in the five days prior; however, this date occurred during the dry season and there was no rain the day of or day before the site visit.

A letter written by Goldfarb & Huck Roth Riojas PLLC appears to assert that Drainage 1 is not a Water of the United States because it is intermittent and therefore not a relatively permanent, standing or continuously flowing body of water; it does not have a continuous surface connection (CSC) to a body of water that is a water of the United States in its own right; and it does not exhibit characteristics of a natural stream and stormwater is its main source of flow.

Relevant sections of the “Revised Definition of ‘Waters of the United States’”, published on 18 January 2023, the “Revised Definition of ‘Waters of the United States’; Conforming”, published on 8 September 2023 and responses to the assertions detailed in the aforementioned letter are included below.

According to the 18 January 2023 “Revised Definition of ‘Waters of the United States’” rule, “A tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water...A tributary may flow through a number of downstream waters, including a non-jurisdictional tributary or non-jurisdictional features, such as a ditch excluded under paragraph (b) of this rule or an excluded waste treatment system...The agencies' longstanding interpretation of the Clean Water Act includes tributaries that are natural, modified, or constructed waters...Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish, as a practical or scientific matter, between natural watercourses and watercourses that are wholly or partly modified or constructed” (33 CFR Part 328 IV.C.4.A) and “The agencies' interpretation of relatively permanent tributaries to include surface waters that have flowing or standing water year-round or continuously during certain times of the year is consistent with the *Rapanos* plurality's interpretation of “waters of the

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United States.” The *Rapanos* plurality interpreted “waters of the United States” as encompassing “relatively permanent, standing or continuously flowing bodies of water,” including streams, rivers, oceans, lakes, and other bodies of waters that form geographical features. 547 U.S. at 739, 742. The plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months... The agencies have decided to implement this approach because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management...Implementation of the relatively permanent standard for tributaries in this rule does not require that relatively permanent flow come from particular sources.” (33 CFR Part 328 IV.C.4.C.II)

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) issued a final rule to amend the final “Revised Definition of ‘Waters of the United States’” rule. According to the amended rule, to be a jurisdictional tributary, the tributary must meet the relatively permanent standard and connect downstream to paragraph (a)(1) or (a)(2) water. Where the January 2023 Rule was not enjoined, the agencies are continuing to implement the January 2023 Rule, as amended by the conforming rule.

Although Drainage 1 does not flow continuously during dry summer months, the relatively permanent waters standard does not necessarily exclude seasonal tributaries, which contain continuous flow during some months of the year but no flow during dry months as documented above. Very clear ordinary high water mark indicators and data presented by Wetland Resources Environmental Consulting demonstrate that Drainage 1 flows continuously during some months of the year and is characterized by relatively permanent flow.

A CSC is not required for a tributary to be considered jurisdictional. As described above, to be considered jurisdictional, tributaries must meet the relatively permanent standard and connect downstream to paragraph (a)(1) or (a)(2) waters. Furthermore, tributaries may flow through non-jurisdictional features, such as a stormwater system. Section 5 above demonstrates that Drainage 1 connects to Lake Washington.

Lastly, jurisdictional tributaries may include modified or constructed waterbodies. Additionally, to be considered a jurisdictional tributary, flow within the tributary is not required to come from particular sources.

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The Corps has determined that Drainage 1 meets the relatively permanent standard and connects downstream to a TNW as documented above; therefore, Drainage 1 is a water of the United States.

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).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. “Critical Area Reported” by Raedeke Associates, Inc. March 4, 2021.

b. “Request for Corps Jurisdictional Determination NWS-2023-55” by Goldfarb & Huck Roth Rioja, PLLC. January 6, 2025.

c. “Streamflow Duration Assessment for Lakeview Watercourse Piping Project” by Wetland Resources Environmental Consulting. June 18, 2024.

d. Kirkland Maps. Accessed on 10 April 2025 at <https://maps.kirklandwa.gov/Html5Viewer/>

10. OTHER SUPPORTING INFORMATION. N/A

⁹ 88 FR 3004 (January 18, 2023)

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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.



