

### DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT 4735 EAST MARGINAL WAY, SOUTH BLDG 1202 SEATLE, WA 98134-2388

**CENWS-Seattle District** 

15 January 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) ,<sup>1</sup> NWS-2024-875

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.

<sup>&</sup>lt;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>&</sup>lt;sup>2</sup> 33 CFR 331.2.

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

<sup>&</sup>lt;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.

## CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2024-875

- 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 1, non-jurisdictional
  - ii. Ditch 2, non-jurisdictional
- iii. Wetland A, jurisdictional, Section 404
- iv. Wetland E, non-jurisdictional
- v. Wetland F, non-jurisdictional
- vi. Wetland G, non-jurisdictional
- vii. Wetland H, jurisdictional, Section 404
- viii. Wetland J, non-jurisdictional
- ix. Wetland K, non-jurisdictional
- x. Wetland L, 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 11.2 acre review area is located at Bellingham, Whatcom County, Washington (48.81219, -122.48957). The review area consists primarily of deciduous forest with patches of evergreen trees and is bisected by Tremont Avenue. Eight wetlands and two ditches were identified in the review area. The review area is bounded by a multi-family residential development to the west, undeveloped forest to the south and east, and an open field to the north.

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- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Nooksack River, approximately 4.5 miles west and 7 miles downstream. The Nooksack River is listed as navigable waterway on the Navigable Waters of the United States in Washington State list dated December 31, 2008.<sup>5</sup>
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There are multiple hydrologic flow paths from aquatic resources in the review area. Three of these paths, the East Fork of Bear Creek, Ditch 3 and Ditch 4, are located outside of the AJD review area. The flow path of Ditches 1, 2 and 4 and the flow paths and relative permanence of surface water in the East Fork of Bear Creek and Ditch 3 are described as follows:

The East Fork Bear Creek flows approximately 500 feet southwest through property adjacent to the eastern edge of the review area. The East Fork Bear Creek then flows approximately 1.5 miles west through open channel and culverts to Bear Creek. Bear Creek then flows approximately 1.9 miles northwest to Silver Creek. Silver Creek flows approximately 4 miles southwest to the Nooksack River which then flows approximately 0.8 miles to Bellingham Bay. According to Northwest Ecological Services, East Fork Bear Creek is a perennial stream: "The on-site reaches of East Bear Creek are vegetated with overhanging willows and reed canary grass patches. Channel substrate is silt and the channel ranges from ten to twenty feet wide. At the time of the site visits (April and June of 2015), the wetted width was five to ten feet. East Bear Creek appears to be a perennial stream." The Corps has determined that East Fork Bear Creek meets the relatively permanent standard and indirectly connects downstream to a TNW.

Ditches 1 and 2 are described in detail in Section 8 below. They both flow west into stormwater infrastructure associated with a multi-family residential development. Water is piped for approximately 1,400 feet west and south into a stormwater pond. This stormwater pond outlets to a pipe that conveys water approximately 700 feet northwest and discharges to Grady Creek. Multiple stormwater laterals contribute flow to this stormwater system. Grady Creek flows approximately 1,000 feet south and west to an unnamed tributary to the East Fork Bear Creek. The unnamed tributary flows approximately, 2,800 feet southwest to the East Fork Bear Creek.

<sup>&</sup>lt;sup>5</sup> 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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Flows in East Fork Bear Creek connect downstream to the Nooksack River as described above.

Ditch 3 flows approximately 500 feet east and southeast outside of and along the southern property boundary. Ditch 3 flows into a culvert under a private driveway and then through stormwater pipes for approximately 760 feet. This stormwater infrastructure then outlets to East Fork Bear Creek. Flows in East Bear Creek connect downstream to the Nooksack River as described above. During a site visit on 10 December 2024, water was observed flowing from Wetland A into Ditch 3 and then through Ditch 3. Ditch 3 has a well-defined channel with obvious bed and bank. Water is visible in the channel in Google Earth aerial imagery from 30 April 2024 (normal conditions per APT), 30 June 2023 (drier than normal conditions per APT), 30 December 2017 (wetter than normal conditions per APT), and 30 March 2016 (wetter than normal conditions per APT). Water is also visible in the channel in Whatcom County aerial imagery from 2022, 2019, 2013, and 2010. The exact dates of the Whatcom County aerial imagery are not known. The Corps has determined that Ditch 3 meets the relatively permanent standard and indirectly connects downstream to a TNW.

Ditch 4 flows approximately 140 feet east from Wetland H to Wetland N and is located entirely outside of the review area. Water in Wetland N then drains to East Fork Bear Creek. Flows in East Fork Bear Creek connect downstream to the Nooksack River as described above. No determination for "relatively permanent" flow in the ditch was attempted due to lack of access and limited information available for this feature. The ditch may or may not be a water of the United States, but this discrete feature provides a continuous surface connection between Wetland H to Wetland N and the East Fork Bear Creek.

- 6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: N/A
- 7. SECTION 404 JURISDICTIONAL WATERS:
  - 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

<sup>&</sup>lt;sup>6</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.

- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4):

Wetland A: Wetland A is a 2.38 acre palustrine scrub shrub and forested depressional wetland in the southern part of the review area. The southwestern portion of Wetland A extends south outside of the review area and abuts Ditch 3. Water was observed flowing from Wetland A to Ditch 3 during a site visit on 10 December 2024. Wetland A abuts, is adjacent to, and has a continuous surface connection to Ditch 3, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland A meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

Wetland H: Wetland H extends east outside of the review area. The northeastern portion of Wetland H drains into Ditch 3 which extends approximately 140 feet east and drains into Wetland N. Approximately 200 feet south of the outlet of Ditch 3, Wetland N drains to and abuts the East Fork Bear Creek, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland H has a continuous surface connection to an (a)(3) tributary and meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

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).<sup>7</sup> 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.,

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

tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Ditch 1: Ditch 1 is an approximately 520-foot-long ditch that flows west on the north side of Tremont Ave into stormwater infrastructure. Water is then piped for approximately 1,400 feet west and south into a stormwater pond. This stormwater pond outlets to a pipe that conveys water approximately 700 feet northwest and discharges to Grady Creek. Multiple additional stormwater inputs from residential development contribute to the stormwater system between Ditch 1 and the outfall to Grady Creek. Water is not visible in the ditch in any aerial imagery or Google Streetview from May of 2023 or September of 2012. During a site visit on 10 December 2024, water, approximately 2-in deep, was observed flowing from Wetland E into Ditch 1 and then west into a culvert inlet. According to the antecedent precipitation tool, there were wetter than normal conditions at the site on this day. According to data collected at the Bellingham Airport weather station, there was 1.47 inches of rain in the area within the five days prior to the site visit. The ditch does not have a defined bed and bank. No ordinary high water mark indicators (OHWM) were observed in the ditch. Ditch 1 does not experience flowing or standing water continuously during certain times of the year that is more than only a short duration in direct response to precipitation. The Corps has determined that Ditch 1 does not meet the relatively permanent standard and is therefore not a water of the U.S.

Ditch 2: Ditch 2 is an approximately 440-foot-long ditch that flows west on the south side of Tremont Ave into stormwater infrastructure. Water is piped for approximately 1,400 feet west and south into a stormwater pond. This stormwater pond outlets to a pipe that conveys water approximately 700 feet northwest and discharges to Grady Creek. Multiple additional stormwater inputs from residential development contribute to the stormwater system between Ditch 2 and the outfall to Grady Creek. Water is not visible in the ditch in any aerial imagery or Google Streetview from May of 2023 or September of 2012. During a site visit on 10 December 2024, water, approximately 1-in deep, was observed flowing from Wetlands C and D (outside of the review area) into Ditch 2 and then west into a culvert inlet. According to the antecedent precipitation tool, there were wetter than normal conditions at the site on this day. According to data collected at the Bellingham Airport weather station, there was 1.47 inches of rain in the area within the five days prior to the site visit. The ditch does not have a defined bed and bank. No ordinary high water mark indicators (OHWM) are observable in the ditch in photos from the site or Google Streetview. Ditch 2 does not experience flowing or standing water continuously during certain times of the year that is more than only a short duration in direct response to precipitation.

The Corps has determined that Ditch 2 does not meet the relatively permanent standard and is therefore not a water of the U.S.

Wetland E: Wetland E is a 0.97 acre palustrine scrub shrub and forested depressional wetland in the western portion of the review area. Wetland E drains to Ditch 1 which is not a water of the U.S. as described above. Ditch 1 flows into stormwater infrastructure that flows eventually to Grady Creek; however, multiple stormwater laterals drain into the system before it reaches the outfall that eventually connects to Grady Creek. Therefore, subsurface flow through the underground stormwater system does not qualify as a continuous surface connection from Wetland E to Grady Creek. Wetland E is not connected to any other aquatic resources. Wetland E 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 E 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 F: Wetland F is a 0.64 acre palustrine forested depressional wetland in the eastern portion of the review area. Wetland F does not have an outlet. The nearest known tributary, the East Fork of Bear Creek, is located approximately 850 east of the wetland. Upland forest separates Wetland F from the East Fork of Bear Creek. Wetland F 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 F 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 G: Wetland G is a 0.02 acre palustrine forested depressional wetland in the northeastern portion of the review area. Wetland G does not have an outlet. The nearest known tributary, the East Fork of Bear Creek, is located approximately 960 east of the wetland. Upland forest and a single family residence separate Wetland G from the East Fork of Bear Creek. Wetland G 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 G 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 J: Wetland J is a 0.01 acre palustrine forested depressional wetland in the eastern portion of the review area. Wetland J does not have an outlet. The nearest known tributary, the East Fork of Bear Creek, is located approximately 870 east of the wetland. Forested uplands and wetlands separate Wetland J from the East Fork of Bear Creek. Wetland J 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 J 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 K: Wetland K is a 0.09 acre palustrine scrub shrub and forested depressional wetland in the northern portion of the review area. Wetland K does not have an outlet. The nearest known tributary, the East Fork of Bear Creek, is located approximately 790 feet southeast of the wetland. Forested uplands and wetlands separate Wetland K from the East Fork of Bear Creek. Wetland K 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 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.

Wetland L: Wetland L is a 0.01 palustrine scrub shrub and forested depressional wetland. Wetland L does not have an outlet. The nearest known tributary, the East Fork of Bear Creek, is located approximately 1,000 feet southeast of the wetland. Forested uplands and wetlands separate Wetland L from the East Fork of Bear Creek. Wetland L 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 L 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 10 December 2024
  - b. USGS TopoView accessed on 12/10/24 at: https://ngmdb.usgs.gov/topoview/viewer/#4/40.01/-100.06
  - c. USDA Web Soil Survey accessed on 12/10/24 at https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx
  - d. Bellingham CityIQ accessed on 12/10/24 at: https://maps.cob.org/geviewer/Html5Viewer/Index.html?viewer=cityiq
  - e. "Wetland Delineation Report Waldron Woods" by NW Ecological Services. August 2015.
- 10. OTHER SUPPORTING INFORMATION. N/A.

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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.



 Purpose: Multi-Family Residential<br/>Applicant: Ninth Street Partners
 Waldron Woods Residential<br/>North
 In: Wetlands<br/>Location: Tremont Avenue, Bellingham,<br/>Sec/Twp/Rng: 01/38N/02E<br/>County: Whatcom

 Adjacent Prop. Owners: See JARPA<br/>Date: 11/2024
 Vicinity Map
 Sheet 1 of 4



SITUATE IN A PORTION OF THE NE 1/4 AND SE 1/4 OF SECTION 1, TOWNSHIP 38 NORTH, RANGE 2 EAST. W.M., CITY OF BELLINGHAM, WHATCOM COUNTY, WASHINGTON

#### SURVEY NOTES

1) HORIZONTAL DATUM: STATE PLANE NAD 27 WASHINGTON NORTH ZONE

2) VERTICAL DATUM: NAVD 88

3) WETLAND DELINEATION BY NWES IN JUNE OF 2015, SURVEYED BY PSE IN JUNE OF 2015.

### SURVEY LEGEND

- EXISTING WETLAND AREA

(F) = EXISTING SAMPLE PLOT LOCATION W/ NUMBER

#### WETLAND TABLE

WETLAND 'A'	103,800 SF	
WETLAND 'B'	504 SF	
WETLAND 'C'	920 SF	
WETLAND 'D'	1,058 SF	
WETLAND 'E'	42,381 SF	
WETLAND 'F'	27,826 SF	
WETLAND 'G'	1,054 SF	
WETLAND 'H'	10,604 SF	
WETLAND 'J'	464 SF	
WETLAND 'K'	3,809 SF	
WETLAND 'L'	481 SF	
WETLAND 'M'	3,099 SF	
WETLAND 'N'	29,233 SF	

\*SQUARE FOOTAGE WITHIN SUBJECT PARCEL

1.50

DWG NO. 2015062\_svX\_Base





Wetland Map with Requested JD Area	Sheet 2 of 4
Waldron Woods Residential JD Request Memo	NOV 2024



COB Map with Stormwater Features (City IQ)	Sheet 3 of 4
Waldron Woods Residential JD Request Memo	NOV 2024



Wetland Map (Oct 2020 Wetland Recon)	Sheet 4 of 4
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