



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

CESPK-RDC-D

4 January 2024
(Updated: 29 March 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 SPK-2023-00157

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 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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1. SUMMARY OF CONCLUSIONS. The following is a list of each individual feature within the review area identified in the consultant's delineation mapping (*Enclosure 1*), with the associated acreage and jurisdictional status of each one.

- a. Seasonal Wetland Swale 1 (SWS-1), non-jurisdictional, 2.260 acres
- b. Seasonal Wetland 1 (SW-1), non-jurisdictional, 0.681 acre
- c. SW-2, non-jurisdictional, 0.037 acre
- d. SW-3, non-jurisdictional, 0.035 acre
- e. SW-4, non-jurisdictional, 0.007 acre
- f. SW-5, non-jurisdictional, 0.147 acre
- g. SW-6, non-jurisdictional, 0.007 acre
- h. Willow Riparian Wetland 1 (WRW-1), jurisdictional, Section 404, 0.082 acre

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 61694 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- d. *Memorandum on NWP-2023-602* (March 19, 2024)

3. REVIEW AREA. The approximately 29-acre review area is located near the intersection of Rio Linda Boulevard and Grace Avenue, Latitude 38.65311° N, Longitude 121.44543° W, City of Sacramento, California.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest traditionally navigable water is the Sacramento River.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The wetland WRW-1 is adjacent to and abutting Magpie Creek, a relatively permanent water that flows southwest until it

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flows into Steelhead Creek, a tributary of the Sacramento River at its confluence near Discovery Park.

6. SECTION 10 JURISDICTIONAL WATERS⁵: There are no aquatic resources or other features within the review area that are jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899.

7. SECTION 404 JURISDICTIONAL WATERS: The following aquatic resources within the review area 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*.

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): WRW-1 is a willow riparian wetland approximately 0.082 acre in size and exhibiting the three defining wetland characteristics: hydric soils, hydrophytic vegetation, and wetland hydrology. This wetland is adjacent to and exhibits a continuous surface water connection by abutting Magpie Creek which is a relatively permanent water flowing into Steelhead Creek, a tributary of the Sacramento River.

g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. There are no aquatic resources or 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) pursuant to the exclusions listed in 33 CFR 328.3(b).⁶

⁵ 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.

⁶ 88 FR 3004 (January 18, 2023)

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b. The following aquatic resources and features within the review area are non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended.

SWS-1, SW-1, SW-2, SW-3, SW-4, SW-5, and SW-6 do not meet the definition of Waters of the U.S. Although they meet the Corps' definition of a wetland as defined in 33 CFR §328.3(c)(16), the wetlands do not exhibit a continuous surface connection with Magpie Creek, nor any other continuous surface connection to TNW's further downstream. The nexuses between SWS-1 and the seasonal wetlands were observed in person on December 21, 2023, and the boundaries between the seasonal wetlands is evident from a border upland plants and a lack of hydrology indicating connectivity. SW-1 is the closest to Magpie Creek, being separated by approximately 50 feet of uplands, and although it is likely water may overflow into the creek following a significant storm event, it would occur as overland sheet flow and does not seem to occur with the frequency or duration to form a discrete feature that qualifies as a continuous surface connection. When observed in person, the general slope of SW-1 is to the southeast, away from Magpie Creek. This is supported by review of LiDAR imagery which reveals the deepest sections of SW-1 to be in the center, suggesting that water pools there and does not readily flow into Magpie Creek (*Enclosure 2*). Conversely, LiDAR imagery also reveals that SW-1 sits at a notably higher elevation than the Ordinary High-Water Mark (OHWM) of Magpie Creek, so inundation within SW-1 is unlikely to originate from Magpie Creek. SWS-1 also is unlikely to exhibit a continuous surface connection with Magpie Creek. SWS-1 extends slightly offsite to the northeast, however it does not reach Magpie Creek. Aerial imagery from Google Earth Pro (*Enclosure 5*) and LiDAR imagery shows that SWS-1 terminates roughly 15-20 linear feet (lf) from the review area boundary. Additionally, the slope of the topography shown in the LiDAR imagery and site visit photographs indicates that SWS-1 flows southwest away from Magpie Creek. What appears to be limited and shallow surface hydrology following rain events in SWS-1 pools in a limited area near the southwest corner of the site and flows southward (off-site) through an approximately 75 ft wide culvert beneath Grace Avenue. A shallow vegetated ditch, approximately 30 ft wide at the widest point, occurs immediately south of Grace Avenue, with a storm drain along the western bank of the ditch. This storm drain was a component of a prior project that required permitting from the Corps, the Rancho Del Paso K-12 Campus project (SPK-2016-00244). The enclosed as-builts from this project illustrate the flow from SWS1 into this storm drain as well as the storm drain's connection to the municipal storm sewer (*Enclosure 4*). The potential flow from the storm drain system into jurisdictional aquatic resources does not need to be evaluated as based on the conclusion from the Corps' March 19, 2024, joint memorandum with the EPA, *Memorandum on NWP-2023-602*, "while there may be situations where a continuous surface connection is maintained despite a minor subsurface interruption, the agencies have determined that subsurface flow through the city's underground storm sewer system does not qualify as a continuous surface connection. Because this storm sewer

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system cannot serve as part of a continuous surface connection, the other aspects of the flow path do not need to be evaluated to determine if they can serve as part of a continuous surface connection.” Therefore, SWS-1 does not exhibit a continuous surface connection with any jurisdictional resources as there are no discrete features indicating a continuous surface connection with a jurisdictional resource. Please also see #10, below.

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. Conducted December 21, 2023.

b. Madrone Ecological Consulting, LLC (Madrone). 2021. *Aquatic Resources Delineation Report for Dry Creek Estates*. Prepared for The True Life Companies. Dated 17 November 2021.

c. Google Earth Pro 7.3.3.7786 (July 21, 2020). Taken February 2022. Sacramento, California. Latitude 38.65306°, Longitude -121.44547°. Eye Alt. 2258 ft. Accessed December 27, 2023.

d. Google Earth Pro 7.3.3.7786 (July 21, 2020). Taken March 2015. Sacramento, California. Latitude 38.65306°, Longitude -121.44547°. Eye Alt. 2258 ft. Accessed December 27, 2023.

e. USGS National Map 3D Digital Elevation Program (3DEP). ArcGIS Pro. Latitude 38.65306°, Longitude -121.44547°. Accessed January 3, 2024.

f. Digital Globe. Taken January 12, 2023. G-EGD. Latitude 38.65306°, Longitude -121.44547°. Zoom Level: 16. Accessed March 7, 2024.

g. Digital Globe. Taken January 29, 2022. G-EGD. Latitude 38.65306°, Longitude -121.44547°. Zoom Level: 16. Accessed March 7, 2024.

h. Digital Globe. Taken January 13, 2022. G-EGD. Latitude 38.65306°, Longitude -121.44547°. Zoom Level: 16. Accessed March 7, 2024.

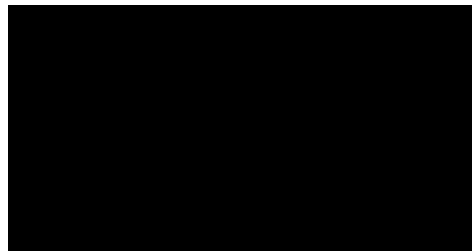
10. OTHER SUPPORTING INFORMATION. A visit of the review area was conducted on December 21, 2023, with the delineation consultant and CA Delta Section Chief Mary Pakenham-Walsh attending as well. A photo log was compiled (*Enclosure 2*). We observed clear boundaries between wetlands and uplands, and the lack of connectivity between all wetlands except WRW-1 and Magpie Creek. Also observed, and

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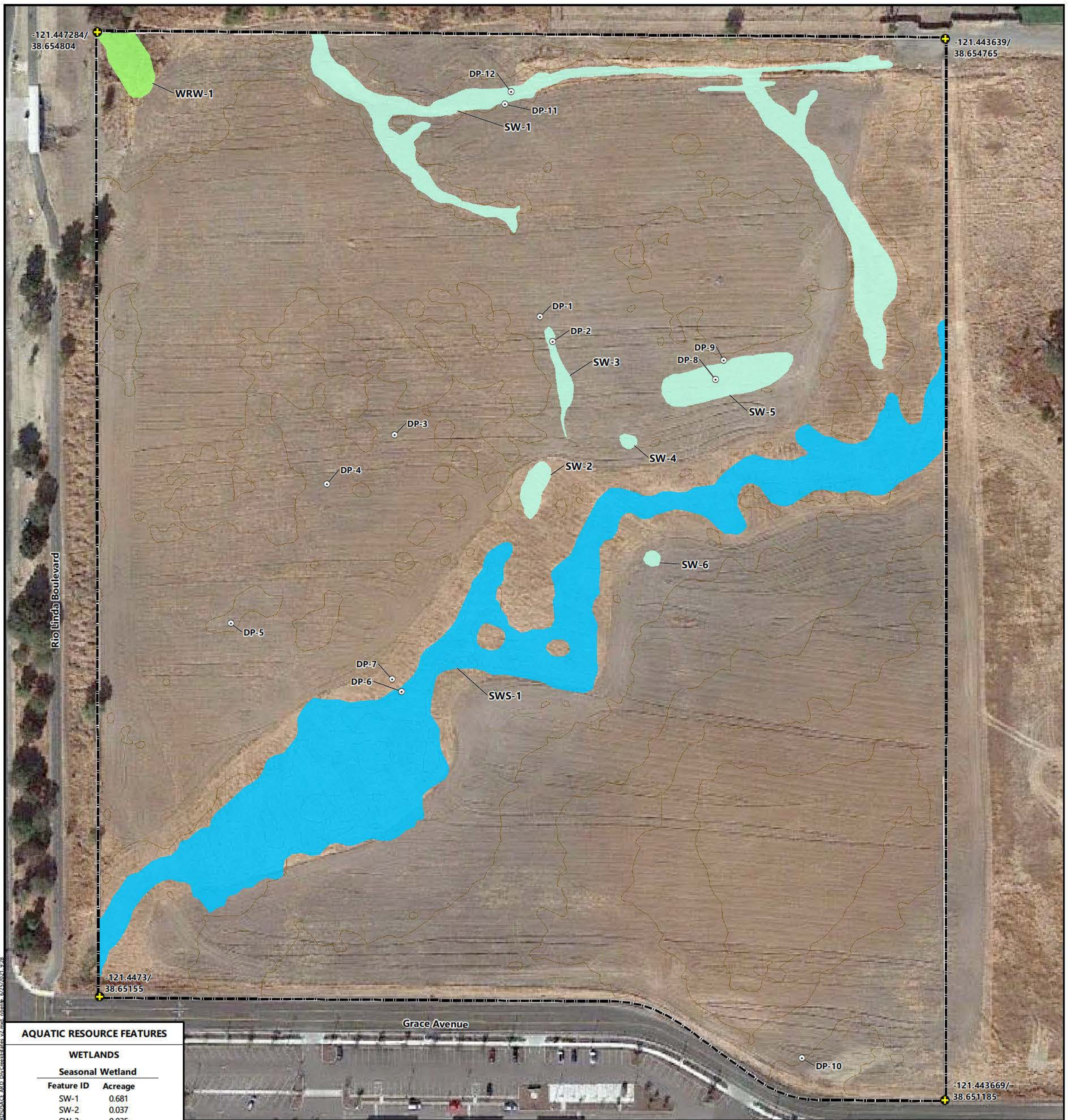
documented in photos 1 and 2, were shallow ponding in the southwestern extent of SWS-1.

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.



5 Encls

1. Delineation Map
2. LiDAR Imagery
3. Site Visit Photolog
4. Storm Drain As-Builts
5. Google Earth Aerial Imagery



AQUATIC RESOURCE FEATURES

WETLANDS

Seasonal Wetland

Feature ID	Acreage
SW-1	0.681
SW-2	0.037
SW-3	0.035
SW-4	0.007
SW-5	0.147
SW-6	0.007
	0.914

Seasonal Wetland Swale

Feature ID	Acreage
SWS-1	2.260
	2.260

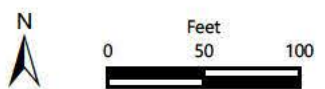
Willow Riparian Wetland

Feature ID	Acreage
WRW-1	0.082
	0.082

Aquatic Resources Total: 3.256 acres

Notes:
Map Scale: 1 inch = 100 feet
Coordinate System: NAD 1983 State Plane California II
Datum: NAD83 (North American Datum 1983)
Projection: Lambert Conformal Conic
Vertical Data: NAVD88 (North American Vertical Datum 1988)
Aerial Base: Google Earth
Aerial Base Flown: October 2020
Topographic Contours: Sacramento County LiDAR
Date Map Prepared: 25 June 2021
Map Prepared by: N. Bente
Delineation Performed by: M. Hirkala, B. Peterson
Definitions:
 NAD = North American Datum
 NAVD = North American Vertical Datum
 USGS = United States Geological Survey

Prepared For:



Study Area Boundary (29 acres)

Reference Point

Data Point

Ground Surface Elevation, 2 foot contour

Aquatic Resources (3.256 acres)

Wetlands

Seasonal Wetland (0.914 acres)

Seasonal Wetland Swale (2.260 acres)

Willow Riparian Wetland (0.082 acre)

Aquatic Resources Delineation

Dry Creek Estates

Sacramento

Sacramento County, California

