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

CENWS-ODR 14 March 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination (JD) 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 2023-963

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 Clean Water Act (CWA), and no effect on any waters covered under the Rivers and Harbors Act (RHA), all categories are included in this Memorandum for Record for efficiency.
[2] 33 CFR 331.2.
[3] Regulatory Guidance Letter 05-02.
[4] The Corps 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.

a. List of each individual feature within the review area and the jurisdictional status of each one.

i. Wetland A: is a not a water of the U.S.

ii. Ditch 1: is not a water of the U.S.

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 review area is 0.18 acres in size located at 2200 College Way, Mount Vernon, Skagit County, Washington. Latitude/Longitude: 48.435256°, -122.312812°. Exact Review Area is shown on the AJD Review Figure 1.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Skagit River, a TNW, is located about 1.8 miles southwest of the Review Area. The Skagit River is listed on the Navigable Waters of the United States in Washington State dated December 31, 2008, from its mouth to river mile 77.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The nearest relatively permanent water (RPW) is Kulshan Creek, located approximately 0.33 miles south and west of the Review Area. Kulshan Creek is a tributary that flows west for approximately 1.5 miles to the Skagit River, a Traditional Navigable Water. Kulshan Creek enters the Skagit River near river mile 12. See Figure 4-Drainage Features Map.

6. SECTION 10 JURISDICTIONAL WATERS[5]: None.

[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.

7. SECTION 404 JURISDICTIONAL WATERS:

   a. Traditional Navigable Waters (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): NA

   f. Adjacent Wetlands (a)(4): NA

   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).

   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 is 0.05-acres in size and is located about 0.33 miles southwest of Kulshan Creek, the nearest tributary. Wetland A sits within a topographical depressional and is dominated by wetland vegetation, reed canarygrass. The eastern boundary of the review area is bounded by an elevated upland path. The primary source of hydrology is groundwater and stormwater runoff. One small ditch, Ditch 1, drains Wetland A south to an existing parking lot. Any excess water would sheet flow southwest across the parking lot to afield as indicated by topography that slopes to the south and west. A stormwater grate is located approximately 20 feet east of the ditch, but it is upslope with no conveyance observed to that grate during a February 13, 2024, site visit. According to the

Antecedent Precipitation Tool for this site, normal precipitation conditions were present at the time of the site visit. This stormwater grate appears to capture stormwater from an apartment building immediately south and east of the review area. The City of Mount Vernon stormwater maps show the nearest stormwater conveyance located 222 feet west of the review area along Laventura Avenue (Figure 5). Stormwater in this area flows south and west to Kulshan Creek based on topography and subbasin maps. This wetland does not abut a jurisdictional tributary or impoundment nor is it separated by a natural berm, bank, or dune. The wetland does not outflow into a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert that connects to an a(1) through a(3) water.

Soils within the Review Area were mapped by the NRCS as Bow gravelly loam, 0 to 3 percent slopes and Bow gravelly loam, 3 to 8 percent slopes (predominantly hydric) in the Review Area. The wetland is not located within a floodplain. Wetland A does not have a continuous surface connection to a jurisdictional tributary or impoundment; this wetland is not a water of the U.S.

Ditch 1: Ditch 1 drains south where it hits a parking lot. Excess flow would flow southwest across the parking lot to a field as indicated by topography that slopes to the south and west. A stormwater grate is located approximately 20 feet east of the ditch, but it is upslope with no conveyance observed to that grate during a February 13, 2024, site visit. According to the Antecedent Precipitation Tool for this site, normal precipitation conditions were present at the time of the site visit. This stormwater grate appears to capture stormwater from an apartment building immediately south and east of the review area. The City of Mount Vernon stormwater maps show the nearest stormwater conveyance located 222 feet west of the review area along Laventura Avenue (Figure 5). Stormwater in this area flows south and west to Kulshan Creek based on topography and subbasin maps. Since Ditch 1 does not connect to a TNW directly or indirectly and sheet flows over uplands, the ditch does not meet the definition of an a(3) tributary. Therefore, Ditch 1 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. Skagit County iMap (Skagit County iMap) datasets for Washington LIDAR, topography, and Aerial imagery accessed 22 February 2024.

   b. City of Mount Vernon Stormwater Maps. Accessed online 12 February 2024.

c. National Regulatory Viewer National Hydrography Dataset accessed 22 February 2024.

d. Natural Resource Conservation Service Web Soil Survey accessed 22 February 2024.

e. USACE site visit on 13 February 2024.

f. Wetland, Fish, and Wildlife Habitat Assessment Report by Soundview Consultants (September 26, 2023).

10. OTHER SUPPORTING INFORMATION.

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.

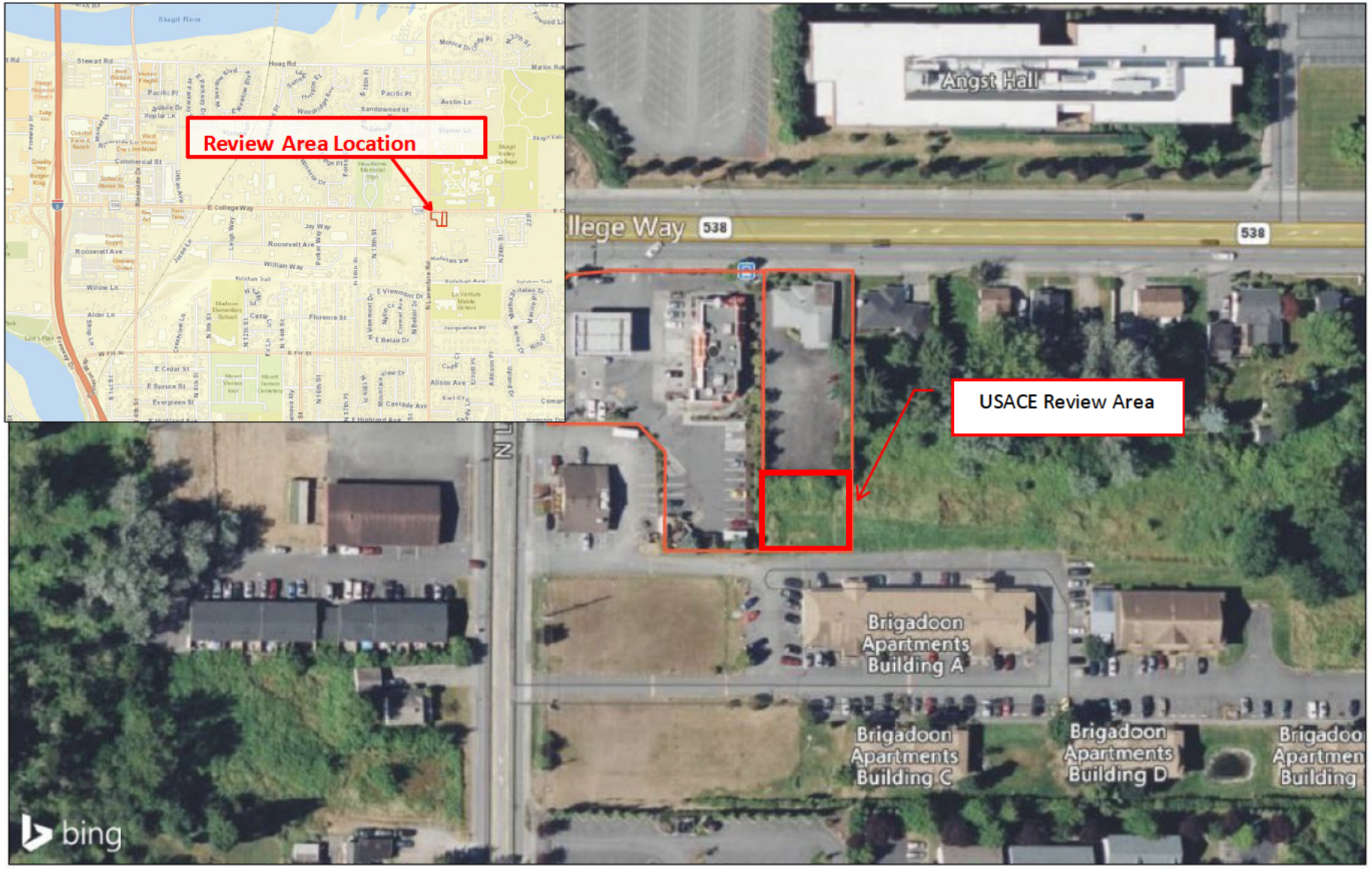

Figure 1. Site map with vicinity map inset-Review Area in red (Bing).

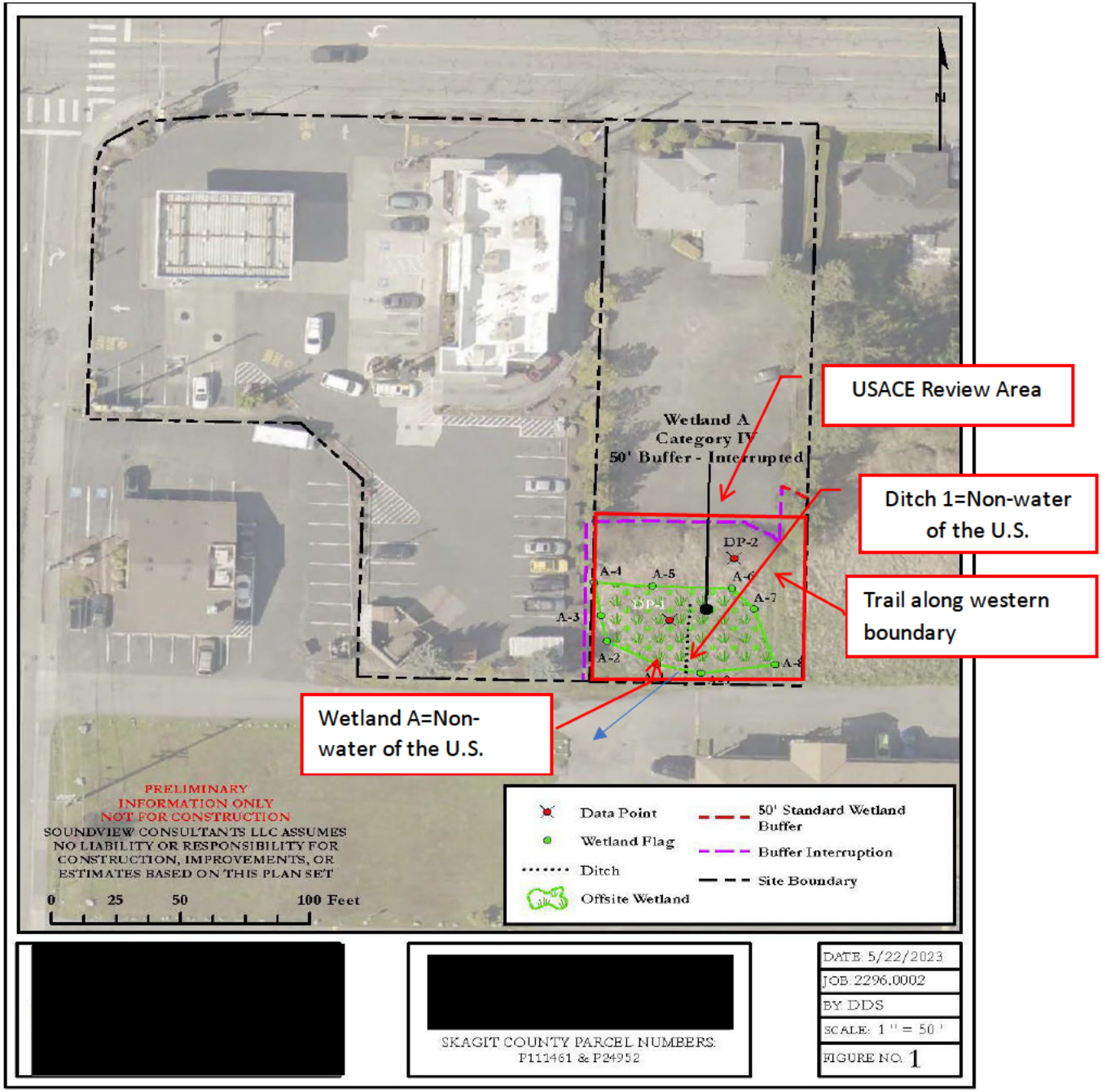

Figure 2. Wetland delineation map.

LIDAR

February 22, 2024

Legend

- County Boundary
- City Names
- Road Labels
- Hydro Labels
- Regional Labels
- 20 foot contours

1:2,257

0 0.0175 0.035 0.07 mi

0 0.03 0.06 0.12 km

Data Accuracy Warning: All GIS data was created from available public records and existing map sources. Map features have been adjusted to achieve a best-fit registration. While great care was taken in this process, maps from different sources rarely agree as to the precise location of geographic features. Map discrepancies can be as great as 300 feet.

Figure 3. LIDAR map with topographic contours. Stormwater flows south and west in the area (arrow in blue).

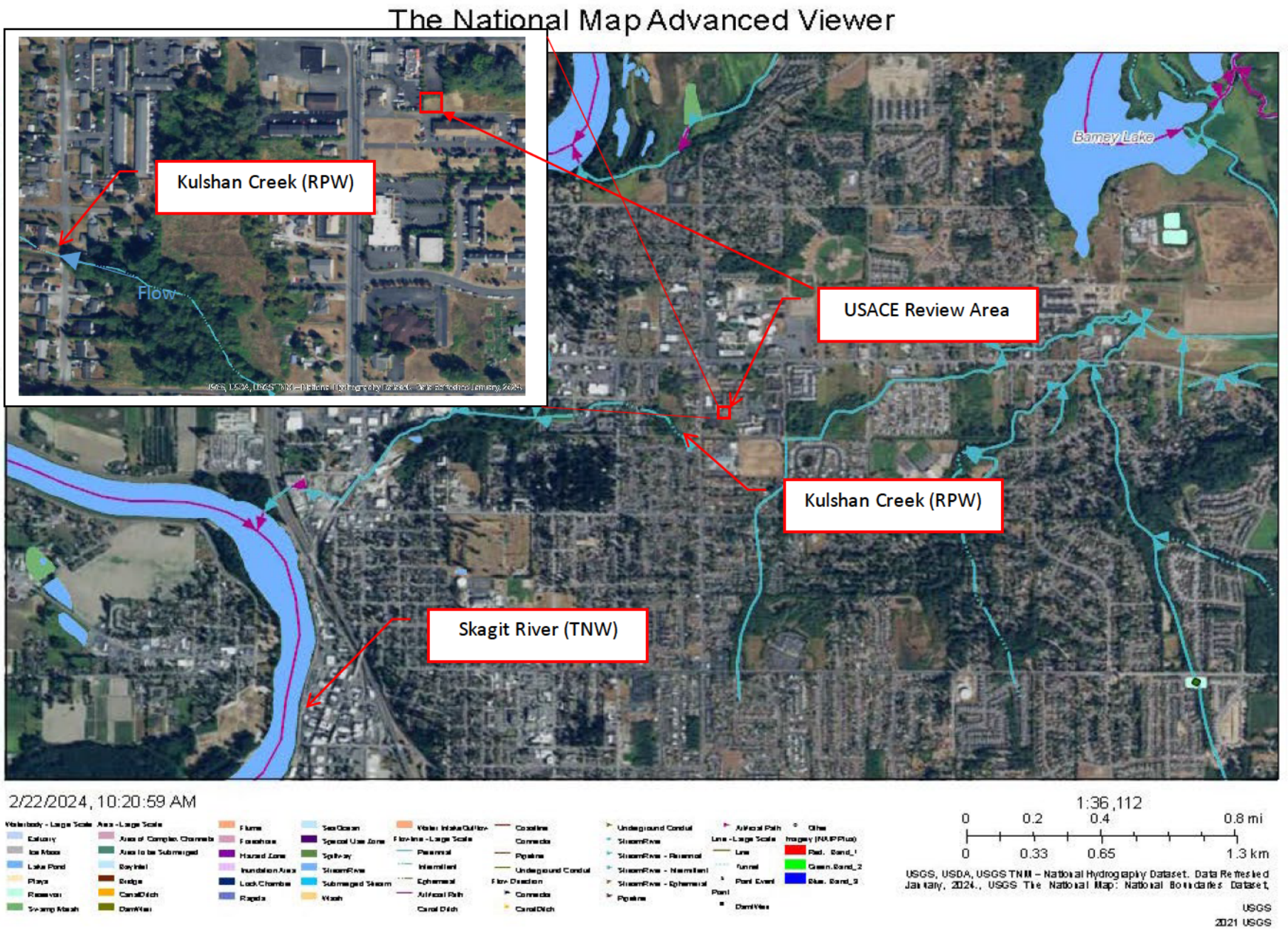

Figure 4. Drainage pathways from Kulshan Creek off-site (inset map) to the Skagit River (TNW).

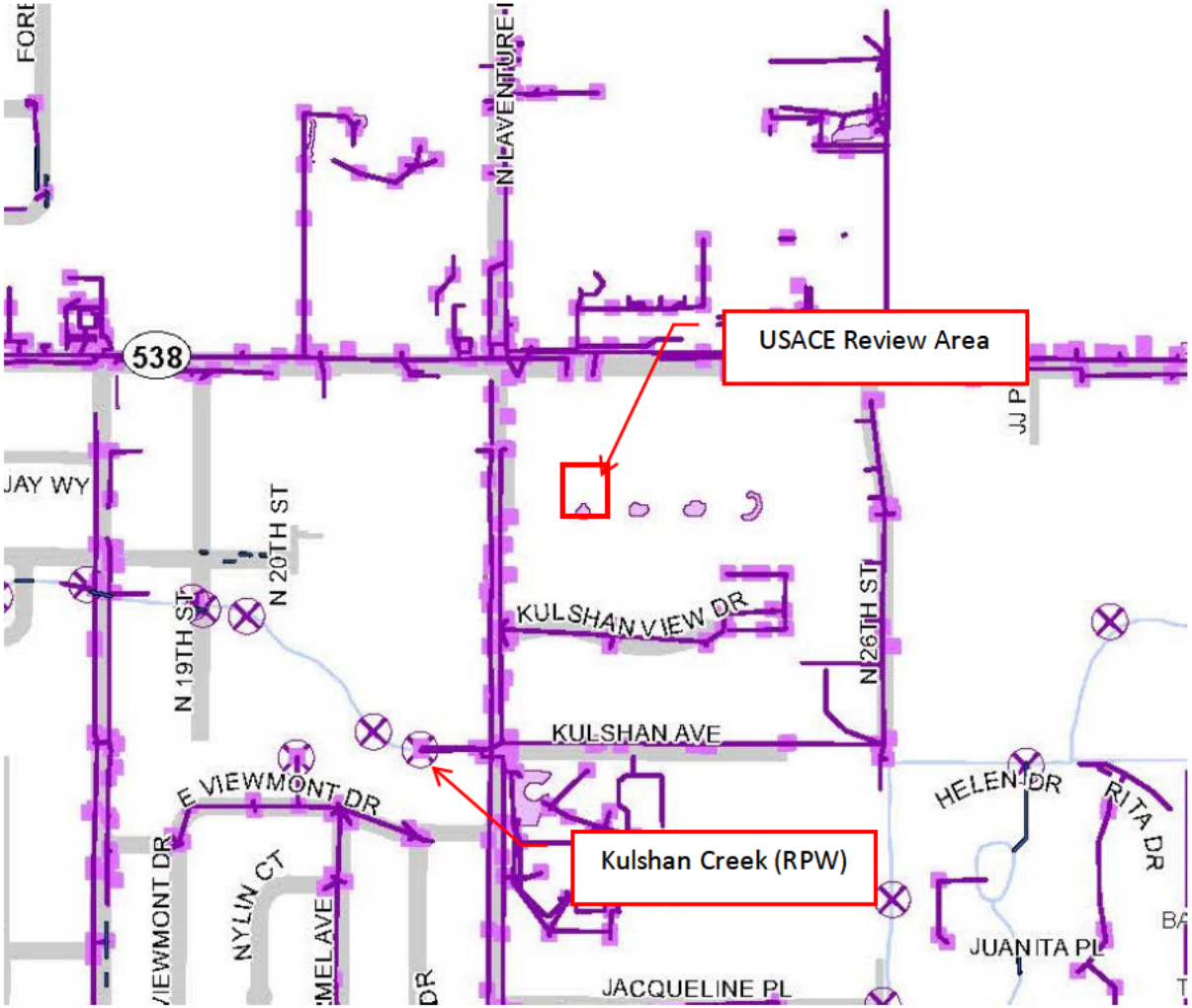

Figure 5. City of Mount Vernon stormwater map features zoomed in to the Review Area. Stormwater conveyance lines in purple.