



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

April 18, 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-2023-31; MFR 1 of 1.

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.

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

- i. Wetland A, non-jurisdictional, Section 404.
- ii. Wetland B, non-jurisdictional, Section 404.
- iii. Wetland C, non-jurisdictional, Section 404.
- iv. Wetland F, non-jurisdictional, Section 404.
- v. Wetland G, non-jurisdictional, Section 404.
- vi. Wetland I, non-jurisdictional, Section 404.
- vii. Wetland J, non-jurisdictional, Section 404.
- viii. Wetland K, non-jurisdictional, Section 404.
- ix. Internal Ditch, non-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. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

The 14-acre review area is located at Covington, King County, Washington. Lat: 47.380380°; Long: -122.121569°. The review area is semi-developed, consisting of forested areas on the eastern portion and maintained (mowed) fields on the western half. The property is bound by 164th Avenue Southeast to the west, residential properties to the north, undeveloped forested lands and 116th Place Southeast to the east, and a public school to the south. A paved driveway bisects the site from west to east and provides access to a single family residence located on the north central side of the site. Topography on the site is generally flat with shallow depressions. The site has a slight slope northeast to southwest on the western 2/3 of the property and northwest to southeast on the eastern 1/3 of the property. Elevations on the site range from approximately 60 to 70 feet above mean sea level. Soils at the site are mapped as Alderwood gravelly sandy loam, 8 to 15 percent slopes, not hydric. A delineation identified ten wetlands on the site as follows:

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Wetland A – PEM Category IV – 0.04 acres
Wetland B – PEM Category IV - 0.07 acres
Wetland C – PEM Category IV – 0.08 acres
Wetland F - PEM Category IV – 0.12 acres
Wetland G - PEM Category IV – 0.003 acres
Wetland I – PSS Category III – 0.03 acres
Wetland J – PFO Category IV – 0.10 acres
Wetland K - PEM Category IV – 0.03 acres
TOTAL – 0.473 acres

Note: Categories based on WA State Wetland Rating System for Western Washington.

In addition, the delineation identified two potential ephemeral drainage features, a 7110-foot long interior ditch and Ditch A. The interior ditch is a very shallow (6 inch deep) depression along the driveway that only conveys water during heavy rain events. Ditch A is located on the western edge of the property outside the review area and along the east side of 164th Avenue Southeast. Ditch A is approximately 2-foot-wide by 1-foot-deep and only conveys water during heavy rain events. The Corps reviewed Google Earth aerials, and there was no surface water present. Specifically, the Google Earth aerials dated May 9, 2019, and April 28, 2023, did not show surface water with the interior ditch or Ditch A, although the area does appear wet. The Corps utilized the Antecedent Precipitation Tool (APT) and determined normal conditions were present at the time of the May 9, 2019, aerial image and drier than normal conditions were present during the April 28, 2023, aerial image. The previous rainfall date prior to May 9, 2019, was April 28, 2019, which rained 0.019 inches. The previous rainfall data for the April 28, 2023 was April 25th. Rainfall dated record 0.85 inches April 23rd, 0.44 inches April 24th, and 0.0511 inches April 25th. Photos of the features within the delineation were taken on March 9, 2022. The Corps utilized the APT to determine that normal conditions were present at this time. The previous rainfall data documented that it had rained on March 6th and rained 0.2 inches on March 8th as well as rained the day of March 9th. There is no observed surface water within the interior ditch, and only minor puddles within Ditch A.

See attached figures for site location, aerial view, and delineated wetland boundaries. No previous jurisdictional determination has been made for wetlands on 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. Duwamish River, 28.6 miles downstream.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

During extreme rainfall events, hydrology within the western 2/3 of the review area would flow into Ditch A (outside the review area), flows into a piped stormwater conveyance which flows south for 0.8 miles before emptying into a 4.7 acre constructed stormwater pond. During infrequent extended heavy rain events when overflow levels are exceeded, water from the pond may outflow and travel for 0.4 miles through an open channel into another 0.5 acre constructed stormwater pond. Outflow from that pond during infrequent extended heavy rain events when overflow levels are exceeded would flow through an open channel for 0.4 miles and drain into Big Soos Creek (a relatively permanent water), which flows for 4.5 miles to the Green River, which flows for 21.4 miles to the Duwamish River, the nearest TNW. The Duwamish River is a listed navigable waterway on the Navigable Waters of the United States in Washington State dated December 31, 2008, from river mile 0 to river mile 10.

During extreme rainfall events, hydrology from the eastern 1/3 of the review area sheet flows across uplands to offsite ditches that flow for 0.5 miles to Little Soos Creek, which flows for 2.2 miles to Big Soos Creek, which flows for 4.5 miles to the Green River, which flows for 21.4 miles to the Duwamish River, the nearest TNW documented above.

NOTE: Ditch A is located outside of the review area boundary. Ditch A was reviewed as a potential a(3) tributary due to its proximity to the review area and wetlands within the review area about Ditch A. The ditch connects to the City of Covington's stormwater system at the southwest corner of the review area with a flow path as described above for the western 2/3 of the review area. Based on the information associated with the APT and recent rainfall in Section 3, the roadside ditch is an ephemeral feature that has flowing or standing water for only a short duration in direct response to precipitation during heavy rainfall events only. Therefore, Ditch A is not a relatively permanent, standing or continuously flowing body of water and does not meet the definition of an a(3) tributary.

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6. SECTION 10 JURISDICTIONAL WATERS⁵: None.

7. SECTION 404 JURISDICTIONAL WATERS: None.

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): N/A.

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).⁶ 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).

Wetlands A is a 0.04-acre emergent wetland. The nearest known tributary is 1.6 linear miles to the southwest. Wetland A is situated approximately 15 feet west of Ditch A at its nearest boundary. There is no evidence of a defined topographic

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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feature connected Wetland A to Ditch A (located outside of the review area). Outflow from the wetland would sheetflow west across intervening uplands before flowing into Ditch A during extreme conditions. The soil within the review area is mapped Alderwood gravelly sandy loam, 8 to 15 percent slopes, not hydric, which does not contain hydric inclusions. Wetland A is not located within a mapped floodplain. Wetland A does not abut and is not separated by only a natural bank nor is there evidence of a discrete conveyance from Wetland A to an a(1) through a(3) water. There is no continuous surface connection downstream. In accordance with the amended 2023 regulatory definition of Waters of the U.S., Wetland A is not a water of the U.S under (a)(4).

Wetlands B, C, and G within the review area are located within a similar area and share a similar flow path. The wetlands will be evaluated together as they all have similar circumstances. Wetland sizes are described in Section 3 above. Site topography is generally northeast to southwest on the western 2/3 of the property and northwest to southeast on the eastern 1/3 of the property. The review area is not located in a floodplain. Wetlands B, C, and G are fed primarily by rainfall and have two hydroperiods, saturated only and seasonally flooded. As documented in the wetland delineation Wetlands B, C and G do not abut or are adjacent to, via a continuous surface connection, relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3). Wetland B, C and G are not waters of the United States.

Wetland F is a 0.12-acre emergent wetland. Wetland F does not abut nor is it separated by a natural berm and bank from an a(1) through a(3) water . Wetland FF does abuts the internal ditch which flows into Ditch A. According to the City of Covington Stormwater System Map, Ditch A flows into a piped stormwater conveyance which flows south for 0.8 miles before emptying into a 4.7 acre constructed stormwater pond. During infrequent extended heavy rain events when overflow levels are exceeded, water from the pond may outflow and travel for 0.4 miles through an open channel into another 0.5 acre constructed stormwater pond. Outflow from that pond during infrequent extended heavy rain events when overflow levels are exceeded would flow through an open channel for 0.4 miles and drain into Big Soos Creek (a relatively permanent water), which flows for 4.5 miles to the Green River, which flows for 21.4 miles to the Duwamish River, the nearest TNW. Since Wetland F discrete conveyance (the internal ditch) ultimately discharges into a constructed stormwater pond prior to a potential a(1) through a(3) water, the Corps has determined that Wetland F does not provide a continuous surface water connection and is not considered a water of the United States.

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Wetland K is a 0.03-acre emergent wetland. Wetland K does not abut nor is it separated by a natural berm and bank from an a(1) through a(3) water. Wetland K does abut Ditch A (located outside the review area and documented as a non-RPW ditch) on its western boundary. According to the City of Covington Stormwater System Map, Ditch A flows into a piped stormwater conveyance which flows south for 0.8 miles before emptying into a 4.7 acre constructed stormwater pond. During infrequent extended heavy rain events when overflow levels are exceeded, water from the pond may outflow and travel for 0.4 miles through an open channel into another 0.5 acre constructed stormwater pond. Outflow from that pond during infrequent extended heavy rain events when overflow levels are exceeded would flow through an open channel for 0.4 miles and drain into Big Soos Creek (a relatively permanent water), which flows for 4.5 miles to the Green River, which flows for 21.4 miles to the Duwamish River, the nearest TNW. Since Wetland K discrete conveyance (Ditch A) discharges into a constructed stormwater pond prior to a potential a(1) through a(3) water, the Corps has determined that Wetland K does not provide a continuous surface water connection and therefore is not considered a water of the United States.

Wetland I is a 0.03-acre emergent wetland. The nearest known tributary is 0.5 linear miles to the southeast. Wetland I is situated approximately 120 feet west of an unnamed ditch at its nearest boundary. There is no evidence of a defined topographic feature connected Wetland I to the unnamed ditch (located outside of the review area). Outflow from the wetland would sheetflow east across intervening uplands before flowing into the unnamed ditch during extreme rainfall conditions. The soil within the review area is mapped Alderwood gravelly sandy loam, 8 to 15 percent slopes, non-hydric, which contain hydric inclusions. Wetland I is not located within a mapped floodplain. Wetland I does not abut and is not separated by only a natural bank nor is there evidence of a discrete conveyance from Wetland I to an a(1) through a(3) water. There is no continuous surface connection downstream. In accordance with the amended 2023 regulatory definition of Waters of the U.S., Wetland I is not a water of the U.S. under (a)(4).

Wetland J is a 0.10-acre forested wetland. The nearest known tributary is 0.25 linear miles to the southeast. Wetland J is situated approximately 100 feet north of an unnamed ditch at its nearest boundary. There is no evidence of a defined topographic feature connected Wetland I to the unnamed ditch (located outside of the review area). Outflow from the wetland would sheetflow south across intervening uplands before flowing into the unnamed ditch during extreme rainfall

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conditions. The soil within the review area is mapped Alderwood gravelly sandy loam, 8 to 15 percent slopes, non-hydric, which contain hydric inclusions. Wetland I is not located within a mapped floodplain. Wetland J does not abut and is not separated by only a natural bank nor is there evidence of a discrete conveyance from Wetland I to an a(1) through a(3) water. There is no continuous surface connection downstream. In accordance with the amended 2023 regulatory definition of Waters of the U.S., Wetland J is not a water of the U.S under (a)(4).

The 710-foot long internal ditch running adjacent to the driveway flows west into Ditch A. Ditch A flows into a piped stormwater conveyance which flows south for 0.8 miles before emptying into a 4.7 acre constructed stormwater pond. During extended heavy rain events when overflow levels are exceeded, water from the pond may outflow and travel for 0.4 miles through an open channel into another 00.5 acre constructed stormwater pond. Outflow from that pond during extended heavy rain events when overflow levels are exceeded would flow through an open channel for 0.4 miles and drain into Big Soos Creek, which flows for 4.5 miles to the Green River, which flows for 21.4 miles to the Duwamish River, the nearest TNW. Based on the information associated with the APT and recent rainfall in Section 3, the internal ditch is an ephemeral feature that has flowing or standing water for only a short duration in direct response to precipitation during heavy rainfall events only. Therefore, the internal ditch is not a relatively permanent, standing or continuously flowing body of water and does not meet the definition of an a(3) tributary and is not a water of the United States.

9. DATA SOURCES.

- a. “*Wetland Delineation Report, Kingfisher Energy Storage*,” revision dated 2 August 2023.
- b. “City of Covington Stormwater System Map” dated December 2018. Accessed 25 January 2024 at <https://safe.menlosecurity.com/doc/docview/viewer/docN8AB62C68D149d0fe666f57e97c52d45387d82149ec79b592a52eff120633002b11ba32530246>
- c. USGS National Hydrography Dataset at <https://www.arcgis.com/apps/mapviewer/index.html?layers=4bd9b6892530404abfe13645fcb5099a>

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- d. National Wetland Inventory at <https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper>

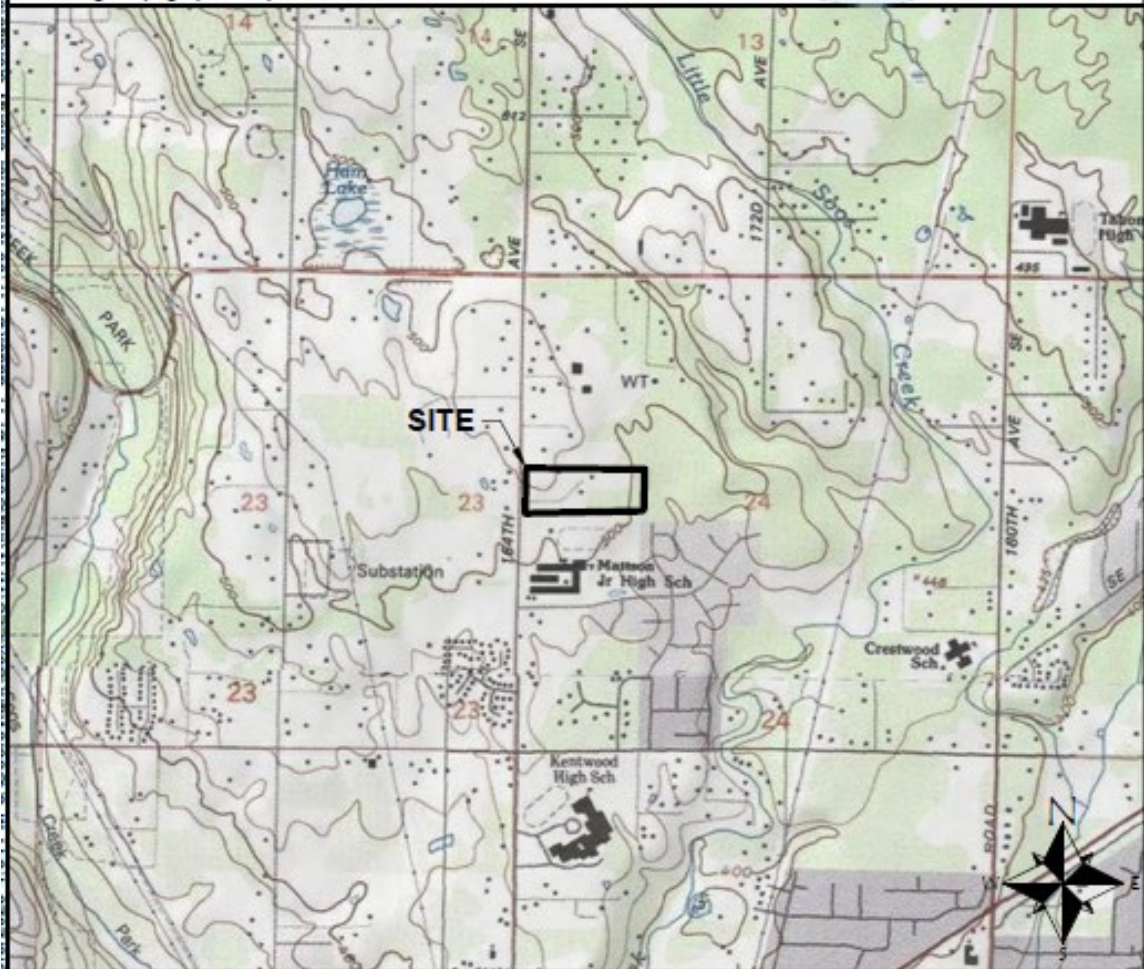
10. OTHER SUPPORTING INFORMATION. N/A

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.

PROJECT VICINITY MAP

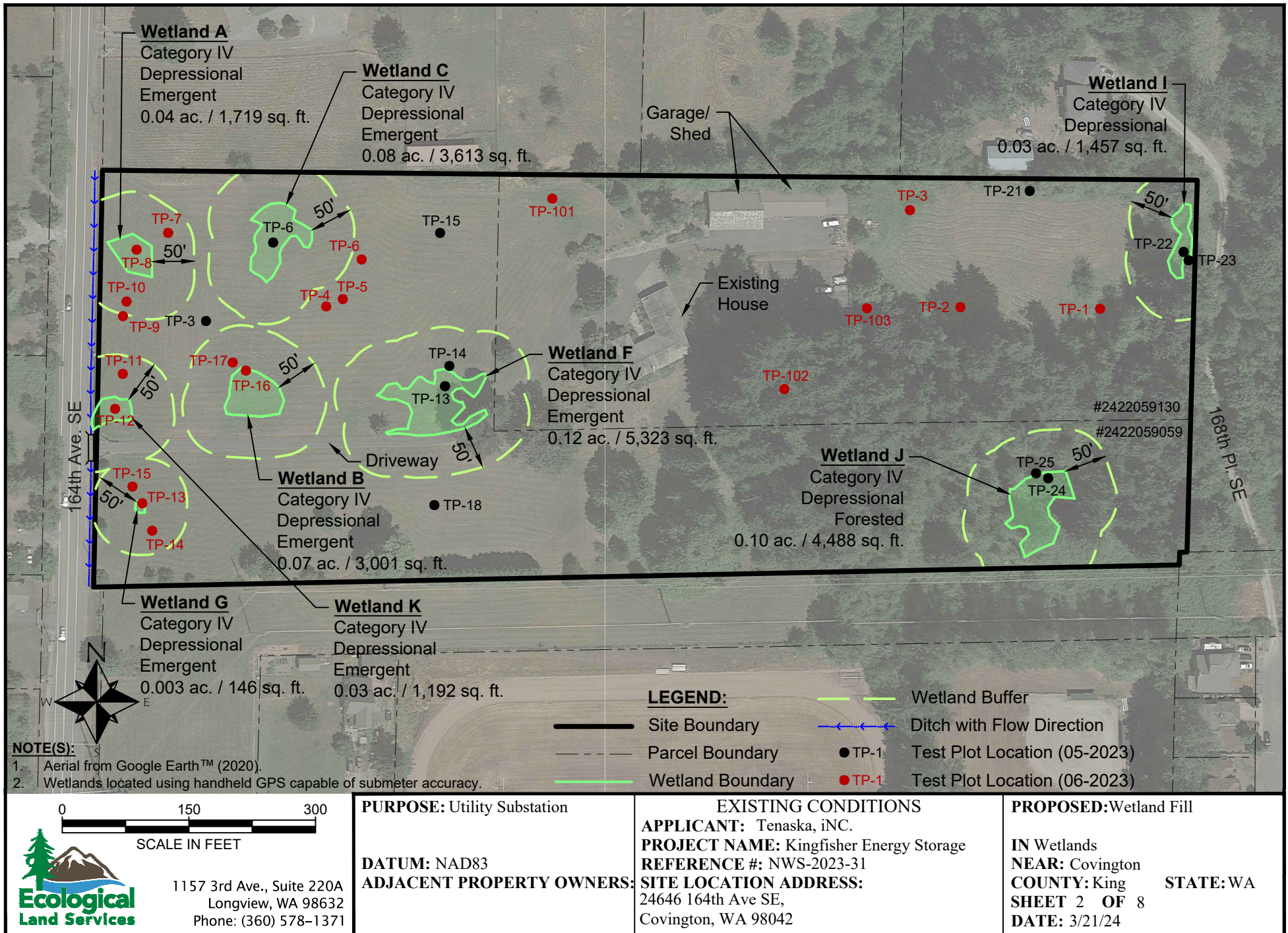
Tenaska Site Jurisdictional Determination Figures

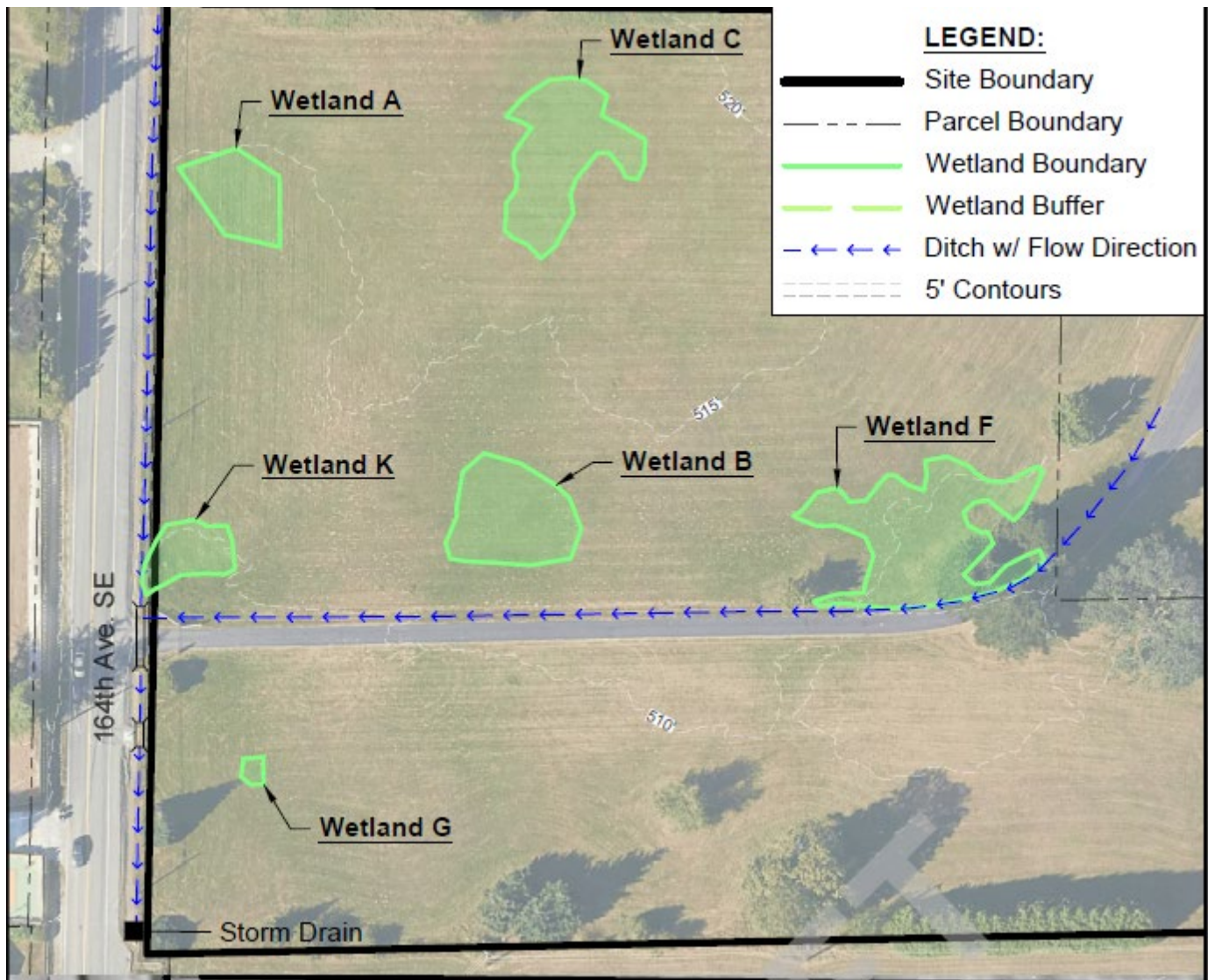
NOTE:
Quadrangle topographic map from USGS.



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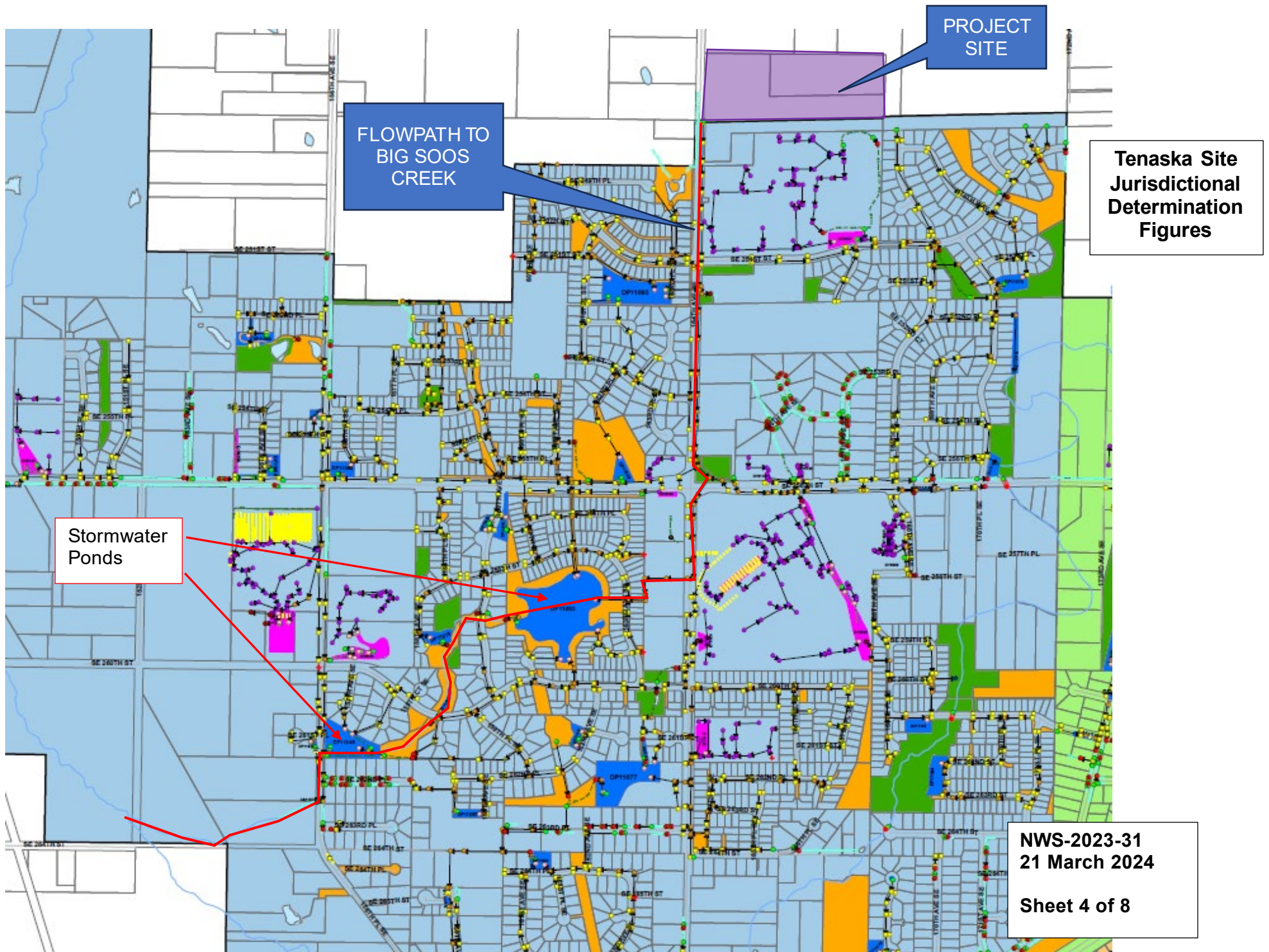


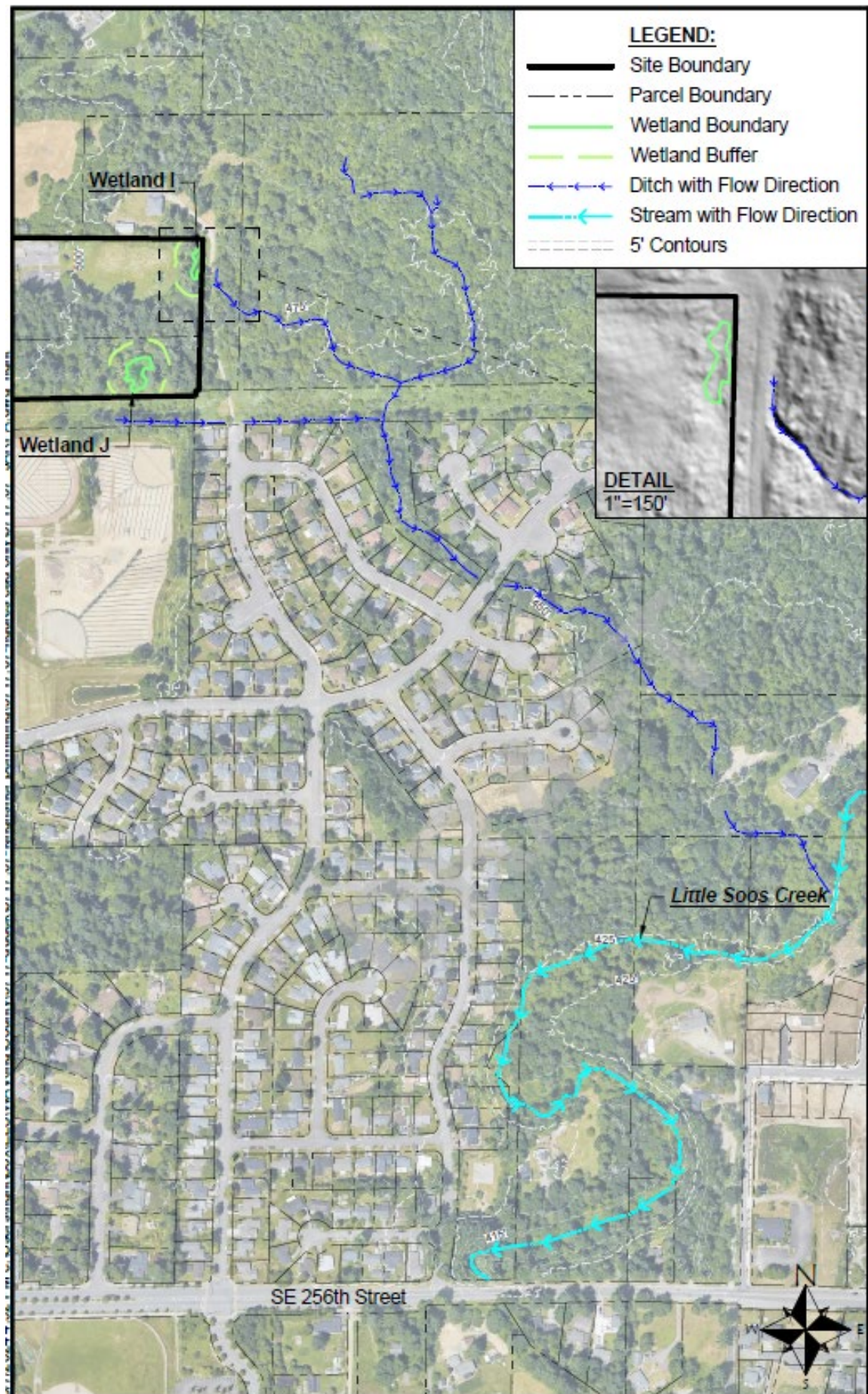


**Tenaska
Onsite
Western Area
Flow Paths**

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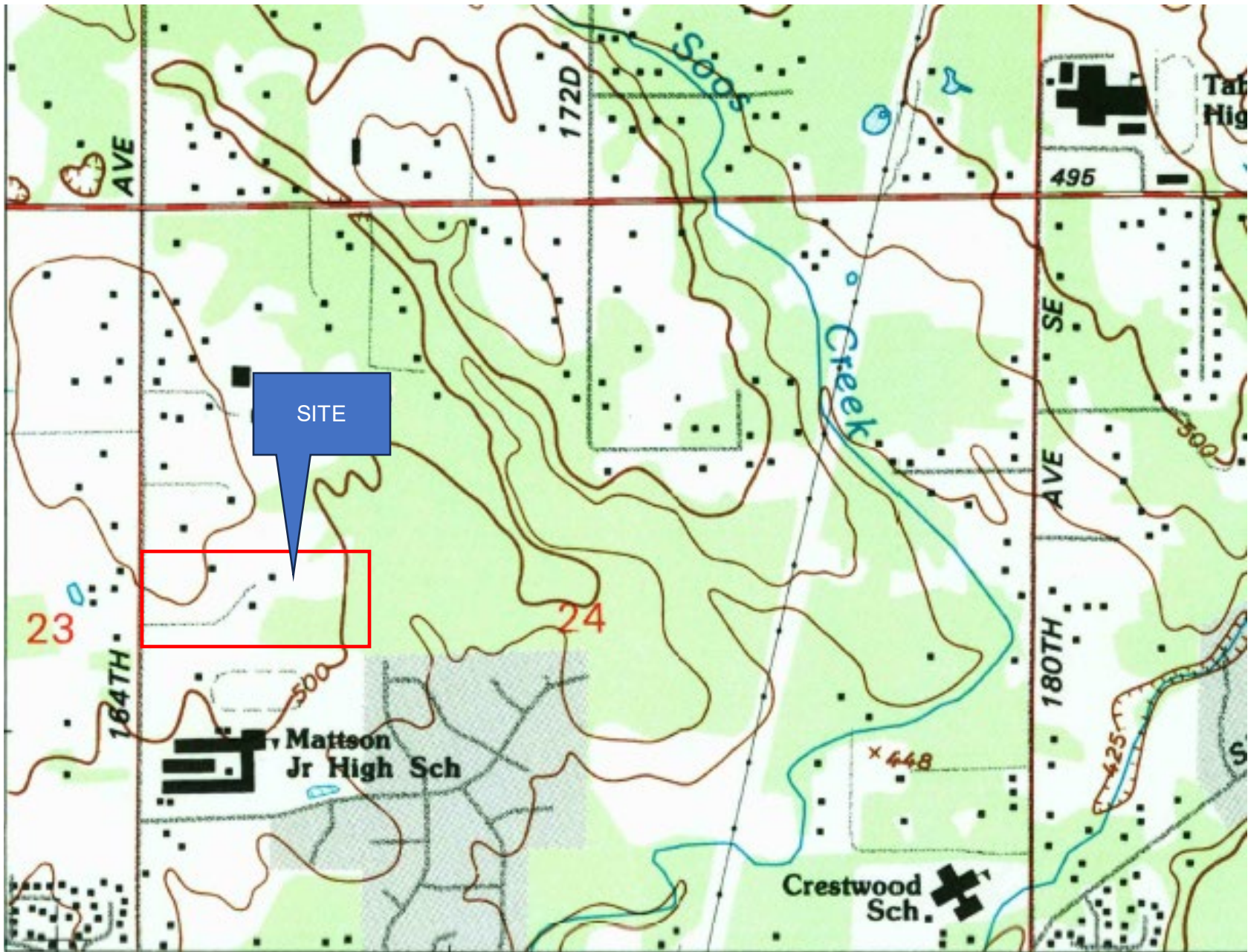




**Tenaska Site
Eastern Area
Flow Paths**

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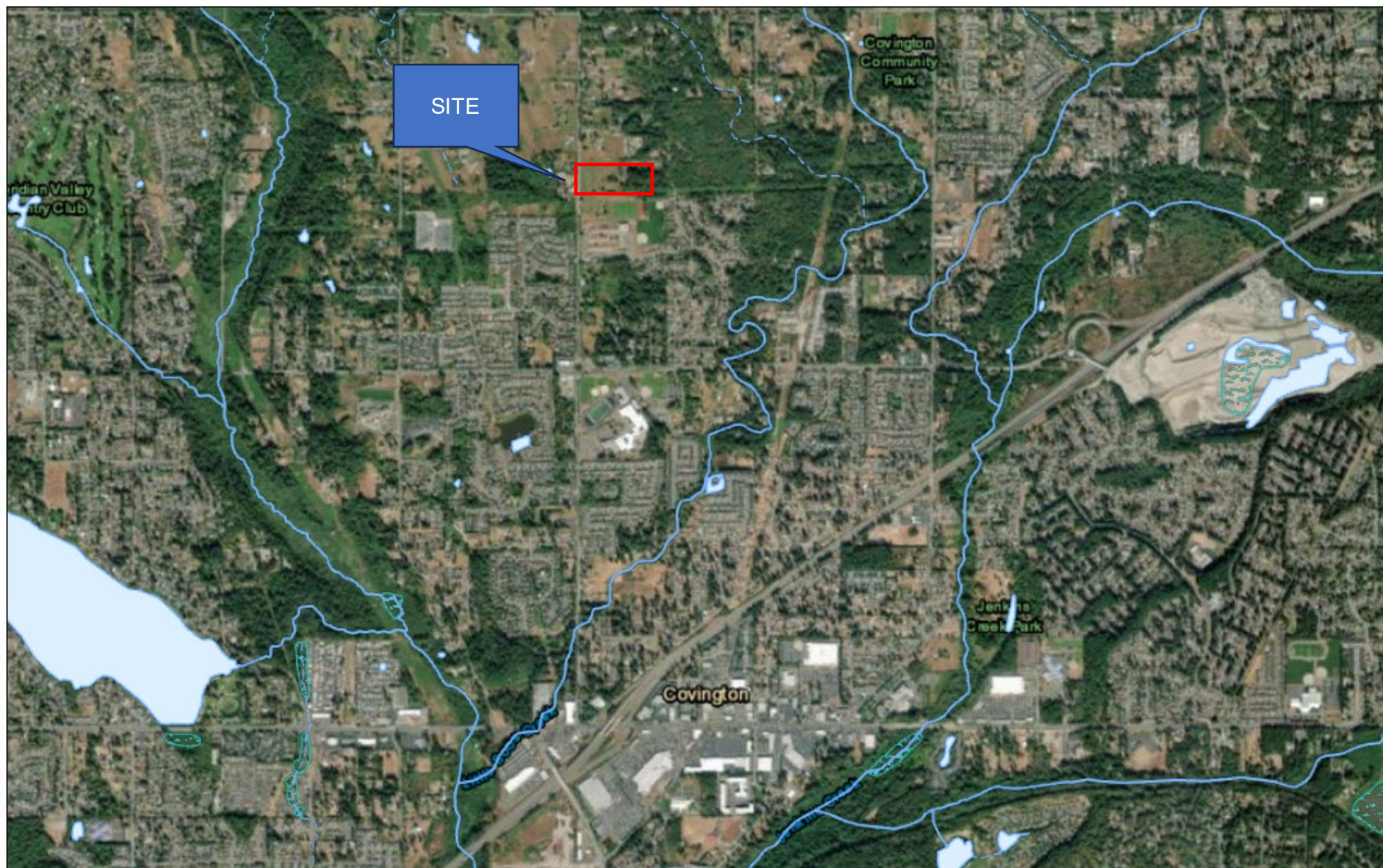
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TOPO MAP

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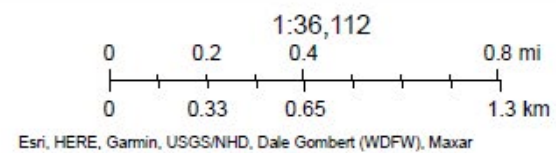
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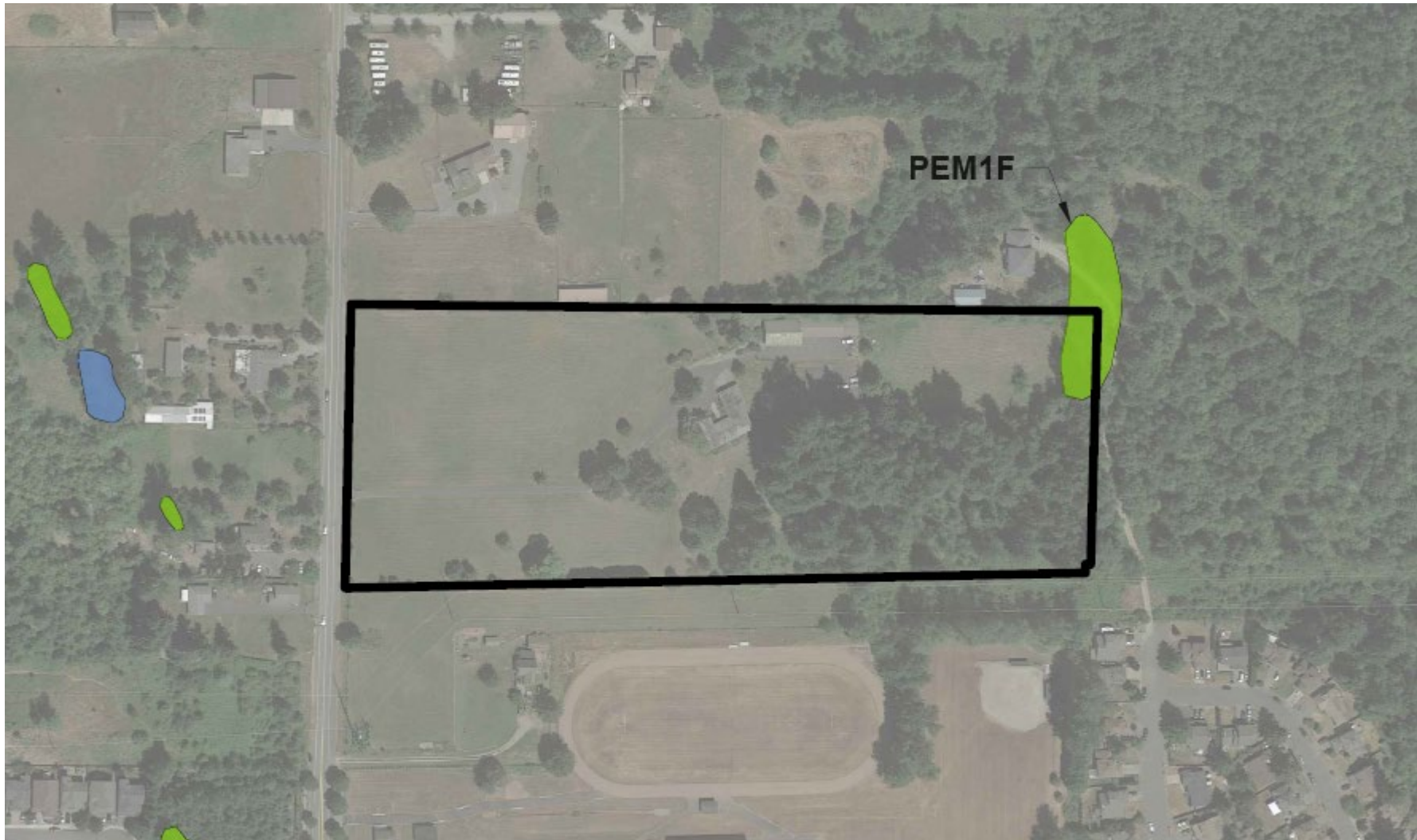


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