



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

August 9, 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-2023-790; MFR 1 of 1. ²

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 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 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 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- 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. Wetland A is not a water of the U.S.
 - ii. Wetland B is not a water of the U.S.
 - iii. Wetland C is not a water of the U.S.
 - iv. Wetland D is not a water of the U.S.
 - v. Wetland E is not a water of the U.S.
 - vi. Drainage Ditch 1 is not a water of the U.S.
 - vii. Drainage Ditch 2 is not a water of the U.S.
 - viii. Drainage Ditch 3 is not a water of the U.S.
 - ix. Drainage Ditch 4 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 located on an approximately 31.31-acre property located at 31109 3rd Avenue in Black Diamond, King County, Washington (47.324238 N latitude, -122.009792 W longitude). The review area consists of five

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(5) wetlands (Wetlands A to E) and four (4) drainage ditches (Drainage Ditches 1 to 4) as depicted in the enclosed figure. The subject property is developed with a commercial building on the southeast corner and with a single-family residence and associated infrastructure adjacent to 3rd Avenue /SR-169 on the east-central portion of the review area. Topography onsite slopes gradually from the northeast to the southwest with elevations from 680 feet above mean sea level (amsl) to 635 feet amsl. The soil within the review area is mapped Alderwood gravelly sandy loam, 8 to 15 percent slopes, which is a moderately-well drained non-hydric soil with minor (less than five percent) components of Norma and Shalcar hydric soils. See attached figures for site location and location of the wetlands and drainage ditches. No previous jurisdictional determination has been made for the wetlands or drainage ditches on the site.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Duwamish River 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. Hydrology Drainage Ditches 1 and 2 would not flow offsite. During discrete events under wetter than normal conditions, surface water from Wetland C may flow into Drainage Ditch 4 which conveys any potential water west through Wetlands B and A before dispersing into uplands. In addition, under such circumstances, surface water from Wetland E and surrounding upland areas may flow into Drainage Ditch 3 then into a culvert under 3rd Avenue/SR-169. Flows would terminate subsurface. Additional details are provided below.

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.

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6. SECTION 10 JURISDICTIONAL WATERS⁷: N/A⁸

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): 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).

Drainage Ditch 1: Drainage Ditch 1 is 904 linear feet (lf) in size. Drainage Ditch 1 does not meet all three wetland criteria (hydrophytic vegetation, hydric soils, and wetland hydrology). Based on historic aerials and historic topographic maps, the ditch was constructed in uplands. Based on the delineation report, specifically Section 5.3, during a period of normal conditions per the Antecedent Precipitation

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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Tool (APT), on October 4, October 17, and November 14, 2018, and January 8, 2019, no flows were observed within the drainage ditches. According to the APT, it had rained 0.94-inch on January 3, 2019, 0.23-inch on January 4, 2019, 0.01-inch on January 5, 2019, 0.50-inch on January 6, 2019, 0.05-inch on January 7, 2019, and 0.12-inch on January 8, 2019. Any flows within the drainage ditch occurs in short duration and in direct response to precipitation during discrete events. This flow pattern applies Drainage Ditches 1 to 4 within the review area. The drainage ditch would only flow in direct response to extreme periods of precipitation and is considered a non-relatively permanent waterway. In accordance with the 2023 regulatory definition of Waters of the U.S., the drainage ditches meet the exclusion (b)(3) ditches excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. Therefore, the Drainage Ditch 1 is not a waters of the U.S.

Drainage Ditch 2: Drainage Ditch 2 is 342 lf in size. Based on the delineation report, specifically Section 5.3, during a period of normal conditions per the APT, on October 4, October 17, and November 14, 2018, and January 8, 2019, no flows were observed within the drainage ditches. Similar to Drainage Ditch 1, Drainage Ditch 2 does not meet all three wetland criteria and only flows in direct response to precipitation during discrete events; therefore, the drainage ditch is considered non-relatively permanent waterway. Based on historic aerials and historic topographic maps, the ditch was constructed in uplands. In accordance with the 2023 regulatory definition of Waters of the U.S., Drainage Ditch 2 meets the exclusion (b)(3) ditches excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. Therefore, Drainage Ditch 2 is not a waters of the U.S.

- 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: Wetland A is 247 square feet in size. The hydroperiod of the subject wetland is saturation. As described above, any flows received from Drainage Ditch 4 would disperse west, offsite into uplands. The wetland is located at least 0.1-mile from the nearest known watercourse, an unnamed stream, located west of the review area. The wetland is not located within a floodplain. As documented in the delineation, Wetland A does not abut, is not separated by natural berm or bank, nor does Wetland A have a discrete conveyance connection to an (a)(1),

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(a)(2), or (a)(3) water. Based on the above information, Wetland A does not have a continuous surface connection downstream to an (a)(1) through (a)(3) water and therefore, is not a water of the U.S.

Wetland B: Wetland B is 124 square feet in size. As documented in the delineation, Wetland B does not abut, is not separated by natural berm or bank, nor does Wetland B have a discrete conveyance connection to an (a)(1), (a)(2), or (a)(3) water. The hydroperiod of the subject wetland is saturation. As described above, any flows received from Drainage Ditch 4 would disperse west, into Wetland A and then offsite into uplands. The wetland is located at least 0.1-mile from the nearest known watercourse, an unnamed stream, located west of the review area. The wetland is not located within a floodplain. Based on the above information, Wetland B does not have a continuous surface connection downstream to an (a)(1) through (a)(3) water and therefore, is not a water of the U.S.

Wetland C: Wetland C is 1,447 square feet in size. The hydroperiod of the subject wetland is saturation. As described above, any flows received from Drainage Ditch 4 would disperse west, into Wetlands B and A and then offsite into uplands. The wetland is located at least 0.1-mile from the nearest known watercourse, an unnamed stream, located west of the review area. The wetland is not located within a floodplain. As documented in the delineation, Wetland C does not abut, is not separated by natural berm or bank, nor does Wetland C have a discrete conveyance connection to an (a)(1), (a)(2), or (a)(3) water. Based on the above information, Wetland C does not have a continuous surface connection downstream to an (a)(1) through (a)(3) water and therefore, is not a water of the U.S.

Wetland D: Wetland D is 170 sf in size onsite and extends slightly offsite to the south. The hydroperiod of the subject wetland is saturation and the unit has no outlet. The nearest known waterbody is Ginder Creek and is located at least 0.2-mile east of the wetland. Ginder Creek is separated from the wetland by commercial and residential development. The wetland is not located within a floodplain. As documented in the delineation, Wetland D does not abut, is not separated by natural berm or bank, nor does Wetland D have a discrete conveyance connection to an (a)(1), (a)(2), or (a)(3) water. Based on the above information, Wetland D does not have a continuous surface connection downstream to an (a)(1) through (a)(3) water and therefore, is not a water of the U.S.

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Wetland E: Wetland E is 2,112 sf in size. As documented in the delineation, Wetland E does not abut, is not separated by natural berm or bank, nor does Wetland E have a discrete conveyance connection to an (a)(1), (a)(2), or (a)(3) water. The hydroperiod for Wetland E is saturation with seasonal flooding at the lowest topographic points within the unit. Drainage Ditch 3 originates at Wetland E and conveys any potential surface flows from the wetland and surrounding upland areas to a culvert inlet located within the review area. The culvert is orientated west-east under 3rd Avenue/SR-169. The City of Black Diamond (City) identifies the culvert as Pipe P-607 which conveys flows into another underground pipe identified as P-606. P-606 terminates underground with no connection to any other drainage infrastructure. The City identifies another pipe (P-463) beneath 3rd Avenue/SR-16 located outside of the review area and at least 500 feet south of P-606. P-463 is connected to a catch basin. No roadside ditches were observed on the west nor east side of 3rd Avenue/SR-169. Therefore, there is no surface or subsurface connection between the culvert, P-606, and P-607 to P-463 or the catch basin. As such, hydrology within Wetland E terminates subsurface. As previously noted, any flows within Drainage Ditch 3 would only be in direct response to discrete events during wetter than normal conditions. Photos taken on May 3, 2024 illustrate ponding observed within Drainage Ditch 3. While conditions during that time were drier than normal, according to the APT, it rained a total of 3.01 inches within the preceding week from April 26, 2024 to May 3, 2024. The wetland is located at least 0.2-mile from Ginder Creek, located east of the review area. Ginder Creek is separated from the wetland by commercial and residential development. Wetland E is not located within a floodplain. Based on the above information, 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.

Drainage Ditch 3: Drainage Ditch 3 is 93 lf in size. Similar to Drainage Ditches 1 and 2 and as described above under Wetland E, Drainage Ditch 3 does not meet all three wetland criteria and only flows in direct response to precipitation during discrete events; therefore, the drainage ditch is considered non-relatively permanent waterway. Therefore, the drainage ditch is considered non-relatively permanent waterway. As described above, the drainage ditch also terminates subsurface and does not provide a downstream connection to an (a)(1) or (a)(2) water. Therefore, Drainage Ditch 3 is not a waters of the U.S.

Drainage Ditch 4: Drainage Ditch 4 is 176 lf in size. Similar to Drainage Ditches 1 to 3, Drainage Ditch 4 does not meet all three wetland criteria. . Based on available information including correspondence with the authorized agent,

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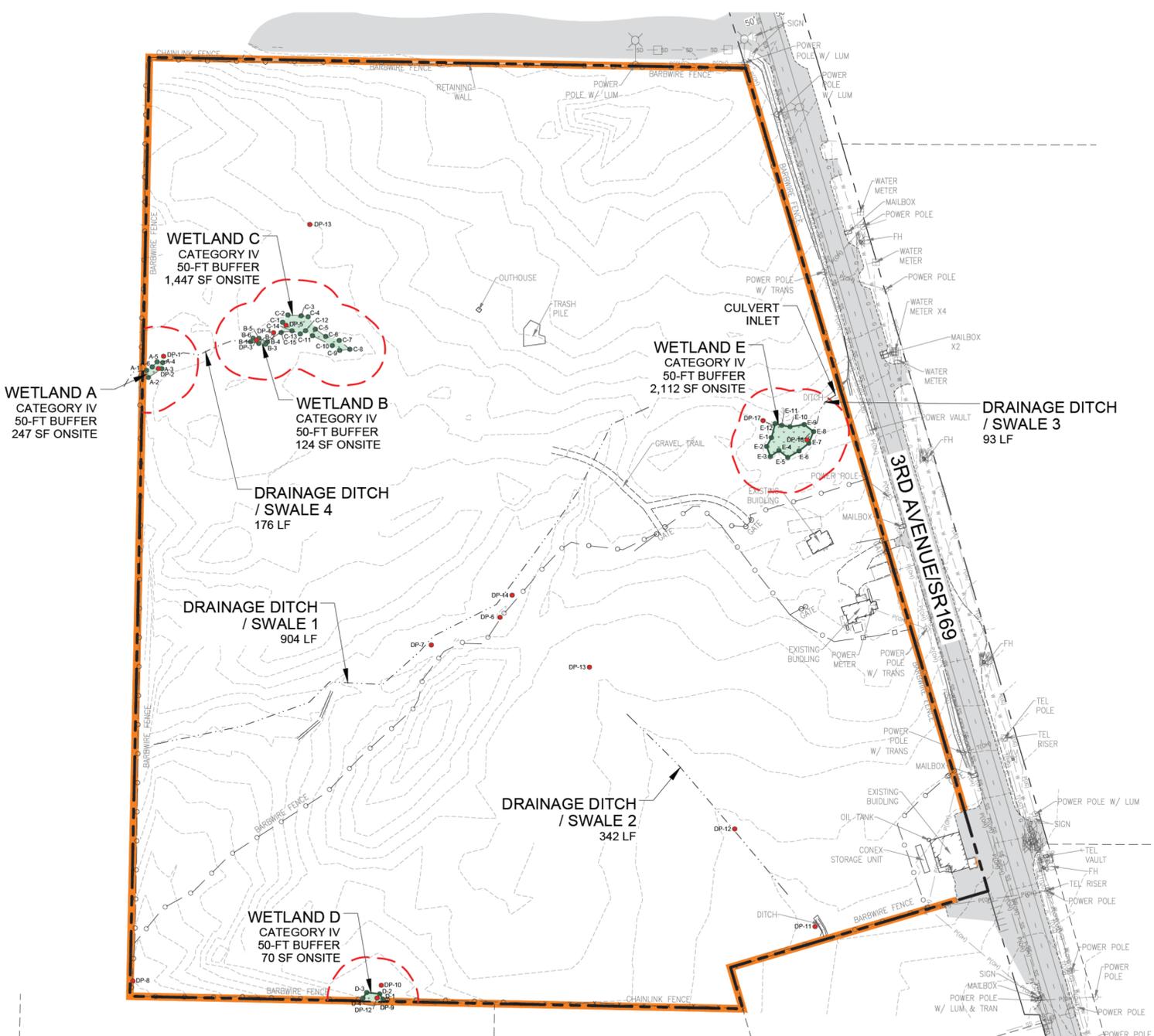
Drainage Ditch 4 also dissipates in upland areas and does not provide a downstream connection to an (a)(1) or (a)(2) water. Therefore, Drainage Ditch 4 is not a waters of the U.S.

9. DATA SOURCES.

- a. Delineation report including photos, dated November 27, 2023, submitted on behalf of the applicant: Wetland and Fish and Wildlife Habitat Assessment Report, 30 Acres
- b. Supplemental information including additional photos and figures, submitted on behalf of the applicant, via email on May 7, 2024
- c. Antecedent Precipitation Tool accessed May 8, 2024
- d. Google Maps Street View accessed May 8, 2024
- e. King County iMap web portal accessed May 8, 2024
- f. City of Black Diamond web app accessed December 8, 2023
- g. Washington Depart of Fish and Wildlife Fish Passage web tool accessed May 23, 2024
- h. U.S. Geological Survey topo viewer accessed December 8, 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.



VICINITY MAP



SOURCE: ESRI (ACCESSED 6/20/2023)

SOURCE:

DEVELOPMENT SITE LOCATION

THE NW ¼ OF SECTION 11,
TOWNSHIP 21N, RANGE 06E, WM

MITIGATION SITE LOCATION

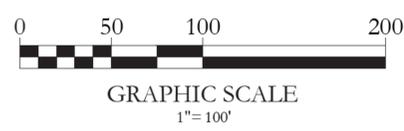
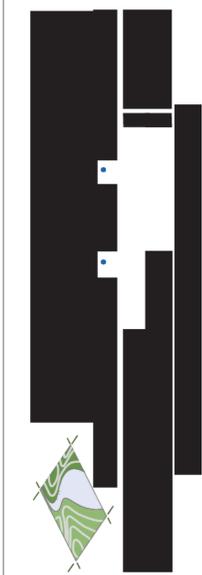
THE NW ¼ OF SECTION 14,
TOWNSHIP 21N, RANGE 06E, WM

APPLICANT/OWNER

NAME: PK PROPERTIES LLC.
ADDRESS: PO BOX 571
BLACK DIAMOND, WA 98010
CONTACT: WESTON BUTT
PHONE: (206) 915-1741
E-MAIL: WESTONBUTT@HOTMAIL.COM

ENVIRONMENTAL CONSULTANT

SOUNDVIEW CONSULTANTS LLC
2907 HARBORVIEW DRIVE
GIG HARBOR, WA 98355
(253) 514-8952



PLAN LEGEND

- AJD REVIEW AREA
- PROPERTY LINE
- EXISTING WETLAND BOUNDARY
- APPROXIMATED WETLAND BOUNDARY (NOT SURVEYED)
- WETLAND BUFFER
- W-# WETLAND FLAG LOCATION
- DP-# DATA PLOT LOCATION
- DRAINAGE SWALE/DITCH
- EXISTING CONTOUR

NOTE: WETLANDS A, B, AND C NOT SURVEYED

30 ACRES

DEVELOPMENT SITE:
31109 3RD AVENUE
MITIGATION SITE:
XXXXX ROBERTS DRIVE
BLACK DIAMOND, WA 98010
KING COUNTY PARCEL NUMBERS:
1121069008 & 1421069177

DATE: 5/16/2024

JOB: 1768.0001

BY: MW

SCALE: AS SHOWN

SHEET: 1