



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

CENWS-Seattle District

July 30, 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 NWS-2024-414.

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 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.

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2024-414

- 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. Wetland B, non-jurisdictional
 - iii. Wetland E, 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 1.5 acre review area is located in an unincorporated area northeast of Duvall, King County, Washington, Lat: 47.769159 , Long: -121.92683. The review area is within in the Cherry Creek subwatershed (HUC 171100100602) of the Snohomish Water Resources Inventory Area (WRIA 7). It is located in a rural area northeast of Duvall. The property is undeveloped but for a utility easement that runs through the western portion of the review area. Site topography is characterized by gentle gradients that slope down to the southwest. Much of the site previously contained second or third growth mixed broadleaf-conifer forest, with many large stumps persisting from early logging.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Snoqualmie River, approximately 1.55 miles directly west of the review area, which flows into the Puget Sound. The Snoqualmie River is listed as a navigable waterway on the Navigable Waters of the United States in Washington State list dated December 31, 2008.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no flowpath from the subject aquatic resources to a TNW, the territorial seas, or interstate waters. The nearest tributary is an unnamed tributary to the North Fork Cherry Creek, 1,015 feet

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2024-414

west of the review area. The unnamed tributary flows into the North Fork Cherry Creek 1.45 miles south of the review area. The North Fork Cherry Creek flows into Cherry Creek, which then flows 1.7 miles and into the Snoqualmie River, a Navigable Water of the United States.

6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to 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*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - 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

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 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.

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).⁷ 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).

Ditch 1: Ditch 1 is approximately 300 linear feet in size. Ditch 1 conveys a small amount of surface flow originating from seeps associated with a high groundwater table in the vicinity of Wetland E, and runoff from the adjacent driveway. Water flows approximately 300 feet east, through Ditch 1 and then infiltrates completely into Wetland B, a depressional wetland with no outlet. The ditch is vegetated with dense reed canarygrass and blackberry, and lacks sufficient flow energy to scour vegetation and perpetuate an active channel. Duration of flow is seasonal as it dries up during the spring, summer, and fall, but appears to have continuous seasonal flow during the winter. The ditch was artificially constructed and was excavated in a location believed to be non-wetland and non-stream. The ditch now conveys drainage to Wetland B, and is likely the primary water source for Wetland B. No other bed and bank characteristics, scour, sorted sediments, drainage patterns or other OHWM indicators were observed. The ditch drains to Wetland B but does not connect to any other wetland, stream or other aquatic feature. The Corps has determined that Ditch 1 does not connect downstream to an (a)(1) or (2) water and is therefore not a water of the U.S.

Wetland B: Wetland B is a 987 square feet (SF) palustrine, forersted, depressional wetland. The source of hydrology for Wetland B appears to be mostly from Ditch 1. The presence of an algal mat indicated that the wetland has

⁷ 88 FR 3004 (January 18, 2023)

CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2024-414

long-term seasonal ponding, however, much of the wetland did not exhibit a high-water table or saturation in the top 12 inches during field investigation, as documented by the wetland delineation report prepared by DCG Watershed dated April 5, 2022. Wetland B does not have an outlet. Although Wetland B is connected to Ditch 1, Ditch 1 is not a Water of the US as documented above. Wetland B 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 B 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 E: Wetland E is a 437 SF palustrine, forested, depressional wetland. Wetland E is a small wetland that appears to derive hydrology from rainwater and groundwater; the wetland is located approximately 21 feet upgradient, northwest from Ditch 1. No surface connection was observed from Wetland E to Ditch 1. Wetland E does not have an outlet. 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.

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.

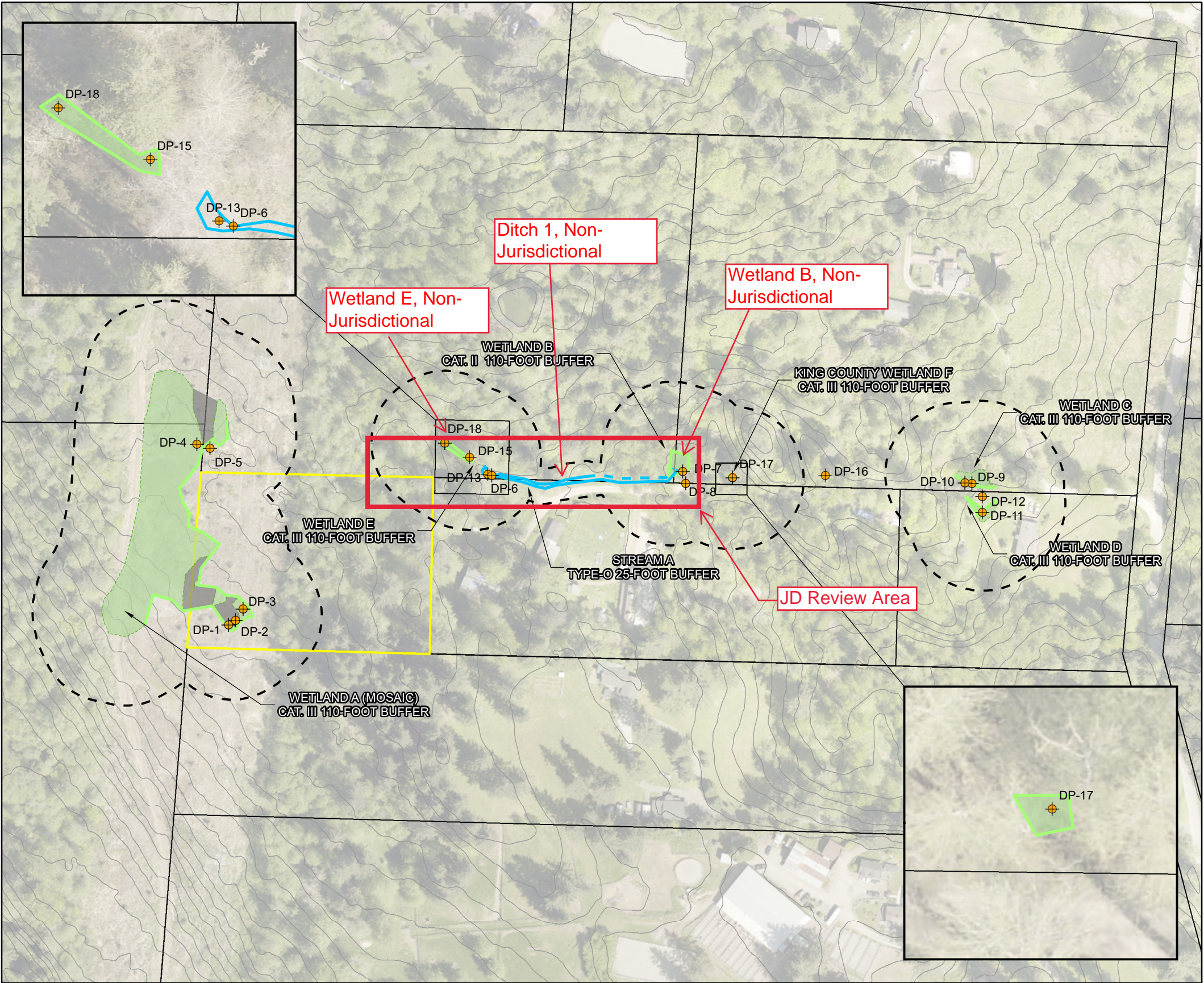
- a. King County iMap, accessed on 7/9/2024 at <https://gismaps.kingcounty.gov/iMap/>
- b. USGS TopoView accessed on 7/9/2024 at <https://ngmdb.usgs.gov/topoview/viewer/#15/47.7675/-121.9245>
- c. National Wetland Inventory accessed on 7/9/2024 at <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>
- d. USDA Web Soil Survey accessed on 7/9/2024 at <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>
- e. DCG Watershed. (February 16, 2024). Parcel #1550000501, Wetland Delineation Report

10. OTHER SUPPORTING INFORMATION. N/A

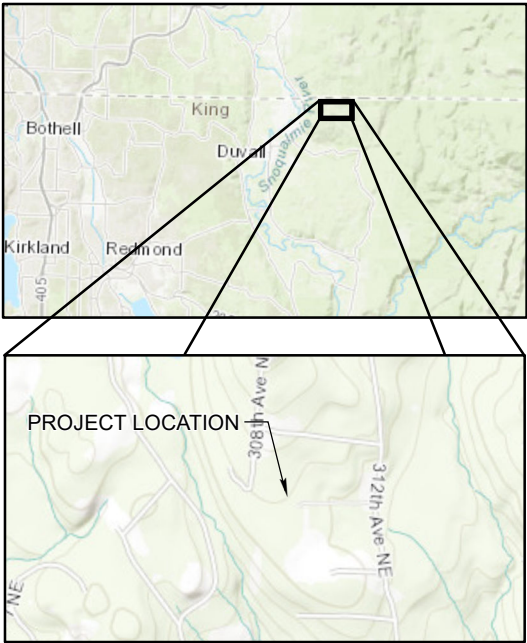
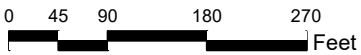
CENWS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWS-2024-414

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.



WETLAND DELINEATION FIGURE



VICINITY MAPS

NOTES:

1. CRITICAL AREAS DELINEATED BY DCG/WATERSHED ON MARCH 29, 2022, MAY 22, 2023, AND JULY 19, 2023.
2. GPS DATA DISPLAYED ON THIS MAP WAS COLLECTED IN THE FIELD USING A TRIMBLE GEOXH OR DA2 HAND HELD UNIT. THE DATA WAS DIFFERENTIALLY CORRECTED USING TRIMBLE PATHFINDER OFFICE SOFTWARE TO FURTHER INCREASE POSITION ACCURACY. GPS DATA IS BELIEVED RELIABLE FOR GENERAL PLANNING AND MOST REGULATORY PURPOSES. HOWEVER, ACCURACY IS VARIABLE AND SHOULD NOT BE CONSIDERED EQUIVALENT TO A PROFESSIONAL LAND SURVEY. NO WARRANTY IS EXPRESSED OR IMPLIED.
3. KING COUNTY WETLAND F WAS DETERMINED TO BE A WETLAND BY KING COUNTY AND WE DELINEATED THE BOUNDARY AS THE EDGE OF THE TOPOGRAPHIC DEPRESSION.

LEGEND:

	WETLAND DATA POINT
	TOPOGRAPHIC CONTOURS
	COMBINED WETLAND AND STREAM BUFFERS
	NON-DELINEATED TYPE-O AQUATIC AREA
	DELINEATED TYPE-O AQUATIC AREA
	DELINEATED WETLAND BOUNDARY
	ESTIMATED WETLAND AREA
	UPLAND HUMMOCK IN MOSAIC
	SUBJECT PARCEL
	KING COUNTY PARCELS

LANIER PROPERTY

WETLAND DELINEATION FIGURE
PARCEL#: 1550000501
NE 197th Street

NO.	DATE	DESCRIPTION	SUBMITTALS AND REVISIONS			
			BY	SP	SP	
1	04-05-2022	DELINEATION FIGURE				
2	01-29-2024	DELINEATION FIGURE				

SHEET SIZE: 11X17
PROJECT MANAGER: SP
DESIGNED: SP
DRAFTED: HM
CHECKED: SP
JOB NUMBER: 190526

SHEET NUMBER:
1 OF 1