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 3 February 2025

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 2023-923

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 water of the U.S., Section 404

ii. Wetland B: is not a water of the U.S.

iii. Wetland C/G/H: is a water of the U.S., Section 404

iv. Wetland Mosaic D/E/F/I: is not a water of the U.S.

v. Ditch 1: is a water of the U.S., Section 404

vi. Ditch 2: is a not water of the U.S.

vii. Ditch 3/Stormwater Conveyance Ditch: is a water of the U.S.

viii. Ditch 4: is not a water of the U.S.

ix. Ditch 5: is not a water of the U.S.

x. Trumpeter Creek is a water of the United States.

xi. Stormwater Pond: 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 14.88 acres in size located at the east end of McLaughlin Road, Burlington, Skagit County, Washington. Latitude/Longitude: 48.438278°, -122.284301°. 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. Trumpeter Creek, a tributary of Nookachamps Creek, which is a tributary to the Skagit River, which 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. Hydrology from within the review area would flow from Wetland A to Trumpeter Creek, in the southeast corner of the review area which flows east into the Nookachamps River 0.3 miles downstream which is outside the review area. The Nookachamps River is a tributary that flows north for approximately 3.9 miles to the Skagit River, a Traditional Navigable Water. Nookachamps River flows into the Skagit River near river mile 19. See Figure 5-Drainage Features Map.

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

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): Trumpeter Creek is 500 linear feet with an average width of 14 feet (7,000 square feet) and a backwater channel to Trumpeter Creek is 550 linear feet with an average width of 12 feet (6,600 square feet) within the review area. During a Corps site visit on February 13, 2024, flowing surface water was observed in Trumpeter Creek and the off-channel area during normal conditions with ordinary high-water mark (OHWM) indicators including a clear natural line on the bank, shelving, and vegetation break. As documented by Google Earth aerials, surface water is consistently present within Trumpeter Creek throughout

[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.

the year and in the dry summer months. Trumpeter Creek is also mapped as a perennial tributary in the 2023 United States Geological Survey Topographic map. Based on the above information, the Corps has determined that Trumpeter Creek and its associated backwater channel meet the relatively permanent standard and are waters of the United States.

Ditch 1: Ditch 1 is 312 linear feet and flows to the stormwater pond, which outlets to Trumpeter Creek through Wetland A. Ditch 1 has seasonal standing water observed at the February 13, 2024, site visit. Based upon the Antecedent Precipitation Tool (APT), normal conditions were present during the site visit. According to rainfall data it had rained the previous day. Ditch 1 is also described as having intermittent flows and a high water table was observed per the November 15, 16, 17, 2022, site visits described in the BYK Wetland Delineation report (Hamer 2024). Normal conditions were reported according to the Antecedent Precipitation Tool (APT) during the November 2022 site visits as described in the BYK Wetland Delineation report (Hamer 2024). As described above, Ditch 1 flows along the northern portion of the review area parallel to McLaughlin Road and turns south through Wetland C/G/H. Ditch 1 continues flowing south through a culvert into the stormwater pond. The stormwater outlets via a culvert into an infiltration trench located within Wetland A and flows into Trumpeter Creek (See Figure 3-Flow Vector map). Trumpeter Creek is a perennial tributary to Nookachamps River, which flows into the Skagit River, a TNW. Based on the above information, Ditch 1 is a relatively permanent water that has an indirect connection through other waters downstream to a TNW and meets the definition of an (a)(3) water and is therefore a water of the United States.

Ditch 3: Ditch 3 is a constructed stormwater conveyance ditch with standing/flowing water year round, defined bed and banks indicating ordinary high-water mark, and surface water that is visible on multiple years of Google Earth aerials. Ditch 3 is 850 feet long and averages 10 feet wide (8,500 square feet) and conveys stormwater from a residential development (called Summersun Estates) west of the Review Area to a stormwater detention pond in the southeast corner of the Review Area. It is partially vegetated with cattail and grasses and conveys stormwater to the stormwater pond before release into Trumpeter Creek. Ditch 3 is a water of the United States. See Figure 4. City of Mount Vernon Stormwater features. At this time the AJD requestor is not proposing to change the use of the existing stormwater conveyance and pond. It will still function for stormwater settling of the adjacent residential development. Based on the above information, Ditch 3 is a relatively permanent water that has an indirect connection (through other waters) downstream to a TNW and meets the definition of an (a)(3) water and therefore is a water of the United States.

f. Adjacent Wetlands (a)(4): Wetland A is a riverine/depressional, palustrine emergent and scrub-shrub wetland that is 1.22-acre in size. The primary source of hydrology is Trumpeter Creek and groundwater. As documented in the 2024 delineation report, Wetland A abuts Trumpeter Creek, therefore, Wetland A has a continuous surface water connection to Trumpeter Creek, an a (3) tributary, and is a water of the United States.

   Wetland C/G/H is a depressional, palustrine emergent wetland that is 1.42 acres in size to the northwest of Wetland A. As described in the BYK Wetland delineation report, Section 1.4, Wetland C/G/H was not identified in previous delineations on the site and developed after the installation of the stormwater pond and stormwater pond access which caused ponding and the development of Wetland C/G/H. Wetland A and Wetland C/G/H were delineated as separate wetlands. Therefore, they are not being considered a single wetland feature separated by an artificial structure (Ditch 3). Wetland C/G/H also abuts Ditch 1, documented as an a(3) tributary above, on their northern boundary. Wetland C/G/H meet the definition of a (a)(4) adjacent wetland and are waters of the United States

g. Additional Waters (a)(5): NA

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).

   Stormwater Pond: The stormwater detention pond is 1.3 acres in size and is located in the southeast corner of the review area. The stormwater pond receives stormwater water generated from the adjacent residential development (Summersun Estates) through Ditch 3 (described above) for settling before release into Trumpeter Creek south and west of the pond. It is included in the City of Mount Vernon’s NPDES Municipal Stormwater Permit and was constructed in uplands from 2012-2015. Wetland delineations conducted in 2005, 2007, 2008, 2009, and 2014 as required and approved by the City of Mount Vernon did not identify wetland in the areas where the stormwater conveyance and pond are now located (BYK Delineation Report 2024). The stormwater pond collects stormwater runoff and allows heavier sediment particles to settle to the

bottom of the pond due to reduced water velocity, effectively removing pollutants from the water before it is released downstream and functioning as a settling basin for stormwater runoff. The design of a stormwater pond creates a calm area where sediment and debris can settle out of the water, accumulating at the bottom of the pond. The stormwater detention pond is an excluded feature under 33 CFR 328.3 (b)(5) as it is an artificial pond in dry land used for a settling basin." The stormwater pond is not a water of the United States. See Figure 4. City of Mount Vernon Stormwater features.

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 Mosaic D/E/F/I is 0.23 acres and is located approximately 200 feet north of the nearest tributary, Trumpeter Creek. The source of hydrology for Wetland Mosaic D/E/F/I is predominantly precipitation and groundwater. The boundaries of Wetland Mosaic D/E/F/I were determined based on a low topographic position in the landscape, and a transition from a hydric soil to non-hydric soil, lack of hydrology in upland areas, and dominance of wetland vegetation. A Corps site visit on February 13, 2024, confirmed the wetland boundary. There is no distinct roadside ditch feature along McLaughlin Road with indicators of surface water, bed/bank, or erosional features that could be found between Wetland D/E/F/I and Wetland C/G/H/Ditch 1. The area between Wetland D/E/F/I and Wetland C/G/H/Ditch 1 was about 3-inches higher and transitions from Douglas spirea and reed canarygrass in Wetland D/E/F/I to sparse reed canarygrass, Himalayan blackberry starts, Canada thistle, and poison hemlock. As mentioned above Wetland Mosaic D/E/F/I is 200 feet from the nearest known tributary and does not abut, nor is it separated by a natural berm or bank. Wetland Mosaic D/E/F/I is separated from Ditches 2 and 3 as there is a topographic rise between the wetland, adjacent uplands, and these ditches. There is no evidence of a discrete conveyance to an a (1) through (a)(3) water. Ditch 5 has not outlet as it dead ends at a driveway and fill pad located west of the ditch. No culvert conveying flow to the west was found at the February 13, 2024, site visit. Wetland Mosaic D/E/F/I is not located within a mapped floodplain. Wetland Mosaic D/E/F/I does not have a continuous surface water connection downstream to a jurisdictional water and is not a water of the U.S.

Wetland B is 0.04-acre in size and is located about 425 feet north of Trumpeter Creek, the nearest tributary, outside of the review area. Wetland B sits within a small linear depressional and is dominated by wetland vegetation, reed

canarygrass. During a February 13, 2024, site visit conducted by the Corps, the entire boundary of the wetland was verified, and no outlet or signs of outflow were observed at the south end of Wetland B. The Antecedent Precipitation Tool indicated normal rainfall conditions as the time of the site visit. Rainfall of 0.37 inch occurred 3 days prior to the February 13, 2024, site visit. The primary source of hydrology is groundwater and stormwater runoff. Ditch 4 drains to Wetland B. No standing or flowing water was observed in Ditch 4. Wetland B does not abut a jurisdictional tributary or impoundment nor are they 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. Soils within the Review Area were mapped by the NRCS as Skipopa silt loam, 3 to 8 percent slopes (predominantly non-hydric) in the northern half of the review area and Bellingham silt loam (predominantly hydric) on the southern half of the Review Area. The wetlands are not located within a floodplain. Wetland B does not have a continuous surface connection to a jurisdictional tributary or impoundment; Wetland B is not waters of the U.S.

Ditch 2 is 176 linear feet and is a shallow constructed ditch feature that did not have flowing or standing water at the time of the February 13, 2024, site visit and are ephemeral. The Antecedent Precipitation Tool indicated normal rainfall conditions as the time of the site visit nor is the ditch indicated on topographic maps. Rainfall of 0.37 inch occurred 3 days prior to the February 13, 2024, site visit. Ditch 2 flows to Ditch 3 which flow path is discussed above. Ditch 2 was determined to have non-relatively permanent flow as it only flows in short duration in response to precipitation events. Ditch 2 is not a water of the United States. The BYK Delineation Report states in Section 4.4.2 of that “The primary function of the ditch is to help ease any backed up stormwater runoff from the North Ditch (Ditch 1) along McLaughlin Road and the impervious parking and storage area in northwest corner of the study area.” This statement was corrected by the author via email dated 2 May 2024, that “Ditch 1 and Ditch 2 are not connected. That one sentence was inadvertently not changed in the latest report revision.”

Ditch 4 is 44 linear feet and is a shallow constructed ditch feature that did not have flowing or standing water at the time of the February 13, 2024, site visit and are ephemeral. The Antecedent Precipitation Tool indicated normal rainfall conditions as the time of the site visit nor is the ditch indicated on topographic maps. Rainfall of 0.37 inch occurred 3 days prior to the February 13, 2024, site visit. Ditch 4 did not show signs of bed and bank and were dominated by grasses. Ditch 4 drains to Wetland B and no outlet from Wetland B was observed as mentioned above. Ditch 4 was determined to have non-relatively permanent

flow , flows into a Wetland B, and does not have connection downstream to a TNW. Ditch 4 is not a water of the United States.

Ditch 5 is 70 linear feet and is a shallow constructed ditch feature that did not have flowing or standing water at the time of the February 13, 2024, site visit and is ephemeral. The Antecedent Precipitation Tool indicated normal rainfall conditions as the time of the site visit nor is the ditch indicated on topographic maps. Rainfall of 0.37 inch occurred 3 days prior to the February 13, 2024, site visit. Ditch 5 did not show signs of bed and bank and no outlet or culvert conveying the ditch to the west under a fill pad and access road was observed. Per the February 13, 2024, site visit, no connection to Ditch 1 was observed and confirmed from as-built drawings of Summersun Estates. A portion of Ditch 5 is within the boundaries of Wetland D which did not have an outlet. Ditch 5 was determined to have non-relatively permanent flow, does not outlet to a relatively permanent waterway, and does not have connection downstream to a TNW. Ditch 5 is not a water of the United States.

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, topographic, and Aerial imagery accessed 12 February 2024.

   b. National Regulatory Viewer National Hydrography Dataset accessed February 14, 2024.

   c. Natural Resource Conservation Service Web Soil Survey accessed February 14, 2024.

   d. USACE site visit on February 13, 2024.

   e. BYK Construction-Critical Areas Assessment Report by Hamer Environmental (April 8, 2024).

   f. City of Mount Vernon NPDES Stormwater Permit Information and Map. Accessed 20 February 2024 online at: NPDES Stormwater Permit | Mount Vernon, WA - Official Website (mountvernonwa.gov).

   g. National Oceanic and Atmospheric Administration. NOAA. National Weather Service. NOWData Online Weather Mapper for Mount Vernon, WA. Accessed online at: Climate (weather.gov).

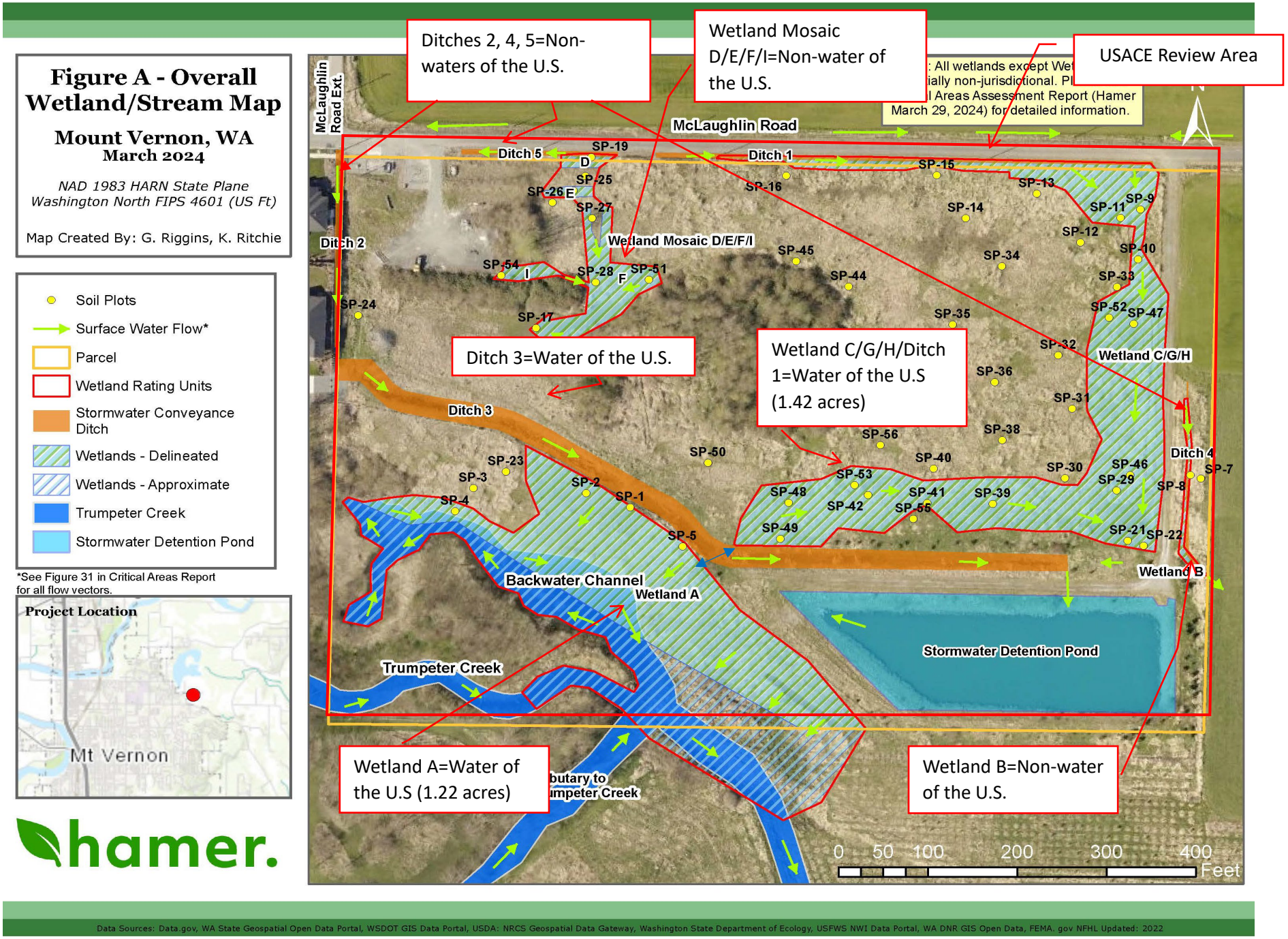
h. As-Built Drawings of Plat of Trumpeter Place Summersun Estates, dated September 18, 2015. Ravnik & Associates, Inc., Civil Engineering & Land Use Planning.

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.

On 17 April 2023, the District send EPA a draft AJD MFR. On 1 May 2023, EPA requested a revised draft AJD MFR. On 30 May 2023, the District send EPA a revised draft AJD MFR. On 13 June 2023, EPA requested a revised draft AJD MFR. On 17 June 2023, the District submitted a revised draft AJD MFR. On 21 June 2023, EPA requested Headquarters (HQ) level joint review with EPA and USACE. On 10 July 2023, HQ requested a revised draft AJD MFR. On 16 July 2023, a revised draft AJD MFR was sent to HQ EPA and USACE. On 25 July 2023, HQ extended review timeframe to 25 October 2024. On 25 October 2023, HQ extended the review timeframe to 24 January 2025. On 18 December 2025, HQ requested a revised draft AJD MFR. On 22 January 2025, the District sent EPA a revised draft AJD MFR. On 28 January 2025, EPA concurred with the draft AJD.

Figure 1. Vicinity Map with Review Area in red (Google Earth).



Data Sources: Data.gov, WA State Geospatial Open Data Portal, WSDOT GIS Data Portal, USDA: NRCS Geospatial Data Gateway, Washington State Department of Ecology, USFWS NWI Data Portal, WA DNR GIS Open Data, FEMA. gov NFHL Updated: 2022

Figure 2. Wetland delineation map.

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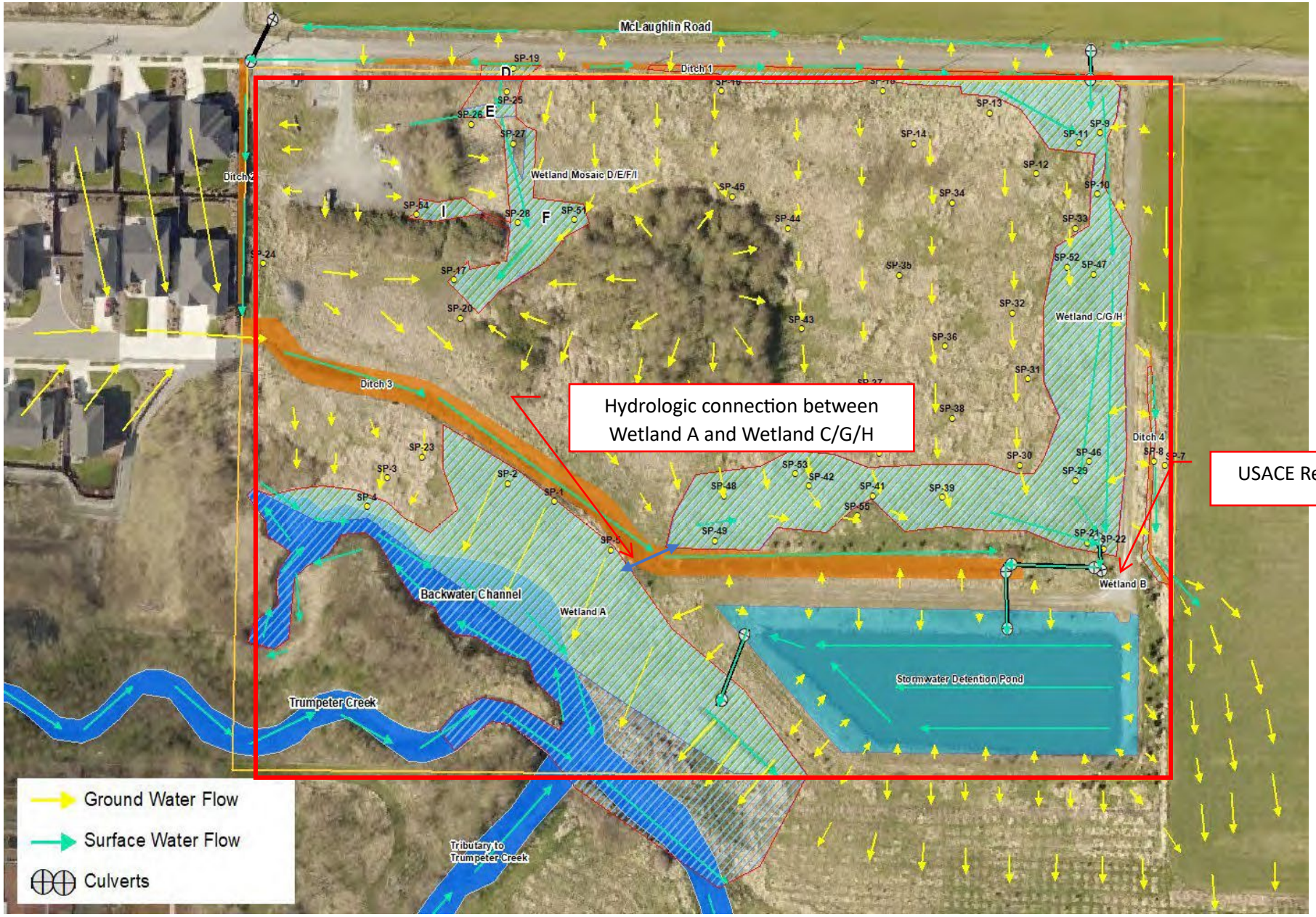

Figure 3. Flow vector map of surface water and ground water through study area.

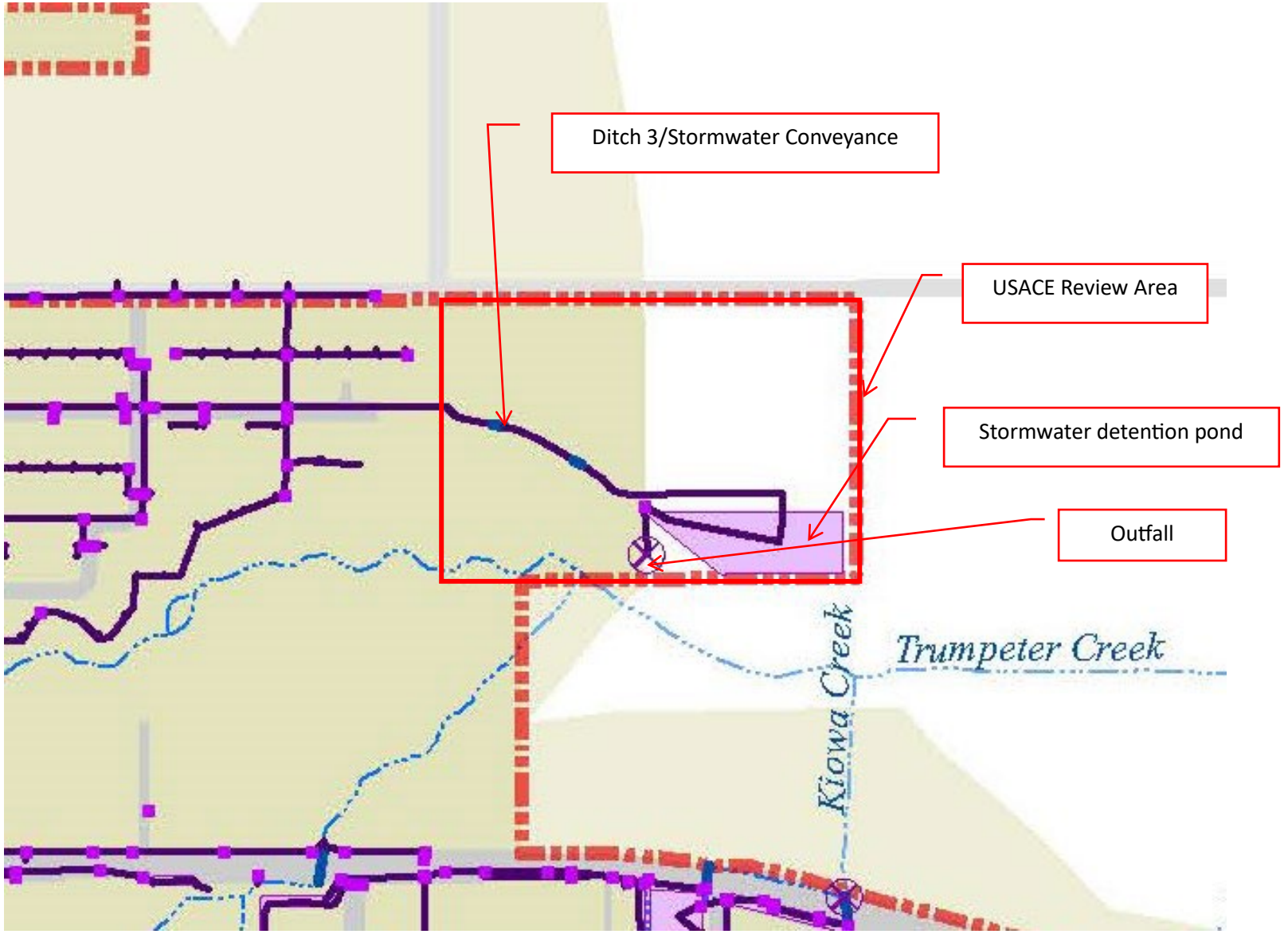

Figure 4. City of Mount Vernon Stormwater NPDES map zoomed in to Review Area. Stormwater features in purple.

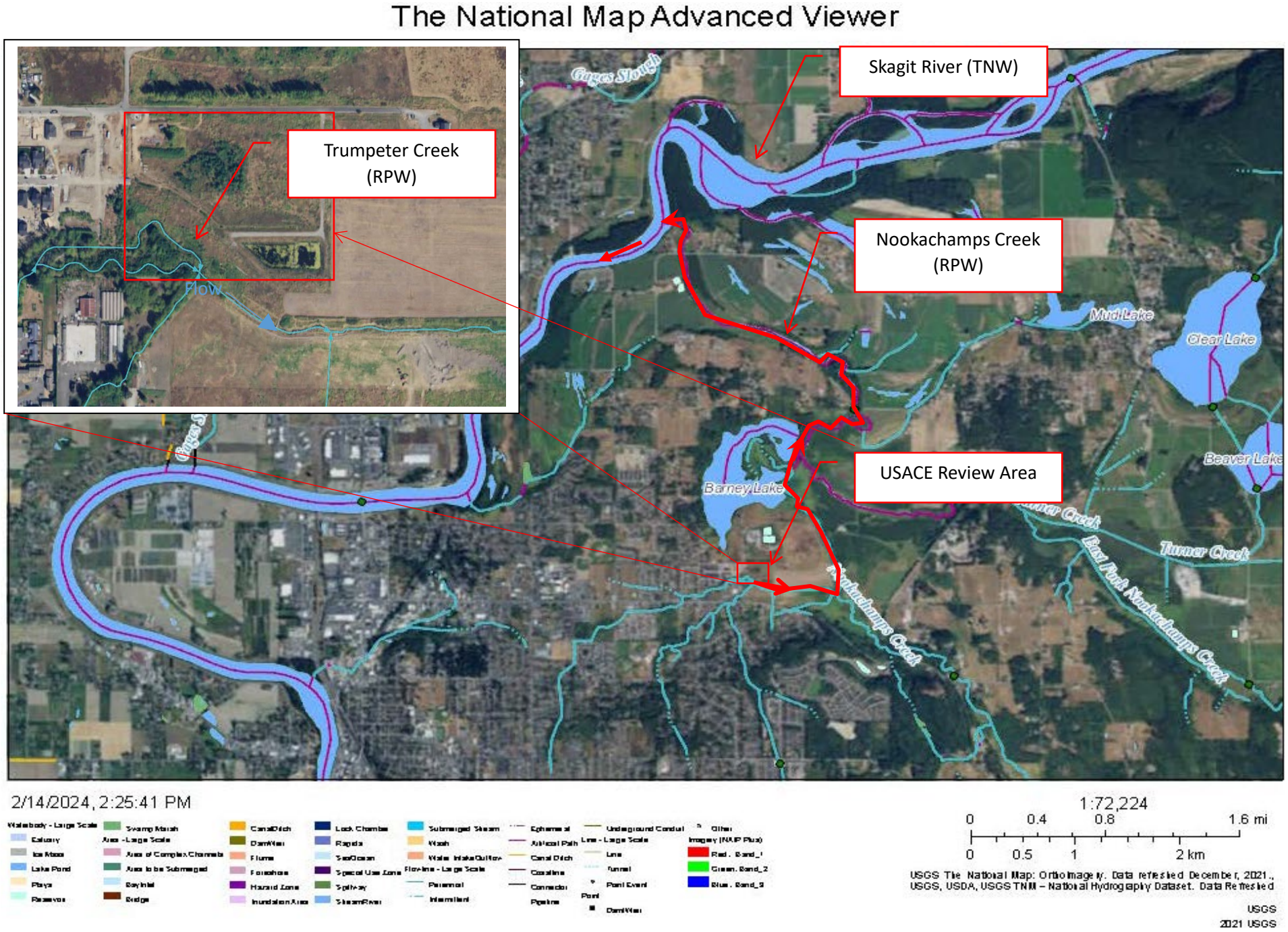

Figure 5. Drainage pathways from Trumpeter Creek on-site (inset map) to the Skagit River (TNW).