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 8 April 2025

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-2024-080[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 CWA, and no effect on any waters covered under 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] 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.

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

1. SUMMARY OF CONCLUSIONS.

    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. Wetland A, non-jurisdictional

        ii. Wetland B/C, jurisdictional, Section 404

        iii. Wetland D, non-jurisdictional

        iv. Wetland E, non-jurisdictional

        v. Wetland F, non-jurisdictional

        vi. Wetland G, non-jurisdictional

        vii. Wetland A-SPB, jurisdictional, Section 404

        viii. Wetland B-SPB, non-jurisdictional

        ix. Portage Creek, jurisdictional, Section 404

        x. Stormwater Pond 1, 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)

    d. “Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency

Concerning The Proper Implementation Of 'Continuous Surface Connection' Under The Definition Of "Waters Of The United States" Under The Clean Water Act" (March 12, 2025)

3. REVIEW AREA. The 62.9-acre review area is located at 20410 Smokey Point Boulevard, Arlington, Snohomish County, Washington at latitude 48.182438 longitude -122.195546. Eight (8) wetlands (Wetland A-SPB, Wetland B-SPB, Wetland A, Wetland B/C, Wetland D, Wetland E, Wetland F, Wetland G), one stream (Portage Creek), and one stormwater pond were identified within the review area as depicted in the enclosed figures. The review area is divided into two sites: Smokey Point Boulevard (SPB) and Island Crossing (IC). The SPB property contains an existing Chevrolet car dealership and undeveloped fields. The IC portion of the review area is undeveloped and has been used for corn and hay production. Topography onsite was uneven with elevations ranging from 33-40 feet throughout the property. The review area is bounded by I-5 North to the west, Portage Creek to the south, and large fields, commercial developments, and residential developments to the north and east.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Stillaguamish River, located approximately 1 mile northeast and 7.3 miles downstream of the review area. The Stillaguamish 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. There are multiple flowpaths from aquatic resources in the review area to a TNW as described below. These flowpaths were identified using USA Topo Maps in ArcGIS Pro.

   Flowpath 1: Portage Creek flows west within the southern portion of the AJD review area. Portage Creek then continues to flow northwest for approximately 4 miles and into South Slough. South Slough then flows west-northwest for approximately 3.33 miles and into the Stillaguamish River.

[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.

Flowpath 2: A pipe outlet in the northwest corner of Stormwater Pond 1 drains to Wetland B-SPB. Wetland B-SPB flows into an approximately 20 foot long culvert that flows into the eastern portion of Wetland A-SPB. According to the technical memorandum dated 14 October 2024, provided by Soundview Consultants LLC, "it is evident in site photos that the culvert that discharges flow from the stormwater pond and the culvert that conveys overflow to Wetland A-SPB are elevated above the compensatory flood storage area (Attachment D). Based on these observations, the surface water connection between Wetland B and Wetland A-SPB appears to be ephemeral in nature and only present following extreme storm events that lead to both the stormwater pond and the excavated compensatory flood storage area to overtop." The Corps observed ponded water at the culvert inlet during a site visit on 2 May 2024; there were normal conditions at the site according to the Antecedent Precipitation Tool. Site photographs provided by Soundview indicate that the culvert draining Wetland B-SPB is very near the wetland level and that there is an unvegetated flowpath between the stormwater pond pipe outlet and the wetland culvert inlet indicating flow during the wet season.

The western portion of Wetland A-SPB drains into Ditch 1 outside of the review area. Ditch 1 flows southeast approximately 200 feet and into a culvert under I-5 North. The approximately 215 foot long culvert outlets west to a channel that flows approximately 230 feet west to Portage Creek.

Ditch 1 is located outside of, but along the western border of the AJD review area. Shallow standing and flowing water was observed in Ditch 1 during a site visit on 2 May 2024. According to the Antecedent Precipitation Tool, this site visit occurred during the dry season and a moderate drought, but there were normal conditions at the site. According to the weather station at the Arlington Municipal Airport, there was 0.06 inches of rain in the five days prior to the site visit and 0.94 inches of rain in the ten days prior to the site visit. Ditch 1 is vegetated primarily with reed canary grass (*Phalaris arundinacea* – FACW). Dense Himalayan blackberry (*Rubus armeniacus* – FAC) grows on the banks of Ditch 1. Ditch 1 experiences flowing or standing water continuously during certain times of the year that is more than only a short duration in direct response to precipitation. Ditch 1 sustains flows through a combination of runoff and an elevated groundwater table. The Corps has determined that Ditch 1 meets the relatively permanent standard and indirectly connects downstream to a TNW.

Flowpath 3: Wetland F drains to a culvert under I-5 outside of the review area. This culvert likely drains southwest to Portage Creek.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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.[8] 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): NA

   e. Tributaries (a)(3):

      Portage Creek: Portage Creek is a perennial tributary that is approximately 353 linear feet within the southern portion of the review area. Portage Creek flows to South Slough which flows to the Stillaguamish River as described above. Portage Creek is a mapped as a perennial tributary on US Geological Service topographic maps. Surface water is visible in Portage Creek in multiple aerials in

[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.

Google Earth including May 2, 2015, March 29, 2016, August 20, 2017, and April 28, 2023. Observed ordinary high water mark indicators included: a defined bed and bank, changes in sediment characteristics and changes in vegetation types. Portage Creek experiences flowing or standing water continuously during certain times of that is more than only a short duration in direct response to precipitation. The Corps has determined Portage Creek meets the relative permanent standard and indirectly connects downstream to a TNW.

f. Adjacent Wetlands (a)(4):

Wetland A-SPB: Wetland A-SPB is an approximately 0.12 acre palustrine emergent wetland. Sources of hydrology to Wetland A-SPB include stormwater pond discharges, seasonally high groundwater table, direct precipitation, and surface sheet flow from uplands. The western portion of Wetland A-SPB drains off-site to Ditch 1. Wetland A-SPB abuts Ditch 1, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland A-SPB has a continuous surface connection to an (a)(3) tributary and therefore meets the definition of an (a)(4) adjacent wetland and is a water of the U.S.

Wetland B/C: Wetland B/C is an approximately 2.74 acre palustrine emergent, riverine and slope wetland. Sources of hydrology to Wetland B/C include a seasonally high groundwater table, direct precipitation, surface sheet flow from surrounding uplands, and overbank flooding from Portage Creek. Wetland B/C is bisected by Smokey Point Boulevard in the western portion of the wetland and a constructed berm in the south central portion of the wetland. For purposes of determining whether a wetland is “adjacent”, artificial structures do not divide a wetland if hydrologic connection is maintained between the divided portions of a wetland. Rather, the wetland is treated as one wetland. A culvert under Smokey Point Boulevard provides a hydrologic connection between the western and eastern portions of the wetland. A culvert under the constructed berm provides a hydrologic connection between the northern and southern portions of the wetland. The Corps is evaluating the wetlands as one wetland due to the wetlands maintaining a hydrologic connection through the culvert under the road and berm. Portage Creek flows west within and abutting Wetland B/C. Therefore, Wetland B/C has a continuous surface connection to and is adjacent to Portage Creek, a relatively permanent tributary as documented above in Section 5. Based on this, the Corps has determined Wetland B/C meets the definition of an (a)(4) adjacent wetland and is a water of the U.S.

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).[9]

   Stormwater Pond 1: Stormwater Pond 1 is an artificial pond and settling basin in the central portion of the review area. Stormwater Pond 1 was constructed in 2015. According to a wetland report dated 19 March 2009, Stormwater Pond 1 was excavated and constructed in uplands (i.e. dry land). 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. Stormwater Pond 1 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.

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 an approximately 0.6 acre palustrine emergent, depressional wetland. Sources of hydrology to Wetland A include a seasonally high groundwater table, direct precipitation, and surface sheet flow. Wetland A is located 0.25 miles north of Portage Creek. Wetland A does not have an outlet, and no surface water connections to other aquatic resources were observed to or from Wetland A during site visits. Wetland A does not abut an (a)(1), (a)(2), or (a)(3) water. Based on the information above, 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-SPB: Wetland B-SPB is an approximately 4.7 acre palustrine emergent wetland. Sources of hydrology to Wetland B-SPB include stormwater pond discharges, seasonally high groundwater table, direct precipitation, and

[9] 88 FR 3004 (January 18, 2023)

surface sheet flow from uplands. An upland berm separates Wetland B-SPB from Wetland A-SPB; however, Wetland B-SPB outlets to a 20-ft long culvert that drains into Wetland A-SPB. According to a technical memo dated 14 October 2024 by Soundview Consultants LLC, Wetland B-SPB is a feature that was excavated from uplands as a compensatory flood storage area to satisfy permitting requirements from the City of Arlington. Although there is a culvert and hydrologic connection between Wetland A-SPB and Wetland B-SPB, they are being evaluated as separate wetlands, and not one single unit, because the upland berm was not installed within and did not divide one existing wetland. Wetland B-SPB does not abut an (a)(1), (a)(2), or (a)(3) water. Wetland B-SPB 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 an approximately 0.1 acre palustrine emergent, depressional wetland. Sources of hydrology to Wetland D include a seasonally high groundwater table, direct precipitation, and surface sheet flow from uplands. Wetland D is located approximately 1,054 feet from Portage Creek. Wetland D does not have an outlet. Wetland D does not abut an (a)(1), (a)(2), or (a)(3) water. Based on the information above, 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. On site investigation confirmed there is no surface water connection.

Wetland E: Wetland E is an approximately 0.06 acre palustrine emergent, depressional wetland. Sources of hydrology to Wetland E include seasonally high groundwater table, direct precipitation, and surface sheet flow. Wetland E is located 100 feet east of Ditch 1. A man made berm separates Wetland E from Wetland A-SPB with no indicators of a surface connection observed. Aerials from Google Earth show an absence of the berm before July 2014. Wetland E does not abut an (a)(1), (a)(2), or (a)(3) water. Based on the information above, Wetland E 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 F: Wetland F is an approximately 0.2 acre palustrine emergent, depressional wetland. Sources of hydrology to Wetland F include a seasonally high groundwater table, direct precipitation, and surface sheet flow from surrounding uplands. The western portion of Wetland F, located outside of the review area, drains to a culvert under I-5 North. Wetland F does not abut an (a)(1), (a)(2), or (a)(3) water. B. Based on this, the Corps has determined Wetland F does not meet the definition of an (a)(4) adjacent wetland and is not a water of the U.S.

Wetland G: Wetland G is an approximately 0.4 acre palustrine emergent, depressional wetland. Sources of hydrology to Wetland G include a seasonally high groundwater table, direct precipitation, and surface sheet flow from uplands. Wetland G is located approximately 1,171 feet from Portage Creek. Wetland G does not have an outlet or any surface water connection to other aquatic resources. Wetland G does not abut an (a)(1), (a)(2), or (a)(3) water. Based on the information above, Wetland G 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.

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. Google Earth accessed February 29, 2024.

   b. Field Visit conducted on March 12, 2024 – details documented in NWS-2024-080 Admin Record titled 20240321-MFR-FieldVisit-NWS-2024-080

   c. Field Visit conducted on May 2, 2024 – details documented in NWS-2024-080 Admin Record titled 20240502-MFR-FieldVisit-NWS-2024-080

   d. Washington Lidar Portal, accessed March 27, 2024: WDNR Lidar (dnr.wa.gov)

   e. USFWS National Wetland Index accessed March 27, 2024: Wetland Mapper (usgs.gov)

   f. WDFW SalmonScape Map accessed March 27, 2024: WDFW SalmonScape (wa.gov)

   g. Arlington, WA Water Utilities accessed March 27, 2024: Utilities

   h. Snohomish Drainage Map accessed March 27, 2024: SWM DI Webmap (snoco.org)

   i. Snohomish County GIS Fish Barrier and Stream Crossings accessed March 27, 2024: Fish Passage and Stream Crossing (snoco.org)

   j. National Flood Hazard Layer Viewer. Accessed 14 January 2025: FEMA hazards (arcgis.com)

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.

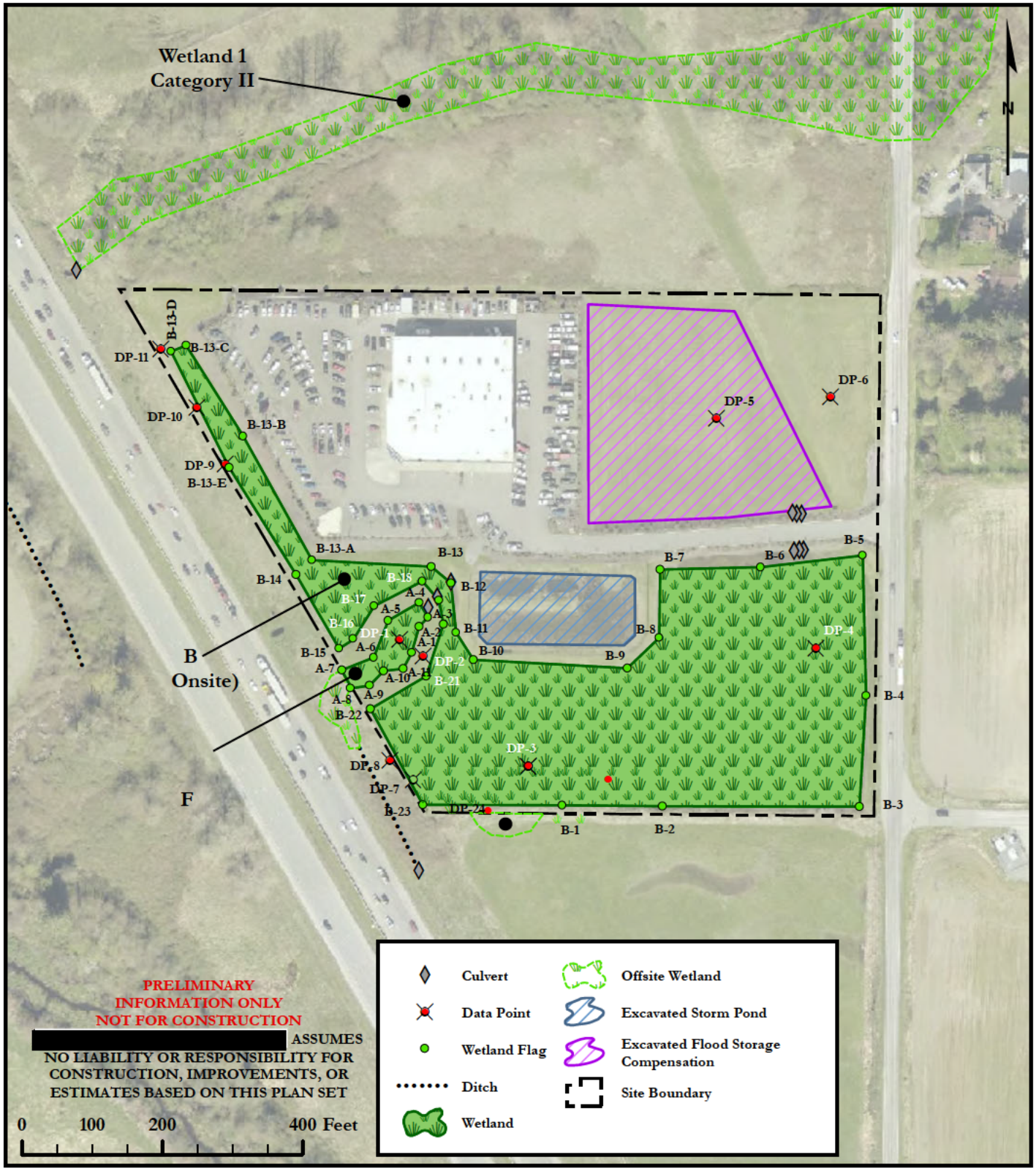
NWS-2024-080 Vicinity Map

Sheet 1

NWS-2024-080 AJD Review Area

0 0.05 0.1 0.2 Miles

EXISTING CONDITIONS



[redacted]

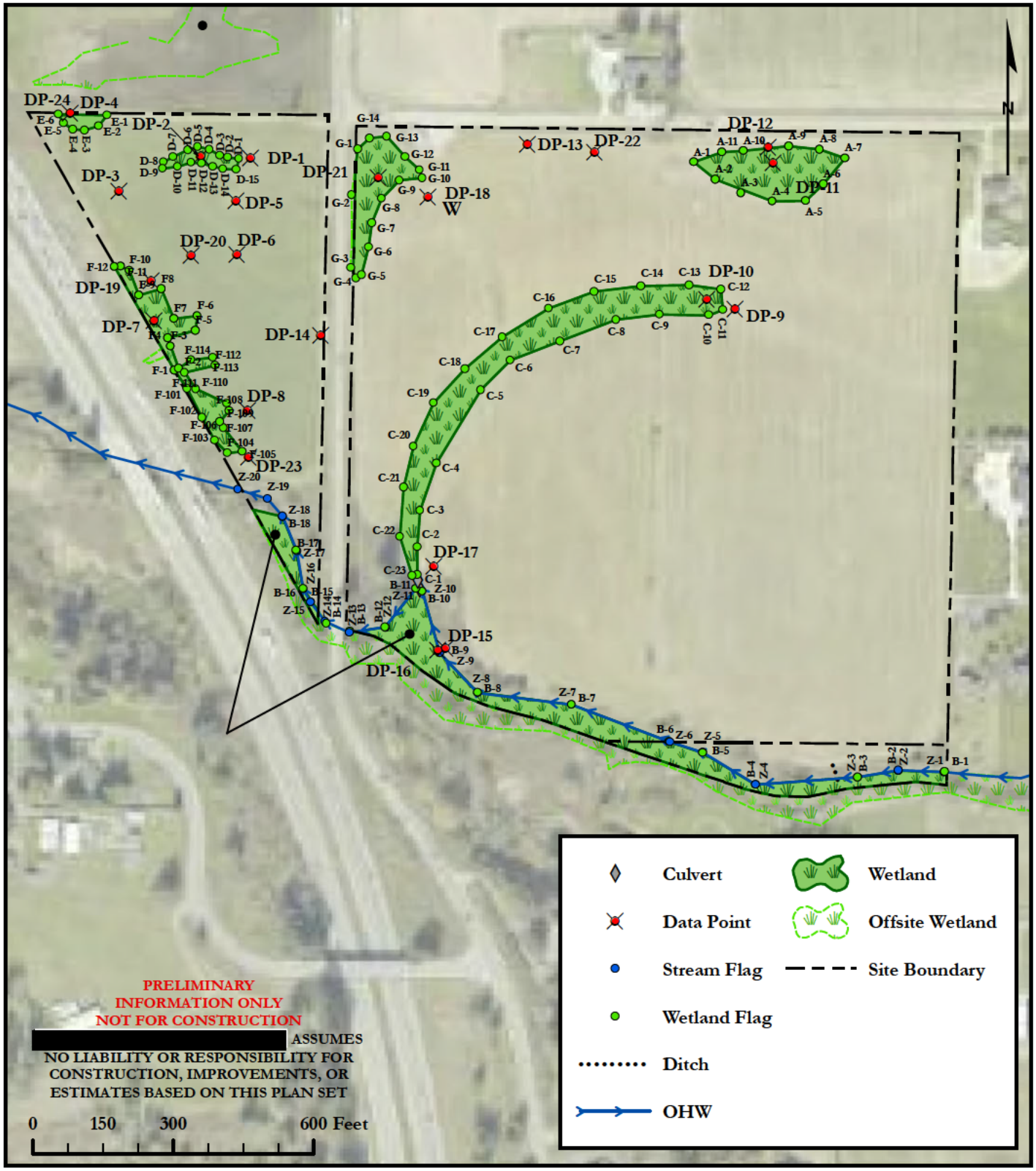
SMOKEY POINT BLVD

20410 SMOKEY POINT BLVD
ARLINGTON, WA 98223

SNOHOMISH COUNTY PARCEL NUMBER:
31050800301000

DATE:	9/19/2024
JOB:	2388.0002
BY:	DDS
SCALE:	1 " = 200 '
FIGURE NO.	1

EXISTING CONDITIONS



[redacted]

ISLAND CROSSING

2720 204TH STREET NE
ARLINGTON, WA 98223

SNOHOMISH COUNTY PARCEL NUMBERS:
31051700101700, 31051700201600, & 31051700100300

DATE:	9/19/2024
JOB:	1779.0008
BY:	DS
SCALE:	1 " = 300 '
FIGURE NO.	1