



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

13 February 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-2024-00906

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 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.

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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 1, jurisdictional, Section 404

- ii. Drainage 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)

- 3. REVIEW AREA. The 2.0-acre review area is located near Bremerton, Kitsap County, Washington (Latitude/Longitude: 47.52577, -122.74428). The review area is within Water Resources Area (WRIA) 15, Kitsap Watershed. The parcel, containing the review area, is located along the right-of-way of the U.S. Navy Railroad. The review area is situated within a lightly developed portion of the city of Bremerton with surrounding land uses consisting of commercial timberland, a railroad spur, golf course, and a roadway. In the immediate vicinity of the review area, the dominant vegetation consists of a mature forest of Douglas fir (*Pseudotsuga menzeseii*), western hemlock (*Tsuga heterophylla*), red alder (*Alnus rubra*), and western redcedar (*Thuja plicata*); a shrub layer consisting of vine maple (*Acer circinatum*), devil's club (*Oplopanax horridus*), and salmonberry (*Rubus spectabilis*); and an herbaceous layer consisting primarily of sword fern (*Polystichum munitum*).

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Sinclair Inlet, approximately 2.15 miles east of the review area. Sinclair Inlet is part of Puget Sound, which is listed as a navigable waterway on the

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Navigable Waters of the United States in Washington State list dated December 31, 2008.⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Water flows from Wetland 1 into an unnamed tributary to Gorst Creek (Tributary 1) approximately 545 feet northeast of the review area (see Enclosure 1, Figure 1). Tributary 1 then flows approximately 0.1 miles southeast into Gorst Creek. Gorst Creek flows approximately 2.8 miles to the east and discharges into the Puget Sound (Sinclair Inlet), a Navigable Water of the United States.

Tributary 1 is mapped by the Statewide Washington Integrated Fish Distribution (SWIFD) map as a Type “F” or fish-bearing stream. A Type “F” stream is classified by the Washington Department of Natural Resources (DNR) as “streams and waterbodies that are known to be used by fish, or meet the physical criteria to be potentially used by fish. Fish streams may or may not have flowing water all year; they may be perennial or seasonal.” The Washington Department of Natural Resources mapped the Type “F” stream on the DNR Hydrography-Watercourses map as a perennial stream. USGS Topographic imagery maps Tributary 1 as a perennial stream. In the applicant’s delineation report, photos taken of Tributary 1 depict flowing water within the channel and several ordinary high water mark indicators, including debris wracking, bank erosion and scour, and the presence of point bars. Based on the above information, the Corps has determined that Tributary 1 meets the relatively permanent standard and indirectly connects downstream to a TNW.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ N/A

⁵ 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.

⁶ 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.

⁷ 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

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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

f. Adjacent Wetlands (a)(4):

Wetland 1: Wetland 1 is a 1,205 square foot (sf) palustrine, forested, slope wetland adjacent to a railroad embankment. Water in Wetland 1 drains into Drainage 1 which flows approximately 444 feet to Tributary 1, a relatively permanent water as documented above. Based on this, the Corps has determined that Wetland 1 has a continuous surface connection to an (a)(3) tributary and meets the definition of an (a)(4) adjacent wetland and is a water of the U.S.

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

329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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).⁸ 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).

Drainage 1: Drainage 1 is an approximately 444 foot long conveyance feature that directs hydrology from Wetland 1 down a slope gradient to Tributary 1. Drainage 1 is a constructed feature associated with the sloping railroad embankment. Ordinary high water mark indicators were not observed by the Corps in Drainage 1. Drainage 1 is approximately one to two feet deep and one to two feet wide, but does not have a defined bed and bank. Drainage 1 is vegetated primarily with sword fern (FACU). No surface water was visible in Drainage 1 during the site visit on 23 September 2024. The Corps has determined that Drainage 1 does connect downstream to an (a)(1) or (a)(2) water, but does not meet the relatively permanent standard and is therefore 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. September 23, 2024, Corps Project Manager conducted a site visit and found that a continuous surface connection exists between Wetland 1 to any water of the U.S.
 - b. WSP USA (November 2023) *Critical Areas Report Project RM18-1806 (Phase 2 of 9) Repair Railroad Culvert – MP 31.55* for Naval Facilities Engineering Systems Command Northwest (NAVFAC NW)
 - c. Corps National Regulatory Viewer, accessed on November 1, 2024 at <https://arcportal-ucop-corps.usace.army.mil/s0portal/apps/experiencebuilder/experience/?id=9e1a61cbac2341d1b75b58c6ffa5a5ca&page=Washington>

⁸ 88 FR 3004 (January 18, 2023)

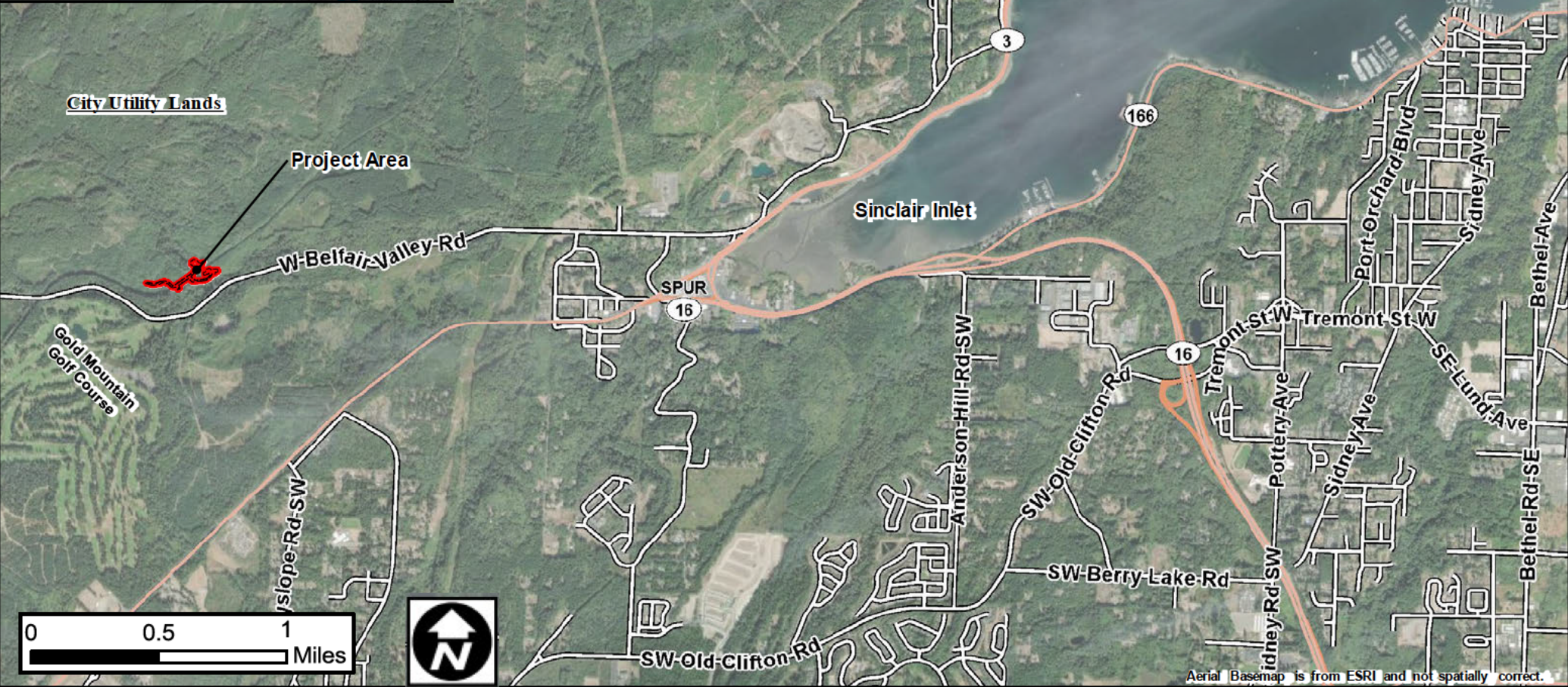
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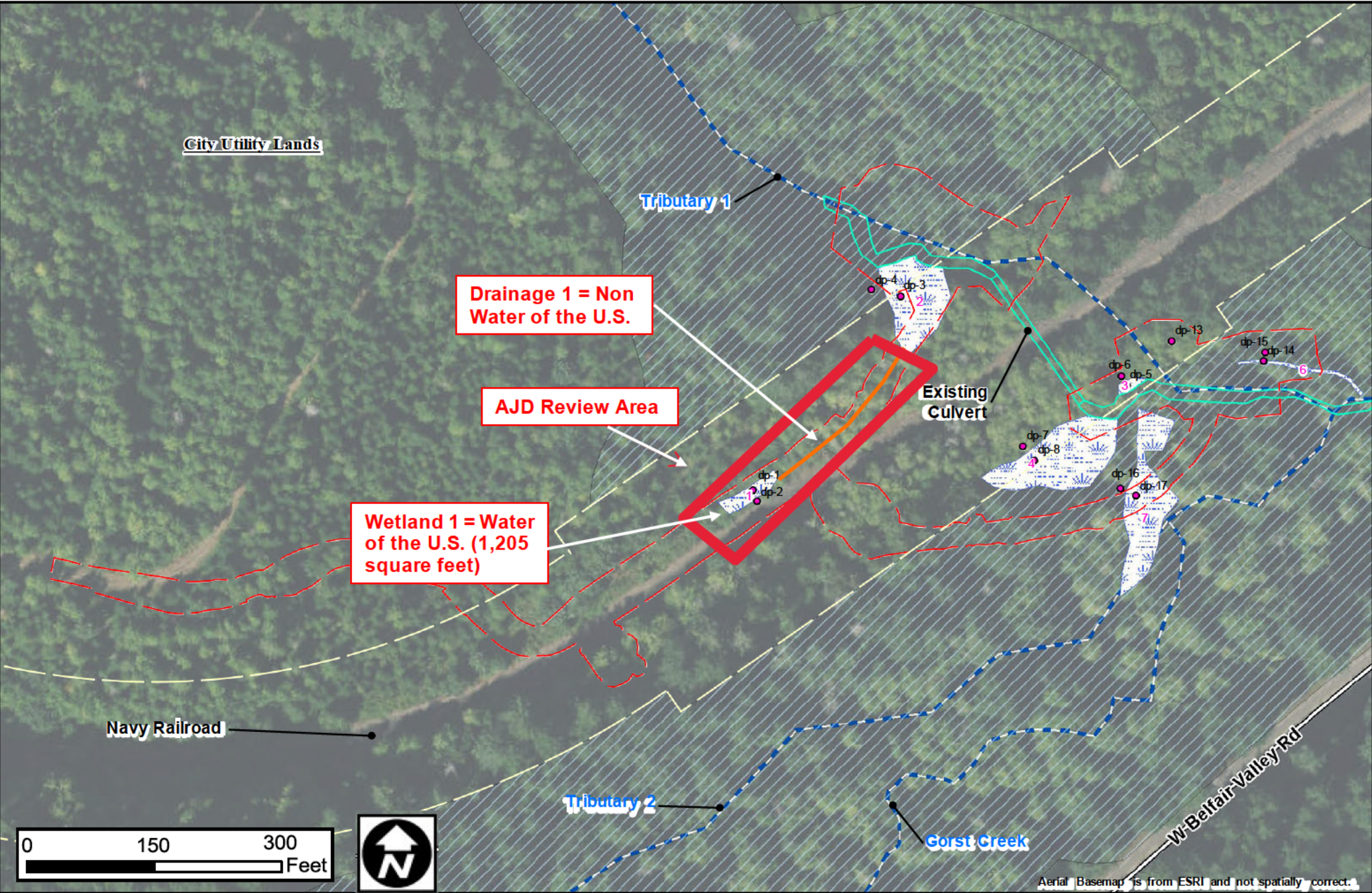
- d. USGS TopoView, accessed on November 1, 2024 at <https://ngmdb.usgs.gov/topoview/viewer/#15/47.7742/-122.2197>
- e. National Wetland Inventory, accessed on November 1, 2024 at <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>
- f. USDA Web Soil Survey, accessed on November 1, 2024 at <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>
- g. Washington Department of Natural Resources Hydrography-Watercourses, accessed on 30 January 2025 at <https://geo.wa.gov/datasets/wadnr::dnr-hydrography-watercourses-forest-practices-regulation/explore?location=47.527841%2C-122.743050%2C16.00>

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.



<p>PURPOSE: NBK Culvert RM 31.55</p> <p>IN: City of Bremerton</p> <p>COUNTY OF: Kitsap</p> <p>STATE: Washington</p> <p>TRS: T24N R01W S36</p> <p>APPLICANT: NAVFAC NW</p>	<p>FIGURE 1: Vicinity Map</p> <p>Critical Area Report Figures</p> 	<p>PROJECT: NBK Culvert Repair RM 31.55</p> <p>LATITUDE: 47°31'35.03"N</p> <p>LONGITUDE: 122°44'33.33"W</p> <p>WATERWAY: Tributary of Gorst Creek DATUM: NAD83 Washington State Plane North</p> <p>November 2023</p> <p>SHEET 1 OF 2</p>	<p>Legend</p> <p> Project Area</p> <p>NWS-2024-00906</p>
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<p>PURPOSE: NBK Culvert RM 31.55</p> <p>IN: City of Bremerton COUNTY OF: Kitsap STATE: Washington TRS: T24N R01W S36</p> <p>APPLICANT: NAVFAC NW</p>	<p>FIGURE 3: Critical Areas Overview</p> <p><u>Critical Area Report Figures</u></p> <div data-bbox="441 1461 892 1591"></div>	<p>PROJECT: NBK Culvert Repair RM 31.55 LATITUDE: 47°31'35.03"N LONGITUDE: 122°44'33.33"W WATERWAY: Tributary of Gorst Creek DATUM: NAD83 Washington State Plane North</p> <p>November 2023 SHEET 2 OF 2</p>	<p>Legend</p> <table><tr><td></td><td>Navy ROW</td><td></td><td>Delineated Wetlands</td></tr><tr><td></td><td>Project Area</td><td></td><td>Wetland and Stream Buffers</td></tr><tr><td></td><td>Wetland Sample Plots</td><td></td><td>Ecology NHD Streams</td></tr><tr><td></td><td>Delineated OHWM</td><td></td><td></td></tr></table> <p>NWS-2024-00906</p>		Navy ROW		Delineated Wetlands		Project Area		Wetland and Stream Buffers		Wetland Sample Plots		Ecology NHD Streams		Delineated OHWM		
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