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

CENWS-ODR 26 March 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-2023-828.

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. Spring Creek, jurisdictional, Section 404

ii. Stream 1, jurisdictional, Section 404

iii. Ditch 1, non-jurisdictional

iv. Wetland A1, jurisdictional, Section 404

v. Wetland A2, jurisdictional, Section 404

vi. Wetland B/M, jurisdictional, Section 404

vii. Wetland C, jurisdictional, Section 404

viii. Wetland D, jurisdictional, Section 404A

ix. Wetland E/W, jurisdictional, Section 404

x. Wetland F, non-jurisdictional

xi. Wetland G, non-jurisdictional

xii. Wetland H, non-jurisdictional

xiii. Wetland J, non-jurisdictional

xiv. Wetland K, jurisdictional, Section 404

xv. Wetland L/X, non-jurisdictional

xvi. Wetland N, non-jurisdictional

xvii. Wetland Y, 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 38.1-acre review area is located at Bellingham, Whatcom County, Washington Lat: 48.801995; Long: -122.478185. The review area consists mostly of undeveloped deciduous and evergreen forest with an open grassy area in the southwest portion. One single family residence with a driveway and adjacent horse pasture is located in the northern portion of the review area. The review area is bounded by Van Wyck Road to the north, mostly undeveloped private property to the east and northwest, Walmart to the southwest, and undeveloped private property to the south.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Bellingham Bay, approximately 4 miles downstream, which is part of the Puget Sound. The Puget Sound is listed as 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. Spring Creek flows 0.3 miles south within the western portion of the Review Area. Spring Creek flows south and southwest from the review area approximately 1.8 miles to Baker Creek. Baker Creek then flows southwest approximately 0.7 miles to Squalicum Creek. Squalicum Creek then flows approximately 1.4 miles southwest to Bellingham Bay. The flow path and relative permanence for surface water for a stream outside of the review area are described as follows:

   Stream 2: Stream 2 flows north from a culvert under Van Wyck Road north of the review area. The culvert inlet is located within Wetland EW. Stream 2 flows northwest approximately 2,000 feet into an unnamed tributary to Spring Creek. This unnamed tributary then flows approximately 750 feet northwest into Spring Creek. Stream 2 is not mapped by NHD or USGS, but is mapped as a stream by Bellingham CityIQ. Bellingham LiDAR (2013) and Whatcom aerial imagery (2013,

2016, 2019, and 2022) indicate Stream 2 has a well-defined channel with obvious bed and bank. Water is visible in the channel in aerial imagery from 2009, 2011, 2013, 2014, 2015, 2016, 2019 and 2022 (Google Earth and Whatcom County). Stream 2 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. Stream 2 sustains flows through a combination of runoff and an elevated groundwater table. The Corps has determined that Stream 2 meets the relatively permanent standard and indirectly connects downstream to a TNW.

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):

      Spring Creek: Spring Creek is 0.3 miles within the review area and flows southwest to Baker Creek. This low gradient (<1% slope) reach of Spring Creek is characterized by gently sloping to steep banks with dense native vegetation. Substrate within Spring Creek consists of gravels and cobbles. Observed OHWM indicators included shelving, debris line, water staining, and absent vegetation. Multiple wetlands are located on the banks of Spring Creek. A 2023 USGS map and the National Hydrography Datatset (NHD) depict Spring Creek as a seasonal stream that flows south through the western portion of the review area. The USGS StreamStats tool maps a 2.67 square mile basin, characterized by rural residential and agricultural development, draining to Spring Creek at the review area. Based on the above information, Spring Creek 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. The Corps has determined that

[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.

Spring Creek meets the relatively permanent standard and indirectly connects downstream to a TNW.

Stream 1: Stream 1 flows from a culvert that drains Wetland A1. Stream 1 flows through a narrow (approximately 1-ft wide and 4-in deep), steep channel for approximately 20 feet before flowing into another culvert. Stream 1 flows out of the second culvert into another small (approximately 2-ft wide and 4-in deep), steep channel that flows approximately 75 ft to Spring Creek and through Wetland A2. Substrate within Stream 1 is characterized by silt and sand. The project's agent reported that Stream 1 flows seasonally and that in stream flows have been observed during multiple site visits and not only in short duration in response to precipitation. According to the weather station at the Bellingham International Airport, there was 1.45-in of rain during the 10 days preceding the USACE site visit on December 18, 2023 when water was observed flowing in Stream 1. There was no rain recorded within three days prior to the site visit. Observed hydrologic indicators included drift deposits and water-stained leaves. According to the Antecedent Precipitation Tool, there were normal conditions at the site on this day Stream 1 is not mapped by NHD or USGS. Based on the above information, Stream 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. The Corps has determined that Stream 1 meets the relatively permanent standard and indirectly connects downstream to a TNW.

f. Adjacent Wetlands (a)(4):

Wetland A1: Wetland A1 is a 19,828 square foot (SF) palustrine emergent and forested slope wetland located in the southeast corner of the review area. As documented in the 2024 revised delineation report, Wetland A1 drains through an approximately 80-ft long culvert to Stream 1 and therefore has a continuous surface water connection to Stream 1. Wetland A1 is adjacent to Stream 1, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland A1 meets the definition of an (a)(4) adjacent wetland and is a water of the United States

Wetland A2: Wetland A2 is a 6,780 SF palustrine forested riverine wetland located in the southern portion of the review area. Wetland A2 directly abuts and therefore has a continuous surface water connection to Spring Creek and Stream 1. Wetland A2 is adjacent to Spring Creek and Stream 1, relatively permanent tributaries as documented above. Based on this, the Corps has

determined that Wetland A2 meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

Wetland B/M: Wetland B/M is a 20,899 SF palustrine emergent riverine and slope wetland located in the middle of the review area. Wetland B/M directly abuts and therefore has a continuous surface water connection to Spring Creek. Wetland B/M is adjacent to Spring Creek, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland BM meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

Wetland C: Wetland C is a 948 SF palustrine emergent riverine wetland located in the western portion of the review area. Wetland C directly abuts and therefore has a continuous surface water connection to Spring Creek. Wetland C is adjacent to Spring Creek, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland C meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

Wetland D: Wetland D is a 1,972 SF palustrine forested riverine wetland located in the northwest corner of the review area. Wetland D directly abuts and therefore has a continuous surface water connection to Spring Creek. Wetland D is adjacent to Spring Creek, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland D meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

Wetland E/W: Wetland E/W is a 2,912 SF palustrine emergent depressional and slope wetland in the northern portion of the review area. A gravel driveway bisects Wetland E/W; however, a culvert under the driveway drains occasional runoff east to west and connects the two wetland portions. For purposes of determining whether a wetland is "adjacent," artificial structures do not divide a wetland if a hydrologic connection is maintained between the divided portions of the wetland. Rather, the wetland is treated as one wetland. If a single portion of that wetlands is adjacent, then the entire wetland is considered adjacent. Thus, based upon the culvert connection through the gravel driveway, the Corps is evaluating Wetland E/W as one wetland. As documented in the 2024 revised delineation report, during high water events, Wetland E/W appears to drain to the north a culvert under Van Wyck Road to Stream 2 and therefore has a continuous surface water connection to Stream

2. Wetland EW is adjacent to Stream 2, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland EW meets the definition of an (a)(4) adjacent wetland and is a water of the United States

Wetland K: Wetland K is a 2,750 SF palustrine forested and emergent slope and riverine wetland in the western portion of the review area. Wetland K directly abuts and therefore has a continuous surface water connection to Spring Creek. Wetland K is adjacent to Spring Creek, a relatively permanent tributary as documented above. Based on this, the Corps has determined that Wetland K meets the definition of an (a)(4) adjacent wetland and is a water of the United States.

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). 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 an approximately 250-foot-long flat ditch that appears to have been excavated in upland. The width of the ditch varies between one and two feet wide. The ditch does not connect to any wetland, stream or other aquatic feature; the ditch does not have an outlet. No water was observed in the ditch during a USACE site visit on December 18, 2024. No OHWM indicators were observed. 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 F: Wetland F is a 2,694 SF palustrine emergent depressional wetland located in the southwestern corner of the review area. Wetland F is

approximately 320 feet west of and above the floodplain of Spring Creek. The area between Wetland F and Spring Creek is characterized by steep forested slopes. Wetland F ponds seasonally, but water does not appear to overtop its edges. According to the revised 2024 wetland delineation report, Wetland F appears to intermittently drain north towards Wetland L/X via a cobble filled ditch along the western property boundary; however, this drainage was not observed during a USACE site visit on December 18, 2024. A memorandum dated February 29, 2024, clarifies that the aforementioned "cobble filled ditch" refers to a French drain located west of and outside of Wetland F. This French drain appears to drain north to Wetland LX. The soil within and around Wetland F is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland F 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 F 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 G: Wetland G is a 390 SF palustrine emergent slope wetland located in the southwestern portion of the review area. Wetland G is located approximately 290 feet west of and above the floodplain of Spring Creek. The area between Wetland G and Spring Creek is characterized by steep, forested slopes. According to the revised 2024 wetland delineation report Wetland G is seasonally saturated and drains to an excavated ditch (Ditch 1) along the southern property boundary; however, we assume this refers to sheet flow as no topographic feature or discrete conveyance was observed connecting the wetland to the ditch during a USACE site visit on December 18, 2023. A memorandum dated February 29, 2024, clarifies that Wetland G does not connect to Ditch 1. The soil within and around Wetland G is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland G is not abutting, 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 G 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 H: Wetland H is a 187 SF palustrine emergent slope wetland located in the southern portion of the review area. Wetland H is located approximately 45 feet west of and above the floodplain of Spring Creek. A steep forested slope separates Wetland H and Spring Creek; this slope is vegetated with sword fern

(FACU), western red cedar (FAC), and Himalayan blackberry (FAC). Wetland H is approximately 20 feet higher in elevation than Spring Creek. During a USACE site visit on December 18, 2023, no channelized outlet from Wetland H to Spring Creek was observed. The soil within and around Wetland H is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland H is not abutting, 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 H 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 J: Wetland J is a 29,480 SF palustrine emergent and forested depressional wetland located in the western portion of the review area. Wetland J is located approximately 200 feet west of and above the floodplain of Spring Creek. Upland vegetation and soils were reported between Wetland J and K. During a USACE site visit on December 18, 2023, no channelized outlet from Wetland J to Spring Creek or other wetlands within the review area was observed. The soil within and around Wetland J is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland J is not abutting, 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 J 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 L/X: Wetland L/X is a 20,677 SF palustrine emergent slope and depressional wetland in the southwest portion of the review area. Wetland LX is located approximately 80 feet from and above the floodplain of Spring Creek. The area between Wetland L/X and Spring Creek is characterized by steep forested slopes. According to the revised 2024 wetland delineation report, "Wetland L/X drains to the creek via a cobble filled ditch within the field." However, this drainage was not observed during a USACE site visit on December 18, 2024. A memorandum dated February 29, 2024, clarifies that the aforementioned "cobble filled ditch" refers to French drains located west of and within Wetland L/X. The French drain appears to outlet within the eastern portion of Wetland L/X. During a USACE site visit on December 18, 2023, no topographic feature or discrete conveyance from Wetland L/X or the associated French drains to Spring Creek were observed. The soil within and around

Wetland L/X is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland LX is not abutting, 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 LX 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 N: Wetland N is a 2,931 SF palustrine emergent slope wetland in the southern portion of the review area. Wetland N is located approximately 110 feet east of and above the floodplain Spring Creek. A steep forested slope separates Wetland N and Spring Creek; this slope is vegetated with sword fern (FACU), western red cedar (FAC), and Himalayan blackberry (FAC). During a USACE site visit on December 18, 2023, no channelized outlet from Wetland N to Spring Creek was observed. The soil within and around Wetland N is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland N is not abutting, 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 N 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 Y: Wetland Y is a 1,829 SF palustrine emergent depressional wetland in the southwest portion of the review area. Wetland Y is located approximately 110 feet southwest of Spring Creek. The area between Wetland Y and Spring Creek is characterized by steep forested slopes. Wetland Y ponds seasonally, but water does not appear to overtop its edges. Wetland Y does not have an outlet and is not located within the floodplain of Spring Creek. The soil within and around Wetland Y is mapped by the USDA Web Soil Survey as Whatcom-Labounty silt loams which are not considered hydric soils; however, this soil does contain hydric minor components (Labounty drained, Bellingham undrained, and Shalcar undrained). Wetland Y is not abutting, 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 Y 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.

a. "Critical Areas Assessment" dated October, 2019 and updated February 2024.

b. USGS TopoView accessed on 2/26/24 at https://ngmdb.usgs.gov/topoview/viewer/#4/40.01/-100.06

c. National Wetland Inventory accessed on 2/26/24 at https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper

d. Washington DNR LiDAR Portal accessed on 2/26/24 at https://lidarportal.dnr.wa.gov/

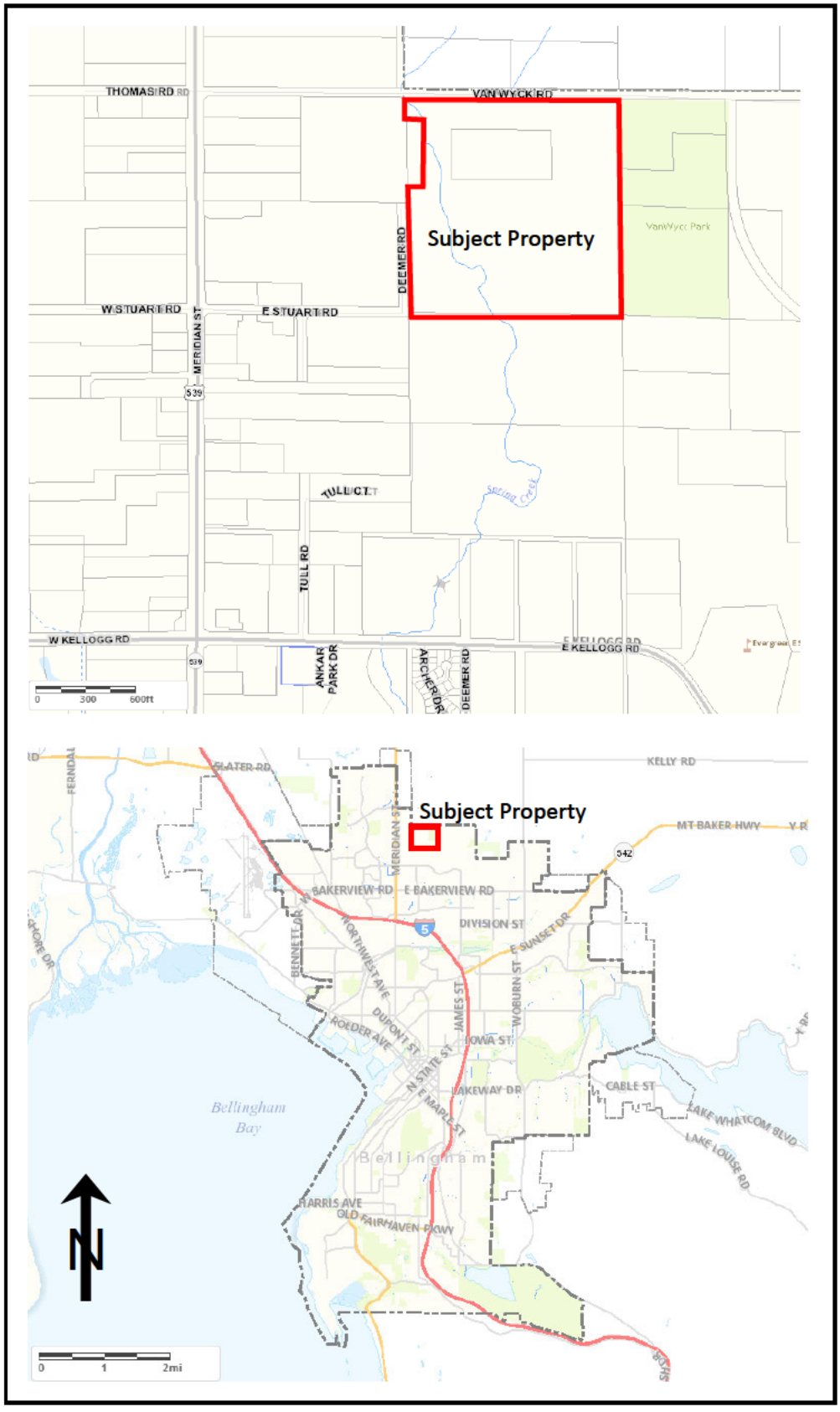
e. USGS National Hydrography Dataset accessed on 2/26/24 at https://hydro.nationalmap.gov/arcgis/rest/services/NHDPlus_HR/MapServer

f. USDA Web Soils Survey accessed on 2/26/24 at https://websoilsurvey.nrcs.usda.gov/app/

g. Bellingham CityIQ accessed on 2/26/24 at https://maps.cob.org/geviewer/Html5Viewer/Index.html?viewer=cityiq

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.



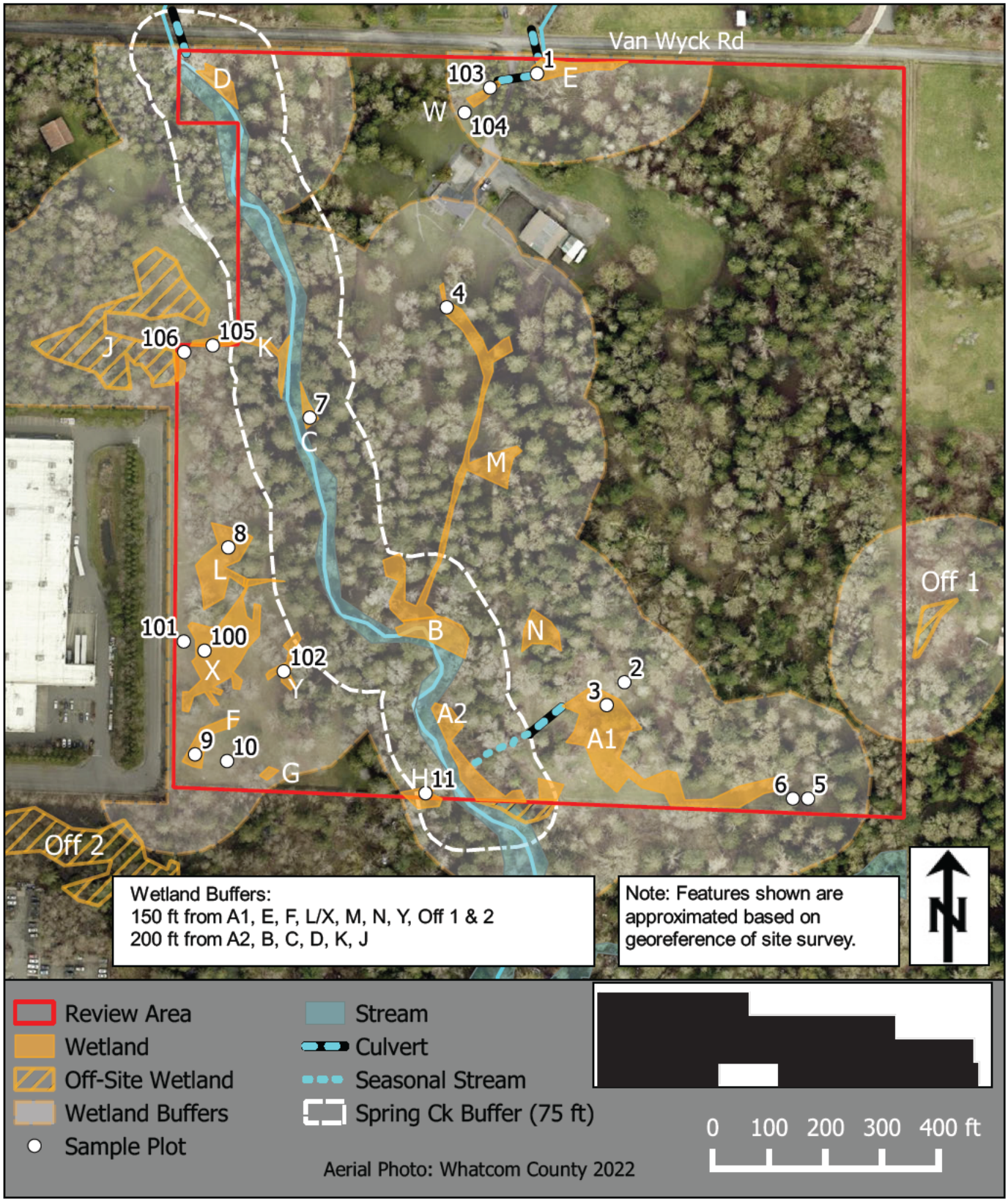
[redacted]

Vicinity Map
(COB City IQ)

247 Van Wyck Road
Critical Areas Assessment

Figure 1

February 2024



[redacted]

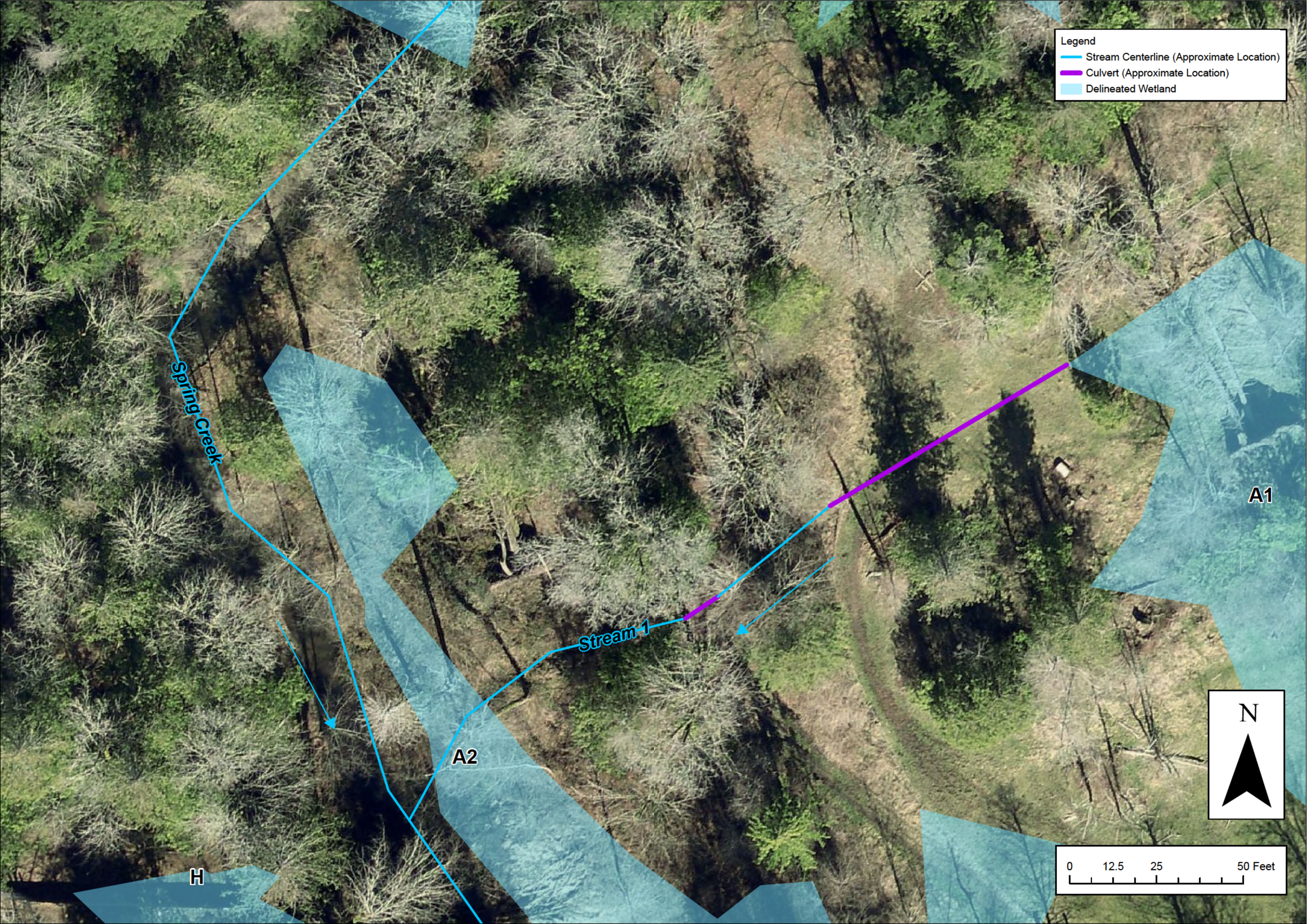
Wetland & Stream Map

Van Wyck Road
Critical Area Assessment

Figure 4

FEB 2024

[redacted]	**SW Corner Drainage Features** **Van Wyck Road**	**FEB 2024**


Legend
Stream Centerline (Approximate Location)
Culvert (Approximate Location)
Delineated Wetland
Spring Creek
Stream 1
A1
A2
H
N
0
12.5
25
50 Feet