



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

6 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) ,<sup>1</sup> NWS-2024-138

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.<sup>2</sup> 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.<sup>3</sup>

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),<sup>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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.

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- a. List of each individual feature within the review area and the jurisdictional status of each one.
  - i. Wetland A, non-jurisdictional
  - ii. Wetland B, 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 review area is a 4-acre area located on the western portion of a property in Bellingham, Whatcom County, Washington at Lat: 48.797205; Lat - 122.482676. The subject property is currently undeveloped with young deciduous forest habitat and open herbaceous areas. Dominant plant species include red alder (*Alnus rubra*), big leaf maple (*Acer circinatum*), Indian plum (*Oemleria cerasifromis*) oceanspray (*Holodiscus discolor*), Himalayan blackberry (*Rubus armeniacus*), salmonberry (*Rubus spectabilis*), bentgrass (*Agrostis spp.*), tall fescue (*Schedonorus arundinaceus*) and creeping buttercup (*Ranunculus repens*). The site slopes gently down to the east. The property is bound by Tull Road to the west, residential multifamily developments to the north and south, and undeveloped private property to the east. See attached figures for site location and delineated wetland boundaries. No previous jurisdictional determination has been made for wetlands or streams on the site.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Bellingham Bay, approximately 5 miles downstream. Bellingham Bay is a part of the Puget Sound which is listed on the Navigable Waters of the United States in Washington State dated December 31, 2008

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. A ditch is located east of the southeast corner of the review area and outside of the review area. This ditch flows

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720 feet east to Spring Creek. Spring Creek flows approximately 1.7 miles south to Baker Creek. Baker Creek flows approximately 1 mile southwest to Squalicum Creek. Squalicum Creek flows approximately 2.3 miles southwest to Bellingham Bay which is part of the Puget Sound.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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): N/A

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). 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.,

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<sup>5</sup> 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.

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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 a 0.009-acre palustrine emergent slope wetland. During a Corps site visit on 15 February 2024, no connection between Wetland A or any other aquatic feature was observed. The wetland experiences saturation only. The soil within the review area is mapped as Whatcom-Labounty silt loam on 0 to 8 percent slopes. Soils within Wetland A met hydric soil indicator A11 (Depleted Below Dark Surface). Wetland A is located 240 feet northwest of the aforementioned ditch and 940 feet west of Spring Creek. This wetland does not have an inlet or outlet. Wetland A is not located within the mapped floodplain. Wetland A 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 A does not have a continuous surface connection to any (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S.

Wetland B: Wetland B is a 0.05-acre palustrine emergent depression wetland. During a Corps site visit on 15 February 2024, no connection between Wetland B or any other aquatic feature was observed. The central portion of Wetland B ponds occasionally, while the edges of the wetland experience saturation only. There is no indication that the occasional ponding in Wetland B extends to the aforementioned ditch, any other wetland, or Spring Creek. The soil within the review area is mapped as Whatcom-Labounty silt loam on 0 to 8 percent slopes. Soils within Wetland B met hydric soils indicator F3 (Depleted Matrix). Wetland B is located approximately 90 feet west of the ditch and approximately 850 feet west of Spring Creek. This wetland does not have an inlet or outlet. Wetland A is not located within the mapped floodplain. Wetland B 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 A does not have a continuous surface connection to any (a)(1), (a)(2), or (a)(3) waters and is not a water of the U.S..

## 9. DATA SOURCES.

- a. “Revised Critical Areas Report and Mitigation Plan: Wetlands and Habitat Conservation Areas for 4302 Tull Road” dated January 4, 2024 by Miller Environmental Services, LLC
- b. USGS TopoView accessed on 2/15/2024 at <https://ngmdb.usgs.gov/topoview/viewer/#4/40.01/-100.06>

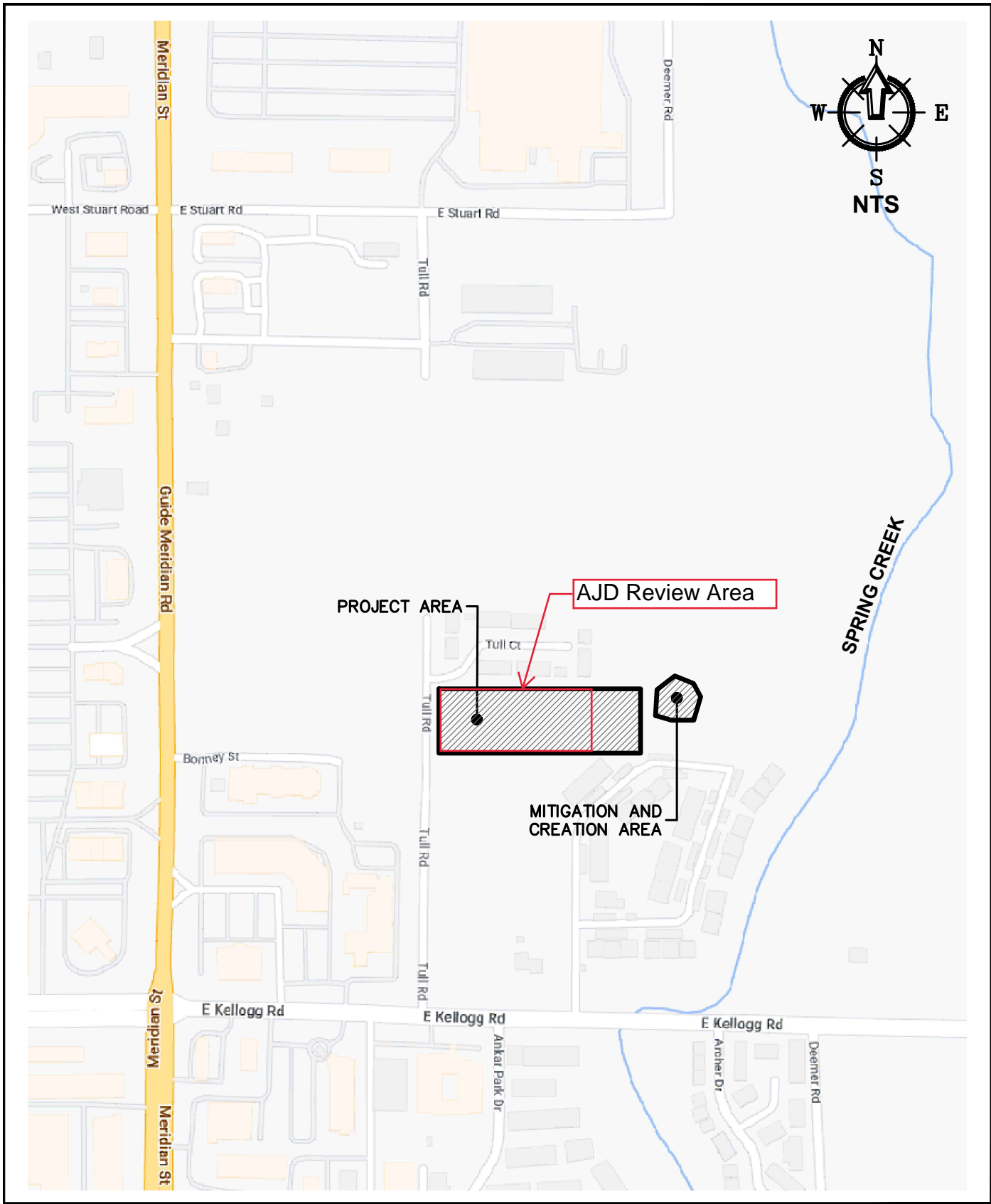
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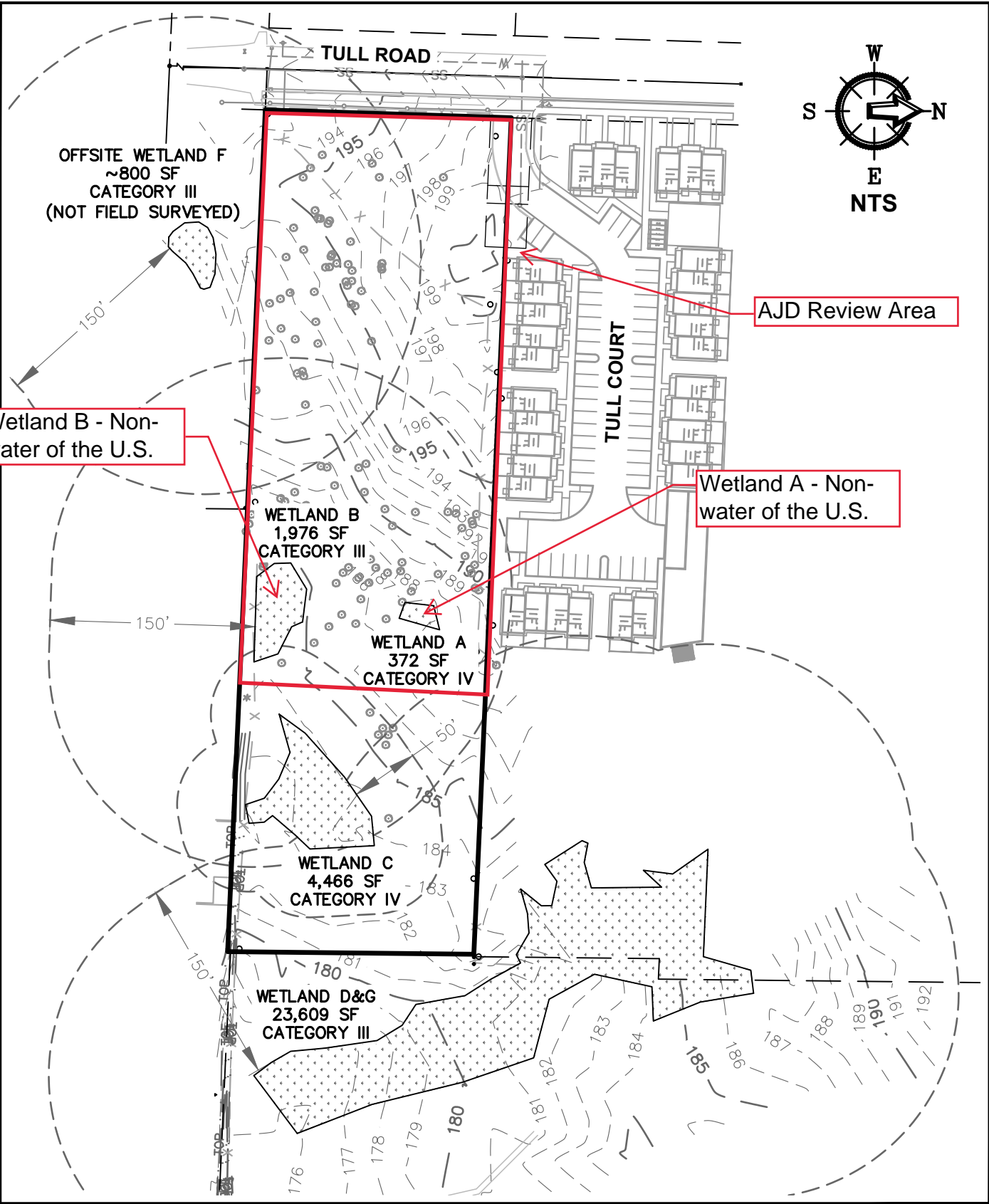
- c. National Wetland Inventory accessed on 2/15/2024 at <https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper>
- d. Washington DNR LiDAR Portal accessed on 2/13/2024 at <https://lidarportal.dnr.wa.gov/>
- e. Bellingham CityIQ accessed on 3/6/2024 at <https://maps.cob.org/geviewer/Html5Viewer/Index.html?viewer=cityiq>

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.



<b>TULL PHASE 2</b>  PROPOSED: WETLAND FILL & CREATION PURPOSE: TOWNHOUSE DEVELOPMENT	<b>VICINITY MAP</b>  CITY OF BELLINGHAM WHATCOM COUNTY WASHINGTON 98226  SEC. 7, T 38 N, R 3 E	Applicant: <b>BOO MARIS</b>	
		Reference #:	
		Waterway: ONSITE WETLANDS/SPRING CREEK	
		Date: 12/18/2023	Sheet 1 Of 10



**TULL PHASE 2**

PROPOSED: WETLAND FILL & CREATION  
 PURPOSE: TOWNHOUSE DEVELOPMENT

**EXISTING CONDITIONS**

CITY OF BELLINGHAM  
 WHATCOM COUNTY  
 WASHINGTON 98226

SEC. 7, T 38 N, R 3 E

Applicant: <b>BOO MARIS</b>	
Reference #:	
Waterway: ONSITE WETLANDS/SPRING CREEK	
Date: 12/18/2023	Sheet 3 Of 10