



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT  
1650 ARCH STREET  
PHILADELPHIA, PENNSYLVANIA 19103-2004

NAP

June 20, 2024

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) ,<sup>1</sup> NAP-2023-00224-85 MFR 1 of 1<sup>2</sup>

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>3</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>4</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>5</sup> the 2023 Rule as amended,

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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 CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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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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. Palustrine Forested Wetland-Section 404 jurisdictional.
  - ii. R4 Stream Channel-Section 404 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 center coordinates are 38.894421°N/ 75.46602°W. The 125.32 +/- acre review area is located 2.50-miles southwest of Milford at 7152 Shawnee Road in Sussex County, Delaware. The review area contains mainly agricultural fields, a residence, and forested land. The review area is bound to the north by a forested wetland complex, to the east by single family residences and forested land, to the south by a tree line and agricultural lands, and to the west by forested land, a tree line, and agricultural land.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is the Mispillion River, approximately 2.5 miles from the review area. The Mispillion River is subject to the ebb and flow of the tide, thereby meeting the definition of a TNW. <sup>6</sup>

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<sup>6</sup> 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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The wetland complex on site flows northeast via Johnson Branch ((a)(3) tributary) into an unnamed (a)(2) impoundment, back into Johnson Branch into Haven Lake ((a)(2) impoundment)), back into Johnson Branch into Silver Lake ((a)(2) impoundment), into the Mispillion River (TNW). The unnamed tributary to Bowman Branch flows into Bowman Branch ((a)(3) tributary) which empties into Haven Lake ((a)(2) impoundment) which discharges into Johnson Branch and then into Silver Lake ((a)(2) impoundment) and into the Mispillion River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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

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<sup>7</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.

<sup>8</sup> 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.

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- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): The R4 Stream Channel encompasses approximately 0.0013 acre within the review area and has a continuous surface connection with Bowman Branch tributary and an unnamed (a)(2) impoundment. The channel is identified as an intermittent tributary on USGS mapping from 1918-1944 and perennial from 2011 to present. The stream channel intercepts groundwater during certain times of the year, providing consistent hydrology for extended periods of the year making it a tributary that is relatively permanent flowing body of water. The tributary is also a conveyance for an upstream wetland. Based off of a review of historical aerial imagery and field investigations, the channel does dry out periodically. As such, the channel is neither ephemeral nor perennial, but intermittent. For these reasons, the tributary meets the definition of an (a)(3) tributary.
- f. Adjacent Wetlands (a)(4): The PFO Wetland located at the rear of the property is approximately 9.98 acres within the review area with a clear topographic break between the uplands and wetlands. The perennial stream Johnson Branch is identified on the USGS Quadrangle Maps as being within the boundary of the wetland. However, there is no discernable bed or bank within the review area, as the wetland is flooded. This is likely due to tailwater conditions created by a downstream in-line pond. Because the PFO Wetland directly abuts and has a continuous surface connection with a downstream unnamed (a)(2) impoundment, the PFO wetland meets the definition of an (a)(4) wetland.
- 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).<sup>9</sup> 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>9</sup> 88 FR 3004 (January 18, 2023)

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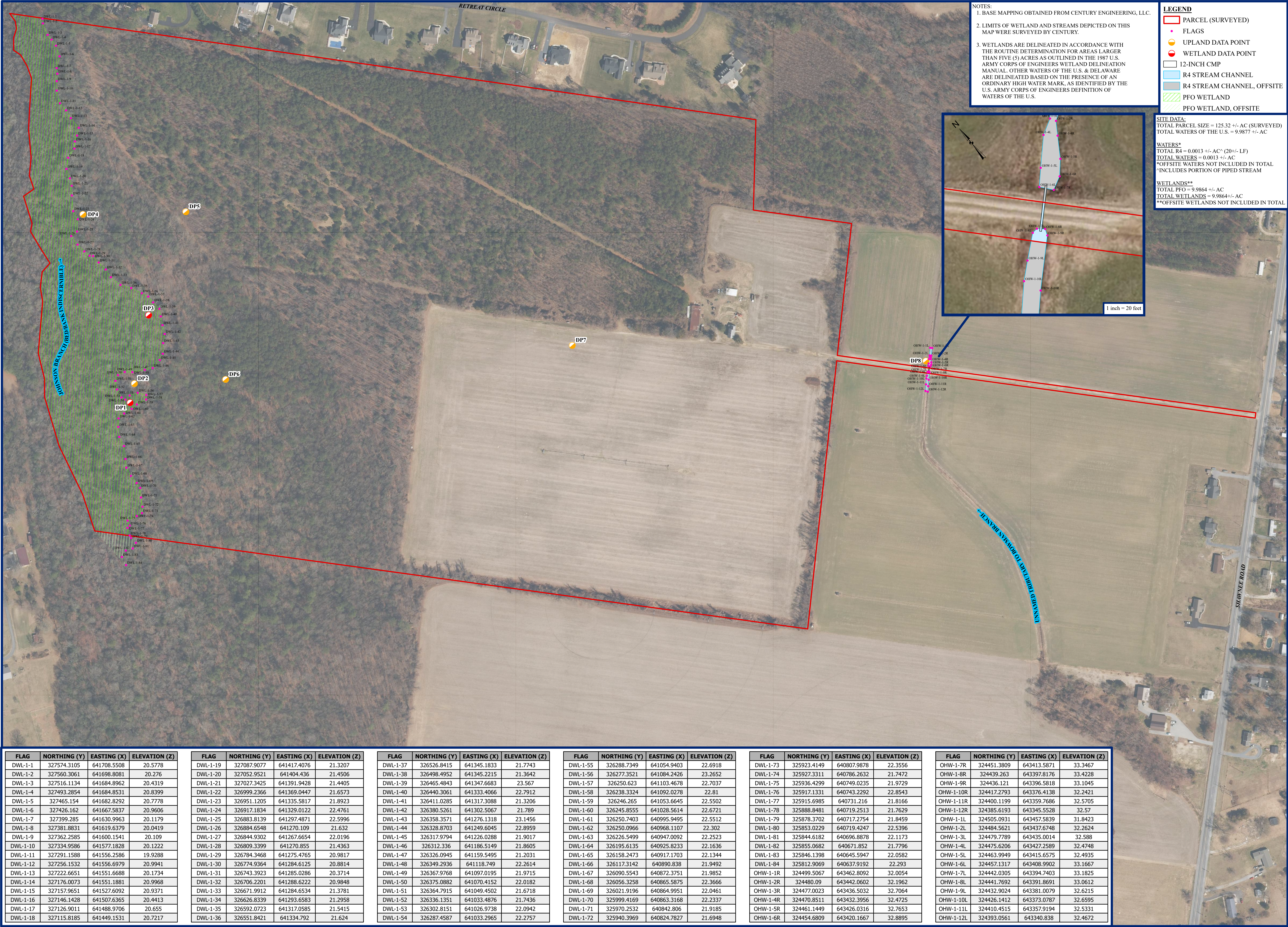
tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

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. A site visit was conducted by the USACE on March 26, 2024.
- b. Delineation report identified as, WATERS OF THE U.S. DELINEATION EDF RENEWABLES SOLAR FARM PROJECTS MISPILLION SOLAR FARM, prepared by Century Engineering, LLC, dated April 24, 2024.
- c. U.S. Army Corps of Engineers Request for Jurisdictional Determination ENG FORM 6247, dated March 13, 2024.
- d. Plans identified as CONDITIONAL US PLAN FOR MISPILLION SOLAR FARM T.P. 130-3.00-63.00 MISPILLION HUNDRED MILFORD, SUSSEX COUNTY, STATE OF DELAWARE 19963, prepared by Century Engineering, dated September 2022, 6 sheets.

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.



NOTES:

1. BASE MAPPING OBTAINED FROM CENTURY ENGINEERING, LLC.

2. LIMITS OF WETLAND AND STREAMS DEPICTED ON THIS MAP WERE SURVEYED BY CENTURY.

3. WETLANDS ARE DELINEATED IN ACCORDANCE WITH THE ROUTINE DETERMINATION FOR AREAS LARGER THAN FIVE (5) ACRES AS OUTLINED IN THE 1987 U.S. ARMY CORPS OF ENGINEERS WETLAND DELINEATION MANUAL. OTHER WATERS OF THE U.S. & DELAWARE ARE DELINEATED BASED ON THE PRESENCE OF AN ORDINARY HIGH WATER MARK, AS IDENTIFIED BY THE U.S. ARMY CORPS OF ENGINEERS DEFINITION OF WATERS OF THE U.S.

- LEGEND**
- PARCEL (SURVEYED)
  - FLAGS
  - UPLAND DATA POINT
  - WETLAND DATA POINT
  - 12-INCH CMP
  - R4 STREAM CHANNEL
  - R4 STREAM CHANNEL, OFFSITE
  - PFO WETLAND
  - PFO WETLAND, OFFSITE

**SITE DATA:**  
TOTAL PARCEL SIZE = 125.32 +/- AC (SURVEYED)  
TOTAL WATERS OF THE U.S. = 9.9877 +/- AC

**WATERS\***  
TOTAL R4 = 0.0013 +/- AC\* (20+/- LF)  
TOTAL WATERS = 0.0013 +/- AC  
\*OFFSITE WATERS NOT INCLUDED IN TOTAL  
\*INCLUDES PORTION OF PIPED STREAM

**WETLANDS\*\***  
TOTAL PFO = 9.9864 +/- AC  
TOTAL WETLANDS = 9.9864 +/- AC  
\*\*OFFSITE WETLANDS NOT INCLUDED IN TOTAL



1 inch = 150 feet

Project Manager: AS

Drawn: TA

Job Number: 225010.005A

Revisions: APRIL 24, 2024

| FLAG     | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|----------|--------------|-------------|---------------|
| DWL-1-1  | 327574.3105  | 641708.5508 | 20.5778       |
| DWL-1-2  | 327560.3061  | 641698.8081 | 20.276        |
| DWL-1-3  | 327516.1134  | 641684.8962 | 20.4319       |
| DWL-1-4  | 327493.2854  | 641684.8531 | 20.8399       |
| DWL-1-5  | 327465.154   | 641682.8292 | 20.7778       |
| DWL-1-6  | 327426.162   | 641667.5837 | 20.9606       |
| DWL-1-7  | 327399.285   | 641630.9963 | 20.1179       |
| DWL-1-8  | 327381.8831  | 641619.6379 | 20.0419       |
| DWL-1-9  | 327362.2585  | 641600.1541 | 20.109        |
| DWL-1-10 | 327334.9586  | 641577.1828 | 20.1222       |
| DWL-1-11 | 327291.1588  | 641556.2586 | 19.9288       |
| DWL-1-12 | 327256.1532  | 641556.6979 | 20.9941       |
| DWL-1-13 | 327222.6651  | 641551.6688 | 20.1734       |
| DWL-1-14 | 327176.0073  | 641551.1881 | 20.9968       |
| DWL-1-15 | 327157.9651  | 641527.6092 | 20.9371       |
| DWL-1-16 | 327146.1428  | 641507.6365 | 20.4413       |
| DWL-1-17 | 327126.9011  | 641488.9706 | 20.655        |
| DWL-1-18 | 327115.8185  | 641449.1531 | 20.7217       |

| FLAG     | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|----------|--------------|-------------|---------------|
| DWL-1-19 | 327087.9077  | 641417.4076 | 21.3207       |
| DWL-1-20 | 327052.9521  | 641404.436  | 21.4506       |
| DWL-1-21 | 327027.3425  | 641391.9428 | 21.4405       |
| DWL-1-22 | 326999.2366  | 641369.0447 | 21.6573       |
| DWL-1-23 | 326951.1205  | 641335.5817 | 21.8923       |
| DWL-1-24 | 326917.1834  | 641329.0122 | 22.4761       |
| DWL-1-25 | 326883.8139  | 641297.4871 | 22.5996       |
| DWL-1-26 | 326884.6548  | 641270.109  | 21.632        |
| DWL-1-27 | 326844.9302  | 641267.6654 | 22.0196       |
| DWL-1-28 | 326809.3399  | 641270.855  | 21.4363       |
| DWL-1-29 | 326784.3468  | 641275.4765 | 20.9817       |
| DWL-1-30 | 326774.9364  | 641284.6125 | 20.8814       |
| DWL-1-31 | 326743.3923  | 641285.0286 | 20.3714       |
| DWL-1-32 | 326706.2201  | 641288.6222 | 20.9848       |
| DWL-1-33 | 326671.9912  | 641284.6534 | 21.3781       |
| DWL-1-34 | 326626.8339  | 641293.6583 | 21.2958       |
| DWL-1-35 | 326592.0723  | 641317.0585 | 21.5415       |
| DWL-1-36 | 326551.8421  | 641334.792  | 21.624        |

| FLAG     | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|----------|--------------|-------------|---------------|
| DWL-1-37 | 326526.8415  | 641345.1833 | 21.7743       |
| DWL-1-38 | 326498.4952  | 641345.2215 | 21.3642       |
| DWL-1-39 | 326465.4843  | 641347.6683 | 23.567        |
| DWL-1-40 | 326440.3061  | 641333.4066 | 22.7912       |
| DWL-1-41 | 326411.0285  | 641317.3088 | 21.3206       |
| DWL-1-42 | 326380.5261  | 641302.5067 | 21.789        |
| DWL-1-43 | 326358.3571  | 641276.1318 | 23.1456       |
| DWL-1-44 | 326328.8703  | 641249.6045 | 22.8959       |
| DWL-1-45 | 326317.9794  | 641070.4152 | 21.9017       |
| DWL-1-46 | 326312.336   | 641186.5149 | 21.8605       |
| DWL-1-47 | 326326.0945  | 641159.5495 | 21.2031       |
| DWL-1-48 | 326349.2936  | 641118.749  | 22.2614       |
| DWL-1-49 | 326367.9768  | 641097.0195 | 21.9715       |
| DWL-1-50 | 326375.0882  | 641070.4152 | 22.0182       |
| DWL-1-51 | 326364.7915  | 641049.4502 | 21.6718       |
| DWL-1-52 | 326336.1351  | 641033.4876 | 21.7436       |
| DWL-1-53 | 326302.8151  | 641026.9738 | 22.0942       |
| DWL-1-54 | 326287.4587  | 641033.2965 | 22.2757       |

| FLAG     | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|----------|--------------|-------------|---------------|
| DWL-1-55 | 326288.7349  | 641054.9403 | 22.6918       |
| DWL-1-56 | 326277.3521  | 641084.2426 | 23.2652       |
| DWL-1-57 | 326250.623   | 641103.4678 | 22.7037       |
| DWL-1-58 | 326238.3324  | 641092.0278 | 22.81         |
| DWL-1-59 | 326246.265   | 641053.6645 | 22.5502       |
| DWL-1-60 | 326245.8555  | 641028.5614 | 22.6721       |
| DWL-1-61 | 326250.7403  | 640995.9495 | 22.5512       |
| DWL-1-62 | 326250.0966  | 640968.1107 | 22.302        |
| DWL-1-63 | 326226.5499  | 640947.0092 | 22.2523       |
| DWL-1-64 | 326195.6135  | 640925.8233 | 22.1636       |
| DWL-1-65 | 326158.2473  | 640917.1703 | 22.1344       |
| DWL-1-66 | 326117.3142  | 640890.838  | 21.9492       |
| DWL-1-67 | 326090.5543  | 640872.3751 | 21.9852       |
| DWL-1-68 | 326056.3258  | 640865.5875 | 22.3666       |
| DWL-1-69 | 326021.9196  | 640864.9951 | 22.0461       |
| DWL-1-70 | 325999.4169  | 640863.3168 | 22.2337       |
| DWL-1-71 | 325970.2532  | 640842.806  | 21.9185       |
| DWL-1-72 | 325940.3969  | 640824.7827 | 21.6948       |

| FLAG     | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|----------|--------------|-------------|---------------|
| DWL-1-73 | 325923.4149  | 640807.9878 | 22.3556       |
| DWL-1-74 | 325927.3311  | 640786.2632 | 21.7472       |
| DWL-1-75 | 325936.4299  | 640749.0235 | 21.9729       |
| DWL-1-76 | 325917.1331  | 640743.2292 | 22.8543       |
| DWL-1-77 | 325915.6985  | 640731.216  | 21.8166       |
| DWL-1-78 | 325888.8481  | 640719.2513 | 21.7629       |
| DWL-1-79 | 325878.3702  | 640717.2754 | 21.8459       |
| DWL-1-80 | 325853.0229  | 640719.4247 | 22.5396       |
| DWL-1-81 | 325844.6182  | 640696.8878 | 22.1173       |
| DWL-1-82 | 325855.0682  | 640671.852  | 21.7796       |
| DWL-1-83 | 325846.1398  | 640645.5947 | 22.0582       |
| DWL-1-84 | 325812.9069  | 640637.9192 | 22.293        |
| OHW-1-1R | 324499.5067  | 643462.8092 | 32.0054       |
| OHW-1-2R | 324480.09    | 643442.0602 | 32.1962       |
| OHW-1-3R | 324477.0023  | 643436.5032 | 32.7064       |
| OHW-1-4R | 324470.8511  | 643432.3956 | 32.4725       |
| OHW-1-5R | 324461.1449  | 643426.0316 | 32.7653       |
| OHW-1-6R | 324454.6809  | 643420.1667 | 32.8895       |

| FLAG      | NORTHING (Y) | EASTING (X) | ELEVATION (Z) |
|-----------|--------------|-------------|---------------|
| OHW-1-7R  | 324451.3809  | 643413.5871 | 33.3467       |
| OHW-1-8R  | 324439.263   | 643397.8176 | 33.4228       |
| OHW-1-9R  | 324436.121   | 643396.5818 | 33.1045       |
| OHW-1-10R | 324417.2793  | 643376.4138 | 32.2421       |
| OHW-1-11R | 324400.1199  | 643359.7686 | 32.5705       |
| OHW-1-12R | 324385.6193  | 643345.5528 | 32.57         |
| OHW-1-1L  | 324505.0931  | 643457.5839 | 31.8423       |
| OHW-1-2L  | 324484.5621  | 643437.6748 | 32.2624       |
| OHW-1-3L  | 324479.7789  | 643435.0014 | 32.588        |
| OHW-1-4L  | 324475.6206  | 643427.2589 | 32.4748       |
| OHW-1-5L  | 324463.9949  | 643415.6575 | 32.4935       |
| OHW-1-6L  | 324457.1317  | 643408.9902 | 33.1667       |
| OHW-1-7L  | 324442.0305  | 643394.7403 | 33.1825       |
| OHW-1-8L  | 324441.7692  | 643391.8691 | 33.0612       |
| OHW-1-9L  | 324432.9024  | 643381.0079 | 32.6215       |
| OHW-1-10L | 324426.1412  | 643373.0787 | 32.6595       |
| OHW-1-11L | 324410.4515  | 643357.9194 | 32.5331       |
| OHW-1-12L | 324393.0561  | 643340.838  | 32.4672       |