



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT
1605 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19103-2004

NAP

January 24, 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 NAP-2024-00074-85 MFR 1 of 1²

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.

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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. Wetland A: Non-jurisdictional
 - ii. Wetland B: Section 404 jurisdictional
 - iii. Wetland D: Section 404 jurisdictional
 - iv. Waters C: Section 404 Jurisdictional
 - v. Ephemeral Channel: 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. 651 (2023)

3. REVIEW AREA. The review area includes approximately 60.80 acres located at 2187 Lynnbury Woods Road, Tax Map Parcel Number 4-00-03700-01-1700-000 in Dover, Kent County, Delaware. The center coordinates for the site are 39.233655°N/75.591098°W. The property consists of a residential dwelling in the southeast with the remaining portion in agriculture. A narrow hedgerow surrounds the property with wooded areas in the northeast and southwest.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Leipsic River is approximately 0.65 mile from the site and is the

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nearest TNW to which the aquatic resources are connected. The Leipsic River is subject to the ebb and flow of the tide, thereby meeting the definition of a TNW.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland A flows into an ephemeral ditch on site which flows into an offsite swale that flows into a perennial stream and then into the Leipsic River (TNW) (0.65 mile). Wetlands B and D flow into Waters C (an unnamed intermittent tributary to Willis Branch), traveling 0.53 mile, which flows into Willis Branch for 0.37 mile and then empties into Garrisons Lake, an (a)(2) impoundment of the Leipsic River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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.

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.

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.

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- 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): Waters C (1,357 linear feet within the review area) continues to flow north offsite for another 1,754 feet into a perennial stream (Willis Branch) which flows for approximately 2,488 linear feet where it empties into an (a)(2) impoundment (Garrisons Lake). Garrisons Lake is an impoundment of the Leipsic River, which is an (a)(1) TNW. The tributary meets the relatively permanent standard, as it has flowing water during certain times of the year. This is evident by the established bed and bank and the presence of an ordinary high water mark. Water was flowing in the tributary during both site visits. However, during the 2023 visit, the presence of flowing water wasn't noted in the entirety of the stream, but a majority of the stream, whereas during the 2024 visit, water was flowing throughout. The National Hydrography Dataset (NHD) identifies Waters C as intermittent for the entire reach to its confluence with Willis Branch. Because Waters C flows outside of the review area onto private property, the NHD layer was utilized for confirming the flow regime that was noted in the review area. For these reasons the Waters C meets the definition of an (a)(3) tributary.
- f. Adjacent Wetlands (a)(4):

Wetland B (0.05 acre) has a continuous surface connection to Waters C (a relatively permanent tributary) through a 20 linear feet by 12" reinforced concrete pipe. Because Wetland B has a continuous surface connection to Waters C (an (a)(3) relatively permanent tributary), it meets the definition of adjacent and is therefore jurisdictional. This is consistent with the Assessment of "Adjacent" Wetlands Consistent with *Sackett* as described in the U.S. Environmental Protection Agency (EPA) and the Office of the Assistant Secretary of the Army for Civil Works (OASACW) Joint Memorandum on NAP-2023-01223.

Wetland D (0.25 acre) is directly abutting Waters C (a relatively permanent tributary). Because Wetland D has a continuous surface connection to Waters C (a relatively permanent tributary), Wetland D meets the definition of adjacent and is therefore jurisdictional.
- g. Additional Waters (a)(5): N/A

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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 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).

Ephemeral Channel: The feature identified as Ephemeral Channel connects Wetland A to the (a)(1) Leipsic River. The Ephemeral Channel flows offsite into a grassed swale and culvert crossings through a neighborhood and back into a relatively permanent unnamed tributary that connects to the Leipsic River. On the January 31, 2023, site visit the entire reach of the Ephemeral Channel was evaluated within the review area, as well as viewing the off-site portion from the review area. The Ephemeral Channel was completely dry with vegetation duff and trees growing throughout the bottom of the channel. The swale outside of the review area was also dry. However, on the January 21, 2024, site visit, the Ephemeral Channel contained flowing water in response to several recent rain events including a rain event that occurred the prior evening and lasted into the morning. Review of historical aerial imagery dating back to 1926 in the consultant’s report depicts the Wetland A feature as a wetland depression in an agriculture field with the Ephemeral Channel exiting the wetland at the same location as it exists today. The linear nature of the Ephemeral Channel and the mounding of soil along the top of the bank of the Ephemeral Channel, provides the basis of the determination that the Ephemeral Channel is manmade. Additionally, the Ephemeral Channel transitions into a grassed swale downstream, that also lacks an ordinary high water mark and a bed and bank. Based on the above information and the lack of bed and bank and ordinary high water mark it has been determined that the Ephemeral Channel flows for only short durations in direct response to precipitation events. Because the Ephemeral Ditch does not drain only uplands, it does not meet the definition of a (b)(3) ditch exclusion. However, because the Ephemeral Ditch does not meet the

⁹ 88 FR 3004 (January 18, 2023)

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relatively permanent standard, it does not meet the definition of a waters of the United States.

Wetland A: Wetland A (2.09 acres) is connected to a relatively permanent unnamed tributary outside of the review area, approximately 1,470 linear feet away. Wetland A flows into the Ephemeral Channel (approximately 478 linear feet on site) which continues as an approximately 232 linear feet swale offsite that enters into a reinforced concrete pipe which continues for approximately 270 linear feet, and then enters a 450 linear feet swale in which two stormwater ponds use as an outlet, which then crosses under Messina Hill Road through a 40 linear feet reinforced concrete pipe that empties into the NHD identified relatively permanent unnamed tributary that flows for approximately 2,375 linear feet, crossing under Dupont Highway and flowing into the Leipsic River, an (a)(1) TNW. Review of historical aerial imagery indicates the signature of standing or flowing water downstream of Messina Hill Road for longer periods of time, that is not a direct response to precipitation.

The number of connections, the types of connections, the indicators of flow, and length of the connection can all inform whether the continuous surface connection requirement is met. As the length of the connection increases, even with stronger indicators of flow (including actual flow, indicators of ordinary high water mark, etc.), the length of the connection can become no longer physically close (see *Sackett*, 598 U.S. at 667), such that the discrete features are no longer providing a continuous physical connection. After consideration of flow, the number, the types, and the length of connection, the 1,470 linear feet length of connection here between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland A does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not “adjacent.” As such, Wetland A does not meet the definition of an (a)(4) Adjacent Wetland and does not meet the definition of a waters of the United States. This is consistent with the Memorandum on NWK-2024-00392, issued by the U.S. EPA and OASACW, dated November 21, 2024.

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. USACE site visits conducted on January 31, 2023, and January 21, 2024.
 - b. Wetland Delineation Report-2187 Lynnbury Woods Road, Dover, Delaware, dated January 9, 2023, prepared by Watershed Eco, LLC., 70 pages.

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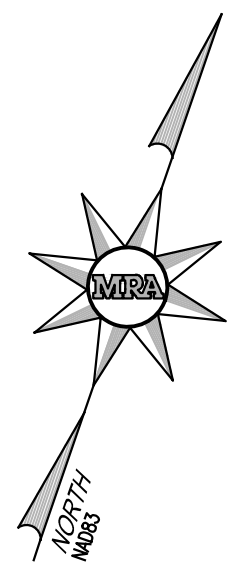
- c. U.S.D.A Form SCS-CPA-026 and map, dated November 4, 1993. (PC determination.)
- d. WETLAND DELINEATION-2187 LYNNBURY WOODS ROAD, DOVER, DELAWARE, dated March 23, 2023, and revised on April 25, 2024, and August 29, 2024, prepared by Watershed Eco, LLC., 1 sheet.

10. OTHER SUPPORTING INFORMATION. The USACE initially visited the site on January 31, 2023. A jurisdictional determination request was later submitted in April 2023. However, upon receipt the USACE Districts were directed by the USACE HQ to place a hold on jurisdictional determinations due to on-going court cases involving the definition of waters of the United States. A site visit was once again conducted on January 31, 2024, for review under the current definition of waters of the United States. Upon review, it was noted that multiple items on the plans needed to be addressed, based on the new rule. A complete wetland delineation plan was received on August 30, 2024.

Memorandum on NAP-2023-01223, issued by the U.S. EPA and OASACW, dated June 25, 2024.

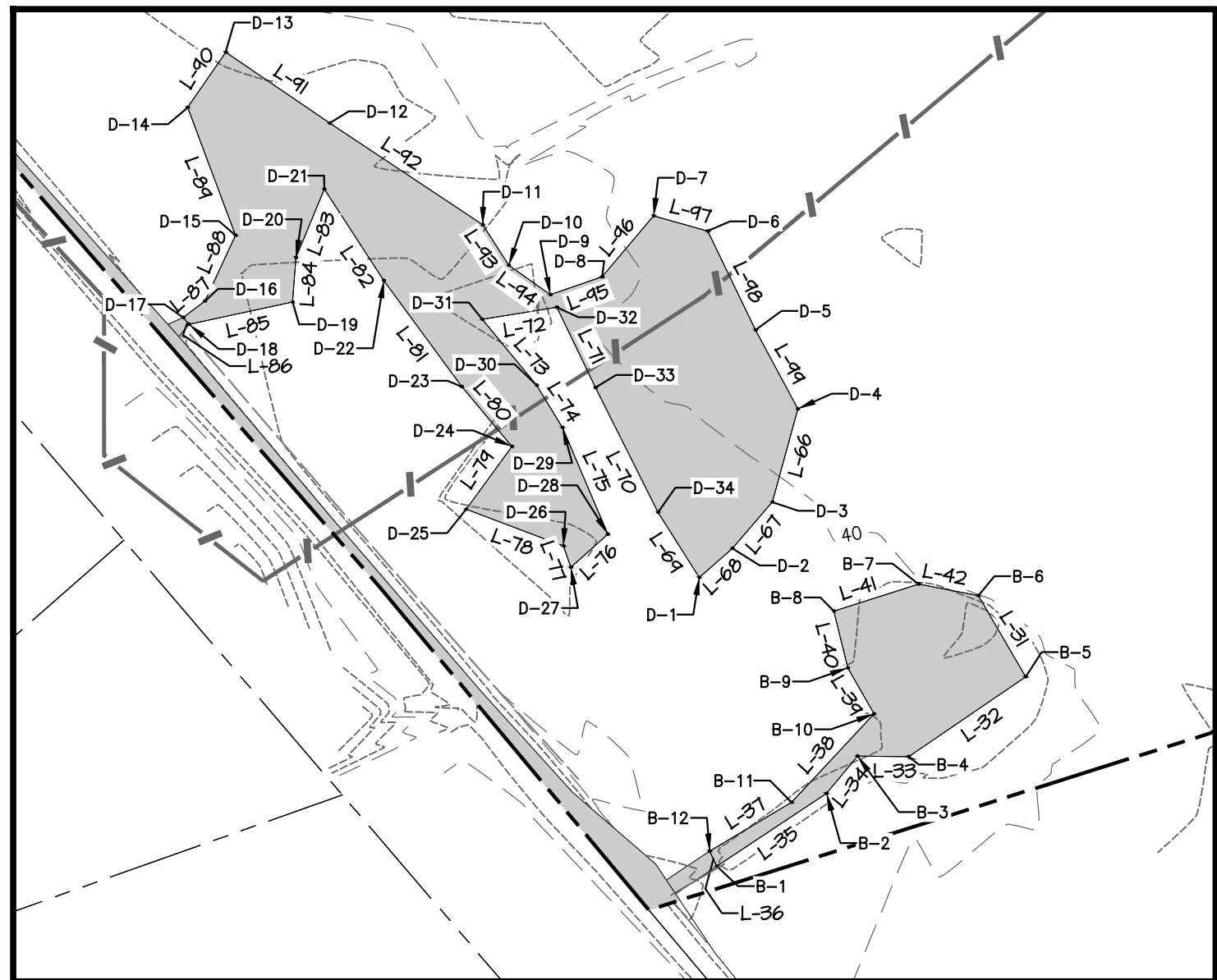
Memorandum on NWK-2024-00392, issued by the U.S. EPA and OASACW, dated November 21, 2024.

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.



LEGEND

	EXIST. PARCEL BOUNDARY
	EXIST. RIGHT-OF-WAY
	EXIST. LOT LINE
	EXIST. SOILS LINE
	NON-TIDAL WETLANDS



WETLAND B & D DETAIL

SCALE: 1" = 50'

GENERAL INFORMATION:

PLAN PREPARED FOR:

K. HOVNANIAN DELAWARE DIVISION, INC.
2441 SOUTH DUPONT BLVD, SUITE G
SMYRNA, DE 19777
CONTACT PERSON: JONATHAN CONTANT
P: 302-505-6105

AREA OF REVIEW:

±61.0 AC.

EXISTING CONDITIONS SHOWN HEREON WERE PROVIDED BY MORRIS & RITCHIE ASSOCIATES, INC. (MRA). EXISTING PROPERTY BOUNDARIES SHOWN HEREON WERE PROVIDED BY KENT COUNTY GIS MAPPING.

THIS SITE IS NOT WITHIN A 100-YEAR FLOODPLAIN.

FLAGS C-2, B-1 TO B-12, AND D-1 TO D-34 WERE NOT IDENTIFIED BY MRA SURVEY AND HAVE BEEN PROVIDED HERE BY INFORMATION FROM WATERSHED ECO INC.

WETLAND A

LINE #	LENGTH	DIRECTION
L-1	87.79	N 70° 08' 56" E
L-2	86.58	N 68° 08' 54" E
L-3	57.50	N 73° 41' 03" E
L-4	71.77	N 33° 45' 34" W
L-5	61.50	N 41° 45' 08" W
L-6	35.64	N 29° 58' 34" W
L-7	59.72	N 17° 06' 16" W
L-8	44.00	N 80° 27' 07" W
L-9	19.88	N 48° 32' 09" E
L-10	51.56	N 23° 14' 30" E
L-11	48.64	N 01° 17' 12" W
L-12	37.85	N 29° 01' 24" E
L-13	47.12	N 86° 12' 11" W
L-14	28.80	N 36° 19' 57" E
L-15	27.12	N 14° 05' 48" E
L-16	28.69	N 66° 41' 55" E
L-17	46.41	N 48° 40' 27" W
L-18	69.72	N 39° 27' 30" W
L-19	62.07	N 66° 34' 10" W
L-20	41.14	N 73° 16' 07" W
L-21	25.08	N 03° 43' 36" W
L-22	44.78	N 89° 54' 19" W
L-23	56.89	N 24° 20' 38" W
L-24	15.88	N 26° 43' 41" E
L-25	20.46	N 76° 52' 04" W
L-26	11.84	N 36° 57' 11" W
L-27	25.66	N 36° 46' 42" W
L-28	37.27	N 20° 35' 44" E
L-29	32.47	N 48° 05' 55" W
L-30	58.02	N 00° 40' 14" W

WETLAND B

LINE #	LENGTH	DIRECTION
L-31	28.77	N 30° 15' 14" W
L-32	44.94	N 55° 38' 38" E
L-33	16.26	S 89° 26' 48" E
L-34	15.34	N 39° 43' 59" E
L-35	41.72	N 56° 22' 02" E
L-36	5.32	S 26° 08' 34" E
L-37	30.27	S 59° 16' 04" W
L-38	38.36	S 42° 56' 21" W
L-39	16.78	S 29° 38' 44" E
L-40	18.57	S 13° 44' 02" E
L-41	28.19	S 72° 24' 43" W
L-42	19.28	N 79° 04' 21" W

WATERS C

LINE #	LENGTH	DIRECTION
L-43	66.22	N 38° 52' 48" W
L-44	33.96	N 33° 41' 52" W
L-45	34.77	N 49° 12' 50" W
L-46	42.98	N 42° 09' 00" W
L-47	75.19	N 40° 44' 29" W
L-48	70.69	N 40° 03' 57" W
L-49	75.90	N 41° 42' 13" W
L-50	66.23	N 41° 08' 08" W
L-51	45.50	N 38° 29' 14" W
L-52	99.31	N 42° 19' 23" W
L-53	70.06	N 38° 06' 09" W
L-54	57.20	N 21° 52' 22" W
L-55	164.65	N 29° 57' 05" W
L-56	73.07	N 30° 39' 38" E
L-57	62.46	N 29° 46' 58" W
L-58	32.93	N 31° 47' 24" W
L-59	62.87	N 25° 27' 26" W
L-60	44.37	N 29° 55' 10" W
L-61	48.32	N 25° 21' 04" W
L-62	73.89	N 29° 18' 32" W
L-63	46.38	N 29° 04' 01" W
L-64	47.01	N 27° 02' 00" W
L-65	44.14	N 29° 39' 37" W

WETLAND D

LINE #	LENGTH	DIRECTION
L-66	30.82	S 15° 14' 38" W
L-67	19.40	S 40° 40' 48" W
L-68	14.02	S 48° 48' 02" W
L-69	24.47	N 32° 17' 37" W
L-70	44.24	N 26° 39' 11" W
L-71	28.25	N 25° 37' 49" W
L-72	23.94	S 80° 51' 51" W
L-73	27.12	S 39° 30' 56" E
L-74	15.67	S 31° 19' 21" E
L-75	36.81	S 23° 04' 23" E
L-76	15.75	S 48° 21' 21" W
L-77	7.14	N 19° 03' 09" W
L-78	32.98	N 69° 21' 52" W
L-79	24.68	N 36° 00' 53" E
L-80	24.75	N 40° 03' 01" W
L-81	41.77	N 36° 13' 30" W
L-82	34.59	N 33° 03' 51" W
L-83	23.51	S 22° 29' 43" W
L-84	14.18	S 04° 21' 21" W
L-85	33.63	S 77° 50' 00" W
L-86	2.82	N 39° 56' 33" W
L-87	8.73	N 52° 40' 52" E
L-88	22.99	N 24° 52' 08" E
L-89	43.28	N 20° 33' 34" W
L-90	21.31	N 34° 32' 26" E
L-91	39.98	S 55° 42' 57" E
L-92	58.24	S 56° 21' 22" E
L-93	15.23	S 32° 45' 16" E
L-94	16.17	S 54° 35' 51" E
L-95	17.35	N 70° 53' 49" E
L-96	25.37	N 40° 12' 51" E
L-97	17.82	S 74° 14' 27" E
L-98	34.86	S 25° 45' 05" E
L-99	28.38	S 28° 08' 02" E

WATERS EXTENDS
BEYOND SUBJECT SITE

WATERS EXTENDS
BEYOND SUBJECT SITE

WATERS EXTENDS
BEYOND SUBJECT SITE

INTERMITTENT WATERS C
6,251 SF
FLAGS C-1 TO C-24

WETLAND D
11,217 SF
FLAGS D-1 TO D-34
(SEE DETAIL, THIS SHEET)

WETLAND B
2,470 SF
FLAGS B-1 TO B-12
(SEE DETAIL, THIS SHEET)

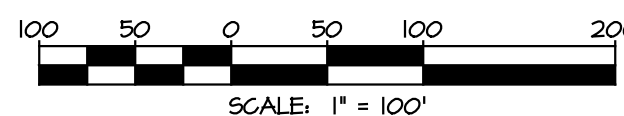
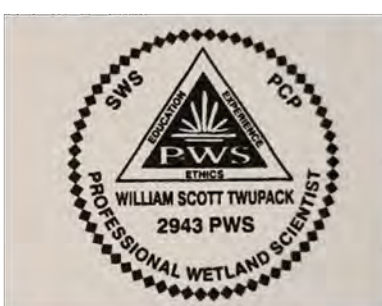
WETLAND CERTIFICATION

This property, Kent County tax parcel #4-00-03700-01-1700-000, has been examined by Watershed Eco, LLC, for the presence of Waters of the United States including wetlands (Section 404 and Section 10), State Subaqueous Lands and State Tidal Wetlands Based on the criteria set forth by reviewing agencies in the form of manuals, policies, and procedures in place at the time that the field investigation was conducted. Any of the above referenced resources that were found on the property are clearly mapped on this plan in accordance with our field investigations and detailed reports prepared by Watershed Eco, LLC, using best professional judgement. These wetland boundaries were field verified by USACE staff on January 31, 2023.



Watershed Eco, LLC.
100 Biddle Avenue, Suite 120
Newark, DE 19702
(302) 505-6595

8/30/2024
Date



MRA

**MORRIS & RITCHIE
ASSOCIATES, INC.**

ENGINEERS, PLANNERS,
SURVEYORS, AND LANDSCAPE
ARCHITECTS

111 RUTHAR DRIVE
NEWARK, DE 19711
302-326-2200

DEVELOPER
K. HOVNANIAN DELAWARE DIVISION, INC.
2441 SOUTH DUPONT BOULEVARD,
SUITE G
SMYRNA, DE 19877
(302) 223-0100

LYNNBURY WOODS

KENT COUNTY, DELAWARE
LITTLE CREEK HUNDRED

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2	COMMENTS PER USAGE	08/29/24
1	WETLAND BOUNDARIES PER USAGE	04/25/24
NO.	REVISION	DATE
JOB NO.	DRAWN BY	CHECKED BY
21627	DPS	CWB
		3/21/23

SHEET TITLE

**WETLAND
DELINEATION
PLAN**

SHEET NUMBER

1 OF 1