



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

NAP

September 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) ,¹ NAP-2024-00635-85 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.

NAP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00635-85

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: Non-jurisdictional
 - iii. Wetland C: 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 consists of a 4.42 acre portion of an approximately 12.05 acre parcel (Tax Parcel 1-34-19.00-12.00) located on the southwest corner of the Central Avenue and Lizzard Hill Road intersection in Frankford, Sussex County, Delaware. The coordinates for the site are 38.511933, -75.125031. The review area supports 3.72 acres of forested land and 0.70 acre of agriculture field. The USFWS NWI Mapper depicts nearly the entire forested areas as a palustrine forested wetland.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Miller Creek, located approximately 7,580 feet from the site. Based on the USFWS NWI mapper, Miller Creek is an estuarine water

NAP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00635-85

body at Double Bridges Road. Because it is labeled as estuarine, it is subject to the ebb and flow of the tide, and therefore a TNW.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no flow path from the subject aquatic resources to a TNW, territorial sea or interstate water as the wetlands on the site lack a continuous surface connection to an (a)(1) through (a)(3) waters.
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.
 - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

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.

NAP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00635-85

- 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).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).

Wetland A is approximately 1.15 acre located within the review area and extends southward out of the review area into the adjacent parcel. A stand of upland forest approximately 65 feet in width separates Wetland A from agricultural land to the south on the adjacent parcel. Surface elevations within Wetland A ranges from approximately 17.0 feet to 18.5. The topography is consistent with a depressional wetland that has no outlet. Wetland A is geographically separated from any other aquatic resource with no continuous surface connection to an (a)(1) through (a)(3) water. As such, Wetland A does not meet the definition of an (a)(4) adjacent wetland, nor does it meet the definition of a waters of the United States.

Wetland B is approximately 0.0252 acre located within the review area and extends southward out of the review area into the adjacent parcel. A stand of

⁹ 88 FR 3004 (January 18, 2023)

NAP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00635-85

upland forest approximately 85 feet in width separates Wetland B from agricultural land to the south in the adjacent parcel. Surface elevations within Wetland A ranges from approximately 19.5 feet to 20.0 feet. The topography is consistent with a depressional wetland that has no outlet. Wetland B is geographically separated from any other aquatic resource with no continuous surface connection to an (a)(1) through (a)(3) water. As such, Wetland B does not meet the definition of an (a)(4) adjacent wetland, nor does it meet the definition of a waters of the United States.

Wetland C is approximately 0.0008 acre located within the review area and extends southward out of the review area into the adjacent parcel. A stand of upland forest approximately 180 feet in width separates Wetland C from agricultural land to the southeast in the adjacent parcel. Surface elevations within Wetland C ranges from approximately 18.5 feet to 19.5 feet. The topography is consistent with a depressional wetland that has no outlet. Wetland C is geographically separated from any other aquatic resource with no continuous surface connection to an (a)(1) through (a)(3) water. As such, Wetland C does not meet the definition of an (a)(4) adjacent wetland, nor does it meet the definition of a waters of the United States.

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 March 7, 2024, and May 21, 2024.
 - b. U.S. ARMY CORPS OF ENGINEERS REQUEST FOR JURISDICTIONAL DETERMINATION (JD) ENG FORM 6247, dated August 12, 2024.
 - c. WETLAND DELINEATION REPORT IDENTIFICATION OF WATERS OF UNITED STATES, INCLUDIG WETLANDS SUBJECT TO THE CORPS OF ENGINEERS REGULATORY PROGRAM ARCHUT FARM-NORTHERN TRACT TAX MAP 1-34-19.00 PARCEL 12.00 (4.42 ACRE PART OF 12.05 ACRE PARCEL) CENTRAL AVENUE & LIZZARD HILL ROAD FRANKFORD, BALTIMORE HUNDRED, SUSSEX COUNTY, DELAWARE, dated September 9, 2024, prepared by Kenneth W. Redinger Environmental Services.

10. OTHER SUPPORTING INFORMATION. N/A

NAP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00635-85

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.

SITE DATA

- PART OF TAX MAP NO. 1-34-19-12 Southerly side of Lizzard Hill Rd.
- STATE: DELAWARE
- COUNTY: SUSSEX
- HUNDRED: BALTIMORE
- AREA: 4.4222 ACRES
- SCALE: 1"=60'
- CLASS "B" SURVEY
- VERTICAL DATUM- NAVD'88 (1988 NORTH AMERICAN VERTICAL DATUM)
- HORIZONTAL DATUM- NAD'83 (1983 NORTH AMERICAN DATUM)

SURVEYOR NOTES

- This plot and survey does not verify the existence or nonexistence of right-of-ways and/or easements pertaining to this property. Including but not limited to Tax Ditch Easements.
- No title search provided or stipulated.
- Deed Book Reference:
Db. 3401, Pg. 116
Db. 2197, Pg. 262
Db. 5323, Pg. 128
Db. 1631, Pg. 318
Db. 5524, Pg. 061

STANDARD LEGEND

These standard symbols will be found in the drawing

- 3/4" PIPE (FD)
- 5/8" REBAR (FD)

x 17.0'

Wetland Certification

I, Kenneth W. Redinger, certify the project area was evaluated for Waters of the United States, including wetlands, subject to the U.S. Army Corps of Engineers Regulatory Program under Section 404 of the Clean Water Act. On-site investigations were conducted between January 25 and July 30, 2024 in accordance with the 1987 Corps of Engineers Wetland Delineation Manual in conjunction with the Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Atlantic and Gulf Coastal Plain Region, Version 2.0 (November 2010) and associated federal regulatory guidance documents. The delineation here shown, in my best professional judgment, accurately depicts the limits of Waters of the United States, including wetlands, within the subject property.

Kenneth W. Redinger, Professional Wetland Scientist #2126
P.O. Box 479 / Horntown, VA 23395
Phone: (757) 894-7032 / Email: kwredinger@yahoo.com

Date

CURVE	RADIUS	ARC LENGTH	CHORD LENGTH	CHORD BEARING	DELTA ANGLE
C1	600.00'	85.25'	85.18'	N 75°49'42" E	8°08'28"
C2	1200.00'	169.78'	169.64'	N 75°50'44" E	8°06'24"
C3	350.00'	214.81'	211.45'	N 89°22'29" E	35°09'54"

LINE	BEARING	DISTANCE
WL1	S 84°05'35" E	265.91' (tie-line)
WL2	N 11°18'12" E	12.41'
WL3	N 13°17'02" W	28.82'
WL4	N 14°21'43" W	49.54'
WL5	N 39°14'31" W	67.08'
WL6	N 49°54'26" W	52.16'
WL7	N 65°49'51" W	74.80'
WL8	N 77°16'48" W	39.92'
WL9	S 86°37'48" W	23.06'
WL10	S 72°01'35" W	77.17'
WL11	S 53°16'37" W	21.86'
WL12	S 80°04'20" W	28.13'
WL13	S 67°02'01" W	31.00'
WL14	S 40°57'10" W	16.25'
WL15	S 05°32'33" E	17.84'
WL16	S 59°42'21" E	23.27'
WL17	S 68°38'37" E	23.25'
WL18	S 79°41'03" E	52.93'
WL19	S 50°30'26" E	35.40'
WL20	S 15°39'38" E	30.37'
WL21	S 24°48'51" W	20.86'

LINE	BEARING	DISTANCE
WL22	S 84°05'35" E	70.17' (tie-line)
WL23	N 40°30'40" W	22.13'
WL24	N 68°35'16" W	8.15'
WL25	N 78°25'02" W	16.97'
WL26	N 83°47'54" W	14.01'
WL27	N 84°52'38" W	12.61'
WL28	S 14°12'26" W	19.21'

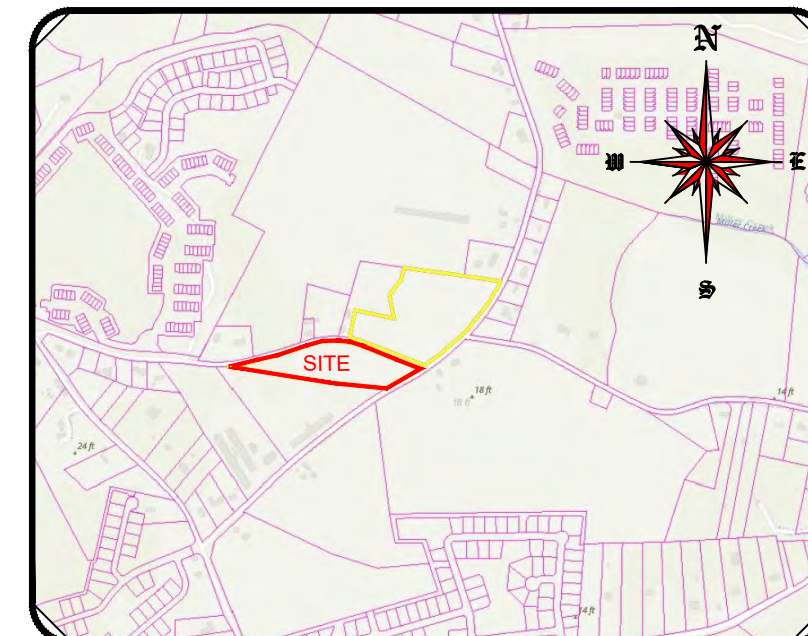
LINE	BEARING	DISTANCE
WL29	S 84°05'35" E	20.53' (tie-line)
WL30	N 63°16'26" W	6.06'
WL31	N 80°51'43" W	7.70'
WL32	S 76°02'48" W	7.62'

Total Project Area - 4.4222 Acres (Southern Parcel Only)

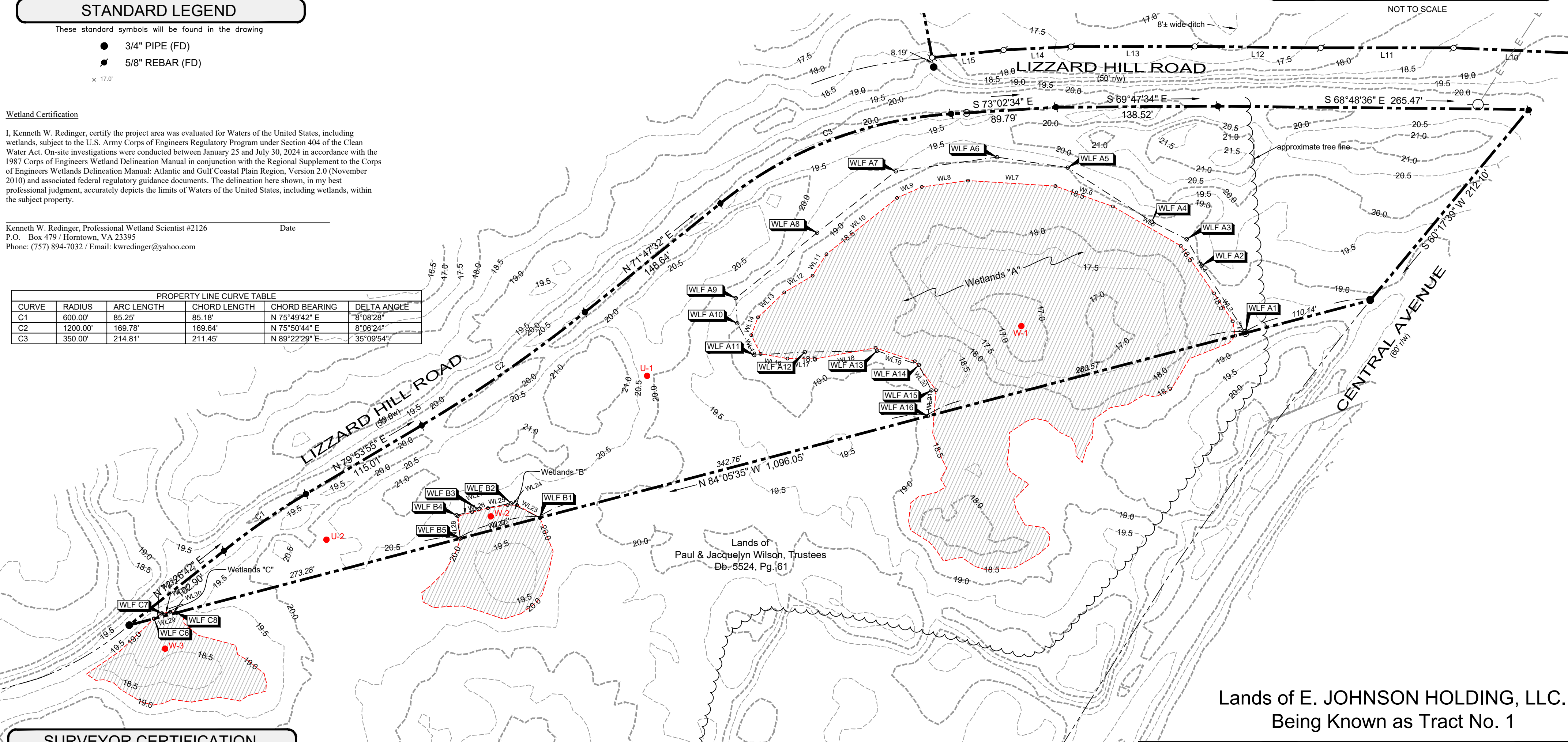
Total Uplands - 3.0570 Acres

Total Wetlands = 1.3652 Acres

- Wetland A - 1.5279 Acres (On-Site = 1.1539 Acres / Offsite = 0.3740 Acres)
- Wetland B - 0.1681 Acres (On-Site = 0.0252 Acres / Offsite = 0.1429 Acres)
- Wetland C - 0.1613 Acres (On-Site = 0.0008 Acres / Offsite = 0.1605 Acres)



VICINITY MAP



Lands of E. JOHNSON HOLDING, LLC.
Being Known as Tract No. 1

SURVEYOR CERTIFICATION

I, GREGORY M. HOOK, registered as a Professional Land Surveyor in the State of Delaware, hereby state that the information shown on this plan has been prepared under my supervision and meets the standards of practice as established by the State of Delaware Board of Professional Land Surveyors. Any changes to the property conditions, improvements, boundary or property corners after the date shown hereon shall necessitate a new review and certification for any official or legal use.

GREGORY M. HOOK, PLS 711

Date

FLOOD DATA This property is in Zone "X" (non-shaded) of the Flood Insurance Rate Map, Community Panel No. 100029-10005C0495 & 513-K which has an effective date of MARCH 16, 2005 and IS NOT in a Special Flood Hazard Area.

DATE OF ORIGINAL: APRIL 18, 2023
REVISION: WETLANDS, DITCH ELEVATIONS DATE: MAY 31, 2023
REVISION: Topography DATE: JULY 22, 2024
REVISION: PER WETLAND SCIENTIST DATE: August 01, 2024
REVISION: DATA POINTS ADDED DATE: August 07, 2024
REVISION: PER WETLAND SCIENTIST DATE: September 09, 2024
REVISION: DATE: , 2024
REVISION: DATE: , 2024
REVISION: DATE: , 2024
Drawn by: MICHAEL LOVELAND Checked by: GREGORY M. HOOK

SEAL

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