IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA, Plaintiff, v. CHAMELEON LLC and GARY V. LAYNE, Defendants.	)))))))))))	Civil Action No. 3:23cv763

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

PRELIMARY STATEMENT

The Government brings a single count against Mr. Layne[1] for violation of the Clean Water Act ("CWA") related to wetlands on his property ("Site"). But to proceed on this claim, jurisdiction must exist, and the Government first must plead facts showing that the water connected to the wetlands on Site are waters of the United States ("WOTUS") "(*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." As this Court correctly stated, it "is now the fossilized rule" that intermittent streams do not qualify as WOTUS. (Apr. 4 Hr'g Tr. 11:18-19; *see also id.* 35:1, 39:7.)

The Amended Complaint now asserts jurisdiction only over Wetland A, seeking to connect the wetlands on Site through a culvert under Ashcake Road, down a "drainage channel" for approximately 478 feet (yellow), through a .36 mile non-jurisdictional/intermittent stream branch of Lickinghole Creek (orange), then down a 1.02 mile section of Lickinghole Creek (red) designated as an intermittent stream before reaching any potential "relatively permanent water"—the perennial stream part of Lickinghole Creek.[2]

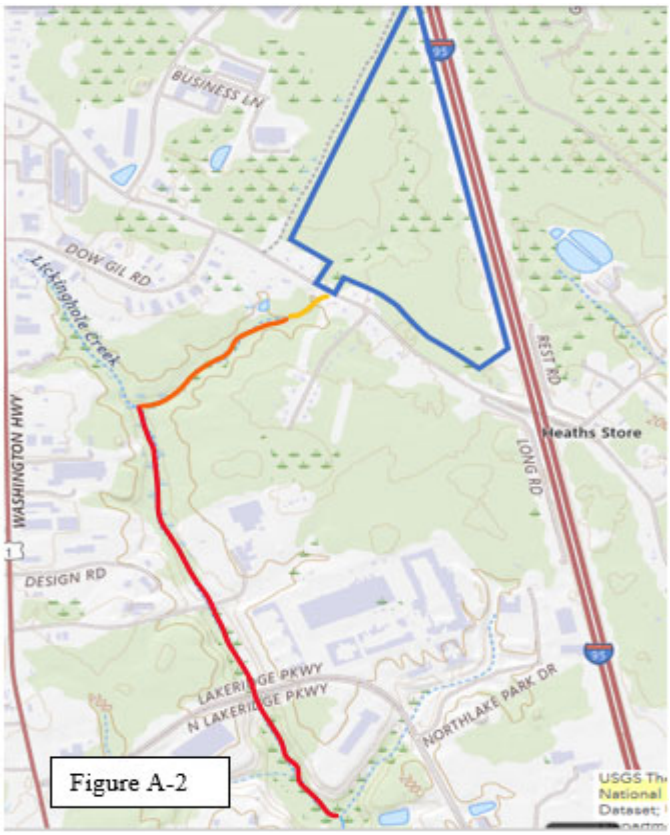

Figure A-2

[1] The Government also names Chameleon LLC, the LLC that Mr. Layne used to purchase the Site. For all intents and purposes, the Government pursues Mr. Layne individually.

[2] The Government relied on this mapping in its Amended Complaint, so Mr. Layne may rely on it in seeking dismissal. (*See* Doc. 56 at 11.) The maps are also government documents. Accordingly, Defendants can utilize them in seeking dismissal. *See Hall v. Virginia*, 385 F.3d

The Amended Complaint offers only the repeated and bare legal conclusion that these three segments are "relatively permanent streams." However, the United States Geological Service ("USGS") has for the past 60-plus years and as recently updated in April and September 2024 used the most up-to-date dataset for identifying aquatic features in the Nation to map these segments—totaling to at least the last 1.38 miles approaching the Site—as, at best, an intermittent stream which either ends or turns into an ephemeral stream approximately 478 feet short of the Site.

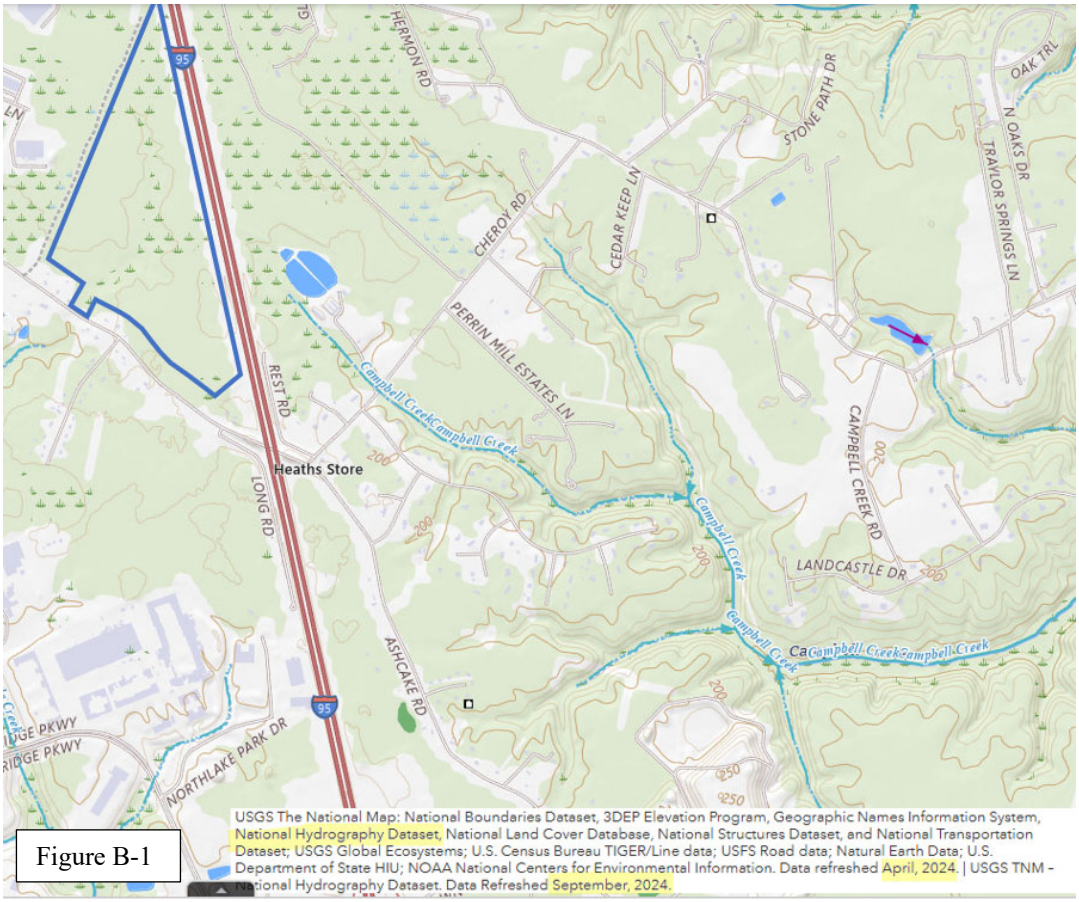

Figure B-1

421, 424 n.4 (4th Cir. 2004); *United States v. Cecil*, 836 F.2d 1431, 1452 (4th Cir. 1988) (taking judicial notice of governmental reports). The Figures contained herein come from the maps attached as Exhibits A through C and are labeled according to pagination. For purposes of simplicity, the "intermittent stream section" or "branch" of Lickinghole Creek discussed throughout this memorandum will refer to the 1.38 miles of mapped intermittent streams that include both the referenced branch of Lickinghole Creek (orange) and Lickinghole Creek (red). The Unnamed Tributary refers to the approximately 478 foot (.09 mile) stretch of unmapped, drainage area that lies between the end of the mapped intermittent stream and the Site (yellow).

Figure B-3

The Government's Amended Complaint contains ***zero*** facts establishing that this long stretch of the three segments—a 478-foot segment of an ephemeral stream, .36 mile intermittent stream branch of Lickinghole Creek, and a 1.2 mile intermittent stream segment of Lickinghole Creek—are WOTUS. Instead, it simply asserts the legal conclusion that these segments are "relatively permanent streams." In addition to not accepting these legal conclusions, the Court also should not accept these allegations since the polestar USGS NHD maps contradict them and control the analysis. At a bare minimum, the Government must assert some facts to bridge this huge gap in federal jurisdiction.

The Amended Complaint remains myopic regarding what allegedly lies ***on*** the Site, trying to paint Mr. Layne in the worst possible light. But that is not how CWA jurisdiction and federal pleading standards work. The Government must ***first*** plead sufficient facts establishing jurisdiction through continuous connections of traditionally navigable waters to WOTUS to wetlands. It has utterly failed to do so for a ***second*** time. This quixotic crusade by the Government against an individual landowner who continues to stand on principle ***must end***. The case should be dismissed with prejudice so that Mr. Layne can finally get on with working with the Commonwealth of Virginia, the only governmental entity with jurisdiction over the Site.[3]

[3] Defendants incorporate by reference their previous argument that the lack of CWA jurisdiction is an issue going to the Court's subject matter jurisdiction. (*See, e.g.*, Doc. 12 at 5 (citing *Cape*

STANDARD OF REVIEW

Failure to state a claim. The court should dismiss a claim when plaintiff fails to plead facts on which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Id.*

These factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A right to relief that is "merely 'conceivable'" does not suffice. *Olajuwon v. Ofogh*, 2023 WL 2667999, at *1 (E.D. Va. Mar. 28, 2023) (Hudson, J.) (quoting *Twombly*, 550 U.S. at 570). A complaint will not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The Court should disregard legal conclusions "couched as facts or unwarranted inferences, unreasonable conclusions, or arguments. *See Call v. Geico Advantage Ins. Co.*, 2023 WL 5109549, at *3 (E.D. Va. Aug. 9, 2023) (Hudson, J.) (quoting *Turner v. Thomas*, 930 F.3d 640, 644 (4th Cir. 2019)).

Consideration of documents other than the Amended Complaint. At the motion to dismiss stage, the court may consider documents incorporated by reference into the complaint, attached as exhibits, or documents "integral to the complaint" where there is no dispute regarding those documents' authenticity. *Id.* (quoting *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-

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Fear River Watch, Inc. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 808 & n.10 (E.D.N.C. 2014) (Flanagan, J.); *see also* Doc. 12 at 19-29.) Defendants acknowledge that the Court denied this previous argument. (Doc. 56 at 8.) Defendants incorporate this previous argument for appellate preservation purposes only.

66 (4th Cir. 2016)). Where the "bare allegations" of the complaint conflict with those documents, ***the documents prevail***. *See id.* (quoting *Goines*, 822 F.3d at 166). Moreover, a court may take judicial notice of certain documents and information in disposing of a motion to dismiss without converting it to a motion for summary judgment. *See Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013); *Phillips v. Pitt Cty. Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *In re PEC Sols., Inc. Securities Litig.*, 418 F.3d 379, 388 n.7 (4th Cir. 2005). This includes publicly-available information from governmental websites. *See Hall*, 385 F.3d at 424 n.4 (noting that it was proper to review publicly-available statistics and information from government website in disposing of Rule 12(b)(6) motion). The Court also should not accept allegations that "contradict matters property subject to judicial notice." *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014) (quoting *Blankenship v. Manchin*, 471 F.3d 523, 529 (4th Cir. 2006)).

ARGUMENT

I. CWA Jurisdiction

The Government "establish first, that the adjacent body of water constitutes 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional navigable waters)." (Doc. 56 at 14 (quoting *Sackett v. Envt'l Proection Agency*, 598 U.S. 651 678-79 (2023)).) The Government has not.[4]

A. Historic Oversight And Enforcement

Passed in 1972, the CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the

[4] Second, the Government must sufficiently plead that "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' beings." (Doc. 56 at 14 (quoting *Sackett*, 598 U.S. at 678-79).) For the same reasons stated herein, the Government has not met this requirement either.

discharge of pollutants, including of "dredged or fill materials," into navigable waters without a permit. *Id.* §§ 1311(a), 1344(a).[5] The statute defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7).

Oversight and enforcement of federally-regulated wetlands fall to the Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA"). The Corps maintains primary responsibility for issuing permits related to discharge of dredged and fill material into covered wetlands. *See* 33 U.S.C. § 1344(a). EPA takes post-violation enforcement actions. *See id.* § 1319.

"The CWA is a potent weapon." *Sackett*, 598 U.S. at 660. Front end compliance to obtain a federal wetlands permit can be "arduous, expensive, and long." *Id.* at 661 (citation omitted). It can take years and hundreds-of-thousands of dollars to complete the permitting process. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality). But there is no guarantee of approval, as the Corps "exercises the discretion of an enlightened despot" in issuing the permits. *Id.*; *see Sackett*, 598 U.S. at 661. Back-end consequences "even for inadvertent violations" can be "crushing." *Sackett*, 598 U.S. at 660 (quoting *Army Corps of Engr's v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)). Individuals face "severe criminal penalties" and civil penalties up to $60,000 per day for violations. *See id.* Given these significant consequences, expansive interpretation of the CWA could give rise to serious due process concerns. *See id.* at 680-81 (stating that due process requires definiteness in penal statutes and EPA interpretation of WOTUS remained "hopelessly indeterminate" (citation omitted)).

[5] The CWA requires different permits for other types of discharges, but permitting for placing fill material into covered wetlands is the only relevant one here. 33 U.S.C. § 1344(a); *see Rapanos*, 547 U.S. at 744-45 ("The Act recognizes this distinction [between other pollutants and dredged or fill material] by providing a separate permitting program for such discharges in § 1344(a).").

B. Tension Between Regulatory Expansion Of Jurisdiction And Text Of CWA.

After the CWA's enactment, the Corps and EPA adopted numerous different regulations with varying views regarding jurisdiction, including over wetlands. *See Sackett*, 598 U.S. at 720-22 (Kavanaugh, J., concurring) (discussing regulations and stating that "eight administrations since 1977 have maintained dramatically different views of how to regulate the environment"). These varied regulations generated significant litigation, with the Supreme Court repeatedly attempting to reign in the administrative expansion of the CWA by consistently returning to the text of the statute itself. *See Rapanos*, 547 U.S. at 724-27. This jurisdictional wrangling included disputes over wetland regulation. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. Army Corps. of Eng'rs*, 531 U.S. 159, 162 (2001) (striking down "Migratory Bird Rule" attempting to expand CWA jurisdiction to isolated intrastate waters which "provide[d] habitat for migratory birds").

In *Rapanos*, the Court again attempted to clarify the appropriate test for jurisdiction over wetlands, including what may or may not qualify as WOTUS. At that time, the Corps considered WOTUS to include, in addition to the "traditional interstate navigable waters," the following:

> "[a]ll interstate waters including interstate wetlands," § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including ***intermittent streams***), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," § 328.3(a)(3); "[t]ributaries of [such] waters," § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," § 328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. § 328.3(c). It specifically provides that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Ibid.*

Rapanos, 547 U.S. at 724 (alterations in original) (emphasis added). This definition included "intermittent streams" and was an "immense expansion of federal regulation of land use." *Id.* at 722. This also came "without ***any*** change in the governing statute." *Id.* (emphasis added).

The Court decried this expansive definition of WOTUS, noting that it covered "270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 states." *Id.* at 722. Additional jurisdictional assertions by the Corps "engulf[ed] entire cities and immense arid wastelands. In fact, ***the entire land area of the United States lies in some drainage basin,*** and an endless network of ***visible channels furrows the entire surface, containing water ephemerally wherever the rain falls***." *Id.* (emphasis added). Under the Corps' previous interpretation (and Government's de facto interpretation here), "[a]ny plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*

With that backdrop, Justice Scalia and the plurality focused on the text of the CWA to reign in federal jurisdiction, homing in on the characteristics of water flow to conclude what did or did not qualify as WOTUS. The Corps' definition claimed jurisdiction "over virtually any parcel of land containing a channel or a conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or ***intermittently*** flow." *Id.* (emphasis added). But the plurality concluded that the phrase "waters of the United States" included "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739 (alterations in original) (quoting Websters Dictionary (Second) 2882). WOTUS did ***not*** include "***channels*** through which water flows ***intermittently or ephemerally***, ***or channels that periodically provide drainage for rainfall***." *Id.* (emphases added).

Restricting WOTUS in this manner—excluding water "containing merely ***intermittent*** or ***ephemeral*** flow"—made "common sense." *Id.* at 733-34 (emphasis added). To include "'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert"

would stretch interpretation of WOTUS "beyond parody." *Id*. The "plain language of the statute simply does not authorize [a] 'Land Is Waters' approach to federal jurisdiction." *Id.* at 734.

Accordingly, the plurality set out a more rigid two-part test to determine the reach of federal jurisdiction over wetlands. First, the water bodies connected to the wetland must "contain[] [WOTUS] (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." *Id.* at 742. Second, the wetland must have a "continuous surface connection with that [WOTUS], making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

Justice Kennedy, however, issued a concurring opinion in which the test for jurisdiction turned on whether the wetland possessed a "significant nexus" to navigable waters. *Id.* at 782 (Kennedy, J., concurring). This looser approach meant that the Corps had to "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands." *Id.*

Given the lack of a majority opinion, resulting guidance indicated that satisfaction of ***either*** test could confer CWA jurisdiction. *See Cape Fear River Watch, Inc.*, 25 F. Supp. 3d at 808 (stating that Corps and EPA guidance issued after *Rapanos* provided that satisfaction of "either test would satisfy a finding of" WOTUS). Courts recognized that Justice Kennedy's broader test conferred far more federal jurisdiction than Justice Scalia's strict test. *See, e.g.*, *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1352-53 (S.D. Ga. 2019).

But in May 2023, the Supreme Court clarified that only one test applied: Justice Scalia's plurality opinion. In *Sackett v. Environmental Protection Agency*, the Supreme Court once again addressed the question of "what the [CWA] means by 'the waters of the United States'" and the correct test to determine the existence of federal jurisdiction over wetlands. 598 U.S. at 659. The Court unanimously overruled the Ninth Circuit Court of Appeals' use of Justice Kennedy's "significant nexus" test, and the majority adopted Justice Scalia's two-part test applying the plain

text of the CWA. *See id.*

C. Intermittent Streams Are Not WOTUS.

CWA jurisdiction only extends to WOTUS. As the Supreme Court has ruled and this Court has reaffirmed in this case, CWA jurisdiction clearly does not extend to intermittent streams. Thus, where Lickinghole Creek becomes intermittent, CWA jurisdiction clearly ends.

In *Rapanos*, there was significant focus on the issue of intermittent streams because the regulatory framework specifically included them within its definition of WOTUS. *Rapanos*, 547 U.S. at 722. The plurality, Justice Kennedy, and the dissent engaged in significant back-and-forth regarding the issue to determine whether these waters could qualify as WOTUS. *See id.* at 732 & n.5, 733-36, 739, 743 (plurality opinion); 769-72 (Kennedy, J.); 801-05 (dissent).

Justice Scalia explained that the nature of the flow of the waters is determinative, effectively grouping water bodies into three categories across a spectrum depending on their flow: permanent, "relatively permanent," and intermittent/ephemeral. On one end of the spectrum, "channels containing permanent flow are plainly within the definition." *See id.* at 732 n.5. On the other end, "'***intermittent***' and '***ephemeral' streams*** . . . are not." *Id.* (emphasis added).

To qualify as WOTUS, waters must at a ***minimum*** be "relatively permanent, standing or flowing bodies of water" such as "streams, oceans, rivers, and bodies of water." *Rapanos*, 547 U.S. at 732-33 (internal quotation marks omitted). Thus water within WOTUS has to be "***continuously*** present [or] ***fixed***." *Id.* at 733 (emphasis added). Recognizing that there were various differences between types of waters (such as an ocean, a river, or a stream), Justice Scalia noted that even the "least substantial" term of "'streams[]' connotes a ***continuous*** flow of water in a permanent channel." *Id.* (emphasis added). This Court and the Government recognize this question of law. (Hr'g Tr. 35:1-9.) The Government "completely agree[d]" that "[t]he

[dispositive] question is whether or not these bodies of water [have] continuous flow." (*Id.*)

This Court recognized that intermittent streams not qualifying as WOTUS "is now the fossilized rule." (Hr'g Tr. 11:9-19; 35:1; 39:3-9.) In dismissing the Government's original Complaint, this Court also correctly held that merely stating that any water is "relatively permanent" is a legal conclusion and should not be given any deference. (Doc. 56 at 14.) Instead, ***facts*** are required, and none are alleged (nor can they be) here to create jurisdiction over the 1.38 mile intermittent stream branches of Lickinghole Creek leading to the Site.

II. The Site

Mr. Layne, through his LLC (Chameleon), owns a parcel of property totaling approximately 102 acres in Hanover County, Virginia just south of Ashland. (Am. Compl. ¶ 27.) The Site is roughly a triangle. (*See* Am. Compl. Fig. 1.) The eastern boundary of the Site abuts and runs parallel to Interstate 95, but the Site does not cross it. (*See id.*) The northwestern boundary runs along a large powerline cut. (*See id.*) The southern boundary runs behind properties located on Ashcake Road, with a small portion jutting towards Ashcake Road itself. (*See id.*) Between the Site and the closest southern intermittent stream section (which is an unnamed tributary of Lickinghole Creek) is Ashcake Road. (*See* Fig. B-1.)

There are three alleged wetland areas contained fully on the Site, labeled Wetlands A through C by the Government. (*See* Am. Compl. ¶ 29 & Fig. 1.) The Amended Complaint does not assert jurisdiction over Wetland B and Wetland C because the Government does not have jurisdiction over those wetlands—only the Commonwealth does. (*See* Am. Compl. ¶ 29 & n.2.)[6] The Amended Complaint asserts jurisdiction over Wetland A through Lickinghole Creek and its

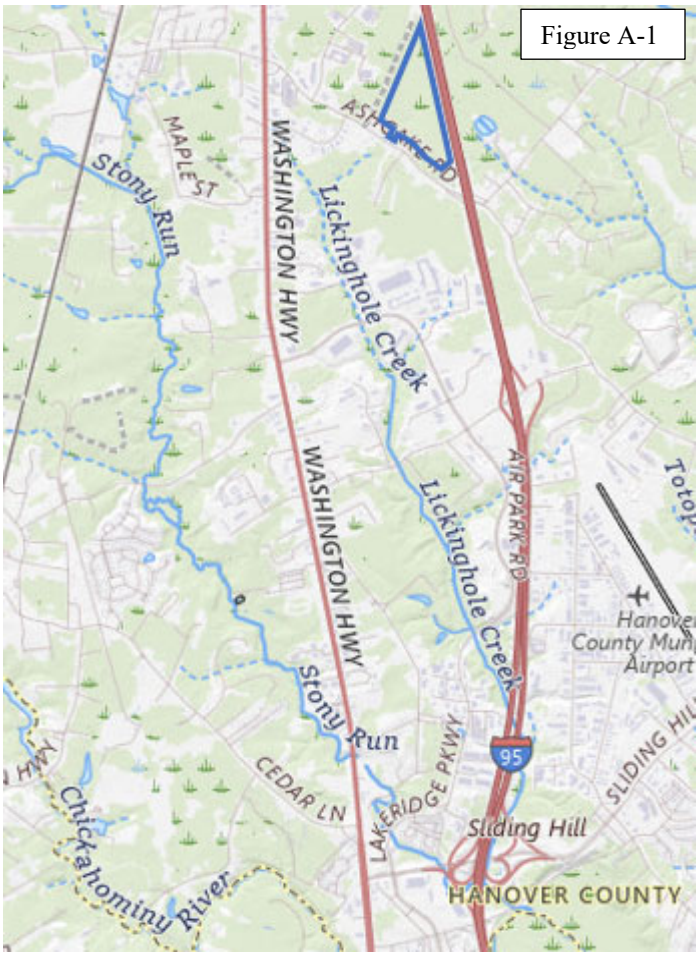
[6] As explained further below, the Government confirmed what USGS mapping already told it—that an unnamed tributary to Campbell Creek is intermittent. Accordingly, jurisdiction is lacking.

alleged "Unnamed Tributary," just south of Ashcake Road. (*See* Am. Compl. ¶ 68.)

III. Lickinghole Creek Near the Site Comprises 1.38 Miles of Intermittent Streams.

To fully understand the reach of CWA jurisdiction in this case, one should start where CWA jurisdiction undoubtedly lies: the Chickahominy River. This is a traditionally-navigable waterway. (Am. Compl. ¶ 76.) The Chickahominy is about 4.39 miles from the Site.[7] The Amended Complaint contends that Stony Run is a relatively permanent tributary of the Chickahominy. (Am. Compl. ¶ 75.) Stony Run's tributary Lickinghole Creek is the linchpin allegedly connecting WOTUS to the Site. (*See id.*) Lickinghole Creek is the final stretch approaching the Site, and it is mapped, as explained below, perennial—to a point—then turning intermittent before the Site.

Figure A-1



A. USGS Mapping

The mapping relied on by the Government in its Amended Complaint is produced by the USGS, which provides publicly available historic and recent topographic maps, the National

[7] The NHD contains features that measure distance of water segments. (*See* Exhibit B at 4-6.) The distances provided herein are provided using those features.

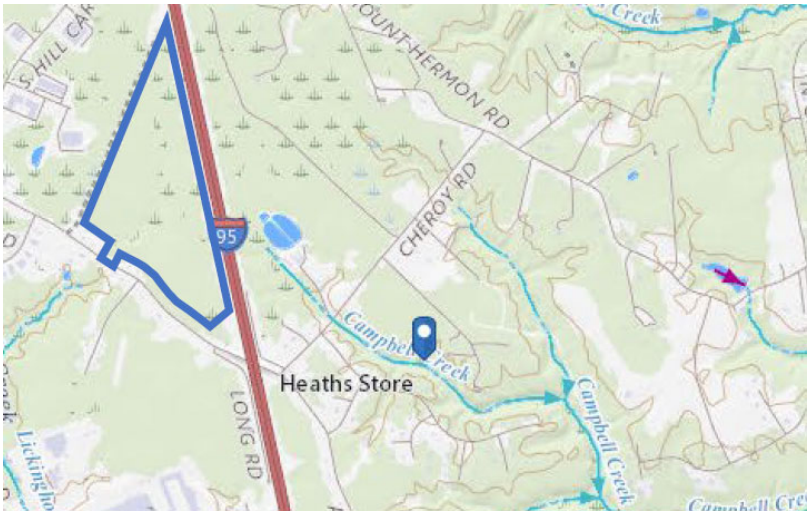
Hydrography Dataset ("NHD"), and other data and applications to assist with identifying WOTUS. U.S. EPA and Dep't of the Army, *Technical Support Document for the Proposed 'Revised Definition of 'Waters of the United States' Rule* at 239 (Dec. 2022) ("*Technical Support Document*"), attached as Exhibit D.)[8] The NHD "depicts aquatic resources such as lakes, ponds, streams, rivers, wetlands, and oceans." *Id.* In particular, the NHD high-resolution data set "is ***the most up-to-date and detailed hydrography dataset for the [N]ation***." *Id.* (emphasis added). As depicted in the map below, the NHD is continually updated, including most recently for the Site and surrounding area in April and September of 2024. (*See* Figs. A-2 & B-1.)

"Stream and river 'flowlines' in NHD are characterized as 'ephemeral,' 'intermittent,' or 'perennial.'" *Id.* Perennial streams "are presumed to carry water throughout the year except during drought." *Id.* On the other hand, intermittent streams "lack flow for some duration." *Id.* Ephemeral streams "hav[e] water only during or after, a local rainstorm or heavy snow melt." *Id.* In the NHD, "many ephemeral streams ***are not mapped***." *Id.* (emphasis added). "That said, . . . many ephemeral streams ***are included*** in the 'intermittent' category, particularly those outside the arid West." *Id.* (emphasis added). Put differently, the NHD's identification of intermittent streams is ***overinclusive,*** as a mapped intermittent stream may actually only be ephemeral.

These maps are highly accurate—the NHD is "the most comprehensive and detailed hydrography" dataset for the nation and is "the most accurate" depiction for CWA jurisdiction decision-making. (*Technical Support Document* at 129.) The Government's own work on this case confirms this. For example, the original Complaint sought to assert jurisdiction over Wetland B through an unnamed tributary to Campbell Creek. The USGS mapping and NHD identified

[8] The Court can take judicial notice of this government document in disposing of the Motion to Dismiss *See Hall*, 385 F.3d at 424; *see also Massey*, 759 F.3d at 353.

this stretch of Campbell Creek as intermittent as it approached, then ended, before the Site:



Line - Large Scale | Flow Direction | Flowline - Small Scale | Flowline - Small Scale (HI, PR, VI, Pacific Territories) | Flowline - Large Scale | Area - Small Scale | Area - Small Scale (HI, PR,

Options | Filter by map extent | Zoom to | Clear selection | Refresh

GNIS_NAME	FType	FCode	PERMANENT_IDENTIF	FDATE	Resolution	GNIS_ID	LENGTHKM
Campbell Creek	StreamRiver	Stream/River: Hydrographic Category = Intermittent	65084209	March 10, 2012	High	01464372	1.64 1.02 miles/ 5385.6 feet

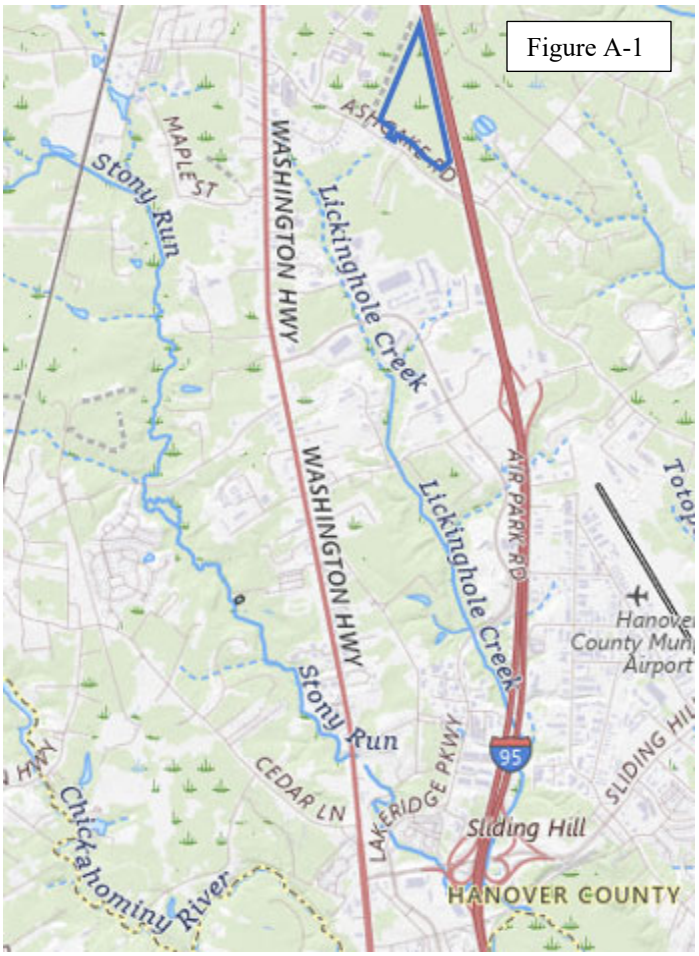
(Excerpted from Doc. 12-4 at D-6.) On May 16, 2024, the Government's own investigator visited this unnamed tributary. And she classified it as an intermittent stream. (*See* Almeter Beta Streamflow Duration Assessment at 1, attached as Exhibit E.)[9] The Government noted that this unnamed tributary was "channelized" and flow was observed. (*Id.*) But the Government ultimately determined that it was "classified as intermittent," (*id.* at 4), ***just as the USGS identified this section of Campbell Creek***. This was and is a correct assessment—a channel that had "flow" at some random point does not simply become "relatively permanent" at the Government's say-so. Indeed, this assessment demonstrating a lack of jurisdiction is why the Government no longer pursues any claim over Wetland B. (*See* Am. Compl. ¶ 29 n.2 (stating that Government was "deferring" to the Commonwealth regarding Wetlands B and C).)

[9] The Government relies on its May 16, 2024, Site Inspection, (Am. Compl. ¶ 58), in its Amended Complaint. Accordingly, Defendants may rely on this document.

Thus, the Government's very own investigator confirmed that USGS mapping is ***correct*** in its identification of intermittent streams surrounding the Site and demonstrates that the NHD's contents cannot be reasonably disputed.

B. Lickinghole Creek's Upper 1.38 Mile Reach

The USGS has mapped Lickinghole Creek since at least 1895. (*See* Exhibit C at 1-4.) It has been repeatedly mapped since—appearing in 1938, 1963, 2016, 2019, and 2022. (*See id.* at 5-19.) The USGS's NHD, last updated in April and September 2024, also depicts Lickinghole Creek. (*See* Exhibit B at 1.) Lickinghole Creek meets Stony Run well south of the Site. (*See* Exhibit A at 1.) Crossing Lewistown Road and continuing towards the Site, but just south of Lakeridge Parkway, the USGS map identifies this section of Lickinghole Creek as a perennial stream (solid blue line) (*Id.* at 2.)



To this point, there is ***potential*** CWA jurisdiction. *Rapanos* did not enunciate a complete bright-line rule as to which "solid blue line streams"—such as USGS perennial streams- categorically qualified as WOTUS, but it did make perfectly clear (as this Court has recognized) that ***intermittent streams categorically did not***. *See* 547 U.S. at 733 n.5, 735, 736, 739.

Just south of Lakeridge Parkway, Lickinghole Creek and its all of its upper reaches and branches become intermittent streams (dotted blue lines). (*See* Exhibit A at 2.) Continuing northward upstream, the intermittent stream sections of Lickinghole Creek and its unnamed tributaries terminate to the west and southwest of the Site. (*See id*.)

This classification of these waters as intermittent is not new at all. Since at least 1963 (nearly a decade before the CWA's enactment), the USGS has classified these upper reaches of Lickinghole Creek as "intermittent." (*See* Exhibit C at 10.)

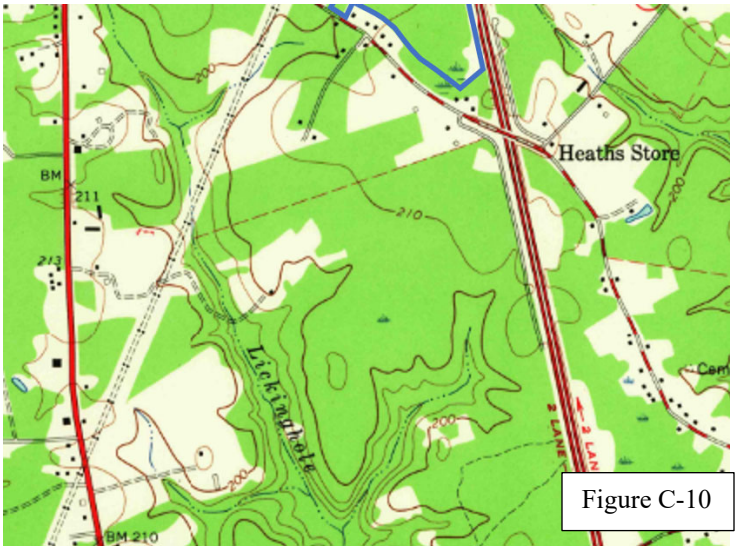


Figure C-10

If anything, technological advances over the last sixty-plus years confirm the USGS's determination from at least 1963. Indeed, the subsequent maps relied on by the Government from 2016, 2019, and 2022, (*see* Am. Compl. ¶ 74), continue to show Lickinghole Creek as an intermittent stream, (*see* Exhibit C at 11-19).

In sum, three sections of Lickinghole Creek identified as intermittent run 1.38 miles and end before reaching the Site. (*See* Exhibit B at 4-6.) These sections do not qualify as WOTUS under Justice Scalia's *Rapanos* test, *Sackett* or this Court's rulings.

Tellingly, the Amended Complaint ***pleads no specific facts*** about this stretch of intermittent stream. The Amended Complaint simply states that the entirety of Lickinghole Creek

is "relatively permanent," which is a legal conclusion afforded no deference here. (Doc. 56 at 14.)

That the Amended Complaint contains no facts concerning this critical 1.38 mile stretch of intermittent stream branches of Lickinghole Creek is a problem of the Government's own making. The Government has been investigating Mr. Layne since early 2020—far before *Sackett*. (Am. Compl. ¶ 41.) This investigation continued post-*Sackett*, which unquestionably removed intermittent streams from CWA jurisdiction. *See* Lazarus, Richard J., *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. Chi. L. Rev. Online 1, https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa (Aug. 11, 2023) (decrying *Sackett* as "an unprovoked hit job on the [N]ation's ability to protect its waters" and agreeing that decision "remove[d] ephemeral and intermittent streams from the Clean Water Act's coverage"). And there can be zero doubt that this Court accurately explained this "fossilized rule" to the Government on April 4, 2024, and it has been the law of this case since then. The Court should not countenance the Government's simply ignoring this critical jurisdictional component of CWA jurisdiction over the Site.

Rather than providing any ***facts*** in the original Complaint, the Government simply relied on these maps which, as described above and confirmed by the Government's own observations, accurately determine that this long stretch of Lickinghole Creek is intermittent (and non-jurisdictional). Moreover, Defendants previously moved to dismiss on the basis that this stretch broke the CWA's jurisdictional chain. (*See* Doc. 12 at 23.) But the Government never addressed this in opposing the previous motion to dismiss, effectively conceding the point. (*See* Doc. 22 at 2-3.) Additionally, the Government was on notice that its previous pleading was defective in that it offered mere legal conclusions that certain tributaries were "relatively permanent." (*See* Doc. 56 at 14 (dismissing complaint and stating that Government "fail[ed] to provide facts beyond legal

conclusions").) At every turn the Government has known that to establish jurisdiction by pleading ***facts***, not the bare legal conclusion that this long stretch of Lickinghole Creek is "relatively permanent." Yet that is all the Amended Complaint does.

Because the Government pleads no ***facts*** supporting an essential element of its claim—that the wetlands on Site connect to WOTUS continuously to traditional navigable waters—and the judicially-noticeable facts establish that Lickinghole Creek is intermittent for this long stretch, this Court should dismiss the Amended Complaint. *See Massey*, 759 F.3d at 353 (stating that court is not required to accept allegations of complaint contradicted by judicially-noticed information).

IV. Lickinghole Creek's Unnamed Tributary Is Not WOTUS.

A. The Government's Alleged Unnamed Tributary Is An Ephemeral Drainage Channel.

1. Two Observations, Three Years Apart

Having completely failed to establish jurisdiction over the 1.38 miles of intermittent stream branches of Lickinghole Creek (and incorporated maps establishing the ***non-existence*** of CWA jurisdiction), the Government seeks to rely on two "observations" at distances of approximately "400 feet" and "50 meters" just off-Site to support its contention that the Unnamed Tributary is "relatively permanent" (which of course does nothing to prove the remaining 1.38 miles of intermittent stream branches of Lickinghole Creek beyond this alleged "Unnamed Tributary"). USGS mapping demonstrates that the two points where the Government supposedly saw flow fall within an area ***past*** where Lickinghole Creek ends. (*See* Fig. B-3.)

The absence of identification of any stream connecting to the Site where these two observations occurred is telling. In the NHD, "many ephemeral streams ***are not mapped***." *Technical Support Document* at 239 (emphasis added). That said, "many ephemeral streams ***are included*** in the 'intermittent' category, particularly those outside the arid West." *Id.* (emphasis

added). In other words, the ***mapped*** stream that ends approximately 478 feet from the Site is ***either*** an intermittent stream or an ephemeral stream (and both are clearly not WOTUS). The ***absence*** of stream mapping for the 478-foot segment demonstrates that ***at best*** there exists an ephemeral stream (and not WOTUS) connecting the Unnamed Tributary to the culvert under Ashcake Road.

The Government claims that during the 2021 inspection, EPA inspectors observed and made "field notes about the characteristics of channelized features . . . continuing off-Site." (Am. Compl. ¶ 54.) According to the Government, "inspectors . . . observed channelized streamflow . . . leaving the Site through a culvert in the southern portion of the Site, and the inspectors observed the stream channel further downstream from the culvert." (Am. Compl. ¶ 54.) The Government claims that this "relatively permanent" tributary off Site has been "field verified." (*See* Am. Compl. Figure 4.)

As an initial matter, the Government repeatedly references seeing "channels" or "channelized" areas off Site. (*See, e.g.* Am. Compl. ¶¶ 68-69.) But these allegations are plainly insufficient under *Sackett* and *Rapanos* because drainage channels are not WOTUS. *See Rapanos*, 574 U.S. at 739 (stating that WOTUS does not include "channels that periodically provide drainage for rainfall"). Instead, there must be ***flow*** present. *See id.* at 733.

The sole, specific allegations are that on ***two*** days during a nearly three-year period, "flow" was observed in this channel. The Government contends that on April 12, 2021 (a single day), EPA personnel observed this channel with water present and "characteristics consistent with regular presence of flow and more than in direct response to precipitation." (Am. Compl. ¶ 71 & Photographs 3 and 4.) Next, the Government contends that an EPA inspector also "observed flow" in this channel "immediately downstream" and "approximately 400 feet" from the Site on April 25, 2024 (a single day). (Am. Compl. ¶ 72.) Based on this single day observation, the Government

asserts again that this demonstrates the conclusion that "the regular presence of flow, more than in direct response to precipitation."

But judicially-noticeable materials contradict this conclusory statement and, in fact, confirm that the USGS's assessment that the area is ephemeral at best and a mere drainage channel. On April 11, 2021, Ashland, Virginia received .16 inches of rain. (*See* Meteorological Data, attached as Exhibit F (April 2021).)[10] On the very day that the Government claims to have witnessed "flow" that was indicative of the "regular presence" and "more than in direct response to precipitation," there was .05 inches of rain. (*Id.*) The data also demonstrates that the area had received over .12 inches of rain in the four days preceding the April 25, 2024 observation. (*See* Exhibit F (April 2024).) In other words, the Government's observations were ***during*** precipitous times—amidst April showers—and immediately following rain, which is contrary to the appropriate practice. (*See* N.C. Div. Water Quality – Methodology for Identification of Intermittent and Perennial Streams and Their Origins 9-10 ("Do not evaluate a stream within 48 hours of rainfall that results in surface runoff. Generally, it takes about 48 hours for increased streamflow resulting from precipitation to attenuate. Delaying a stream determination following rainfall helps to eliminate visual bias associated with observing water in a stream that may not currently have baseflow."), attached as Exhibit G.)

2. Non-Specific "Observations" In 2024

But for these ***two, single, specific dates after rainfall years apart in a mere drainage area***, the Government offers nothing. Instead, the Government offers vague generalities that "[b]etween

[10] The attached meteorological data comes from the National Weather Service, part of the National Oceanic and Atmospheric Administration, which itself is a part of the United States Department of Commerce. Accordingly, the Court can and should take judicial notice of this governmental data. *See Hall*, 385 F.3d at 424 n.4; *Cecil*, 836 at 1452.

March and August 2024, EPA inspectors and consultants also visited areas in the vicinity of the Site and ***observed tributaries and channelized features*** that convey flow from the Site's wetlands to downstream waters." (Am. Compl. ⁋ 58.) (emphasis added). The Government contends it evaluated flow "less than 50 meters" from the Site on an unidentified day. (Am. Compl. ⁋ 73.)

As an initial matter, save for the single allegation of evaluation, the Government does not appear to contend that its inspectors and consultants observed ***flow*** on any of these dates. Instead, they allege only that they witnessed "channelized features that convey flow." (Am. Compl. ⁋ 58.) In fact, the Amended Complaint repeatedly hedges on the presence of flow, choosing instead to describe the area as showing a channel or channelized features at least 19 times. (*See, e.g.*, Am. Compl. ⁋⁋ 54, 55, 58, 67-72, 74.) Again, the presence of a channel does not meet the applicable test for CWA jurisdiction, and the Government knows this. Campbell Creek exhibited channelized features (and even flow), but the Government's own consultant agreed that it was an intermittent stream. (*See* Exhibit E at 4.) And again, none of these allegations go to the 1.38 miles of intermittent stream branches of Lickinghole Creek further away from the "approximately 400" feet of the channel leading away from the culvert on Ashcake Road.

Because the Government chooses to be vague in places, it is difficult to tell the meteorological conditions ***preceding*** these alleged observations and supposed evaluation, even if flow were present. The Site experienced weather typical for the area during this time frame—varying amounts of rain on some days, no rain on others. (*See* Exhibit F (March 2024 through August 2024 Meteorological Data (highlighted in Exhibit)).)

What is known, however, is that one of the Government's consultants visited this area near Ashcake Road (at the culvert between the Site and the end of the drainage area above Lickinghole

Creek) at least five times. (*See* Daniels Decl. ¶ 10, Doc. 48-1.)[11] And on at least two occasions—September 28, 2023, and October 26, 2023—he observed "little to no flow." (*Id.*) This should come as no surprise because in the two days before each of those visits, there occurred a grand total of ***zero*** inches of rainfall. (*See* Exhibit F (September and October 2023 Meteorological Data).)[12]

Nevertheless, on the days in 2024 where he did observe flow—February 1, 2024, March 4, 2024, and April 17, 2024—the area (conveniently) had experienced rain very recently. In the last four days of January 2024, 1.52 inches of rain had fallen. (*See* Exhibit F (January 2024 Meteorological Data).) Preceding his March 4, 2024 visit, 1.28 inches of rain fell in the previous two days. (*See* Exhibit F (March 2024 Meteorological Data.) And the day before the April 17, 2024 observation of "flow," there was .46 inches of rain. (*See* Exhibit F (April 2024 Meteorological Data).)

It is quite telling and curious that, after witnessing ***no*** flow in 2023, the Government decided to send its consultant out after major rain events in 2024 and simply offers vague "observations" during other times attempting to demonstrate jurisdiction here.

In full context, there are only two ***logical and common-sense*** conclusions: (1) that the USGS NHD identification of Lickinghole Creek as ***at best*** an intermittent stream as it approaches the Site for 1.38 miles and (2) that there is simply a drainage area for approximately 478 feet off-

[11] The Daniels Declaration is part of the Court's record. The Court can and should take judicial notice of the observations contained therein. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (noting that the court is permitted to take judicial notice of its own files and records); *Mitchell v. Henderson*, 128 F. Supp. 2d 298, 301 (D. Md. 2001) (stating that "court may take judicial notice of its own records . . . without converting to a motion for summary judgment"); *see also In re Wilkerson*, 644 B.R. 349, 360 n.13 (E.D. Va. Bankr. 2022) ("The Court can take judicial notice of its own records.").

[12] Tellingly, his declaration includes no pictures from these dates, choosing to whistle past the graveyard instead.

Site are ***correct***. *See, e.g.*, *Va. Office of Protection & Advocacy v. Va. Dep't Educ.*, 262 F. Supp. 2d 648, 660-62 (E.D. Va. 2003) (Hudson, J.) (dismissing count for failure to state a claim and stating that plaintiff's "argument stretches logic beyond its bounds of elasticity"). The Government cannot connect the wetlands on Site through a culvert, an ephemeral stream/drainage area, and a long stretch of intermittent stream. *See Lewis v. United States*, 88 F.4th 1073, 1077 (5th Cir. 2023) (finding no CWA jurisdiction where connection to wetlands ran through "(a) roadside ditches and (b) a culvert to (c) an unnamed non-'relatively permanent water' tributary").

B. "Seasonal Streams" Are Not WOTUS.

Signaling the weakness of their position, the Government amended its complaint to allege in places that the streams flow perennially "or at least seasonally," (*see, e.g.*, Am. Compl. ⁋⁋ 69, 74), completely ignoring that these streams have been identified as intermittent or ephemeral streams by the USGS. Regardless, *Sackett*, in adopting *Rapanos*, does not confer jurisdiction over "seasonal streams."

Justice Scalia's reference to a seasonality concept applied only to "seasonal rivers" and does not discuss any "seasonal stream." The Government cannot simply take the modifier "seasonal," read out the noun "river," and attach the modifier to any channel, ditch, "Unnamed Tributary," or stream over which it wishes to manufacture jurisdiction. *See United States v. Sharfi*, 2024 WL 4483354, at *12 (S.D. Fla. Sept. 21, 2024) ("Initially, I note that this footnote [5] regarding seasonality, by its own terms, applies to rivers and not ditches.").[13]

[13] The Amended Complaint cites to two cases for the apparent proposition that "seasonal streams" can be jurisdictional. In *United States v. Mlaskoch*, the court found that the tributaries "enjoy[ed] flow for at least three months, which is sufficient to meet the standard for relatively permanent," with the standard itself being based on the Corps' own interpretation of "seasonal." 2014 WL 1281523, at *16-17 (D. Minn. Mar. 31, 2014). This "three month" standard was one conjured up by the Corps in the wake of *Rapanos* in an attempt to maintain expansive jurisdiction and ignore constraints placed on jurisdiction by the Supreme Court. This decision pre-dated *Sackett* as well

Compounding the problem, the Government does not even explain what it means by "seasonally" flowing. Does it flow during the "rainy season"? That plainly fails to meet the definition of WOTUS because—almost definitionally—flow would be reacting only to rain. Does seasonally equal "three months"? As noted above, this benchmark was established by the Corps in the wake of *Rapanos* in an attempt to retain maximum jurisdiction. (*See supra* n.13.) Such a vague standard is exactly what the Supreme Court has consistently criticized the EPA and Corps for doing for years. *See Sackett*, 598 U.S. at 666-67 (detailing that EPA's and the Corps' numerous regulatory schemes and interpretations resulted in "system of 'vague' rules that depended on 'locally developed practices'" and "guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas'").

An approach allowing the Government to simply allege that flow occurs "seasonally" in a "channel" during some non-specific period would create a "Land is Waters" approach to CWA jurisdiction that *Rapanos* and *Sackett* foreclose. *See Sharfi*, 2024 WL 4483354, at *12 (holding that "channels with seasonal flow" do "not meet the *Sackett* standard of 'relatively permanent, standing or continuously flowing bod[ies] of water' to qualify as WOTUS"). The Government's position would create an exception that swallows the rule and completely ignores *Sackett*.

The Court need not take Mr. Layne's word for that. Congress recently conducted hearings on the EPA's and Corps' disregard of *Sackett*'s holding, finding that the Government "is not

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as the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which eliminated *Chevron* deference and severely cut down on federal agencies' ability to impose self-serving interpretations of regulations. In *City of San Francisco Baykeeper v. City of Sunnyvale*, the court denied a motion for reconsideration on a pre-*Sackett* motion for summary judgment in which the court applied the "significant nexus" test. *See* 2023 WL 8587610, at *1-3 (N.D. Cal. Dec. 11, 2023). The court denied reconsideration because its prior decision found that the channel at-issue "flow[ed] seasonally," seizing on *Rapanos*'s language that "seasonal rivers" were not necessarily excluded from CWA jurisdiction. *Id.* at *5. But there is no allegation that the unnamed tributary here is a "seasonal river," the exact phrase Justice Scalia used in *Rapanos*.

adhering to *Sackett*, attempting to maintain broad Federal overreach." (Letter from Sam Graves to Michael S. Regan (EPA Administrator) and Michael L. Connor (Assistant Secretary of the Army Corps for Civil Works) at 1 (Oct. 31, 2024), attached as Exhibit H.) The EPA and Corps have, much like the Government does here with "seasonal" flow, failed to define what constitutes "relatively permanent" waters. (*Id.* at 3.) Chairman Graves found that both Congress and the Supreme Court had given the EPA and Corps "clear directions" that they "continue to ignore." (*Id.* at 5.) What the Government seeks to do here with "seasonal" flow is exactly what Congress has found elsewhere—that the Government seeks to simply ignore *Sackett* and grasp onto broad federal powers over remote wetlands with no connection to traditional navigable waters

C. The Government's Figures Simply Show Drainage Channels.

1. Hillshade Data

The Governments' Figures 5 and 6 support the conclusion that there simply exists drainage channels around the Site. According to the Government, Figure 5 is a "digital elevation model" and Figure 6 is magnified hillshade raster data. (Am. Compl. ¶ 66.) These depictions show "channel-like features" where "EPA inspectors would expect that water would flow." (Am. Compl. ¶ 66.) According to the Government, EPA inspectors did see water flowing through these channels. (Am. Compl. ¶ 66.)

But these show nothing more than where water would ***drain***. They do not say anything about relative permanence. Moreover, what the Amended Complaint does not say about these images reveals more than what the Amended Complaint actually says. Along I-95 towards the southern end of the Site, there can be seen similar lower elevations and curvelinear features:

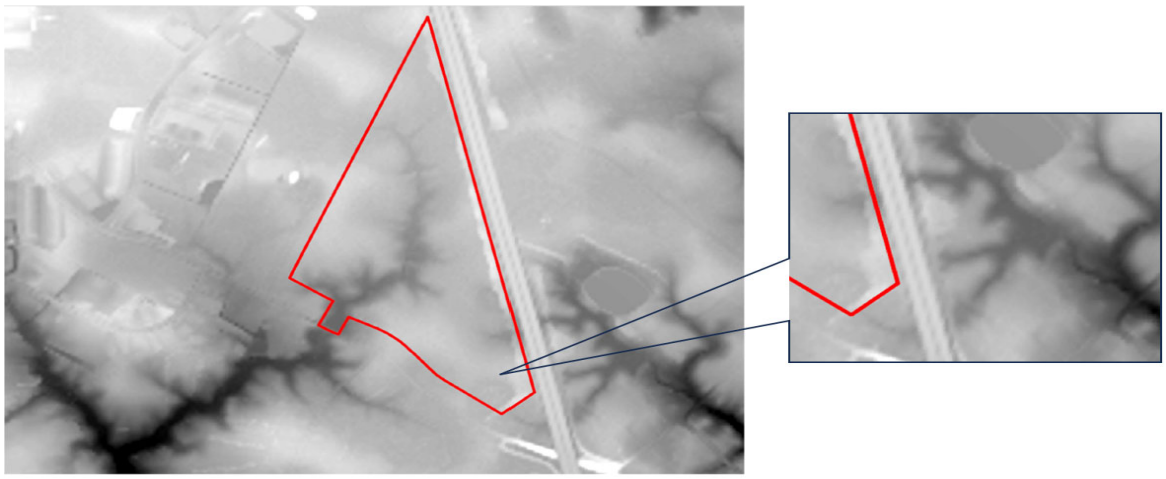


Figure 5 – Digital Elevation Model. The red line depicts the approximate Site boundaries. The darker indentations show lower elevations and the lighter colors are higher elevations.

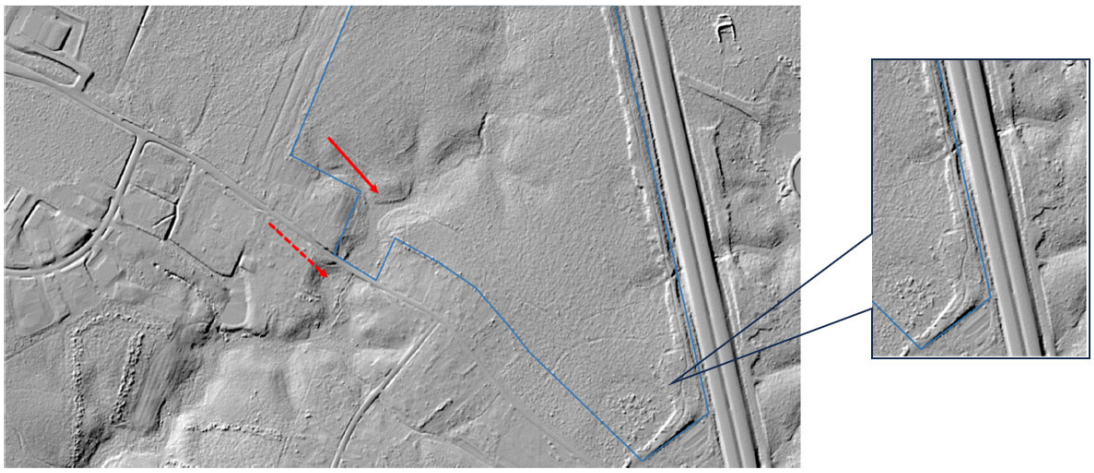


Figure 6 – Hillshade raster data. The blue line depicts the approximate Site boundaries. The red arrows point to features on the Site as described in Paragraphs 66 and 67. The blue line and arrows are the only additions to the depicted data layer.

This area is where the Government previously contended that "unnamed tributaries" connected to Campbell Creek. But as described above, the Government's own investigator confirmed what USGS mapping already told the Government—that the unnamed tributary is at best intermittent. And the Government rightly acknowledges that it ***lacks*** jurisdiction over the wetlands allegedly "connected" to these unnamed tributaries.

2. StreamStats

The Government's Figure 7 no doubt has surface appeal as it contains a blue pixelated line running through the Site. (Am. Compl. ⁋ 67, Fig. 7.) That ***does not show a stream***, but rather

where overland flow would tend to accumulate given the terrain. The USGS confirms this:

What are the blue pixelated lines? Are they real streams? Why are there so many/few of them?

By StreamStats

"Are they real streams?"[14] No. According to the website, "[t]hey aren't necessarily true streams, ***especially in headwaters areas***." (emphasis added.) As the Government must acknowledge, the blue pixelated line on the page runs to the "[u]pper portion of the watershed," of Lickinghole Creek. It is ***past*** the headwaters of Lickinghole Creek. The FAQ page explains that "in more weathered terrain, with more humid climates, ***the stream grids tend to correspond to drainage channels***." *Id.* (emphasis added). These blue pixelated lines "are ***not*** intended to mean there is a stream in that place; only that if there were overland flow that these areas where that flow would tend to accumulate, given the terrain represented in the [digital elevation models]." *Id.*

Figure 7 confirms this by showing "streams" flowing through buildings:

[14] https://www.usgs.gov/streamstats/what-are-blue-pixelated-lines-are-they-real-streams-why-are-there-so-manyfew-them

No one would expect there to be any "stream" flowing through the lobbies of these structures. If the Government contends that Figure 7 shows an ***actual*** stream, it should explain how it is that these streams are flowing through these structures and explain why its own USGS is wrong to tell people otherwise.

Moreover, the presence of a pixelated blue line does ***not*** indicate that any purported stream is "relatively permanent" such that it can meet's *Sackett*'s test. The same figure shows a "stream" to the east of I-95 that is the "unnamed tributary" that the original Complaint claimed as "relatively permanent" and connecting to Campbell Creek:

But as described at length above, the Government ***confirmed*** that this is not a relatively permanent stream—it is intermittent just as the USGS identified it. And as a result, it does not qualify as WOTUS.

That the Government has offered that on two occasions that it observed "flow" off Site conforms with these figures because what the Government witnessed was simply ***drainage***. As Justice Scalia explained, "***the entire land area of the United States lies in some drainage basin***, and an endless network of ***visible channels furrows the entire surface, containing water ephemerally wherever the rain falls***." *Rapanos*, 574 U.S. at 722 (emphasis added). Again,

allowing the Government to proceed where its figures, ***by their very own terms***, simply show drainage would be contrary to *Rapanos* and *Sackett*.

V. The Court Should Dismiss With Prejudice.

The Court has already given the Government a second bite at the apple. It should not get a third especially given that they have failed on numerous occasions to address the 1.38 miles of intermittent streams approaching the Site.

Dismissal with prejudice ***will not*** leave the Site unregulated. States have traditionally held the rights and prerogatives to regulate both water and land use within their borders. *See* 33 U.S.C. § 1251(b). That was so because "[r]egulation of land use . . . is a quintessential state and local power." *Rapanos*, 547 U.S. at 738; *Sackett*, 598 U.S. at 679 ("Regulation of land and water use lies at the core of traditional state authority."). Congress recognized States' important and historical interests when passing the CWA. Congress's explicit policy was "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). In other words, while the CWA granted authority to the Federal Government, it remained the primary responsibility and right of each State to protect its waters and regulate its lands. *See id.* § 1251(b); *Sackett*, 598 U.S. at 674 ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water." (citation omitted)).

States should be primarily concerned with regulation and use of the land and waters within their borders because they have better understanding of the specific and various impacts and benefits of activities within their own jurisdictions. Indeed, in response to *Sackett*, DEQ recognized that intermittent streams no longer were jurisdictional under the CWA but noted that

the decision did not affect its regulation of wetlands in Virginia and that DEQ would continue its regulation despite the restriction of federal jurisdiction. *See* DEQ Mem. at 1-3.[15] The Commonwealth's goal through regulation of its land and waters, including wetlands, "is straightforward: ***healthy state and local economies and healthy waterways are integrally related; balanced economic development and water quality are not mutually exclusive***." *Id.* at 3.

DEQ has robust regulatory and enforcement capabilities. (*See* Am. Compl. ¶¶ 34-40.) DEQ issues Water Protection Permits related to activities potentially impacting the state's land and waters through Virginia Code § 62.1-44.15:20. Virginia law defines "state waters" to include wetlands: 'State waters' means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Va. Code § 62.1-44.3. DEQ notes that this definition of "state waters" is far broader than the CWA's definition of WOTUS. *See* DEQ Mem. at 1 ("In contrast to the CWA, Virginia has a very *broad* and *comprehensive* statutory definition of state waters." (emphasis added)).

Dismissal with prejudice, therefore, will simply allow the proper governmental body—the Commonwealth—to exercise jurisdiction over the wetlands on Site.

CONCLUSION

For the reasons set forth above, the Court should dismiss the Government's Amended Complaint with prejudice.

Dated: January 2, 2025

Respectfully submitted,

/s/ *Frank Talbott V*
Eugene E. Mathews (VSB No. 36384)
Frank Talbott V (VSB No. 86396)
McGuireWoods LLP

[15] DEQ Memorandum – Recent Supreme Court Decision *Sackett v. Environmental Protection Agency (EPA)* – Effect in Virginia and How to Move Forward Without Economic Dislocation, *available at* https://www.deq.virginia.gov/home/showpublisheddocument/18677.

Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-4773
Fax: (804) 698-2313
mmathews@mcguirewoods.com
ftalbott@mcguirewoods.com

John M. Lain (VSB No. 33005)*
WireGill LLP
9200 Forest Hill Avenue
Suite C-1
Richmond, Virginia 23235
Telephone: (804) 477-6786
jlain@wiregill.com

*Not yet admitted in Eastern District of Virginia

Counsel for Chameleon LLC and Gary V. Layne

CERTIFICATE OF SERVICE

I certify that on January 2, 2025, I filed the forgoing electronically, which sent a notice of electronic filing to all counsel of record in this matter.

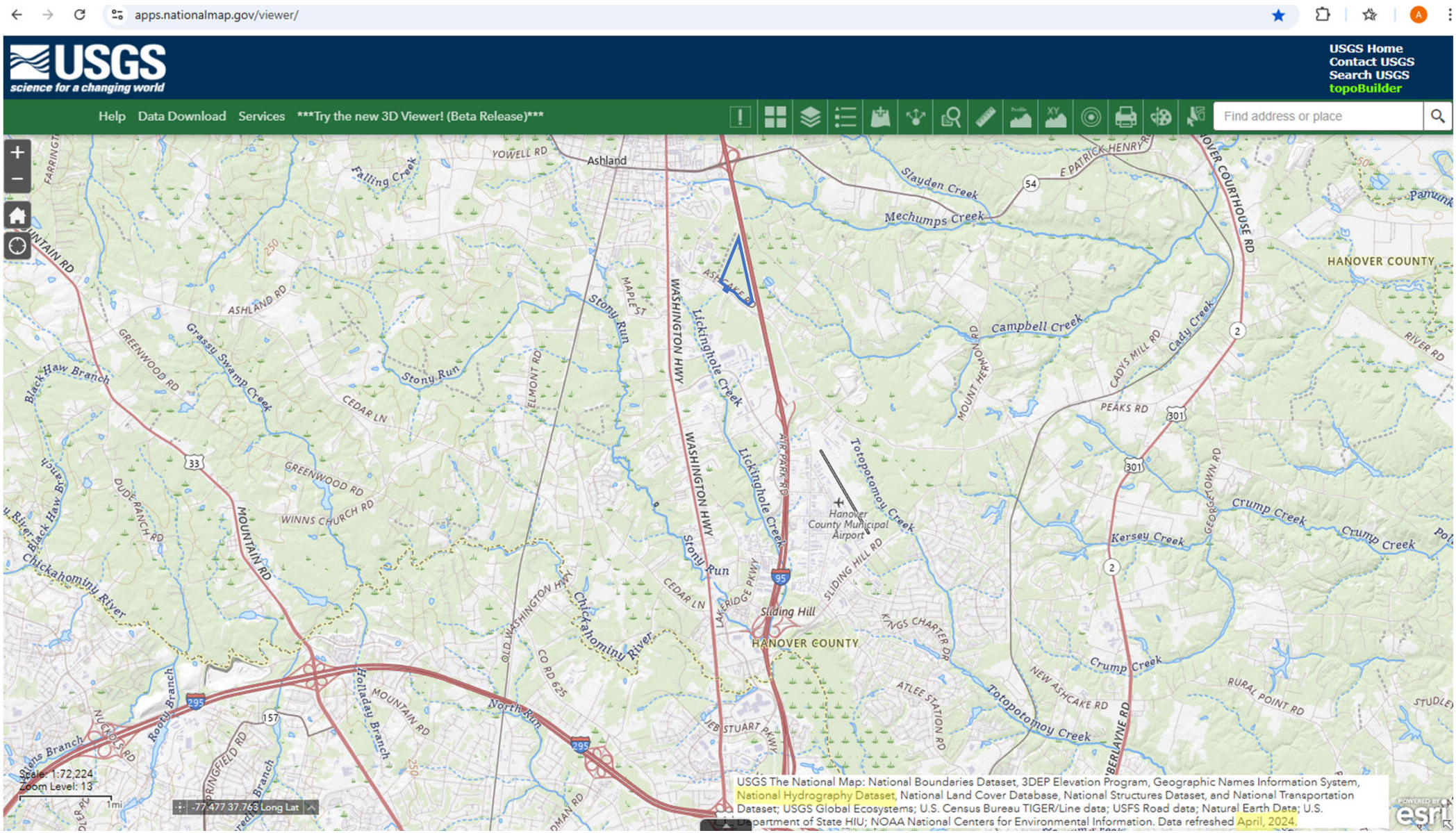
/s/ *Frank Talbott V*

Exhibit A

USGS National Map

https://apps.nationalmap.gov/viewer/

2


apps.nationalmap.gov/viewer/
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science for a changing world
USGS Home
Contact USGS
Search USGS
topoBuilder
Help
Data Download
Services
Try the new 3D Viewer! (Beta Release)
Find address or place
Ashland
YOWELL RD
Falling Creek
Slayden Creek
Mechumps Creek
E PATRICK HENRY RD
HANOVER COURTHOUSE RD
HANOVER COUNTY
Pamunkey
ASHLAND RD
MAPLE ST
Stony Run
WASHINGTON HWY
Lickinghole Creek
ASHCAKE RD
Campbell Creek
CADYS MILL RD
Cady Creek
RIVER RD
MOUNT HERMON RD
PEAKS RD
301
GREENWOOD RD
Grassy Swamp Creek
Black Haw Branch
CEDAR LN
ELMONT RD
33
DUDE RANCH RD
WINNS CHURCH RD
MOUNTAIN RD
Chickahominy River
AIR PARK RD
Totopotomoy Creek
Hanover County Municipal Airport
SLIDING HILL RD
Crump Creek
Kersey Creek
GEORGETOWN RD
OLD WASHINGTON HWY
CO RD 625
Sliding Hill
HANOVER COUNTY
I-95
KINGS CHARTER DR
NEW ASHCAKE RD
ATLEE STATION RD
RURAL POINT RD
Holladay Branch
North Run
JEB STUART PKWY
295
157
NUCKOLS RD
SPRINGFIELD RD
BERLAYNE RD
Scale: 1:72,224
Zoom Level: 13
1mi
-77.477 37.763 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024.
esri

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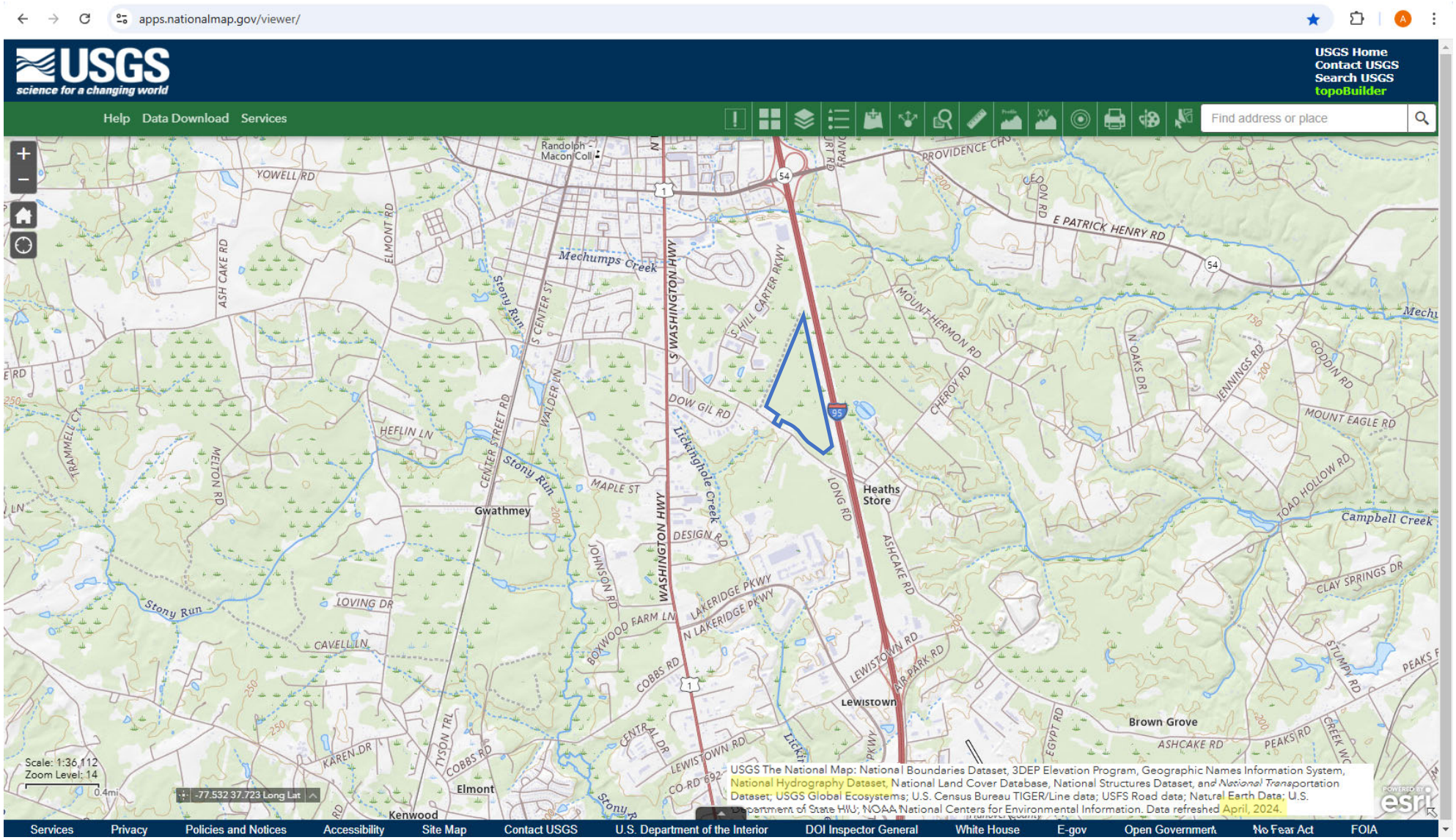
apps.nationalmap.gov/viewer/
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science for a changing world
USGS Home
Contact USGS
Search USGS
topoBuilder
Help
Data Download
Services
Find address or place
Mechumps Creek
Stony Run
Gwathmey
Heaths Store
Lewistown
Brown Grove
Elmont
Kenwood
Campbell Creek
Lickinghole Creek
YOWELL RD
ASH CAKE RD
ELMONT RD
S CENTER ST
S WASHINGTON HWY
S HILL CARTER PKWY
E PATRICK HENRY RD
MOUNT HERMON RD
CHEROY RD
N OAKS DR
JENNINGS RD
GOODIN RD
MOUNT EAGLE RD
TOAD HOLLOW RD
CLAY SPRINGS DR
STUMPY RD
PEAKS RD
CREEK WC
DOW GIL RD
HEFLIN LN
CENTER STREET RD
WALDER LN
MAPLE ST
DESIGN RD
LONG RD
ASHCAKE RD
LAKERIDGE PKWY
N LAKERIDGE PKWY
BOXWOOD FARM LN
JOHNSON RD
LOVING DR
CAVELL LN
COBBS RD
LEWISTOWN RD
AIR PARK RD
EGYPT RD
CENTRAL DR
KAREN DR
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USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024.
Services
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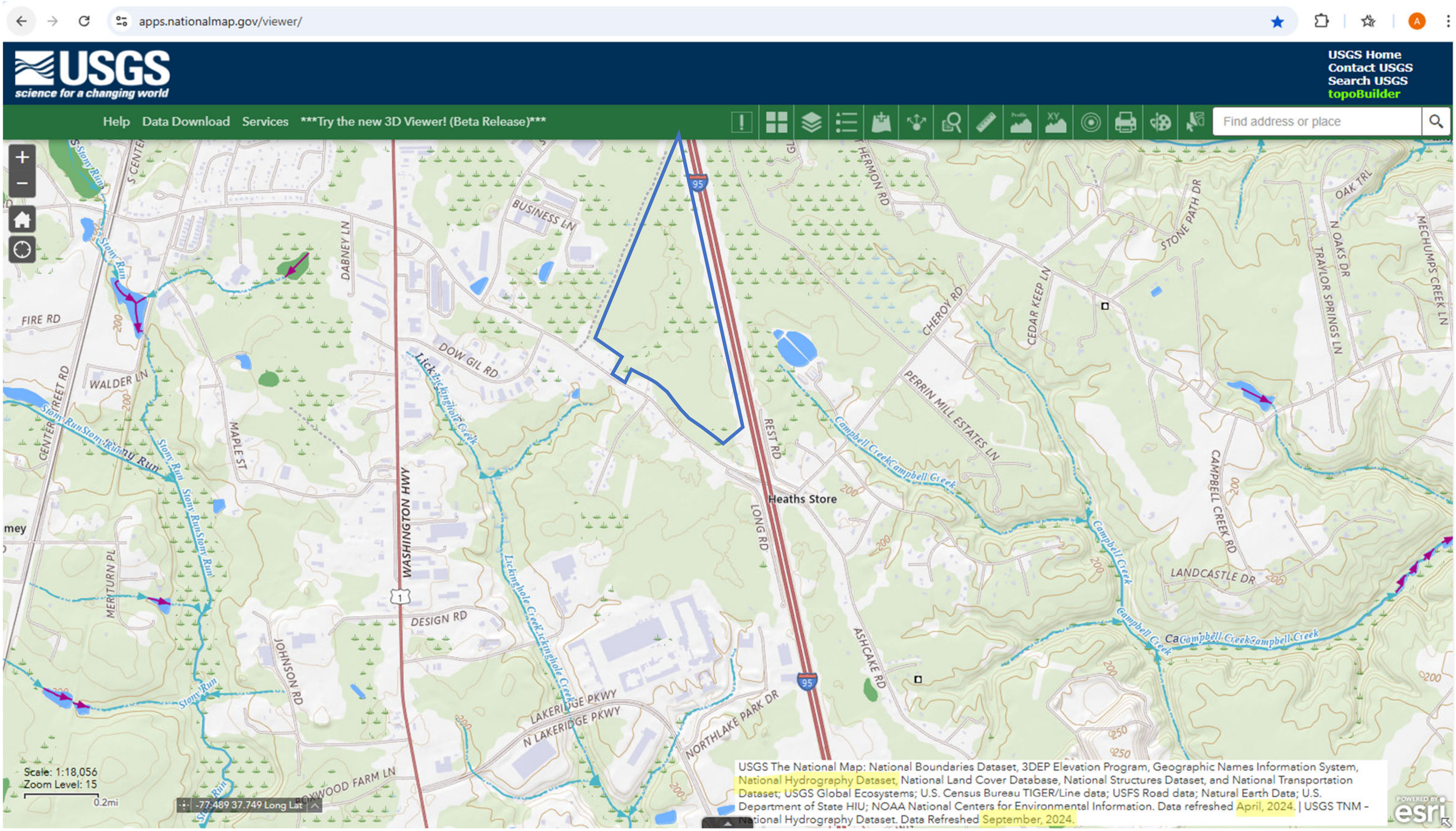
Policies and Notices
Accessibility
Site Map
Contact USGS
U.S. Department of the Interior
DOI Inspector General
White House
E-gov
Open Government
No Fear Act
FOIA

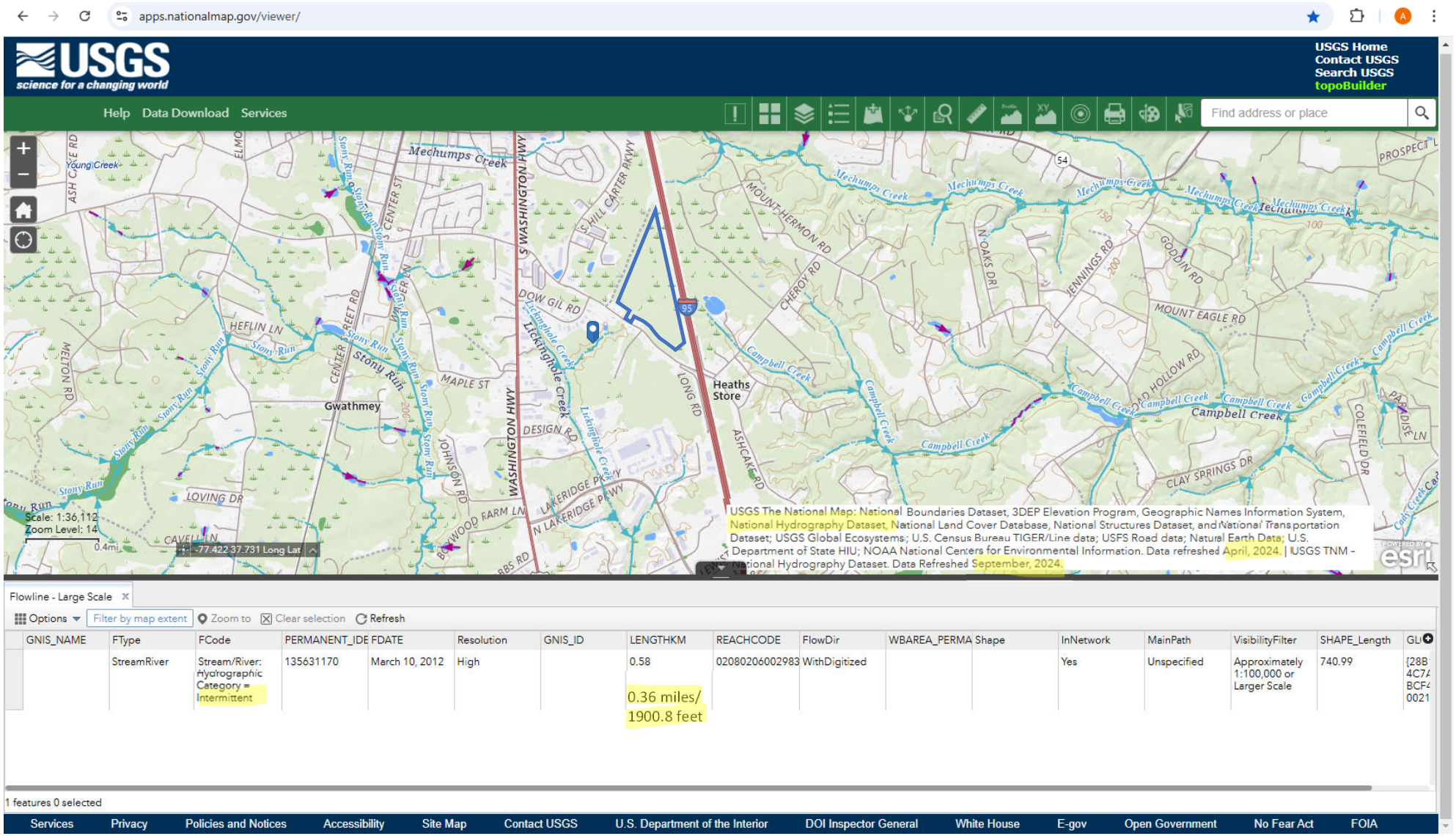
Exhibit B

USGS National Map with National Hydrography Dataset

https://apps.nationalmap.gov/viewer/

Maps showing Intermittent and Perineal Streams
from National Hydrography Dataset all shown at Level 14 (0.4 mile)
and
Segments shown with blue markers and lengths of segments in attribute table are measured in KM and then converted to miles and linear feet


apps.nationalmap.gov/viewer/
USGS
science for a changing world
USGS Home
Contact USGS
Search USGS
topoBuilder
Help
Data Download
Services
Try the new 3D Viewer! (Beta Release)
Find address or place
BUSINESS LN
DABNEY LN
FIRE RD
WALDER LN
MAPLE ST
DOW GIL RD
Lickinghole Creek
WASHINGTON HWY
HERMON RD
CHEROY RD
CEDAR KEEP LN
STONE PATH DR
OAK TRL
N OAKS DR
TRAYLOR SPRINGS LN
MECHUMPS CREEK LN
PERRIN MILL ESTATES LN
REST RD
Campbell Creek
Heaths Store
LONG RD
CAMPBELL CREEK RD
LANDCASTLE DR
MERTURN PL
JOHNSON RD
DESIGN RD
LAKERIDGE PKWY
N LAKERIDGE PKWY
NORTHLAKE PARK DR
ASHCAKE RD
FOXWOOD FARM LN
Stony Run
CENTER STREET RD
Scale: 1:18,056
Zoom Level: 15
0.2mi
-77.489 37.749 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024. | USGS TNM - National Hydrography Dataset. Data Refreshed September, 2024.
esri


apps.nationalmap.gov/viewer/
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science for a changing world
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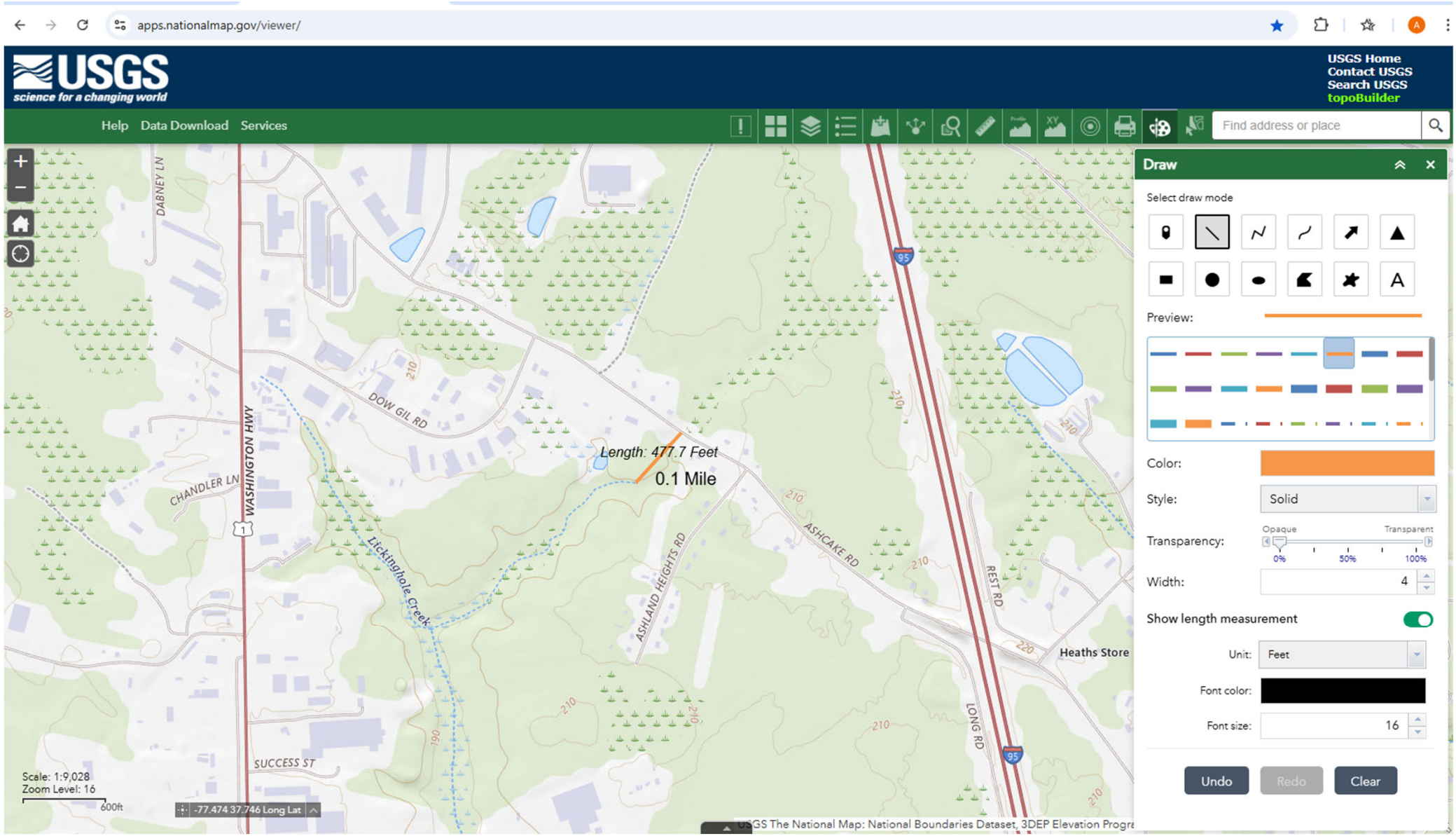
Search USGS
topoBuilder
Help
Data Download
Services
Find address or place
Mechumps Creek
Stony Run
Gwathmey
Heaths Store
Campbell Creek
Lickinghole Creek
S WASHINGTON HWY
LONG RD
MOUNT EAGLE RD
Scale: 1:36,112
Zoom Level: 14
-77.422 37.731 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024. | USGS TNM - National Hydrography Dataset. Data Refreshed September, 2024.
esri
Flowline - Large Scale
Options
Filter by map extent
Zoom to
Clear selection
Refresh
GNIS_NAME | FType | FCode | PERMANENT_IDE | FDATE | Resolution | GNIS_ID | LENGTHKM | REACHCODE | FlowDir | WBAREA_PERMA | Shape | InNetwork | MainPath | VisibilityFilter | SHAPE_Length | GLI
StreamRiver | Stream/River: Hydrographic Category = Intermittent | 135631170 | March 10, 2012 | High | 0.58 | 02080206002983 | WithDigitized | Yes | Unspecified | Approximately 1:100,000 or Larger Scale | 740.99
0.36 miles/ 1900.8 feet
1 features 0 selected
Services
Privacy
Policies and Notices
Accessibility
Site Map
Contact USGS
U.S. Department of the Interior
DOI Inspector General
White House
E-gov
Open Government
No Fear Act
FOIA


apps.nationalmap.gov/viewer/
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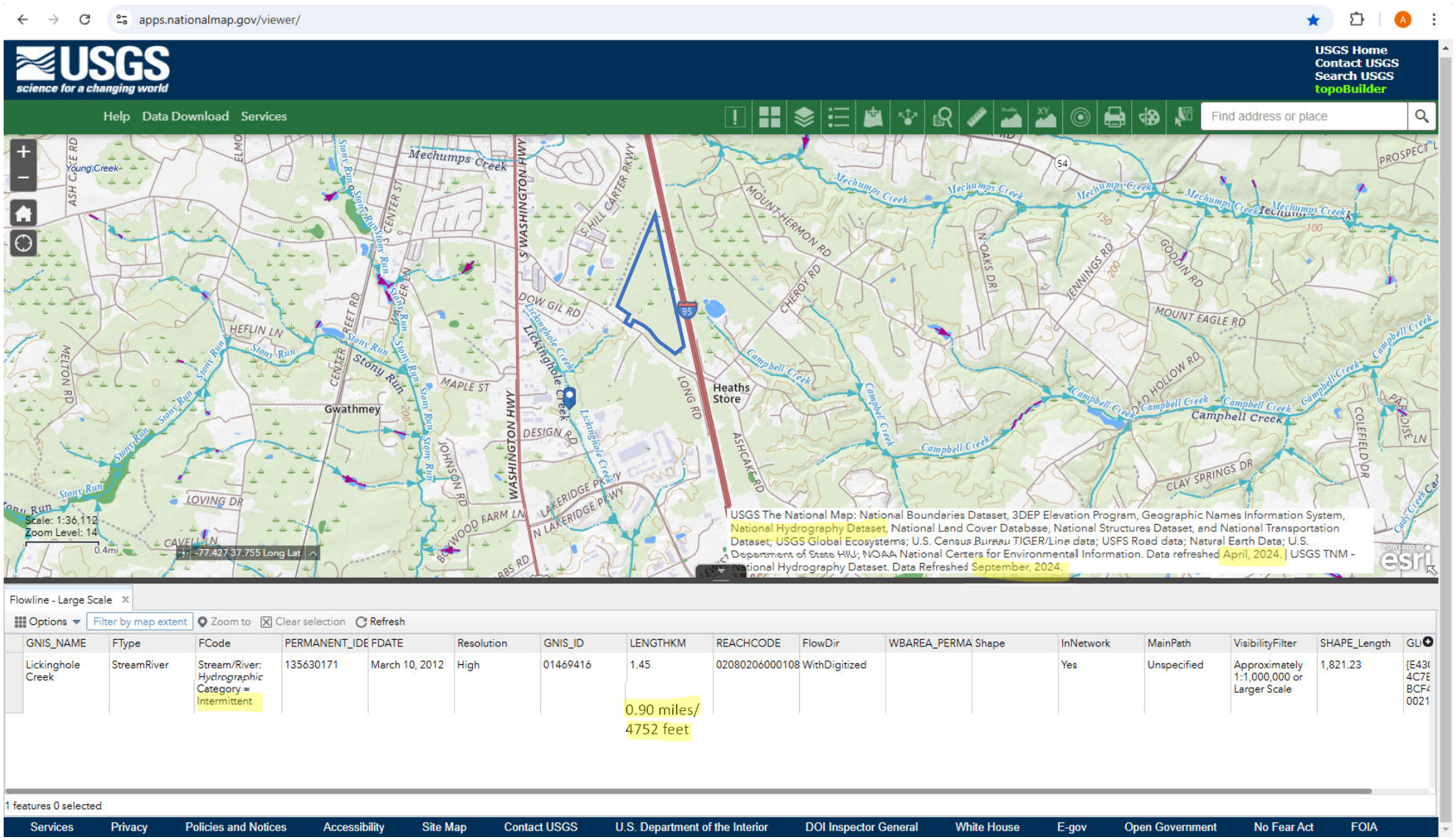
Help
Data Download
Services
Find address or place
Draw
Select draw mode
Preview:
Color:
Style:
Solid
Transparency:
Opaque
Transparent
0%
50%
100%
Width:
4
Show length measurement
Unit:
Feet
Font color:
Font size:
16
Undo
Redo
Clear
Length: 477.7 Feet
0.1 Mile
DABNEY LN
DOW GIL RD
CHANDLER LN
WASHINGTON HWY
Lickinghole Creek
ASHLAND HEIGHTS RD
ASHCAKE RD
REST RD
LONG RD
Heaths Store
SUCCESS ST
Scale: 1:9,028
Zoom Level: 16
600ft
-77.474 37.746 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Progra


apps.nationalmap.gov/viewer/
USGS
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USGS Home
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Search USGS
topoBuilder
Help
Data Download
Services
Find address or place
Mechumps Creek
Stony Run
Lickinghole Creek
Campbell Creek
Gwathmey
Heaths Store
WASHINGTON HWY
LONG RD
MOUNT EAGLE RD
Scale: 1:36,112
Zoom Level: 14
-77.427 37.755 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024. | USGS TNM - National Hydrography Dataset. Data Refreshed September, 2024.
Flowline - Large Scale
Options
Filter by map extent
Zoom to
Clear selection
Refresh
GNIS_NAME | FType | FCode | PERMANENT_IDE | FDATE | Resolution | GNIS_ID | LENGTHKM | REACHCODE | FlowDir | WBAREA_PERMA | Shape | InNetwork | MainPath | VisibilityFilter | SHAPE_Length
Lickinghole Creek | StreamRiver | Stream/River: Hydrographic Category = Intermittent | 135630171 | March 10, 2012 | High | 01469416 | 1.45 | 02080206000108 | WithDigitized | | | Yes | Unspecified | Approximately 1:1,000,000 or Larger Scale | 1,821.23
0.90 miles/ 4752 feet
1 features 0 selected
Services
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Policies and Notices
Accessibility
Site Map
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U.S. Department of the Interior
DOI Inspector General
White House
E-gov
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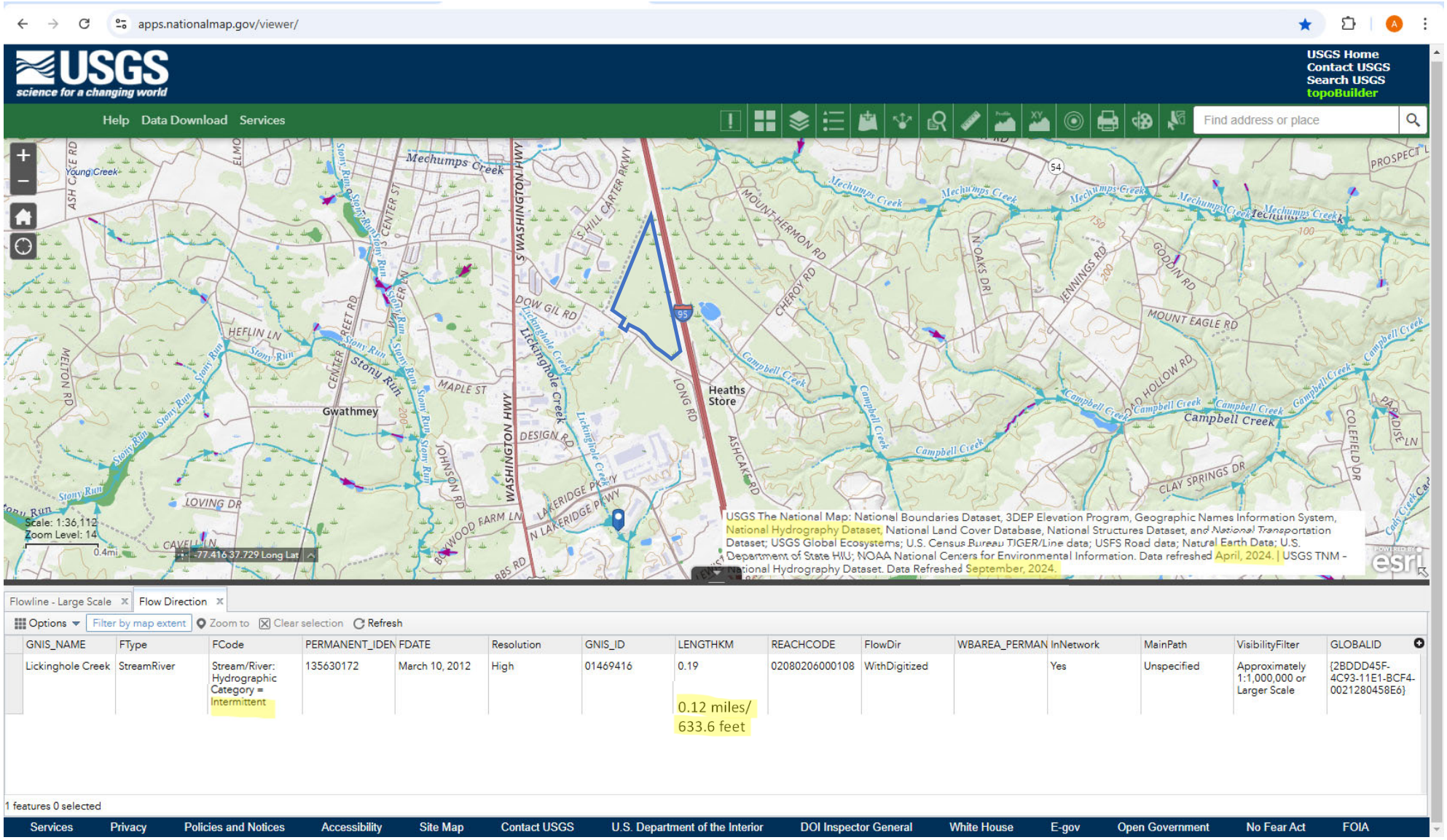
apps.nationalmap.gov/viewer/
USGS
science for a changing world
USGS Home
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Search USGS
topoBuilder
Help
Data Download
Services
Find address or place
Mechumps Creek
Stony Run
Gwathmey
Heaths Store
Lickinghole Creek
Campbell Creek
WASHINGTON HWY
LONG RD
MOUNT HERMON RD
MOUNT EAGLE RD
CHEROY RD
JENNINGS RD
GODWIN RD
DOW GIL RD
DESIGN RD
MAPLE ST
HEFLIN LN
LOVING DR
CLAY SPRINGS DR
ASHCAKE RD
LAKERIDGE PKWY
Scale: 1:36,112
Zoom Level: 14
-77.416 37.729 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024. | USGS TNM - National Hydrography Dataset. Data Refreshed September, 2024.
esri
Flowline - Large Scale
Flow Direction
Options
Filter by map extent
Zoom to
Clear selection
Refresh
GNIS_NAME | FType | FCode | PERMANENT_IDEN | FDATE | Resolution | GNIS_ID | LENGTHKM | REACHCODE | FlowDir | WBAREA_PERMAN | InNetwork | MainPath | VisibilityFilter | GLOBALID
Lickinghole Creek | StreamRiver | Stream/River: Hydrographic Category = Intermittent | 135630172 | March 10, 2012 | High | 01469416 | 0.19 | 02080206000108 | WithDigitized | | Yes | Unspecified | Approximately 1:1,000,000 or Larger Scale | {2BDDD45F-4C93-11E1-BCF4-0021280458E6}
0.12 miles/ 633.6 feet
1 features 0 selected
Services
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Accessibility
Site Map
Contact USGS
U.S. Department of the Interior
DOI Inspector General
White House
E-gov
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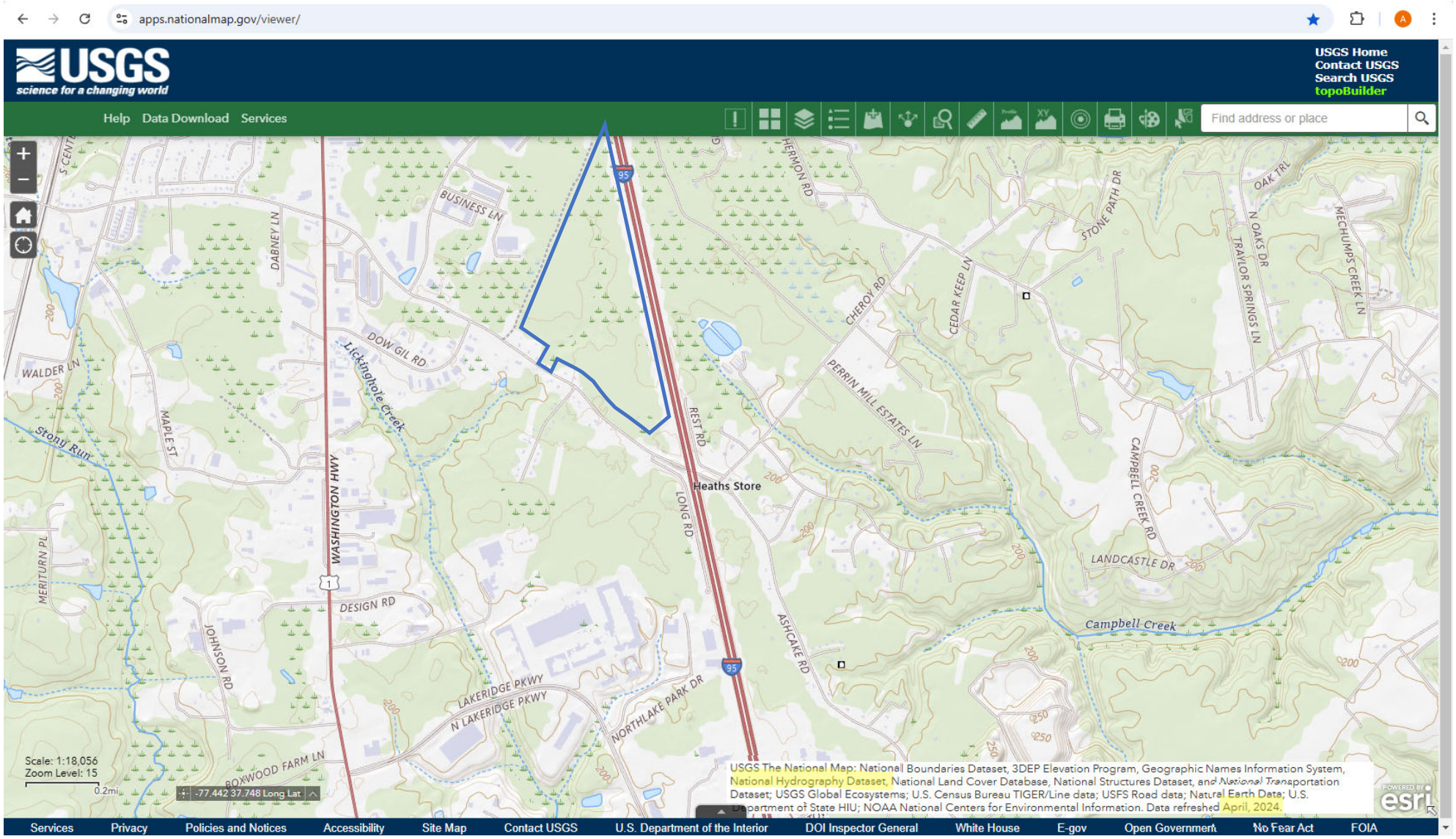
apps.nationalmap.gov/viewer/
USGS
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topoBuilder
Help
Data Download
Services
Find address or place
Heaths Store
WASHINGTON HWY
LONG RD
REST RD
BUSINESS LN
DOW GIL RD
Lickinghole Creek
Stony Run
WALDER LN
DABNEY LN
MAPLE ST
MERITURN PL
JOHNSON RD
DESIGN RD
BOXWOOD FARM LN
LAKERIDGE PKWY
N LAKERIDGE PKWY
NORTHLAKE PARK DR
ASHCAKE RD
HERMON RD
CHEROY RD
CEDAR KEEP LN
PERRIN MILL ESTATES LN
STONE PATH DR
OAK TRL
N OAKS DR
TRAYLOR SPRINGS LN
MECHUMPS CREEK LN
CAMPBELL CREEK RD
LANDCASTLE DR
Campbell Creek
Scale: 1:18,056
Zoom Level: 15
0.2mi
-77.442 37.748 Long Lat
USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road data; Natural Earth Data; U.S. Department of State HIU; NOAA National Centers for Environmental Information. Data refreshed April, 2024.
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Accessibility
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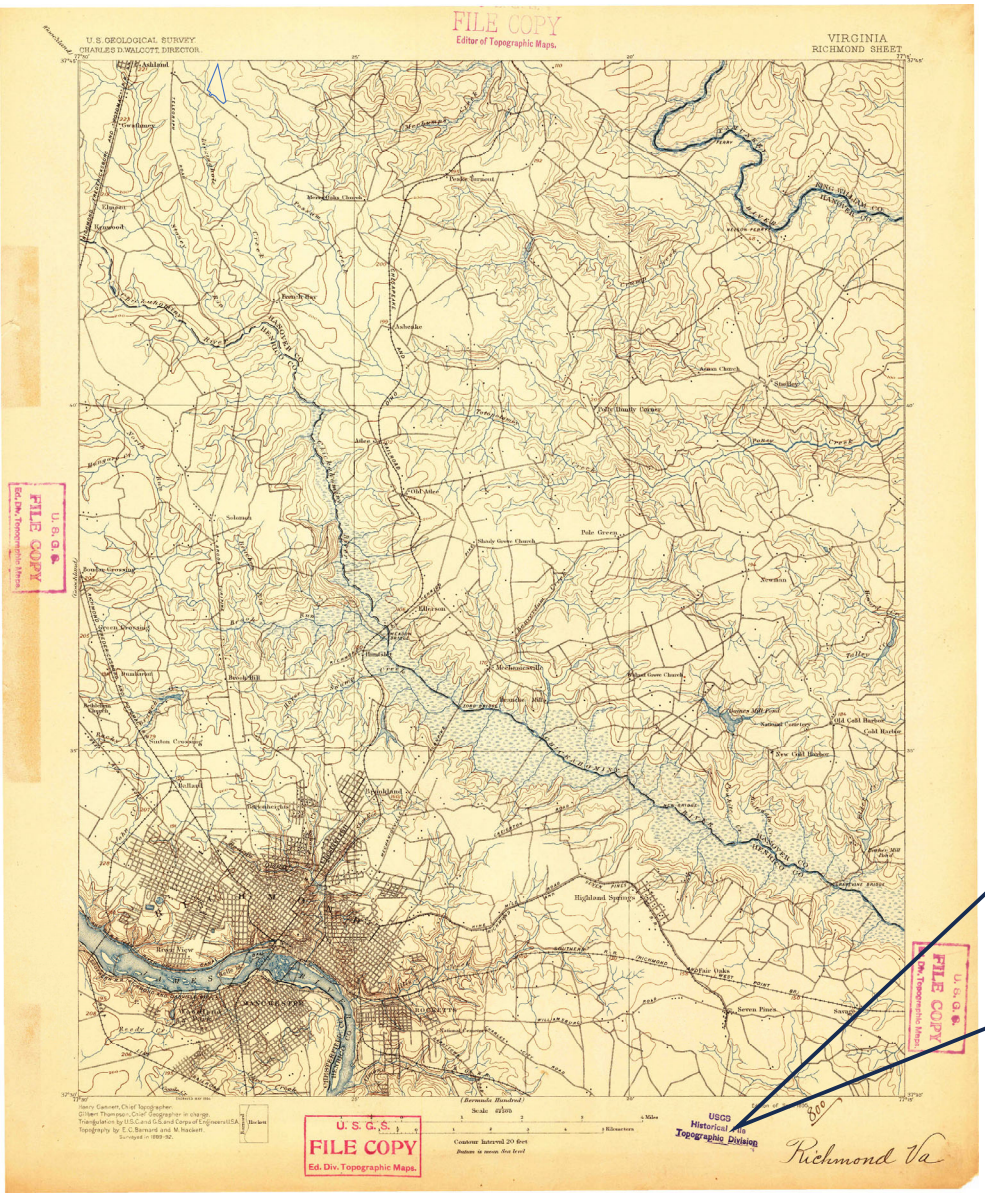
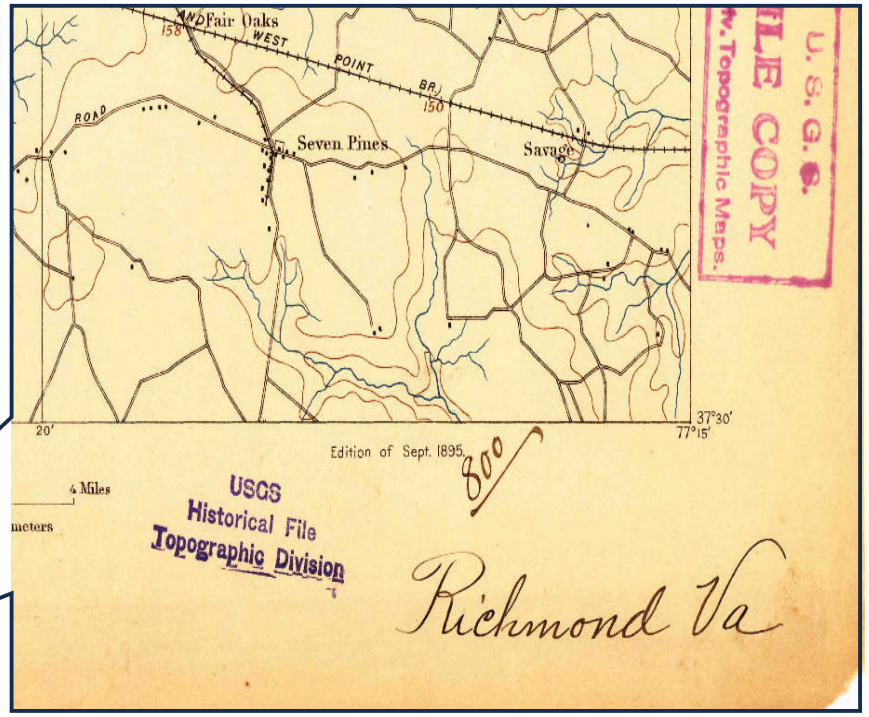
Exhibit C

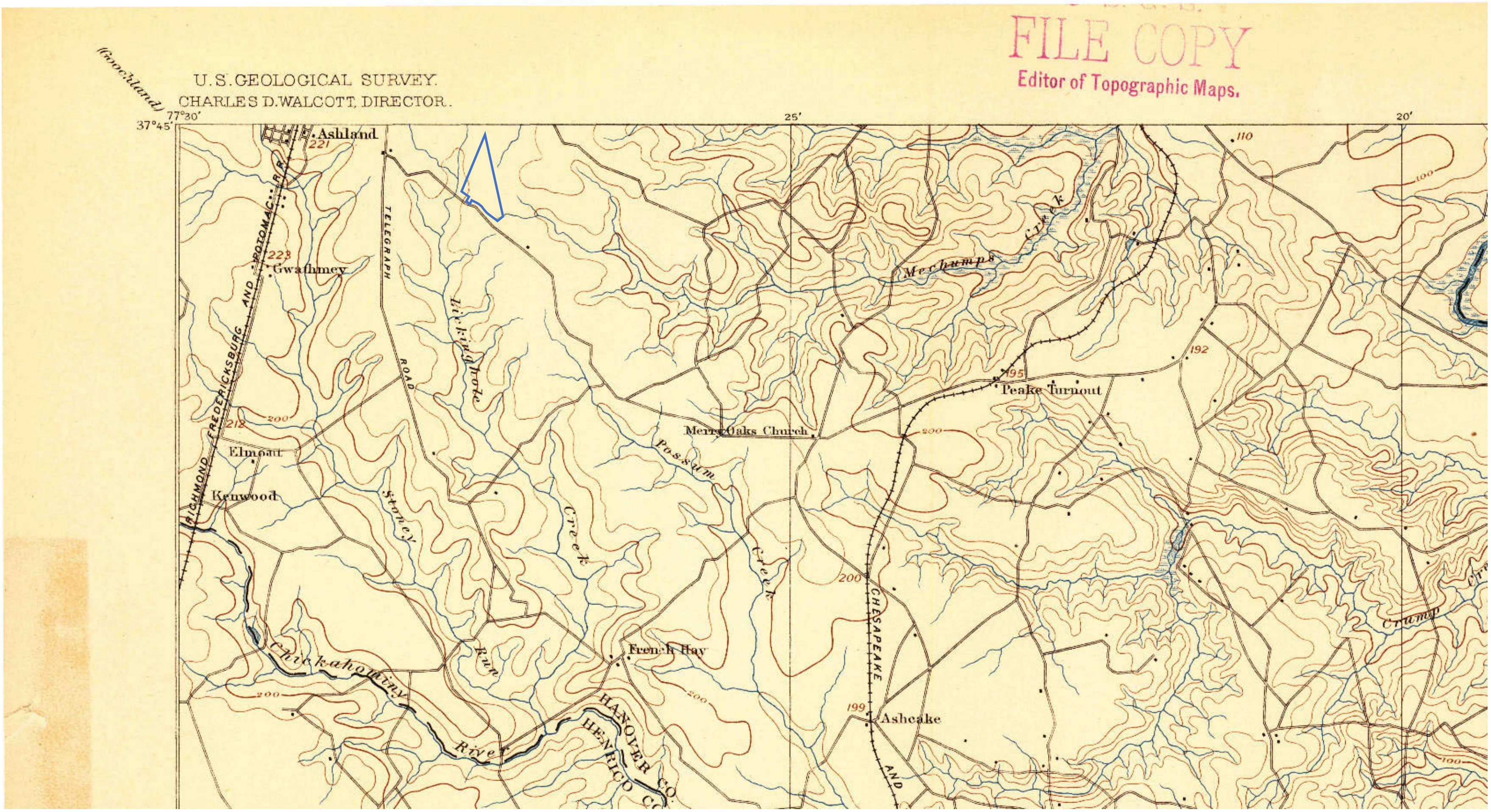
USGS Historic Maps

https://www.usgs.gov/programs/national-geospatial-program/historical-topographic-maps-preserving-past

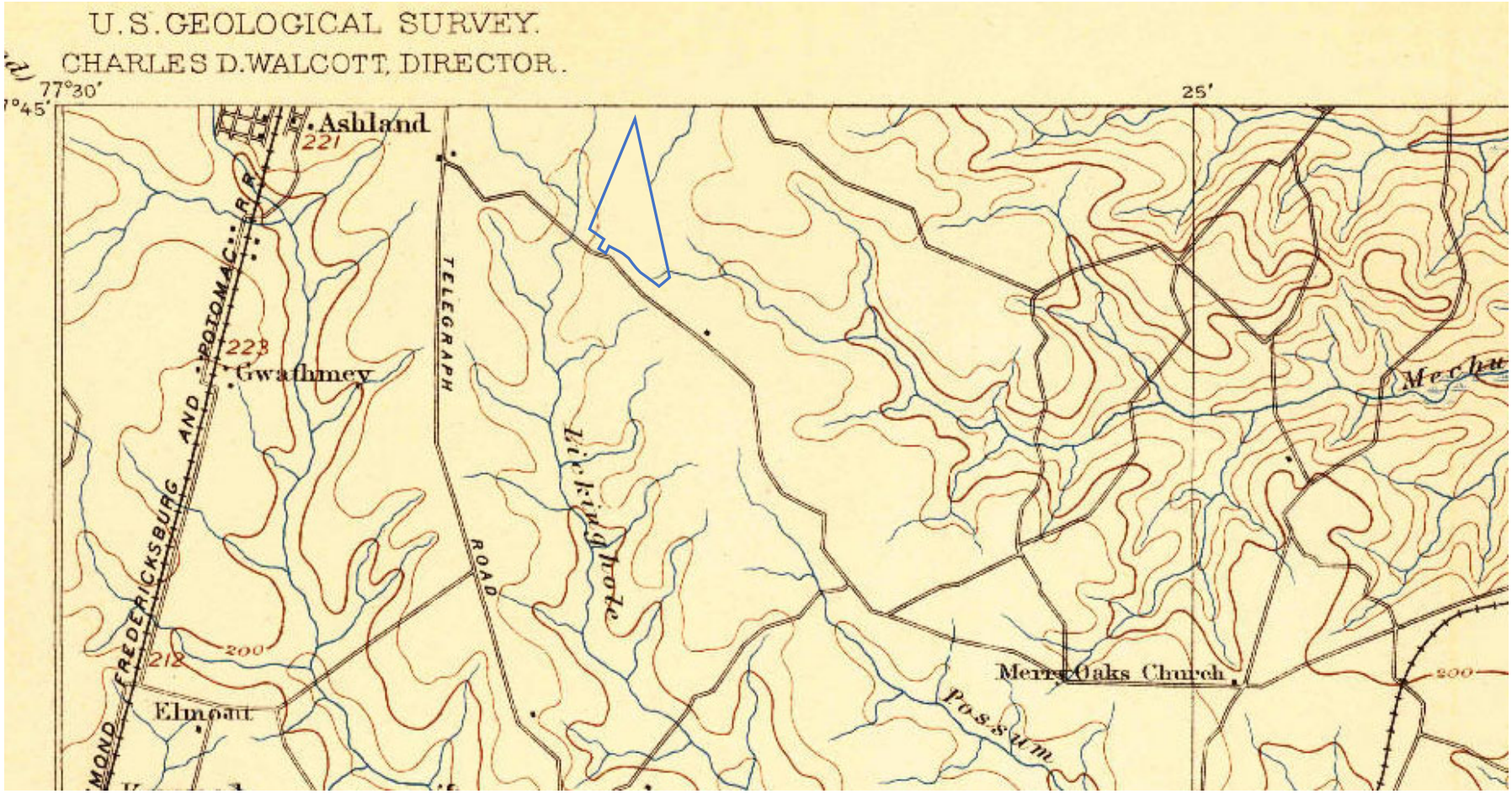
1895 Map


FILE COPY
Editor of Topographic Maps.
U. S. GEOLOGICAL SURVEY
CHARLES D. WALCOTT, DIRECTOR
VIRGINIA
RICHMOND SHEET
U. S. G. S.
FILE COPY
Ed. Div. Topographic Maps.
USGS
Historical File
Topographic Division
Richmond Va

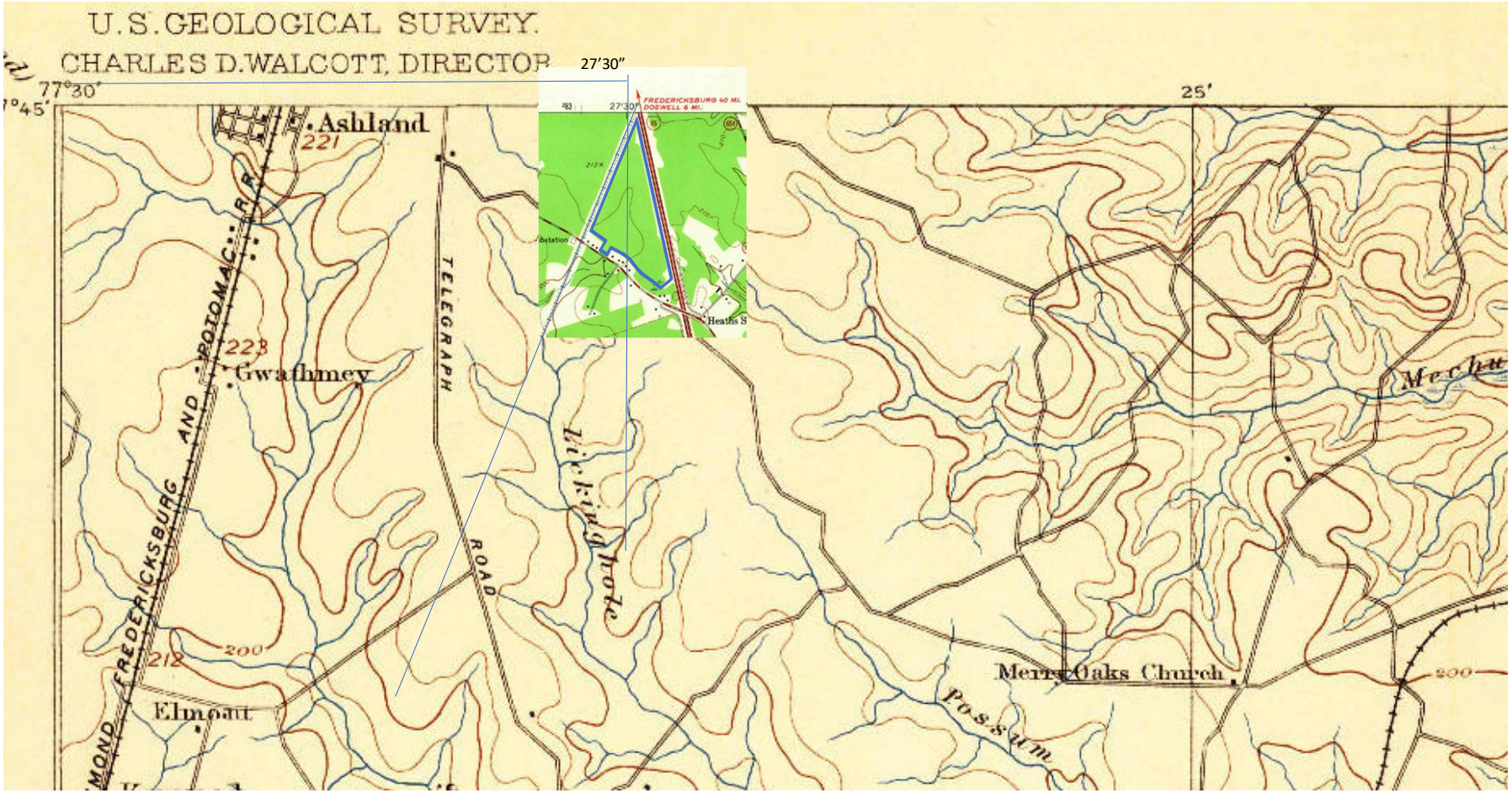

Fair Oaks
WEST
POINT
ROAD
Seven Pines
Savage
20'
37°30'
77°15'
Edition of Sept. 1895
4 Miles
meters
USGS
Historical File
Topographic Division
Richmond Va
U. S. G. S.
FILE COPY
Div. Topographic Maps.


U.S. GEOLOGICAL SURVEY.
CHARLES D. WALCOTT, DIRECTOR.
FILE COPY
Editor of Topographic Maps.
Ashland
Gwathmey
Elmont
Kenwood
TELEGRAPH ROAD
RICHMOND FREDERICKSBURG AND POTOMAC R.R.
Stoney Run
Chickahominy River
Merry Oaks Church
Possum Creek
French Hay
HANOVER CO.
HENRICO CO.
Mechumps Creek
Peake Turnout
CHESAPEAKE AND
Asheake
Crump

1895 Map

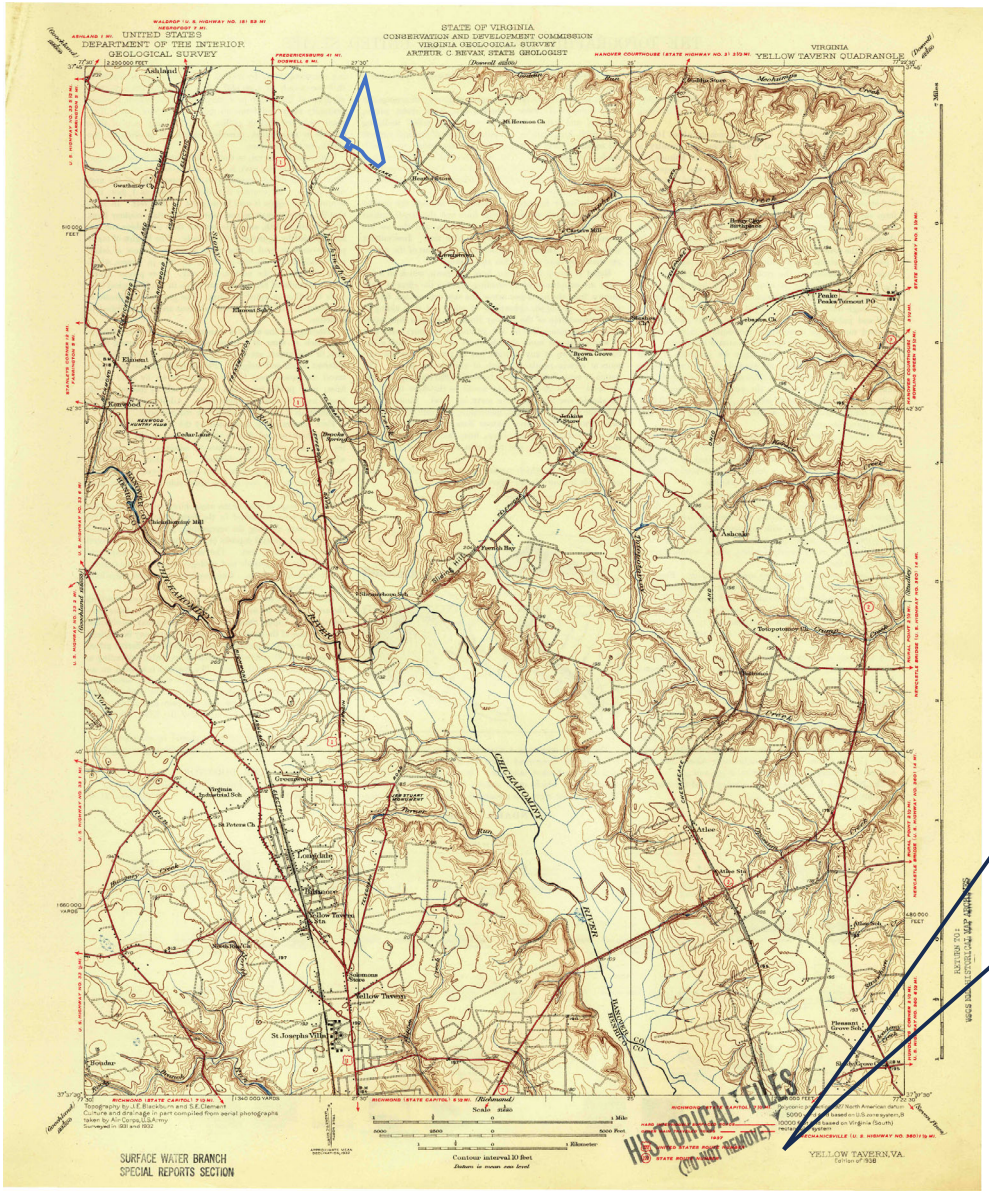

U.S. GEOLOGICAL SURVEY.
CHARLES D. WALCOTT, DIRECTOR.
77°30'
25'
Ashland
221
223
Gwathmey
TELEGRAPH
ROAD
FREDERICKSBURG AND POTOMAC R.R.
Elmont
212
200
Merry Oaks Church
Possum
200

1895 Map

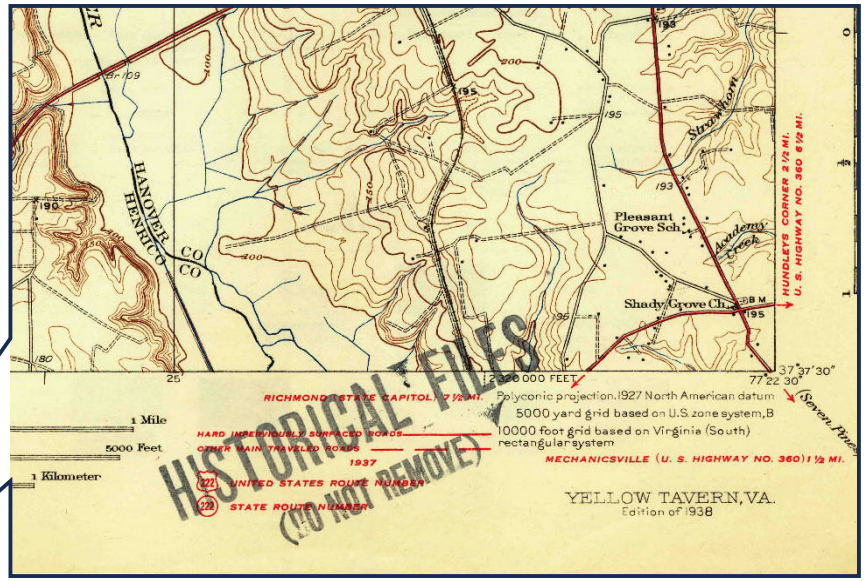


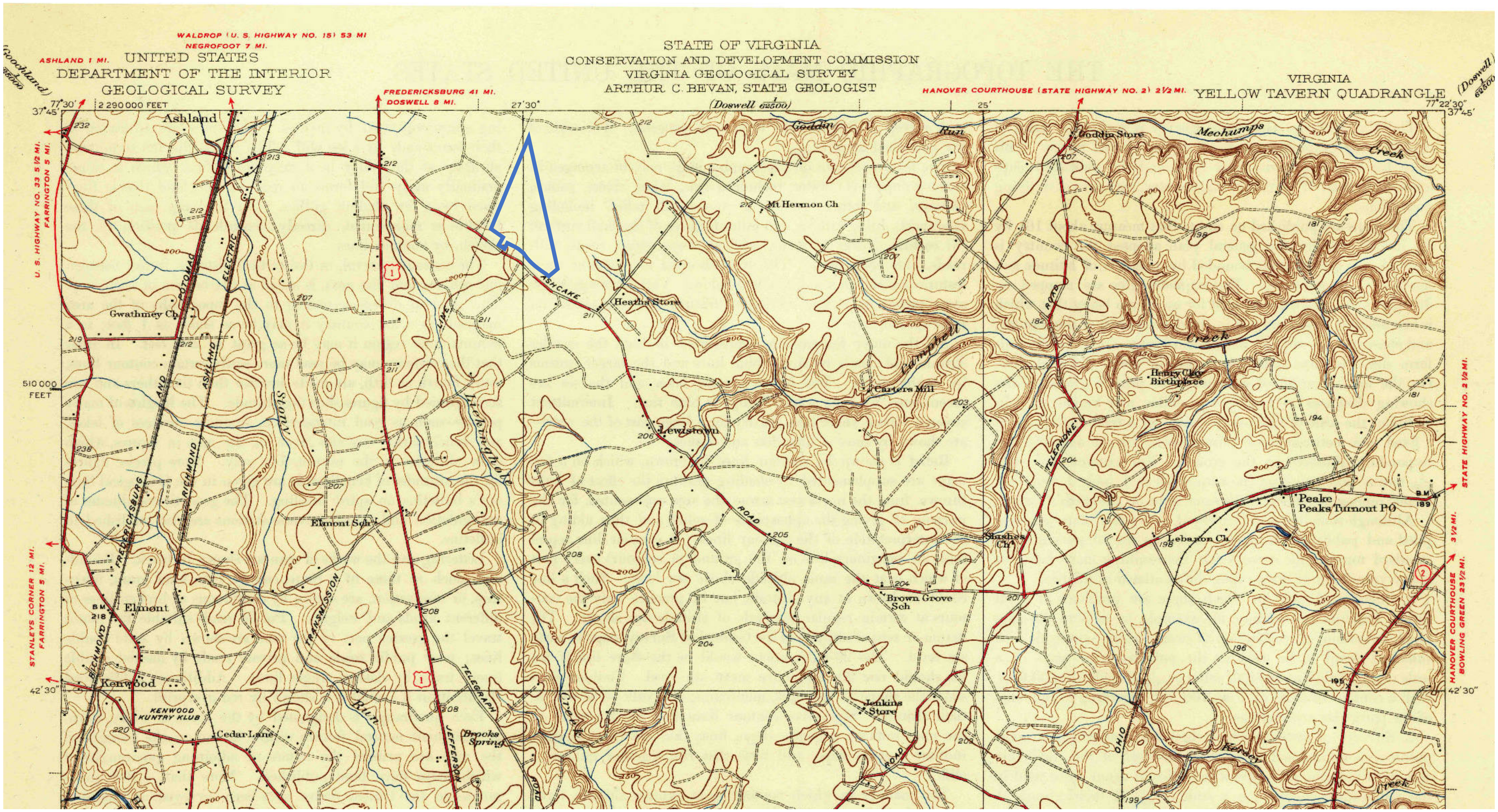
1895 Map

In order to correctly locate the parcel on the 1895 map and to account for the different map scales, lines and overlays were added as shown here. These mark-ups provide geographic information that helped identify the parcel's location.

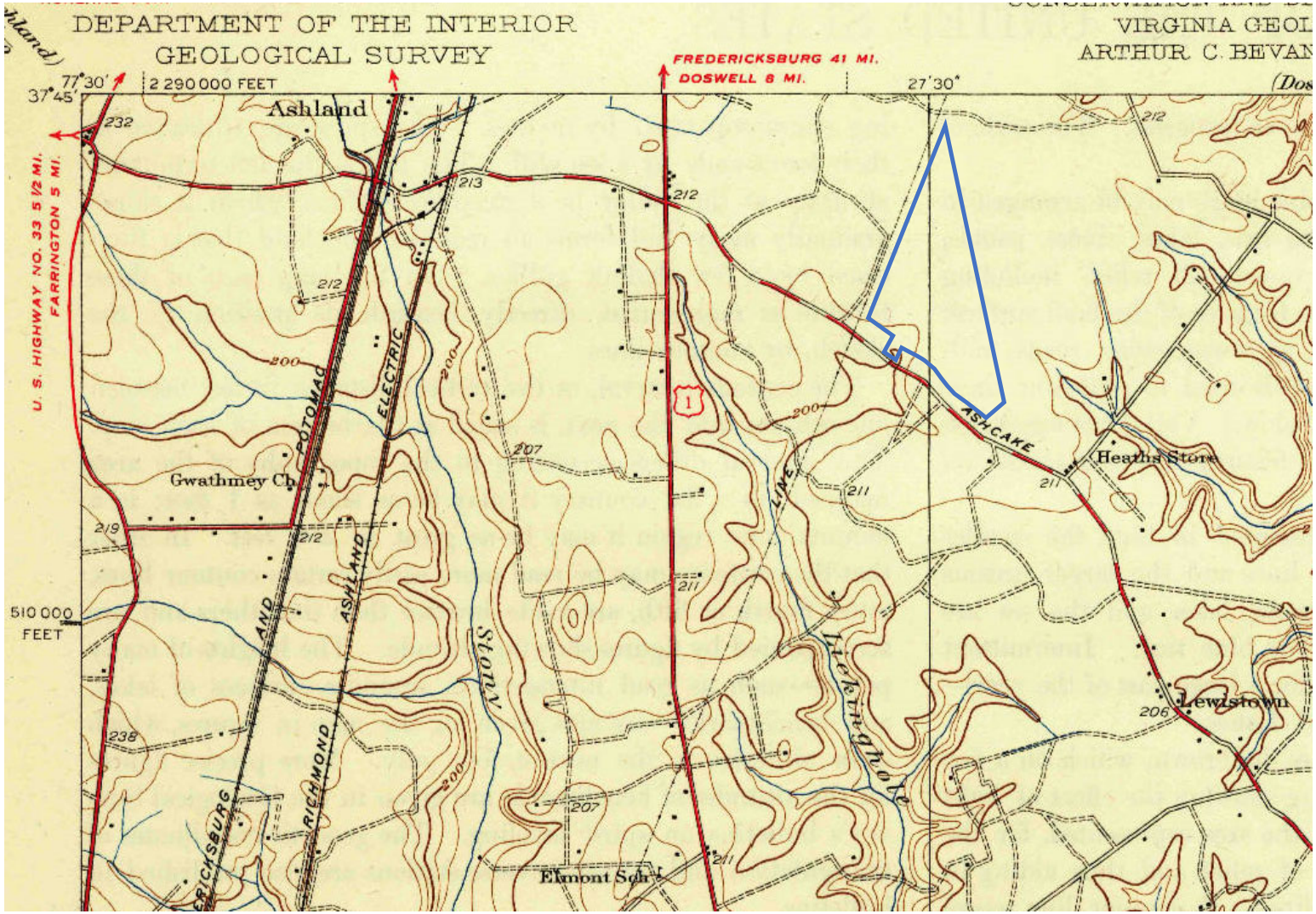

STATE OF VIRGINIA
CONSERVATION AND DEVELOPMENT COMMISSION
VIRGINIA GEOLOGICAL SURVEY
ARTHUR C. NEVAN, STATE GEOLOGIST
UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
VIRGINIA
YELLOW TAVERN QUADRANGLE
SURFACE WATER BRANCH
SPECIAL REPORTS SECTION
HISTORICAL FILES
(DO NOT REMOVE)
YELLOW TAVERN, VA.
Edition of 1938

1938 Map

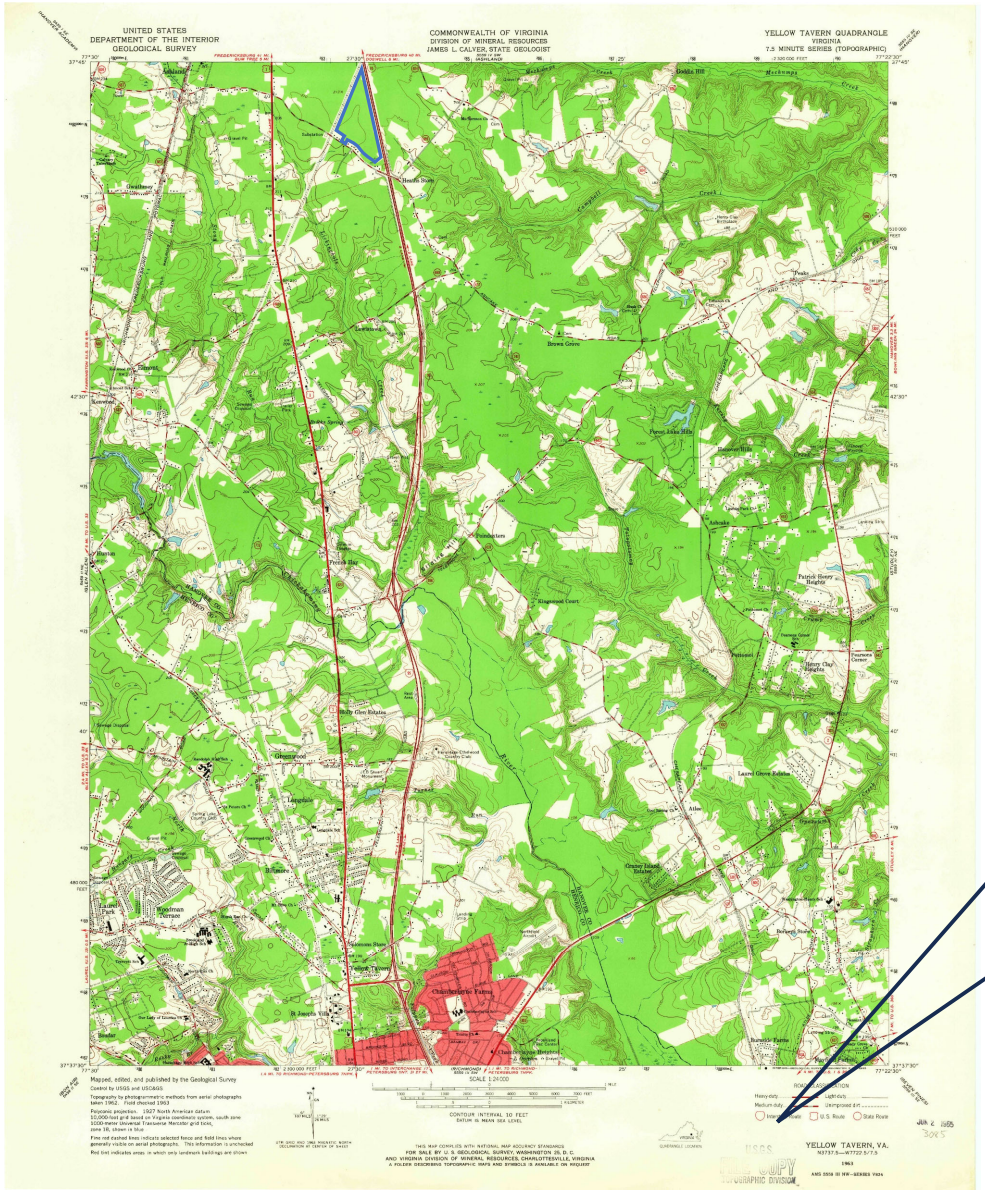

HANOVER
HENRICO
CO
CO
Pleasant Grove Sch.
Shady Grove Ch.
Academy Creek
Strawhorn
HUNDLEYS CORNER 2½ MI.
U. S. HIGHWAY NO. 360 6½ MI.
MECHANICSVILLE (U. S. HIGHWAY NO. 360) 1½ MI.
RICHMOND (STATE CAPITOL) 7½ MI.
1 Mile
5000 Feet
1 Kilometer
1927 North American datum
5000 yard grid based on U.S. zone system, B
10000 foot grid based on Virginia (South) rectangular system
1937
UNITED STATES ROUTE NUMBER
STATE ROUTE NUMBER
HISTORICAL FILES
(DO NOT REMOVE)
YELLOW TAVERN, VA.
Edition of 1938


UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
STATE OF VIRGINIA
CONSERVATION AND DEVELOPMENT COMMISSION
VIRGINIA GEOLOGICAL SURVEY
ARTHUR C. BEVAN, STATE GEOLOGIST
VIRGINIA
YELLOW TAVERN QUADRANGLE
WALDROP (U. S. HIGHWAY NO. 15) 53 MI
NEGROFOOT 7 MI.
ASHLAND 1 MI.
FREDERICKSBURG 41 MI.
DOSWELL 8 MI.
HANOVER COURTHOUSE (STATE HIGHWAY NO. 2) 2 1/2 MI.
Ashland
Gwathmey Ch
Mt Hermon Ch
Heaths Store
Goddin Store
Meehumps
Creek
Campbell
Carters Mill
Henry Clay Birthplace
Lewistown
ASHCAKE
ROAD
Elmont Sch
Elmont
Kenwood
KENWOOD KUNTRY KLUB
Cedar Lane
Brooks Spring
Brown Grove Sch
Slashes Ch
Lebanon Ch
Peake
Peaks Turnout PO
Jenkins Store
TELEGRAPH
TELEPHONE
TRANSMISSION
JEFFERSON
RICHMOND
FREDERICKSBURG
POTOMAC
ELECTRIC
OHIO
510 000 FEET
2 290 000 FEET
77°30'
37°45'
27'30"
25'
77°22'30"
42'30"

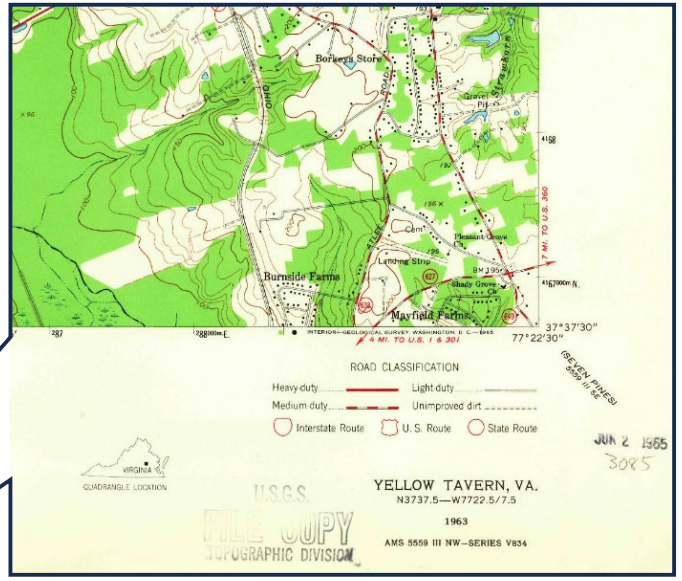
1938 Map

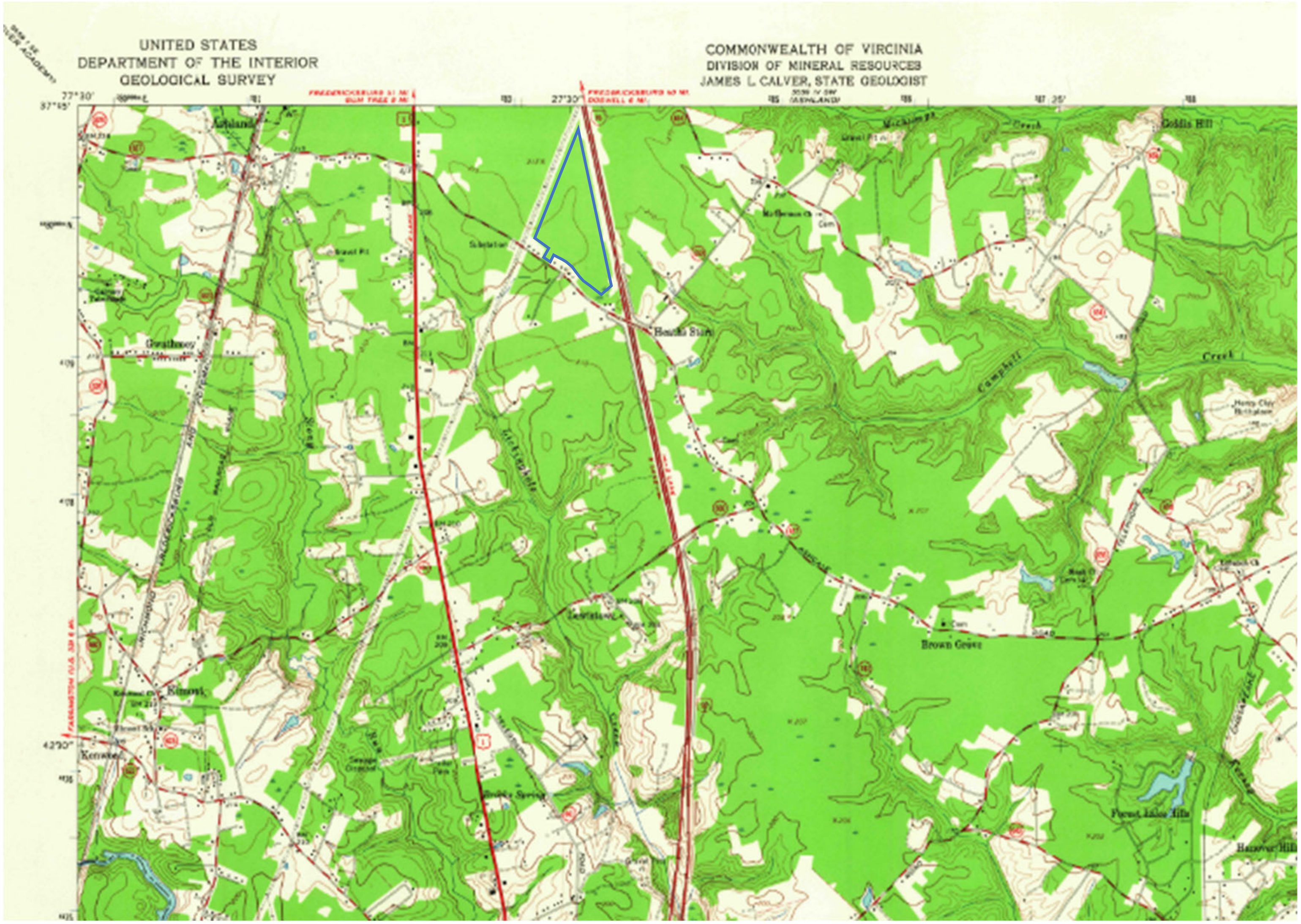

DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
VIRGINIA GEOL
ARTHUR C. BEVAN
FREDERICKSBURG 41 MI.
DOSWELL 8 MI.
77°30'
2 290 000 FEET
27'30"
37°45'
Ashland
U. S. HIGHWAY NO. 33 5 1/2 MI.
FARRINGTON 5 MI.
POTOMAC
ELECTRIC
ASHLAND
AND
RICHMOND
FREDERICKSBURG
STORY
LINE
ASHCAKE
Heaths Store
Gwathmey Ch
Elmont Sch
Lewistown
510 000
FEET

1938 Map

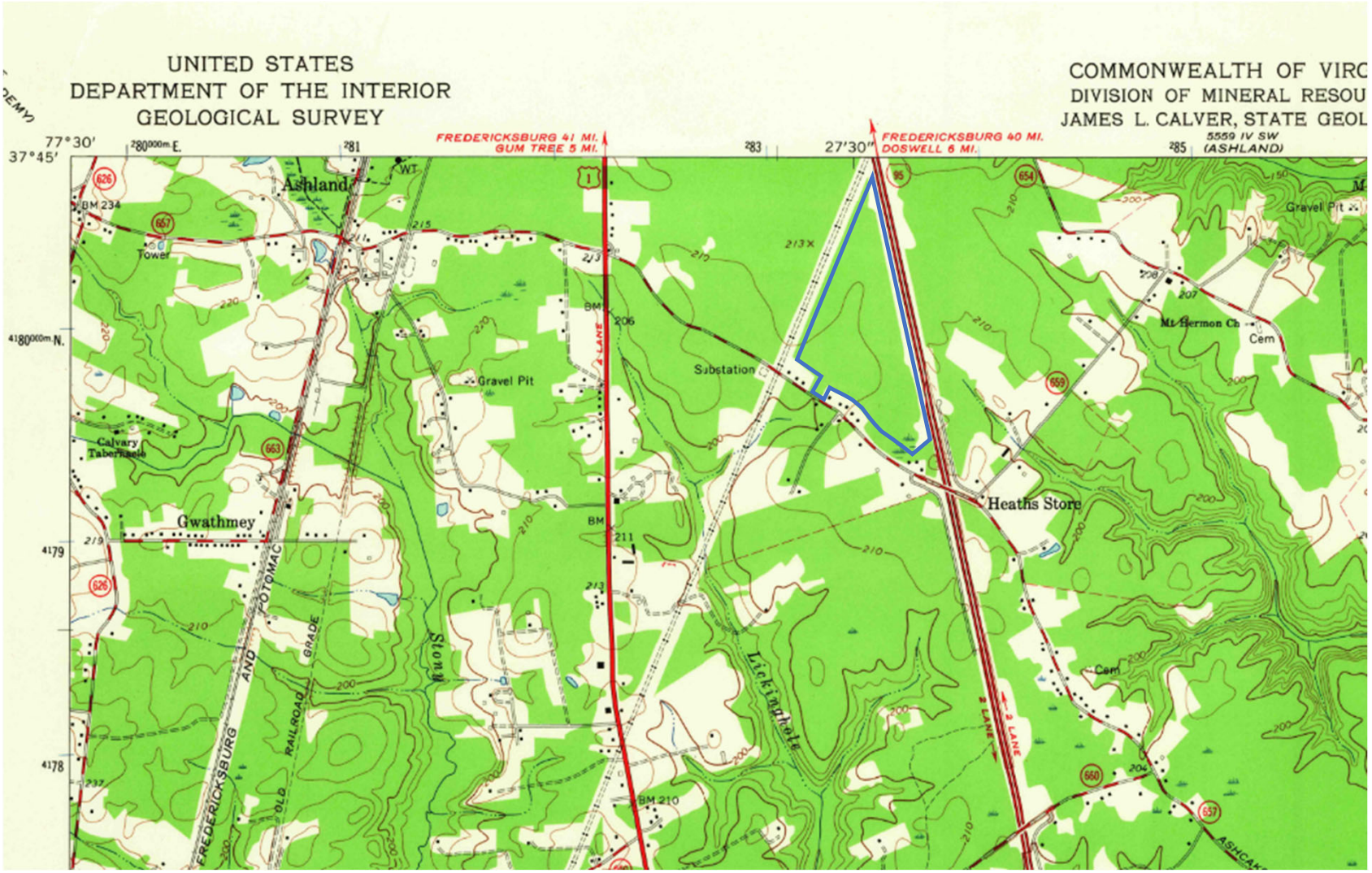

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
COMMONWEALTH OF VIRGINIA
DIVISION OF MINERAL RESOURCES
JAMES L. CALVER, STATE GEOLOGIST
YELLOW TAVERN QUADRANGLE
VIRGINIA
7.5 MINUTE SERIES (TOPOGRAPHIC)
YELLOW TAVERN, VA.

1963 Map

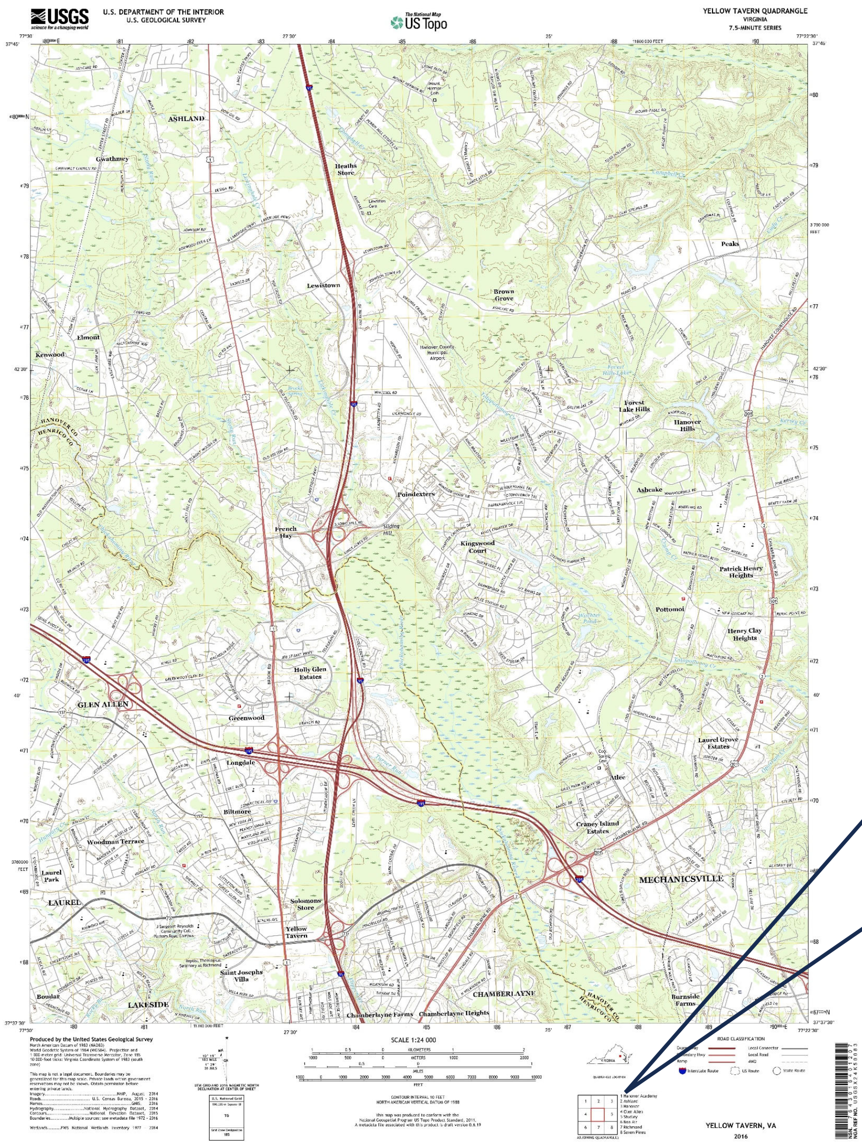

Burnside Farms
Mayfield Farms
ROAD CLASSIFICATION
Heavy duty
Light duty
Medium duty
Unimproved dirt
Interstate Route
U. S. Route
State Route
QUADRANGLE LOCATION
YELLOW TAVERN, VA.
N3737.5—W7722.5/7.5
1963
AMS 5559 III NW—SERIES V834
USGS
FILE COPY
TOPOGRAPHIC DIVISION


UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
COMMONWEALTH OF VIRGINIA
DIVISION OF MINERAL RESOURCES
JAMES L. CALVER, STATE GEOLOGIST
Brown Grove
Forest Lake Hills
Campbell
Creek

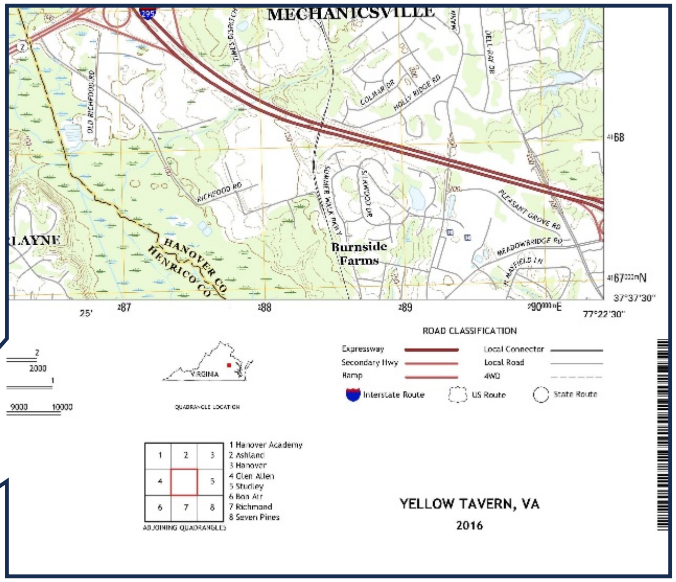
1963 Map

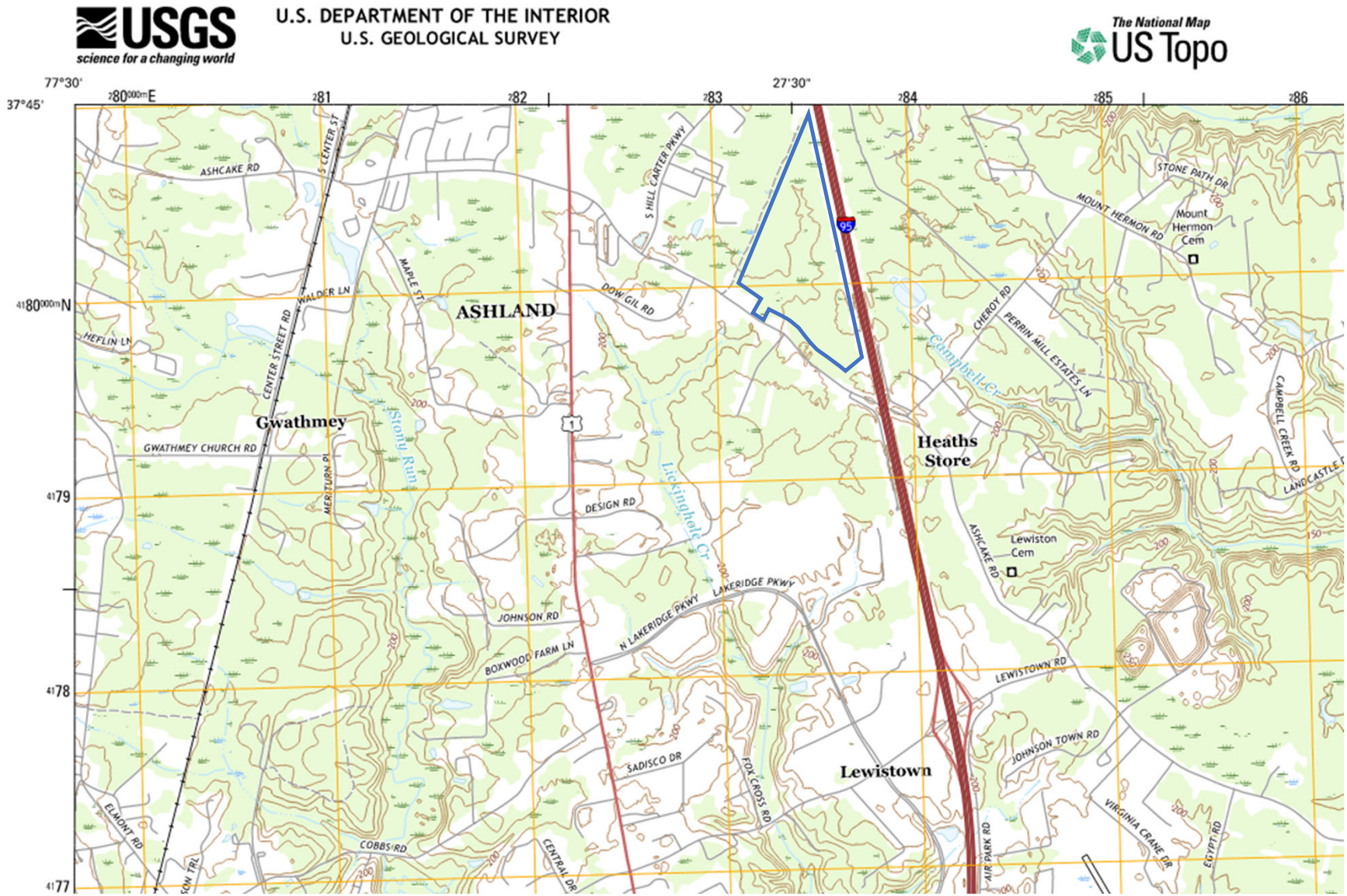

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
COMMONWEALTH OF VIRG
DIVISION OF MINERAL RESOU
JAMES L. CALVER, STATE GEOL
5559 IV SW
(ASHLAND)
77°30'
37°45'
27'30"
FREDERICKSBURG 41 MI.
GUM TREE 5 MI.
FREDERICKSBURG 40 MI.
DOSWELL 6 MI.
Ashland
BM 234
Tower
Gravel Pit
Substation
Mt Hermon Ch
Cem
Calvary
Tabernacle
Gwathmey
Heaths Store
BM 206
BM 211
BM 210
4 LANE
2 LANE
FREDERICKSBURG AND POTOMAC RAILROAD
OLD GRADE
Stony
Lickinghole
4180000m N.
4179
4178

1963 Map

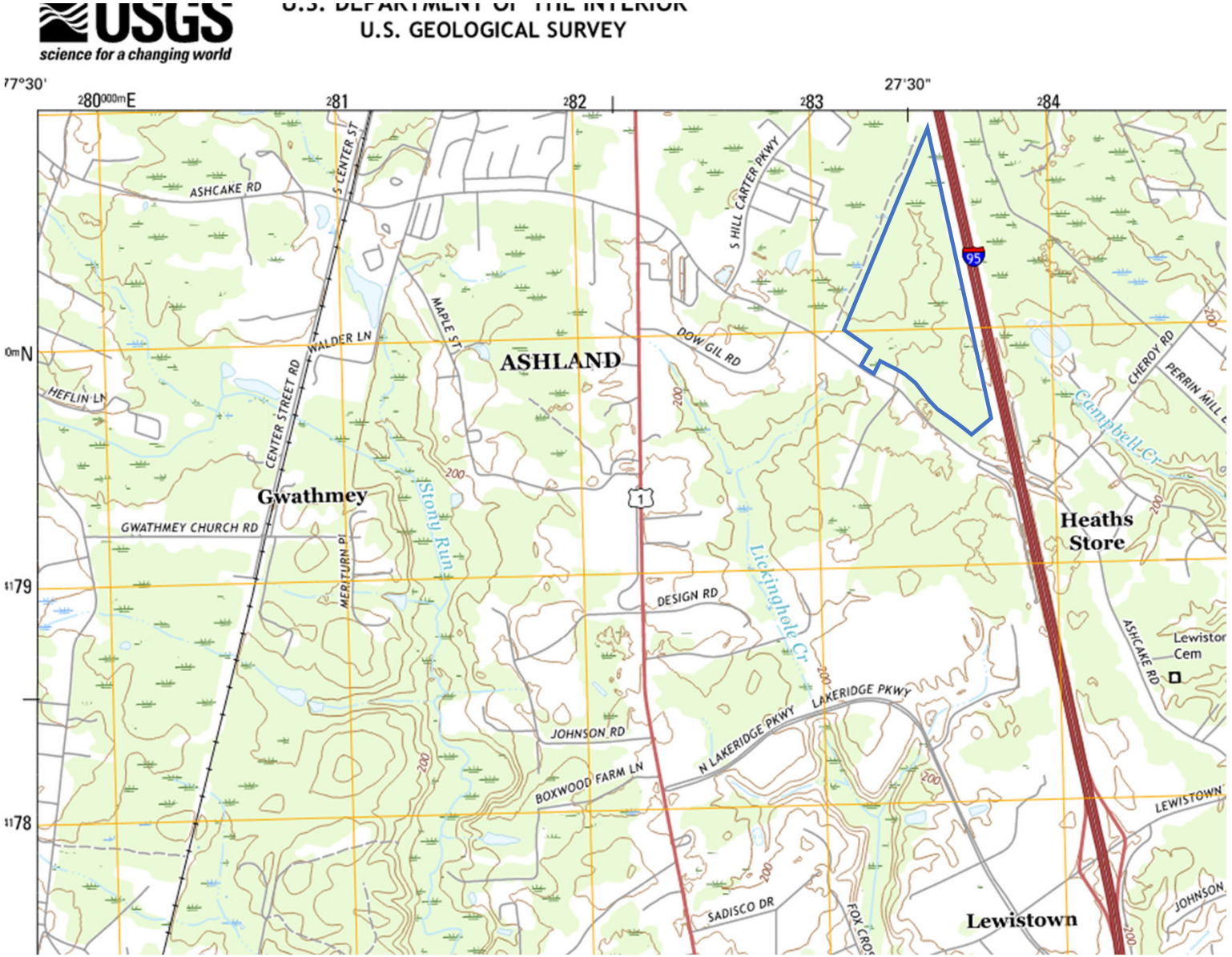

U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
US Topo
YELLOW TAVERN QUADRANGLE
VIRGINIA
7.5-MINUTE SERIES
ASHLAND
Lewistown
GLEN ALLEN
MECHANICSVILLE
YELLOW TAVERN, VA
2016

2016 Map


MECHANICSVILLE
Burnside
Farms
HANOVER CO
HENRICO CO
ROAD CLASSIFICATION
Expressway
Secondary Hwy
Ramp
Local Connector
Local Road
4WD
Interstate Route
US Route
State Route
VIRGINIA
QUADRANGLE LOCATION
1 Hanover Academy
2 Ashland
3 Hanover
4 Glen Allen
5 Studley
6 Bon Air
7 Richmond
8 Seven Pines
ADJOINING QUADRANGLES
YELLOW TAVERN, VA
2016


USGS
science for a changing world
U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
The National Map
US Topo
77°30'
37°45'
27'30"
ASHLAND
Gwathmey
Heaths Store
Lewistown
Mount Hermon Cem
Lewiston Cem
ASHCAKE RD
S CENTER ST
CENTER STREET RD
WALDER LN
HEFLIN LN
MAPLE ST
S HILL CARTER PKWY
DOW GIL RD
GWATHMEY CHURCH RD
MERITURN PL
Stony Run
DESIGN RD
Lickinghole Cr
JOHNSON RD
BOXWOOD FARM LN
N LAKERIDGE PKWY
LAKERIDGE PKWY
SADISCO DR
FOX CROSS RD
CENTRAL DR
COBBS RD
ELMONT RD
STONE PATH DR
MOUNT HERMON RD
CHEROY RD
PERRIN MILL ESTATES LN
Campbell Cr
CAMPBELL CREEK RD
LANCASTLE
LEWISTOWN RD
JOHNSON TOWN RD
VIRGINIA CRANE DR
EGYPT RD
AIR PARK RD
95
1

2016 Map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ASHCAKE RD
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WALDER LN
DOW GIL RD
ASHLAND
HEFLIN LN
CENTER STREET RD
CHEROY RD
PERRIN MILL
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Stony Run
Lickinghole Cr
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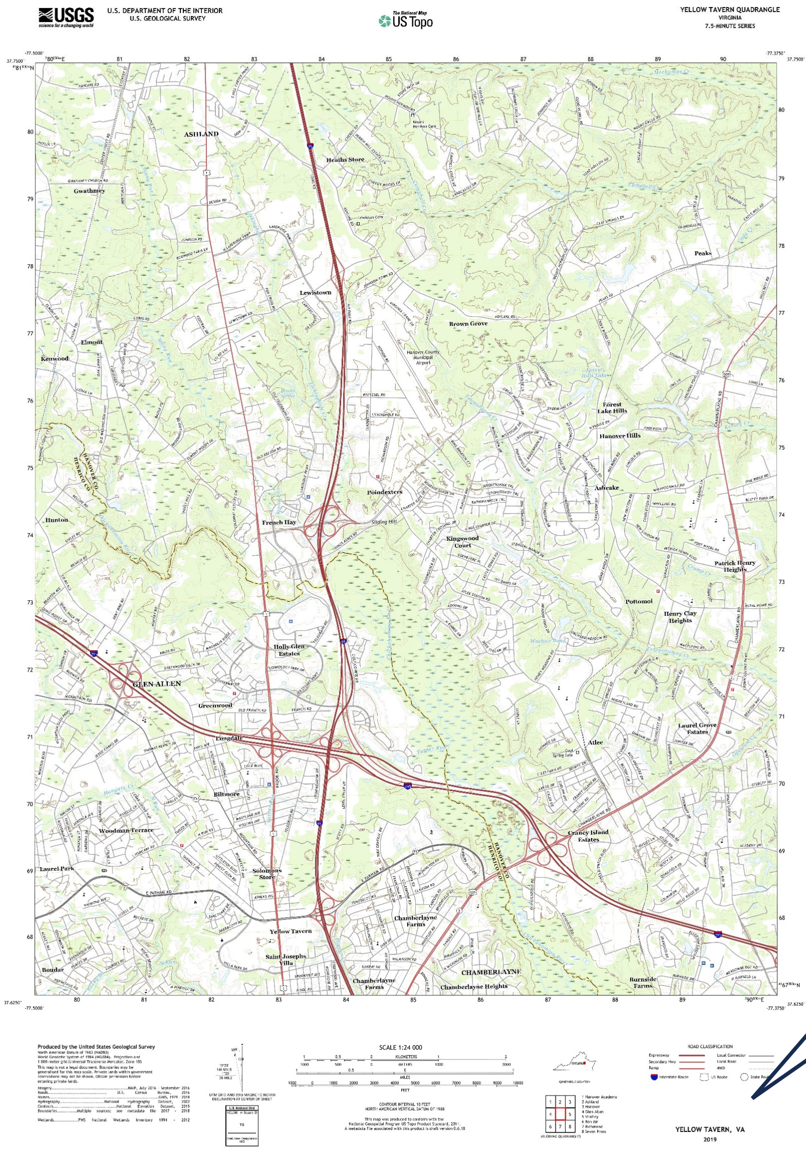
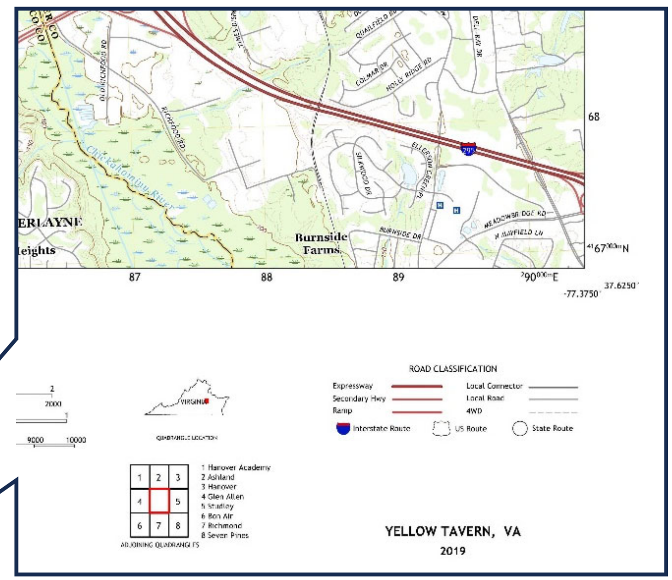
2016 Map


USGS
U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
US Topo
YELLOW TAVERN QUADRANGLE
VIRGINIA
7.5-MINUTE SERIES
YELLOW TAVERN, VA
2019

2019 Map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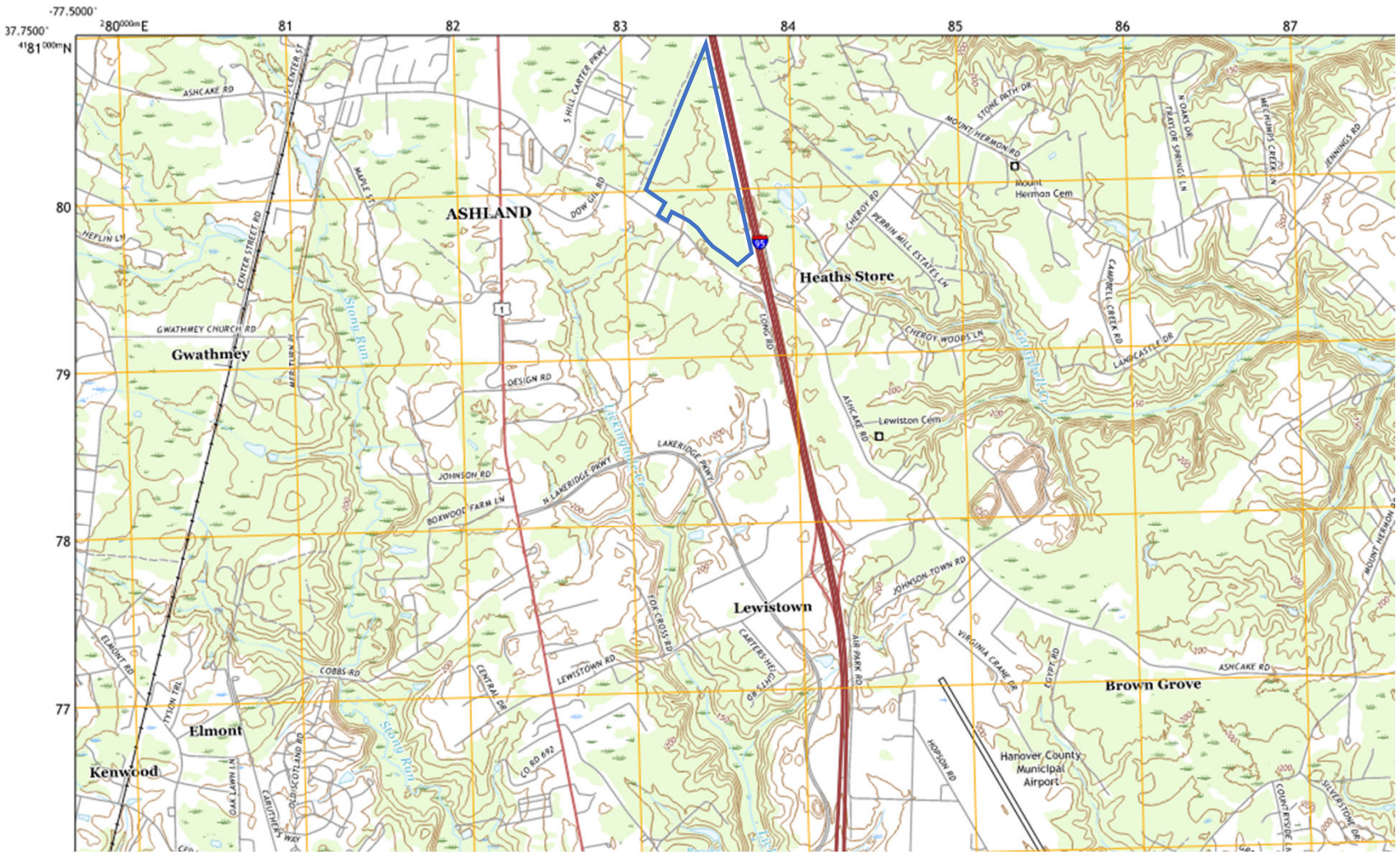
Farms
ROAD CLASSIFICATION
Expressway
Secondary Hwy
Ramp
Local Connector
Local Road
4WD
Interstate Route
US Route
State Route
1 Hanover Academy
2 Ashland
3 Hanover
4 Glen Allen
5 Studley
6 Bon Air
7 Richmond
8 Seven Pines
YELLOW TAVERN, VA
2019

USGS science for a changing world

U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY

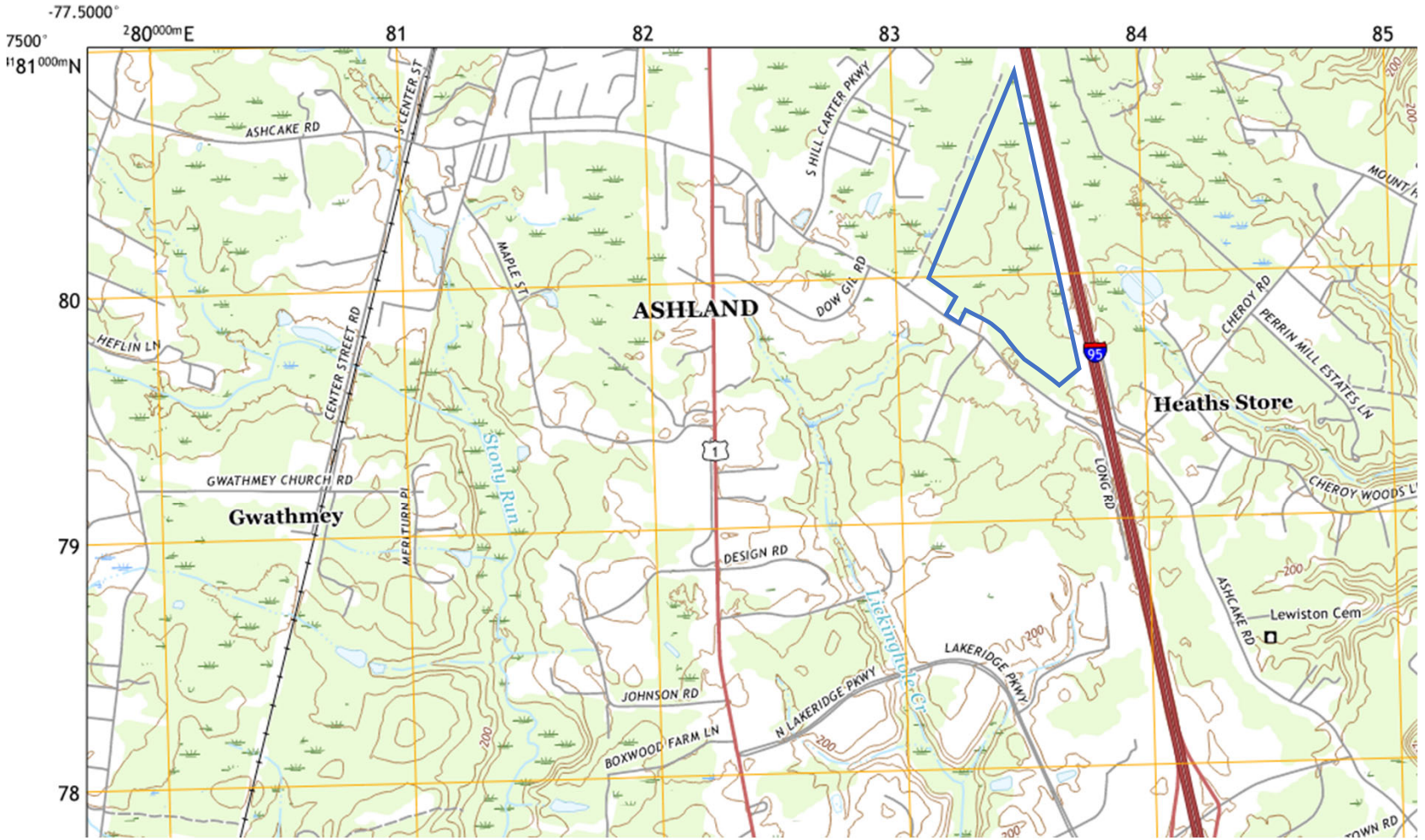
The National Map US Topo



2019 Map

USGS science for a changing world

U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY



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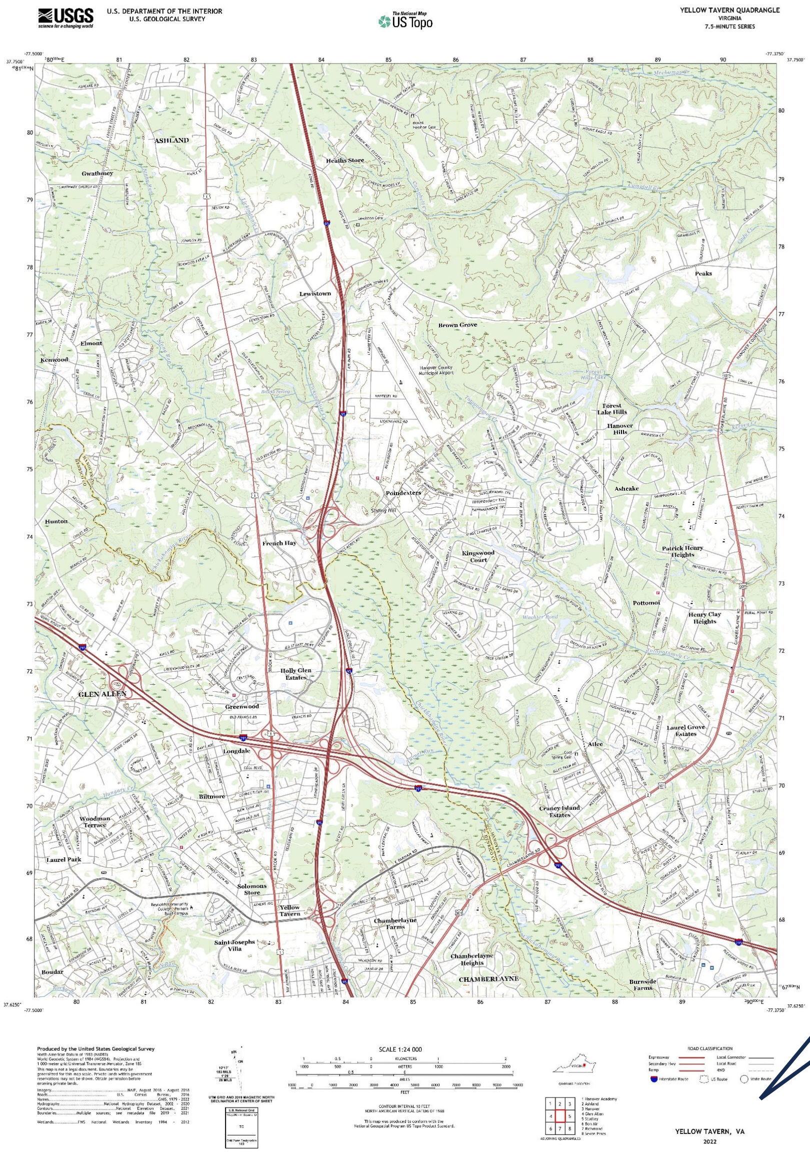
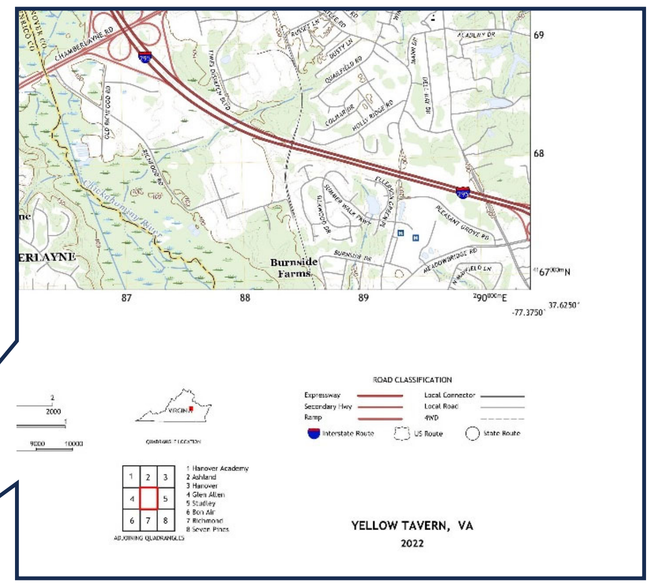

USGS
U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
US Topo
YELLOW TAVERN QUADRANGLE
VIRGINIA
7.5-MINUTE SERIES
ASHLAND
GLEN ALLEN
CHAMBERLAYNE
YELLOW TAVERN, VA
2022

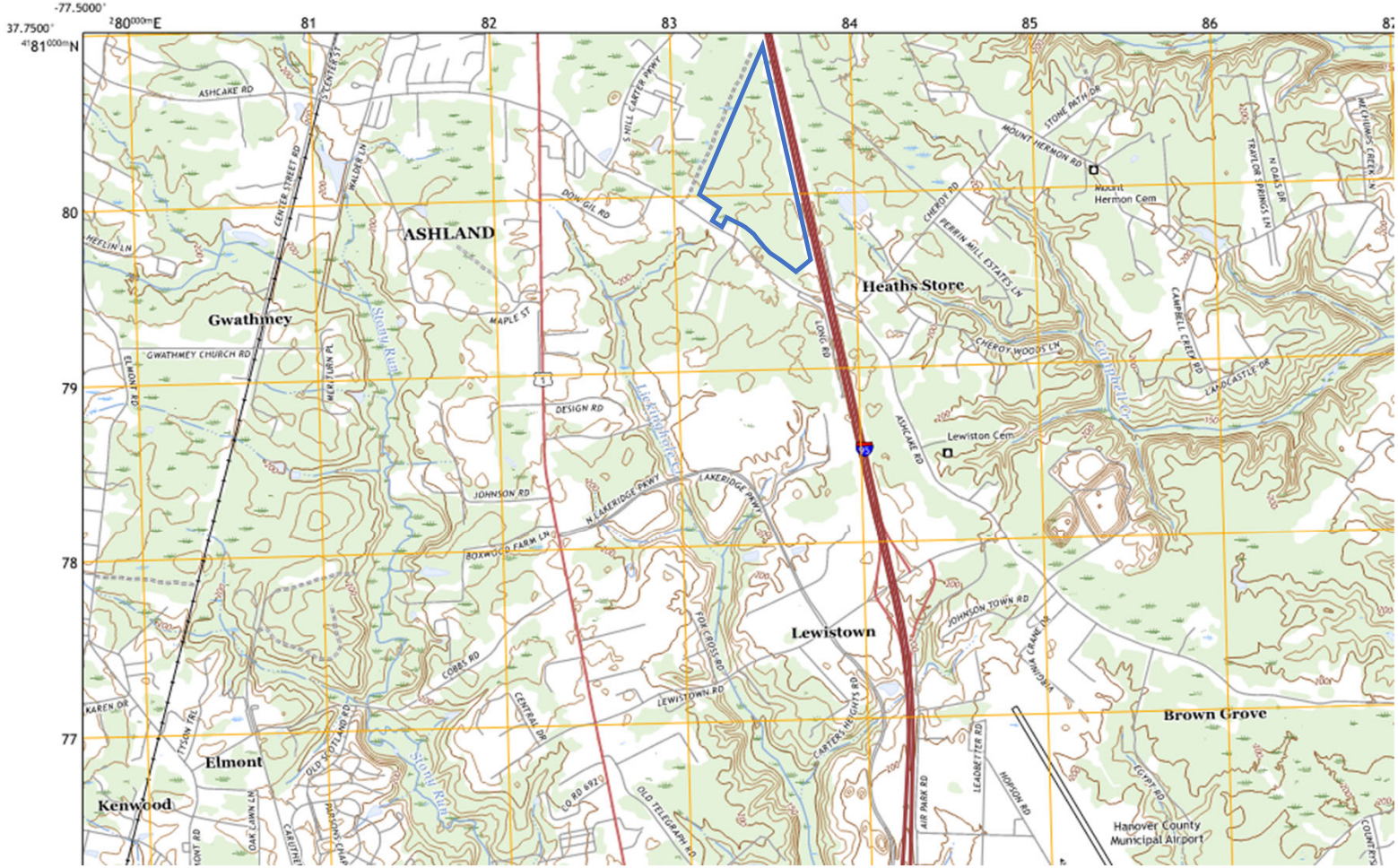
2022 Map


CHAMBERLAYNE RD
ERLAYNE
Burnside
Farms
ROAD CLASSIFICATION
Expressway
Secondary Hwy
Ramp
Local Connector
Local Road
4WD
Interstate Route
US Route
State Route
1 Hanover Academy
2 Ashland
3 Hanover
4 Glen Allen
5 Studley
6 Bon Air
7 Richmond
8 Seven Pines
ADJOINING QUADRANGLES
YELLOW TAVERN, VA
2022

USGS science for a changing world

U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY

The National Map US Topo



2022 Map

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U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY

2022 Map

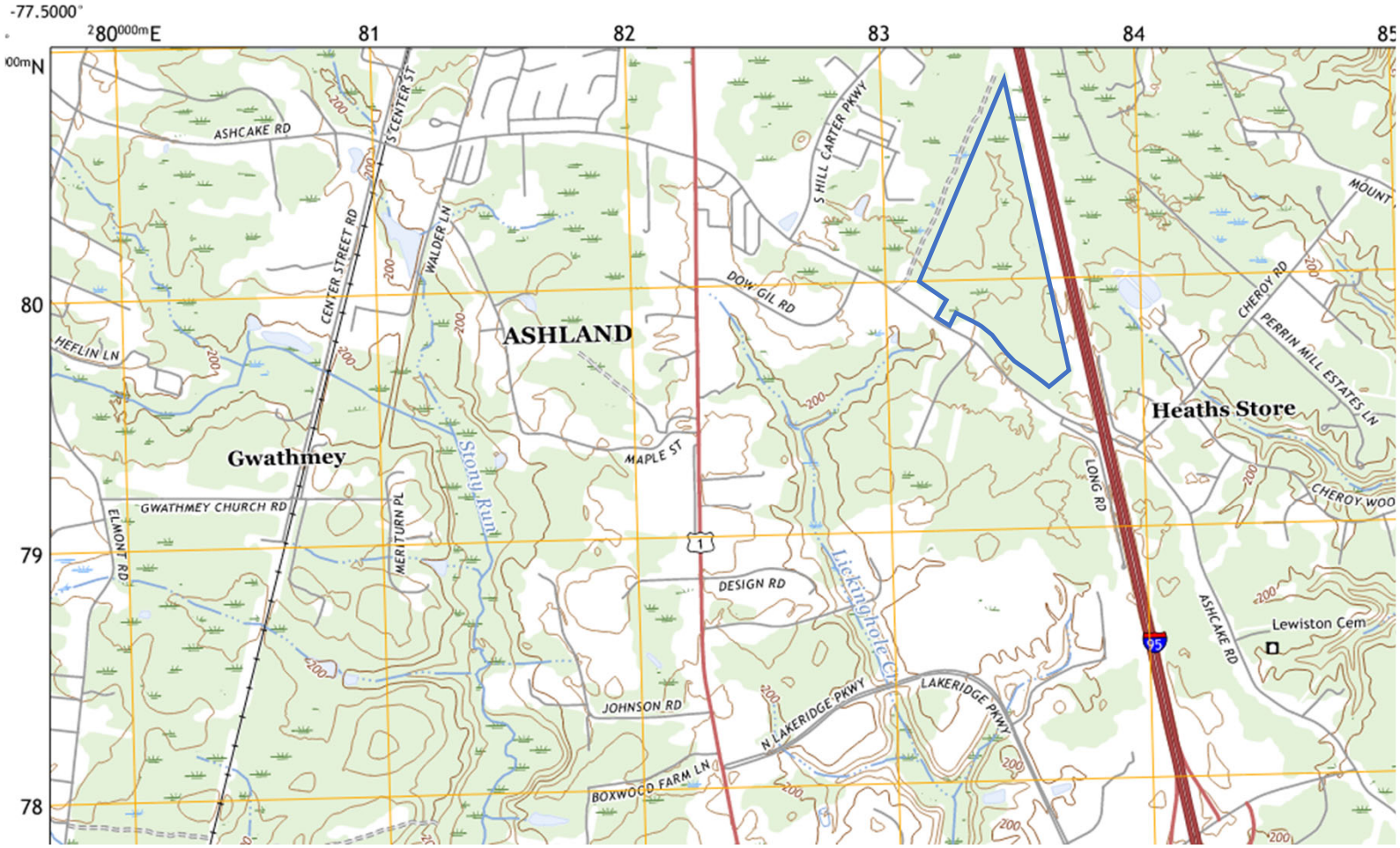

Exhibit D

Technical Support Document for the Final "Revised Definition of 'Waters of the United States'" Rule

U.S. Environmental Protection Agency

and

Department of the Army

December 2022

2. *White Paper*

As part of the administrative record for the 2020 NWPR, the agencies added to the docket a white paper entitled "Limitations of the National Hydrography Dataset at High Resolution and the National Wetlands Inventory and their use for Determining the Scope of Waters Subject to Clean Water Act Jurisdiction." EPA and Army 2020b, hereafter "White Paper." The agencies used the White Paper in part to support their arguments at the time that the USGS National Hydrography Dataset (NHD) and the U.S. FWS National Wetlands Inventory (NWI) were inappropriate to use on a national level to estimate the 2020 NWPR's potential effect on the extent of waters that would no longer be jurisdictional under the rule, particularly as standalone datasets. While the White Paper was factual in stating that the datasets were not designed as regulatory datasets and do not explicitly depict the full geospatial scope of Clean Water Act jurisdiction, based on further analysis and interagency review the agencies have determined that the datasets can be used in national assessments of the potential effects of a revised definition of "waters of the United States," as appropriately caveated. The agencies also find that the White Paper presented flawed arguments, including a disproportionate focus on limitations of the datasets, but failed to adequately consider the positive value of the datasets and the breadth of the available literature surrounding both datasets.

a. Background

The NHD and the NWI are the most comprehensive and detailed hydrography and wetlands datasets for the nation and are the most accurate national datasets at the spatial scale that is relevant to Clean Water Act decision-making. Despite being the most comprehensive available datasets of their kind, however, neither the NHD or NWI were designed to be regulatory datasets, both have certain known limitations, and neither can be used as a standalone tool to determine the full scope of Clean Water Act jurisdiction. Additionally, the definitions that the datasets use may differ from regulatory definitions under the Clean Water Act (*e.g.*, the NWI's Cowardin definition of "wetlands" is broader than the regulatory definition). As Federal Geographic Data Committee (FGDC) National Geospatial Data Assets (NGDAs) that support a broad range of users and applications, it is important that these datasets maintain this non-regulatory focus. However, EPA, the Army, and other interagency partners view these datasets as able to form the foundation of a decision support system that overlays regulatory-related information (*e.g.*, location of traditional navigable waters, modeled flow permanence and hydrologic connectivity, and approved jurisdictional determinations).

As for any rulemaking, accurately estimating the potential effects of a proposed or final action can be challenging, and a rule defining the scope of Clean Water Act jurisdiction is no exception. In a rulemaking, in the absence of precise data for all cases, the agencies typically use the best available data to estimate the direction and magnitude of potential effects of a rule. For purposes of assessing the effects of revising the definition of "waters of the United States," the agencies in their economic analysis have often relied on data from the Corps' ORM database regarding where jurisdictional determinations and Clean Water Act section 404 permits have been issued. *See* 2015 Clean Water Rule EA; 2020 NWPR EA; Economic Analysis for the Final Rule. Because the 2020 NWPR as proposed was assumed to reduce the scope of jurisdictional waters compared to the legal status quo, the agencies initially attempted to also utilize NHD and NWI to estimate the potential effects of that proposed rule. Proposed 2020 NWPR RPA;

1. Mapping and Remote Sensing

Multiple federal agencies provide data, maps, web-based viewers and tools that can help implement this rule. These include, but are not limited to, USGS, U.S. FWS, NRCS, NOAA, Federal Emergency Management Agency (FEMA), EPA, and the Corps.

The USGS provides publicly and freely available historic and recent topographic maps, aerial photography, the National Hydrography Dataset (NHD), and other data and applications which depict and classify many features relevant to identifying "waters of the United States." One of the most commonly used geospatial datasets from the USGS is the NHD, which was created to assist scientists in modeling hydrologic features and for cartographic mapping purposes. Simley 2018. The NHD depicts aquatic resources such as lakes, ponds, streams, rivers, wetlands, and oceans throughout the United States (including many canals and ditches). *Id*. NHD High Resolution is at the 1:24,000 scale[47] or higher. In Alaska, the NHD is available at the 1:63,360 scale. Stream and river "flowlines" in NHD are characterized as "ephemeral," "intermittent," or "perennial." This hydrographic categorization was initially based on the original pre-digital mapping effort of USGS topographic maps, with periodic updates from the USGS and data stewards. In NHD, perennial reaches are presumed to carry water throughout the year except during drought, whereas intermittent reaches are assumed to lack flow for some duration.[48] The NHD defines ephemeral as having water only during or after, a local rainstorm or heavy snowmelt, although the NHD did not start classifying some streams in the digital dataset as "ephemeral" until the 2000s. Simley 2006; Simley 2015; Dewald 2017. Although many ephemeral streams are not mapped, those that are mapped are primarily mapped in NHD at high resolution. That said, even in the high-resolution dataset, many ephemeral streams are included in the "intermittent" category, particularly those outside of the arid West. Many, but not all, canals and ditches, lakes and ponds, wetlands, and reservoirs are also mapped in the NHD. The high-resolution dataset is currently the most up-to-date and detailed hydrography dataset for the nation, mapping more streams and other aquatic resources than the medium resolution dataset.

In 2006, USGS and EPA developed the first medium-resolution version of the NHDPlus to support modeling the occurrence of water and to provide the ability to connect detailed information from the surrounding landscape to the stream network. Buto and Anderson 2020. The NHDPlus is a suite of geospatial products that that build upon and extend the capabilities of the NHD, the National Elevation Dataset, and the Watershed Boundary Dataset. The NHDPlus includes a stream network, catchments, and streamflow estimates, as well as other attributes that enable stream "navigation" (*e.g.*, allow users to "navigate" up- and downstream from a given point in the stream network).[49] An NHDPlus catchment is

[47] Scale is the relationship between distance on the map and distance on the ground. If the scale were 1:24,000, for instance, then one inch on the map would represent 24,000 inches or 2,000 feet on the ground. If the scale were 1:63,360, then one inch on the map would represent 63,360 inches or one mile on the ground. *See* USGS 1992.
[48] Definitions of terms used in the NHD and additional information on NHD features are available in the National Hydrography Dataset Feature Catalog, available at https://nhd.usgs.gov/userGuide/Robohelpfiles/NHD_User_Guide/Feature_Catalog/NHD_Feature_Catalog.htm.
[49] "Navigate" and "navigation" in this context refer to the ability to trace a stream network upstream and downstream using GIS. The terms do not refer to actual navigability of a water and do not imply that a feature is or is not navigable.

Exhibit E

Beta Streamflow Duration Assessment

SDAM Version 1.1 Release Date: November 2023

Report generated on: May 21, 2024

General Site Information

Project name or number: UNT4 at VCU Property

Site code or identifier:

SDAM Region: Northeast

Assessor(s): Katelyn Almeter

Waterway name: UNT to Campbell Creek

Visit date: 5/16/2024

Current weather conditions: Clear/Sunny

Notes on current or recent weather conditions:

`Clean and sunny with minimal cloud cover (less than 5%)`

Location: 37.7404 N, -77.4525 E

Surrounding land use within 100 m: Forested

Description of reach boundaries: Upstream end at culvert under rest stop road and downstream end at confluence with Campbell Creek

Assessment reach length (m): 110

Disturbed or difficult conditions:

`Stream modifications (e.g., channelization)`

Notes on disturbances or difficult site conditions:

```
Upper part of the reach had been channelized. Culverted above.
Wetlands surround the stream and channel was braided through portions of the reach.
```

Observed hydrology:

Percent of reach with surface flow: 70

Percent of reach with surface and sub-surface flows: 85

Number of isolated pools: 4

Notes on observed hydrology: Observed hydrology followed the largest channel through the braided portion of the reach.

US_0078357

Site Photos

Top of reach looking downstream:

Middle of reach looking upstream:

Middle of reach looking downstream:

Bottom of reach looking upstream:

Site Sketch

Indicators

Biological indicators

Stream Shading

Percent Shade: 91.18%

Aquatic Invertebrates

Total abundance of aquatic benthic macroinvertebrates: 10

Notes on aquatic invertebrates:

Aquatic invertebrate photos and photo descriptions:

Richness of aquatic benthic macroinvertebrates

Number of aquatic benthic macroinvertebrate taxa (family- or higher-level) identified from the assessment reach: 5

BMI score: 3

Geospatial Indicators

Mean Precipitation (mm) (Months 8-10): 103.5129318

Drainage Area (sq.mi.): 0.05

Drainage Area Score: 0

Notes about the drainage area:

`from USGS streamstats`

Drainage area photos and descriptions:

Geomorphic Indicators

Upland Rooted Plants

Upland Rooted Plants score: 3

Notes about absence of upland rooted plants in streambed:

Upland Rooted Plants photos and descriptions:

Bankfull channel width (m): 1.21

Natural Valley

Natural Valley score: 0.75

Notes about natural valley:

Natural Valley photos and descriptions:

Slope

Slope Percent: 0.5

Notes about slope:

Slope photos and descriptions:

Supplemental Information

Additional notes about the assessment:

Supplemental information photos and descriptions:

This reach is classified as intermittent.

End of Report

Exhibit F

Climatological Data for ASHLAND, VA - April 2021

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2021-04-01	61	40	50.5	-2.8	14	0	0.61	0.0	0
2021-04-02	47	29	38.0	-15.7	27	0	0.00	0.0	0
2021-04-03	58	26	42.0	-12.1	23	0	0.00	0.0	0
2021-04-04	75	44	59.5	5.1	5	0	0.00	0.0	0
2021-04-05	75	40	57.5	2.7	7	0	0.00	0.0	0
2021-04-06	81	44	62.5	7.3	2	0	0.00	0.0	0
2021-04-07	83	46	64.5	9.0	0	0	0.00	0.0	0
2021-04-08	81	52	66.5	10.6	0	2	0.00	0.0	0
2021-04-09	75	53	64.0	7.8	1	0	0.00	0.0	0
2021-04-10	77	55	66.0	9.4	0	1	T	0.0	0
2021-04-11	80	57	68.5	11.6	0	4	0.16	0.0	0
2021-04-12	77	50	63.5	6.3	1	0	0.05	0.0	0
2021-04-13	69	50	59.5	1.9	5	0	0.05	0.0	0
2021-04-14	70	47	58.5	0.6	6	0	T	0.0	0
2021-04-15	67	52	59.5	1.3	5	0	0.34	0.0	0
2021-04-16	67	36	51.5	-7.0	13	0	0.00	0.0	0
2021-04-17	67	35	51.0	-7.8	14	0	0.00	0.0	0
2021-04-18	68	43	55.5	-3.6	9	0	0.00	0.0	0
2021-04-19	65	49	57.0	-2.4	8	0	0.38	0.0	0
2021-04-20	76	42	59.0	-0.7	6	0	0.00	0.0	0
2021-04-21	75	54	64.5	4.5	0	0	0.00	0.0	0
2021-04-22	57	32	44.5	-15.8	20	0	0.00	0.0	0
2021-04-23	58	34	46.0	-14.5	19	0	0.07	0.0	0
2021-04-24	64	34	49.0	-11.8	16	0	0.08	0.0	0
2021-04-25	67	49	58.0	-3.1	7	0	0.64	0.0	0
2021-04-26	71	43	57.0	-4.3	8	0	0.00	0.0	0
2021-04-27	85	48	66.5	5.0	0	2	0.00	0.0	0
2021-04-28	87	63	75.0	13.2	0	10	0.00	0.0	0
2021-04-29	85	67	76.0	14.0	0	11	0.00	0.0	0
2021-04-30	81	62	71.5	9.3	0	7	0.05	0.0	0
Sum	2149	1376	-	-	216	37	2.43	0.0	-
Average	71.6	45.9	58.8	0.7	-	-	-	-	0.0
Normal	71.1	45.2	58.1	-	241	35	3.41	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - September 2023

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2023-09-01	79	53	66.0	-7.6	0	1	0.00	0.0	0
2023-09-02	82	54	68.0	-5.4	0	3	0.00	0.0	0
2023-09-03	90	60	75.0	1.9	0	10	0.00	0.0	0
2023-09-04	92	67	79.5	6.6	0	15	0.00	0.0	0
2023-09-05	92	69	80.5	7.8	0	16	0.00	0.0	0
2023-09-06	93	70	81.5	9.1	0	17	0.00	0.0	0
2023-09-07	95	71	83.0	10.8	0	18	0.00	0.0	0
2023-09-08	92	67	79.5	7.6	0	15	0.00	0.0	0
2023-09-09	91	68	79.5	7.9	0	15	0.75	0.0	0
2023-09-10	82	67	74.5	3.2	0	10	0.02	0.0	0
2023-09-11	83	66	74.5	3.5	0	10	0.11	0.0	0
2023-09-12	88	65	76.5	5.8	0	12	0.14	0.0	0
2023-09-13	85	66	75.5	5.1	0	11	0.00	0.0	0
2023-09-14	79	62	70.5	0.4	0	6	0.00	0.0	0
2023-09-15	77	54	65.5	-4.3	0	1	0.00	0.0	0
2023-09-16	78	50	64.0	-5.4	1	0	0.00	0.0	0
2023-09-17	75	58	66.5	-2.6	0	2	0.00	0.0	0
2023-09-18	76	60	68.0	-0.7	0	3	1.17	0.0	0
2023-09-19	78	52	65.0	-3.4	0	0	0.00	0.0	0
2023-09-20	79	57	68.0	0.0	0	3	0.00	0.0	0
2023-09-21	78	58	68.0	0.3	0	3	0.00	0.0	0
2023-09-22	75	56	65.5	-1.8	0	1	0.00	0.0	0
2023-09-23	67	57	62.0	-4.9	3	0	2.61	0.0	0
2023-09-24	71	65	68.0	1.5	0	3	1.84	0.0	0
2023-09-25	71	61	66.0	-0.2	0	1	0.00	0.0	0
2023-09-26	68	60	64.0	-1.8	1	0	0.03	0.0	0
2023-09-27	67	58	62.5	-2.9	2	0	T	0.0	0
2023-09-28	66	51	58.5	-6.5	6	0	0.00	0.0	0
2023-09-29	69	60	64.5	-0.1	0	0	0.00	0.0	0
2023-09-30	71	61	66.0	1.8	0	1	0.00	0.0	0
Sum	2389	1823	-	-	13	177	6.67	0.0	-
Average	79.6	60.8	70.2	0.9	-	-	-	-	0.0
Normal	79.2	59.5	69.3	-	35	166	4.19	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - October 2023

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2023-10-01	78	58	68.0	4.2	0	3	0.00	0.0	0
2023-10-02	79	56	67.5	4.0	0	3	0.00	0.0	0
2023-10-03	81	57	69.0	5.9	0	4	0.00	0.0	0
2023-10-04	79	55	67.0	4.3	0	2	0.00	0.0	0
2023-10-05	78	54	66.0	3.7	0	1	0.00	0.0	0
2023-10-06	77	62	69.5	7.6	0	5	0.00	0.0	0
2023-10-07	74	54	64.0	2.5	1	0	0.17	0.0	0
2023-10-08	62	41	51.5	-9.6	13	0	0.00	0.0	0
2023-10-09	66	50	58.0	-2.8	7	0	T	0.0	0
2023-10-10	70	43	56.5	-3.9	8	0	T	0.0	0
2023-10-11	69	45	57.0	-3.0	8	0	0.00	0.0	0
2023-10-12	72	50	61.0	1.4	4	0	0.00	0.0	0
2023-10-13	72	47	59.5	0.2	5	0	0.00	0.0	0
2023-10-14	67	54	60.5	1.6	4	0	**0.69**	0.0	0
2023-10-15	62	49	55.5	-3.1	9	0	0.07	0.0	0
2023-10-16	60	41	50.5	-7.7	14	0	0.00	0.0	0
2023-10-17	62	44	53.0	-4.8	12	0	0.00	0.0	0
2023-10-18	63	50	56.5	-1.0	8	0	0.00	0.0	0
2023-10-19	71	42	56.5	-0.6	8	0	0.00	0.0	0
2023-10-20	67	52	59.5	2.7	5	0	0.47	0.0	0
2023-10-21	68	49	58.5	2.1	6	0	0.05	0.0	0
2023-10-22	67	44	55.5	-0.6	9	0	0.00	0.0	0
2023-10-23	61	**34**	47.5	-8.3	17	0	0.00	0.0	0
2023-10-24	68	36	52.0	-3.4	13	0	0.00	0.0	0
2023-10-25	78	49	63.5	8.4	1	0	0.00	0.0	0
2023-10-26	78	49	63.5	8.8	1	0	0.00	0.0	0
2023-10-27	81	54	67.5	13.1	0	3	0.00	0.0	0
2023-10-28	**84**	57	70.5	16.4	0	6	0.00	0.0	0
2023-10-29	**84**	61	72.5	18.7	0	8	0.00	0.0	0
2023-10-30	82	58	70.0	16.6	0	5	0.00	0.0	0
2023-10-31	69	46	57.5	4.4	7	0	0.17	0.0	0
Sum	2229	1541	-	-	160	40	1.62	0.0	-
Average	71.9	49.7	60.8	2.5	-	-	-	-	0.0
Normal	68.9	47.7	58.3	-	237	29	3.69	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - January 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-01-01	44	32	38.0	0.6	27	0	T	T	0
2024-01-02	45	32	38.5	1.2	26	0	0.00	0.0	0
2024-01-03	46	24	35.0	-2.2	30	0	0.00	0.0	0
2024-01-04	44	36	40.0	2.9	25	0	0.00	0.0	0
2024-01-05	41	20	30.5	-6.5	34	0	0.00	0.0	0
2024-01-06	42	27	34.5	-2.5	30	0	1.04	0.0	0
2024-01-07	53	30	41.5	4.6	23	0	T	0.0	0
2024-01-08	48	27	37.5	0.6	27	0	0.00	0.0	0
2024-01-09	59	29	44.0	7.2	21	0	**2.10**	0.0	0
2024-01-10	59	44	51.5	14.7	13	0	0.43	0.0	0
2024-01-11	54	27	40.5	3.7	24	0	0.00	0.0	0
2024-01-12	51	26	38.5	1.8	26	0	T	0.0	0
2024-01-13	55	43	49.0	12.3	16	0	0.55	0.0	0
2024-01-14	54	26	40.0	3.3	25	0	0.00	0.0	0
2024-01-15	40	29	34.5	-2.2	30	0	0.25	**3.0**	0
2024-01-16	42	28	35.0	-1.7	30	0	0.12	0.2	**2**
2024-01-17	31	**11**	21.0	-15.7	44	0	0.00	0.0	1
2024-01-18	44	17	30.5	-6.3	34	0	0.00	0.0	T
2024-01-19	38	30	34.0	-2.8	31	0	0.02	T	T
2024-01-20	30	20	25.0	-11.8	40	0	0.00	0.0	T
2024-01-21	34	14	24.0	-12.9	41	0	0.00	0.0	T
2024-01-22	44	14	29.0	-7.9	36	0	0.00	0.0	T
2024-01-23	53	24	38.5	1.5	26	0	0.00	0.0	0
2024-01-24	68	44	56.0	19.0	9	0	0.00	0.0	0
2024-01-25	69	61	65.0	27.9	0	0	0.03	0.0	0
2024-01-26	77	61	69.0	31.8	0	4	0.02	0.0	0
2024-01-27	65	44	54.5	17.2	10	0	0.00	0.0	0
2024-01-28	58	42	50.0	12.7	15	0	1.39	0.0	0
2024-01-29	52	38	45.0	7.6	20	0	0.13	0.0	0
2024-01-30	47	27	37.0	-0.5	28	0	0.00	0.0	0
2024-01-31	45	36	40.5	2.8	24	0	0.00	0.0	0
Sum	1532	963	-	-	765	4	6.08	3.2	-
Average	49.4	31.1	40.2	3.2	-	-	-	-	0.1
Normal	46.8	27.2	37.0	-	868	0	3.29	5.9	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - March 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-03-01	58	26	42.0	-1.2	23	0	T	0.0	0
2024-03-02	57	41	49.0	5.6	16	0	1.28	0.0	0
2024-03-03	67	49	58.0	14.3	7	0	0.00	0.0	0
2024-03-04	67	43	55.0	11.0	10	0	T	0.0	0
2024-03-05	64	48	56.0	11.7	9	0	0.91	0.0	0
2024-03-06	60	52	56.0	11.5	9	0	0.54	0.0	0
2024-03-07	68	48	58.0	13.2	7	0	0.21	0.0	0
2024-03-08	63	42	52.5	7.4	12	0	0.00	0.0	0
2024-03-09	57	42	49.5	4.1	15	0	0.75	0.0	0
2024-03-10	54	43	48.5	2.8	16	0	0.03	0.0	0
2024-03-11	59	34	46.5	0.5	18	0	0.00	0.0	0
2024-03-12	72	34	53.0	6.7	12	0	0.00	0.0	0
2024-03-13	74	38	56.0	9.3	9	0	0.00	0.0	0
2024-03-14	80	39	59.5	12.5	5	0	0.00	0.0	0
2024-03-15	78	56	67.0	19.7	0	2	0.00	0.0	0
2024-03-16	70	43	56.5	8.9	8	0	0.00	0.0	0
2024-03-17	71	51	61.0	13.0	4	0	0.00	0.0	0
2024-03-18	69	41	55.0	6.7	10	0	0.00	0.0	0
2024-03-19	53	29	41.0	-7.7	24	0	0.00	0.0	0
2024-03-20	69	38	53.5	4.5	11	0	0.00	0.0	0
2024-03-21	68	33	50.5	1.1	14	0	0.00	0.0	0
2024-03-22	58	32	45.0	-4.7	20	0	0.00	0.0	0
2024-03-23	62	46	54.0	3.9	11	0	2.23	0.0	0
2024-03-24	57	31	44.0	-6.4	21	0	0.00	0.0	0
2024-03-25	58	27	42.5	-8.3	22	0	0.00	0.0	0
2024-03-26	62	30	46.0	-5.1	19	0	0.00	0.0	0
2024-03-27	62	44	53.0	1.5	12	0	1.09	0.0	0
2024-03-28	50	46	48.0	-3.9	17	0	0.69	0.0	0
2024-03-29	66	31	48.5	-3.7	16	0	0.00	0.0	0
2024-03-30	76	35	55.5	2.9	9	0	0.00	0.0	0
2024-03-31	76	48	62.0	9.0	3	0	0.02	0.0	0
Sum	2005	1240	-	-	389	2	7.75	0.0	-
Average	64.7	40.0	52.3	4.5	-	-	-	-	0.0
Normal	59.9	35.7	47.8	-	538	5	3.79	1.8	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - April 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-04-01	67	45	56.0	2.7	9	0	T	0.0	0
2024-04-02	68	50	59.0	5.3	6	0	0.25	0.0	0
2024-04-03	68	50	59.0	4.9	6	0	**0.69**	0.0	0
2024-04-04	58	36	47.0	-7.4	18	0	0.40	0.0	0
2024-04-05	59	35	47.0	-7.8	18	0	T	0.0	0
2024-04-06	56	**32**	44.0	-11.2	21	0	T	0.0	0
2024-04-07	64	35	49.5	-6.0	15	0	0.00	0.0	0
2024-04-08	74	37	55.5	-0.4	9	0	0.00	0.0	0
2024-04-09	79	53	66.0	9.8	0	1	0.00	0.0	0
2024-04-10	78	59	68.5	11.9	0	4	0.00	0.0	0
2024-04-11	74	60	67.0	10.1	0	2	0.04	0.0	0
2024-04-12	69	58	63.5	6.3	1	0	0.46	0.0	0
2024-04-13	69	48	58.5	0.9	6	0	0.00	0.0	0
2024-04-14	80	40	60.0	2.1	5	0	0.00	0.0	0
2024-04-15	**88**	58	73.0	14.8	0	8	0.00	0.0	0
2024-04-16	83	52	67.5	9.0	0	3	0.46	0.0	0
2024-04-17	76	53	64.5	5.7	0	0	0.00	0.0	0
2024-04-18	82	58	70.0	10.9	0	5	0.00	0.0	0
2024-04-19	80	51	65.5	6.1	0	1	0.00	0.0	0
2024-04-20	71	54	62.5	2.8	2	0	0.00	0.0	0
2024-04-21	69	46	57.5	-2.5	7	0	0.12	0.0	0
2024-04-22	60	38	49.0	-11.3	16	0	0.00	0.0	0
2024-04-23	71	35	53.0	-7.5	12	0	0.00	0.0	0
2024-04-24	74	54	64.0	3.2	1	0	T	0.0	0
2024-04-25	73	50	61.5	0.4	3	0	0.00	0.0	0
2024-04-26	64	41	52.5	-8.8	12	0	0.00	0.0	0
2024-04-27	63	50	56.5	-5.0	8	0	0.01	0.0	0
2024-04-28	83	56	69.5	7.7	0	5	0.00	0.0	0
2024-04-29	86	59	72.5	10.5	0	8	0.00	0.0	0
2024-04-30	85	61	73.0	10.8	0	8	0.00	0.0	0
Sum	2171	1454	-	-	175	45	2.43	0.0	-
Average	72.4	48.5	60.4	2.3	-	-	-	-	0.0
Normal	71.1	45.2	58.1	-	241	35	3.41	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - May 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-05-01	82	61	71.5	9.0	0	7	0.00	0.0	0
2024-05-02	88	57	72.5	9.8	0	8	0.00	0.0	0
2024-05-03	86	59	72.5	9.6	0	8	0.00	0.0	0
2024-05-04	65	54	59.5	-3.6	5	0	T	0.0	0
2024-05-05	73	56	64.5	1.2	0	0	0.45	0.0	0
2024-05-06	80	65	72.5	9.0	0	8	0.50	0.0	0
2024-05-07	78	64	71.0	7.3	0	6	0.13	0.0	0
2024-05-08	87	64	75.5	11.6	0	11	0.00	0.0	0
2024-05-09	84	63	73.5	9.4	0	9	T	0.0	0
2024-05-10	84	58	71.0	6.7	0	6	0.06	0.0	0
2024-05-11	66	49	57.5	-7.0	7	0	T	0.0	0
2024-05-12	70	50	60.0	-4.7	5	0	0.08	0.0	0
2024-05-13	78	46	62.0	-2.9	3	0	0.00	0.0	0
2024-05-14	74	61	67.5	2.4	0	3	0.05	0.0	0
2024-05-15	67	58	62.5	-2.8	2	0	0.85	0.0	0
2024-05-16	79	56	67.5	2.0	0	3	T	0.0	0
2024-05-17	75	57	66.0	0.3	0	1	T	0.0	0
2024-05-18	68	59	63.5	-2.4	1	0	1.42	0.0	0
2024-05-19	71	59	65.0	-1.1	0	0	0.02	0.0	0
2024-05-20	78	57	67.5	1.1	0	3	0.00	0.0	0
2024-05-21	83	56	69.5	2.9	0	5	0.00	0.0	0
2024-05-22	89	62	75.5	8.7	0	11	0.00	0.0	0
2024-05-23	86	69	77.5	10.5	0	13	0.00	0.0	0
2024-05-24	84	67	75.5	8.2	0	11	0.35	0.0	0
2024-05-25	87	61	74.0	6.5	0	9	T	0.0	0
2024-05-26	88	67	77.5	9.8	0	13	0.00	0.0	0
2024-05-27	82	64	73.0	5.0	0	8	0.34	0.0	0
2024-05-28	84	63	73.5	5.3	0	9	0.00	0.0	0
2024-05-29	83	57	70.0	1.5	0	5	0.19	0.0	0
2024-05-30	76	53	64.5	-4.2	0	0	0.00	0.0	0
2024-05-31	76	53	64.5	-4.5	0	0	0.00	0.0	0
Sum	2451	1825	-	-	23	157	4.44	0.0	-
Average	79.1	58.9	69.0	3.4	-	-	-	-	0.0
Normal	76.5	54.7	65.6	-	86	105	4.24	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - June 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-06-01	82	49	65.5	-3.7	0	1	0.00	0.0	0
2024-06-02	83	58	70.5	1.0	0	6	0.00	0.0	0
2024-06-03	84	68	76.0	6.2	0	11	0.00	0.0	0
2024-06-04	87	64	75.5	5.4	0	11	0.00	0.0	0
2024-06-05	85	69	77.0	6.7	0	12	T	0.0	0
2024-06-06	84	72	78.0	7.4	0	13	0.45	0.0	0
2024-06-07	86	66	76.0	5.1	0	11	T	0.0	0
2024-06-08	86	56	71.0	-0.2	0	6	0.00	0.0	0
2024-06-09	88	67	77.5	6.1	0	13	0.00	0.0	0
2024-06-10	83	58	70.5	-1.2	0	6	0.00	0.0	0
2024-06-11	79	58	68.5	-3.5	0	4	0.00	0.0	M
2024-06-12	82	57	69.5	-2.8	0	5	0.00	0.0	M
2024-06-13	88	63	75.5	3.0	0	11	0.00	0.0	0
2024-06-14	90	69	79.5	6.7	0	15	0.00	0.0	0
2024-06-15	86	65	75.5	2.4	0	11	T	0.0	0
2024-06-16	86	58	72.0	-1.3	0	7	0.00	0.0	0
2024-06-17	90	66	78.0	4.4	0	13	0.00	0.0	0
2024-06-18	89	69	79.0	5.1	0	14	0.00	0.0	0
2024-06-19	89	65	77.0	2.9	0	12	0.00	0.0	0
2024-06-20	90	64	77.0	2.7	0	12	0.00	0.0	0
2024-06-21	94	67	80.5	5.9	0	16	0.00	0.0	0
2024-06-22	99	68	83.5	8.7	0	19	0.00	0.0	0
2024-06-23	96	77	86.5	11.5	0	22	0.00	0.0	0
2024-06-24	92	77	84.5	9.3	0	20	0.00	0.0	0
2024-06-25	91	60	75.5	0.1	0	11	0.00	0.0	0
2024-06-26	99	73	86.0	10.4	0	21	0.00	0.0	0
2024-06-27	89	70	79.5	3.7	0	15	0.30	0.0	0
2024-06-28	86	68	77.0	1.0	0	12	0.00	0.0	0
2024-06-29	92	69	80.5	4.4	0	16	0.00	0.0	0
2024-06-30	95	79	87.0	10.7	0	22	0.00	0.0	0
Sum	2650	1969	-	-	0	368	0.75	0.0	-
Average	88.3	65.6	77.0	3.9	-	-	-	-	0.0
Normal	82.9	63.2	73.1	-	9	251	4.58	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - July 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-07-01	92	60	76.0	-0.4	0	11	1.34	0.0	0
2024-07-02	85	58	71.5	-5.1	0	7	0.00	0.0	0
2024-07-03	85	63	74.0	-2.7	0	9	0.00	0.0	0
2024-07-04	92	68	80.0	3.2	0	15	0.11	0.0	0
2024-07-05	97	72	84.5	7.6	0	20	0.00	0.0	0
2024-07-06	97	76	86.5	9.5	0	22	0.00	0.0	0
2024-07-07	95	73	84.0	6.9	0	19	0.00	0.0	0
2024-07-08	91	74	82.5	5.3	0	18	0.00	0.0	0
2024-07-09	96	73	84.5	7.3	0	20	0.00	0.0	0
2024-07-10	94	77	85.5	8.2	0	21	0.00	0.0	0
2024-07-11	93	73	83.0	5.7	0	18	0.49	0.0	0
2024-07-12	87	70	78.5	1.1	0	14	0.24	0.0	0
2024-07-13	88	71	79.5	2.1	0	15	1.38	0.0	0
2024-07-14	97	72	84.5	7.1	0	20	0.00	0.0	0
2024-07-15	98	74	86.0	8.6	0	21	0.00	0.0	0
2024-07-16	97	75	86.0	8.6	0	21	0.00	0.0	0
2024-07-17	94	77	85.5	8.1	0	21	0.00	0.0	0
2024-07-18	88	72	80.0	2.6	0	15	0.15	0.0	0
2024-07-19	85	68	76.5	-0.9	0	12	0.00	0.0	0
2024-07-20	82	68	75.0	-2.4	0	10	T	0.0	0
2024-07-21	88	66	77.0	-0.3	0	12	0.00	0.0	0
2024-07-22	86	66	76.0	-1.3	0	11	0.00	0.0	0
2024-07-23	88	76	82.0	4.7	0	17	0.00	0.0	0
2024-07-24	83	72	77.5	0.3	0	13	0.44	0.0	0
2024-07-25	80	70	75.0	-2.2	0	10	T	0.0	0
2024-07-26	81	68	74.5	-2.7	0	10	T	0.0	0
2024-07-27	84	64	74.0	-3.1	0	9	0.00	0.0	0
2024-07-28	87	62	74.5	-2.6	0	10	0.00	0.0	0
2024-07-29	88	62	75.0	-2.0	0	10	0.00	0.0	0
2024-07-30	88	62	75.0	-2.0	0	10	0.12	0.0	0
2024-07-31	91	71	81.0	4.1	0	16	T	0.0	0
Sum	2777	2153	-	-	0	457	4.27	0.0	-
Average	89.6	69.5	79.5	2.3	-	-	-	-	0.0
Normal	86.7	67.6	77.2	-	0	377	4.29	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Climatological Data for ASHLAND, VA - August 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-08-01	95	71	83.0	6.1	0	18	0.00	0.0	0
2024-08-02	97	74	85.5	8.7	0	21	0.00	0.0	0
2024-08-03	91	72	81.5	4.8	0	17	0.11	0.0	0
2024-08-04	86	71	78.5	1.8	0	14	0.18	0.0	0
2024-08-05	89	71	80.0	3.4	0	15	0.44	0.0	0
2024-08-06	89	73	81.0	4.4	0	16	0.00	0.0	0
2024-08-07	82	73	77.5	1.0	0	13	0.77	0.0	0
2024-08-08	77	73	75.0	-1.4	0	10	0.79	0.0	0
2024-08-09	84	74	79.0	2.6	0	14	0.57	0.0	0
2024-08-10	88	74	81.0	4.7	0	16	0.00	0.0	0
2024-08-11	85	67	76.0	-0.2	0	11	0.00	0.0	0
2024-08-12	81	67	74.0	-2.2	0	9	0.00	0.0	0
2024-08-13	81	65	73.0	-3.1	0	8	0.00	0.0	0
2024-08-14	84	63	73.5	-2.5	0	9	0.00	0.0	0
2024-08-15	85	60	72.5	-3.4	0	8	0.00	0.0	0
2024-08-16	88	62	75.0	-0.8	0	10	0.00	0.0	0
2024-08-17	88	73	80.5	4.8	0	16	0.00	0.0	0
2024-08-18	88	71	79.5	3.9	0	15	0.39	0.0	0
2024-08-19	85	66	75.5	0.0	0	11	0.23	0.0	0
2024-08-20	73	60	66.5	-8.9	0	2	0.01	0.0	0
2024-08-21	73	51	62.0	-13.3	3	0	0.00	0.0	0
2024-08-22	77	51	64.0	-11.2	1	0	0.00	0.0	0
2024-08-23	80	51	65.5	-9.6	0	1	0.00	0.0	0
2024-08-24	82	56	69.0	-5.9	0	4	0.00	0.0	0
2024-08-25	85	57	71.0	-3.8	0	6	0.00	0.0	0
2024-08-26	93	57	75.0	0.4	0	10	0.00	0.0	0
2024-08-27	88	68	78.0	3.5	0	13	T	0.0	0
2024-08-28	97	68	82.5	8.2	0	18	0.00	0.0	0
2024-08-29	95	71	83.0	8.8	0	18	0.00	0.0	0
2024-08-30	85	69	77.0	3.0	0	12	1.65	0.0	0
2024-08-31	84	71	77.5	3.7	0	13	0.00	0.0	0
Sum	2655	2050	-	-	4	348	5.14	0.0	-
Average	85.6	66.1	75.9	0.2	-	-	-	-	0.0
Normal	85.1	66.2	75.7	-	1	331	3.91	0.0	-

Observations for each day cover the 24 hours ending at the time given below (Local Standard Time).
Max Temperature : 6pm
Min Temperature : 6pm
Precipitation : 6pm
Snowfall : unknown
Snow Depth : 6pm

Exhibit G

North Carolina
Division of Water Quality

Methodology for Identification of Intermittent and Perennial Streams and Their Origins

Version 4.11
Effective Date: September 1, 2010

fundamental source of water for intermittent and perennial stream baseflow as defined in the North Carolina Administrative Code (NCAC) is groundwater resulting from the intersection of the water table with the streambed. This definition is consistent with those of several other federal and state government agencies as well as many academic organizations (Moore 2003; Jackson et al. 2005; Beaudry et al. 2006; U.S. Army Corps of Engineers 2007,Wilson 2003).

As baseflow becomes more persistent in the downstream direction, stream discharge, both stormflow and baseflow, increases and stream characteristics related to geomorphic, hydrologic and biological processes are more readily observed. For example, stream bedforms, such as gravel bars and pool-riffle sequences, are much more defined in perennial streams than in intermittent streams due to increased sediment supply as well as transport and depositional processes. Furthermore, aquatic organisms respond to the availability of habitat formed and maintained by geomorphic and hydrologic processes and vary depending on the persistence of water and streamflow.

Stream characteristics and commonly observable features resulting from geomorphic, hydrologic and biological processes are used in this stream identification methodology to produce a numeric score. Attributes serve as indicators that can be observed independently of each other, although they are not intended to independently determine stream flow duration. The total score of all indicators provides the means for stream determination. The score is then used to assign a stream type of “ephemeral”, “intermittent”, or “perennial” to the stream reach being evaluated.

SECTION 2 - Stream Identification Field Method and Rating Form

Suggested Field Equipment

Aquatic net and shallow white pan – used to catch and examine benthic macroinvertebrates and aquatic vertebrates. A small aquarium net and plastic container lid may suffice if carrying full-size equipment is not feasible.

Global Positioning System (GPS) – used to determine coordinates of the stream origin or of a stream reach.

Camera – used to photograph and document site features.

Munsell Soil Color Charts (Munsell 2000) – used to determine the soil matrix chroma when looking for soil-based evidence of a seasonal high-water table.

Field Indicators of Hydric Soils of the United States (USDA 2010)– used to help determine the presence of a high water table.

Soil auger – used to extract soils.

National List of Vascular Plant Species that Occur in Wetlands: 1996 National Summary (U.S. FWS 1997) - used to determine the indicator status of plants found in and adjacent to the streambed.

Basic rules for making stream determinations:

Do not evaluate a stream within 48 hours of rainfall that results in surface runoff.

Generally, it takes about 48 hours for increased streamflow resulting from precipitation to attenuate. Delaying a stream determination following rainfall helps to eliminate visual bias associated with observing water in a stream that may not currently have baseflow. Also stormflow may obscure many of the channel features that need to be observed and evaluated.

Review information on stream to be evaluated.

Gather and review available information regarding the area and location of the stream. The use of U.S. Geological Survey (USGS) topographic maps, Natural Resources Conservation Service (NRCS) soil survey maps, geology maps and/or high resolution topographic data (e.g., LiDAR-based) or aerial photography may help provide information when conducting the field investigation. Other important data may include land use/land cover or current construction activity in the area. To assist in evaluating whether flow in the stream is typical, current streamflow at nearby gauges, recent rainfall compared to normal, and drought status information is useful.

Become familiar with the characteristics of headwaters streams in the region of interest.

Beginning users of this manual and form should visit a variety of headwater streams, look for the geomorphic, hydrologic and biological features discussed here, and gain experience observing the magnitude and variability of these features. The field evaluator is strongly encouraged to attend the four-day stream identification methodology class, taught by the NC DWQ and/or NC State University, pass the written and field exams, and to have familiarity with geomorphic, hydrologic and biological characteristics in headwater streams.

Walk to the upstream extent of the feature when feasible.

Evaluating the degree of development of many of the Stream Identification Method indicators involves comparing the stream reach of interest to upstream portions of the stream. Headwater streams are often discontinuous with segments with very poorly developed channels where baseflow flows under the surface. Therefore, an apparent perennial or intermittent stream origin may not be the actual origin. Continue walking upstream towards the ridge top until you are certain that you have observed the entire drainageway to its origin.

Evaluate at least 100 ft of stream to determine average conditions.

Determinations must not be made by observing one location in a stream, but rather should be made by observing a reach of stream. Generally, at least one hundred feet (sometimes more) of channel should be walked to make observations. This initial examination allows the evaluator to examine and study the nature of the channel, noting the presence or absence of bedforms, dominant sediment size, dominant stream processes, and characteristics that indicate the predominant source of water (stormflow, baseflow, tributary discharge, and the presence of benthic macroinvertebrates and/or vegetation). These initial observations also aid in determining the magnitude (absent, weak, moderate or strong) of specific parameters.

Scoring

Identification of stream flow duration is accomplished by evaluating 26 different attributes of the stream and assigning a numeric score to each attribute. A scoring sheet (included on the last page of this manual) is used to record the score for each attribute and determine the total numeric score for the stream under investigation. The sheet specifically requests information for Date, Project, Evaluator, Site, County, Other (Quad Name), and Latitude and Longitude. However any other pertinent observations should also be recorded on this sheet. These may

Exhibit H

Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Sam Graves
Chairman

Jack Ruddy, Staff Director

Rick Larsen
Ranking Member

Katherine W. Dedrick, Democratic Staff Director

October 31, 2024

The Honorable Michael S. Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
United States Department of the Army
108 Army Pentagon
Washington, DC 20310

Dear Administrator Regan and Assistant Secretary Connor:

As Members of the House Transportation and Infrastructure Committee, we write regarding the United States Army Corps of Engineers (Corps) and United States Environmental Protection Agency (EPA) implementation of the definition of "waters of the United States" (WOTUS) under the *Clean Water Act* (*CWA*) following the United States Supreme Court's decision in *Sackett v. EPA* (*Sackett*).[1] This Administration is not adhering to *Sackett*, attempting to maintain broad Federal overreach, slow-walking implementation, failing to provide adequate direction to regulated communities, and delaying projects which require certainty under a *CWA* permitting regime.

In *Sackett*, the Supreme Court provided needed clarity on the definition of a WOTUS, reinforcing property owners' rights, protecting the separation of powers by limiting the authority that Congress explicitly delegated in statute, and adhering to the Congressional intent of the *CWA*.[2] *Sackett* rightly upheld the cooperative Federalism framework of the *CWA*, as well as the authority of states to regulate non-Federal waters within their borders as they see fit.

Importantly, all nine Supreme Court justices agreed that use of the "significant nexus" test to determine WOTUS was illegitimate and represented major Federal overreach.[3] Despite warnings from this Committee and others that the Administration should not issue a new WOTUS rule before the *Sackett* decision, your Agencies published a WOTUS rule in January 2023 based substantially on the "significant nexus" concept.[4]

[1] *Sackett v. EPA*, 598 U.S. 651 (2023) [Hereinafter *Sackett*].
[2] *Id.*; *CWA*, Pub. L. No. 92-500, 86 Stat. 816.
[3] *Sackett, supra* note 1.
[4] *See e.g.* Letter from Reps. Sam Graves, Dan Newhouse, David Rouzer, et. al. to EPA Admn. Michael S. Regan and Asst. Sec'y of the Army for Civil Works Michael L. Connor (Mar. 8, 2022); *see also e.g.* Brief of Sen. Shelley Moore Capito, Rep. Sam Graves, and a Coalition of 199 Members of Congress as *Amici Curiae* supporting Petitioners, *Sackett v. EPA*, No. 21-454 (Oct. 3, 2022); Revised definition of "Waters of the United States" Final Rule, 88 Fed Reg. 3004 (Jan. 18, 2023).

In addition to striking down the "significant nexus" test, the majority in *Sackett* articulated a clear, administrable definition of WOTUS; however, this Administration continues to flout the *Sackett* decision.[5] The majority opinion held that "the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right,' so that they are "indistinguishable" from those waters."[6] Thus, *Sackett* clearly distinguished that a WOTUS must have a continuous surface connection to a traditionally navigable water to be subject to *CWA* regulations.[7] Subsequently, your Agencies published a revised WOTUS rule in September 2023 to conform with *Sackett*.[8] However, the substance and implementation of this revised rule has been problematic.[9]

In June 2023, Chairmen Graves and Rouzer, along with the Ranking Members of the Senate Environment and Public Works Committee and its Subcommittee on Fisheries, Water, and Wildlife sent a letter to your Agencies, imploring them to "adhere to the majority opinion and not slow-walk compliance with the decision."[10] Additionally, on September 11, 2024, the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure held a hearing entitled, "Waters of the United States Implementation Post-*Sackett* Decision: Experiences and Perspectives."[11]

This hearing provided an opportunity for Members to hear from regulated communities dependent on a clear and dependable WOTUS regulatory regime on whether your Agencies were meeting Congress' expectations. At the hearing, witnesses provided concerning testimony about implementation of WOTUS since the decision in *Sackett*.[12] For example, Courtney Briggs, representing the American Farm Bureau Federation, testified that "[t]he Biden Administration's interpretation and implementation of WOTUS lacks clarity and certainty for landowners and businesses and stretches the Federal Government's jurisdictional reach beyond the limits of what is legal."[13] Unfortunately, the hearing illustrated that that the Administration's slow and unclear implementation of the post-*Sackett* rule is failing to comply with the Supreme Court's decision. As a result, the regulated community is facing negative real world impacts throughout the country.

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[5] *Sackett*, *supra* note 1.
[6] *Id.* at 27.
[7] *Id.*
[8] Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023).
[9] *See* Press Release, H. Comm. on Transp. and Infrastructure, *Hearing Highlights Ongoing Struggles of States, Farmers, Home Builders & Others with Administration's WOTUS Rule*, (Sept. 11, 2024), *available at* https://transportation.house.gov/news/documentsingle.aspx?DocumentID=407746.
[10] Letter from the Hon. Sam Graves, Chairman, H. Comm, on Transp. and Infrastructure, the Hon. David Rouzer, Chairman, Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, the Hon. Shelley Moore Capito, Ranking Member, S. Comm. on Environment and Public Works, and the Hon. Cynthia M. Lummis, Ranking Member, Subcomm. on Fisheries, Water, and Wildlife of the S. Comm. on Environment and Public Works, to EPA Admn. Michael S. Regan and Asst. Sec. of the Army for Civil Works Michael L. Connor (June 21, 2023).
[11] *Waters of the United States Implementation Post*-Sackett *Decision: Experiences and Perspectives Hearing Before the Subcomm. on Water Resources and Environ. of the H. Comm. on Transp. and Infrastructure*, 118th Cong., (Sept. 11, 2024) [Hereinafter September 2024 Hearing].
[12] *See id.*
[13] *Id.*, Testimony of Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of American Farm Bureau Federation.

Adherence to *Sackett*

Stakeholders have raised concerns that the amended, September 2023, WOTUS rule does not adequately address *Sackett*. For example, while the amended rule does remove references to the "significant nexus" test, it leaves several other concepts from the *Sackett* decision undefined.[14] At the September Subcommittee hearing, Vince Messerly, a professional engineer and wetlands delineator testified that "the Agencies refused to define 'continuous surface connection' or 'relatively permanent'" [15] in the revised rule.

The EPA and Corps have not provided a workable WOTUS rule compliant with *Sackett*, which will have devastating consequences on states and proponents for energy, agriculture, manufacturing, homebuilding, and infrastructure projects. Emma Pokon, Commissioner of the Alaska Department of Environmental Conservation warned in her testimony that rather than developing an implementable standard consistent with *Sackett*, "the agencies appear intent on leveraging uncertainty and the risk of civil and criminal liability to effectively maintain sweeping authority in their own hands."[16] It is disconcerting that the Administration is ignoring the clear decision of the Supreme Court in order to facilitate an overreach of Federal authority, expanding jurisdiction over waters in which the Federal Government shall have no involvement.

Permitting Uncertainty and Delays

Compounding our concerns, the revised WOTUS rule has only served to further uncertainty and delays in processing permit applications and approved jurisdictional determinations (AJDs). Given the breadth of industries that rely on a dependable and clear *CWA* permitting regime, your Agencies' continued delays halts the progress of important projects.

On September 27, 2023, your Agencies released a joint coordination memorandum, outlining management of WOTUS and AJDs.[17] In theory, this coordination memorandum, and its extensions issued on June 25, 2024, and August 30, 2024, direct more AJDs to be elevated from the Corps district level to the headquarters of both Agencies.[18] In practice, this elevation process has stalled

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[14] Press Release, WATERS ADVOCACY COALITION, *Revised WOTUS rule ignores SCOTUS ruling*, (Aug. 29, 2023), *available at* https://watersadvocacy.org/revised-wotus-rule-ignores-scotus-ruling.
[15] September 2024 Hearing, *supra* note 12, Testimony of Vincent E. Messerly P.E., President, Streams and Wetlands Foundation, on behalf of National Association of Home Builders.
[16] September 2024 Hearing, *supra* note 12, Testimony of Emma Pokon, Commissioner, Alaska Department of Environmental Conservation.
[17] EPA and Corps, Joint Coordination Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA), (Sept. 27, 2023), *available at* https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf [Hereinafter Sept. 23 Memo].
[18] *Id*.; EPA and Corps, Extension of Joint Coordination Memoranda to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), (June 25, 2024), *available at* https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf; EPA and Corps, Coordination Process Update: Joint Coordination Memoranda to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), *available at* https://www.epa.gov/system/files/documents/2024-08/ajd-coordination-memos-update-report_8-28-2024_508.pdf [Hereinafter August 2024 Memo].

numerous important projects that rely on AJDs for assurance that they are in compliance with the *CWA*.

At the September 2024 hearing, we heard multiple examples of projects, including even the construction of wetlands, that have been halted or delayed due to bureaucratic inaction or unclear direction.[19] In addition, it appears as if your Agencies plan to continue this inadequate framework. The elevation and coordination process outlined in the joint coordination memorandum has been extended through March 27, 2025, raising concerns that your Agencies will continue to circumvent these AJD decisions and delay projects well into next year.[20] This means that some draft AJDs could be stuck in review for nearly two years before the permitting process begins.

Transparency

In addition to the slow pace of post-*Sackett* implementation, this Administration's failure to be transparent and provide clear direction to the public, states, and even Corps districts, has created significant uncertainty on the ground.[21] For months, the Administration has refused to produce memoranda, training materials, or other tools that would be helpful for the regulated community to understand how your Agencies are implementing WOTUS.[22]

While your Agencies have begun publicly posting memoranda on AJDs on their websites, practically they do little to increase confidence in permitting outside of each specific site. In the August 2024 coordination memorandum, it states that "the memoranda do not impose legally binding requirements on EPA, the Corps, Tribes, States, or the regulated community, and may or may not apply to a particular situation based upon the circumstances."[23] In addition, at the September 2024 hearing, Mr. Messerly testified that "EPA was asked whether their coordination memos were nationally binding. This is a critical issue because, under the APA (Administrative Procedures Act), nationally binding documents must be open for public comment. As we tried to proceed for an answer, the EPA simply ended the conversation."[24] As such, the few documents available to the public do not provide certainty to regulated entities, and the Administration has been evasive in providing direction to the regulated community.

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[19] *See e.g.* September 2024 Hearing, *supra* note 10 (Statements of Courtney Briggs in response to questioning by Rep. Eric Burlison; Vincent E. Messerly, P.E. by Rep. Mike Bost; Emma Pokon by Rep. David Rouzer, Chairman, Subcomm. on Water Resources and Environ. Of the H. Comm. on Transp. and Infrastructure).
[20] August 2024 Memo, *supra* note 16.
[21] *See e.g.* Letter from Patrick Morrissey, Attorney General, State of West Virginia, and 23 other Attorneys General, to Hon. Sam Graves, Chairman, H. Comm. on Transp. and Infrastructure, the Hon. David Rouzer, Chairman, Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, the Hon. Rick Larsen, Ranking Member, H. Comm. on the Transp. and Infrastructure, and Hon. Grace Napolitano, Ranking Member, Subcomm. on Water Resources and Environment of the H. Comm on Transp. and Infrastructure (Sept. 6, 2024), *available at* https://ago.wv.gov/Documents/Letter%20Congress%20WOTUS.pdf.
[22] Fact Sheet from WATERS ADVOCACY COALITION, Landowners and the Regulated Community Deserve Accountability from EPA and the Army Corps on WOTUS (May 2024), (on file with Comm.).
[23] August 2024 memo, *supra* note 16.
[24] September 2024 Hearing, *supra* note 12, Testimony of Vincent E. Messerly P.E., President, Streams and Wetlands Foundation, on behalf of National Association of Home Builders.

Due to the lack of transparency for the public, several stakeholders placed requests under the *Freedom of Information Act* (FOIA) seeking further information on your Agencies decision making processes.[25] The response to their FOIA request included highly redacted materials that did not provide substantive information to the public regarding the processing of AJDs with a claim that many materials were "deliberative," and therefore could not be made public.[26] At the September 2024 hearing, Courtney Briggs, representing the American Farm Bureau Federation, raised an important point: "How can something that is being used on the ground to make determinations that directly impact regulated parties be deliberative. … This is a flagrant abuse of power and a blatant disregard for government transparency."[27] The Administration's refusal to release to these materials is blatantly disrespecting to the public and its right to be informed about regulations that directly affect them. Based on the unclear piecemeal approach to AJDs, the Administration appears to be making the rules up as it goes, leaving those who rely on a competent permitting regime in the dark.

The Committee is deeply concerned that your Agencies have failed to comply with *Sackett* and provide regulated communities with the permitting certainty they rely on. Congress and the Supreme Court provided clear directions that your Agencies continue to ignore. Despite repeated attempts to seek clarification about this Administration's implementation of WOTUS rules, your Agencies continue to thwart transparency, failing to adequately respond to questions posed by Members following the Subcommittee hearings.[28] As part of the Committee's continuing oversight activities of your Agencies' WOTUS implementation, please provide responses to the following questions and requested information, as soon as possible, but no later than 5:00 p.m. ET on November 14, 2024:

1. Your Agencies contend that the memoranda issued as part of the coordination process do not impose legally binding requirements. If not legally binding, then please describe the purpose of the memoranda?

2. Please provide copies of any written instructions, talking points, technical documents, guidance documents, memoranda of understanding, or memoranda of agreement referring or relating to the implementation of the definition of WOTUS since May 25, 2023.

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[25] *See e.g.* Email from Courtney Briggs, Chairman, Waters Advocacy Coalition, *FOIA Request – Records Related to Implementation of the Revised Definition of "Waters of the United States*," (Mar. 12, 2024), *available at* https://insideepa.com/sites/insideepa.com/files/documents/2024/mar/epa2024_0542a.pdf; *see also Industry FOIA Request Seeks 'Internal' EPA Guidance Amid WOTUS Concerns*, INSIDEEPA, (Mar. 25, 2024), *available at* https://insideepa.com/daily-news/industry-foia-request-seeks-internal-epa-guidance-amid-wotus-concerns.

[26] *See e.g.* Response to FOIA Request submitted by National Association of Home Builders, *available at* https://www.nahb.org/~/media/NAHB/advocacy/docs/industry-issues/waters-of-the-us/foia-wotus-response.

[27] September 2024 Hearing, *supra* note 12, Testimony of Courtney Briggs, Chairman, Waters Advocacy Coalition, on behalf of American Farm Bureau Federation.

[28] For example, after Subcommittee Hearings, Members have the opportunity to ask further Questions for the Record. In response to Questions for the Record for a Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, titled *Review of Fiscal Year 2024 Budget Request: Agency Perspectives (Part II)*, (July 13, 2023), EPA failed to provide adequate detail. Additionally, response to Questions for the Record on this subject have not been received following a Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. and Infrastructure, titled *Water Resources Development Acts: Status of Past Provisions and Future Needs* (Dec. 5, 2023).

3. Do your Agencies plan to release any further public guidance for implementing the revised WOTUS rule to the public?

4. What steps are your Agencies taking to create a permitting regime faithful to the *Sackett* decision, outside of removing the "significant nexus" test?

5. How does the average time it takes to receive an AJD following *Sackett* compare to timelines pre-*Sackett*?

6. How many draft AJDs remain in the coordination and elevation process?

7. Why did your Agencies extend the elevation and coordination process through March 2025? Are there plans to extend the process further?

8. What effect has the lack of guidance had on the issuance of permits among Corps districts?

9. Are all Corps districts issuing AJDs? If not, please describe why AJDs are not being issued.

Pursuant to House Rule X, clause 1(r), the Committee has jurisdiction over these issues and shall conduct appropriate oversight of these actions. This request and any documents created as a result of this request will be deemed Congressional documents of the Committee. An attachment contains additional instructions for responding to this request. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2165 of the Rayburn House Office Building and the Minority Staff in Room 2164 of the Rayburn House Office Building.

Thank you for your prompt attention to this important. If you have questions, please contact Ryan Hambleton, Majority Staff Director, Subcommittee on Water Resources and Environment, at [redacted]

Sincerely,

Sam Graves
Chairman
Committee on Transportation
and Infrastructure

David Rouzer
Chairman
Subcommittee on Water Resources
and Environment

Eric A. "Rick" Crawford
Chairman
Subcommittee on Highways and Transit

Garret Graves
Subcommittee on Aviation

Daniel Webster
Subcommittee on Coast Guard and
Maritime Transportation

Troy E. Nehls
Subcommittee on Railroads, Pipelines,
and Hazardous Materials

Brian Babin, D.D.S.
Member of Congress

Aaron Bean
Member of Congress

Mike Bost
Member of Congress

Tim Burchett
Member of Congress

Eric Burlison
Member of Congress

Mike Collins
Member of Congress

John S. Duarte
Member of Congress

Mike Ezell
Member of Congress

Vince Fong
Member of Congress

Jenniffer González-Colón
Member of Congress

Dusty Johnson
Member of Congress

Thomas H. Kean, Jr.
Member of Congress

Doug LaMalfa
Member of Congress

Celeste Maloy
Member of Congress

Tracey Mann
Member of Congress

Marcus J. Molinaro
Member of Congress

Burgess Owens
Member of Congress

Pete Stauber
Member of Congress

Jeff Van Drew
Member of Congress

Bruce Westerman
Member of Congress

Rudy Yakym III
Member of Congress

cc: Mr. Jaime Pinkham, Principal Deputy Assistant Secretary of the Army for Civil Works
United States Department of the Army

The Honorable Rick Larsen, Ranking Member
Committee on Transportation and Infrastructure

The Honorable Grace F. Napolitano, Ranking Member
Subcommittee on Water Resources Environment

Enclosure
Attachment A – Requirements for Responding to the House Committee on Transportation and Infrastructure Records Requests in the 118th Congress