

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

_____)	
UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:23-cv-763
)	
CHAMELEON LLC and GARY V.)	
LAYNE,)	
Defendants.)	
)	
_____)	

AMENDED COMPLAINT

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (“EPA”) files this Complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action under Section 309(b) and (d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(b) & (d). The United States seeks injunctive relief and civil penalties against Chameleon LLC (“Chameleon”) and Gary V. Layne (“Layne”) (collectively “Defendants”) for the discharge of pollutants to waters of the United States in Hanover County, Virginia, without authorization by the United States Department of the Army, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. The property that is the subject of this Complaint (“the Site”) is located at 10426 Ashcake Road, Ashland, Virginia 23005 and is identified in Figure 1 (below).

3. In this action, the United States seeks to: (1) enjoin the unpermitted discharge of pollutants to waters of the United States at the Site, in violation of CWA Section 301(a), 33

U.S.C. § 1311(a); (2) require Defendants, at their own expense and at EPA's direction, to restore and/or mitigate the impacts of their unlawful activities; and (3) require Defendants to pay civil penalties as provided in CWA Section 309(d), 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and CWA Section 309(b), 33 U.S.C. § 1319(b).

5. Venue is proper in the Eastern District of Virginia under CWA Section 309(b), 33 U.S.C. § 1319(b), and under 28 U.S.C. § 1391(b) and (c), because Defendant Chameleon's principal place of business is in this District, Defendant Layne resides in this District, the Site is located in this District, and the cause of action alleged herein arose in this District.

6. The United States provided notice of the commencement of this action to the Commonwealth of Virginia as required by CWA Section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

7. The United States Department of Justice is vested with the authority to bring this action on behalf of the United States of America under 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

8. Defendant Chameleon is a limited liability company incorporated in the Commonwealth of Virginia on June 21, 2010. Upon information and belief, Chameleon's principal place of business is located at 15226 Lazy Creek Road, Beaverdam, Virginia 23015. The sole officer and registered agent of Chameleon is Defendant Layne.

9. Defendant Layne is a private individual who resides and conducts business in the Eastern District of Virginia. Upon information and belief, Layne resides or at one time resided at 15250 Lazy Creek Road, Beaverdam, Virginia 23015.

10. At all times relevant to the Complaint, Defendants owned, leased, and/or otherwise controlled the Site and/or otherwise controlled the activities that occurred on such property.

STATUTORY AND REGULATORY BACKGROUND

A. Clean Water Act

11. 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).

12. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to navigable waters except in compliance with, *inter alia*, a permit issued under CWA Section 402 or 404, 33 U.S.C. §§ 1342 or 1344, or by other CWA provisions not applicable here. Strict liability applies under CWA Section 301(a), 33 U.S.C. § 1311(a).

13. CWA Section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the U.S. Army Corps of Engineers ("Corps"), to issue permits for the discharge of dredged and/or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

14. CWA Section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

15. CWA Section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, rock, sand, and cellar dirt.

16. Federal regulations define "fill material" as any material that has the effect of replacing portions of the waters of the United States with dry land or changing the bottom elevation of a water of the United States. 40 C.F.R. § 232.2.

17. CWA Section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas." Wetlands with a continuous

surface connection to bodies that are “waters of the United States” in their own right (i.e., “adjacent wetlands”) are included in this definition. *See Sackett v. EPA*, 598 U.S. 651, 678 (2023).

18. The term “wetlands” means “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(b) (2014); 33 C.F.R. § 328.3(c)(1) (2024) (same).

19. “Waters of the United States” include “those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.” *Sackett*, 598 U.S. at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (cleaned up)). Relatively permanent waters “do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Rapanos*, 547 U.S. at 732 n.5, 733 n.5 (contrasting a seasonal river with a stream in which flow is “broken, fitful,” or “exist[s] only, or no longer than, a day”).¹

20. CWA Section 502(14), 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

21. CWA Section 502(5), 33 U.S.C. § 1362(5), defines “person” to include “an

¹ *See also San Francisco Baykeeper v. City of Sunnyvale*, No. 20-824, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (“ . . . the creeks here flow intermittently in the sense that they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation, which *Rapanos* explicitly does not exclude from the definition of [waters of the United States].”); *United States v. Mlaskoch*, No. 10-cv-2669, 2014 WL 1281523, *17 (D. Minn. Mar. 31, 2014) (finding tributaries relatively permanent based on direct observation of flow over three months, a reasonable inference of flow in a prior month, and the presence of ordinary high-water marks and beds and banks).

individual [or] corporation.”

22. No person may discharge fill material into wetlands that are waters of the United States without a permit—typically issued by the Corps—under Section 404(a) of the CWA, 33 U.S.C. § 1344(a).

23. CWA Section 309(b), 33 U.S.C. § 1319(b), authorizes the United States to commence a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA Section 301(a), 33 U.S.C. § 1311(a).

24. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), subjects any person who violates CWA Section 301, 33 U.S.C. § 1311, to civil penalties.

FACTUAL BACKGROUND

25. The real property on which the unauthorized discharges occurred (i.e., the Site) is located at 10426 Ashcake Road in Ashland, Hanover County, Virginia. The property is identified in the real property records of Hanover County as parcel ID # 7789-45-3668.

26. Prior to 2019, the Site was undeveloped forest, including forested wetlands.

27. Chameleon purchased the Site on or about October 17, 2018. The Site comprises approximately 102 contiguous acres located immediately west of Interstate Highway 95 (“I-95”) and northeast of Ashcake Road.

28. Upon information and belief, at all times relevant to this Complaint, Defendants owned, controlled, and/or operated the Site.

29. Beginning in or about early 2019, and continuing through at least August 2021, one or more of the Defendants and/or persons acting on their behalf conducted earthmoving activities on the Site, including but not limited to land-clearing, grubbing, ditching, sidecasting, and installing culverts, surface impoundments, and drainage pipes. That activity impacted approximately 80 acres of the Site, including approximately 21 acres of wetlands

across three areas, which, for purposes of this litigation, are identified as Wetland A, Wetland B, and Wetland C. *See* Figure 1. This action concerns only impacts to Wetland A, which comprise 17 of those 21 acres.²



Figure 1 - Aerial map of wetland impact areas

² The original Complaint filed in this matter on November 13, 2023, included allegations related to all three identified wetland areas. In this Amended Complaint, the United States is deferring to the Commonwealth of Virginia to address impacts to Wetlands B and C.

30. The activities set forth in Paragraph 29 caused by one or more of the Defendants and/or persons acting on their behalf, resulted in the unauthorized discharges of dredged and/or fill material to wetlands on the Site.

31. The dredged or fill material that one or more of the Defendants and/or persons acting on their behalf caused to be discharged included, *inter alia*, dirt, spoil, rock, and sand, all of which constitute “pollutants” as defined in CWA Section 502(6), 33 U.S.C. § 1362(6).

32. One or more of the Defendants and/or persons acting on their behalf used mechanized land-clearing and earthmoving equipment, including bulldozers, to accomplish these discharges. This equipment constitutes “point sources” as defined in CWA Section 502(14), 33 U.S.C. § 1362(14).

33. Defendants did not obtain a permit from the Secretary of the Army, acting through the Corps, for the discharges of dredged or fill material to waters of the United States as required by CWA Sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344, nor did Defendants obtain a Virginia Water Protection permit under Virginia law (*see* Va. Code § 62.1-44.15:20(A)).

Investigation by the Virginia Department of Environmental Quality

34. On or about April 3, 2019, the Virginia Department of Environmental Quality (“VADEQ”) received information of potential clearing and grubbing activities at the Site from the Hanover County Department of Public Works and the Virginia Department of Forestry (“DOF”), indicating that these activities may be impacting wetlands at the Site. DOF indicated to VADEQ, by letter dated March 29, 2019, that the activities on the Site were not consistent with normal forest management practices, and Hanover County indicated that the activities did not qualify for the forestry exemption from erosion and sediment control requirements.

35. On or about May 10, 2019, VADEQ personnel met Layne at the construction

entrance to the Site. When VADEQ asked to enter the Site to look at the areas within the Site boundaries that the U.S. Fish and Wildlife Service's National Wetlands Inventory has identified as potential wetland areas, Layne denied them entry and VADEQ left the Site.

36. On or about August 27, 2019, VADEQ obtained a warrant from the Circuit Court of Hanover County to inspect the Site. On or about August 30, 2019, three VADEQ inspectors executed the warrant at the Site with a VADEQ enforcement manager, representatives from the Hanover County Sheriff's Office, and Layne. VADEQ staff proceeded to inspect portions of the Property for the presence of surface waters subject to jurisdiction under the VADEQ Virginia Water Protection Program. The VADEQ Enforcement Manager encouraged Layne to stop any further land disturbance pending the results of the inspection and to manage any potential risk of a continuing violation at the Site.

37. Upon information and belief, on several occasions in the Fall of 2019, Layne and Chameleon began new timber harvesting activities in additional areas of the Site, including additional grubbing.

38. On or about October 9, 2019, VADEQ issued a Notice of Violation (NOV No. 1910-001174) to Layne and Chameleon, notifying them that the observed impacts to forested wetlands were not authorized and that VADEQ intended to conduct additional investigations on the Site. NOV No. 1910-001174 stated that, at that time, approximately 78% of the Site had been cleared and disturbed.

39. Even after receiving NOV No. 1910-001174 from VADEQ, Defendants continued earthmoving and other activities that resulted in discharges of fill material to wetlands without a permit.

40. Aerial imagery demonstrates that, by April 2021, nearly all of the Site had been cleared and disturbed. *See* Figure 2 (below, aerial photographs showing disturbance).

United States' Investigation

41. VADEQ notified the Corps' Norfolk District, Southern Virginia Regulatory Section, of the unauthorized activities at the Site. On or about January 7, 2020, and again on or about February 21, 2020, the Corps sent letters to Defendants advising them that their activities in wetlands at the Site may be in violation of Section 404 of the CWA and requesting a response from Layne.

42. Defendants did not respond to the Corps' letters and did not seek a CWA Section 404 permit from the Corps. Defendants continued earthmoving activities that resulted in discharges of fill material to wetlands.

43. After Defendants did not respond to the Corps' letters, the Corps referred the matter to EPA.

44. On or about May 8, 2020, pursuant to its authority under Section 308 of the CWA, 33 U.S.C. § 1318(a), EPA sent a letter to Defendants at Layne's home address, which included (a) a notification that the Corps had referred the case to EPA, and (b) a Request for Information.

45. On or about May 29, 2020, Layne sent a response letter to EPA. The letter did not respond to EPA's requests for information but rather asserted that Defendants' activities did not violate the Clean Water Act.

46. On or about July 29, 2020, pursuant to its authority under Section 308 of the CWA, 33 U.S.C. § 1318(a), EPA sent another letter to Defendants at Layne's home address. This letter indicated that Layne's May 29, 2020 letter was not an adequate response to the Request for Information and requested that Layne respond to EPA's inquiries. This letter also included a request for site access to conduct an inspection and a Consent to Enter Property form for Layne to sign.

47. On or about September 3, 2020, Layne called the EPA supervisor, Andrew Dinsmore, Chief of the Safe Drinking Water Act & Wetlands Section, to indicate that he would be unable to respond to the July 29, 2020 letter because the letter had been delivered to his home, was left outside in the rain, and was therefore illegible. During that call, Dinsmore and Layne spoke about EPA's request to perform a site visit. Layne refused to allow EPA access.

48. On or about September 3, 2020, EPA mailed two additional copies of the July 29, 2020 letter to Layne's home address: one through U.S. Postal Service standard mail and another by certified mail. Defendants did not respond to those letters.

49. On or about November 6, 2020, an EPA inspector left a voicemail for Mr. Layne. Defendants did not return the EPA inspector's call.

50. On March 12, 2021, EPA requested an administrative warrant from this Court to visit and inspect the Site. This Court issued that administrative warrant on March 15, 2021. *See U.S. Environmental Protection Agency v. Chameleon LLC, et al.*, No. 3:21-mc-2 (E.D. Va. Mar. 15, 2021) (Dkt. 1-3).

51. On or about April 12, 2021, EPA served the administrative warrant on Defendants and initiated an inspection of the Site. Pursuant to that warrant, from April 12, 2021, through April 14, 2021, EPA conducted an inspection ("2021 Inspection"), identified the presence of aquatic resources, including wetlands, on the Site, and observed impacts to those aquatic resources from Defendants' activities on the Site.

52. Prior to EPA's 2021 Inspection, Defendants disturbed most of the 102-acre Site. Defendants cleared much of the Site of trees and vegetation, grubbed (dug out trunks and roots), excavated and dredged low lying areas to construct drainage ditches and ponds, and spread fill and dredged material (dirt) across a large portion of the Site. This work is visible in the two aerial photographs below (Figure 2), one dated before Defendants conducted the work

and the second after Defendants had disturbed the Site.



Figure 2 - 2018 aerial photo on left showing pre-disturbance conditions and 2024 aerial photo on right showing post-disturbance conditions

53. As a result of Defendants' activities, at the time of EPA's 2021 Inspection, most of the Site consisted of soils with vegetative cover limited to a few small areas. Defendants had constructed a series of drainage ditches, pipes, and detention ponds that changed the way water moved within and off the Site. *See* Photograph 1 and Photograph 2. Nevertheless, during EPA's 2021 Inspection, EPA inspectors collected evidence demonstrating that wetlands had been present on the Site prior to Defendants' activities.



Photograph 1: EPA 2021 inspection photo (DSCN2686) taken on April 13, 2021, showing constructed drainage ditches in Wetland A.



Photograph 2: EPA 2021 inspection photo (DSCN2746) taken on April 13, 2021, showing a constructed berm across Wetland A with a single pipe in the berm (below the inspector's foot) directing and altering flow/hydrology.

54. In addition, during the 2021 Inspection, EPA inspectors observed and made field notes about the characteristics of channelized features on the Site and continuing off-Site.

55. Despite the disturbed condition of the Site, EPA inspectors observed intact wetlands at the southern portions of the Site that extended to Ashcake Road, and wetland indicators (i.e., features of wetland soils, hydrophytic vegetation, and wetland hydrology) showing that wetlands were present in disturbed portions of the Site prior to Defendants' activities. The inspectors also observed channelized streamflow in and from Wetland A 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. EPA described its observations in an inspection report that the Agency sent to Defendants.

56. Based on its inspection, EPA determined that Defendants had discharged dredged and/or fill material to at least 21 acres of wetlands, including 17 acres of Wetland A, through land-clearing, grubbing, and earthmoving activities. *See* Figure 1 (above) & Figure 4 (below).

57. Defendants continued to cause or engage in activities that resulted in unauthorized discharges of dredged and/or fill material to wetlands even after EPA's 2021 Inspection and notification of inspection results.

58. On May 16, 2024, after the United States filed its original Complaint in this action, Defendants permitted EPA inspectors and government consultants access to the Site for approximately 4 hours. Between 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.

59. The dredged and/or fill material that Defendants discharged remains in place at the Site and continues to affect wetlands on site, including Wetland A, and downstream waters.

60. Defendants have not obtained a permit, taken corrective action, and/or provided

compensatory mitigation for the losses to waters of the United States.

Aquatic Features Associated with the Site

61. The Site contains at least 21 acres of wetlands impacted by Defendants' actions, including the 17 acres of impacts to Wetland A.

62. The U.S. Fish and Wildlife Services' National Wetland Inventory ("NWI") identifies three wetland areas on Site. The dark green polygons on Figure 3 represent wetlands identified on the Site by the NWI. *See* Figure 3 (NWI Map of Site). NWI classifies the Site's wetland areas as "freshwater forested/scrub-shrub wetlands." NWI generates its mapping using high altitude imagery (aerial imagery) based on visible vegetation, hydrology, and geography. The U.S. Fish and Wildlife Service advises that "on the ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis."³ As such, the NWI does not necessarily map all wetlands in a particular location.

³ <https://www.fws.gov/node/264582>.

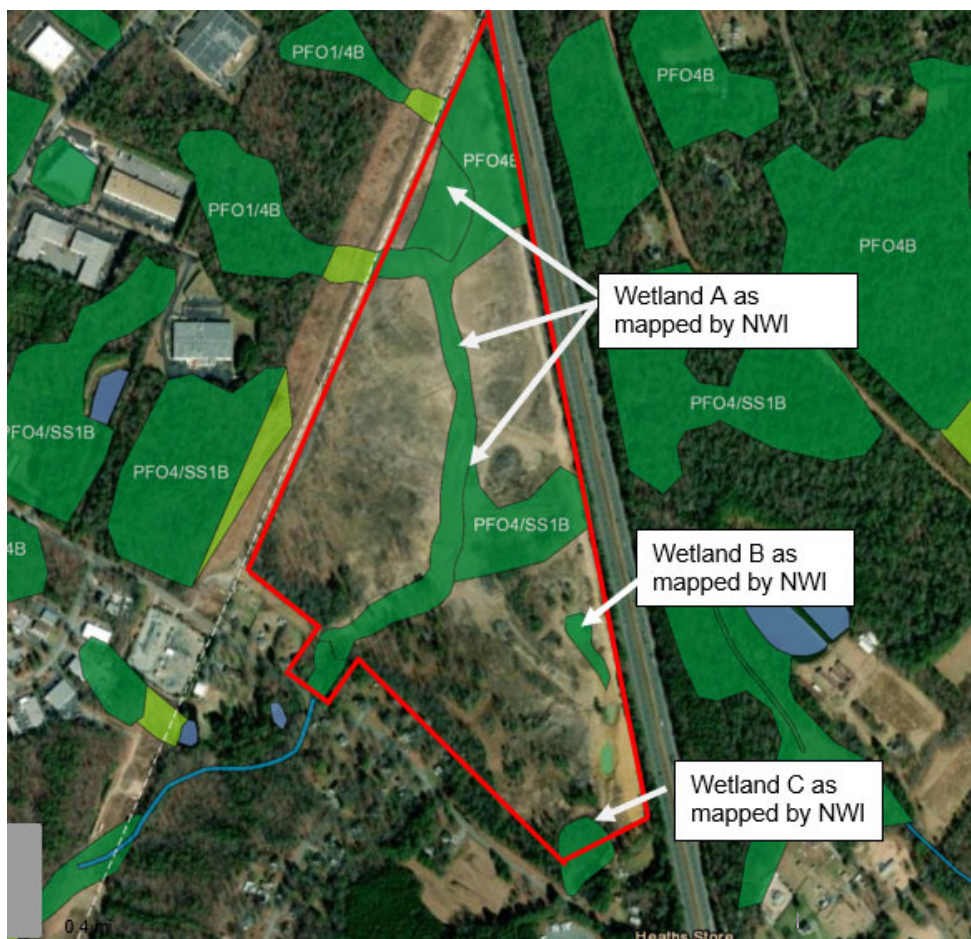


Figure 3 – NWI base map consisting of an aerial image with NWI wetlands layer depicted, showing freshwater forested/scrub-shrub wetland in dark green, emergent wetland in light green, and riverine wetland in light blue linear form. Red lines showing approximate Site border and arrowed text boxes identifying the wetlands are the only additions to the data depicted on the image.

63. After the 2021 Inspection, EPA also identified three areas of wetlands, which, as explained above, are Wetland A, Wetland B and Wetland C.⁴ While EPA’s identification of wetland areas (based, in part, on EPA’s on-the-ground inspection) and NWI’s identification of wetland areas overlap, they are not identical. Figure 4 shows the impacted wetlands EPA identified after its 2021 inspection as cross-hatched areas, and Wetland A is identified as a red cross-hatch. The wetlands mapped on and off the Site by the NWI are identified as white polygons with a blue wetlands symbol.

⁴ As explained above, this action only concerns Wetland A, as the United States is deferring to the Commonwealth of Virginia to address impacts to Wetlands B and C.

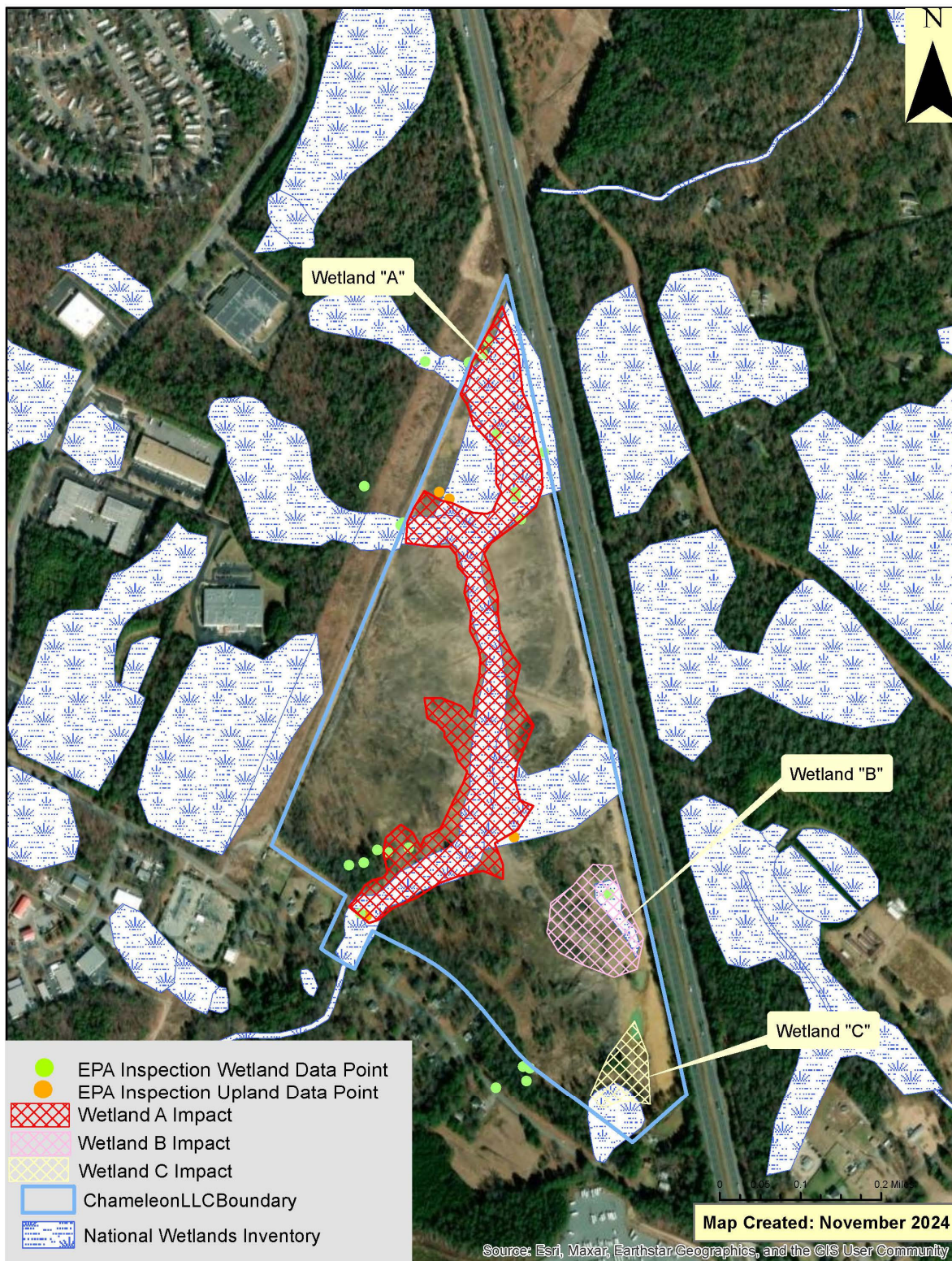


Figure 4 – Impacted wetlands EPA identified on the Site after its April 2021 inspection, wetlands identified by NWI both on and off the Site, relatively permanent tributaries identified by the National Hydrography Dataset and field verified, and EPA’s 2021 wetlands sample locations.

Wetland A

64. A wetland report prepared in 1990 for a previous owner of the Site identified approximately 38 acres of wetlands on the Site, including in the areas identified as Wetlands A, B, and C in Figures 1, 3, and 4, based on the identification of hydric soil, dominant hydrophytic vegetation, and wetland hydrology in the form of surface water ponding and high groundwater levels.

65. The main north-south wetland complex on the Site, as depicted in Figure 1 and Figure 4, is “Wetland A.” Wetland A is an aquatic feature that, prior to Defendants’ unpermitted activities, possessed the three indicators that identify a wetland: hydric soils, hydrology, and hydrophytic vegetation. The area identified as Wetland A in Figure 1 and Figure 4 comprises approximately 17 acres.

66. Wetland A encompasses a central curvilinear depressed area that historically carried water from the northern end of Wetland A to the southern end of Wetland A at its border with Ashcake Road. The curvilinear depressed feature is visible on the digital elevation model and the United States Geological Survey (“USGS”) National Map with the “3DEP Elevation – Hillshade” (“Hillshade raster”) data layer displayed, which are high-resolution representations of ground-level elevation generated by Light Detection and Ranging data (“LiDAR”). EPA’s on-Site inspectors observed this curvilinear depressed feature holding and carrying water. Figure 5 is the digital elevation model. In this image, the darker indentations show lower elevations and the lighter areas are higher elevations. Figure 6 is Hillshade raster data magnified. The red arrows in Figure 6 point to the curvilinear feature within Wetland A with a lower elevation. The lower elevation areas represent depressional or channel-like features through which EPA inspectors would expect that water would flow. In the field, EPA inspectors observed water in these features

and confirmed that water flows through and pools in these areas on the Site.



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. The red property boundary is the only addition to the depiction.

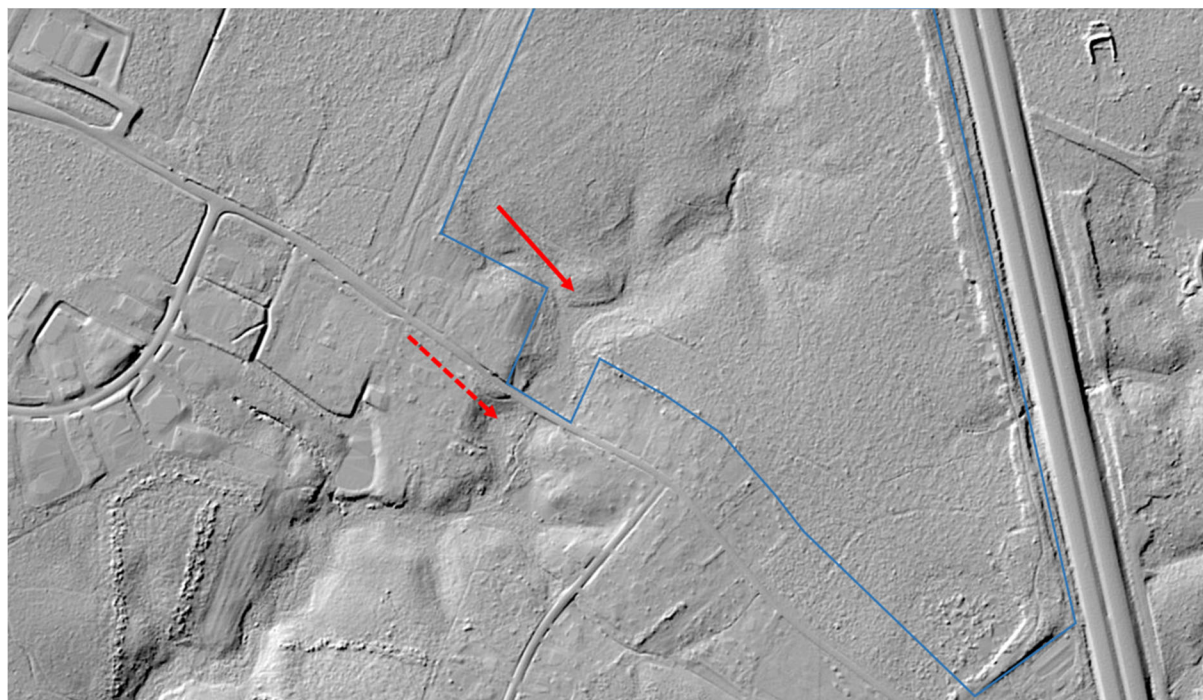


Figure 6 – Hillshade raster data. The blue line depicts the approximate Site boundaries. The red arrows point to features on the Site as described in Paragraphs 66 and 67. The blue line and arrows are the only additions to the depicted data layer.

67. The curvilinear feature continues from the southern end of Wetland A until it connects with an unnamed tributary that flows southwest of the Site under Ashcake Road (“Unnamed Tributary 1”). Unnamed Tributary 1 is mapped by the USGS in its StreamStats online mapping application with the national and Virginia stream layers displayed. *See* Figure 7. As shown below, StreamStats depicts Unnamed Tributary 1 as originating within Wetland A, flowing south along the curvilinear feature depicted in Figures 5 and 6, and then flowing from the Site under Ashcake Road in a southwesterly direction before connecting with Lickinghole Creek. The depiction of Unnamed Tributary 1 in StreamStats is indicative of the presence of a channelized feature that regularly contains water based on estimated streamflow statistics and basin characteristics (e.g., the geographic area that drains to a particular stream). “StreamStats provides estimates of various streamflow statistics for user-selected sites by solving equations that were developed through a process known as regionalization. This process

involves use of regression analysis to relate streamflow statistics computed for a group of selected streamgages within or near a region of study (usually a state) to basin characteristics measured for the stations.”⁵

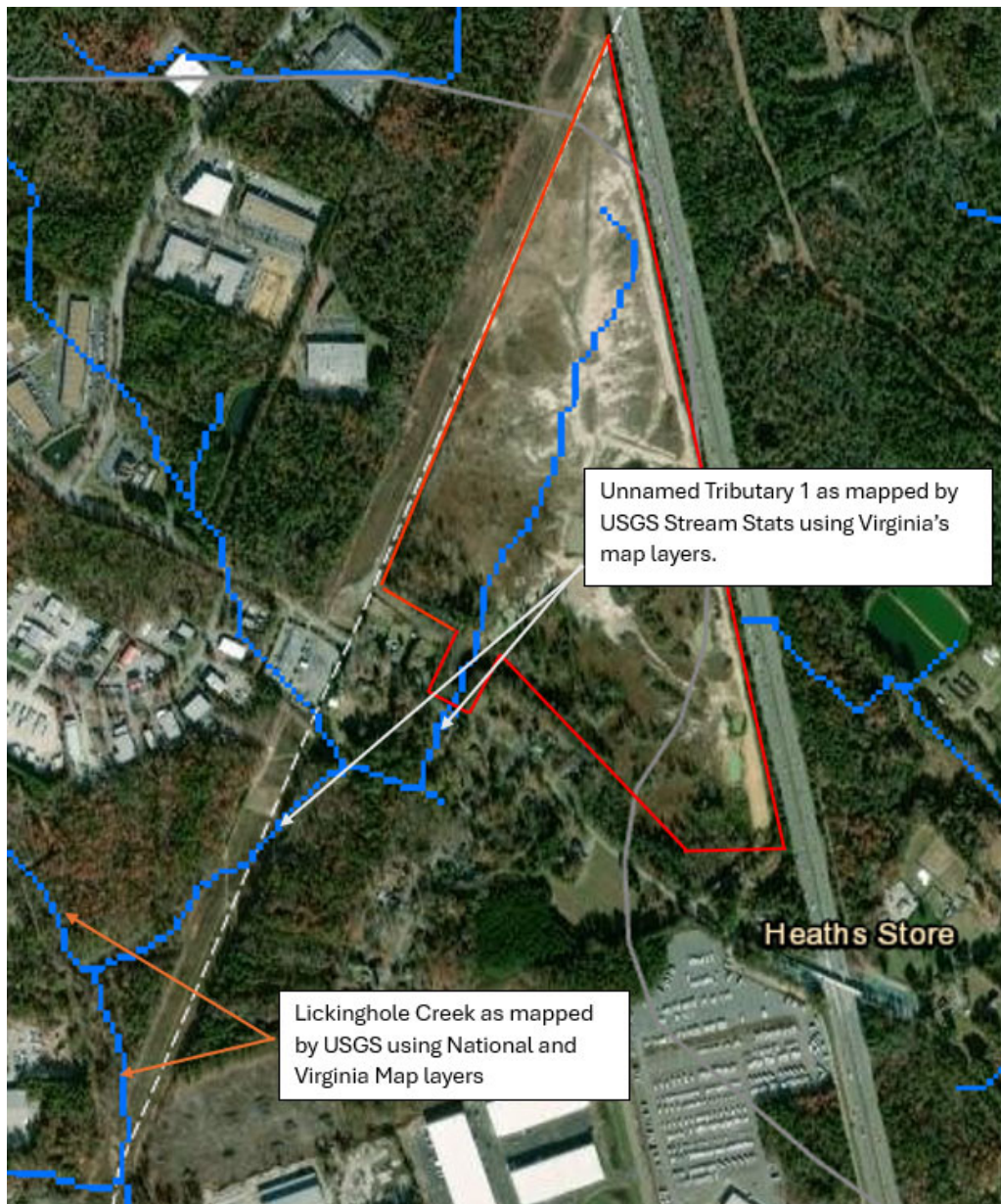


Figure 7 – USGS StreamStats with a base map consisting of an aerial photograph, and depicting the national and Virginia stream layers. A red line depicts the approximate border of the Site and arrowed text boxes identify the tributaries mapped by StreamStats. The red lines and arrowed text boxes are the only additions to the StreamStats data depicted in the image.

⁵ <https://www.usgs.gov/streamstats/streamstats-fundamentals>

68. Water from Wetland A flows through a confined stream channel as it crosses and then leaves the Site. From there, it flows through a confined stream channel, through a culvert under Ashcake Road, and then into Unnamed Tributary 1. Wetland A abuts and physically touches Unnamed Tributary 1, which is a channel containing water that flows through portions of Wetland A, flows from the Site through a culvert beneath Ashcake Road, and in turn connects, flows to, and is a tributary to Lickinghole Creek.

69. The characteristics of a stream channel—as that channel appears in remote sensing data and as it appears in the field—provide information as to the frequency and duration of flow within that channel. Unnamed Tributary 1 is a stream channel with characteristics demonstrating that, prior to Defendants’ unpermitted activities upstream, contained flow perennially or at least seasonally.

70. The remote sensing data supports that conclusion. Among other things, Unnamed Tributary 1 appears on the USGS StreamStats online mapping application with the national and Virginia stream layers displayed (Figure 7), the USGS’s National Map with the “3DEP Elevation – Hillshade” data layer displayed (Figure 6), and the digital elevation model (Figure 5).

71. EPA personnel observed and photographed Unnamed Tributary 1 during the 2021 Inspection. Where the channel flows under Ashcake Road, EPA personnel observed and photographed Unnamed Tributary 1 flowing from the Site through an approximately 16-inch diameter, metal culvert pipe under Ashcake Road located at approximately 37° 44’ 23.4599” N, 77° 27’ 36.5939” W. EPA personnel observed that Unnamed Tributary 1 had an Ordinary High-Water Mark (“OHWM”) and bed and banks. The stream channel had a wetted width of 29 inches and a bankfull width of 54 inches with a stable rocky bed. *See* Photograph 3 and Photograph 4. These characteristics are consistent with the regular presence of flow and more

than in direct response to precipitation and, thus, that Unnamed Tributary 1 was a perennial stream at the time Defendants filled Wetland A.



Photograph 3: EPA 2021 inspection photo (DSCN2574) taken on April 12, 2021, showing inlet of culvert under Ashcake Road flowing from the Site; looking northeast.



Photograph 4: EPA 2021 inspection photo (DSCN2573) taken on April 12, 2021, showing outlet of culvert under Ashcake Road flowing from the Site; looking southwest.

72. An EPA inspector observed and photographed two reaches of Unnamed Tributary 1 downstream from the Site on April 25, 2024. The first location was immediately downstream (to the southwest) of Ashcake Road from the Site and the second location was approximately 400 feet to the southwest of Ashcake Road. In both locations, the EPA inspector observed flow in Unnamed Tributary 1. The inspector observed at both locations that Unnamed Tributary 1 had a well-defined channel with bed and banks and an OHWM. The inspector also identified aquatic insects (benthic macroinvertebrates) at both locations that require water flow for a portion of their lifecycle. Both locations also had an absence of rooted vegetation within the channel. All of these channel characteristics are consistent with the regular presence of flow, more than in direct response to precipitation, and, thus, Unnamed Tributary 1 was a perennial stream at the time Defendants filled Wetland A.

73. In addition, EPA inspectors and government consultants evaluated the flow of Unnamed Tributary 1 directly across—i.e., less than 50 meters from—the Site, on the downstream side of Ashcake Road, using the North Carolina Division of Water Quality Methodology for Identification of Intermittent and Perennial Streams and their Origins, and determined that Unnamed Tributary 1 possesses features consistent with perennial (year-round) flow.

74. Unnamed Tributary 1 connects to Lickinghole Creek. Lickinghole Creek is a named stream with an incised channel containing flow perennially or at least seasonally and is depicted in StreamStats (Figure 7), the USGS's National Map with the "3DEP Elevation – Hillshade" data layer displayed (Figure 6), and the digital elevation map (Figure 5). Lickinghole Creek consistently appears as a geographic feature on USGS topographic maps from 1895, 1938, and 1963, and more recent topographic maps including 2016, 2019, and 2022.

75. Lickinghole Creek connects to Stony Run. Stony Run is a named stream containing flow perennially or year-round. It is depicted in StreamStats (Figure 7). Stony Run, from its confluence with Lickinghole Creek to its confluence with the Chickahominy River, was first identified by Virginia as impaired for recreational use in 2004, and EPA approved Virginia's total maximum daily load (TMDL) for bacteria in Stony Run in 2012.

76. Stony Run connects to the Chickahominy River. The Chickahominy River is named after the Chickahominy Tribe, a Native American tribe that had settled along the river when English colonists arrived in 1607. The Chickahominy River flows year-round at its confluence with Stony Run, and downstream portions of the Chickahominy River are subject to the ebb and flow of the tide. The Chickahominy River is a traditional navigable water.

77. Wetland A is a wetland that physically touches and abuts, and therefore has a continuous surface connection to, Unnamed Tributary 1.⁶ Unnamed Tributary 1 is or was, at the time Defendants filled Wetland A, a perennial stream and therefore a relatively permanent water that connects through other perennial tributaries to the Chickahominy River, a traditional navigable water. Alternatively, Wetland A is a wetland with an unimpaired, physical surface connection, and therefore has a continuous surface connection, by way of Unnamed Tributary 1, to Lickinghole Creek, a perennial stream and therefore a relatively permanent water that connects

⁶ See, e.g., *United States v. Mlaskoch*, No. 10-cv-2669, 2014 WL 1281523, at *17 (D. Minn. Mar. 31, 2014) (“Because the affected wetlands abutted these tributaries, jurisdiction under the CWA is proper.”); *United States v. Donovan*, No. 96-484, 2010 WL 3000058, at *4 (D. Del. July 23, 2010) (“A continuous surface connection exists when a wetland physically abuts another regulated body of water.”) (citation to *Rapanos* plurality omitted), report and recommendation adopted, 2010 WL 3614647 (D. Del. Sept. 10, 2010), *aff'd*, 661 F.3d 174 (3d Cir. 2011); *United States v. Brace*, No. 1:17-cv-00006, 2019 WL 3778394, at *24 (W.D. Pa. Aug. 12, 2019) (a “continuous surface connection” “may also occur when a wetland physically abuts another regulated body of water”) (quoting *Donovan*, *supra*; cleaned up), *aff'd on other grounds*, 1 F.4th 137 (3d Cir. 2021); *United States v. Bedford*, No. 2:07-cv-491, 2009 WL 1491224, at *12 (E.D. Va. May 22, 2009) (holding that “there is a continuous surface connection between the wetlands on the Bedford Site and the Southern Tributary” because “the wetlands are adjacent to, contiguous with, directly abut, and drain into the Southern Tributary”).

to the perennial Stony Run, which connects to the Chickahominy River, a traditional navigable water.

Unauthorized Discharges of Pollutants at the Site

COUNT I – VIOLATION OF THE CLEAN WATER ACT

78. The United States re-alleges Paragraphs 1 through 77 and incorporates those allegations by reference.

79. Each of the Defendants is a “person” within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

80. Wetland A is a “water of the United States” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and/or was so at the time Defendants filled Wetland A.

81. Through the activities described in this Complaint, Defendants and/or persons acting on their behalf caused dredged and/or fill material to be discharged into Wetland A. Defendants’ discharges began in or around early 2019 and continued through at least August 2021.

82. The dredged or fill material that Defendants caused to be discharged includes, *inter alia*, dredged spoil, rock, sand, and/or cellar dirt, all of which are “pollutants” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

83. Defendants and/or persons acting on their behalf used mechanized land-clearing and earthmoving equipment to cause the discharges. These types of equipment are “point source[s]” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

84. Defendants did not obtain a permit from the Corps for the discharges of dredged and/or fill material to waters of the United States, as required by CWA Sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344. Defendants were not authorized to discharge dredged and/or fill material to waters of the United States at the Site.

85. Defendants owned and/or otherwise controlled the property on which each unauthorized discharge of dredged and/or fill material to the waters of the United States occurred.

86. Defendants planned, conducted, directed, contracted for, supervised, and/or otherwise controlled and/or participated in the unauthorized activities at issue on the Site.

87. Defendants' activities at the Site resulted in the filling of Wetland A, which constitutes a water of the United States.

88. By engaging in unauthorized discharges of dredged and/or fill material to Wetland A, Defendants have violated and continue to violate CWA Section 301(a), 33 U.S.C. § 1311(a).

89. Each day that such dredged or fill material remains in place constitutes a separate violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

90. Under CWA Sections 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d), Defendants are subject to injunctive relief and civil penalties for violating CWA Section 301(a), 33 U.S.C. § 1311(a).

91. Unless enjoined, Defendants are likely to continue to allow dredged and/or fill material to remain in waters of the United States at the Site in violation of CWA Section 301, 33 U.S.C. § 1311.

PRAYER FOR RELIEF

The United States respectfully requests that this Court order the following relief:

1. That Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants to waters of the United States, except in compliance with the CWA;
2. That Defendants be enjoined to undertake measures, at their own expense and at the direction of EPA, to completely restore the Site and conduct mitigation for irreversible

environmental impacts and/or temporal loss of aquatic resources;

3. That Defendants be assessed a civil penalty under CWA Section 309(d), 33 U.S.C. § 1319(d), for each day that Defendants have been in violation of CWA Section 301(a), 33 U.S.C. § 1311(a);

4. That the United States be awarded costs and disbursements, including expert witness fees, incurred in this action; and

5. That this Court grant the United States such other relief as the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, I served the foregoing Amended Complaint on the following counsel for Defendants via ECF:

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