DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, NORFOLK DISTRICT
803 FRONT STREET
NORFOLK, VA 23510-1011

CENAO-WRR-E

18 February 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),[1] NAO-2008-01927, MFR 1 of 1[2]

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.[3] AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.[4] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[5] the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of "waters of the United States" found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as

[1] While the Supreme Court's decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.
[2] When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).
[3] 33 CFR 331.2.
[4] Regulatory Guidance Letter 05-02.
[5] USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

   a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

      i. (a)(7) Wetland - PFO-2 (~34.44 acres) – jurisdictional (Section 404)

      ii. PFO-6 (~0.18 acres) – non-jurisdictional

      iii. PFO-7 (~9.69 acres) – non-jurisdictional

      iv. (a)(5) RPW Tributary 1 (~2.75 acres, ~3,000 linear feet) – jurisdictional (Section 404)

      v. Ditch 1 (~0.6 acres, ~1,000 linear feet) – non-jurisdictional

      vi. Ditch 2 (~0.27 acres, ~1,000 linear feet) – non-jurisdictional

      vii. (a)(5) RPW Tributary 2 (~0.23 acres, ~380 linear feet) – jurisdictional (Section 404)

   These features are generally depicted in Figure 1 below.

Figure 1: Review area outlined in red (~66 acres) showing location of aquatic resources per the 2018 PJD previously approved by the Corps.

2. REFERENCES.

a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

d. *Sackett v. EPA*, 598 U.S. _, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is an approximately 66-acre portion of the Cavalier Commerce Park, located in the northeast quadrant of the intersection of Cavalier Boulevard and South Military Highway (center coordinates LAT 36.774757°, LONG -76.352673°), in Chesapeake, Virginia (tax map parcel # 0240000000611). See Figures 2 and 3.

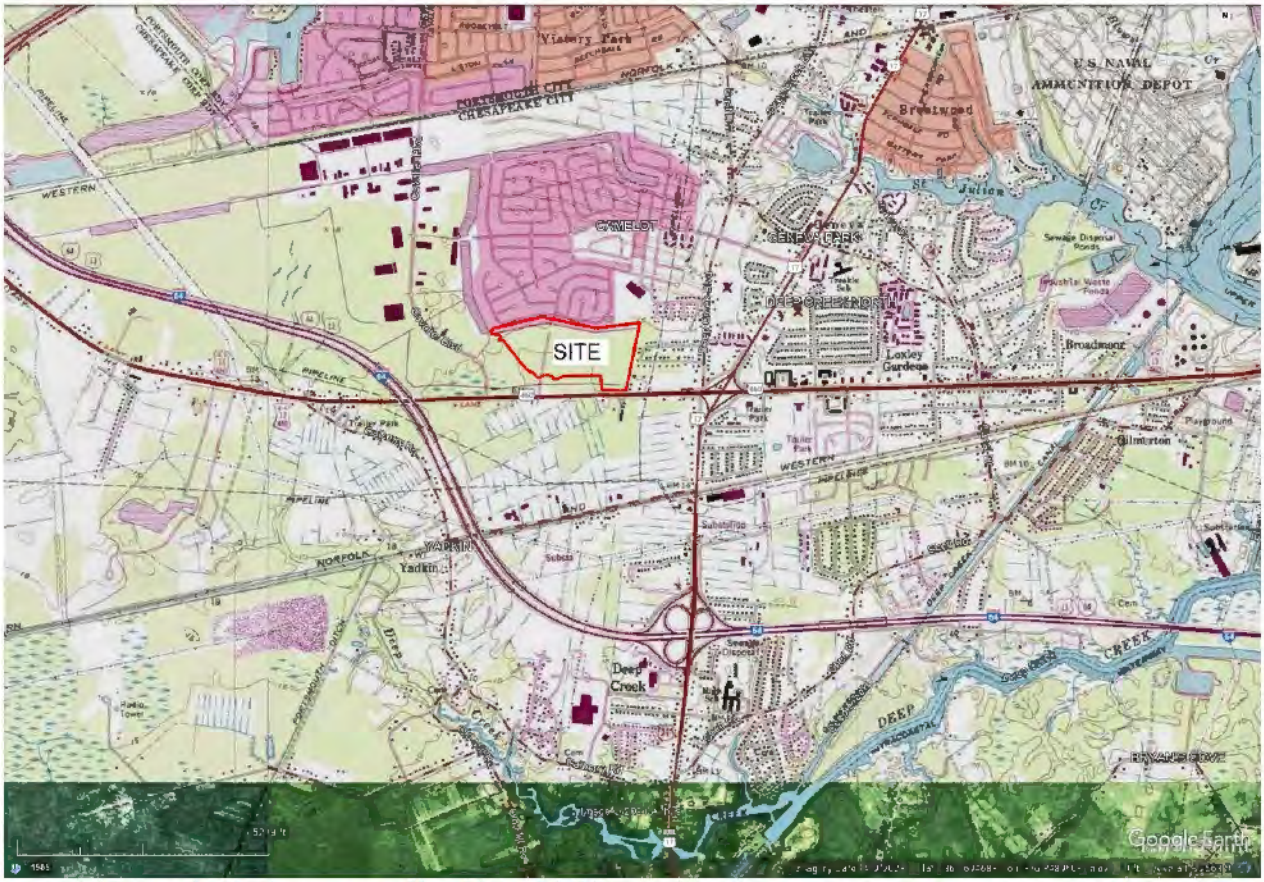


Figure 2: Review area outlined in red (~66 acres).

Figure 3: Review area outlined in red (~66 acres). Project site is largely surrounded by existing residential and commercial development and associated infrastructure.

For this AJD analysis we relied on the general location and extent of aquatic resources identified in the PJD approved by our office on 21 September 2018 (Figure 4).

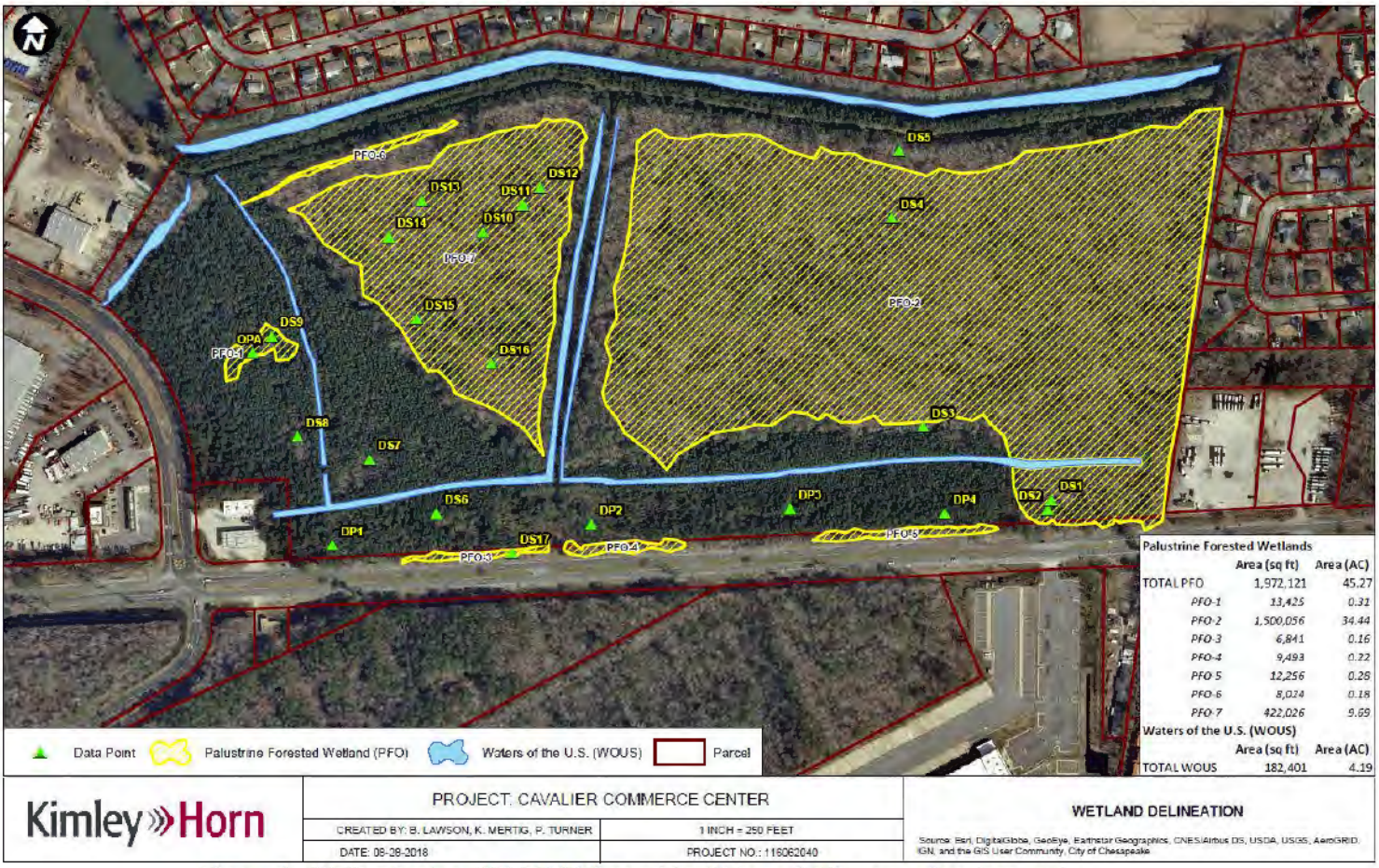


Figure 4: 21 September 2018 PJD figure identifying ~4.19 acres of waters and ~45.27 acres of PFO wetlands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[6]

St. Julian's Creek, a tidal tributary to the Southern Branch of the Elizabeth River. See Figures 2 and 5.

[6] This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

The following is the flowpath from onsite Wetland PFO-2 to St. Julian's Creek (Figure 5):

Wetland PFO-2 (within review area)

- Abuts Tributary 2 (RPW), both outside and within review area
- Connects to Tributary 1 through offsite culvert (~105 feet)
- West in Tributary 1 (RPW) - ~1,380 linear feet (~0.26 miles) – within review area
- North and East in manmade tributary (RPW) - ~8,083 linear feet (~1.5 miles) – outside of review area
- East in buried culverted connection - ~1,024 linear feet (~0.2 miles) – outside of review area
- East in headwaters of St. Julian Creek (RPW) - ~536 linear feet (~0.1 miles) – outside of review area
- East to tidal/TNW St. Julian Creek (outside of review area)

Total distance: 13,668 linear feet (~2.6 miles)

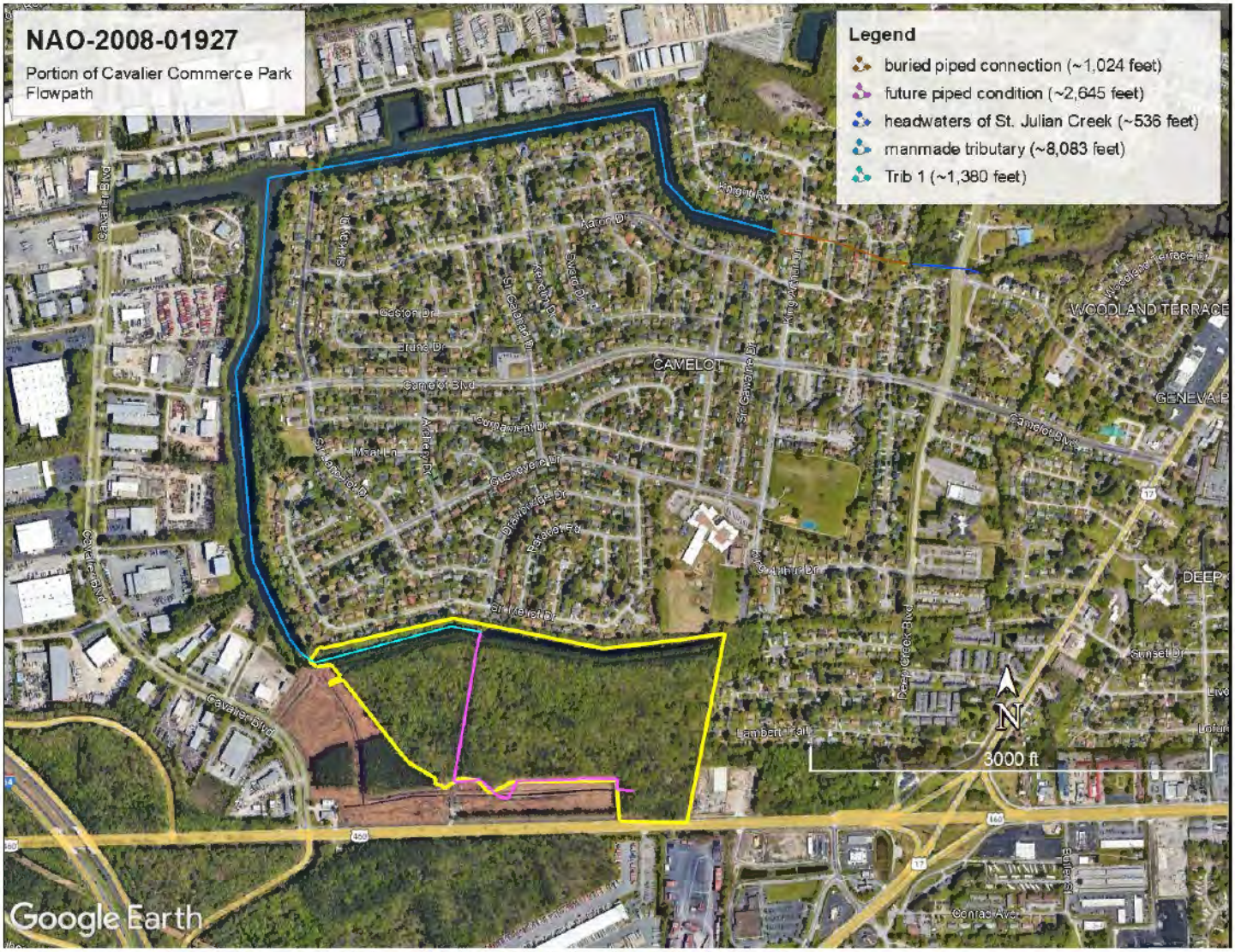


Figure 5: Flowpath from Wetland PFO-2 to St. Julian's Creek.

6. SECTION 10 JURISDICTIONAL WATERS[7]: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic

[7] 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[8] N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

   a. TNWs (a)(1): N/A

   b. Interstate Waters (a)(2): N/A

   c. Other Waters (a)(3): N/A

   d. Impoundments (a)(4): N/A

   e. Tributaries (a)(5):
      i. **Tributary 1 (~2.75 acres, ~3,000 linear feet)** is an RPW, manmade tributary to St. Julian Creek that was constructed circa 1982 by the City of Chesapeake. The City of Chesapeake stormwater planimetrics map (Data Source 9c) and the National Hydrography Dataset (Data Source 9d) both show Tributary 1 as part of a surface tributary to St. Julian Creek. This aquatic resource was excavated within an area mapped as hydric soils by the NRCS (Data Source 9e). It is mapped by the NWI as PUBFx (Palustrine, Unconsolidated Bottom, semi-permanently Flooded, Excavated) (Data Source 9f). OHWM field indicators observed for this feature include: bed and banks, multiple observed flow events (water present during all field visits and in every available aerial photograph), vegetation absent, line of water-stained litter on banks. Tributary 1 is part of a permanently inundated network that is connected to St. Julian Creek.

[8] This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

ii. **Tributary 2 (~0.23 acres, ~380 linear feet)** is an RPW, manmade tributary to St. Julian Creek that was constructed sometime prior to 1973 by the City of Chesapeake. The 1921 USGS topo maps the entire AJD review area within a larger wetland area between the Dismal Swamp and St. Julian Creek (Data Source 9b). This aquatic resource was excavated within an area mapped as hydric soils by the NRCS (Data Source 9e). It is mapped by the NWI as R4SBCx (Riverine, Intermittent, Streambed, Seasonally Flooded, Excavated) (Data Source 9f). OHWM field indicators observed for this feature include: bed and banks, multiple observed flow events (at least localized water present during all field visits and in all aerial photographs), vegetation absent, line of water-stained litter on banks.

Dr. Wes Hudson's (Corps, Norfolk District) 25 September 2018 MFTR in support of the 2018 PJD notes:

> "The ditches on the site are large (~10 ft wide) and deep (-8 ft deep) and have perennial flow regimes. Water was observed flowing during the June 26 field visit in most of the ditches. These ditches are draining this site and some of the surrounding area north to a large manmade canal that drains into the Elizabeth River (TNW)."

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

PFO-2 (~34.44 acres) abuts RPW Tributary 2.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified as "generally non-jurisdictional" in the preamble to the 1986 regulations (referred to as "preamble waters").[9] Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A

b. Describe aquatic resources and features within the review area identified as "generally not jurisdictional" in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A

[9] 51 FR 41217, November 13, 1986.

c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A

e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in "*SWANCC*," would have been jurisdictional based solely on the "Migratory Bird Rule." Include the size of the aquatic resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. N/A

f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

i. **PFO-6 (~0.18 acres)** is a depressional linear wetland that lacks a continuous surface connection to any other WOTUS. There is no evidence of an existing conveyance (swale, culvert, drain tile, or the like) around the entire perimeter of this wetland. LiDAR (Data Source 9g) depicts a clear high berm along the northern and southern boundaries of this feature separating it from Tributary 1 and other waters.

ii. **PFO-7 (~9.69 acres)** is a hydric mineral soil flats wetland that is completely encompassed by uplands. There is no evidence of any conveyance (swale, culvert, drain tile, or the like) around the entire perimeter of this wetland. As such, there is no continuous surface water connection to any water of the U.S., discrete or otherwise. LiDAR (Data Source 9g) depicts a clear high berm along the northern boundary of this feature separating it from Tributary 1.

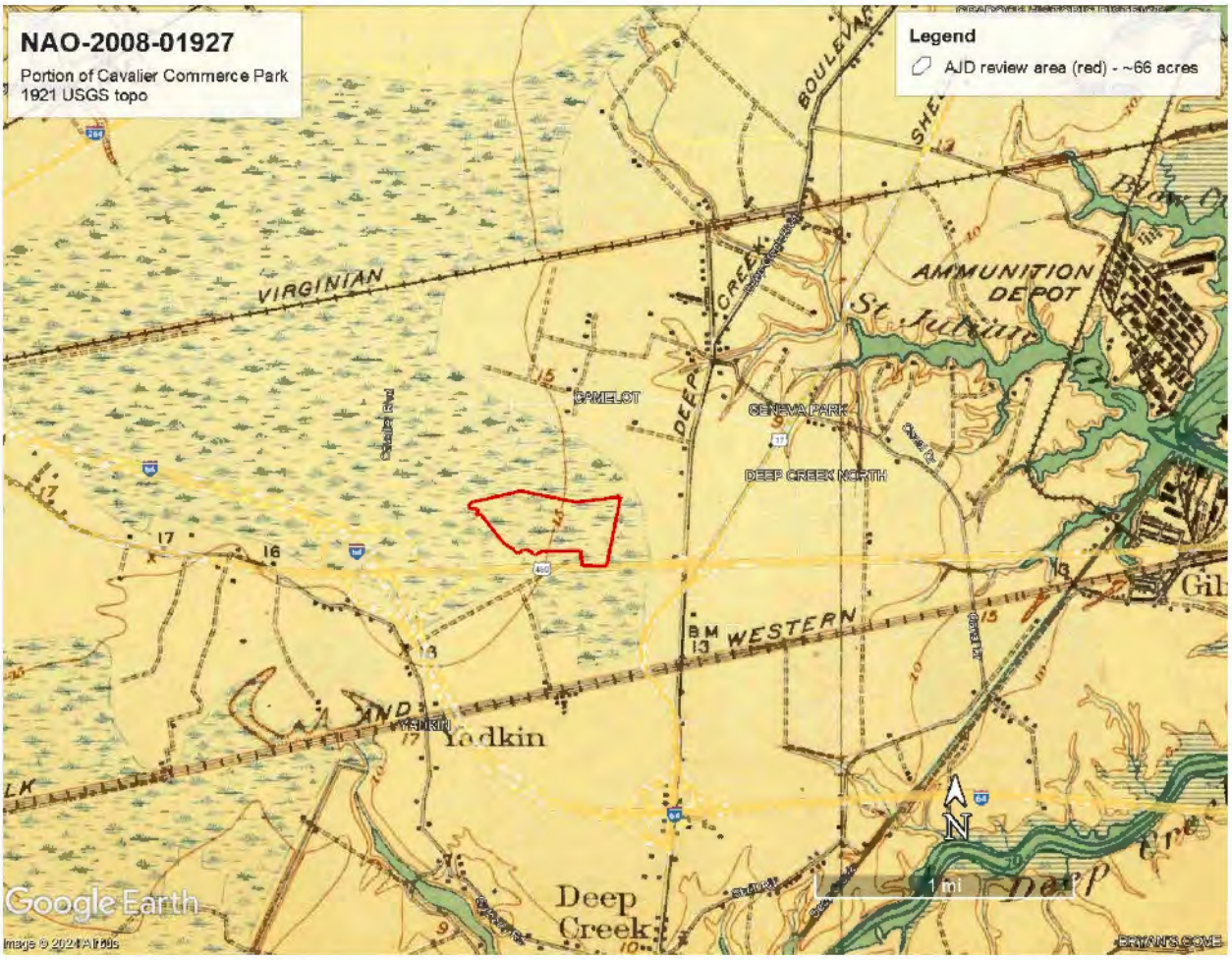
iii. **Ditch 1 (~0.6 acres, ~1,000 linear feet)** and **Ditch 2 (~0.27 acres, ~1,000 linear feet)** are manmade features created when material was excavated on either side of the central dirt access road to create an elevated earthen

roadbed. Although these features have OHWM field indicators, they both lack a continuous surface connection to other waters. There are no open or culverted connections on either end of these features.

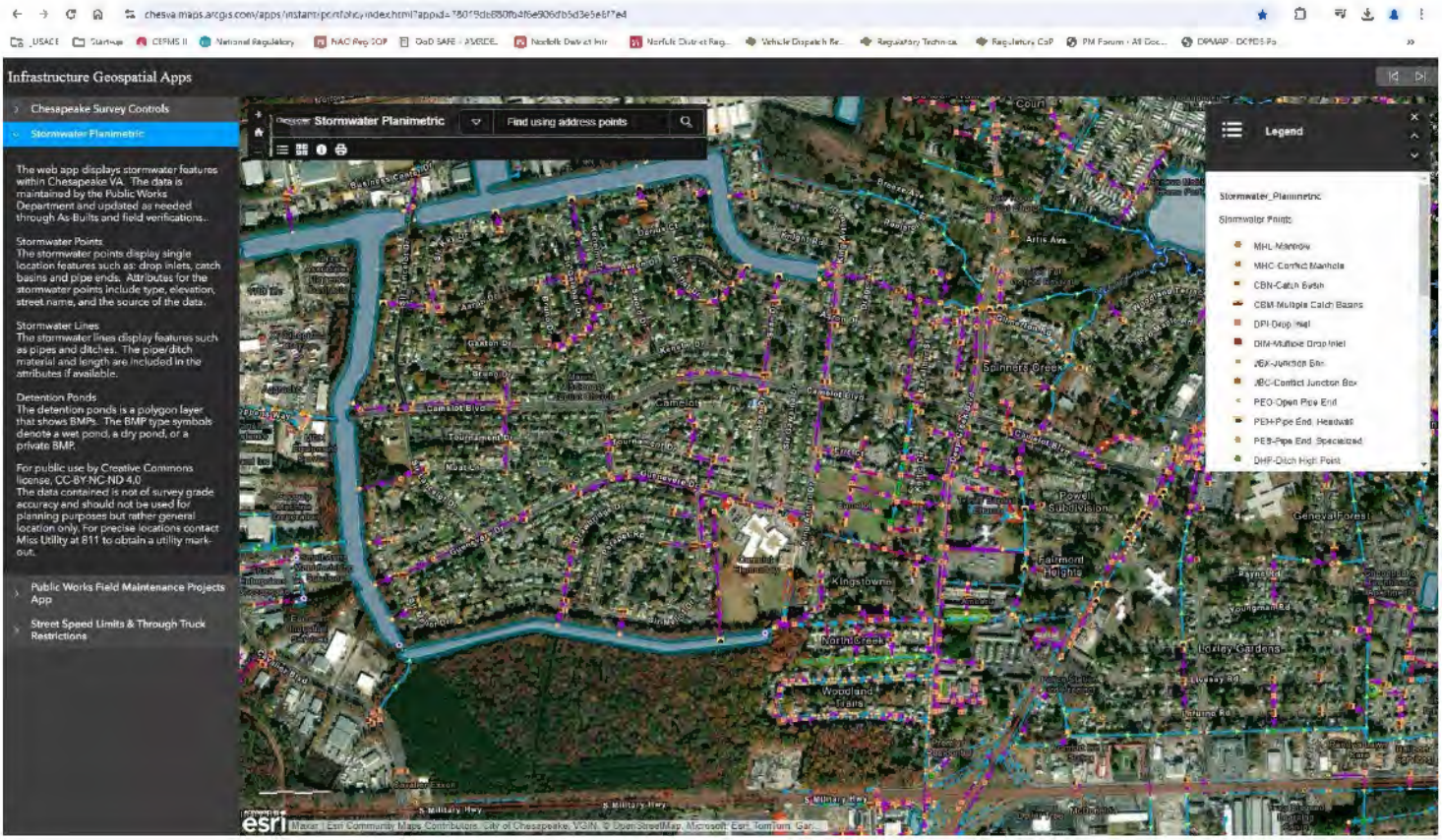
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

a. Field visits with project proponents on 28 Jan 2022 and 17 July 2024.

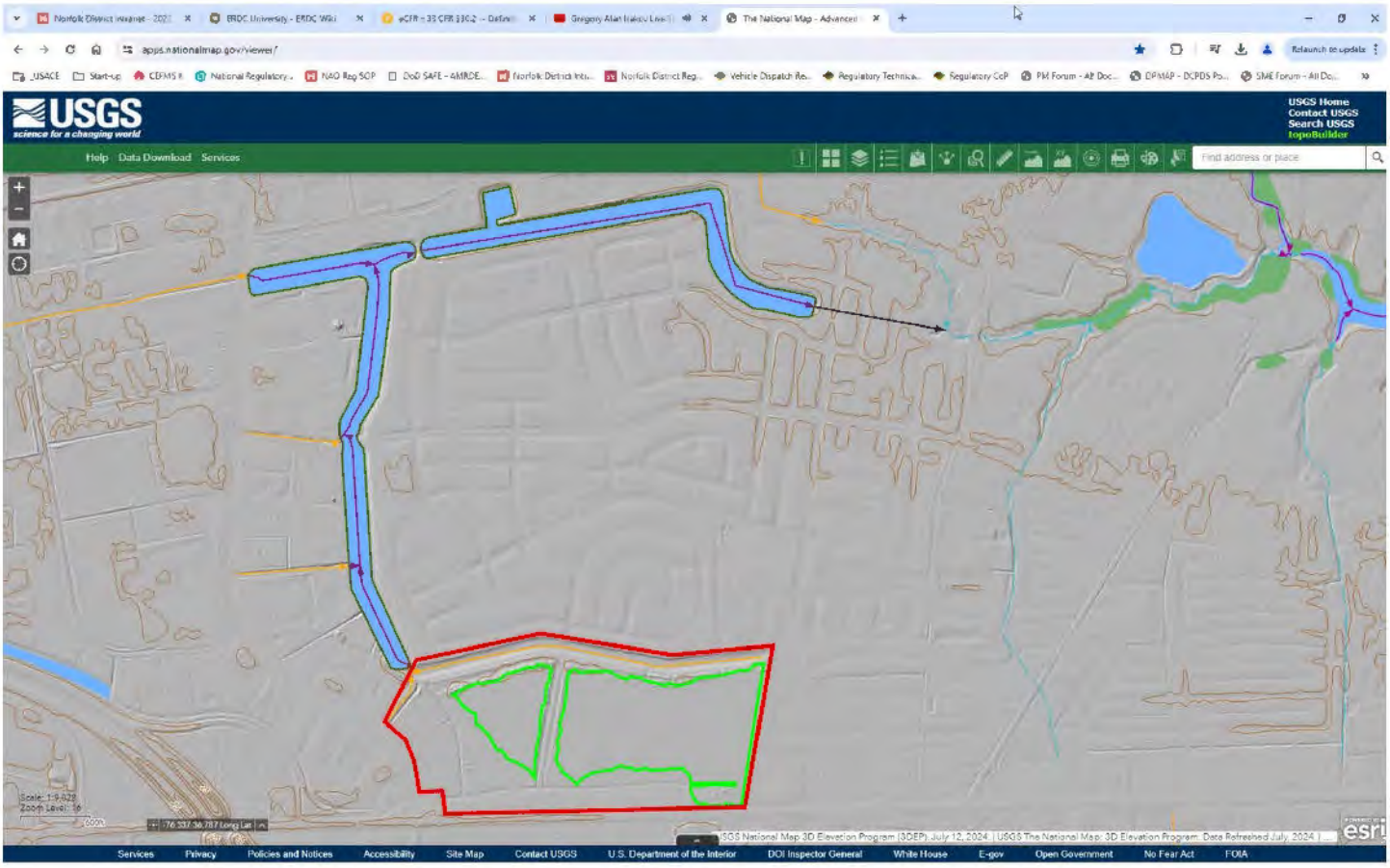
b. 1921 USGS topo. Accessed 24 October 2024.



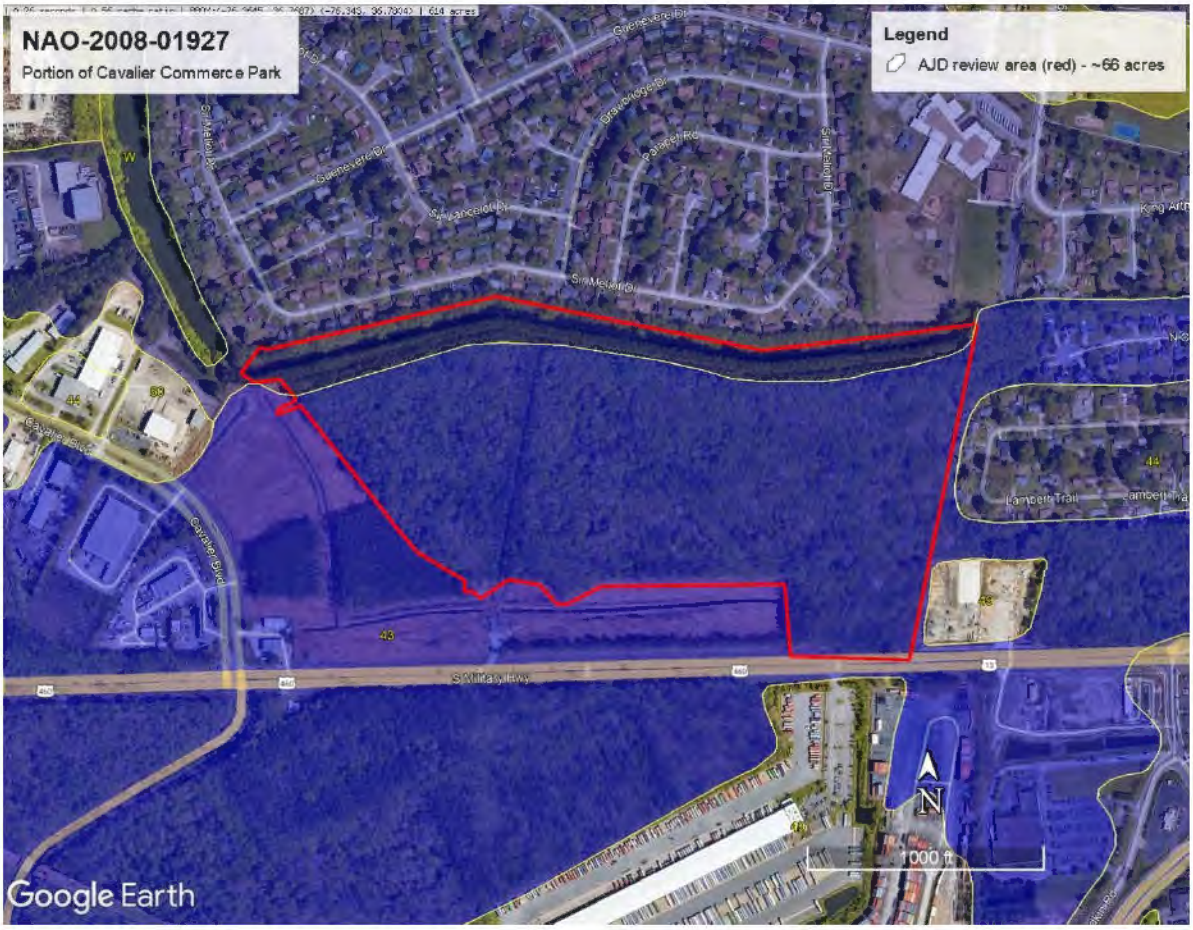
c. City of Chesapeake, VA – stormwater planimetrics figure showing continuous surface connection from Tributary 1 to St. Julian Creek. Accessed 25 Sept 2024.



d. The National Map, National Hydrography Dataset - showing continuous surface connection from Tributary 1 to St. Julian Creek. Accessed 01 August 2024.



e. NRCS soil survey. Accessed 24 October 2024. Hydric soils shaded in blue. Tomotley-Deloss complex, 0 to 1 percent slopes.



f. FWS National Wetland Inventory. Accessed 24 October 2024.

g. LiDAR, accessed 24 October 2024. Locations of 3 culverts for Tributary 2 outside of the AJD review area. Also note high spoil berms south of Tributary 1 and on the outer edges of Ditches 1 and 2. Potential connections via the breaks in the spoil berm in the northeastern portion of the review area were investigated during the 17 July 2024 field visit.

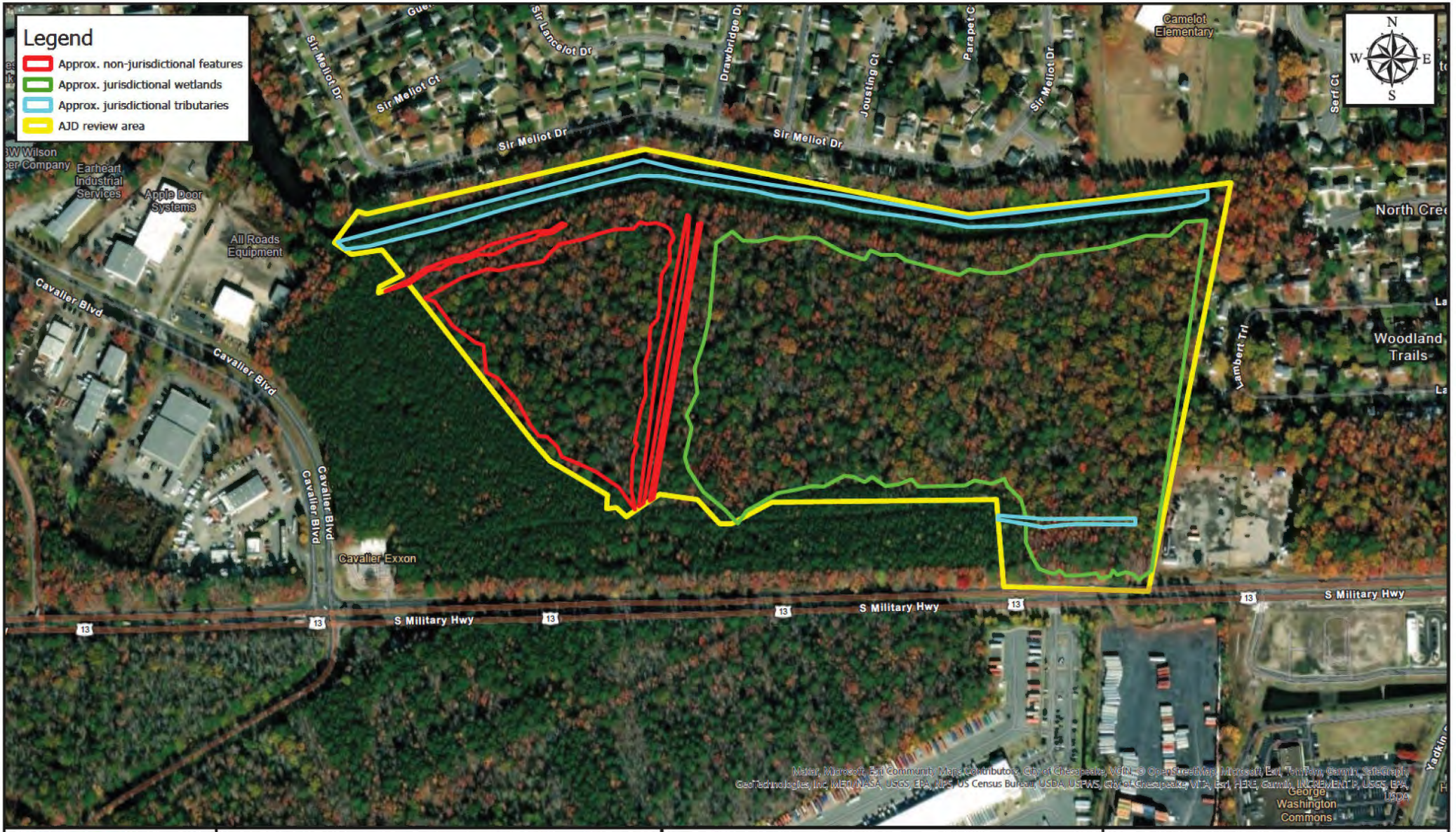
10. OTHER SUPPORTING INFORMATION.

a. MEMORANDUM ON SAS-2001-13740

b. MEMORANDUM ON NWP-2023-602

c. This MFR and draft AJD letter were coordinated with the EPA on 28 January 2025.

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



NAO-2008-01927 - Cavalier Commerce Center

0 0.05 0.1 0.2
mi

Map Center: 76.354275°W 36.77398°N

Map Created by: D. Knepper

Date: 2/18/2025

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere