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. 3:23-cv-763

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

Defendants used mechanized equipment to discharge fill material into approximately 21 acres of wetlands in Hanover County, Virginia. The Clean Water Act ("CWA" or "the Act") prohibits (1) any person from (2) discharging pollutants, including fill material, (3) from a point source (4) to "waters of the United States," (5) without a permit. 33 U.S.C. § 1311; *see Potomac Riverkeeper, Inc. v. Nat'l Cap. Skeet & Trap Club, Inc.*, 388 F. Supp. 2d 582, 585 (D. Md. 2005). The United States' Complaint alleges facts showing each of those elements.

Defendants' motion to dismiss the Complaint misapprehends the law and the facts the United States alleges. Defendants contend that the wetlands they unlawfully filled are not "waters of the United States" because, contrary to the United States' allegations, the wetlands do not have a continuous surface connection to tributaries covered by the CWA. But they argue that the purported absence of waters falling within CWA *regulatory* jurisdiction presents a question of this Court's *subject matter* jurisdiction over the United States' claim. That is incorrect. This Court has several bases for subject matter jurisdiction over this enforcement action and jurisdiction to assess civil penalties under the CWA. *See* 28 U.S.C. §§ 1331, 1345, 1355; 33 U.S.C. § 1319(d). Defendants' argument speaks to whether the United States has stated—and eventually can prove—its claim, not to this Court's power to hear the claim in the first place. Defendants' Rule 12(b)(1) motion should therefore be denied.

Defendants' Rule 12(b)(6) motion is also unavailing. Defendants dispute the sufficiency of the United States' allegations, not by taking the alleged facts as true, but by offering their own interpretation of maps and other resources cited in the Complaint. Defendants are not, however, permitted to dispute factual allegations in a Rule 12(b)(6) motion. Rather, the Court must take the well-pleaded facts as true and draw all reasonable inferences from those facts in the United

States' favor. The Complaint alleges that the filled wetlands abut tributaries that the United States has determined are covered by the CWA, as informed by those maps and resources and EPA's thorough inspection of the Site. That is enough to overcome a 12(b)(6) motion. But even if Defendants' arguments were permissible at this stage, Defendants' factual analysis is flawed. Indeed, the screenshots from a government website that they include in their brief misrepresent the data due to user error. And EPA verified the presence of waters of the United States through its site inspection. Of course, Defendants are free to challenge the factual allegations in the Complaint, but the appropriate time to do so is on motions for summary judgment or at trial. The United States' Complaint provides the necessary short and plain statement of its CWA claim and adequately alleges facts which, taken as true, show its entitlement to relief. Defendants' Rule 12(b)(6) motion should be denied.

STANDARD OF REVIEW

A Rule 12(b)(1) motion challenging the court's subject matter jurisdiction must assert "that the district court has no authority or competence to hear and decide the case before it." 5B Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 1350 (4th ed., West 2024). "Such a challenge can be facial, asserting that the facts as pled fail to establish jurisdiction, or factual, disputing the pleadings themselves and arguing that other facts demonstrate that no jurisdiction exists." *Moschetti v. Off. of the Inspector Gen.*, No. 3:22-cv-24-HEH, 2022 WL 3329926, at *1 (E.D. Va. Aug. 11, 2022) (citing *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017)). Courts assume all factual allegations in a complaint are true at the Rule 12 stage, but "if the factual basis for jurisdiction is challenged, the plaintiff has the burden of proving subject matter jurisdiction." *United States v. Sea Bay Dev. Corp.*, No. 2:06-cv-624, 2007 WL 1169188, at *2 (E.D. Va. Apr.

18, 2007) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)).

As the plaintiff, the United States is not subject to the well-pleaded complaint rule and must only show its claim is justiciable. *See United States v. City of Arcata*, 629 F.3d 986, 990 (9th Cir. 2010) (finding well-pleaded complaint rule "poses no bar to federal jurisdiction" where the United States is a plaintiff) (citing 28 U.S.C. § 1345). To establish federal question jurisdiction, a plaintiff must generally show "that he or she has alleged a claim for relief arising under federal law and that the claim is not frivolous." 5B Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 1350 (4th ed., West 2024); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Dismissal should be granted 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Mowery v. Nat'l Geospatial-Intel. Agency*, 42 F.4th 428, 434 (4th Cir. 2022) (quoting *Balfour Beatty Infrastructure, Inc. v. Mayor of Balt.*, 855 F.3d 247, 251 (4th Cir. 2017)). "Only when a claim asserted under federal law is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy' should the complaint be dismissed for lack of jurisdiction." *PEM Entities LLC v. County of Franklin*, 57 F.4th 178, 184 (4th Cir. 2023) (quoting *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 666 (1974)).

A Rule 12(b)(6) motion, by contrast, "test[s] the sufficiency of a complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). It "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* (citation omitted). To survive a 12(b)(6) motion to dismiss, a "complaint need only 'give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'" *Moschetti*, 2022 WL 3329926, at *2 (quoting

Ray v. Roane, 948 F.3d 222, 226 (4th Cir. 2020)). "In considering such a motion, a plaintiff's well-pleaded allegations are taken as true, and the complaint is viewed in the light most favorable to the plaintiff." *Id.* at *2 (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). Thus, a Rule 12(b)(6) motion should be granted only "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards*, 178 F.3d at 244; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a defendant challenges subject matter jurisdiction under Rule 12(b)(1), this Court "may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Mowery*, 42 F.4th at 433 (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)); *see also Blitz v. Napolitano*, 700 F.3d 733, 736 n.3 (4th Cir. 2012) (considering declaration defendants relied on for Rule 12(b)(1) motion). In deciding a motion to dismiss under Rule 12(b)(6), a court "may consider attachments to a complaint or the motion to dismiss if 'integral to the complaint and authentic.'" *Leichling v. Honeywell Int'l, Inc.*, 842 F.3d 848, 851 (4th Cir. 2016) (quoting *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

BACKGROUND

I. Statutory and Regulatory Background

The Clean Water Act is Congress's comprehensive scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In support of that goal, 33 U.S.C. § 1311(a), prohibits any "person" from discharging any "pollutant" from a "point source" to waters of the United States, unless authorized by the CWA,

most often through a permit. *See* 33 U.S.C. § 1311(a), (e); *see also United States v. Deaton*, 332 F.3d 698, 704 (4th Cir. 2003). The U.S. Army Corps of Engineers ("Corps") or authorized states may issue permits to discharge dredged or fill material to waters of the United States under Section 404 of the CWA, 33 U.S.C. § 1344(a).

EPA can enforce the discharge prohibition in a civil action under 33 U.S.C. § 1319(b) seeking injunctive relief and civil penalties.. *See id.* § 1319(b), (d). The Act gives federal district courts subject matter jurisdiction to restrain such violations, require compliance, and impose civil penalties. *Id.* § 1319(b), (d). Under CWA Section 404, 33 U.S.C. § 1344, "each day the [fill] remains in the wetlands without a permit constitutes an additional day of violation." *Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993).

To establish a *prima facie* case that Defendants violated Sections 1311(a) and 1344, the United States must show that Defendants are (1) persons (2) who discharged a pollutant (3) from a point source (4) to waters of the United States (5) without authorization. *See United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009); *Deaton*, 332 F.3d at 704; *Potomac Riverkeeper*, 388 F. Supp. 2d at 585.

The Act defines "person" to include individuals and corporations. *See* 33 U.S.C. § 1362(5); *see United States v. Lambert*, 915 F. Supp. 797, 802-03 (S.D. W. Va. 1996).

The "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "pollutant" is, among other things, dredged spoil, rock, sand, and cellar dirt. *Id.* § 1362(6). Under the Act's implementing regulations, "pollutant" also includes "fill material," i.e., any material that has the effect of replacing portions of a water of the United States with dry land or of changing the bottom elevation of a water of the United States. *See* 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2.

A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term includes earthmoving equipment, such as bulldozers, excavators, and backhoes. *See, e.g.*, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987).

"Waters of the United States," in turn, has been defined by regulation and through a series of cases to include traditional navigable waters, relatively permanent tributaries of such waters, and certain wetlands adjacent to those waters. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 230.3(s) (1993); *Sackett v. EPA*, 598 U.S. 651, 678 (2023) (citing *Rapanos v. United States*, 547 U.S. 715, 755 (2006)).[1] "Wetlands" are "those 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(c)(1); *see also* 33 C.F.R. § 328.3(b) (2014).

As explained above, a person may discharge dredged or fill material to waters of the United States only if they obtain authorization from the Corps or an authorized state, 33 U.S.C. § 1344(a), or if the activity meets the requirements of 33 U.S.C. § 1344(f).

II. Factual Background

Defendants—Chameleon, LLC, and its sole owner, Gary Layne—own a 101.66-acre

[1] The amended regulations defining "waters of the United States"— 40 C.F.R. § 120.2(a) (2023); 33 C.F.R. § 328.3(a) (2023)—are currently enjoined in Virginia. *See West Virginia v. EPA*, 669 F. Supp. 3d 781, 789, 819 (D.N.D. 2023) (enjoining the 2023 rule as to Virginia and 23 other states). Because of this, EPA and the Corps are applying the "pre-2015" regulatory definition, consistent with the Supreme Court's decision in *Sackett*. *See* EPA, Pre-2015 Regulatory Regime (updated Mar. 18, 2024), https://www.epa.gov/wotus/pre-2015-regulatory-regime.

property ("the Site") located immediately west of Interstate 95 at 10426 Ashcake Road in Ashland, Virginia. Compl. ¶¶ 24, 26. Defendants purchased the property on or about October 17, 2018. *Id.* ¶ 26. Prior to 2019, the Site was forested and undeveloped. *Id.* ¶ 25.

In March and April 2019, the Virginia Department of Forestry and Hanover County Department of Public Works informed the Virginia Department of Environmental Quality ("VADEQ") of potential clearing and grubbing activities at the Site. *Id.* ¶ 49. VADEQ inspectors attempted to visit the Site, but Defendant Layne refused access. *Id.* ¶ 50. VADEQ eventually obtained a warrant from the local circuit court to inspect the Site. *Id.* ¶ 51. After an August 2019 inspection, VADEQ encouraged Defendant Layne to stop any further land disturbances, but Defendants continued their unpermitted activities throughout the fall. *Id.* ¶¶ 51-52. VADEQ issued a Notice of Violation on October 9, 2019. *Id.* ¶ 53.

VADEQ then informed the U.S. Army Corps of Engineers of Defendants' unpermitted activities. *Id.* ¶ 54. Defendants did not respond to two inquiries from the Corps about the unauthorized impacts. *Id*. The Corps then referred the matter to EPA. *Id.* ¶ 55. After Defendants repeatedly refused to provide EPA information or access to the Site, *id.* ¶¶ 56-61, the United States obtained an administrative warrant from this Court to inspect the Site, *id.* ¶ 62.

EPA conducted an inspection from April 12, 2021, through April 14, 2021. Compl. ¶ 63. As explained in the attached declaration by EPA Inspector Katelyn Almeter, during the three-day inspection, EPA inspectors walked the Site and the unnamed tributaries (as far as possible) and collected evidence, including photographs, videos, GPS data, soil samples, flora and fauna observations, as well as stream and water table data. *See* Declaration of Katelyn Almeter ¶ 6. EPA also observed the four unnamed tributaries that the wetlands abut as described in the Complaint. *Id.* ¶ 6. Based in large part on that inspection, EPA concluded that Defendants had

disturbed at least 21 acres of wetlands that are waters of the United States. *See* Compl. ¶ 28-29, 64. Those 21 acres of wetlands are in three separate areas of the Site, which the Complaint and Exhibit 1, ECF No. 5-1, identify as Wetlands A, B, and C.

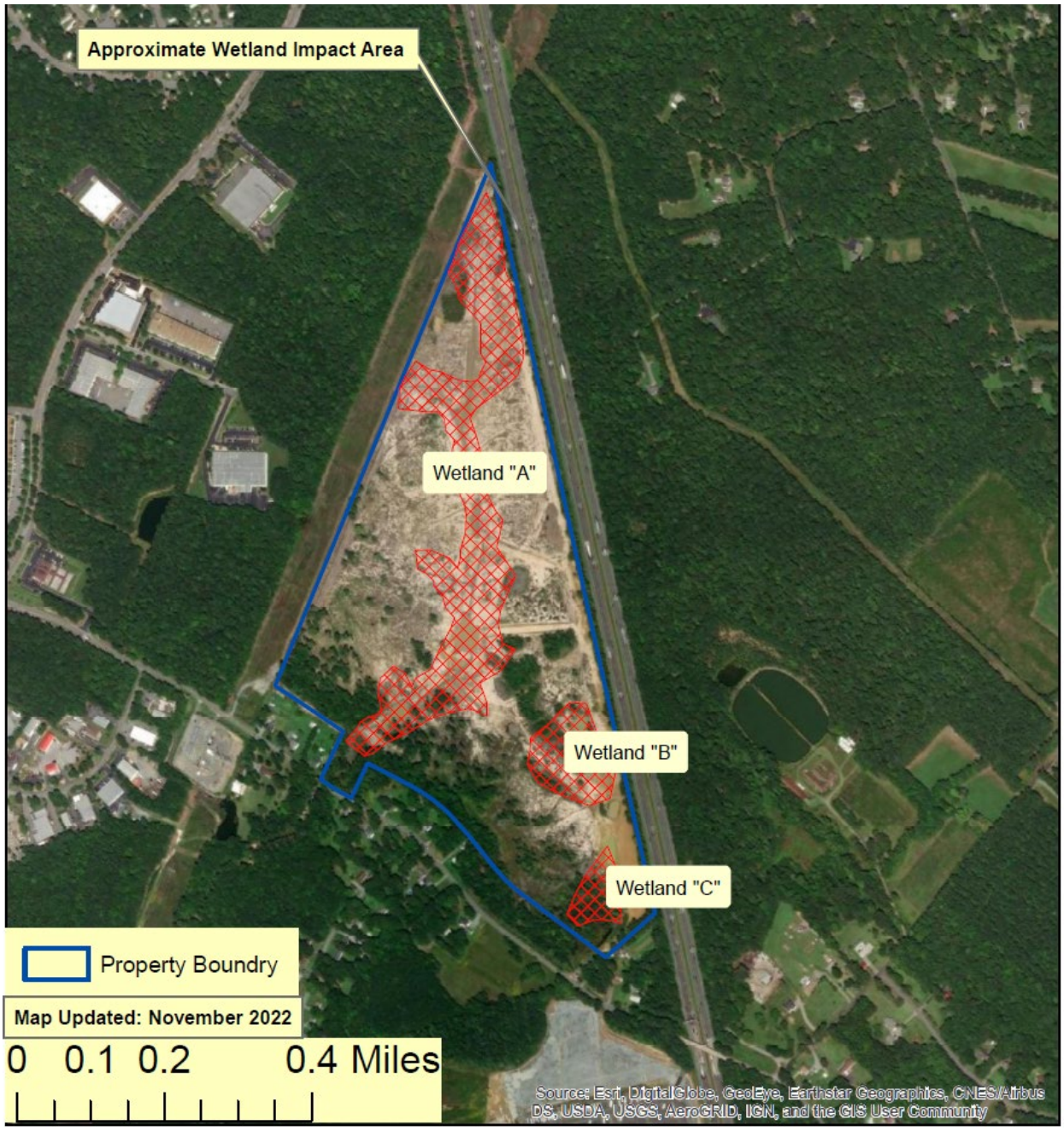

Figure 1, Compl. Ex. 1, ECF No. 5-1.

Wetland A stretches north to south on the Site and is the largest impacted area. The Complaint alleges that this wetland is adjacent to, abuts, and has a continuous surface connection

to an unnamed tributary within the Site, which is a relatively permanent tributary to Lickinghole Creek. Compl. ¶¶ 30, 31. The Complaint also alleges that both the unnamed tributary that Wetland A abuts and Lickinghole Creek "are mapped by the United States Geological Survey ("USGS") in its StreamStats online mapping application and visible in the hillshade elevation data," citing websites where such information is publicly available. *See id.* ¶ 32 & n.2 (citing https://streamstats.usgs.gov/ss/ and https://apps.nationalmap.gov/viewer/).[2] Finally, the Complaint alleges that Lickinghole Creek is a relatively permanent tributary of Stony Run, which is a relatively permanent tributary of the Chickahominy River, a traditional navigable water. *Id.* ¶ 33.

Wetland B, in the eastern part of the Site, "is adjacent to, abuts, and has a continuous surface connection to a relatively permanent unnamed tributary to Campbell Creek on the eastern edge of the Site." *Id.* ¶ 34. The Complaint alleges that the unnamed tributary flows east under I-95 and is a relatively permanent tributary of Campbell Creek, and—like Lickinghole Creek and the unnamed tributary that Wetland A abuts—is visible on StreamStats and in USGS hillshade elevation data. *Id.* ¶¶ 35-36. The Complaint also alleges that Campbell Creek is a relatively permanent tributary of Machumps Creek, which in turn is a relatively permanent tributary to the Pamunkey River, a traditional navigable water. *Id.* ¶ 36.

Wetland C, in the southern part of the Site, sits in a drainage area of two relatively permanent unnamed tributaries to waters of the United States. *Id.* ¶ 37. The Complaint alleges that Wetland C "extends northwest to Ashcake Road and is adjacent to and has a continuous surface connection to a relatively permanent unnamed tributary to the unnamed tributary"

[2] "StreamStats" is a common shorthand for the USGS Streamflow Statistics and Spatial Analysis Tool for Water-Resources Applications.

connected to Wetland A, which, as explained above, is also relatively permanent and eventually flows to the Chickahominy River. *Id.* ¶¶ 38-39. The Complaint alleges that Wetland C "is also adjacent to, abuts, and has a continuous surface connection to" a second unnamed relatively permanent tributary: one that also connects to Campbell Creek and eventually flows to the Pamunkey River. *Id.* ¶¶ 40, 42. The Complaint also alleges that this second unnamed tributary is visible in USGS hillshade elevation data. *Id.* ¶ 41.

Consistent with its typical practice, EPA consulted "desktop" resources both before and after the on-site investigation. *See* Almeter Decl. ¶¶ 7, 27. Those included sources described in the Complaint, such as the USGS hillshade data. Hillshade data uses high-resolution elevation data to display a bare-earth picture of ground elevation variations, shaded to provide a clearer picture of an area's topography. *See id.* ¶¶ 25-27. EPA uses that data to identify the potential presence of waters of the United States because it shows where water is likely to regularly flow or pool. *See id.* ¶ 27. EPA also consulted StreamStats. *Id.* ¶¶ 14-17. StreamStats is an online application providing Geographic Information Systems ("GIS") "analytical tools that are useful for water-resources planning and management, and for engineering and design purposes" which "can be used to delineate drainage areas for user-selected sites on streams, and then get basin characteristics and estimates of flow statistics for the selected sites anywhere this functionality is available."[3] EPA consulted StreamStats and other tools before its inspection to assess whether waters of the United States had likely been impacted by Defendants' fill activity on the Site. *See* Almeter Decl. ¶ 7, 27. During the inspection, EPA inspectors observed unnamed tributaries in locations that were consistent with the digital stream depicted in StreamStats. *See id.* ¶¶ 16-17.

[3] USGS, *StreamStats* (last visited Mar. 26, 2024), https://www.usgs.gov/mission-areas/water-resources/science/streamstats-streamflow-statistics-and-spatial-analysis-tools?qt-science_center_objects=0#qt-science_center_objects.

Following the inspection, EPA concluded that waters of the United States had likely been impacted, based in part on StreamStats data, which, with the relevant data layers selected as shown in Figure 2 below, maps a channel and drainage basin that bisects the Site and connects to an unnamed tributary to Lickinghole Creek. *See id.* In Figure 2, the Site sits directly left of the two-lane highway, Interstate 95, and north of Ashcake Road.

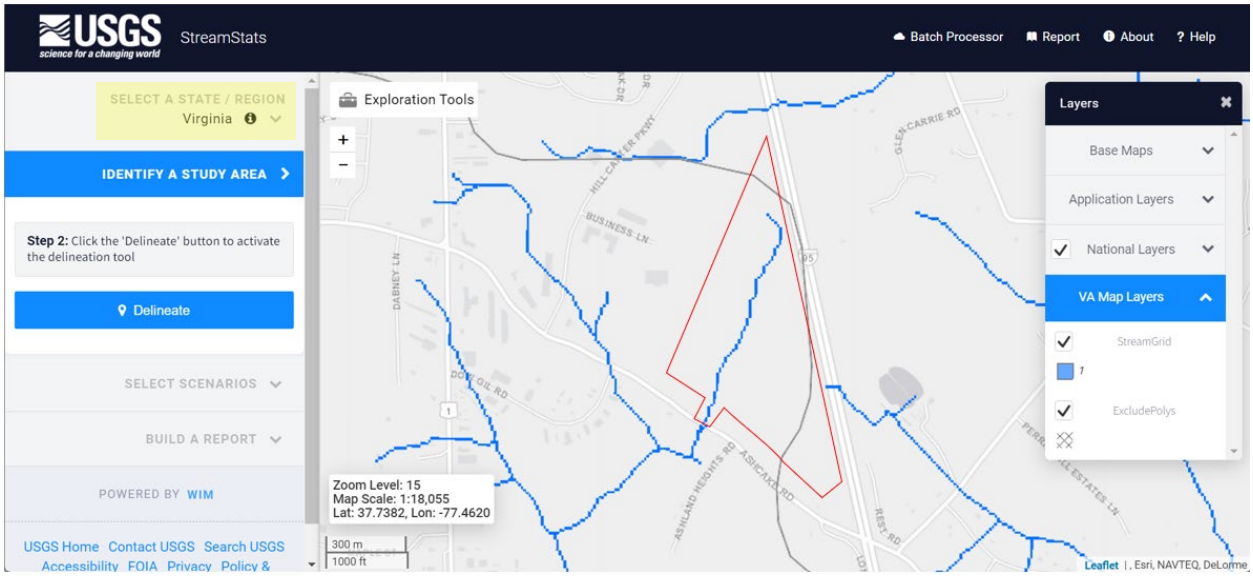

Figure 2, USGS StreamStats Screenshot (yellow highlighting and red outline added). *See* Almeter Decl. ¶ 16.

The USGS StreamStats data does not include all the tributaries EPA observed during its Site inspection but provides data supporting EPA's conclusions from the inspection. *See* Almeter Decl. ¶¶ 12, 16-17. These desktop resources also rely on data that predates Defendants' fill activities, thus providing pre-disturbance or baseline information about the Site's conditions. *See id.* ¶ 27.

In short, the Complaint alleges that each of the three impacted wetland areas abuts, is adjacent to, and has at least one continuous surface connection to a relatively permanent tributary that flows to a traditional navigable water and is therefore a water of the United States.

ARGUMENT

I. This Court has subject matter jurisdiction because the case arises under federal law, the United States is the plaintiff, and the CWA confers jurisdiction.

Defendants' motion confuses federal courts' subject matter jurisdiction with federal regulatory "jurisdiction" under the Clean Water Act. Defendants' argument—whether the CWA applies to the wetlands described in the Complaint—goes to the merits of the United States' claims, not this Court's subject matter jurisdiction. *See Sea Bay*, 2007 WL 1169188, at *5. Congress conferred jurisdiction on federal district courts to decide cases arising under federal laws, like the Clean Water Act, and where the United States is a plaintiff. *See* 28 U.S.C. §§ 1331, 1345, 1355. Indeed, in the Clean Water Act itself, Congress conferred jurisdiction on federal district courts to consider cases involving alleged violations of the Act. *See* 33 U.S.C. § 1319(b). Because federal statutes unambiguously vest this Court with subject matter jurisdiction over the Complaint, and because Defendants' motion is an attack on the merits of the government's claims, the Court must deny Defendants' motion to dismiss pursuant to Rule 12(b)(1).

Defendants' objections to the United States' CWA claim do not affect the bases for subject matter jurisdiction here. First, 28 U.S.C. § 1345 grants federal district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States[.]" *See also* 14 Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 3651 (4th ed., West 2024) ("No difficulties of subject matter jurisdiction are presented when the United States is the plaintiff in an action in the federal courts."). Of course, this case is a suit commenced by the United States. Second, 28 U.S.C. § 1331 grants the federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Thus, even if the United States were subject to the well-pleaded complaint rule, *but see City of Arcata*, 629 F.3d at 990, there can be no dispute that this case arises under the federal CWA. Third, 28 U.S.C. § 1355

grants federal district courts "original jurisdiction" over "any action or proceeding for the recovery or enforcement of any fine, penalty or forfeiture . . . incurred under any Act of Congress," such as the CWA civil penalty the United States seeks here. *See* Compl. ¶ 1, Prayer for Relief; *see* 33 U.S.C. § 1319(d). And fourth, the CWA itself authorizes EPA to sue in district court for "appropriate relief . . . for any violation" of 33 U.S.C. § 1311, including the violations we allege in the Complaint, and it grants district courts "jurisdiction to restrain such violation and to require compliance." 33 U.S.C. § 1319(b). This Court thus has subject matter jurisdiction to hear the United States' claim. *See Sea Bay*, 2007 WL 1169188, at *2-3.

Defendants do not contest any of these bases for jurisdiction. Other than one vague citation to 33 U.S.C. § 1319, the motion does not even cite these statutes. Instead, Defendants contend that the wetlands impacted by their unpermitted discharges are not "waters of the United States" under the Supreme Court's recent decision in *Sackett*, 598 U.S. 651. But stating that objection as a Rule 12(b)(1) argument confuses two distinct concepts: this Court's subject matter jurisdiction and the United States' federal regulatory jurisdiction. Whether the United States' regulatory jurisdiction extends to the wetlands impacted by Defendants' discharges is a necessary element of the CWA claim. By contrast, this Court's subject matter jurisdiction asks whether the Court has the power to hear that claim in the first place. *See Steel Co.*, 523 U.S. at 89 ("It is firmly established in our cases that the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[I]f the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad.").

In other words, although the presence of waters of the United States is often referred to as "jurisdictional," demonstration of this "jurisdictional element" "in an individual circumstance

does not affect 'a court's constitutional or statutory power to adjudicate a case.'" *United States v. Carr*, 271 F.3d 172, 178 (4th Cir. 2001) (citation omitted); *accord United States v. Krilich*, 209 F.3d 968, 972 (7th Cir. 2000).

This Court opined on this very issue in *Sea Bay*, 2007 WL 1169188, at *2. There, this Court denied a similar Rule 12(b)(1) motion, explaining that CWA regulatory "jurisdiction" (*i.e.*, the authority to regulate pollutant discharges to particular waters) is distinct from federal courts' subject matter jurisdiction. The Court analogized the CWA's definition of "navigable waters" to the inclusion of a threshold number of employees in the definition of "employer" under Title VII of the Civil Rights Act. *Id*. at *4-5. In doing so, the Court cited *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 516 (2006), which concluded that Title VII's 15-employee threshold "is an element of a plaintiff's claim for relief, not a jurisdictional issue." *See Sea Bay*, 2007 WL 1169188, at *5. The *Sea Bay* court, in turn, concluded that the same is true of the CWA definition of "waters of the United States," which "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id*. (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). "'[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'" *Sea Bay*, 2007 WL 1169188, at *5 (quoting *Arbaugh*, 546 U.S. at 516).

The *Sea Bay* decision is consistent with similar decisions from federal courts across the country. In *Krilich*, the Seventh Circuit explained that proof that a pollutant was discharged to "waters of the United States" is "merely an element of the United States' Clean Water Act case under" 33 U.S.C. § 1311, while "subject matter jurisdiction over this question involving federal law comes from 28 U.S.C. § 1331." 209 F.3d at 972. Likewise, the First Circuit in *United States v. Puerto Rico*, 721 F.2d 832, 839-40 (1st Cir. 1983), concluded that, in the CWA, Congress did

not "supplant 28 U.S.C. § 1345 as to water pollution control matters." Other courts have reached similar conclusions. *See, e.g.*, *United States v. Hartz Const. Co.*, No. 98 C 4785, 1999 WL 417388, *3 (N.D. Ill. June 15, 1999) (rejecting argument that the existence of "waters of the United States" implicated subject matter jurisdiction and finding such jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and 33 U.S.C. § 1319(b)); *United States v. Bd. of Trs. of Fla. Keys Cmty. Coll.*, 531 F. Supp. 267, 269 (S.D. Fla. 1981) (similar); *United States v. Thorson*, 219 F.R.D. 623, 625 (W.D. Wis. 2003) (similar).

Ignoring those precedents, Defendants rely on a single decision from the Eastern District of North Carolina, *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 808 & n.10 (E.D.N.C. 2014). The Court should disregard that decision as unpersuasive. Unlike *Sea Bay*, the *Cape Fear* court did not examine the distinction between regulatory jurisdiction and federal court jurisdiction; it simply said that although the defendant "casts its argument . . . as a failure to state a claim, the court examines it together with groundwater as a jurisdictional question pursuant to the CWA." *Id*. at 808 n.10. But even as the court dismissed plaintiffs' claims purportedly "for lack of subject matter jurisdiction under the CWA," it reasoned that the groundwater at issue "does not fall within the meaning of the" CWA, meaning the plaintiffs' claims had no merit under the statute. *Id.* at 810. For the reasons explained in *Sea Bay* and the other cases cited above, *Cape Fear* erred by dismissing the case under Rule 12(b)(1).

But even indulging the argument that the scope of waters protected by the CWA defines federal courts' subject matter jurisdiction, this Court should still deny the Rule 12(b)(1) motion because it is entwined with the merits of the United States' claim. The Fourth Circuit has held that a "factual attack on the jurisdictional allegations of a complaint is permissible so long as it does not involve the merits of the action." *United States v. North Carolina*, 180 F.3d 574, 580

(4th Cir. 1999). Here, Defendants' motion attacks the factual basis for the United States' allegation that the impacted wetlands have a continuous surface connection to relatively permanent tributaries connected to traditional navigable waters, and thus that they constitute "waters of the United States." As in *Sea Bay*, "[t]he proper construction of 'waters of the United States' and whether the property in question is subject to the CWA goes straight to the merits" of the United States' case. 2007 WL 1169188, at *5. Thus, if one assumes that the merits bear on this Court's subject matter jurisdiction at all here, those merits are "so closely related" to jurisdiction that they are "not suited for resolution in the context of a motion to dismiss for lack of subject matter jurisdiction." *North Carolina*, 180 F.3d at 581.

This Court should deny Defendants' request for dismissal pursuant to Rule 12(b)(1), both because this Court has subject matter jurisdiction and the motion improperly attacks the merits of the United States' claims. If the Court takes a different approach, however, the United States respectfully requests an opportunity to take discovery and then respond to Defendants' motion with opposing evidence. *See Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) ("And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous."); *see also EEOC v. Alford*, 142 F.R.D. 283, 289-90 (E.D. Va. 1992) (finding that discovery should be allowed where the 12(b)(1) motion was an indirect attack on the merits of plaintiff's claim).

II. The Complaint alleges facts sufficient to state a claim that Defendants violated the Clean Water Act.

The United States has adequately pleaded all elements of its claim under Sections 1311 and 1344. As explained above, to plead a *prima facie* case that Defendants violated 33 U.S.C. § 1311(a) and 1344, the United States must allege that Defendants: (1) are persons (2) who

discharged dredged or fill material (3) from a point source (4) to waters of the United States (5) without a Section 404 permit. *See Cundiff*, 555 F.3d at 213; *Potomac Riverkeeper*, 388 F. Supp. 2d at 585. The United States did so. The Complaint alleges that Defendants, Chameleon, LLC, and Gary Layne, (1) are persons—a private individual and a limited liability corporation, Compl. ¶¶ 8-9; (2) who discharged dredged or fill material, *id.* ¶¶ 44-45; (3) using "mechanized land-clearing and earthmoving equipment, including bulldozers," which are point sources, *id.* ¶ 47; (4) into wetlands that abut, are adjacent to, and have a continuous surface connection to relatively permanent tributaries connected to traditional navigable waters and are thus waters of the United States, *id.* ¶¶ 28-42, 77; (5) without a permit, *id.* ¶¶ 48, 74.

The only element Defendants contest is whether their discharges were to waters of the United States. *See* Mot. at 19-30. Contrary to Defendants' suggestion, however, the United States need not "establish" this element of its merits claim at the pleading stage. *Id.* at 19. Rather, to overcome a Rule 12(b)(6) motion, the United States merely must allege facts that, if taken as true, state a claim for relief. *See Moschetti*, 2022 WL 3329926, at *2. Defendants' suggestion otherwise turns the Federal Rules on their head.

The Court should also reject Defendants' implication that the United States' allegations do not meet the Supreme Court's elucidation of "waters of the United States" in *Sackett*, 598 U.S. 651. In *Sackett*, the Supreme Court held that wetlands are "waters of the United States" if they have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality opinion)). The United States' allegations here pass that legal standard. *See* Argument II.B-C, *infra*. And nothing in *Sackett*

changed decades of black letter law addressing the pleading requirements to state a claim for relief.

Finally, the Court should reject Defendants' attempt to dispute the facts alleged in the Complaint with their misguided analysis of the desktop resources attached or referred to in the Complaint. *See* Mot. at 7-12, 28. To be sure, at the motion to dismiss stage, this Court may consider materials that we incorporated by reference into or attached as exhibits to the Complaint, or documents that are "integral to the complaint" where there is no dispute as to their authenticity. *See Call v. GEICO Advantage Ins. Co.*, No. 3:22-cv-652-HEH, 2023 WL 5109549, at *3 (E.D. Va. Aug. 9, 2023). And if the "bare allegations" of the Complaint conflicted with those attachments or exhibits, the attachments and exhibits could prevail. *See id.* (citation omitted). But, as explained below, there is no such conflict here. Because the well-pleaded allegations in the Complaint state a claim and Defendants offer no valid basis for second-guessing those allegations at this stage, this Court should deny Defendants' Motion.

A. The *Sackett* decision did not change the elements the United States must plead for its CWA claim.

Defendants argue that the Supreme Court's decision in *Sackett* "significantly tightens" the scope of waters covered by the CWA. *See* Mot. at 3 (citing *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023)). True: *Sackett* rejected the "significant nexus" test for CWA coverage from Justice Kennedy's concurrence in *Rapanos*, 547 U.S. at 759-88. But the United States did not apply the "significant nexus" test here. Thus, Defendants' contention that the United States' allegations here do not meet the standard adopted in *Sackett* is false. The United States alleges that each of the impacted wetlands abuts, is adjacent to, and has a continuous surface connection with a relatively permanent tributary that is connected to a traditional navigable water, consistent

with *Sackett*'s adoption of the *Rapanos* plurality test, *see Sackett*, 598 U.S. at 677-79; Compl. ¶¶ 28-42.

Sackett reduced the scope of "waters of the United States" by eliminating one of the two jurisdictional standards established in *Rapanos*, but that change does not impact the United States's claim here. *Sackett* adopted the plurality opinion in *Rapanos*, 547 U.S. 715. In that plurality opinion, four Justices concluded that the CWA covers "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and "wetlands with a continuous surface connection to" to such waterbodies, "so that there is no clear demarcation between 'waters' and wetlands." *Rapanos*, 547 U.S. at 716, 742. Such a continuous surface connection, the plurality reasoned, would make it "difficult to determine where the 'water' ends and the 'wetland' begins," and hence would make jurisdictional wetlands "as a practical matter indistinguishable from waters of the United States." *Id.* at 742, 755. *Sackett* clarified that Justice Kennedy's concurrence in *Rapanos* could no longer be relied upon to establish Clean Water Act jurisdiction.

Sackett adopted the *Rapanos* plurality's relatively permanent standard without alteration. *See Sackett*, 598 U.S. at 671 ("we conclude that the *Rapanos* plurality was correct"); *see also United States v. Bobby Wolford Trucking & Salvage, Inc.*, No. C18-0747 TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023) ("In *Sackett*, the Supreme Court adopted the analysis articulated by Justice Scalia for the plurality in *Rapanos*."). In doing so, the *Sackett* Court reiterated the two criteria that must be present for an adjacent wetland to qualify as a water of the United States: "first, that the adjacent body of water constitutes 'waters of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it

difficult to determine where the 'water' ends and the 'wetland' begins." *See Sackett*, 598 U.S. at 678-79 (alterations omitted).

The United States' allegations meet that legal standard. The Complaint alleges the "Site contains at least 21 acres of impacted wetlands, which are adjacent to, and have continuous surface connections with, relatively permanent tributaries of traditional navigable waters." Compl. ¶ 28. The Complaint further explains how each wetland abuts (i.e., physically touches) at least one unnamed tributary that is relatively permanent and connects to either the Chickahominy or Pamunkey Rivers, both traditional navigable waters. *See* Compl. ¶¶ 30-42. The Federal Rules require nothing more.

B. The Complaint adequately alleges that each of the unnamed tributaries the impacted wetlands abut are relatively permanent.

The Complaint also alleges that each of the four unnamed tributaries that Wetlands A, B, and C abut is relatively permanent. *See* Compl. ¶¶ 28, 31-38, 40. Defendants attempt to essentially rewrite the United States' Complaint to say the unnamed tributaries are intermittent, *see* Mot. at 20-24, but their arguments mischaracterize the relatively permanent standard.

In *Rapanos*, 547 U.S. at 732, the Court recognized that "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," nor "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original). The Court found it had "no occasion" then "to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel" as waters of the United States, though it recognized there are more scientifically precise distinctions between "'perennial' and 'intermittent' flows." *Id.* It clarified only that permanently flowing channels are waters of the

United States and "streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' or 'existing only, or no longer than, a day; diurnal . . . short-lived,'—are not." *Id.*[4]

Defendants' characterization of the types of flow that satisfy the *Rapanos* plurality is wrong. *See* Mot. at 20-24. The Fourth Circuit has consistently interpreted the relatively permanent standard from *Rapanos* to include channels with less than perennial flow. In *Precon Development Corporation v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011), for example, the Fourth Circuit considered whether certain tributaries were relatively permanent. The Corps had concluded that one of the ditches was a relatively permanent tributary because photographs demonstrated they had flowing water from February through April. *Id.* at 284. Although Precon argued that one of the ditches was dry throughout January, which was typically the wettest month, the court found that drought conditions during January made that single month an ineffective indicator of whether the tributary was relatively permanent. *Id.* at 293 n.12. Similarly, in *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Engineers, Charleston Dist.*, 501 F. App'x 268, 271, 275 (4th Cir. 2012), the Fourth Circuit upheld a Corps determination that two tributaries were waters of the United States because they had "continuous flow more than seasonally." The court credited the Corps' determination because it considered flow and "numerous permissible factors" such as clear channel definition, a defined high water mark, groundwater influx, and sinuosity, i.e., a ratio of valley slope to channel slope. *Id.* at 271-72, 273-75.

[4] The *Rapanos* plurality had no occasion to apply an "intermittent" standard in a scientific sense, and EPA and the Corps have neither categorically included nor excluded "intermittent" waters in the relatively permanent standard. *See* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3085 (Jan. 18, 2023) (noting commenters' proposed definitions of "intermittent," but declining to add the term to the rule because it could cause confusion and uncertainty).

Courts have consistently found that relatively permanent flow does not have to be year-round. Several courts have found that seasonal flow is sufficient for relatively permanent flow. *See, e.g.*, *United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011) (applying *Rapanos* standard and finding water was a "'seasonal' creek over which the Corps has jurisdiction, and not simply an 'intermittent' and 'ephemeral' waterway."); *S.F. Baykeeper v. City of Sunnyvale*, No. 5:20-cv-00824-EJD, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (explaining that "having a seasonally intermittent flow to a [water of the United States] nonetheless qualifies as 'relatively permanent' under *Sackett* and *Rapanos*"). Other courts, including within this Circuit, have found tributaries that flow for at least two or three months of the year satisfy the relatively permanent standard. *See Foster v. EPA*, No. 2:14-cv-16744, 2019 WL 4145583, at *21 (S.D. W. Va. Aug. 29, 2019) (collecting cases); *see, e.g.*, *United States v. Moses*, 496 F.3d 984, 985, 991-93 (9th Cir. 2007) (holding that in *Rapanos* "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States" and upholding verdict that stream that flowed during a two-month period was a "water of the United States").

In *Sackett*, the Supreme Court did not disagree with, undermine, or even comment on the way the courts or federal agencies have applied the *Rapanos* plurality's relatively permanent test, nor did it purport to overrule the many decisions applying that test since 2006. Not surprisingly, the courts that have had occasion to consider the relatively permanent test after *Sackett* have found that the standard for these fact-specific determinations is the same. *See, e.g.*, *Bobby Wolford*, 2023 WL 8528643, at *2 (rejecting defendants' attempt to vacate a consent decree based on *Sackett* because defendants had the opportunity to contest jurisdiction based on the same standard under *Rapanos* and did not); *City of Sunnyvale*, 2023 WL 8587610, at *4 ("The Court finds that *Sackett* does not alter its conclusion that the remaining waters are [waters of the

United States]—protection still exists for seasonal rivers, creeks, and streams that are tributaries to covered waters.").

The analysis in *City of Sunnyvale*, 2023 WL 8587610, at *4, is particularly apt. In that case, the court denied a motion for reconsideration premised on *Sackett* and explained that, while its prior order "did not expressly cite the 'relatively permanent' standard that the *Sackett* Court adopted from *Rapanos*, having a seasonally intermittent flow to a [water of the United States] nonetheless qualifies as 'relatively permanent' under *Sackett* and *Rapanos*." *Id.* The court explained that the creeks at issue in that case "clearly differ from the 'ordinarily dry channels through which water occasionally or intermittently flows' or the 'transitory puddles or ephemeral flows of water' referenced in *Rapanos*" because they "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." *Id.*

Here, our Complaint alleges that each of the unnamed tributaries that the wetlands abut is relatively permanent and is connected to traditional navigable waters. *See* Compl. ¶¶ 28, 31-42. The Complaint thus alleges sufficient facts to support our CWA claim under *Sackett*.

C. Defendants incorrectly interpret the Complaint's allegations and disregard the Rule 12(b)(6) standard by failing to take those allegations as true.

The United States' Complaint alleges sufficient facts to support its CWA claim. At the pleading stage, the only question before the Court is whether the facts stated in the Complaint, taken as true, are sufficient to state a claim. *See Twombly*, 550 U.S. at 556. Because the Complaint adequately alleges that Defendants discharged pollutants from point sources to wetlands constituting "waters of the United States," consistent with the legal standard discussed above—in other words, each element of the United States' claim—the answer is yes. *See id.* at 570 (a claim to relief must merely be "plausible on its face").

Defendants' 12(b)(6) attack on the Complaint disregards this time-honored standard by arguing that the facts we allege in the Complaint are not true: specifically, that the relatively permanent tributaries are not actually relatively permanent, and that the subject wetlands do not abut, are not adjacent to, and have no continuous surface connection to those tributaries. These factual attacks are improper at the pleading stage. They are also baseless. Defendants incorrectly interpret maps and data described in the Complaint, including by failing to display correct data layers to read those maps and data. The United States has alleged, and will show when it presents evidence to this Court, that the wetlands harmed by Defendants' activities abut, are adjacent to, and have a continuous surface connection to tributaries that have relatively permanent flow and connect to traditional navigable waters. Those allegations are more than sufficient to make out our prima facie case, and thus this Court should deny Defendants' Rule 12(b)(6) motion.

1. The United States alleged sufficient facts, taken as true, to demonstrate that the tributaries the wetlands abut are relatively permanent.

The Complaint's allegations—that each of the impacted wetlands abut, are adjacent to, and have a continuous surface connection with a relatively permanent tributary connected to a traditional navigable water, *see* Compl. ¶¶ 28-42—are sufficient to state a claim for relief. The Complaint makes clear that its allegations are premised on EPA's 2021 Site inspection. *See* Compl. ¶ 29. To add to that, the Complaint cites U.S. Geological Survey hillshade data and StreamStats mapping to support its allegations in concrete ways: that the unnamed tributaries that Wetland A and Wetland B abut are mapped in StreamStats and visible in hillshade data, *see id.* ¶¶ 32, 35, and the unnamed tributary that Wetland C abuts and that flows to Campbell Creek is also visible in hillshade data, *see id.* ¶ 41. These alleged facts, if true, suffice to demonstrate that the unnamed tributaries are relatively permanent.

Most importantly, for the purposes of a Rule 12(b)(6) motion, Defendants must assume that our factual allegations are true. *See Moschetti*, 2022 WL 3329926, at *2. Their failure to do so dooms their motion. The Court should end its inquiry here and deny Defendants' motion.

2. Even if it were permissible for Defendants to challenge the truth of the United States' alleged facts, their motion would still fail.

Defendants' screenshots from the maps and data cited in our Complaint do not resolve the multifaceted, fact-intensive inquiry here for two reasons. First, Defendants misinterpret those resources. Second, those resources are only a few of many sources of evidence for determining whether tributaries are relatively permanent, and they are not dispositive of that question.

Defendants misuse and appear to misunderstand the maps and data cited in the Complaint. Take for example the U.S. Geological Survey's StreamStats application. *See* Mot. Ex. B, ECF No. 12-2. StreamStats is a web-based application that provides access to an assortment of GIS analytic tools, including tools that use state- or region-specific data in regression equations to generate a digital stream layer to represent the expected location and extent of streams or drainage areas. *See* Almeter Decl. ¶ 14. The screenshots that Defendants use from their attempt to use this tool only show the U.S. Geological Survey base map; they do not include the stream data layer. *Id.* ¶ 15. That is because, as one can see in those screenshots, Defendants failed to select the applicable region, in this case "Virginia," within the application. Selecting the box labeled "Virginia," as highlighted in Figure 2 above, displays the digital stream layer as alleged in our Complaint: the unnamed tributaries that Wetland A and Wetland B abut appear on the StreamStats map. *See* Compl. ¶¶ 32, 35.

EPA's "How's My Waterway" Tool also depicts what we alleged: the unnamed tributary to Lickinghole Creek that Wetland A abuts is impaired. *See* Compl. ¶ 32; Almeter Decl. ¶¶ 18-21. Defendants argue it shows the tributaries do not reach the site, but that, again, misinterprets the

data. *See* Mot. at 10; Mot. Ex. C., ECF No. 12-3. The streams mapped in "How's My Waterway" are derived from the National Hydrography Dataset—the same data used to generate the streams shown in the U.S. Geological Survey National Map in Exhibits A and D to the Motion to Dismiss, ECF Nos. 12-1 & 12-4. *See* Almeter Decl. ¶ 18. The National Hydrography Dataset typically has a high degree of accuracy with respect to *mapped* streams, but often fails to capture other streams that different, higher-resolution mapping or on-the-ground fieldwork identify. *Id*. ¶ 12. Furthermore, Defendants misleadingly omit data from other watersheds, including the watershed encompassing Campbell Creek. *See id.* ¶ 19. And, in any event, the Complaint does not rely on the "How's My Watershed" tool to allege the extent of streams; it alleges that the unnamed tributary to Lickinghole Creek is classified as "impaired" for recreation. *See* Compl. ¶ 32. Defendants' failure to correctly use these desktop resources only highlights the necessity of discovery to resolve these and other issues of fact.

The desktop resources only play a supporting role in the United States' allegations, which are principally informed by EPA's Site inspection. *See* Compl. ¶¶ 29, 63-65. Many desktop resources are known to "under map" the extent of aquatic features, and their availability and quality can vary regionally. *See* Almeter Decl. ¶ 12. Because of this, EPA inspectors, and wetlands scientists generally, often use both field observations and desktop and remote-sensing data to support their determinations, which rely heavily on current site conditions. *Id.* ¶ 7. That is why the United States sought a warrant to inspect the Site before pursuing further enforcement action against Defendants. *See* Warrant, *EPA v. Chameleon, et al.*, No. 3:21-mc-2 (E.D. Va. Mar. 15, 2021), ECF No. 3. The United States has hired expert witnesses to perform additional work on the Site to support our allegations about the extent of the wetlands impacts and the relative permanence of the tributaries. Desktop resources will supplement on-the-ground data the United

States has and will continue to collect. *Id.* ¶ 27. Of course, Defendants can dispute the appropriate conclusion to draw from the maps and data at a later time; but they—and the Court—are obligated to take the United States' alleged facts as true at the pleading stage.

In addition, Defendants mistake the desktop resources' stream classifications as legal conclusions that bind the United States and the courts. *See* Mot. at 6-12, 24-27. The U.S. Geological Survey National Map and the National Hydrography Dataset traditionally use solid blue lines to symbolize perennial streams and dashed blue lines to symbolize intermittent streams, but those characterizations are not CWA classifications. They are not used for regulatory purposes, nor are they interchangeable with the legal and policy terms used by EPA or federal courts. *See* Almeter Decl. ¶¶ 11, 24. For example, the U.S. Geological Service defines a perennial stream as a "stream that normally has water in its channel *at all times*."[5] At the same time, it defines an intermittent stream as a "stream that flows only when it receives water from rainfall runoff or springs, or from some surface source such as melting snow," without reference to how frequently that stream may maintain flow.[6] Nor does the U.S. Geological Survey use (or define) the term "seasonal stream" or even "relatively permanent." In short, its definitions do not align with the standard. *See* Argument II.B, *supra*.

Whether the tributaries discussed in the Complaint are "relatively permanent" is a highly fact-sensitive inquiry that this Court should not resolve on a motion to dismiss. That is because courts determine whether tributaries are relatively permanent after considering "numerous permissible factors"—not just desktop resources—all of which are matters of fact. *See Deerfield*, 501 F. App'x at 271-75 (upholding Corps' jurisdictional determination based on consideration of

[5] U.S. Geological Survey, *Water Basics Glossary* (updated June 17, 2013), https://water.usgs.gov/water-basics_glossary.html (emphasis added).
[6] *Id.*

flow and "numerous permissible factors," including ordinary high water mark, channel, groundwater influence, and sinuosity).

Only after considering evidence on these factual considerations have courts in this Circuit decided whether tributaries are relatively permanent. In *Foster*, 2019 WL 4145583 at *22, the Southern District of West Virginia determined after a bench trial that the tributary at issue was relatively permanent because the evidence established that it flowed for at least four months a year. In *United States v. Bedford*, No. 2:07-cv-491, 2009 WL 1491224, *1, *12 (E.D. Va. May 22, 2009), this Court found, after an evidentiary hearing, that the tributary at issue was a perennial stream that carried flow throughout the year. Indeed, Defendants do not cite—and EPA is unaware of—any decision from this Circuit in which a court determined that desktop resources alone defeated allegations that affected wetlands are waters of the United States.

In this case, the United States alleges that each of the unnamed tributaries that share a continuous surface connection with Wetlands A, B, and C are relatively permanent and connect to traditional navigable waters. *See* Compl. ¶¶ 28-42. The United States bases its allegations on EPA's consultation of desktop resources and observations during a three-day site inspection. *See id.* ¶¶ 29, 63-65. As described above, EPA's site inspection involved a thorough collection of data and evaluation of the impacted wetlands and the tributaries that those wetlands abut. *See* Factual Background, *supra*. Although Defendants criticize the United States for not including more detail about this inspection in the Complaint, *see* Mot. at 13, and the United States could easily amend its Complaint to include this detail,[7] its factual allegations are already sufficient.

[7] If the Court finds that the United States' Complaint alleges insufficient facts, the Court should dismiss without prejudice and with leave to amend. *See Fariasantos v. Rosenberg & Assocs., LLC*, 303 F.R.D. 272, 279 (E.D. Va. 2014) (explaining that leave to amend shall be "freely given" absent "undue delay, bad faith," etc.) (citation omitted).

3. Whether the wetlands abut and have a continuous surface connection to waters of the United States is a fact-intensive inquiry and inappropriate to resolve at the pleading stage.

Refusing to take the Complaint's factual allegations as true, Defendants also dispute the United States' allegations that the impacted wetlands abut and have a continuous surface connection to the unnamed tributaries. *See* Mot. at 27-29. As with relative permanence, determining whether the affected wetlands abut and have a continuous surface connection to waters of the United States is a fact-sensitive inquiry this Court should not resolve on a motion to dismiss. *See United States v. Andrews*, No. 3:20-CV-1300 (JCH), 2023 WL 4361227, at *10 (D. Conn. June 12, 2023) (granting summary judgment to United States because the "undisputed evidence," including an expert report, showed "that continuous surface flow paths link the wetlands with the Unnamed Tributary . . . as required by the *Sackett* Court's two-part test for adjacent wetlands"); *see United States v. Donovan,* No. 96-484-LPS, 2010 WL 3614647, at *5 (D. Del. Sept. 10, 2010), *aff'd*, 661 F.3d 174 (3d Cir. 2011) (granting summary judgment to the United States upon presentation of "evidence . . . supporting the existence of a continuous surface connection between the wetlands and the streams on Defendant's property"). The United States alleges that each of the three impacted wetlands abuts and has a continuous surface connection to at least one unnamed relatively permanent tributary that is connected to a traditional navigable water. *See* Compl. ¶¶ 28, 30, 34, 38, 40. In short, the Complaint alleges that each of the three wetlands (1) "has a continuous surface connection with" and is indistinguishable from (2) an "adjacent body of water [that] constitutes 'waters of the United States.'" *Sackett*, 598 U.S. at 678-79.

Defendants argue *Sackett* and *Lewis* support their 12(b)(6) argument disputing the wetlands' continuous surface connections, but those cases are inapposite. In *Sackett*, the Supreme

Court granted certiorari to review the Ninth Circuit's affirmance of the district court's grant of summary judgment to EPA. *See Sackett*, 598 U.S. at 663. In contrast to this case, the parties had already presented evidence on the extent of the wetlands and tributaries at issue. *Id.* at 662-63. The same is true of *Lewis*, 88 F.4th 1073, in which Fifth Circuit reviewed the district court's summary judgment ruling. Here, the parties have yet to present any evidence about the extent of the wetlands or their continuous surface connections to waters of the United States.[8]

Consistent with *Sackett*, the United States alleges that each of the wetlands at issue abuts and has a continuous surface connection to unnamed relatively permanent tributaries connected to traditional navigable waters. *See* Compl. ¶¶ 28, 30, 34, 38, 40. That is all the Federal Rules require at this stage. The United States has sufficiently stated its CWA claim.

CONCLUSION

For these reasons, the Court should deny Defendants' motion to dismiss.

Dated: March 26, 2024

Respectfully submitted,

TODD KIM
Assistant Attorney General

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Trial Attorney

[8] Alternatively, the Court may defer consideration of Defendants' motion until summary judgment. *See* Fed. R. Civ. P. 12(i) (explaining that Rule 12(b)(1)-(7) motions must be decided before trial "unless the court orders a deferral until trial"); *see also Wood v. Gen. Dynamics Corp.*, 157 F. Supp. 3d 428, 431 (M.D.N.C. 2016) (deferring motion to dismiss until "the next dispositive stage of litigation" so ruling could be informed by a "better developed factual record"); 2 James Moore et al, Moore's Federal Practice - Civil § 12.50 (2024) (noting deferral "allows a court to give consideration to matters with such grave consequences as" Rule 12(b)(1)-(7) motions).

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CERTIFICATE OF SERVICE

I certify that on March 26, 2024, I filed the forgoing electronically, which sent a notice of electronic filing to all counsel of record in this matter.

/s/ Amanda V. Lineberry
Amanda V. Lineberry

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. 3:23-cv-763

DECLARATION OF KATELYN ALMETER

Pursuant to 28 U.S.C. § 1746, I, KATELYN ALMETER, hereby declare as follows:

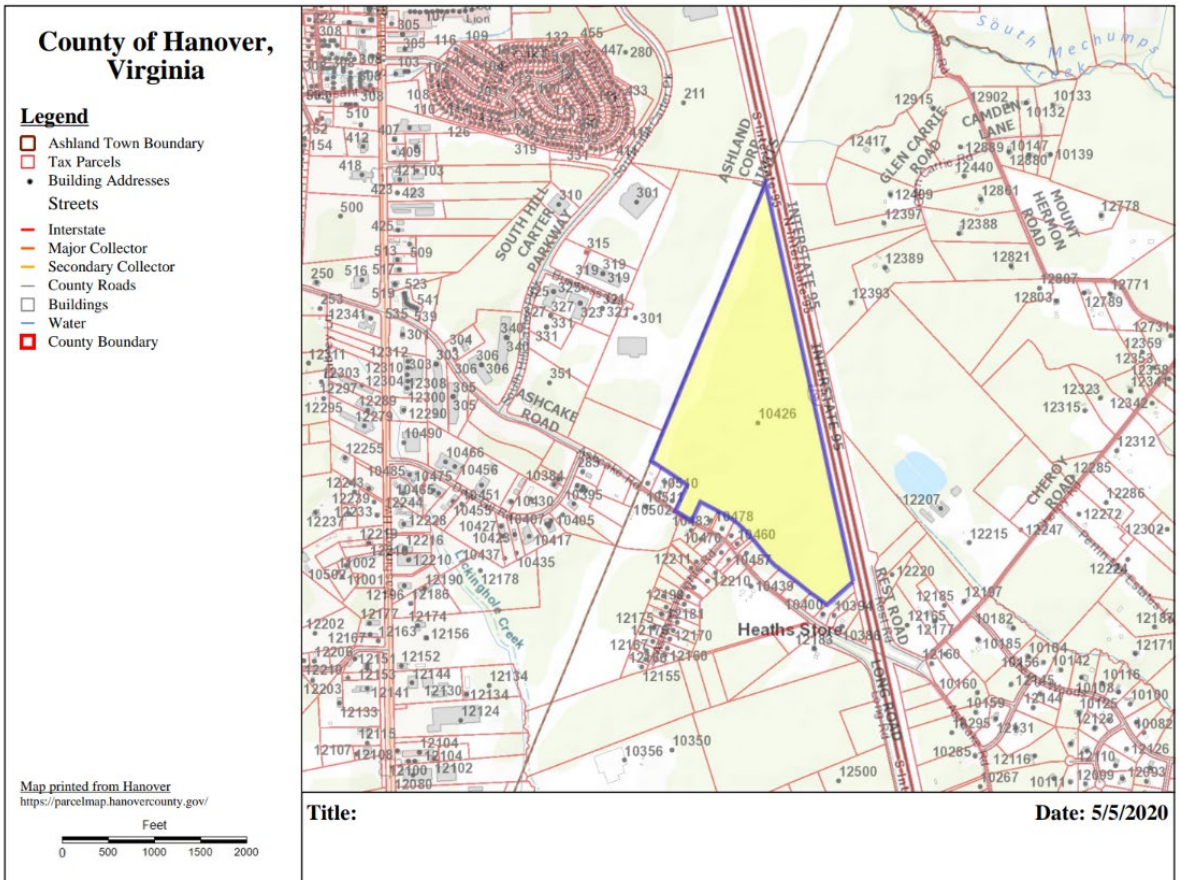
1. I am an Environmental Scientist and Inspector in the Safe Drinking Water Act & Wetlands Section in the Water Branch of the Enforcement and Compliance Assurance Division ("ECAD"), U.S. Environmental Protection Agency Region III ("EPA"). I hold a Bachelor of Arts degree in Environmental Science. I have been employed by EPA since May 2015.

2. My job responsibilities at EPA include conducting site inspections and case development under Section 308 and 404 of the Clean Water Act ("CWA") to identify and assess aquatic resources, conduct delineations to document the presence of wetland soils, wetland vegetation, and hydrology, and collect evidence to support enforcement matters. I also use remote-sensing, digital and geo-spatial tools to interpret aerial photography, datasets, maps, and project plans. Applying my technical expertise, I support EPA CWA enforcement actions and assist in the drafting and preparation of various enforcement documents, including administrative orders and consent decrees.

3. I submit this sworn Declaration in support of the United States' Response to Defendants' Motion to Dismiss in the matter of *United States v. Chameleon, LLC, et al.*, Civil Action No. 3:23-cv-00763 (E.D. Va.).

4. On March 22, 2020, I was assigned to investigate potential CWA violations at a 101.66-acre site owned by Chameleon LLC and Gary V. Layne and located at 10426 Ashcake Road, Ashland, Hanover County, Virginia, (hereafter the "Site") following the referral from the U.S. Army Corps of Engineers, Norfolk District. *See* Compl. Ex. 1, ECF No. 5-1. The Site is also identified as parcel #7789-45-3668 with the Hanover County Parcel Viewer. To the best of my knowledge, Chameleon LLC is a company owned and controlled by Mr. Gary V. Layne of 15250 Lazy Creek Road, Beaverdam, Virginia.

Figure A



5. On October 31, 2019, I received information via email regarding the Site from the Virginia Department of Environmental Quality ("VADEQ"), including a copy of an Inspection Report for an August 30, 2019 inspection by VADEQ. On February 10, 2020, I received a copy of the October 9, 2019 Notice of Violation issued by VADEQ. I also received letters from the U.S. Army Corps of Engineers dated January 7, 2020, and February 21, 2020, which stated that they were notified of work in wetlands at the Site by VADEQ, that there was no corresponding authorization by their office for such work, that it potentially constituted a violation of the CWA, and requested that Mr. Layne contact their office via the point of contact provided.

6. I have knowledge of the Site, including the site conditions, topography, presence and location of aquatic resources, and earth-moving and ditching activities from conducting a three-day inspection of the Site from April 12, 2021 to April 14, 2021. During the inspection, I walked the Site and the unnamed tributaries as far as possible and collected data, including photographs, videos, GPS data, soil samples, flora and fauna observations, as well as stream and water table data. I observed and documented Site conditions, including aquatic features like the disturbed wetlands identified in the Complaint, unimpacted wetlands (including unimpacted wetland areas contiguous with the disturbed wetlands), and four tributaries connecting to the wetlands on the Site.

7. I also have knowledge of the Site from preliminary data gathering and reviewing remote-sensing and other data sources available for the Site, such as aerial photography, U.S. Geological Survey maps, the U.S. Fish & Wildlife's National Wetlands Inventory, the U.S. Department of Agriculture's Soil Survey, National Hydrography Dataset elevation data (including hillshade), and National Oceanic & Atmospheric Administration precipitation and temperature data. These publicly available, remote-sensing and desktop resources and tools are

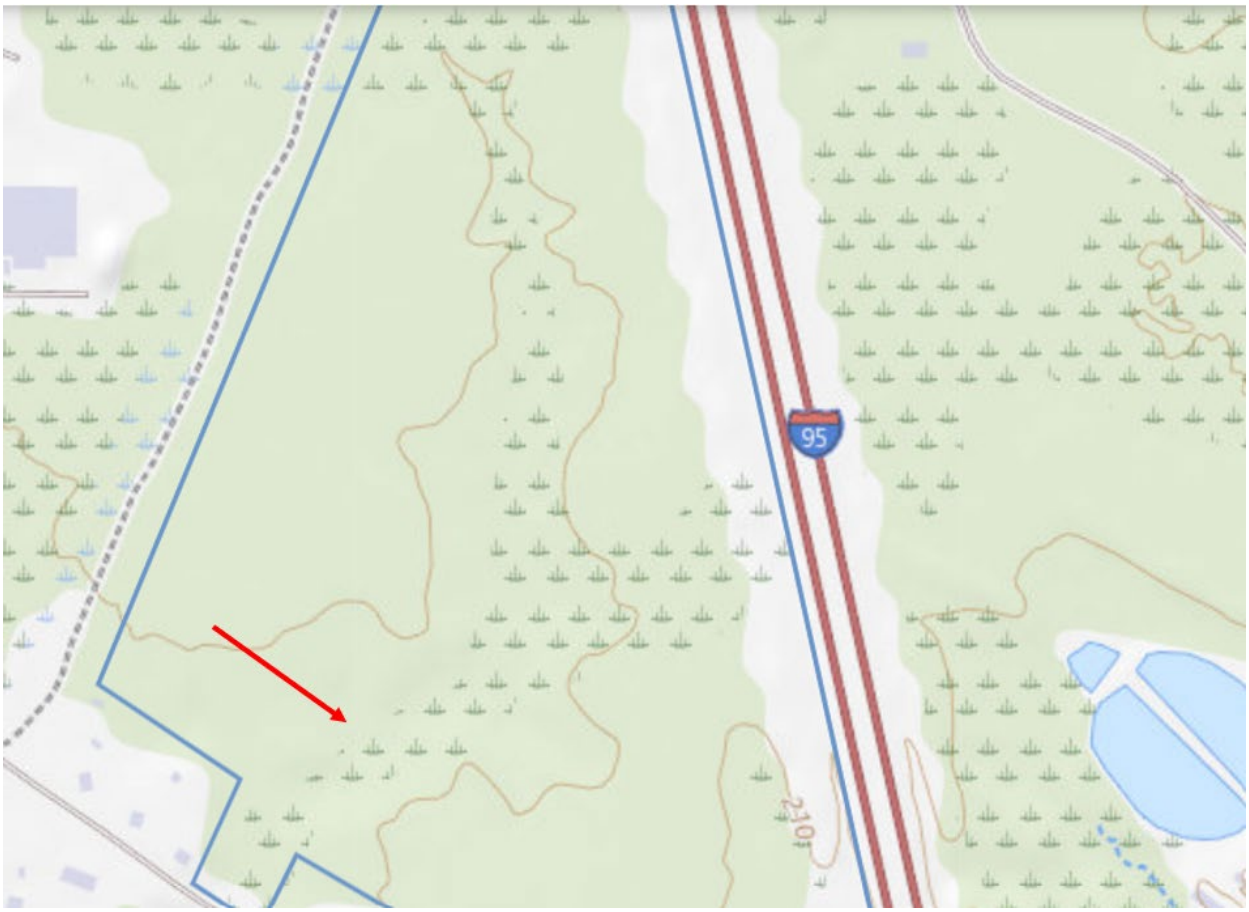
used by wetlands scientists for preliminary data gathering and as resources to support and assist in planning for site-specific field data collection and providing landscape context to the on-site observations. There is no single resource that identifies all aquatic features nationwide, but an approach using the weight of evidence from the best available sources of information, in combination with field-verification and additional site-specific data collection, is a robust approach to wetland determinations consistent with standard practice.

U.S. Geological Survey National Map – Defendants' Exhibit A

8. Defendants' Motion to Dismiss refers to the U.S. Geological Survey's National Map viewer. Exhibit A to the Motion comprises screenshots of the national map online tool at increasing levels of magnification. The last screenshot of the National Map, at page A-6, includes a blue polygon outlining the Site.

9. The National Map viewer is a resource created by the U.S. Geological Survey using publicly available data, primarily hosted by the U.S. Geological Survey, but also serves other common data layers such as the U.S. Fish and Wildlife Service's National Wetlands Inventory. Exhibit A to Defendants' motion shows the basemap called "USGS National Map" in the display. The USGS National Map uses certain standardized symbols to demarcate topographic, geographic, and other features. For instance, on A-6, the map includes symbols that look like a group of clumps of grass to indicate where wetlands (e.g., marsh or swamp) are likely located, as shown in Figure B below (red arrow added).

Figure B



10. The U.S. Geological Survey National Map uses the National Hydrography Dataset (a U.S. Geological Survey dataset) for the location and characterization of streams mapped in the dataset. The National Map represents streams from this Dataset in two ways. Streams that U.S. Geological Survey identifies as "perennial" are shown as solid blue lines. Streams that the U.S. Geological Survey identify as "intermittent" are shown as hashed blue lines.

11. There are varying definitions of the terms "perennial" and "intermittent" across the scientific literature, stream classification systems, and mapping datasets. The U.S. Geological Survey's definition of "intermittent" is unique to the U.S. Geological Service. The U.S. Geological Service defines a perennial stream as a "stream that normally has water in its channel

at all times," and it defines an intermittent stream as a "stream that flows only when it receives water from rainfall runoff or springs, or from some surface source such as melting snow." These definitions do not mention other indicators of relatively permanent flow that scientists typically investigate on the ground.[1] Accepted methodologies for stream assessment in my field include an assessment of ordinary high water mark, channel, sources of groundwater influence including but not limited to springs, presence of aquatic biota, and sinuosity. The U.S. Geological Service technical definitions do not align with the legal and policy term "relatively permanent standard" that I assess using my expertise and experience as an EPA inspector.

12. As an Inspector with EPA credentials for Section 404 of the CWA, and with training in wetland identification, wetland delineation, and stream assessments, I use the U.S. Geological Survey National Map as a preliminary resource for planning and early case development to provide information on the potential presence, types, and number of aquatic features and general site layout/conditions, as is typical before a field visit. The National Map and the National Hydrography Dataset typically have a high degree of accuracy with respect to the mapped network; however, the unmapped stream system is significant and therefore the mapped network cannot be considered to be all-encompassing of the stream network. Higher resolution mapping often identifies additional streams not identified at the scale of the National Map. Since the dataset is consistently an under-representation of the stream system in this ecoregion, field-verification is generally needed to establish a complete mapping of the stream network for an area. Site-specific observations or field-based methodologies are generally the standard approach for establishing flow regime, particularly in headwater reaches.

[1] U.S. Geological Survey, *Water Basics Glossary* (updated June 17, 2013), https://water.usgs.gov/water-basics_glossary.html.

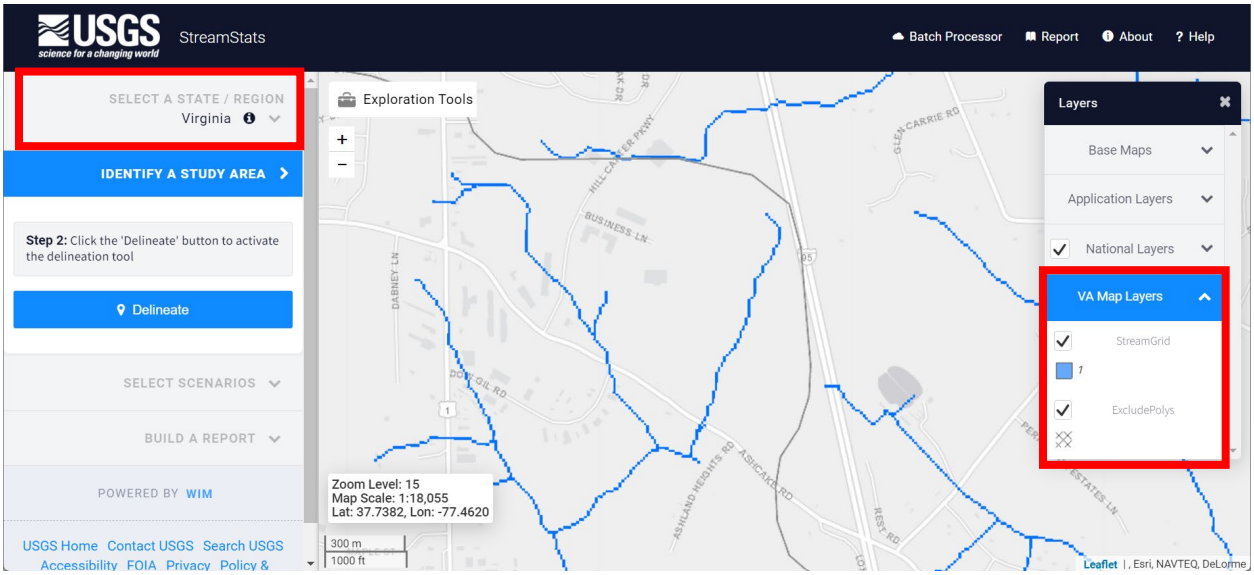
U.S. Geological Survey StreamStats – Defendants' Exhibit B

13. Exhibit B to the Defendants' Motion to Dismiss is a series of screenshots from the U.S. Geological Survey's StreamStats Tool Base Map.

14. StreamStats is a web-based application that provides access to an assortment of Geographic Information Systems ("GIS") analytic tools that are useful for water-resources planning and management, for engineering and design purposes, and which can be used to delineate drainage areas and represent basin characteristics and estimates of flow statistics. The application uses state- or regional-specific data to develop regression equations to generate a digital stream layer in the expected location and extent of streams or drainage areas that would be expected based on the parameters. While the "stream grid" displayed in the tool is simulated, it generally provides a reliable idea of the size of the drainage basin and other basin characteristics, from which expected streamflow volumes can be calculated, using regression equations.

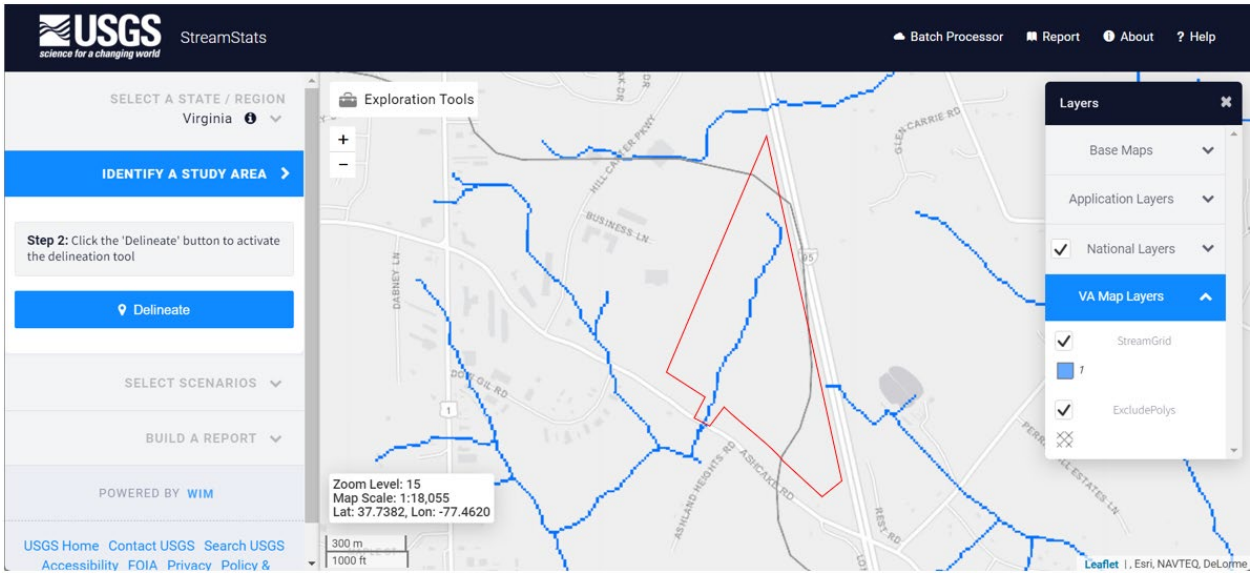
15. The screenshots in Defendants' Exhibit B show the base map but do not include the digital stream layer generated in StreamStats, as shown in Figure C below. On the lefthand side of the screenshots in Defendants' Exhibit B, you can see that the Defendants did not select the applicable state or region—Virginia. Selecting the desired state or region dictates what regression equations the application uses for the stream location and flow statistics calculation. When that box is selected, it displays the digital stream layer, as in Figure C below (red boxes added).

Figure C



16. When the StreamStats stream layer is selected, as shown below (including an outline of the Site boundaries I added to the image), you can see a northeast-southwest running blue line representing a stream or basin within the western edge of the Site. That stream line crosses Ashcake Road, the southern extent of the Site, and connects with Lickinghole Creek to the southwest of the Site. As alleged at Paragraph 32 of the Complaint, this data supports my observation of, and the United States' allegation of, an unnamed tributary to Lickinghole Creek to which Wetland A abuts, is adjacent, and has a continuous surface connection.

Figure D



17. As shown in Figure D, the StreamStats stream layer also shows a blue stream line on the eastern edge of the Site, going southeast across I-95 and connecting with Campbell Creek to the southeast of the Site. As alleged at Paragraph 35 of the Complaint, the StreamStats data supports my observation, and the United States' allegation of, an unnamed tributary to Campbell Creek to which Wetland B abuts, is adjacent, and has a continuous surface connection.

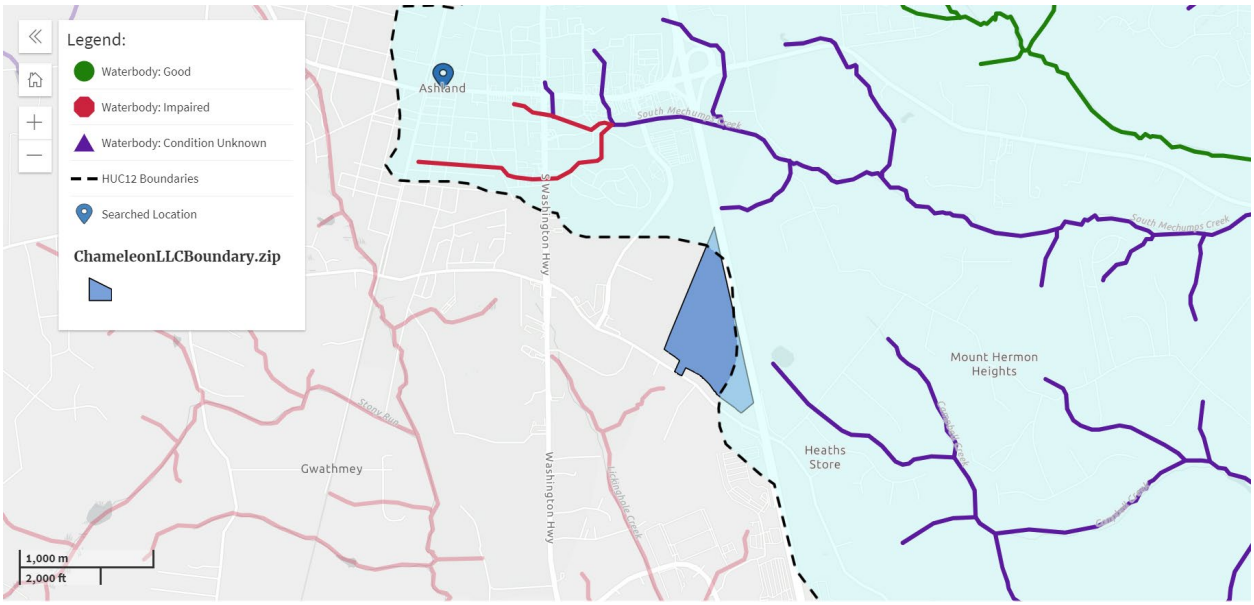
EPA "How's My Waterway" Tool – Defendants' Exhibit C

18. The EPA "How's My Waterway" Tool is a web-based tool that uses the National Hydrography Dataset—as discussed in Paragraphs 10 and 12, above, and 22, below—in conjunction with water quality data reported to EPA by the states. In other words, the extent of streams in the How's My Waterway Tool is coextensive with the U.S. Geological Survey National Map in Exhibits A and D to the Defendants' Motion to Dismiss because they use the same dataset for stream extent/network.

19. Defendants' Exhibit C is a series of screenshots from the "How's My Waterway" Tool for the Stony Run watershed, which includes Lickinghole Creek. In their display,

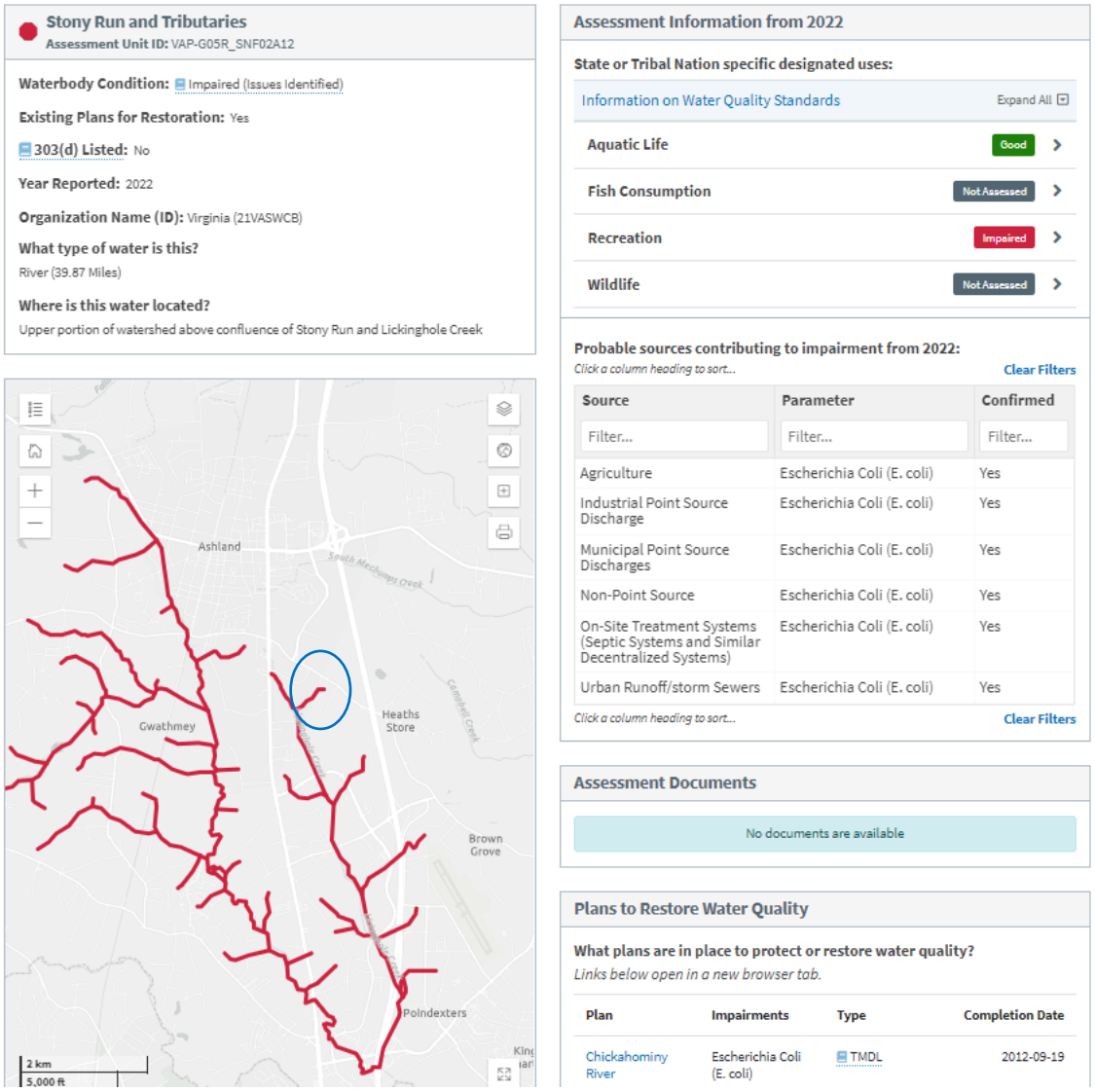
Defendants did not include any other watersheds, omitting, for instance, the watershed that includes Campbell Creek to the east of the Site. A screenshot from "How's My Waterway" for that watershed is below (Figure E).

Figure E



20. As alleged in Paragraph 32 of the Complaint, "How's My Waterway" shows that the unnamed tributary to Lickinghole Creek, circled in the image below, is "impaired" for its designated use, "recreation." An "impaired" designation means that state water quality data show that the water is not meeting water quality standards. The probable source contributing to that impairment is Escherichia Coli (E. coli). Figure F shows the unnamed tributary and its impairment designation.

Figure F



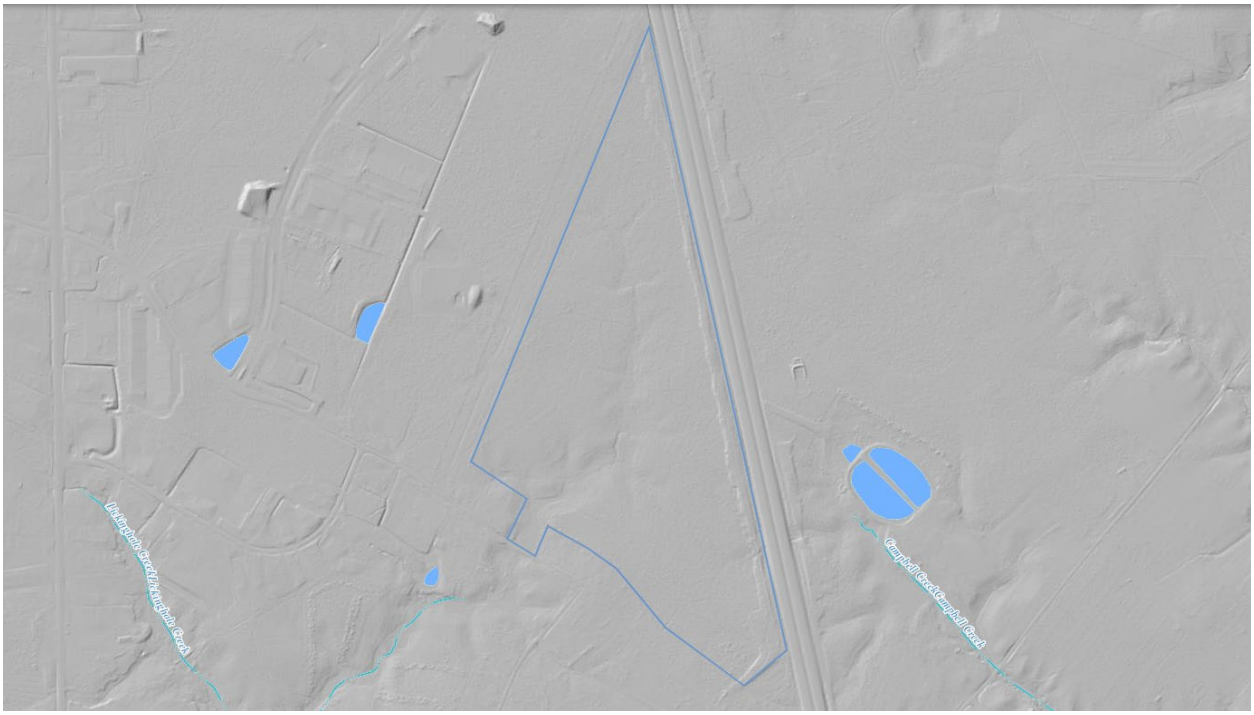
21. As alleged in Paragraph 32 of the Complaint, the unnamed tributary circled in the image above is a part of a Total Maximum Daily Load for the Chickahominy River watershed, as seen in the section of the image titled *Plans to Restore Water Quality*.

U.S. Geological Survey National Hydrography Dataset – Defendants' Exhibit D

22. Defendants' Exhibit D is a series of screenshots from the U.S. Geological Survey's National Hydrography Dataset. As discussed in Paragraph 18, the National Hydrography Dataset is the same data used for the U.S. Geological Survey's basemap, as

displayed in Defendants' Exhibit A. The addition of the National Hydrography Dataset in Exhibit D shows the same extent of streams, but adds additional data to that stream network such as flow line, flow direction, water body area, and certain point data. It is available as a layer in the viewer so it can be used with other available basemaps or layers. For example, the National Hydrography Dataset can be used with the U.S. Geological Survey Hillshade raster, which shows elevation, as seen in Figure G below.

Figure G



23. The images in Defendants' Exhibit D show flow through the unnamed tributaries from the Site downstream to Lickinghole and Campbell Creeks to the west and east, respectively.

24. Defendants' Exhibit D also highlights the National Hydrography Dataset's classification of those unnamed tributaries as "intermittent." As explained above, that "intermittent" characterization is the same as in Paragraph 11 and uses the U.S. Geological Survey definition of "intermittent" as: "a stream that flows only when it receives water from

rainfall runoff or springs, or from some surface source such as melting snow." It is not used to indicate the frequency or duration of flow through that channel during the year. In short, its technical classifications do not align with the legal and policy term "relatively permanent standard" that I assess using my expertise and experience as an EPA inspector.

U.S. Geological Survey Hillshade Raster – Defendants' Exhibit E

25. Defendants' Exhibit E is a screenshot from the U.S. Geological Survey's National Map with the "3DEP Elevation – Hillshade" data layer displayed. The hillshade is a raster that is a high-resolution representation of ground-level elevation using data taken by LiDAR (Light Detection and Ranging) data, which is collected from aircraft or drones as a "point cloud" collected from the returns of pulses of light, and processed into a geo-spatial layer for use in mapping tools such as the National Map viewer to provide high-resolution data that, when processed, create elevation data such as a bare earth model. These detailed depictions of the land surface when available can show subtle elevation changes. Visible linear and curvilinear incisions on a bare earth model can help identify the flow characteristics of water features in greater detail.

26. Figure H is the Hillshade raster data for the Site, as displayed in Defendants' Exhibit E, with additional magnification. Figure I is the Hillshade raster data with the National Hydrography Dataset layer, with additional magnification. In this image, the darker indentations show lower elevation and the lighter colors are higher elevation. The gradient on the image below displays depressional topography, similar to a curvilinear basin, in the central portion of the site consistent with Wetland A. This type of depressional area is indictive of the location where drainage or water is likely to flow or drain to and collect. On the west side of the Site, as indicated with a red arrow in Figure J below, you can see the drainage area that corresponds to

Wetland A in Exhibit 1 to the Complaint, which continues through the area identified as an unnamed tributary to Lickinghole Creek, as alleged in Paragraph 32 of the Complaint. The raised linear feature of Ashcake Road is visible at the south end of the Site. A narrow, linear depression consistent with the elevation signature of a stream is visible immediately south of Ashcake Road (indicated with the red, dashed arrow). To the west of the Site on the image below, you can see a narrow, linear depression consistent with the elevation signature of a stream visible on the eastern and western sides of I-95 at the location of Wetland B (indicated with the yellow, dotted arrows). This continues in a snaking line to Campbell Creek, as alleged in Paragraph 35 of the Complaint. In the southern corner of the Site, you can see a narrow, curvilinear depression consistent with the elevation signature of a stream visible from the southern end of the site through the adjacent property towards I-95. That feature is then again visible on the eastern side of I-95, as alleged in Paragraph 41 of the Complaint. They are indicated with the purple arrows in Figure J below. The narrow, curvilinear depression, indicated with the white arrow, is consistent with the elevation signature of a stream where I observed the unnamed tributary to the unnamed tributary to Lickinghole Creek.

Figure H

Figure I

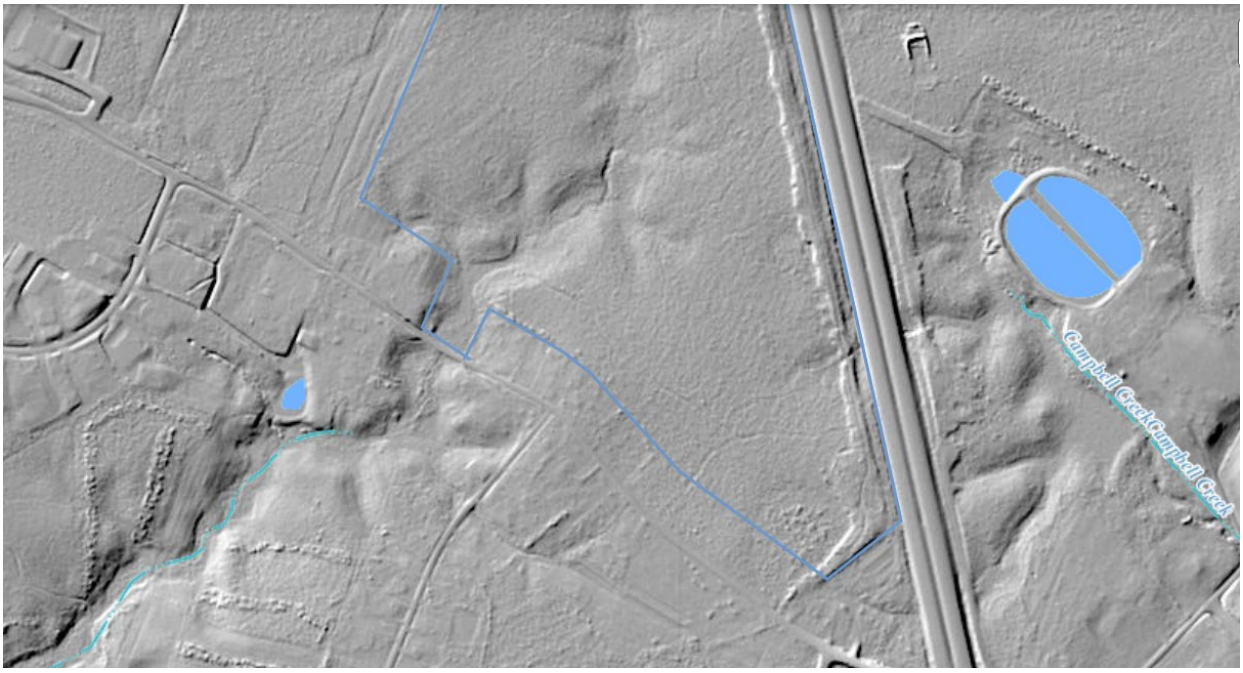
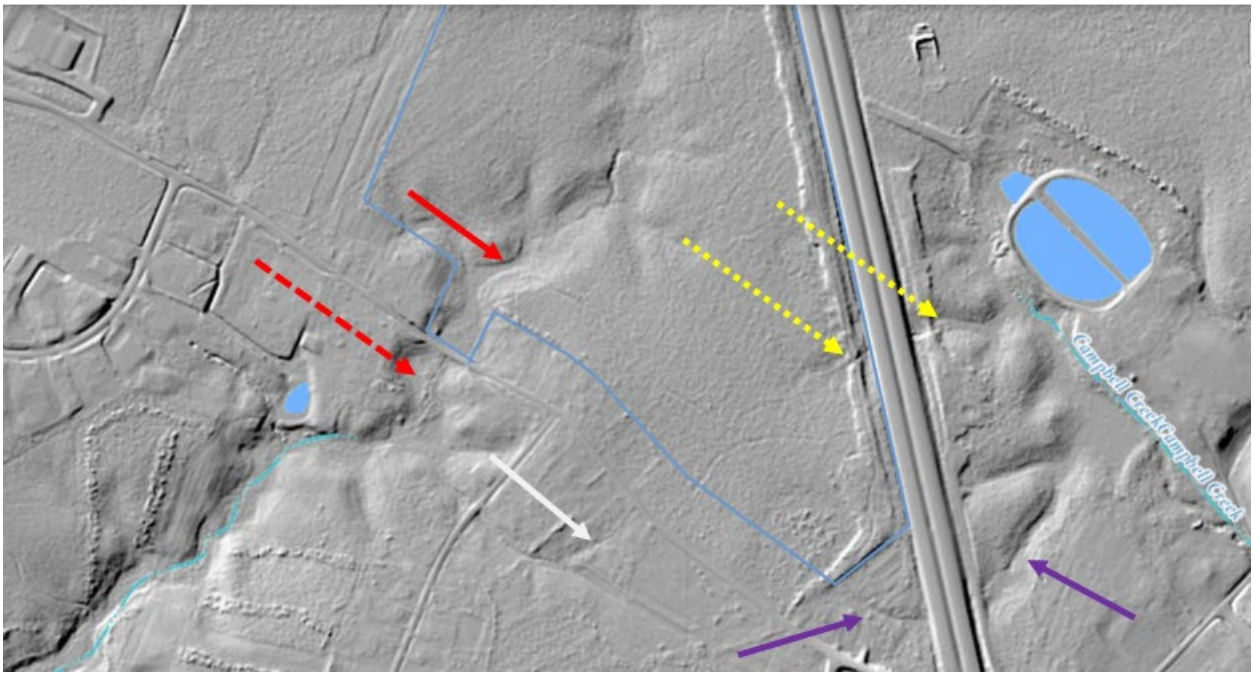


Figure J



27. In my practice, the high-resolution elevation data that a Hillshade can provide is useful in identifying low-laying topography or depressional areas that may be indicative of

wetlands or narrow linear or curvilinear depressions indicative of streams, because they show where water is likely to regularly flow or pool. This type of elevation data is very useful in instances where disturbance has occurred as the data can show "pre-disturbance" or "baseline" conditions. The data are best used in conjunction with field-based data collection for aquatic feature identification. Preliminary data gathering and desktop tools can provide valuable information on initial site conditions, baseline or pre-disturbance conditions, and the potential presence of aquatic features. The tools are typically used in conjunction with site-specific, field observations and data collection. Field verification and additional data collection, such as I conducted during the April 2021 inspection, used in conjunction with these desktop tools are the standard practice for wetland and stream identification, delineation, flow regime determinations, and verifying jurisdictional connections.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Executed this 26 day of March, 2024.

Katelyn Almeter
Inspector
U.S. Environmental Protection Agency
Region III