



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, NEW YORK DISTRICT  
26 FEDERAL PLAZA, ROOM 16-406  
NEW YORK, NEW YORK 10278-0090

CENAN-OP-R

02 OCTOBER 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023),<sup>1</sup> NAN-2021-01384-WOR.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
  - i. Wetland WLA, jurisdictional, Section 404
  - ii. Wetland WLB, non-jurisdictional
  - iii. Wetland WLC, non-jurisdictional
  - iv. Wetland WLE, jurisdictional, Section 404
  - v. Esopus Creek, jurisdictional, Section 404

## 2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))

3. REVIEW AREA. Review area size 19.55 acres, 41.9413, -74.0322, City of Kingston, Ulster County, New York.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Esopus Creek is located partially within the property line, but does not become a TNW until it nears its confluence with the Hudson River, approximately 10 straight-line miles and 13 river miles north by northeast of the property, at the Falls at Saugerties.<sup>6</sup>

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<sup>6</sup> 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, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

A perennial, unnamed tributary to Esopus Creek flows through the middle of Wetland WLE, then directly into Esopus Creek, just off site. The unnamed tributary is a perennial tributary to Esopus Creek, as evidenced by aerial photography, observed bed and banks, ordinary high-water marks and running water during most times of the year. Wetland WLA is separated from the perennial tributary by a small former railroad bed, but the water appears to flow directly from WLA to the tributary, through the ballast of the railroad bed. Wetlands WLB and WLC are located approximately 235 feet from and 12 feet higher in elevation than the perennial tributary, with no apparent hydrologic connection .

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup> N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

b. The Territorial Seas (a)(1)(ii): N/A

c. Interstate Waters (a)(1)(iii): N/A

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<sup>7</sup> 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.

<sup>8</sup> 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.

- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): Esopus Creek is a perennial tributary to the Hudson River, as evidenced by aerial photography, observed bed and banks, ordinary high-water marks and flowing water during most times of the year. The unnamed tributary to Esopus Creek, at the core of Wetland WLE, is perennial, as evidenced by aerial photography, observed bed and banks, ordinary high-water marks and flowing water during most times of the year.
- f. Adjacent Wetlands (a)(4): Wetland WLE is adjacent to a perennial, unnamed tributary to Esopus Creek, directly bordering the stream throughout the property. Wetland WLA is adjacent to the same perennial, unnamed tributary that flows through Wetland WLE, separated from it by a former railroad bed, with water from Wetland WLA flowing through the ballast, directly into the tributary. The limits of wetlands were delineated by the applicant using the 87 Manual/Regional Supplement.
- g. Additional Waters (a)(5): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup> N/A
- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water): Wetlands WLB and WLC are located at the top of their micro-watershed, supplied with hydrology predominantly from runoff from Interstate Route 87 (I-87), with no other apparent hydrologic source. The limits of wetlands were delineated by the applicant using the 87 Manual/Regional Supplement. During the site visit of July 27, 2022, water appeared to be perched on top of a knoll, near I-87. Flow from I-87 appears to be infrequent and of short duration. Wetlands WLB and WLC are

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

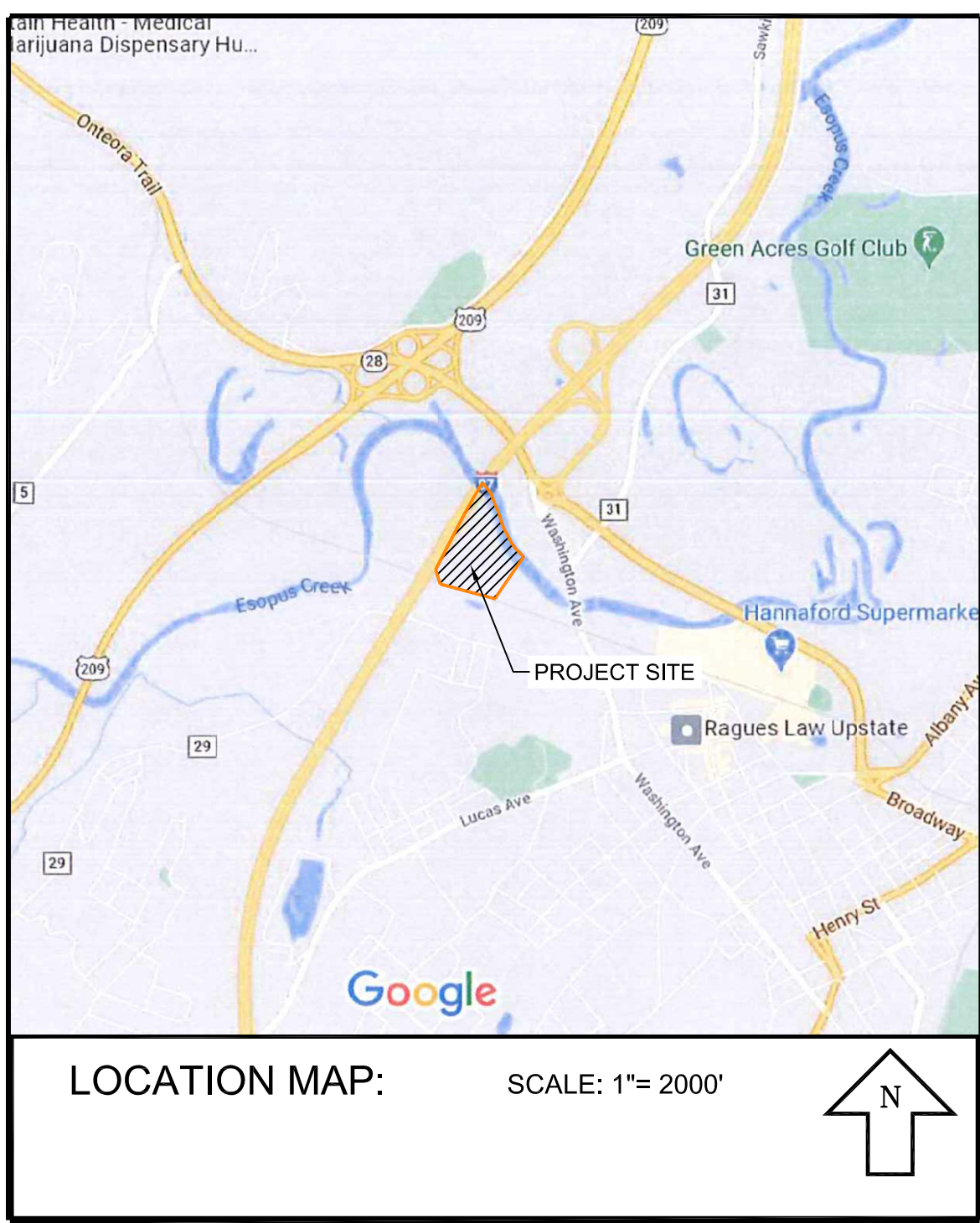
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located approximately 235 feet from and 12 feet higher in elevation than the perennial unnamed tributary to Esopus Creek that flows through Wetland WLE, with no apparent continuous surface connection.

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. Site visit conducted on July 27, 2022
  - b. "Wetland Delineation Report Kingston Meadows Seniors Residence 191 Hurley Avenue City of Kingston, Ulster County, NY", prepared by Ecological Solutions, LLC, dated August 15, 2021
  - c. Google Earth aerial photographs, dated October 7, 2011, and April 16, 2016
  - d. USDA Web Soil Survey generated May 8, 2023
  - e. USGS Kingston West, NY topographic map
  - f. FEMA Firmette 36111C0460F
10. OTHER SUPPORTING INFORMATION. Falls at Saugerties photograph dated October, 2022, acquired from Google Maps, showing limit of navigability for Esopus Creek.
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.





FEDERAL WETLAND DELINEATION PERFORMED BY KAREN SCHNELLER-MCDONALD ON SEPTEMBER 10, 2009 AND MICHAEL NOWICKI ON NOVEMBER 14, 2009.

BOUNDARY AND TOPOGRAPHIC INFORMATION TAKEN FROM THE FOLLOWING PLANS:

- TOPOGRAPHIC SURVEY, CITY OF KINGSTON, ULSTER COUNTY, NEW YORK, EDITION OF 1955
- 151-189 MURLEY AVENUE, ALTA/ACSM LAND TITLE SURVEY PREPARED FOR: HUDSON VALLEY HOUSING DEVELOPMENT FUND CO., INC. CITY OF KINGSTON, COUNTY OF ULSTER, NEW YORK, PREPARED BY THE CHAZEN COMPANIES AND DATED 10/19/07
- TAX MAP, CITY OF KINGSTON, ULSTER COUNTY, NEW YORK

PROPERTY OWNER

ULSTER SAVING BANK  
180 SCHWENK DRIVE  
KINGSTON, NEW YORK 12401

TAX PARCEL NUMBER

CITY OF KINGSTON, ULSTER COUNTY, NEW YORK  
SECT 48.070 BLOCK 1 LOT 7.2

AREA

851,678 SQ. FT.  
19.55 ACRES

SITE LONGITUDE/LATITUDE

W: 74.032  
N: 41.941

LEGEND:

- PROPERTY LINE
- ADJACENT PROPERTY LINE
- EXISTING MAJOR CONTOUR
- EXISTING MINOR CONTOUR
- EXISTING PROPERTY EASEMENT
- EXISTING BUILDING
- EXISTING GUIDERAIL
- EXISTING FENCE
- EXISTING STONE WALL
- EXISTING WET AREA
- EXISTING FLOOD ZONE LINE
- EXISTING TREE LINE
- EXISTING OVERHEAD WIRES
- EXISTING SIGN
- EXISTING SIGN
- EXISTING RAILROAD TRACKS
- EXISTING WETLANDS AS FLAGGED

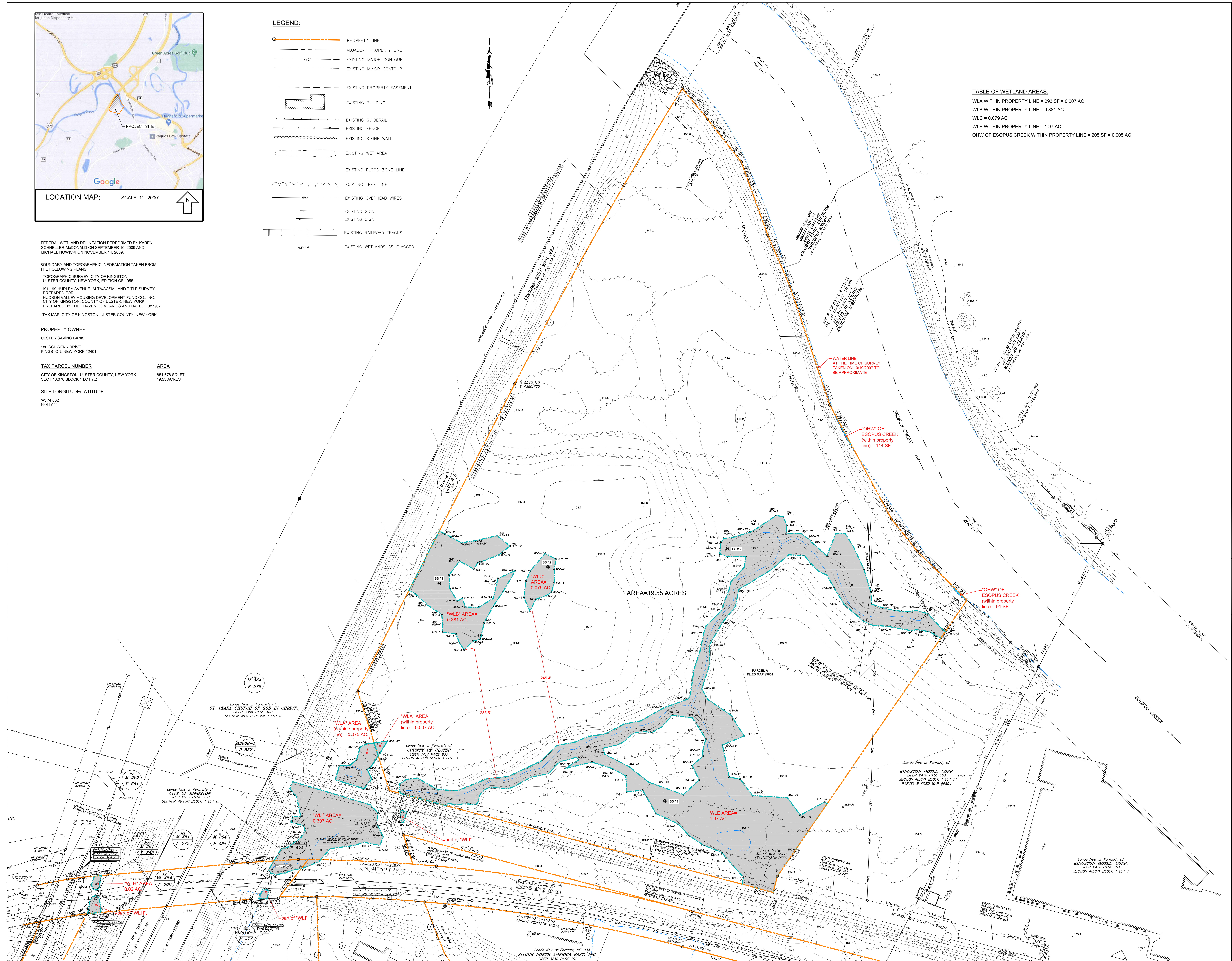


TABLE OF WETLAND AREAS:

WLA WITHIN PROPERTY LINE = 293 SF = 0.007 AC  
WLB WITHIN PROPERTY LINE = 0.381 AC  
WLC = 0.079 AC  
WLE WITHIN PROPERTY LINE = 1.97 AC  
OHW OF ESOPUS CREEK WITHIN PROPERTY LINE = 205 SF = 0.005 AC

LAWRENCE J. PAGGI, PE, PC  
CONSULTING ENGINEERING  
& Site Planning  
SUITE 205 PLAZA 9, 2029 U.S. ROUTE 12524  
FISHKILL, NEW YORK 12524

KINGSTON MEADOWS SENIORS RESIDENCE  
493-495 WASHINGTON AVENUE, CITY OF  
KINGSTON, ULSTER COUNTY, NEW YORK  
WETLAND DELINEATION MAP

Revisions:  
APRIL 27, 2022

DATE:  
JANUARY 19, 2022

SCALE:  
1" = 50'

JOB NUMBER:  
07-0717-12

SHEET NUMBER:  
C1

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