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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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UNITED STATES OF AMERICA,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No. 19-18601
	:
THOMAS J. BYRD, JR.,	:
	:
	:
Defendant.	:

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**NOTICE OF LODGING OF PROPOSED CONSENT DECREE  
FOR 30-DAY PUBLIC COMMENT PERIOD**

The attached proposed Consent Decree is hereby lodged with the Court, pursuant to 28 C.F.R. § 50.7, for public comment. Notice of lodging of this Consent Decree, and the opportunity to comment thereon, will be published in the Federal Register. The United States will receive public comments on the proposed Consent Decree for the requisite 30-day public comment period. During the pendency of the public comment period, no action is required of this Court. After the public comment period has expired, the United States will respond to any comments timely received and, should it appear to the United States that the settlement is in

the public interest, file a motion asking the Court to sign and enter the Consent Decree.

The United States respectfully requests that the Court take no action with respect to the lodged Consent Decree and stay all deadlines in this case until any public comments are received and evaluated, and the United States moves for entry of the Consent Decree or otherwise advises the Court.

Respectfully submitted,

CRAIG CARPENITO  
United States Attorney



By: ALLAN B. K. URGENT  
JESSICA O'NEILL  
Assistant United States Attorneys

Dated:

Of Counsel:

John F. Kasbar, District Counsel  
Amanda Phily, Assistant District Counsel  
U.S. Army Corps of Engineers

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

----- x  
UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 19-18601

THOMAS J. BYRD, JR.,

Defendant.

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WHEREAS, Plaintiff United States of America, by the authority of the Attorney General, and at the request of the Secretary of the United States Department of the Army, acting through the United States Army Corps of Engineers, has filed a Complaint in this action concurrently with this Consent Decree alleging that Defendant, Thomas J. Byrd, Jr., violated and remains in violation of section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311, and section 10 of the Rivers and Harbors Act of 1899 (“RHA”), 33 U.S.C. § 403.

WHEREAS, the Complaint alleges that Defendant’s earthmoving activities resulted in the unauthorized discharge of dredged or fill material into waters of the United States, including streams and wetlands hydrologically and ecologically connected to the Great Egg Harbor River;

WHEREAS, Defendant admits liability to the United States arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest; and

THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I with the consent of the Parties, **IT IS HEREBY ADJUDGED, ORDERED, AND DECREED** as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d) and Section 17 of the RHA, 33 U.S.C. §413, and over the Parties. Venue lies in this District pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because Byrd resides in the District, the subject property is located in the District, and the cause of action alleged herein arose in the District. Venue is also proper in the United States District Court for the District of New Jersey pursuant to RHA Section 12, 33 U.S.C. § 406, because the structure obstructing the navigable capacity of waters of the United States exists in the District. For purposes of this Consent Decree, including any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

2. For purposes of this Consent Decree, including any action to enforce this Decree, the Parties agree, and the Court finds, that the Complaint states claims upon which relief may be granted pursuant to Sections 301(a) and 309(d) of the CWA, 33 U.S.C. § 1311(a) and 1319(d), and Section 17 of the RHA, 33 U.S.C. §413.

II. DEFINITIONS

3. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to

them in the CWA or such regulations, unless otherwise provided in this Decree.

Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

“Complaint” shall mean the complaint filed by the United States in this action on the same date as and immediately preceding this consent decree (ECF No. 1).

“Consent Decree” shall mean this Decree, all Appendices listed in Section XX, and all modifications made effective in accordance with Section XIV.

“Corps” shall mean the United States Army Corps of Engineers and any of its successor departments or agencies.

“CWA” means the Clean Water Act, 33 U.S.C. §§ 1251-1388.

“Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

“Defendant” shall mean Thomas J. Byrd, Jr.

“Effective Date” shall have the definition provided in Section XV.

“Paragraph” shall mean a portion of this Decree identified by an Arabic numeral.

“Parties” shall mean the United States and Defendant.

“Section” shall mean a portion of this Decree identified by a roman numeral.

“Site” shall mean real property, currently owned or controlled by Defendant, consisting of 175.15 acres at 1325 Mays Landing/Somers Point Road, and identified as Lots 1 and 2, Block 8301, and Lot 4, Block 8202, Egg Harbor Township, Atlantic County, New Jersey. The Site is depicted in blue on Exhibit 1 of the Complaint.

“United States” shall mean the United States of America, acting on behalf of the Secretary of the United States Department of the Army, acting through the United States Army Corps of Engineers.

### III. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendant and any successors, assigns, or other persons otherwise bound by law.

5. No transfer of ownership or control of the Site or of any less-than-fee-simple interest in the Site (e.g., an easement), whether in compliance with the procedures of this paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. As a condition of any such transfer, Defendant shall reserve all rights necessary to comply with this Consent Decree. At least 30 Days prior to any such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall concurrently provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to U.S. Army Corps of Engineers Philadelphia District, the United States Attorney for the District of New Jersey, and the United States Department of Justice, in accordance with Section XIV. Any attempted or actual



transfer of any interest in the Site without complying with this Paragraph constitutes a violation of this Decree.

6. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, including, for example, any contractor or consultant retained to perform remedial work or monitoring and maintenance required under this Consent Decree. To the extent that Defendant retains any contractor or consultant to perform remedial work, monitoring and maintenance, or any other obligation required under this Consent Decree, Defendants shall condition any such contract upon performance that conforms to the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, contractors, or consultants to take any actions necessary to comply with the provisions of this Consent Decree.

#### IV. INJUNCTIVE RELIEF

8. Permanent injunction. Except as in accordance with this Consent Decree, Defendant and Defendant's agents, successors, and assigns are enjoined from discharging any pollutant to waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

9. Restoration. Defendant shall restore the Site in accordance with Section 1.0 and 2.0 of Appendix A to this Consent Decree on or before May 15, 2020.

Within 30 Days of completion of the work, Defendant shall provide written notice to the United States at the addresses specified in Section XIV.

10. Monitoring and Monitoring Reports. Defendant shall monitor and maintain the Site in accordance with Section 3.0 of Appendix A to this Consent Decree. Defendant shall submit reports to the United States in accordance with Appendix A to this Consent Decree. Within 30 Days of completion of all monitoring and maintenance, Defendant shall provide written notice to the United States at the addresses specified in Section XIV.

11. Permits. Where any compliance obligation under this Section requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section IX for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and completed applications and has taken all other actions necessary to obtain all such permits or approvals.

#### V. STIPULATED PENALTIES

12. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved

under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

13. Late Restoration. If Defendant fails to commence the restoration under Paragraph 9 within 60 days of the entering of this Consent Decree, Defendant shall pay a stipulated penalty of \$10,000.00. If Defendant fails to complete the restoration under Paragraph 9 on or before May 15, 2020, the following stipulated penalties shall accrue per Day for each violation of a requirement of Paragraph 9:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500.00 .....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$1000.00 .....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$2000.00 .....	31 <sup>st</sup> day and beyond

14. Late Monitoring and Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the monitoring and reporting requirements of Paragraph 10 and Appendix A of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$50.00 .....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$100.00 .....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$200.00 .....	31 <sup>st</sup> day and beyond

15. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily

completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

16. Defendant shall pay any stipulated penalty within 30 Days of receiving the United States' written demand.

17. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree.

18. Stipulated penalties shall continue to accrue as provided in Paragraph 22, during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the Corps that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days of the effective date of the agreement or the receipt of the Corps' decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of receiving the final appellate court decision.

19. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraphs 13 and 14, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

20. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

21. The payment of penalties and interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

22. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XII (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendant's violation of this Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by

an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

## VI. FORCE MAJEURE

23. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant’s contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant’s best efforts to fulfill the obligation. The requirement that Defendant exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. “Force Majeure” does not include Defendant’s financial inability to perform any obligation under this Consent Decree.

24. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice orally or by electronic mail to the United States through the Corps, within 72 hours of when Defendant first knew that the event might cause a delay. Within seven days thereafter, Defendant shall provide in writing to the United States an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be

taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

25. If the United States agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the United States for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. The United States will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

26. If the United States does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, the United States will notify Defendant in writing of its decision.

27. If Defendant elects to invoke the dispute resolution procedures set forth in Section VII (Dispute Resolution), it shall do so no later than 15 days after receipt of the United States' notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 33 and 34. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to the United States and the Court.

## VII. DISPUTE RESOLUTION

28. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Consent Decree.



29. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

30. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

31. The United States shall serve its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on

Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

32. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XI (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

33. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

34. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 40 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by the United States under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under

applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 40, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better further the objectives of the Consent Decree.

35. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 18. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section V (Stipulated Penalties).

#### VIII. INFORMATION COLLECTION AND RETENTION

36. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

a. monitor the progress of activities required under this Consent Decree;

- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendant or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant's compliance with this Consent Decree.

37. Upon request, Defendant shall provide the United States or its authorized representatives splits of any samples taken by Defendant. Upon request, the United States shall provide Defendant splits of any samples taken by the United States.

38. Until five years after the termination of this Consent Decree, Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

39. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to the United States. Defendant may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

40. Defendant may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

41. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty

or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

IX. SCOPE, EFFECT, AND RESERVATION OF RIGHTS

42. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint through the date of lodging, subject to Defendant's compliance with this Decree.

43. The Parties acknowledge that, as of the Effective Date of this Consent Decree, Nationwide Permit 32, part ii found at 77 Fed. Reg. 10,184 (Feb. 21, 2012), provides CWA section 404 authorization, subject to the conditions provided in Nationwide Permit 32 and this Consent Decree, for any dredged or fill material that was placed at the Site in conjunction with discharges alleged to be violations of the CWA in the Complaint. The Parties further acknowledge that Nationwide Permit 32 provides CWA section 404 authorization for the discharge of dredged or fill material insofar as such discharge is necessary for Defendant to fulfill the requirements of Paragraph 9, with such authorization being subject to the conditions provided in Nationwide Permit 32 and this Consent Decree.

44. Except as provided in Paragraph 43, nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the Corps' ability to exercise its authority pursuant to CWA section 404(c), 33 U.S.C. § 1344(c).

45. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 49. This Consent Decree shall not be construed to limit the rights of the United States to obtain remedies under the CWA, its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly stated in Paragraph 42.

46. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Site or Defendant's violations, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 49.

47. This Consent Decree is not and shall not be interpreted to be a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth in this Decree. The United States does not, by its consent to the entry

of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CWA or with any other provisions of federal, state, or local laws, regulations, or permits.

48. This Consent Decree does not limit or affect the rights of the United States or Defendant as against any person not a party to this Decree.

49. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### X. COSTS

50. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

#### XI. NOTICES

51. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

As to the United States by email: Pdpa-nap@usace.army.mil  
Re: DJ # \_\_\_\_\_

As to the United States by mail: U.S. Attorney's Office  
District of New Jersey  
401 Market Street, 4<sup>th</sup> Floor  
Camden, NJ 08101

As to the Corps: Enforcement Section  
Regulatory Branch



Operations Division  
Philadelphia District  
U.S. Army Corps of Engineers  
Wanamaker Bldg 100 Penn Sq. East  
Philadelphia, PA 19107-3390  
Keith A. Davis, Esq.  
Nehmad Perillo Davis & Goldstein, P.C.  
4030 Ocean Heights Avenue  
Egg Harbor Township, NJ 08234

As to Defendant:

52. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

53. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### XII. EFFECTIVE DATE

54. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

#### XIII. RETENTION OF JURISDICTION

55. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections VII and XIV, or effectuating or enforcing compliance with the terms of this Decree.

#### XIV. MODIFICATION

56. Except as otherwise set forth, in Appendix A, the terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent

written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

57. Any disputes concerning modification of this Decree shall be resolved pursuant to Section VII (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 34, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

#### XV. TERMINATION

58. After Defendant has completed the requirements of Appendix A of this Consent Decree and has paid any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

59. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

60. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section VII. However, Defendant

shall not seek Dispute Resolution of any dispute regarding termination until 60 days after service of its Request for Termination.

#### XVI. PUBLIC PARTICIPATION

61. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

#### XVII. SIGNATORIES/SERVICE

62. Each undersigned representative of Defendant and the Assistant United States Attorney certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

63. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court

including, but not limited to, service of a summons. Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

#### XVIII. INTEGRATION

64. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. [Other than deliverables that are subsequently submitted and approved pursuant to this Decree,] The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

#### XIX. FINAL JUDGMENT

65. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

#### XX. APPENDICES

66. The following Appendices are attached to and part of this Consent Decree:

“Appendix A” is the Wetland Restoration/Creation Plan and Exhibits; and

“Appendix B” is the Nationwide Permit 32.

Dated and entered this \_\_\_ day of \_\_\_\_\_, 20\_\_

---

UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

CRAIG CARPENITO  
United States Attorney


9/3/2019  
Date



ALLAN B. K. URGENT  
JESSICA R. O'NEILL  
Assistant United States Attorney  
United States Attorney's Office  
401 Market Street, 4<sup>th</sup> Floor  
Camden, NJ 08101  
856-757-5139

FOR THE U.S. ARMY CORPS OF ENGINEERS:

9/3/2019  
Date

  
\_\_\_\_\_  
JOHN F. KASBAR  
District Counsel  
U.S. Army Corps of Engineers, Philadelphia  
District

FOR DEFENDANT:

\_\_\_\_\_  
Date

\_\_\_\_\_  
THOMAS J. BYRD, JR.

\_\_\_\_\_  
Date

\_\_\_\_\_  
KEITH A. DAVIS, ESQ.  
Nehmad Perillo Davis & Goldstein, P.C.  
4030 Ocean Heights Avenue  
Egg Harbor Township, NJ 08234  
609-927-1177  
Attorney for Defendant Thomas J. Byrd, Jr.

FOR THE UNITED STATES OF AMERICA:

CRAIG CARPENITO  
United States Attorney

\_\_\_\_\_  
Date

\_\_\_\_\_  
ALLAN B. K. URGENT  
JESSICA R. O'NEILL  
Assistant United States Attorney  
United States Attorney's Office  
401 Market Street, 4<sup>th</sup> Floor  
Camden, NJ 08101  
856-757-5139

FOR THE U.S. ARMY CORPS OF ENGINEERS:

\_\_\_\_\_  
Date


\_\_\_\_\_  
JOHN F. KASBAR  
District Counsel  
U.S. Army Corps of Engineers, Philadelphia  
District

FOR DEFENDANT:

6-24-19  
Date

  
\_\_\_\_\_  
THOMAS J. BYRD, JR.

8/12/19  
Date

  
\_\_\_\_\_  
KEITH A. DAVIS, ESQ.  
Nehmad Perillo Davis & Goldstein, P.C.  
4030 Ocean Heights Avenue  
Egg Harbor Township, NJ 08234  
609-927-1177  
Attorney for Defendant Thomas J. Byrd, Jr.

APPENDIX A





**US Army Corps  
of Engineers**

Philadelphia District

Regulatory Branch

Surveillance and Enforcement Section

**United States v. Thomas J. Byrd Jr.**  
**Action ID Number NAP-2014-1001**

**WETLAND RESTORATION / CREATION PLAN**  
**for**  
**THOMAS J. BYRD, JR. PROPERTY**  
**BLOCK 8301, LOT 1 and BLOCK 8202, LOT 4**  
**EGG HARBOR TOWNSHIP**  
**ATLANTIC COUNTY**  
**NEW JERSEY**

**PREPARED BY:**

**Kevin F. Maley, Chief**  
**Surveillance and Enforcement Section**  
**Regulatory Branch, Philadelphia District**  
**United States Army Corps of Engineers**

**May 10, 2019**  
**(Revised September 5, 2019)**



US Army Corps  
of Engineers  
Philadelphia District

## WETLAND RESTORATION / CREATION REQUIREMENTS

### 1.0 Restoration Activities - All Areas

Mr. Byrd shall adhere to the following general removal and restoration requirements for all areas to be restored:

#### 1.1 General Requirements

1.1.1 Mr. Byrd shall completely remove all unauthorized dredged and/or fill material, including soil, stone, sand, wood, shells, concrete, asphalt, and other materials, from areas subject to Federal jurisdiction or used as backfill within areas identified as Areas, "A-2", "A-3", "B", "C-1", "C-2", "F" and portions of "E", as shown on Exhibit 1 and described in the following Restoration/Creation Requirements. Mr. Byrd shall dispose of all removed materials in a Corps approved, upland location.

1.1.2 All unauthorized dredged and/or fill material shall be removed to the ground surface existing prior to the performance of unauthorized work. In the event that the ground surface existing prior to the performance of unauthorized work cannot be identified during removal and restoration activities, material shall be removed to the elevation of the adjacent undisturbed wetland surface.

1.1.3 Restoration work using heavy equipment shall be performed with equipment operating from already filled areas or uplands. Removal of unauthorized work shall begin at the most waterward edge of the unauthorized work and proceed landward. If necessary, heavy equipment may be staged in adjacent undisturbed wetland areas, but only if approved in advance by the U.S. Army Corps of Engineers, Regulatory Branch (Corps) representative. Further, no heavy equipment shall be staged on undisturbed wetland areas or restored wetland areas unless staged on properly sized meadow mats. Any use of meadow mats in undisturbed or restored wetlands shall be temporary only. The mats shall be removed from the wetlands within two days of completion of mat use and the impacted areas restored to pre-disturbance grades. Vegetation killed by use of the mats shall be replanted within five days of completion of mat use.

1.1.4 All restoration earth work shall be performed using an excavator equipped with a flat blade on the bucket.

1.1.5 Prior to the performance of removal or restoration work, all equipment operators shall attend a preconstruction meeting with a Corps representative on the site.

No equipment operator shall perform removal or restoration work without first meeting with a Corps representative to review the removal and restoration requirements. During removal and restoration work, Corps staff will be available to help guide successful removal/restoration efforts.

1.1.6 Prior to the preconstruction meeting, Area "C-1" shall be sufficiently drained (see discussion below) and the upland limits of all wetland areas to be restored and created shall be survey-located and staked clearly in the field.

1.1.7 Unless specifically exempted by Mr. Michael Leggiero, Corps Biologist, or other Corps representative onsite during restoration activities, all unauthorized subsurface pipes leading to or located in Areas "A-2", "A-3", "B", "C-1", "C-2", or "F", shall be completely removed and/or permanently disabled from beneath the areas subject to Federal jurisdiction.

1.1.8 Prior to performing earthwork, it is the responsibility and discretion of Mr. Byrd, his representative, and/or contractor to call the utility mark-out hotline. In New Jersey, call 1-800-272-1000.

1.1.9 The upland/wetland edge of restored or created wetlands (with the exception of the river road restoration which is discussed below) shall be graded to a slope no steeper than 3:1 (horizontal to vertical) and stabilized to prevent erosion.

1.1.10 Unless specifically exempted by Mr. Leggiero or other Corps representative onsite during restoration activities, stabilization of restored or created wetland edges shall be accomplished by the placement of silt fencing along the toe of slope. No portion of the toe of slope of the upland/wetland edge shall occur in areas subject to Federal jurisdiction.

1.1.11 All unauthorized dredged and/or fill material removed from areas subject to Federal and/or State jurisdiction, and not used for restoration as identified in Section 2.2 below, shall be placed on an upland, non-wetland area approved by Mr. Leggiero or other Corps representative. Mr. Leggiero can be contacted by telephone at (267) 284-6561, by cell phone at (570) 472-4515, or by electronic mail (e-mail) at michael.p.leggiero@usace.army.mil.

1.1.12 Mr. Byrd shall allow Corps inspectors, following reasonable notification and scheduling, access to the site to observe, inspect, and provide guidance during the restoration and monitoring of the work identified in this document.

1.1.13 Minor deviations from the restoration plan as identified in this document and referenced plans due to unforeseen circumstances or site conditions, shall be subject to prior approval by Mr. Leggiero or other Corps representative.

## 2.0 Restoration Requirements - Specific Areas

In addition to the above-noted general removal and restoration requirements, Mr. Byrd shall adhere to the following specific area wetland creation and restoration requirements:

### 2.1 Area "A-1" (House Pond) Wetland Creation

2.1.1 Area "A-1", the pond and the retaining berms located adjacent to the house (house pond), illegally constructed from 0.59 acre of wetlands and shown on Exhibit 2, shall be allowed to remain and be authorized under Nationwide Permit 32. The creation of 0.59 acre of wetland from uplands adjacent to the house pond originally proposed as compensatory mitigation shall not be required.

2.1.2 Nationwide Permit General Condition 20(a) states: "In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied."

2.1.3 Inasmuch as it has come to the attention of this office that the proposed work to excavate an undisturbed upland area on Mr. Byrd's property to create the 0.59 acre compensatory wetland has the potential to adversely impact potential resources protected by the NHPA, the wetland creation requirement and the associated planting requirement have been removed from the restoration plan.

### 2.2 Areas "A-2", "A-3" and "F" (Linear Ditches West of the House)

2.2.1 Unauthorized dredged and/or fill material shall be removed from Areas "A-2", "A-3", and "F" (along the edge of the NJDEP mapped coastal wetlands boundary), and shall be used to backfill the ponds created in Areas "A-2", "A-3", and "F".

2.2.2. If the ground surface existing in Areas "A-2", "A-3", and "F" prior to the performance of unauthorized work cannot be identified during removal and restoration activities, material shall be removed to the elevation of the adjacent undisturbed wetlands.

2.2.3. Upon completion of restoration, no stabilization-seeding/planting is required in Areas "F", "A-2" or "A-3" due to the presence in those areas of *Phragmites australis*.

### 2.3 Areas "B", "C-1" and "C-2" (15+ Acre Impoundment and Edge Wetlands)

2.3.1 Prior to removal of any unauthorized material from Areas "B" or "C-2",

impounded water shall be drained from the 15+ acre Area "C-1". Draining shall be regulated to a rate sufficient to prevent downstream erosion. It is recommended that Area "C-1" be drained well enough in advance of the intended restoration earthwork (and prior to the preconstruction meeting) so that remaining impounded water will not hinder the restoration efforts or cause avoidable erosion and downstream sedimentation.

2.3.2 After Area "C-1" is sufficiently drained, the unauthorized material shall be removed from Areas "B" and "C-2" to the surface existing prior to the performance of unauthorized work.

2.3.3 A Corps representative must be present to provide guidance during removal of the Area "B" dam. No earth work to remove the dam shall be initiated without a Corps representative present.

2.3.4 Earth-working equipment utilized to remove the dam and the unauthorized material at Area "C-2" shall remain on existing fill, on the existing roadway surface, or on upland areas at all times and be prohibited from entering into or working from the wetland surface without prior approval from the Corps representative.

2.3.5 Removal of unauthorized dredged and/or fill material from Areas "B" shall start at the north end and work south.

2.3.6 Removal of the unauthorized dam shall be performed while the tide level is, or is expected to be, below the elevation where work is being or is to be performed. In the event that incoming tidal waters reach the area of on-going restoration work, work shall cease until the tidal waters recede below the elevation where work is being or is to be performed.

2.3.7 To stabilize restored wetland Areas "B" and "C-2", all restored, bare surface wetland areas subject to earth disturbance shall be seeded with a local, non-invasive wetland seed mixture, appropriate for saturated soil conditions. No stabilization-seeding shall be initiated prior to approval of the restoration earthwork by a Corps representative. Seeding and any additional planting proposed by Mr. Byrd in these areas shall be initiated within five days of approval by the Corps of successful earthwork completion, and be completed no later than 30 days following initiation.

2.3.8 All disturbed areas along the slope of the upland/wetland edge proximate to the large, 15+ acre impoundment (Areas "B", "C-1", and "C-2"), shall be seeded with a local, non-invasive seed mixture to prevent erosion of sediment into restored wetland areas.

2.3.9 Mr. Byrd specifically reserves the right to manually relocate any species to other habitats, as appropriate during and after the impoundment is drained.

2.3.10 In the event that naturally occurring beaver activity occurs following completion of the restoration of Areas "B", "C-1", and "C-2" that results in adverse

flooding of his upland property, Mr. Byrd shall promptly seek Corps and NJDEP guidance on appropriate mitigative actions.

#### 2.4 Area "E" (River Road)

2.4.1 Mr. Byrd shall remove unauthorized dredged and/or fill material from the wetlands along the access road to the Great Egg Harbor River ("Area E") to conform to the 1/3 acre limit of roadway fill in tidal wetlands authorized by the Federal Nationwide Permit #14 (NWP-14) *Linear Transportation Projects*, as shown on Exhibit 3. Minor deviations in the footprint of the restored roadway from the location shown in Exhibit 3 due to unforeseen circumstances or site conditions, shall be subject to prior approval by Mr. Leggiero or other Corps representative in the field during restoration. Under no circumstances will the final approximately 14 foot wide road and final geometry of the cul-de-sac exceed 1/3 acre of disturbance. Upon completion of the roadway restoration, the slope of the roadway edge to wetlands shall be no steeper than 2:1 horizontal to vertical, and be stabilized to prevent erosion.

2.4.2 Exhibit 3 depicts the final 1/3 acre roadway approximately 14 feet in width, toe to toe to remain, along with a portion of the cul-de-sac to be used as a turn-around. Exhibit 3 depicts the turn-around as a linear, square area. However, the geometry of the cul-de-sac may be adjusted to a more circular area in consultation with, and with approval from, Mr. Leggiero or other Corps representative onsite during restoration, provided the total disturbance to regulated areas does not exceed 1/3 acre.

2.4.3 Earth-working equipment utilized to remove the unauthorized material from Area "E" shall remain on existing fill, on the existing roadway surface, or upland areas at all times and shall be prohibited from entering into or working from the wetland surface.

2.4.4 Removal of unauthorized dredged and/or fill material from Area "E" shall start at the edge of the Great Egg Harbor River and work landward.

2.4.5 Removal of the unauthorized material shall be performed while the tide is or is expected to be below the elevation where work is being or is to be performed. In the event that incoming tidal waters reach the area of on-going restoration work, work shall cease until the tidal waters recede below the elevation where work is being or is to be performed.

2.4.6 Unauthorized material removed along the road to reduce the width of the road to 14 feet (toe to toe) shall be removed to the elevation of the immediately adjacent undisturbed wetlands.

2.4.7 Seeding and/or planting are not required in the restored wetlands along the road due to the predominance in that area of *Phragmites australis*.

## 2.5 Area “D” – Mooring Piles

2.5.1 The existing mooring piles (Area “D”) shall be completely removed from the area subject to Federal jurisdiction or be cut off at the mud line.

## 3.0 Monitoring and Monitoring Reports

### 3.1 Monitoring

3.1.1 Mr. Byrd or his representatives shall monitor the seeded restored wetlands in “Areas B” and “Area C-2” at the end of each complete growing season for a period of three years.

3.1.2 Mr. Byrd or his representatives shall also monitor the stabilization-seeded upland/wetland slopes adjacent to restored wetland “Areas B” and “Area C-2” at the end of each complete growing season for a period of three years.

3.1.3 Seeded areas (restored wetlands and wetland/upland slopes) are required to achieve 85 percent areal vegetative coverage. Bare areas greater than 5' x 5' with less than 85 percent vegetative coverage at the end of 2020, and at the end of each subsequent complete growing season during the three-year monitoring period, shall be reseeded the following Spring.

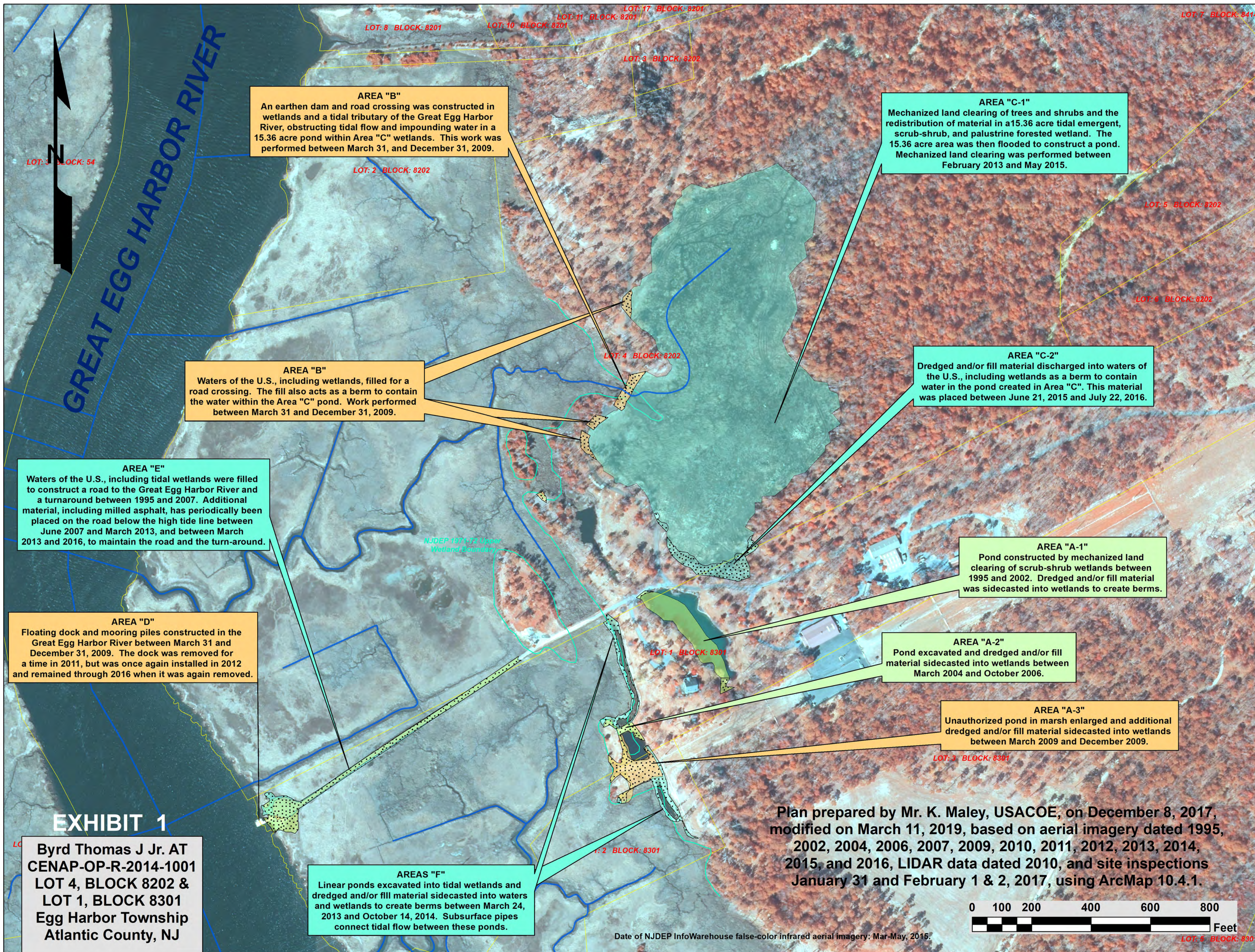
### 3.2 Monitoring Reports

3.2.1 A baseline report shall be submitted to the USACE and NJDEP prior to monitoring, and be followed by three subsequent annual monitoring reports by November 15th of each monitoring year. The reports shall identify the status of seeded areas and any re-seeding efforts. The monitoring reports shall include any identified problems that may arise and shall provide proposed solutions.

3.2.2 In the event that the wetland restoration and creation is not successful at the end of the three-year monitoring period, additional restoration and/or mitigation, i.e., earthwork and/or seeding, may be required at the discretion of the Corps.

# **Exhibit 1**

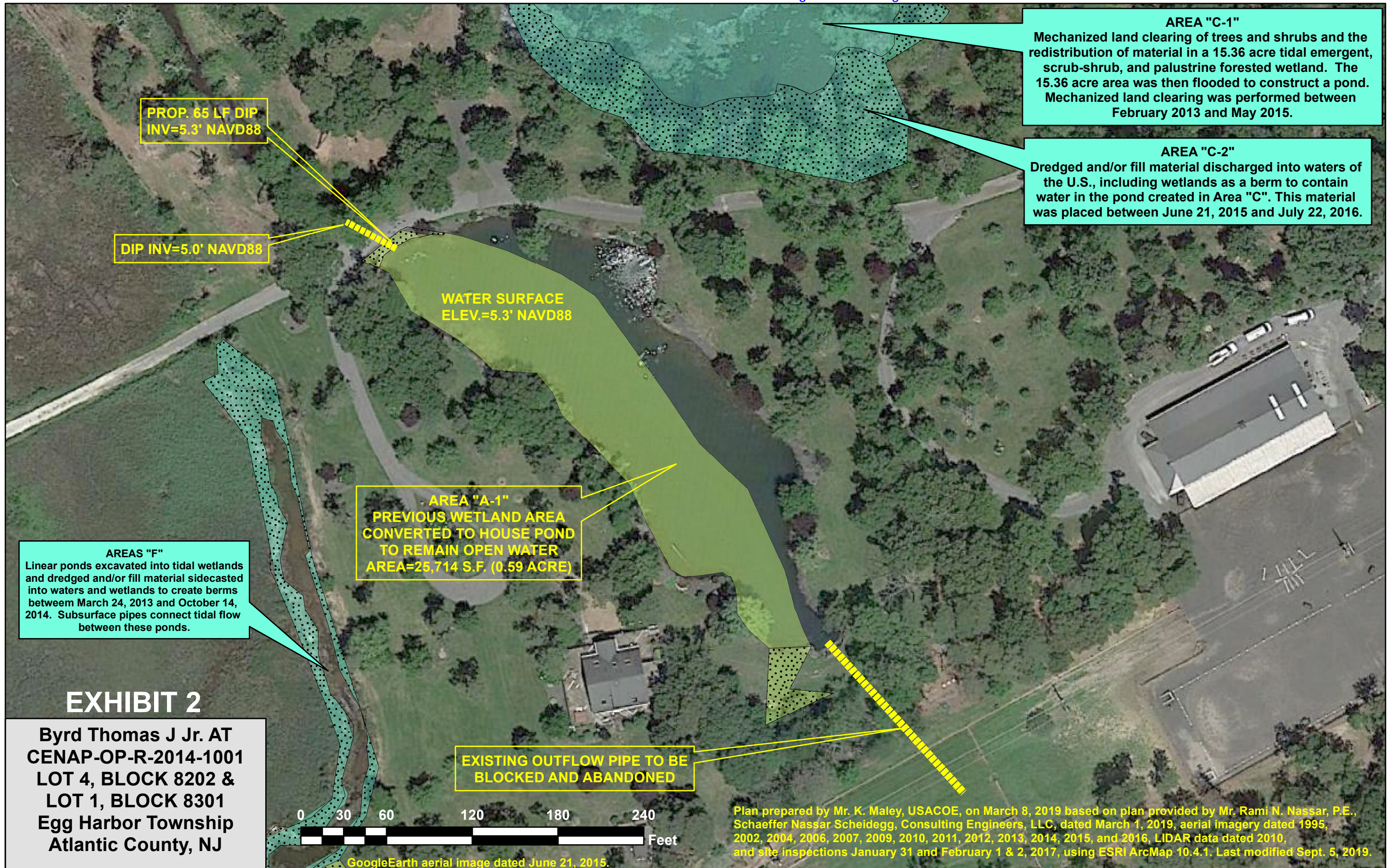






## **Exhibit 2**

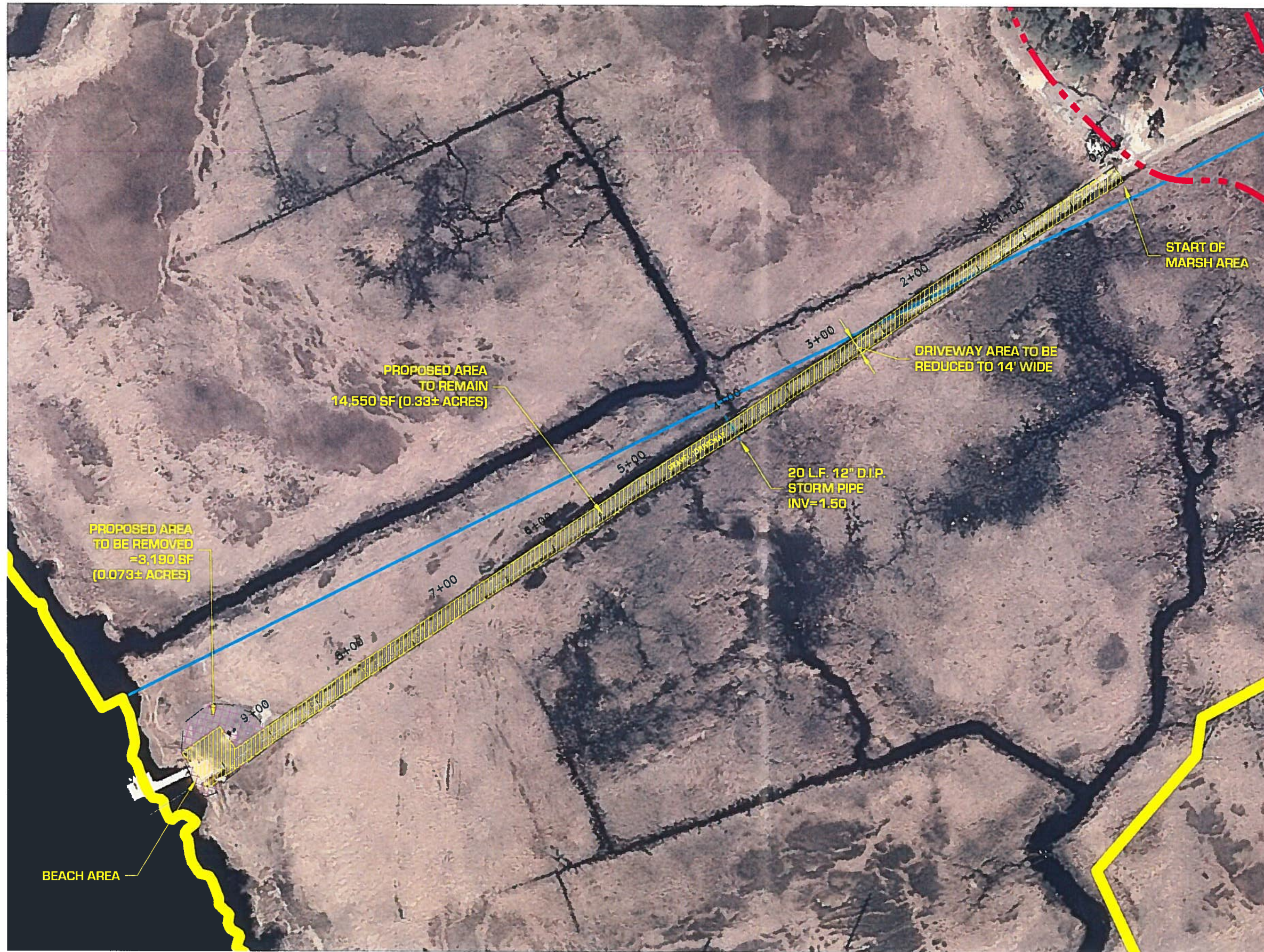






## **Exhibit 3**





STATION	EXISTING WIDTH (TOE TO TOE)
STA 900	15'-0"
STA 850	14'-6"
STA 800	14'-6"
STA 750	14'-2"
STA 700	14'-7"
STA 650	14'-8"
STA 600	16'-0"
STA 550	15'-2"
STA 500	14'-11"
STA 450	14'-5"
STA 400	14'-8"
STA 350	14'-8"
STA 300	14'-4"
STA 250	15'-5"
STA 200	15'-10"
STA 150	15'-6"
STA 100	15'-0"
STA 050	14'-8"
STA 000	16'-2"

EXHIBIT 3

PLANS FOR PERMIT PURPOSES ONLY

**Schaeffer Nassar Scheidegg**  
 CONSULTING ENGINEERS, LLC  
 Surveyors • Environmentalists • Planners  
 1425 Cantillon Boulevard • Mays Landing • New Jersey  
 Telephone: (609) 625-7400 • Fax: (609) 909-0253  
 Certificate of Authorization #9492B103800

**RAMI N. MASSAR**  
 PROFESSIONAL ENGINEER  
 NEW JERSEY LIC. NO. 348202  
 DATE

RESTORATION PLAN FOR:  
**THOMAS BYRD**  
 1325 MAYS LANDING - SCOVERS POINT ROAD, BLOCK B801, LOT 1 & B202 LOT 4  
 EGG HARBOR TOWNSHIP, NEW JERSEY

DATE 3-01-19  
 SCALE NTS  
 BY VRM  
 CHECKED RNN  
 SHEET NO  
**1**  
 1 OF 1  
 FILE# 16-352



APPENDIX B



REPLY TO  
ATTENTION OF

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

**DEPARTMENT OF THE ARMY**  
PHILADELPHIA DISTRICT CORPS OF ENGINEERS  
WANAMAKER BUILDING, 100 PENN SQUARE EAST  
PHILADELPHIA, PENNSYLVANIA 19107-3390

Regulatory Branch  
Surveillance and Enforcement Section

**SEP 06 2019**

SUBJECT: CENAP-OP-R-2014-1001 (NWP 32)  
Project Name: Byrd Thomas J Jr AT  
NJDEP#: EA ID# PEA 150001-0108-14-0005.1  
Decimal Latitude: 39.359992° Longitude: -74.709129° and  
Decimal Latitude: 39.359137° Longitude: -74.712846°

Mr. Thomas J. Byrd Jr.  
1325 Mays Landing-Somers Point Road  
Egg Harbor Township, New Jersey 08234

Dear Mr. Byrd:

This letter is written with regard to your proposal to maintain an open water pond and berms constructed in 0.59 acre of wetlands adjacent to your house, and to maintain an approximately 0.33 acre access roadway and turn-around in wetlands to the Great Egg Harbor River on your property located on Block 8202, Lot 4 and Block 8301, Lot 1, Egg Harbor Township, Atlantic County, New Jersey.

Under current Federal regulations, a Department of the Army permit is required for work or structures in navigable waters of the United States and/or the discharge of dredged or fill material into waters of the United States including wetlands.

**Based upon our review of your Consent Decree and the referenced Wetland Restoration/Creation Plan, it has been determined that the proposed regulated work to remain is approved by the existing Department of the Army Nationwide Permit 32 (NWP 32) described below provided the work is conducted in compliance with the Consent Decree, the Wetland Restoration/Creation Plan, the NWP general conditions, regional conditions, and the project specific special conditions.**

**NWP 32. Completed Enforcement Actions.** Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, **consent decree**, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, **consent decree**, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching the settlement agreement, the Corps ensured compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e).

(**Authorities:** Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

You are advised that this verification of NWP authorization is valid until the Nationwide Permits expire on March 18, 2022, unless the NWP authorization is modified, suspended, or revoked prior to this date. In the event that the NWP authorization is modified during that time period, this expiration date will remain valid, provided the activity complies with any subsequent modification of the NWP authorization.

It is noted that CZM consistency from the State is only required for those activities in or affecting a State's coastal zone. Additionally, some of the NWPs do not involve a discharge of dredged or fill material, and as such, do not require a 401 WQC. If the State has denied the required WQC and/or not concurred with the Corps' CZM consistency determination, the NWP



authorization is considered denied without prejudice until an individual project specific WQC and/or CZM approval is obtained.

**The State of New Jersey has denied 401 WQC and has not concurred with the Corps' CZM consistency during the issuance of Philadelphia District's regional conditions for NWP 32. Therefore, you are being directed to seek further review by the state in which they will attach the required Federal consistency determination and certification as part of their review as applicable. This approval must be obtained in order for the activity to be authorized under the NWP and a copy provided to this office before work begins. Any project specific conditions required by the State for the WQC and/or CZM approval will automatically become part of the NWP authorization.**

The activities authorized by this NWP verification must comply with the NWP General Conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. A copy of the NWP General Conditions and the Philadelphia District 2017 NWP Regional Permit Conditions for New Jersey for which this verification is subject to, can be found at:

***<https://www.nap.usace.army.mil/Missions/Regulatory/Permits/NWP.aspx>***

In instances where you are unable to access a digital copy of the 2017 NWP General Conditions and/or the 2017 NWP Regional Permit Conditions for New Jersey, a hard copy will be transmitted by registered mail to you at your request. It is further noted that you may request a copy by email at any time, after which the NWP General Conditions and Regional Permit Conditions will be provided to you by facsimile or other electronic means per your request.

Activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

You should carefully note that this NWP authorization is based upon your agreement to comply with the terms and conditions of this NWP including any and all attached project specific special conditions listed below. Initiation of any authorized work shall constitute your agreement to comply with all of the NWP's conditions. You should also note that the authorized work may be subject to periodic inspections by a representative of this office. The verification of a Nationwide Permit including all general and special conditions is not subject to appeal.

**PROJECT SPECIFIC SPECIAL CONDITIONS:**

1. All work performed in association with the above noted project shall be conducted in accordance with the Consent Decree you signed on June 24, 2019, and the attached restoration plan (Exhibit A) identified as "Wetland Restoration/Creation Plan for Thomas J. Byrd, Jr. Property, Block 8301, Lot 1 and Block 8202, Lot 4, Egg Harbor Township, Atlantic County,

New Jersey”, last revised September 5, 2019. The project plan provides for restoration of Section 10, Rivers and Harbors Act of 1899 and Section 301 of the Clean Water Act violations on your property, maintaining approximately 0.33 acre of fill for an existing dead-end road and vehicle turn-around in wetlands, and maintaining 0.04 acre of fill in wetlands for pond berms. The stated purpose of the berms is to maintain a 0.59 acre open water pond that was constructed in wetlands adjacent to a single-family residence. The stated purpose of the roadway fill is to provide waterfront access to and from the Great Egg Harbor River.

2. Any deviation in construction methodology or project design from that shown on the above noted drawings or described in the Wetland Restoration/Creation Plan must be approved by this office, in writing, prior to performance of the work. All modifications to the above noted drawings or plan shall be approved, in writing, by this office. No work shall be performed prior to written approval of this office.

3. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

4. To ensure compliance with Regional Condition – 6 (G-6) and to protect diadromous fish migration, spawning activities, and EFH, all in-water work shall be avoided between March 1 and July 31 of any year.

5. To ensure compliance with NWP General Condition – 20, Historic Properties, any unauthorized material removed during restoration shall be removed to the wetland surface existing prior to the performance of unauthorized work only. No excavation shall occur into undisturbed areas or soils below the pre-fill surface.

If you should have any questions regarding this matter, please contact Mr. Kevin Maley of this office at (215) 656-5764, or Mr. Michael Leggiero at (570) 472-4515.

Sincerely,



Edward E. Bonner  
Chief, Regulatory Branch

Enclosures

Copies Furnished:

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