

VI. APPENDICES

SR 1, Little Heaven Grade Separated Intersection Environmental Assessment / Section 4(f) Evaluation



*U.S. Department of Transportation
Federal Highway Administration*



Delaware Department of Transportation

APPENDIX A: MEMORANDUM OF AGREEMENT

*SR 1, Little Heaven Grade Separated Intersection
Environmental Assessment / Section 4(f) Evaluation*



*U.S. Department of Transportation
Federal Highway Administration*



Delaware Department of Transportation

MEMORANDUM OF AGREEMENT (MOA)

**AMONG THE FEDERAL HIGHWAY ADMINISTRATION, THE DELAWARE STATE
HISTORIC PRESERVATION OFFICE, AND THE DELAWARE DEPARTMENT OF
TRANSPORTATION**

**REGARDING IMPLEMENTATION OF THE LITTLE HEAVEN GRADE SEPARATED
INTERSECTION PROJECT KENT COUNTY, DELAWARE**

**STATE CONTRACT NUMBER: 24-122-02
FEDERAL AID NUMBER: NH-K008(6)**

WHEREAS, the Federal Highway Administration (FHWA) with the Delaware Department of Transportation (DelDOT) propose to construct 2.73 miles of transportation improvements including a grade separated intersection along US 113/SR 1 in Little Heaven, Kent County, DE, hereon referred to as the "Project", and

WHEREAS, the FHWA in consultation with the Delaware State Historic Preservation Office (DE SHPO) and DelDOT has established the Project undertaking's Area of Potential Effect (APE), as defined in 36 CFR 800.16(d), as those areas within the Limit of Construction (LOC), Temporary Construction Easements (TCE), Permanent Easements (PE), Right of Way (ROW), and adjacent or contiguous properties where visual effects may occur (**see Attachment A**); and

WHEREAS, the FHWA has consulted with the DE SHPO in accordance with Section 106 of the National Historic Preservation Act, 16 U.S.C. Part 470, and its implementing regulations (36 CFR Part 800) to resolve any adverse effects that may occur as a result of this Project undertaking; and

WHEREAS, FHWA has afforded the public an opportunity to comment on the effects of the Project undertaking on historic properties through the National Environmental Policy Act (NEPA) of 1969, as amended; and through DelDOT's Public Involvement Procedures; and

WHEREAS, FHWA has elected to phase the identification and evaluation of historic properties as provided in 36 CFR 800.4(b)(2) as stipulated under this agreement; and

WHEREAS, FHWA pursuant to 36 CFR Part 800.4 (a)(2), has determined that within the APE, the following properties are listed in or are eligible for the National Register of Historic Places:

W. C. Fountain Farmstead (Cultural Resource Survey No. K01689);
Barrett's Chapel and Cemetery (K00103);
Jehu Reed House (K00137);
Mt. Olive School (K02685); and
Thomas James House (K02686); and

WHEREAS, FHWA in consultation with the DE SHPO has applied the criteria of adverse effect to known historic properties; and

WHEREAS, FHWA has determined that the Project will have no effect on:

W. C. Fountain Farmstead (K01689); and

WHEREAS, FHWA, through DelDOT has determined that this project will have no adverse effect on:

Thomas James House (K02686);
The Barrett's Chapel and Cemetery (K00103); and

WHEREAS, FHWA, through DelDOT has determined that this project will have an adverse effect on:

Jehu Reed House (K00137);
Mt. Olive School (K02685); and

WHEREAS, FHWA has determined that the Project may also affect as yet unidentified historic properties in areas that have not been subject to prior cultural resource investigations, and/or resources for which eligibility for listing in the National Register of Historic Places has not yet been determined; and

WHEREAS, FHWA and DelDOT have notified the Advisory Council on Historic Preservation (ACHP) of the Project's potential to adversely affect known historic properties and it declined to participate in the consultation on November 12, 2008. However, if through the process outlined in this Memorandum of Agreement (MOA), the signatories find that other historic properties may be adversely affected, coordination with the ACHP may resume; and

WHEREAS, DelDOT participated in the consultation, has responsibilities for implementing stipulations under this MOA, and has been invited to be a signatory to this MOA, pursuant to 36 CFR 800.6(c)(2); and

WHEREAS, FHWA has contacted the Delaware Nation and the Stockbridge-Munsee Tribe concerning the Project. The Delaware Nation indicated its interest in being a consulting party to all projects within the State of Delaware, and therefore has been invited to participate in developing this MOA; and

WHEREAS, FHWA and DelDOT will inform the Delaware Nation and the Stockbridge-Munsee of project activities related to Native American archaeological sites, investigations, and treatments, as provided for under the stipulations of this MOA, and

NOW, THEREFORE, the FHWA, DE SHPO, and DelDOT agree that the Project will be implemented in accordance with the following stipulations, in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

The FHWA shall ensure that the following stipulations are implemented:

I. Archaeological Resources

A. Identification/Evaluation

Prior to starting construction or other ground-disturbing activities, FHWA and DelDOT in consultation with the DE SHPO shall complete identification (Phase I) archaeological surveys within the APE (**Attachment A**) for the project, and will determine if identified sites will require a Phase II level archaeological survey to evaluate their National Register of Historic Places eligibility. Evaluation Studies (Phase IB and/or Phase II) may require additional background research and/or additional field excavations. All surveys shall conform to the requirements of Stipulation VII of this MOA.

DelDOT shall prepare reports on findings of the archaeological identification/evaluation surveys and shall submit the reports to the DE SHPO for their review and concurrence. Copies will also be provided to any consulting parties for comment. Upon receipt of the document, the review period will be thirty (30) days. FHWA and DelDOT will take into account comments and will recommend any next steps.

During the Evaluation Studies (Phase II), FHWA and DelDOT shall apply the National Register criteria (36 CFR 60.4) in accordance with 36 CFR 800.4 (c), taking into account applicable historic contexts and management plans developed for Delaware's historic and prehistoric archaeological resources.

If FHWA and DelDOT determine that any of the National Register criteria are met, and the DE SHPO agrees, the archaeological site(s) shall be considered eligible for the National Register. If FHWA and DelDOT determine that the National Register criteria are not met, and the DE SHPO agrees, the archaeological site(s) shall be considered not eligible for the National Register.

Based on the Evaluation Studies (Phase II), should a signatory to this agreement not agree on the eligibility determination of an archaeological site(s), the DelDOT and FHWA shall obtain a determination from the Secretary of the Interior, pursuant to 36 CFR 800.4(c)(2), 36 CFR 63.2(c) and 63.3(d).

B. Effect Determination/Mitigation

If eligible archaeological sites are identified and affected within the APE, DelDOT will make a reasonable effort to avoid these sites or to minimize impacts to them. If the eligible sites cannot be avoided, DelDOT will apply the Criteria of Adverse Effect in accordance with 36 CFR Part 800.5.

If the project will have an adverse effect on archaeological sites, DelDOT in consultation with the DE SHPO, shall develop a treatment plan. The treatment plan may include elements of data recovery or an alternative mitigation plan.

DelDOT shall submit the treatment plan to the DE SHPO, the Delaware Nation, and other interested or consulting parties that may be identified later in time for their review and comment. Upon receipt of the document, the review period will be thirty (30) days. Following thirty (30) days, DelDOT will take into account any comments, and will recommend any next steps.

Should data recovery investigations be warranted, DelDOT and FHWA shall ensure that a data recovery plan is developed in consultation with the DE SHPO, or other consulting parties or interested parties identified later in time. The plan shall specify, at a minimum:

- the property, properties, or portions of properties where data recovery is to be carried out, and any property that will or may be destroyed without data recovery;
- research questions to be addressed through data recovery, with an explanation of their relevance and importance;
- the research methods to be used, with an explanation of their relevance to the research questions;
- the methods to be used in analysis, data management, and data dissemination, including a schedule;
- a provision for assessing materials that may be in need of conservation;
- proposed disposition of recovered materials and records;
- proposed methods for involving the interested public in the data recovery, and for disseminating the results of the work to the interested public;
- a proposed schedule for the submission of progress reports to the DE SHPO; and
- provisions to meet on-site in order to evaluate the success of the initial fieldwork phase of any data recovery program, and near the end of the fieldwork efforts to validate substantial completion.

When and/or if an alternative mitigation strategy is chosen and approved by the DE SHPO, FHWA, and DelDOT, it may include but is not limited to: analysis and synthesis of past data accumulated through either DE SHPO, FHWA, and DelDOT projects, updating the relevant DE SHPO and DelDOT archaeological websites and GIS databases, development of historic and prehistoric contexts and preservation priorities, statewide predictive models, development of travel or informational displays with the cultural resource work for this Project, oral histories from the project APE, documentaries about the history of the APE, virtual tour / website about the archaeological sites being mitigated in the APE, and improved archaeological data management and access for both DE SHPO and DelDOT.

DelDOT will complete all necessary data recovery fieldwork prior to commencing construction in the site areas. Alternative mitigation may or may not be completed prior to commencing construction in the site areas.

DelDOT shall provide all draft and final archaeological reports and public information materials to the DE SHPO for review and comment. DelDOT shall also provide all such reports and materials that pertain to Native American archaeological sites to the Delaware Nation for review and comment. DelDOT will take into account any comments received. All final reports shall meet the Secretary of the Interior's standards and Guidelines for Archaeological Documentation (48 FR 44734-37), while also satisfying the DE SHPO's guidelines for archaeological surveys or investigations.

C. Public Involvement:

If mitigation is necessary, DelDOT will prepare a public participation plan and public information materials. Before releasing materials to the public, DelDOT shall submit the proposed action plan(s) with any materials to the FHWA, DE SHPO, the Delaware Nation, and other consulting or interested parties that may be identified for their review and comment. Upon receipt of the materials, the review period will be thirty (30) days. Following thirty (30) days, DelDOT will take into account any comments received, and will recommend any next steps, if necessary, to the FHWA, DE SHPO and the Delaware Nation.

The public participation plan may include, but is not limited to archaeological site tours for the public and educational groups. The specific public outreach materials produced will be determined individually for each site for which mitigation is necessary and may include, but are not limited to pamphlets, videos, historical markers, brochures, websites, exhibits, displays for public buildings booklets on the history or prehistory of the project area, lectures or presentations at academic conferences, and/or public institutions such as schools and historical societies.

DelDOT shall distribute the public information materials to other consulting parties and interested parties, local schools, historical societies, libraries, museums and/or other venues and individuals deemed pertinent in consultation with the DE SHPO, FHWA, and the Delaware Nation.

D. Registration of Site(s):

After the completion of the data recovery effort, DelDOT shall, in consultation with the DE SHPO, and other interested parties, as deemed appropriate by the FHWA, reevaluate the Site(s) to determine if it has yielded and/or may still yield information important in the prehistory or history of Delaware. If DelDOT and the DE SHPO agree that the Site(s) still meets the Criteria for eligibility to the National Register of Historic Places, then DelDOT shall instruct its qualified cultural resource consultant to prepare a Determination of Eligibility form for possible use as a formal nomination to the National Register of Historic Places for the remaining areas of the site(s), and submit it to the DE SHPO for review and further revision, as necessary.

E. Curation

DelDOT shall ensure that all records and materials resulting from the archaeological investigations will be processed, prepared for, and curated in accordance with 36 CFR Part 79 and the Division of Historical and Cultural Affairs' (the Division) "Guidelines for the Curation

of Archaeological Collections” (2001). These records and materials shall be curated at the Division, or its designee, following the policies of the institution, except as may be provided for under the following paragraph.

As part of the Public Involvement efforts outlined in Stipulation I.C. of this Agreement, the FHWA, DelDOT and DE SHPO will consult to determine if any archaeological materials may be loaned to a public museum or other public institution for the purposes of exhibit or research, following the Division’s loan policy and procedures. Such loans and exhibits may occur only after the curatorial procedures, referenced in the first paragraph in this stipulation, have been completed. As deemed appropriate by FHWA, DelDOT, the DE SHPO, the Delaware Nation and other consulting or interested parties identified later in time will be consulted concerning curation and any public exhibition of artifacts.

F. Cemeteries and Human Remains

DelDOT Environmental Studies and/or appropriate DelDOT construction engineering staff shall immediately (within 24 hours) notify the DE SHPO and FHWA of the discovery of any human remains encountered during the archaeological investigations or the project construction. DelDOT shall cease all activities that may disturb or damage the remains, and comply with the Delaware Unmarked Human Remains Act (7DE Code Chapter 54).

If the human remains are of Native American affiliation, then FHWA will immediately notify the Delaware Nation and the Stockbridge-Muncee Tribe (the Tribes). FHWA and DelDOT will forward information regarding Native American discoveries to the DE SHPO and the Tribes for review and comments. This will occur as soon as possible, within a period no longer than two (2) weeks. FHWA will request that the parties comment on the information within two (2) weeks of receipt. FHWA will then consult with the Tribes, the DE SHPO and DelDOT to determine an appropriate course of action in accordance with 36 CFR 800, and taking into account the above cited state law.

The DE SHPO will comply with the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601) with regard to disposition of the remains and/or associated funerary objects, as applicable.

G. Residual Right of Way

The Project will require property acquisition that may or may not involve impacts to archaeological sites. Should existing right of way or lands acquired (for purposes of the Project) be later subdivided and/or declared excess right of way (to be leased, transferred, or sold), preservation covenants for that subject parcel will first be considered by DelDOT, FHWA, and DE SHPO before DelDOT takes any action to divest itself from such lands. The parties will determine if the subject parcel(s) contain, or has the potential to contain, any historic properties, and if so, determine the need for any legal instruments that would ensure long-term preservation of such properties. This will adequately address any reasonably foreseeable adverse effects that could occur due to transfer, lease, or sale of property out of Federal ownership or control without

adequate and legally enforceable restrictions to ensure long-term preservation (or mitigation) of historic properties (36 CFR part 800.5(a)(2)(vii)).

II. Historic Buildings

A. Landscaping and Other Amenities

DelDOT in consultation with the property owner will consider including landscaping in its design plans for the Mount Olive School, Thomas James House, and Barratt's Chapel and Cemetery, to replace trees will be removed as part of the construction at each location. The replanting will reduce some of the adverse visual effect at Mount Olive School, and will ensure that the project will not alter conditions at the Thomas James House or the Barratt's Chapel and Cemetery in a manner that could result in an adverse effect. DelDOT shall submit a proposed landscaping concept to the property owners and the DE SHPO for review and comment. The review period will be (thirty) 30 days. DelDOT will take into account any comments received, and incorporate the final concept into the project plans and specifications.

DelDOT will reconstruct the existing sidewalk along Clapman Road that fronts the Mount Olive School property.

According to past coordination with the DE SHPO and the Barratt's Chapel Board of Trustees, the commemorative bell, the current historical marker, and the entrance sign for Barratt's Chapel and Cemetery will be offset and relocated from their current location. Before relocating the historical marker, DelDOT shall first obtain the approval of the Delaware Public Archives. Should this plan be modified such that fixtures would be located elsewhere on the property, DelDOT and FHWA will notify the DE SHPO to determine if adverse effects apply and further consultation is necessary.

B. Alternative Mitigation

In consideration of the fact that some adverse effects to the Mount Olive School and Jehu Reed House are not directly mitigatable, DelDOT, in consultation with the DE SHPO and the property owners, will consider alternative forms of mitigation. Mitigation would focus on ways to ensure that the history of the Little Heaven area is not forgotten over time and on delineating the importance of the Mount Olive School and Jehu Reed House. Such measures may include, but are not necessarily limited to, a historical marker or other signage, or other options similar to those outlined in Stipulation I.B. of this MOA.

After consulting with the property owners, DelDOT shall submit a proposed concept to the property owners and the DE SHPO for review and comment. The review period will be (thirty) 30 days. DelDOT will take into account any comments received.

If the final concept includes a sign, DelDOT shall incorporate the final concept into the project plans and specifications. Once the sign is erected, it will not be FHWA or DelDOT's responsibility to maintain it, if it is installed outside of DelDOT's right-of-way or easements. If the parties prefer a formal historical marker through the Delaware Public Archives' Historical

Marker Program, DelDOT's participation will be limited to assisting in preparing the application, following the requirements of the program.

C. Vibration Monitoring

DelDOT, in consultation with the DE SHPO and FHWA has the option to develop and implement a vibration monitoring plan to monitor the effects (or prevent an adverse effects) of Project construction on both the Mt. Olive School and the Jehu Reed House. Should an agreement be reached to monitor either building, DelDOT shall acquire the services of a professional engineer or other qualified expert, as appropriate, that is knowledgeable about the effects of construction vibration on historic buildings, to develop this plan. The plan will include a schedule for documenting the baseline conditions of the historic properties that will be monitored.

During construction, if the monitoring indicates that damage is occurring to historic properties subject to the monitoring plan, DelDOT shall instruct its contractor to cease construction in the immediate area. DelDOT shall then, in consultation with the DE SHPO, FHWA, and the property owners, acquire the services of a professional engineer and/or architect that is knowledgeable about the effects of construction vibration on historic buildings, to:

1. determine the nature and extent of the damage caused by the construction; and
2. alter any construction methods that may have caused the damage; and
3. develop and implement methods to stabilize and/or repair the damage, in accordance with the recommended approaches in the *Secretary of the Interior's Standards and Guidelines* or other agreed upon method.

III. Unexpected Discoveries

In the event that previously unidentified cultural resources are discovered or unanticipated effects to historic properties occur during construction, DelDOT shall instruct the contractor to cease construction in the immediate area, and immediately notify FHWA. FHWA shall comply with 36 CFR Part 800.13 by consulting with the DE SHPO. If said discovery or unanticipated effects pertain to resources of Native American affiliation, FHWA and DelDOT shall include the Delaware Nation in the consultation. The FHWA will notify the DE SHPO and the Delaware Nation within one (1) working day of the discovery. The FHWA, DelDOT, and the DE SHPO will meet at the location of the discovery within forty-eight (48) hours of the initial notification to determine appropriate treatment of the discovery prior to resumption of construction activities within the area of discovery. If the affected resource is of Native American affiliation, FHWA shall first consult with the Delaware Nation before implementing any such treatment option.

IV. Disposal of Project Related Materials

DelDOT shall consult with the DE SHPO concerning the location of the disposal of materials produced by any and all demolition, construction, excavation, and/or dredging associated with the Project. Upon receipt of adequate information, the DE SHPO will have thirty (30) days to review any and all such locations to ensure the disposal will not adversely affect historic

properties. DelDOT shall notify the contractor, if the DE SHPO objects to the proposed disposal sites, and request alternative disposal site(s). In turn, this site(s) will be subject to DE SHPO review. DelDOT shall ensure that its contractors do not use any such site(s) if the activity may adversely affect historic properties.

V. Review of Project Plans

DelDOT shall provide copies of the semi-final and final design plans of the Project to the DE SHPO. FHWA will also notify the Delaware Nation of the availability of the plans, and if so requested, provide copies for their review and comment. The DE SHPO and the Delaware Nation as consulting parties will have thirty (30) days from the receipt of all materials to provide comments on the plans. DelDOT shall take into account any comments provided.

VI. Subsequent Changes to the Project

If DelDOT proposes any changes to the Project affecting location, design, methods of construction, materials, or footprint of the Project, DelDOT shall provide the DE SHPO, the Delaware Nation, and other consulting parties identified later in time with information concerning the proposed changes. The DE SHPO and consulting parties will have thirty (30) days from the receipt of this information to comment on the proposed changes. DelDOT shall take into account any consulting party comments, prior to implementing such changes. Should changes occur, DelDOT, in consultation with the DE SHPO, may need to redefine the APE beyond the areas depicted in **Attachment A**. DelDOT shall consult with the DE SHPO to identify and evaluate historic buildings, structures, and/or districts in any newly affected areas, and assess the effects of the project thereon, following the process outlined for Archaeological Resources in Stipulations I.A. and I.B of this agreement, or as applicable under 36 CFR 800.13.

VII. Administrative Stipulations

A. Personnel Qualifications

All cultural resource work carried out pursuant to this agreement will be performed by or under the direct supervision of a person or persons meeting at a minimum the "*Secretary of the Interior's Standards and Guidelines*" (http://www.cr.nps.gov/local-law/Arch_Standards.htm), formerly 61 CFR Appendix A. DelDOT's Environmental Studies personnel will have direct authority to select and authorize any and all qualified cultural resource management firms or subconsultants to carry out this work on an as-needed basis throughout the duration of the Project.

B. Survey and Data Recovery Standards

DelDOT shall ensure that any and all cultural resource surveys and/or data recovery plans conducted pursuant to this MOA are done in accordance with the *Secretary of the Interior's Standards and Guidelines for Identification and Evaluation*, and for *Archaeological Documentation*, as applicable, and in accordance with the DE SHPO's *Guidelines for Architectural and Archaeological Surveys in Delaware* (1993).

Survey proposals and data recovery plans shall include a research design that stipulates: objectives, methods, and expected results; production of draft and final reports; and preparation of materials for curation in accordance with Stipulation I.E., including budgeting for initial conservation assessments and treatment. Additional requirements for data recovery plans are found in Stipulation I.B. of this Agreement.

All data recovery plans shall also take into account the Advisory Council on Historic Preservation's guidance for *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites*. Reports will meet professional standards set forth by the Department of the Interior's "*Format Standards for Final Reports of Data Recovery Program*" (42 FR 5377-79).

All data recovery plans, public outreach, or future consultation shall also follow and/or consider any supplemental guidance and provisions provided by, but not limited to, the American Association of State Highway Transportation Officials, FHWA, Transportation Research Boards, National Park Service, Advisory Council on Historic Preservation or recognized academic journals or professional organizations as identified by DelDOT and/or the DE SHPO.

DelDOT shall ensure that all draft and final cultural resource reports are provided to the FHWA and DE SHPO within four (4) years of the completion of any fieldwork. Relevant draft and final cultural resource reports will also be provided to the Delaware Nation.

VIII. Dispute Resolution

Should any signatory to this Agreement object in writing to any plans, specifications or actions proposed or carried out pursuant to this agreement, FHWA shall consult with the objecting party to resolve the objection. If FHWA determines that the objection cannot be resolved, FHWA shall forward all documentation relevant to the dispute to the ACHP. Within thirty (30) days after receipt of all pertinent documentation, the ACHP will either:

- A. Advise FHWA that the ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA shall respond to the objection accordingly;
- B. Provide FHWA with recommendations, which FHWA will take into account in reaching final decision regarding the dispute; or
- C. Notify FHWA that it will comment pursuant to 36 CFR 800.7(a) and proceed to comment. Any ACHP comment provided in response to such a request will be taken into account by FHWA in accordance with 36 CFR 800.7(c)(4) with reference to the subject of the dispute.

Should the ACHP not exercise one of the above options within thirty (30) days after receipt of all pertinent documentation, FHWA may assume the ACHP's concurrence in its proposed response to the objection.

Any recommendation or comment provided by the ACHP will be understood to pertain only to the subject of the dispute; FHWA's responsibility to carry out all actions under this MOA that are not the subject of the objection will remain unchanged.

IX. Duration

This MOA shall remain in force until its Stipulations have been fulfilled. This time period shall not exceed five (5) years from the date of the final signature. If within six (6) months of the end of this five year period, stipulations remain unfulfilled, the parties to this Agreement will consult to determine if extension or other amendment of the Agreement is needed. No extension or amendment will be considered in effect unless all the signatories to the MOA have agreed to it in writing.

X. Review of Implementation

FHWA, DelDOT, and the DE SHPO shall review the project annually, to monitor progress of the implementation of the terms of this MOA. This review should occur in January of each year following execution of the MOA.

XI. Amendments

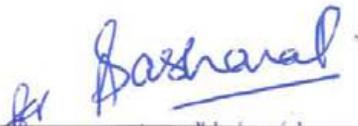
Any party to this Agreement may propose to FHWA that the Agreement be amended, whereupon FHWA shall consult with the other parties to consider such an amendment, in accordance with 36 CFR Part 800.6(c)(7).

XII. Termination

- A. If the FHWA or DelDOT determines that it cannot implement the terms of this MOA, or the DE SHPO determines that the MOA is not being properly implemented, FHWA, DelDOT, or the SHPO may propose to the other parties to this MOA that it be terminated.
- B. The party proposing to terminate this MOA shall notify all parties to this MOA, explaining the reasons for termination and affording them at least thirty (30) days to consult and seek alternatives to termination. The parties shall then consult.
- C. Should all consultation fail, FHWA or the DE SHPO may terminate the MOA by so notifying all parties in writing.
- D. Should this MOA be terminated, FHWA shall either:
 - 1. Consult in accordance with 36 CFR 800.6(a)(1) to develop a new MOA or;
 - 2. Request the comments of the ACHP pursuant to 36 CFR 800.7(a)

Execution of this MOA by the FHWA, DE SHPO and DelDOT and implementation of its terms is evidence that the FHWA has afforded the ACHP an opportunity to comment on the Little Heaven Grade Separated Intersection Project and that the FHWA has taken into account the effects of the undertaking on historic properties.

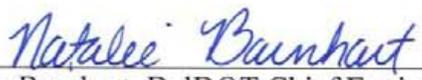
FOR THE FEDERAL HIGHWAY ADMINISTRATION

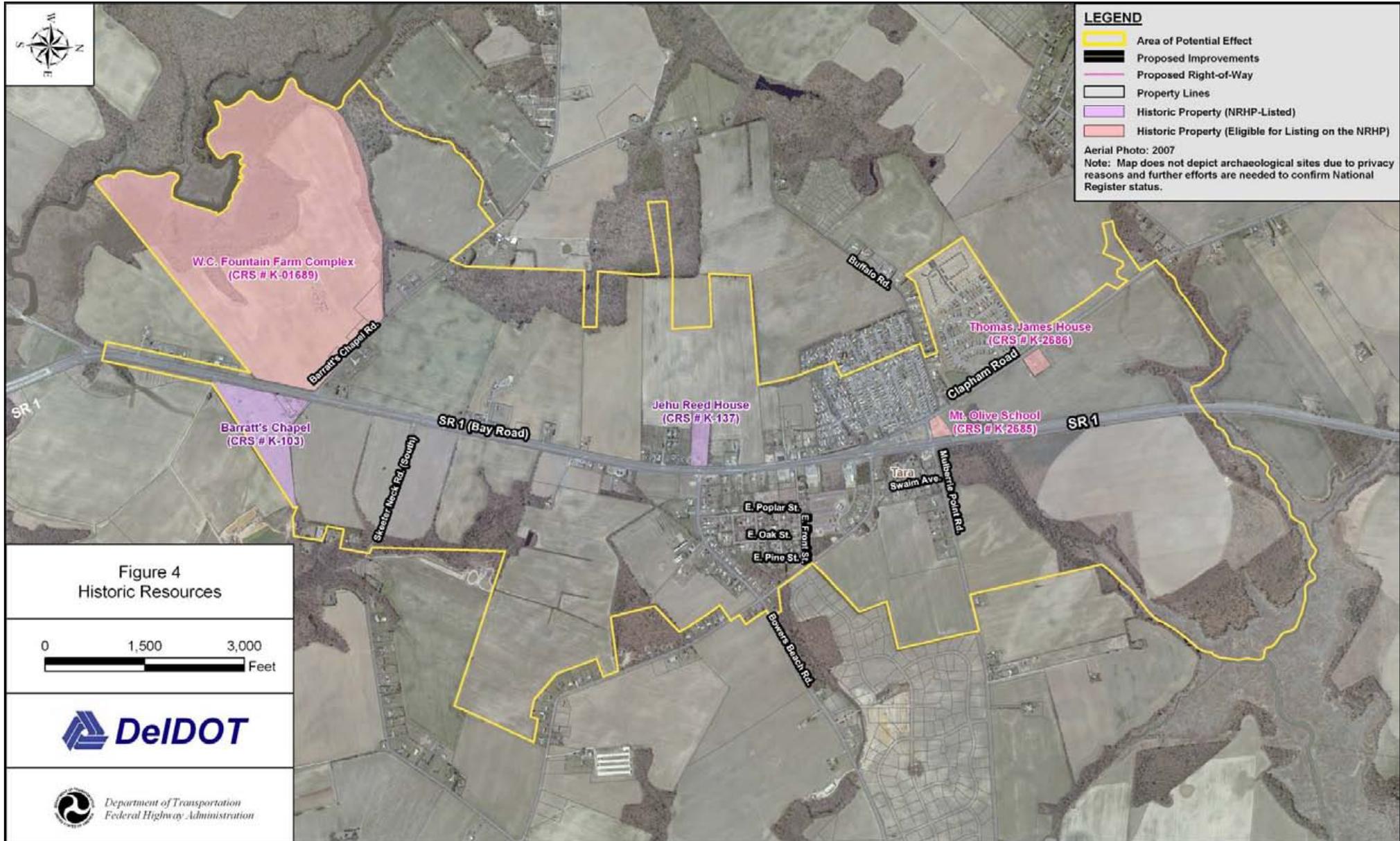
By:  Date: 6/3/2010
Hassan Raza, FHWA Division Administrator

FOR THE DELAWARE STATE HISTORIC PRESERVATION OFFICER

By:  Date: 6/3/10
Timothy Slavin, DHCA Director and State Historic Preservation Officer

DELAWARE DEPARTMENT OF TRANSPORTATION

By:  Date: 5/27/10
Natalie Barnhart, DelDOT Chief Engineer



APPENDIX B: AGENCY CORRESPONDENCE

*SR 1, Little Heaven Grade Separated Intersection
Environmental Assessment / Section 4(f) Evaluation*



*U.S. Department of Transportation
Federal Highway Administration*



Delaware Department of Transportation



STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. Box 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

October 28, 2009

Mr. Timothy Slavin, Director
Division of Historic and Cultural Affairs
21 The Green, Suite A
Dover, Delaware 19901

Dear Mr. Slavin:

The Delaware Department of Transportation (DelDOT) Environmental Studies Section is pleased to submit the Documentation in Support of for a Determination of Effect with attached Memorandum of Agreement for the SR 1, Little Heaven Grade Separated Intersection Project. The project is funded under state contract # 24-122-02 and federal aid number NH-K008(6). The report document reflects all our multi stage coordination efforts as far as incorporation and Section 106 consultation of adverse effect. The Memorandum of Agreement (MOA) memorializes Section 106 consultation, effect determinations, mitigation measures, and future archaeological needs.

We hope that you will also provide an accompanied letter acknowledging to DelDOT and FHWA that Section 106 consultation has been effectively implemented and your agency's opinion on the direct impacts to historic properties. The MOA and Effect document with relevant agency opinions will be included in the Final Environmental Assessment and Section 4(f) Evaluation prepared for the Little Heaven Project.

Please coordinate your review directly with Michael Hahn at 302-760-2131 of my section. As always, thank you for your continued cooperation.

Sincerely,

Therese M. Fulmer, Manager
Environmental Studies

TF/mh
Enclosure

Nick Blendy, FHWA (with copy)
Dan Montag, FHWA
Gwen Davis, DE SHPO
Robert McCleary, Assistant Director, Engineering Support
Brian McIlvaine, Project Engineer
Michael Hahn, Environmental Studies
David Clarke, Environmental Studies
Kevin Cunningham, Environmental Studies
William Conway, Century Engineering, Inc.
File



State of Delaware
Historical and Cultural Affairs

*M. Hahn
DelDOT*

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November 24, 2009

Mr. Nicholas Blendy
Environmental Specialist
Federal Highway Administration
J. Allen Frear Federal Building
300 South New Street
Dover, DE 19904-6726



RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); Finding of Adverse Effect and draft MOA

Dear Mr. Blendy:

The DE SHPO has reviewed the documentation supporting the finding of Adverse Effect and draft Memorandum of Agreement (MOA) for the above-referenced undertaking, prepared by the Delaware Department of Transportation (DelDOT) on your agency's behalf. Additionally, this office has been considering DelDOT's proposed approach for evaluating archaeological sites within the project's Area of Potential Effect (APE). The DE SHPO would like to offer its formal comments on these aspects of the consultation under Section 106 of the National Historic Preservation Act, and its implementing regulations (36 CFR Part 800).

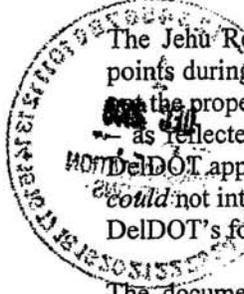
The Adverse Effect documentation indicates that DelDOT staff have applied the Criteria of Adverse Effect (36 CFR Part 800.5) to those properties within the undertaking's APE that are known to be listed in, or are eligible for listing in the National Register of Historic Places. These properties include: the Jehu Reed House (Cultural Resource Survey # K00137, listed); Barratt's Chapel (K00103, listed); the Mt. Olive Colored School (K02685, eligible); the Thomas James House (K02686, eligible); and the W.C. Fountain Agricultural Complex (K01689, eligible).

In keeping with previous consultation with this office, DelDOT has, on behalf of your agency, determined that the project: will not affect the W.C. Fountain Agricultural Complex; will not adversely affect Barratt's Chapel or the Thomas James House; but will adversely affect the Mt. Olive School. The DE SHPO concurs with these findings.

However, different from the understanding reached earlier, DelDOT presently proposes that the project will not adversely affect the National Register-listed Jehu Reed House. The DE SHPO does not agree with this finding. DelDOT's decision in this regard confuses the property's integrity with the potential for the property to be adversely affected by the undertaking.



Letter to N. Blendy
November 24, 2009
Page 2



The Jehu Reed House's physical integrity has certainly suffered in recent years. At several points during the six-year consultation for this project, our agencies have considered whether or not the property retains sufficient integrity to sustain its National Register status. The conclusion as reflected in DelDOT's documentation – has been that the property is still eligible. Yet DelDOT appears to be stating that because the property's integrity is diminished, that the project *could* not introduce adverse effects of its own. The DE SHPO disagrees with this interpretation. DelDOT's focus on the property's integrity really amounts to questioning its eligibility.

The documentation also applies an exceptionally narrow reading of the Criteria of Adverse Effect, examples 36 CFR Part 800.5(a)(2)(iv) and (v) to the Jehu Reed House. The approach is inconsistent with DelDOT's assessments for other projects, found to adversely affect similar historic properties. This office also finds that, contrary to statements in the documentation, the current viewshed of the property is not significantly different than it was at the time of its listing in the National Register. The project's construction of a 22-foot tall, grade-separated intersection directly in front of the house will, however, introduce a significant change. In assessing whether this change constitutes an adverse effect, DelDOT fails to consider the cumulative effects of the undertaking on the Jehu Reed House.

Therefore, the DE SHPO recommends that FHWA and DelDOT either reconsider their assessment of the project's adverse effects on the Jehu Reed House, or formally re-address the question of resource's eligibility by seeking the opinion of the Keeper of the National Register, an avenue provided for under the Section 106 process (36 CFR Part 800.4(c)(2)).

That said, the DE SHPO agrees that adverse effects to the Jehu Reed House cannot be avoided or directly mitigated. Based on earlier consultation, DelDOT has already undertaken alternatives analysis and supported its reasons for the current project design. The property has already been sufficiently recorded. Other typical mitigative treatments – landscaping and altering project design materials – would not be effective in this circumstance. Alternative forms of mitigation should be sought. DelDOT's documentation and draft MOA includes some suggestions that could be explored further.

In addition to concerns with the proposed finding for the Jehu Reed House, the sections of the draft MOA pertaining to architectural properties requires both substantive and technical revisions before the DE SHPO can agree to sign the document. This office is committed to working expeditiously with FHWA and DelDOT to resolve these issues.

With respect to potential archaeological properties, the documentation accurately states that efforts to identify and evaluate sites that may be eligible for listing in the National Register of Historic Places have not yet been completed. DelDOT has elected to phase these efforts, as permitted under the Section 106 regulations. The draft MOA outlines the process for: further efforts to identify and evaluate archaeological sites; assessing the effects of the project on eligible archaeological sites; consulting on ways to avoid, minimize and/or mitigate for adverse effects; and involving other consulting parties, including Native Americans, and the public. This

November 24, 2009
Letter to N. Blendy
Page 3

office agrees that the measures outlined in the draft MOA for archaeological resources are appropriate. Only a few minor technical changes are suggested for this section of the MOA.

Consultation concerning the results of the archaeological survey to date is ongoing. Artifacts have been found on nearly all of the tested parcels within the APE. DE SHPO and DeIDOT archaeologists have been working with the consultant to determine which areas constitute archaeological sites (15 at last count), and of those sites, which would require further evaluation to determine their National Register eligibility (9 at last count, cited in the documentation).

DeIDOT has suggested that for some of these sites, alternative measures be considered in lieu of evaluating eligibility. After considerable discussion among our staff, the DE SHPO cannot support this proposal as is. Such alternatives are best considered at the mitigation stage, when there is better understanding of what may be lost and how that loss can be appropriately compensated.

However, in discussing these issues with DeIDOT staff, it is clear that our agencies' share the basic goal that inspired their proposal. That is, to ensure that the "reasonable and good faith effort" to identify historic properties achieves both the intent of Section 106 and adds to our understanding of Delaware's past. Such efforts should include: applying well-defined sampling strategies; applying clearly stated (and perhaps more stringent) criteria for eligibility of sites, which may allow for making better decisions at the identification phase; and considering the most judicious use of available funds.

This office is committed to working with FHWA and DeIDOT on these issues, for the SR 1/ Little Heaven project and others. The DE SHPO is also open to seeking further guidance on these issues, from the Advisory Council on Historic Preservation, the Federal Highway Administration, and other states.

In sum, as a result of our review of DeIDOT's adverse effect documentation and draft MOA, and consultation on archaeological properties, the DE SHPO recommends that:

1. FHWA and DeIDOT consider the project's effects on the Jehu Reed House to be Adverse, and consult with the DE SHPO to identify and implement an alternative form of mitigation, or seek the opinion of the Keeper of the National Register; and
2. FHWA, DeIDOT and DE SHPO consult further to craft a mutually acceptable Memorandum of Agreement to resolve the project's adverse effects; and
3. Under the auspices of the MOA, DeIDOT and DE SHPO staff continue to work together to clearly define a defensible sampling strategy and evaluation process for archaeological sites that may be affected by the project, and thereby reduce the overall level of effort.

Thank you for your consideration of these comments. As noted above, this office is committed to resolving differences of opinion among our agencies, and successfully concluding the Section 106 consultation for the SR 1/Little Heaven Intersection project. DE SHPO staff will be

November 24, 2009
Letter to N. Blendy
Page 4

available to work on these issues with FHWA and DelDOT at the next coordination meeting, scheduled for December 9, 2009. In the interim, if you have any questions, please do not hesitate to contact me (at stephen.marz@state.de.us or 302-736-7400) and/or Gwen Davis, who is reviewing this project (at gwen.davis@state.de.us or 302-736-7410).

As requested, the DE SHPO will also provide comments on the project's direct effects on historic properties. To this end, please provide a copy of the draft Section 4(f) Evaluation for our review.

Sincerely,



Stephen Marz, Deputy Director
and Deputy State Historic Preservation Officer

cc: Dan Montag, Federal Highway Administration
Rob McCleary, Asst. Director, Engineering Support, DelDOT
Therese M. Fulmer, Manager, Environmental Studies, DelDOT
Brian McIlvaine, Project Engineer, DelDOT
Michael C. Hahn, Senior Highway Planner, DelDOT
Kevin Cunningham, Archaeologist, DelDOT
David Clarke, Archaeologist, DelDOT
Gwenyth A. Davis, Archaeologist, SHPO, Division of Historical & Cultural Affairs
Joan Larrivee, Architectural Historian, SHPO, Division of Historical & Cultural Affairs



24-122-02

STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. Box 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

January 11, 2010

Mr. Timothy Slavin, Director
Division of Historic and Cultural Affairs
The Green Suite 21A
Dover, Delaware 19901

Dear Mr. Slavin:

On behalf of the Federal Highway Administration (FHWA), the Delaware Department of Transportation (DeIDOT) Environment Studies Section has recently received comments regarding the Documentation Support for the Determination of Effect (dated October 2009) for the SR 1/Little Heaven Grade Separated Intersection Project. We are specifically focused on your 11/24/09 letter to FHWA and in subsequent agency discussions on 12/18/09.

For records and on-going coordination, DeIDOT acknowledges that the undertaking's effects upon the Jehu Reed House (Delaware CRS No. K-137) are adverse for Section 106 consultation. After direct access onto the property, our agency does not dispute the fact that visual aesthetic effects will likely occur. As the property's relevant defining characteristics are sparsely seen from the road or involved with the project, the question remained is whether the proposed undertaking is really negatively impacting the property and deemed as adverse?

Although the defining characteristics of the Jehu Reed House were never specifically defined and those remaining defining characteristics have been compromised to some degree, it is safe to say that the integrity of location and/or design might be adversely affected (visually) by the undertaking.

After discussion with your office and FHWA and rather than choosing an alternative path for the Keeper of the National Register's opinion of its listing, we deem the visual effect to this listed property as adverse under 36 CFR 800.5(a)(2)(v). As such, we have revised our final Section 106 Finding of Adverse Effect with an accompanied Memorandum of Agreement to reflect this change. In addition, since the effect is considered adverse we have proposed mitigation measures for the historic Jehu Reed property. Proposed measures were already discussed with your office on the property and are simply recognized as un-mitigated.

Conversely it was not our understanding that the project's effects to the Jehu Reed property (and others) were not fully conceived and agreed upon in earlier consultation. We apologize for this misconfusion. However, as part of this, our agency still declares under 36 CFR 800.5(a)(2)(iv), that the change in character of the property's use or of physical features within the property's setting that contribute to its historic significance is not adverse. This is explained in the documentation. The Jehu Reed property will remain as residential and the change of physical features within the setting of the property that contribute to its historic significance is really not applicable. Within the undertaking area, all adjacent land uses, setting, and feeling surrounding the Jehu Reed House (property) does not contribute, nor indemnify, to the property's historic significance. In sum, nothing within the surrounding area that is identified as physical feature contributes to this property's local



Letter to T. Salvin
January 11, 2010
Page 2 of 2

significance. Thus, transportation changes within the surrounding area would not be considered adverse. Your 11/24/09 comments did not dispute or support this with reasoning.

Lastly, our staff had modified language in the current adverse effects document to reflect the future and on-going archaeology studies. It is apparent that "alternative" field measures or methodologies may be employed in the field, but not as a specific parameter to identify and then discard any number of archaeological sites identified under the Phase I effort. Our staff will elaborate and discuss the details with your office and FHWA as we progress.

In this regard, we have revised and are resubmitting the Documentation Support for the Determination of Effect with MOA. We also specifically request your agency comments and opinions with respect to historic properties, their effects, and formalized mitigation measures under the MOA.

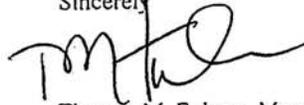
In addition to the "Finding", as the agency with jurisdiction, we will request your opinion in writing on the effects to properties applicable to Section 4(f) of the U.S. Department of Transportation Act and those under the new *de minimus* Section 4(f) application. As a point of reference, please refer to the informational draft provided directly to Ms. Gwen Davis.

Under the Section 4(f) Evaluation, the only property involved is the Mount Olive School. This former schoolhouse would be impacted by takes and uses in of the property. Your concurrence is also needed (in writing) under 23 CFR 774.13 that minor takes or temporary occupancy and use of the property upon the Barratt's Chapel and Cemetery and the Thomas James House meets exception or are qualified and not considered adverse under the Section 4(f) *de minimus* finding. This is a necessary step for FHWA and as part of the final NEPA compliance.

For these reasons, we request your 30-day concurrence in writing. Should you have a question or further comment regarding the above direction, please immediately contact Michael C. Hahn directly at (302) 760 2131 (MichaelC.Hahn@state.de.us).

Thank you for your continuing efforts.

Sincerely



Therese M. Fulmer, Manager
Environmental Studies

TMF/mh (attachment)

cc: Dan Montag, FHWA
Nicholas Blendy, FHWA
Steven Marz, SHPO
Gwen Davis, SHPO
Joan Larrivee, SHPO
Robert B. McCleary, Assistant Director, Engineering Support
Brian McIlvaine, Project Engineer
Kevin Cunningham, Environmental Studies
David Clarke, Environmental Studies
Michael C. Hahn, Environmental Studies
Jon Schmidt, Environmental Studies
File

State of Delaware
Historical and Cultural Affairs

Mike

21 The Green
Dover, DE 19901-3611

Phone: (302) 736.7400

Fax: (302) 739.5660

February 17, 2010

Mr. Nicholas Blendy
Environmental Specialist
Federal Highway Administration
J. Allen Frear Federal Building
300 South New Street
Dover, DE 19904-6726

RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); *Revised* Finding of Adverse Effect and draft MOA

Dear Mr. Blendy:

As noted in an email dated February 9, 2010, the DE SHPO has reviewed DelDOT's revised documentation supporting the finding of Adverse Effect for the above-referenced undertaking. Although this office does not agree with some of the content of the documentation, the revised version signifies that the FHWA, DelDOT and DE SHPO concur on the basic findings. That is, the project, as currently designed, will:

- not affect the W.C. Fountain Agricultural Complex (K01689);
- not adversely affect Barratt's Chapel (K00103) or the Thomas James House (K02686);
- adversely affect the Mt. Olive School (K02685) *and* the Jehu Reed House (K00137);
- likely adversely any archaeological sites that are found eligible for listing in the National Register of Historic Places.

The DE SHPO appreciates that FHWA and DelDOT took into account the DE SHPO's earlier comments (letter dated November 24, 2009) on the undertaking's effects on historic properties.

This office is currently reviewing the revised draft Memorandum of Agreement (MOA) and the draft Section 4(f) Evaluation, and will provide comments on those documents under separate cover. Our staff is also continuing to work with DelDOT's archaeologists toward resolving questions on the archaeological survey to date and next steps; the goal is to outline a scope of work for the evaluation (Phase II) level survey within the next month.



Letter to N. Blendy
February 17, 2010
Page 2

As our agencies continue efforts to conclude the formal Section 106 consultation, if you have any questions, please do not hesitate to contact Gwen Davis, who is reviewing this project (at gwen.davis@state.de.us or 302-736-7410). Thank you.

Sincerely,



Stephen Marz, Deputy Director
and Deputy State Historic Preservation Officer

cc: Dan Montag, Federal Highway Administration
Rob McCleary, Asst. Director, Engineering Support, DelDOT
Therese M. Fulmer, Manager, Environmental Studies, DelDOT
Brian McIlvaine, Project Engineer, DelDOT
Michael C. Hahn, Senior Highway Planner, DelDOT
Kevin Cunningham, Archaeologist, DelDOT
David Clarke, Archaeologist, DelDOT
Gwenyth A. Davis, Archaeologist, SHPO, Division of Historical & Cultural Affairs
Joan Larrivee, Architectural Historian, SHPO, Division of Historical & Cultural Affairs

State of Delaware
Historical and Cultural Affairs

Mike

21 The Green
Dover, DE 19901-3611

Phone: (302) 736.7400

Fax: (302) 739.5660

February 17, 2010

Ms. Therese M. Fulmer, Manager
Environmental Studies
Delaware Department of Transportation
800 Bay Road, P.O. Box 778
Dover, DE 19904

RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); DE SHPO case no. 2003.06.02.02; "Section 4(f)" Evaluation

Dear Ms. Fulmer:

Thank you for providing the DE SHPO with an opportunity to comment on DelDOT's draft Section 4(f) Evaluation, prepared for compliance with U.S. Department of Transportation regulations 23 CFR Part 774, for the SR 1/Little Heaven project. According to the documentation, DelDOT's position is that the project's effects on the Thomas James House and Barratt's Chapel and Cemetery meet the US DOT's criteria for *de minimus* impacts, but that the effects on Mt. Olive School will constitute a use of the historic property that requires full 4(f) evaluation.

While confirmation of DelDOT's interpretation of 4(f) rules lies with FHWA, the DE SHPO will state that DelDOT's findings are consistent with those made under the Section 106 review process. That is, FHWA and DelDOT proposed, and the DE SHPO concurred that the project would not adversely affect the Thomas James House and Barratt's Chapel, but would adversely affect Mt. Olive School (see letters dated November 24, 2009, and February 17, 2010).

Several sections of the draft Evaluation would benefit from clarification, particularly with respect to analysis of the effects on the Mt. Olive School. On the attached pages, the DE SHPO offers several suggestions for revisions.

The 4(f) Evaluation makes several references to the Environmental Assessment that DelDOT has prepared for compliance with the National Environmental Policy Act. Please note that the DE SHPO does not have a copy of this document, and therefore cannot speak to its accuracy with regard to historic properties.



Letter to T. Fulmer
February 17, 2010
Page 2

If you have any further questions concerning this matter, please do not hesitate to contact Gwen Davis (at gwen.davis@state.de.us or 302-736-7410), who is reviewing this project. Thank you.

Sincerely,



Stephen Marz, Deputy Director
and Deputy State Historic Preservation Officer

Enclosure

cc: Nicholas Blendy, Environmental Specialist, Federal Highway Administration (w/enclosure)
Michael C. Hahn, Senior Highway Planner, DelDOT
David Clarke, Archaeologist, DelDOT

JOINT PROCESSING COMMENT FORM

U.S. ARMY ENGINEER DISTRICT, PHILADELPHIA

APPLICATION: NAPOF-R/ DEL DOT, SP 1 - Little Heaven

PUBLIC NOTICE DATE: 1/14 INTERCHANGE NUMBER: _____

COUNTY: KENT WATERWAY: _____

DNREC STATUS: _____

COMMENTING AGENCY:

- ENVIRONMENTAL PROTECTION AGENCY
- U.S. FISH AND WILDLIFE SERVICE FOR THE DEPARTMENT OF THE INTERIOR
- NATIONAL MARINE FISHERIES SERVICE, NOAA, DEPARTMENT OF COMMERCE
- DELAWARE DNREC, WETLANDS SECTION
- OTHER _____

COMMENT:

- NO COMMENT
- NO OBJECTION
- CONCUR WITH _____ RECOMMENDATIONS
- WILL SEND LETTER INDICATING COMMENTS
- STANDARD MARINA CONDITIONS (EPA)
- STANDARD FILL CONDITIONS (EPA)
- WATER QUALITY CERTIFICATION APPROVED WITH FOLLOWING CONDITIONS:

WETLANDS LICENSE/PERMIT:

- HAS BEEN ISSUED
- WILL PROBABLY BE ISSUED WITH THESE SPECIAL CONDITIONS:

OTHER COMMENTS: No T & E spp w/in the purview of NMFS are found in the project area

(CONTINUE ON REVERSE IF NECESSARY)

SIGNATURE: Tim Dodger DATE: 21 Jan '04



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Chesapeake Bay Field Office
177 Admiral Cochrane Drive
Annapolis, MD 21401

February 9, 2004

Ms. Dorothy Daly
A.D. Marble & Company
375 East Elm Street
Suite 200
Conshohocken, PA 19428

RE: SR 1, Little Heaven Interchange, Kent County, DE

Dear Ms. Daly:

This responds to your letter, received November 10, 2003, requesting information on the presence of species which are federally listed or proposed for listing as endangered or threatened within the above reference project area. We have reviewed the information you enclosed and are providing comments in accordance with Section 7 of the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.).

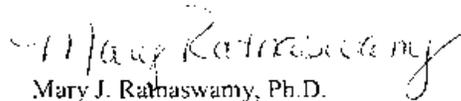
Except for occasional transient individuals, no proposed or federally listed endangered or threatened species are known to exist within the project impact area. Therefore, no Biological Assessment or further Section 7 Consultation with the U.S. Fish and Wildlife Service is required. Should project plans change, or if additional information on the distribution of listed or proposed species becomes available, this determination may be reconsidered.

This response relates only to federally protected threatened or endangered species under our jurisdiction. For further information on other rare species, you should contact Karen Bennett of the Delaware Natural Heritage Program at (302) 653-2880.

An additional concern of the Service is wetlands protection. The Service's wetlands policy has the interim goal of no overall net loss of Delaware Bay's remaining wetlands, and the long term goal of increasing the quality and quantity of the Basin's wetlands resource base. Because of this policy and the functions and values wetlands perform, the Service recommends avoiding wetland impacts. All wetlands within the project area should be identified, and if construction in wetlands is proposed, the U.S. Army Corps of Engineers, Philadelphia District should be contacted for permit requirements. They can be reached at (215) 656-6728.

We appreciate the opportunity to provide information relative to fish and wildlife issues, and thank you for your interest in these resources. If you have any questions or need further assistance, please contact Maricela Constantino at (410) 573-4542.

Sincerely,



Mary J. Rathaswamy, Ph.D.
Program Supervisor, Threatened and Endangered Species

cc: COE, Dover, DE



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DIVISION OF FISH & WILDLIFE
NATURAL HERITAGE & ENDANGERED SPECIES
4876 HAY POINT LANDING ROAD
SMYRNA, DELAWARE 19977



TELEPHONE: (302) 653-2880
FAX: (302) 653-3431

December 4, 2009

Ms. Therese Fulmer
800 Bay Road
PO Box 778
Dover, DE 19903

Re: Sr 1 Little Heaven Interchange

Dear Ms. Fulmer:

Thank you for contacting the Delaware Natural Heritage and Endangered Species Program (NHESP) about information on rare, threatened and endangered species, unique natural communities, and other significant natural resources as they relate to the SR 1 Little Heaven Interchange.

A review of our database indicates that there are currently no records of state-rare or federally listed plants, animals or natural communities at this project site. As a result, at present, this project does not lie within a State Natural Heritage Site, nor does it lie within a Delaware National Estuarine Research Reserve which are two criteria used to identify "Designated Critical Resource Waters" in the Army Corps of Engineers (ACOE) Nationwide Permit General Condition No. 19. A copy of this letter shall be included in any permit application or pre-construction notification submitted to the Army Corps of Engineers for activities on this property.

Natural Area

The northwest section of the proposed project impacts a state designated Natural Area. The Natural Area is on an unnamed tributary of Trunk Ditch. As discussed during the agency site visit on August 24, 2009, efforts should be made to minimize disturbance to the forest, wetlands and streams in this area.

If you require further information about this area for your planning project, please contact Eileen Butler, Natural Areas Program Manager, at (302) 739-9235.

We are continually updating our records on Delaware's rare, threatened and endangered species, unique natural communities and other significant natural resources. If the start of the project is delayed more than a year past the date of this letter, please contact us again for the latest information. Feel free to get in touch with me if you have any questions or require additional information.

Sincerely,

Matthew Bailey
Matthew Bailey

DelDOT Environmental Review Coordinator
(302) 653-2882 ext. 127
(302) 382-4151 cell
matthew.bailey@state.de.us

DelDOT 2008 SR 1 Little Heaven Interchange flup

Delaware's Good Nature Depends on You!



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF SOIL AND WATER CONSERVATION
21309 BERLIN RD, UNIT #6
GEORGETOWN, DELAWARE 19947

DRAINAGE PROGRAM

TELEPHONE: (302) 855-1930

November 15, 2007

Laura C. Miller
Century Engineering Inc
4134 N Dupont Hwy
Dover, DE 19901

RE: **Little Heaven Grade Separated Intersection**

Dear Ms. Miller:

There are no Tax Ditches in the project area. Please feel free to contact our office with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Brooks P. Cahall".

Brooks P. Cahall
Environmental Program Manager

Delaware's good nature depends on you!



LETTER OF TRANSMITTAL

FROM: A. D. MARBLE & COMPANY
 375 East Elm Street
 Suite 200
 Conshohocken, PA 19428
 Telephone: (484) 533-2548
 Fax: (484) 533-2550
 E-mail: syates@admarble.com

TO: Century Engineering DATE: November 24, 2008
 ADDRESS: 4134 N. Dupont Highway JOB NO.: P-731B
 CITY: Dover, DE 19901 RE: SR 1, Little Heaven Grade Separated Inter.
 ATTENTION: Laura Miller

PLEASE BE ADVISED:

WE ARE SENDING YOU: ATTACHED UNDER SEPARATE COVER VIA: _____

THE FOLLOWING:

- PRINTS PLANS REPORTS SPECIFICATIONS SAMPLES
 ARTWORK PROOFS PHOTOGRAPHS COPY OF LETTER CHANGE ORDER

COPIES

DESCRIPTION

COPIES	DESCRIPTION
1	USACE JD Little Heaven Grade Separated Interchange

THESE ARE BEING TRANSMITTED AS INDICATED BELOW:

- AS REQUESTED APPROVED AS IS RESUBMIT _____ COPIES FOR APPROVAL
 FOR APPROVAL APPROVED WITH CORRECTIONS SUBMIT _____ COPIES FOR DISTRIBUTION
 FOR YOUR USE RETURNED WITH CORRECTIONS RETURN _____ CORRECTED _____
 FOR YOUR COMMENTS RETURNED AFTER LOAN TO US _____
 FOR BID (S) DUE _____

COMMENTS:

SIGNED: Sharon Yates



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

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

NOV 19 2008

Regulatory Branch
Applications Section I

SUBJECT: CENAP-OP-R-2008-916-23 (JD)
Project Name: DELDOT - Little Heaven Grade Separated Intersection

Dorothy Daly
AD Marble and Company
375 Elm Street, Suite 200
Conshohocken, Pennsylvania 19428

Dear Ms. Daly:

The plans identified on the following page depict the extent of Federal jurisdiction on the subject property. The basis of our determination of jurisdiction is also provided (Enclosure 1).

Pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, a Department of the Army permit is required for work or structures in navigable waters of the United States and the discharge of dredged or fill material into waters of the United States including adjacent and isolated wetlands. Any proposal to perform the above activities within the area of Federal jurisdiction requires the prior approval of this office.

This delineation/determination has been conducted to identify the limits of the Corps Clean Water Act jurisdiction for the particular site identified in this request. This delineation/determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are U.S. Department of Agriculture (USDA) program participants, or anticipate participating in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

This letter is valid for a period of five (5) years. However, this jurisdictional determination is issued in accordance with current Federal regulations and is based upon the existing site conditions and information provided by you in your application. This office reserves the right to reevaluate and modify the jurisdictional determination at any time should the existing site conditions or Federal regulations change, or should the information provided by you prove to be false, incomplete or inaccurate.

This letter contains an approved jurisdictional determination for your subject site. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR 331. Enclosed you will find a combined Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form (Enclosure 2). If you request to appeal this

determination, you must submit a completed RFA form to the North Atlantic Division Office at the following address:

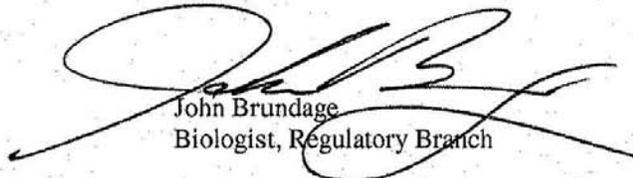
Michael G. Vissichelli
Regulatory Appeals Review Officer
North Atlantic Division, U.S. Army Corps of Engineers
Fort Hamilton Military Community
General Lee Avenue, Building 301
Brooklyn, NY 11252-6700
EMAIL: Michael.G.Vissichelli@usace.army.mil

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by 19 January 2009.

It is not necessary to submit an RFA form to the Division Office if you do not object to the determination in this letter.

If you should have any questions regarding this matter, please contact me at 302-736-9763 between the hours of 1:00 and 3:30 p.m. or write to the above address.

Sincerely,



John Brundage
Biologist, Regulatory Branch

SUBJECT PROPERTY: The DELDOT Little Heaven Grade Separated Intersection Project Site, Kent County, Delaware.

SURVEY DESCRIPTION: Plans dated August 2008, revised per USACE on July 31, 2008, entitled: *SRI/Little Heaven Grade Separated Interchange, Kent County, Delaware*, 10 sheets.

COMMENTS: The above referenced site was inspected by a Corps of Engineers representative on July 31, 2008.

Enclosures

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): November 19, 2008

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CENAP-OP-R-2008-916 (Waters 1 Kiunk Ditch)

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Delaware County/parish/borough: Kent City: Little Heaven
Center coordinates of site (lat/long in degree decimal format): Lat. 39.04583° ~~Picklist~~, Long. -75.46305° ~~Picklist~~
Universal Transverse Mercator:

Name of nearest waterbody: Kiunk Ditch

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: St Jones River

Name of watershed or Hydrologic Unit Code (HUC): 02040207

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
 Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date:
 Field Determination. Date(s): July 31, 2008

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There ~~Picklist~~ "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

- Waters subject to the ebb and flow of the tide.
 Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There ~~are~~ "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
 Wetlands adjacent to TNWs
 Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
 Non-RPWs that flow directly or indirectly into TNWs
 Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
 Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
 Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
 Impoundments of jurisdictional waters
 Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: 2000 linear feet: 6 feet ave. width (ft) and/or acres.
Wetlands: 10 acres.

c. Limits (boundaries) of jurisdiction based on: ~~1987 Delineation Manual~~

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
Explain: A ditch and small pond within the High Point residential development are artificial in nature, being entirely supplied with water by a man-made well and pump. These features are not waters of the US.

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size:

Drainage area:

Average annual rainfall: inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through tributaries before entering TNW.

Project waters are river miles from TNW.

Project waters are river miles from RPW.

Project waters are aerial (straight) miles from TNW.

Project waters are aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW⁵: Klunk Ditch (RPW) to the St Jones River (TNW) to Delaware Bay (TNW).

Tributary stream order, if known:

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: Kiunk Ditch is partially channelized for drainage purposes.

Tributary properties with respect to top of bank (estimate):

Average width: 10 feet
Average depth: 1 feet
Average side slopes: 3:1.

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: stable.

Presence of run/riffle/pool complexes. Explain:

Tributary geometry: Relatively straight

Tributary gradient (approximate average slope): 2 %

(c) Flow:

Tributary provides for: Seasonal flow

Estimate average number of flow events in review area/year: 20 (or greater)

Describe flow regime: permanent.

Other information on duration and volume: stream appears to flow year-round.

Surface flow is: Discrete. Characteristics:

Subsurface flow: Dick Ditch. Explain findings:

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):

Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain:

Identify specific pollutants, if known:

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷ibid.

(iv) **Biological Characteristics. Channel supports (check all that apply):**

- Riparian corridor. Characteristics (type, average width):
- Wetland fringe. Characteristics:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:

Properties:
Wetland size: 10 acres
Wetland type. Explain: mostly PFO1.
Wetland quality. Explain: relatively high in places but generally low in project area..
Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: ~~ick List~~. Explain:

Surface flow is: ~~ick List~~
Characteristics:

Subsurface flow: ~~ick List~~. Explain findings:
 Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

- Directly abutting
- Not directly abutting
 - Discrete wetland hydrologic connection. Explain:
 - Ecological connection. Explain:
 - Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are ~~1.2~~ river miles from TNW.
Project waters are ~~1.2~~ aerial (straight) miles from TNW.
Flow is from: ~~Wetland to navigable waters~~.
Estimate approximate location of wetland as within the ~~100 to 500 year~~ floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: clear.
Identify specific pollutants, if known:

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

- Riparian buffer. Characteristics (type, average width):
- Vegetation type/percent cover. Explain:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

All wetland(s) being considered in the cumulative analysis: ~~ick List~~
Approximately () acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N) Size (in acres) Directly abuts? (Y/N) Size (in acres)

Summarize overall biological, chemical and physical functions being performed:

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.
 Wetlands adjacent to TNWs: acres.
2. **RPWs that flow directly or indirectly into TNWs.**
 Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: environmental scientist's report and personal observation of flow in July when stream flows are normally at their annual low.
 Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

Provide estimates for jurisdictional waters in the review area (check all that apply):

Tributary waters: 2000 linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters:

3. **Non-RPW⁸ that flow directly or indirectly into TNWs.**

Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

Tributary waters: linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.

Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: **Personal observation that the wetland and stream (RPW) share a continuous connection.**

Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

Provide acreage estimates for jurisdictional wetlands in the review area: 10 acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

Demonstrate that impoundment was created from "waters of the U.S.," or

Demonstrate that water meets the criteria for one of the categories presented above (1-6), or

Demonstrate that water is isolated with a nexus to commerce (see E below).

E. **ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰**

which are or could be used by interstate or foreign travelers for recreational or other purposes.

from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

which are or could be used for industrial purposes by industries in interstate commerce.

Interstate isolated waters. Explain:

Other factors. Explain:

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

Tributary waters: linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters:

Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.

Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.

Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).

Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:

Other: (explain, if not covered above): **Artificial pond and ditch at High Point residential development (see above).**

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

Non-wetland waters (i.e., rivers, streams): linear feet width (ft).

Lakes/ponds: acres.

Other non-wetland waters: acres. List type of aquatic resource:

Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).

Lakes/ponds: acres.

Other non-wetland waters: acres. List type of aquatic resource:

Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:

Data sheets prepared/submitted by or on behalf of the applicant/consultant.

Office concurs with data sheets/delineation report.

Office does not concur with data sheets/delineation report.

Data sheets prepared by the Corps:

Corps navigable waters' study:

U.S. Geological Survey Hydrologic Atlas:

USGS NHD data.

USGS 8 and 12 digit HUC maps.

U.S. Geological Survey map(s). Cite scale & quad name:

USDA Natural Resources Conservation Service Soil Survey. Citation:

National wetlands inventory map(s). Cite name:

State/Local wetland inventory map(s):

FEMA/FIRM maps:

100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)

Photographs: Aerial (Name & Date):

or Other (Name & Date):

Previous determination(s). File no. and date of response letter:

Applicable/supporting case law: Rapanos ET UX., ET AL. v. United States, 547 U.S. 04-1034 and 04-1384 (2006)(Rapanos); National Association of Homebuilders v. US Army Corps of Engineers, et. al., D.C. District Court Case No. 1:06-cv-00502 (July 26, 2006)

Applicable/supporting scientific literature:

Other information (please specify): Regulatory Guidance Letters 07-01 (Documentation of JD's - JDIS Guidebook); 05-05 (OHWM); 05-02 (Geographic Extent of JD); 06-01(Timelines for Appeals).

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): November 19, 2008

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CENAP-OP-R-2008-916 (Waters2 UNT)

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Delaware County/parish/borough: Kent City: Little Heaven
Center coordinates of site (lat/long in degree decimal format): Lat. 39.04583° ~~Picklist~~, Long. -75.46305° ~~Picklist~~
Universal Transverse Mercator:

Name of nearest waterbody: Unnamed tributary to the Murderkill River

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Murderkill River

Name of watershed or Hydrologic Unit Code (HUC): 02040207

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date:

Field Determination. Date(s): July 31, 2008

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There ~~are~~ ~~Picklist~~ "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There ~~are~~ "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: 100 linear feet; 6 feet ave. width (ft) and/or acres.

Wetlands: acres.

c. Limits (boundaries) of jurisdiction based on: ~~1987 Delineation Manual~~

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain:

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: Pick List

Drainage area: Pick List

Average annual rainfall: inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through Pick List tributaries before entering TNW.

Project waters are Pick List river miles from TNW.

Project waters are Pick List river miles from RPW.

Project waters are Pick List aerial (straight) miles from TNW.

Project waters are Pick List aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW⁵: Unnamed Tributary (RPW) to the Murderkill River (TNW) to Delaware Bay (TNW).

Tributary stream order, if known:

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: The UNT has been channelized for drainage purposes.

Tributary properties with respect to top of bank (estimate):

Average width: 10 feet
Average depth: 1 feet
Average side slopes: 2:1

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: stable.

Presence of run/riffle/pool complexes. Explain: none.

Tributary geometry: Relatively straight

Tributary gradient (approximate average slope): 2 %

(c) Flow:

Tributary provides for: Seasonal flow

Estimate average number of flow events in review area/year: 20 (or greater)

Describe flow regime: seasonal.

Other information on duration and volume:

Surface flow is: Discrete and confined. Characteristics:

Subsurface flow: Not list. Explain findings:

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):

Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain:

Identify specific pollutants, if known:

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
------------------------------	------------------------	------------------------------	------------------------

Summarize overall biological, chemical and physical functions being performed:

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:
3. Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.
 Wetlands adjacent to TNWs: acres.
2. **RPWs that flow directly or indirectly into TNWs.**
 Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
 Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: Environmental Scientist's report.

Provide estimates for jurisdictional waters in the review area (check all that apply):

Tributary waters: 100 linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters:

3. **Non-RPWs⁸ that flow directly or indirectly into TNWs.**

Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

Tributary waters: linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.

Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

Provide acreage estimates for jurisdictional wetlands in the review area: 10 acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

Demonstrate that impoundment was created from "waters of the U.S.," or

Demonstrate that water meets the criteria for one of the categories presented above (1-6), or

Demonstrate that water is isolated with a nexus to commerce (see E below).

E. **ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY);¹⁰**

which are or could be used by interstate or foreign travelers for recreational or other purposes.

from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

which are or could be used for industrial purposes by industries in interstate commerce.

Interstate isolated waters. Explain:

Other factors. Explain:

Identify water body and summarize rationale supporting determination:

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
 Other non-wetland waters: acres.
Identify type(s) of waters:
 Wetlands: acres.

F. **NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):**

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
 Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
 Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
 Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
 Lakes/ponds: acres.
 Other non-wetland waters: acres. List type of aquatic resource:
 Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
 Lakes/ponds: acres.
 Other non-wetland waters: acres. List type of aquatic resource:
 Wetlands: acres.

SECTION IV: DATA SOURCES.

A. **SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):**

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
 Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 Office concurs with data sheets/delineation report.
 Office does not concur with data sheets/delineation report.
 Data sheets prepared by the Corps:
 Corps navigable waters' study:
 U.S. Geological Survey Hydrologic Atlas:
 USGS NHD data.
 USGS 8 and 12 digit HUC maps.
 U.S. Geological Survey map(s). Cite scale & quad name:
 USDA Natural Resources Conservation Service Soil Survey. Citation:
 National wetlands inventory map(s). Cite name:
 State/Local wetland inventory map(s):
 FEMA/FIRM maps:
 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
 Photographs: Aerial (Name & Date):
or Other (Name & Date):
 Previous determination(s). File no. and date of response letter:
 Applicable/supporting case law: Rapanos ET UX., ET AL. v. United States, 547 U.S. 04-1034 and 04-1384 (2006)(Rapanos)
 Applicable/supporting scientific literature:
 Other information (please specify): Regulatory Guidance Letters 07-01 (Documentation of JD's - JDIS Guidebook); 05-05 (OHWM); 05-02 (Geographic Extent of JD); 06-01(Timelines for Appeals).

B. **ADDITIONAL COMMENTS TO SUPPORT JD:**

**NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND
REQUEST FOR APPEAL**

Applicant: Delaware Dept of Transportation	File: CENAP-OP-R-2008-916	Date: Nov 19, 2008
Attached is:		See Section below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
<input type="checkbox"/>	PERMIT DENIAL	C
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	D
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I: The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://usace.army.mil/inet/functions/cw/ccow/reg.or> Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the Philadelphia District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations (JD) associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the Philadelphia District Engineer. Your objections must be received by the Philadelphia District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the Philadelphia District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the Philadelphia District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the Philadelphia District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the North Atlantic Division Engineer, ATTN: CENAD-ET-O, Fort Hamilton Military Community, Building 301, General Lee Avenue, Brooklyn, NY 11252-6700. This form must be received by the North Atlantic Division Engineer within 60 days of the date of this notice with a copy furnished to the Philadelphia District Engineer.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the North Atlantic Division Engineer, ATTN: CENAD-ET-O, Fort Hamilton Military Community, Building 301, General Lee Avenue, Brooklyn, NY 11252-6700. This form must be received by the North Atlantic Division Engineer within 60 days of the date of this notice with a copy furnished to the Philadelphia District Engineer.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the North Atlantic Division Engineer, ATTN: CENAD-ET-O, Fort Hamilton Military Community, Building 301, General Lee Avenue, Brooklyn, NY 11252-6700. This form must be received by the North Atlantic Division Engineer within 60 days of the date of this notice with a copy furnished to the Philadelphia District Engineer.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II: REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION

If you have questions regarding this decision and/or the appeal process you may contact:

John Brundage
U.S. Army Corps of Engineers, Philadelphia District
ATTN: CENAP-OP-R
Wanamaker Building, 100 Penn Square East
Philadelphia, PA 19107-3390
Telephone: 302-736-9763

If you only have questions regarding the appeal process you may also contact:

Michael G. Vissichelli
Regulatory Appeals Review Officer
North Atlantic Division, U.S. Army Corps of Engineers
Fort Hamilton Military Community
General Lee Avenue, Building 301
Brooklyn, NY 11252-6700
Telephone: (718) 765-7150
E-mail: Michael.G.Vissichelli@usace.army.mil

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____	Date:	Telephone number:
Signature of appellant or agent.		



U.S. Department
of Transportation
**Federal Highway
Administration**

DELMAR Division - Delaware

300 South New St., Suite 2101
Dover Delaware 19904

April 3, 2009

In Reply Refer To: HDA-DE

Kerry Holton, Tribal President
Delaware Nation
PO Box 825
Anadarko, OK 73005

Dear Mr. Holton,

The purpose of this letter is to initiate consultation between the Delaware Nation and the Federal Highway Administration (FHWA) regarding the following federally funded project: **Little Heaven Grade Separated Interchange Project, Kent County, State Contract No. 24-122-02, Federal Aid Number NH-K008 (6).**

The Little Heaven Project southern limit is located just north of the SR1 North Frederica Grade Separated Intersection Project that the Delaware Nation is a consulting party including signature to the Memorandum of Agreement (MOA). Mapping is attached locating both projects.

The Little Heaven Project is currently being processed an Environmental Assessment (EA) and Phase I a & b archaeological surveys have been underway for the past few years and continues to date. No known Native American sites have been discovered so far. When and if any Native American archaeological sites are found, FHWA and the Delaware Department of Transportation (DelDOT) will continue coordination with you. Attached is a preliminary Draft MOA outlining the commitments that DelDOT will fulfill regarding the unfinished archaeological work and any future work if any site is found eligible to the National Register of Historic Places. You may contact David Clarke, DelDOT Project Archaeologist at (302) 760-2271 to discuss any questions that you or other Delaware Nation members may have regarding the surveys and Draft MOA.

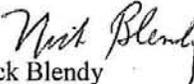
After review, please let us know of the Delaware Nation interests in the Little Heaven Project and participation as a consulting party in the continued development of the Draft MOA. This is consistent with Delaware Nation comments made in a September 8, 2009 email regarding the North Frederica Project and responded to our October 3, 2009 exchange of emails (attached).

Thank you for your input in reviewing the above cited project. If interested in the project, FHWA and DelDOT look forward to working with you and members of the Delaware Nation. If you have any questions or would like further information please contact me at (302) 734-2966.

**MOVING THE
AMERICAN
ECONOMY**



Sincerely,


Nick Blendy
Environmental Specialist

cc: Tamara Francis, Cultural Preservation Director
Gwen Davis, DE SHPO
David Clarke, DelDOT
Kevin Cunningham, DelDOT
Terry Fulmer, DelDOT
Mike Simmons, DelDOT
Dan Johnson, FHWA



U.S. Department
of Transportation
**Federal Highway
Administration**

DELMAR Division - Delaware

**300 South New St., Suite 2101
Dover Delaware 19904**

April 3, 2009

In Reply Refer To: HDA-DE

Robert Chicks, President
Stockbridge Munsee Community Band of Mohican Indians
PO Box 70
Bowler, WI 54416

Dear Mr. Chicks,

The purpose of this letter is to initiate consultation between Stockbridge Munsee and the Federal Highway Administration (FHWA) regarding the following federally funded project: **Little Heaven Grade Separated Interchange Project, Kent County, State Contract No. 24-122-02, Federal Aid Number NH-K008 (6)**. Project mapping is enclosed.

The Little Heaven Project is currently being processed an Environmental Assessment (EA) and Phase I a & b archaeological surveys have been underway for the past few years and continues to date. No known Native American sites have been discovered so far. When and if any Native American archaeological sites are found, FHWA and the Delaware Department of Transportation (DelDOT) will continue coordination with you. Attached is a preliminary Draft MOA outlining the commitments that DelDOT will fulfill regarding the unfinished archaeological work and any future work if any site is found eligible to the National Register of Historic Places. You may contact David Clarke, DelDOT Project Archaeologist at (302) 760-2271 to discuss any questions that you or other Stockbridge Munsee members may have regarding the surveys and Draft MOA.

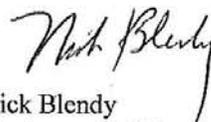
After review, please let us know of Stockbridge Munsee interests in the Little Heaven Project including participation as a consulting party in the continued development of the Draft MOA.

Thank you for your input in reviewing the above cited project. If you are interested, FHWA and DelDOT look forward to working with you and the Stockbridge Munsee Community Band of Mohican Indians. If you have any questions or would like further information please contact me at (302) 734-2966.

**MOVING THE
AMERICAN
ECONOMY**



Sincerely



Nick Blendy
Environmental Specialist

cc: Terry White, Tribal Historic Preservation Officer
Gwen Davis, DE SHPO
David Clarke, DeIDOT
Kevin Cunningham, DeIDOT
Terry Fulmer, DeIDOT
Mike Simmons, DeIDOT
Dan Johnson, FHWA

Stockbridge-Munsee Tribal Historic Preservation Office

Sherry White - Tribal Historic Preservation Officer

W13447 Camp 14 Road

P.O. Box 70

Bowler, WI 54416

APR 17 2009

April 14, 2009

Nick Blendy
Environmental Specialist
Federal Highway Administration
300 South New St., Suite 2101
Dover, DE 19904

RE: Little Heaven Grade Separated Interchange Project
Kent County, State Contract No. 24-122-02
Federal Aid Number NH-K008 (6)

Dear Mr. Blendy:

Thank you for contacting the Stockbridge-Munsee Tribe regarding the above referenced project. The Tribe is committed to protecting archaeological sites that are important to tribal heritage, culture and religion. Furthermore, the Tribe is particularly concerned with archaeological sites that may contain human burial remains and associated funerary objects.

As described in your correspondence, the proposed ground disturbing activity of this project does not appear to be in a region of archaeological interest to the Stockbridge-Munsee Tribe.

We appreciate your cooperation in notifying the Historic Preservation Office. Should you have any questions, feel free to contact me.

Sincerely,

Sherry White/gj

Sherry White,
Tribal Historic Preservation Officer

(715) 793-3970

Email: sherry.white@mohican-nsn.gov



Preserving America's Heritage

November 12, 2008

Therese M. Fulmer
Manager, Environmental Studies
Department of Transportation
800 Bay Road
P.O. Box 778
Dover, Delaware 19903

Ref: *Proposed SRI, Little Heaven Grade Separated Intersection Project
Kent County, Delaware*

Dear Ms. Fulmer:

On October 27, 2008, the Advisory Council on Historic Preservation (ACHP) received your notification and supporting documentation regarding the adverse effects of the referenced undertaking on a property or properties listed or eligible for listing in the National Register of Historic Places. Based upon the information you provided, we have concluded that Appendix A, *Criteria for Council Involvement in Reviewing Individual Section 106 Cases*, of our regulations, "Protection of Historic Properties" (36 CFR Part 800), does not apply to this undertaking. Accordingly, we do not believe that our participation in the consultation to resolve adverse effects is needed. However, if we receive a request for participation from the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer, affected Indian tribe, a consulting party, or other party, we may reconsider this decision. Additionally, should circumstances change, and you determine that our participation is needed to conclude the consultation process, please notify us.

Pursuant to 36 CFR §800.6(b)(1)(iv), you will need to file the final Memorandum of Agreement (MOA), developed in consultation with the Delaware State Historic Preservation Office (SHPO) and any other consulting parties, and related documentation with the ACHP at the conclusion of the consultation process. The filing of the MOA and supporting documentation with the ACHP is required in order to complete the requirements of Section 106 of the National Historic Preservation Act.

Thank you for providing us with your notification of adverse effect. If you have any questions or require our further assistance, please contact Kelly Fanizzo at 202 606-8583 or via e-mail at kfanizzo@achp.gov.

Sincerely,

LaShavio Johnson
Historic Preservation Technician
Federal Permitting, Licensing and Assistance Section
Office of Federal Agency Programs

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov



Delaware Department of Transportation
Carolann Wicks, P.E.
Secretary

SR 1, Little Heaven Grade Separated Intersection Project

30-Day Comment Period for Environmental Assessment and Draft Section 4(f) Evaluation

Kent County, Delaware

The Delaware Department of Transportation (DelDOT) and the Federal Highway Administration (FHWA) are undertaking a project that involves the proposed construction of a SR 1 grade separated intersection at Little Heaven in Kent County, Delaware. The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

DelDOT and the FHWA, in accordance with the Federal requirements of 23 CFR 771.119 and 23 CFR 774, are hereby notifying the public of the availability of the Environmental Assessment and Draft Section 4(f) Evaluation. Copies of the document are available at the DelDOT Administrative Building at 800 Bay Road, Dover, Delaware. Interested parties may also obtain a copy of the document by contacting DelDOT Public Relations at 302-760-2080.

All interested parties are invited to comment upon the project. Comments must be submitted in writing within 30 days of the publication of this notice or by May 21, 2010. Written comments may be sent to the following address:

Office of Public Relations
Delaware Department of Transportation
P.O. Box 778
Dover, Delaware 19904

PUBLIC NOTICE



STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. BOX 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

April 5, 2010

Kevin Magerr
Environmental Protection Agency
1650 Arch Street (3EP30)
Philadelphia, PA 19103

Dear Mr. Magerr:

The Delaware Department of Transportation is pleased to submit the Environmental Assessment for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County. The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration Contract Number is NH-K008(6). The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

Please provide any comments you may have within thirty (30) days of receiving the Environmental Assessment.

We look forward to continuing our coordination with you on this project.

Sincerely,

Therese M. Fulmer
Manager, Environmental Studies

TF:tfb
Enclosure

cc: Hassan Raza, FHWA
Natalie Barnhart, Chief Engineer, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Thad McIlvaine, Project Manager, South Project Development, DelDOT
Michael Hahn, Environmental Studies

File





STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. BOX 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

April 5, 2010

Bob Zepp
U.S. Fish & Wildlife Service
177 Admiral Cochrane Drive
Annapolis, MD 21401

Dear Mr. Zepp:

The Delaware Department of Transportation is pleased to submit the Environmental Assessment for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County. The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration Contract Number is NH-K008(6). The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

Please provide any comments you may have within thirty (30) days of receiving the Environmental Assessment.

We look forward to continuing our coordination with you on this project.

Sincerely,

Therese M. Fulmer
Manager, Environmental Studies

TF:tfb
Enclosure

cc: Hassan Raza, FHWA
Natalie Barnhart, Chief Engineer, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Thad McIlvaine, Project Manager, South Project Development, DelDOT
Michael Hahn, Environmental Studies





STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. BOX 778
DOVER, DELAWARE 19903

April 5, 2010

CAROLANN WICKS, P.E.

SECRETARY

Laura Herr
DNREC
Division of Water Resources
Wetlands & Subaqueous Lands Section
89 Kings Highway
Dover, DE 19901

Dear Ms. Herr:

The Delaware Department of Transportation is pleased to submit the Environmental Assessment for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County. The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration Contract Number is NH-K008(6). The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

Please provide any comments you may have within thirty (30) days of receiving the Environmental Assessment.

We look forward to continuing our coordination with you on this project.

Sincerely,

Therese M. Fulmer
Manager, Environmental Studies

TF:tfb
Enclosure

cc: Hassan Raza, FHWA
Natalie Barnhart, Chief Engineer, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Thad McIlvaine, Project Manager, South Project Development, DelDOT
Michael Hahn, Environmental Studies





STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. Box 778
DOVER, DELAWARE 19903

April 5, 2010

CAROLANN WICKS, P.E.
SECRETARY

Sara Cooksey
DNREC
Division of Soil & Water Conservation
89 Kings Highway
Dover, DE 19901

Dear Ms. Cooksey:

The Delaware Department of Transportation is pleased to submit the Environmental Assessment for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County. The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration Contract Number is NH-K008(6). The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

Please provide any comments you may have within thirty (30) days of receiving the Environmental Assessment.

We look forward to continuing our coordination with you on this project.

Sincerely,

Therese M. Fulmer
Manager, Environmental Studies

TF:tfb
Enclosure

cc: Hassan Raza, FHWA
Natalie Barnhart, Chief Engineer, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Thad McIlvaine, Project Manager, South Project Development, DelDOT
Michael Hahn, Environmental Studies





STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. Box 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

April 19, 2010

Mr. Willie Taylor
Director Office of Environmental Policy and Compliance
U.S. Department of the Interior
1849 C Street, NW MS 2462
Washington, DC 20240

Dear Mr. Taylor:

The Delaware Department of Transportation is pleased to submit the Environmental Assessment/Draft Section 4(f) Evaluation for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County (one hard copy and eight CD's enclosed). The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration (FHWA) Contract Number is NH-K008(6), the FHWA contact is Nick Blendy, 302.734.2966, nick.blendy@dot.gov. The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

Please provide any comments you may have within forty-five (45) days of receiving the Environmental Assessment/Draft Section 4(f) Evaluation. Should you have any questions please feel free to contact me at 302.760.2095 or terry.fulmer@state.de.us.

Sincerely,

Therese M. Fulmer
Manager, Environmental Studies

TF:tfb

Enclosure

cc: Hassan Raza, FHWA
Natalie Barnhart, Chief Engineer, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Thad McIlvaine, Project Manager, South Project Development, DelDOT
Nick Blendy, FHWA
Dan Montage, FHWA
Michael Hahn, Environmental Studies
File



State of Delaware
Historical and Cultural Affairs

21 The Green
Dover, DE 19901-3611

Phone: (302) 736.7400

Fax: (302) 739.5660

June 3, 2010

Ms. Therese M. Fulmer, Manager
Environmental Studies
Delaware Department of Transportation
800 Bay Road, P.O. Box 778
Dover, DE 19904

RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); Memorandum of Agreement

Dear Ms. Fulmer:

This office had reviewed the final, revised Memorandum of Agreement (MOA), as received on May 27, 2010, for the SR 1/Little Heaven project, and agrees with the terms stated therein. It is understood that several minor typographical errors in the document will be corrected.

The State Historic Preservation Officer has signed the MOA, and per your request, is returning the document to DelDOT (enclosed). After the Federal Highway Administration (FHWA) has signed the MOA, please provide us with a copy of the executed agreement. Copies should also be sent to the Advisory Council on Historic Preservation and the Delaware Nation.

The DE SHPO looks forward to working with you to implement the terms of the MOA. Should you have any questions at this time, please do not hesitate to contact us. Thank you.

Sincerely,



Gwentyth A. Davis
Archaeologist

Enclosure

cc: Nicholas Blendy, Environmental Specialist, Federal Highway Administration
Stephen Marz, Deputy Director and Deputy SHPO, Division of Historical & Cultural Affairs





U.S. Department
of Transportation
**Federal Highway
Administration**

DELMAR Division – Delaware

**300 South New St., Suite 2101
Dover, Delaware 19904**

June 9, 2010

President Kerry Holton
The Delaware Nation
31064 State Highway 281
Anadarko, OK 73005

Dear Mr. Holton,

The Federal Highway Administration (FHWA) is providing the Delaware Nation a copy of the executed Memorandum of Agreement (MOA) for the federally funded project: **Little Heaven Grade Separated Project, Kent County, State Contract No. 24-122-02, Federal Aid Number NH-K008(6)**. The draft MOA was appended to the April 2010 Environmental Assessment (EA)/Draft Section 4(f) Evaluation mailed to the Delaware Nation on April 21, 2010. The only public or agency comments received on the EA/Draft Section 4(f) Evaluation is the attached June 9, 2010 letter from the US Department of Interior recommending that a copy of the signed MOA be included in the final documentation for the Little Heaven EA/Section 4(f) Evaluation project. This will occur. Please advise if the Delaware Nation requests a copy of the final report for files.

Thank you again for the assistance the Delaware Nation has provided for the State of Delaware. If you have any questions or would like to further discuss, please contact me at (302) 734-2966 or by email at nick.blendy@dot.gov.

Sincerely,

Nick Blendy
Environmental Specialist





STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. BOX 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

June 10, 2010

Mr. Reid Nelson
Advisory Council on Historic Preservation
The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, D.C. 20004

Dear Mr. Nelson:

The Delaware Department of Transportation is pleased to submit the signed Memorandum of Agreement for the SR 1, Little Heaven Grade Separated Intersection Project in Kent County, DE. The DelDOT Contract Number is 24-122-02 and the Federal Highway Administration (FHWA) Contract Number is NH-K008(6). The FHWA contact is Nick Blendy, 302-734-2966, nick.blendy@dot.gov. The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

Pursuant to 36 CFR §800.6(b)(1)(iv), we are filing the final Memorandum of Agreement (MOA), developed in consultation with the Delaware State Historic Preservation Office (SHPO) and the Federal Highway Administration (FHWA), with the Advisory Council on Historic Preservation (ACHP) at the conclusion of the consultation process. The filing of the MOA and supporting documentation with the ACHP is required in order to complete the requirements of Section 106 of the National Historic Preservation Act.

Should you have any questions please feel free to contact me at 302-760-2095 or terry.fulmer@state.de.us.

Sincerely,

A handwritten signature in blue ink that reads "Therese M. Fulmer".

Therese M. Fulmer
Manager, Environmental Studies

(Attachments)

cc: Hassan Raza, FHWA





United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240



JUN 9 2010

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PEP/NRM

ER 10/373

Ms. Therese M. Fulmer
Manager, Environmental Studies
Delaware Department of Transportation
800 Bay Road
Post Office Box 778
Dover, Delaware 19903

Dear Ms. Fulmer:

This is in response to a request for the Department of the Interior's (Department) review and comment on the Draft Environmental Assessment and Section 4(f) Evaluation for **SR-1, Little Heaven Grade Separated Intersection in Kent County, Delaware**. We offer the following comments on this project for your consideration.

Section 4(f) Comments

The Department concurs that there is no prudent and feasible alternative to the proposed use of Section 4(f) land, which consists of Barratt's Chapel and Cemetery, Thomas James House and the Mt. Olive Colored School/Mt. Olive School. The measures to minimize harm to historic resources listed on the National Register of Historic Places or determined eligible for listing, must, however, be explicitly consistent with the Memorandum of Agreement developed in consultation with the Delaware State Historic Preservation Office (SHPO) and concurred with by the Advisory Council on Historic Preservation. We recommend that a signed copy of the agreement documenting compliance with Section 106 of the National Historic Preservation Act be included in the final documentation to reflect the procedures for protecting cultural resources determined in consultation with the SHPO.

We appreciate the opportunity to provide these comments.

Sincerely,

Willie R. Taylor
Director, Office of Environmental
Policy and Compliance



STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
800 BAY ROAD
P.O. BOX 778
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.
SECRETARY

June 17, 2010

Hassan Raza, Division Administrator
Federal Highway Administration, Delmar Division
J. Allen Frear Federal Building
300 S. New Street, Room 2101
Dover, DE 19904-6726

Dear Mr. Raza:

The Delaware Department of Transportation (DelDOT) is requesting a Finding of No Significant Impact (FONSI) for the **SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, Delaware State Contract No. 24-122-02, Federal Aid Project No. NH-K008(6).**

Public notice of the availability of the Environmental Assessment (EA) and Draft Section 4(f) Evaluation dated April 2010 was posted in the News Journal and the Delaware State News on April 20, 2010 providing a 30-day comment period. The 30-day period expired on May 21, 2010. No comments were received from the public notice.

On April 1, 2010, copies of the Environmental Assessment and Draft Section 4(f) Evaluation were forwarded to the Delaware Division of Natural Resources and Environmental Control (DNREC), Wetlands and Subaqueous Lands Section and Coastal Zone Management Office, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service for a 30-day review period. No comments were received.

On April 19, 2010, copies of the Environmental Assessment and Draft Section 4(f) Evaluation were forwarded to the U.S. Department of Interior (DOI), Office of Environmental Policy and Compliance for a 45-day review period per 23 CFR 774 requirements. DOI responded suggesting we include a signed copy of the Memorandum of Agreement (MOA) developed with the Delaware State Historic Preservation Office (DE SHPO) and Federal Highway Administration (FHWA) in the final Environmental Assessment. The DOI letter dated June 9, 2010 and the signed MOA have been incorporated in the enclosed EA dated June 2010. Chapter V. Agency and Public Coordination has been updated to include the above information.



Hassan Raza Letter
June 17, 2010
Page 2

Based on the above, we request your concurrence in a FONSI determination for the SR 1/Little Heaven Grade Separated Intersection Project and approval of the Section 4(f) Evaluation.

Following your approval, we will notify the State Clearinghouse of the availability of the FONSI, issue a public notice on the FONSI determination, (draft notice attached for your review), as well as any other notifications you feel are appropriate.

As always, thank you for your continued cooperation.

Sincerely,

A handwritten signature in blue ink that reads "Natalie Barnhart".

Natalie Barnhart
Director

TF:tfb

Enclosures

cc: Robert McCleary, Assistant Director, Engineering Support, DelDOT
Michael Simmons, Assistant Director, South Project Development, DelDOT
Basharat Siddiqi, FHWA
Dan Montag, FHWA
Nick Blendy, FHWA
Thad MacIlvaine, Project Manager, South Project Development, DelDOT
Therese Fulmer, Manager, Environmental Studies, DelDOT
Mike Hahn, Environmental Studies, DelDOT
File



Delaware Department of Transportation
Carolann Wicks, P.E.
Secretary

SR 1, Little Heaven Grade Separated Intersection Project

Approval of Location and Finding of No Significant Impact

Kent County, Delaware

The Delaware Department of Transportation (DelDOT) and the Federal Highway Administration (FHWA) are undertaking a project that involves the construction of a grade separated intersection at SR 1 and Little Heaven in Kent County, Delaware. The purpose of the project is to improve traffic operations, safety and roadway conditions within the project area.

The project area extends 2.73 miles along SR 1 from south of Barratts Chapel Road (K371) to north of Mulberrie Point Road (K373). The project includes the construction of new SR 1 northbound lanes and a service road east of SR 1 from Barratts Chapel Road to Mulberrie Point Road in Little Heaven. The existing SR 1 northbound lanes will be converted to SR 1 southbound lanes, and the existing SR 1 southbound lanes will be converted to a service road. Both directions of SR 1 will be elevated at the intersection at Bowers Beach Road (K18) by the construction of a grade separation, which will provide access to and from the service roads on either side of SR 1.

DelDOT and the FHWA, in accordance with the Federal requirements of the 23 CFR 771.121(b), are hereby notifying the public of the issuance of a Finding of No Significant Impact (FONSI) for the project. The FONSI has been prepared in accordance with the National Environmental Policy Act to document and support FHWA's determination that the Selected Alternate would not have a significant effect on the human and natural environment. Copies of the FONSI documentation are available at the DelDOT Administrative Building at 800 Bay Road, Dover, DE. Interested parties may also obtain a copy of the document by contacting DelDOT Public Relations at 1-800-652-5600 (in DE) or 302-760-2080. (in DE).

Office of Public Relations
Delaware Department of Transportation
P.O. Box 778
Dover, Delaware 19903

PUBLIC NOTICE