



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT
1600 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19103-2004

CENAP-OPR

July 21, 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ NAP-2024-00078-85 MFR 1 of 1²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

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

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

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

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

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Agricultural Drainage Ditch A: Non-jurisdictional
 - ii. Agricultural Drainage Ditch B: Non-jurisdictional
 - iii. Agricultural Drainage Ditch C: Jurisdictional
 - iv. Agricultural Drainage Ditch D/E: Non-jurisdictional
 - v. Palustrine Forested Wetlands: Non-jurisdictional

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 12.63 acres in size located at the northeast corner of the Bayard Road and Double Bridges Road intersection at Tax Map Parcel 134-19.00-22.00 in Frankford, Sussex County, Delaware. The center coordinates for the site are 38.50561°N/75.124482°W. The review area is currently in agricultural production.

A site visit was conducted on February 26, 2021, at the request of the consultant, to discuss the aquatic resources on-site and provide guidance on whether a permit or jurisdictional determination would be necessary for redevelopment of the site. At that time, it was suggested to apply for an approved jurisdictional determination (AJD). However, the application was received after the definition of waters of the United States had changed and jurisdictional determination were placed on hold. Following several rule changes, a new AJD request was received.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Based off the NWI mapper, the nearest TNW in which the aquatic resource is connected is approximately 0.87 mile from the review area. Miller Creek is subject to the ebb and flow of the tide and therefore meets the TNW definition.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Agricultural Drainage Ditches A, B and D/E connect to Agricultural Drainage Ditch C (Beaver Dam Canal Prong No. 1) which flows northeast into Miller Creek (TNW).
6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

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

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

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

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- a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): The Agricultural Drainage Ditch C, also identified as Beaver Dam Canal Prong No.1 is 0.0981 acre or 448 linear feet and is the feature in which Drainage Ditch A, B and D/E flow. Agricultural Drainage Ditch C continues off site, and flows into Miller Creek, an (a)(1)(i) TNW, approximately 0.87 mile away. The National Hydrography Dataset does not apply a label to the entire portion of this ditch but identifies the lower portion as being perennial. Site visits conducted on February 26, 2021, and July 30, 2024, confirmed the presence of an ordinary high water mark throughout the entirety of the ditch. Given that the site was visited during the typical wet and dry portions of the year and the presence of flowing/standing water was confirmed, the ditch does not strictly flow in response to precipitation, but instead exhibits a relatively permanent flow. Aerial imagery was reviewed to 1926, in which the ditch is present at the same location, indicating that this ditch was likely part of the natural stream/wetland complex, but was channelized to improve agriculture. Of note, is the Web Soil Survey indicating this ditch is located through the Mullica-Berryland Complex, which is identified as a hydric soil confirming that this area may have supported a stream at some point. For these reasons, Agricultural Drainage Ditch C meets the relatively permanent standard, therefore meeting the definition of an (a)(3) Tributary.
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature

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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹

Agricultural Drainage Ditch A is 0.2025 acre or 924 linear feet. This ditch is excavated wholly in dry land, draining only dry land and does not carry a relatively permanent flow of water. Additionally, the ditch lacks a bed and bank, wrack deposits and alluvial deposits that would be strong indicators of relatively permanent or standing water. The National Hydrography Dataset indicates this resource as a ditch. For these reasons, the ditch meets the (b)(3) ditch exclusion.

Agricultural Drainage Ditch B is 0.0621 acre or 428 linear feet. This ditch is excavated wholly in dry land, draining only dry land and does not carry a relatively permanent flow of water. Additionally, the ditch lacks a bed and bank, wrack deposits and alluvial deposits that would be strong indicators of relatively permanent or standing water. For these reasons, the ditch meets the (b)(3) ditch exclusion.

Agricultural Drainage Ditch D/E is 0.0485 acre or 463 linear feet. This ditch is excavated wholly in dry land, draining only dry land and does not carry a relatively permanent flow of water. This ditch carries stormwater from Double Bridges Road. Additionally, the ditch lacks a bed and bank, wrack deposits and alluvial deposits that would be strong indicators of relatively permanent or standing water. For these reasons, the ditch meets the (b)(3) ditch exclusion.

- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

The aquatic resource identified as Palustrine Forested Wetlands is 0.0221 acre in size within the northwest parcel boundary and extends outside of the review area. This wetland is geographically separated from any other aquatic resources and does not have a continuous surface connection to the nearest (a)(3) tributary Agricultural Drainage Ditch C. While the wetlands do extend beyond the property line, the extent is limited to within the wooded area. Beyond the wooded area, outside of the review area, exists a single-family home subdivision. This was verified during the USACE February 26, 2021, site visit. Review of aerial imagery further verifies that the wetland does not connect to any other resources to the north or the west. Because the Palustrine Forested Wetland does not have a

⁹ 88 FR 3004 (January 18, 2023)

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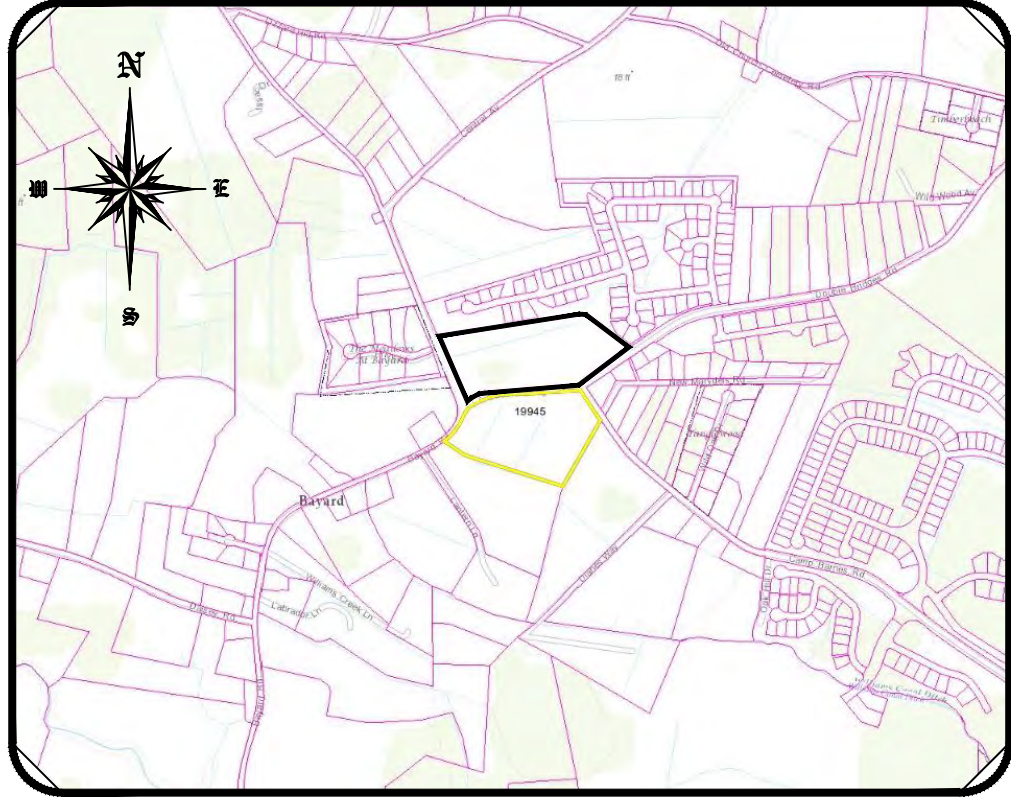
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continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. USACE site visit conducted on February 26, 2021, and July 30, 2024.
 - b. WETLAND DELINEATION REPORT IDENTIFICATION OF WATERS OF THE UNITED STATES, INCLUDING WETLANDS SUBJECT TO THE CORPS OF ENGINEERS REGULATORY PROGRAM ARCHUT FARM-NORTHERN TRACT TAX MAP 1-34-19.00 PARCELS 22.00 (12.6352 ACRE PART) FRANKFORD, BALTIMORE HUNDRED, SUSSEX COUNTY, DELAWARE, prepared by Kenneth W. Redinger Environmental Services, dated July 1, 2025.
 - c. WETLAND DELINEATION SURVEY LANDS OF BAYARD COMMONS, LLC., prepared by Simpler Surveying & Associate, Incorporated, dated June 3, 2021, and last revised on June 30, 2025, 1 sheet.

10. OTHER SUPPORTING INFORMATION.

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



P/O TAX MAP NO. 1-34-19-22
STATE: DELAWARE
COUNTY: SUSSEX
HUNDRED: BALTIMORE
MUNICIPALITY:
AREA: 12.6352 ACRES
SCALE: 1"=50'
CLASS "C" SURVEY
HORIZONTAL DATUM=NAD'83 (1983 NORTH AMERICAN DATUM)
VERTICAL DATUM= NAVD'88 (1988 NORTH AMERICAN VERTICAL DATUM)

1. This plat and survey does not verify the existence or nonexistence of right-of-ways and/or easements pertaining to this property. Including but not limited to Tax Ditch Easements.
2. No title search provided or stipulated.
3. Deed Book Reference:
 - Db. 3648, Pg. 165 (Parcel 22)
 - Db. 4123, Pg. 266 (Parcel 30)
 - Db. 4415, Pg. 295 (Parcel 110.03)
 - Db. 3831, Pg. 323 (Parcel 111)
4. Plat Book Reference:
 - Pb. 93, Pg. 147 (Parcel 30)
 - Pb. 46, Pg. 172 (Parcel 110.03)

WETLAND NOTES

Routine Level on-site investigations were conducted by Kenneth W. Redinger (Professional Wetland Scientist #2126) on January 22, February 26, and May 13, 2021 to delineate in accordance with the 1987 Corps of Engineers Wetland Delineation Manual in conjunction with the Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Atlantic and Gulf Coastal Plain Region; Version 2.0 (November 2010) and associated regulatory guidance documents.

The jurisdictional status of Waters of the United States, including wetlands, is interpreted in light of the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*; U.S. Environmental Protection Agency (USEPA) and U.S. Army Corps of Engineers (USACE) regulations published in the Federal Register on February 10, 2023 (88 FR 328 and 329) (USACE 328 and 40 CFR Part 120, becoming effective on March 20, 2023 (Volume 88 Number 11, Pages 3004 through 3144)); conforming guidance revising the definition of Waters of the United States published in the Federal Register and becoming effective on March 20, 2023 (Volume 88 Number 11, Pages 3145 through 6196); USEPA guidance memorandum dated/implemented March 12, 2025 regarding the implementation of the definition of waters of the United States to provide consistency with the Supreme Court's decision in *Sackett v. Environmental Protection Agency* March 24, 2025 CFR 33 Part 328 and 40 CFR Part 120 (Volume 90 Number 55, Pages 13428 through 13431); and associated regulatory guidance.

I, GREGORY M. HOOK, hereby certify that I am a registered land surveyor, in the State of Delaware, that the information shown hereon has been prepared under my supervision and to the best of my knowledge and belief. I certify that the information on this plan is true and correct to the accuracy required by accepted engineering and surveying standards and practices, and complies with applicable laws and regulations as required by the State of Delaware.

GREGORY M. HOOK, PLS 711

Date _____

woods line (typ.

PALUSTRINE FORESTED WETLANDS		PROPERTY LINE CURVE TABLE					
DISTANCE		CURVE	RADIUS	ARC LENGTH	CHORD LENGTH	CHORD BEARING	DELTA ANGLE
	6.01'	C1	R =360.00'	L =196.75'	CH =194.31'	BRG. = S71°07'28" W	= 31°18'49"
	50.59'	C2	R =615.72'	L =313.81'	CH =310.42'	BRG. = S72°10'50" W	= 29°12'05"
	59.14'	C3	R =275.00'	L =89.83'	CH =69.64'	BRG. = N44°52'26" W	= 14°45'26"
		C4	R =275.00'	L =210.40'	CH =205.31'	BRG. = N26°36'55" E	= 43°50'13"
		C5	R =565.72'	L =288.33'	CH =285.22'	BRG. = N72°10'50" E	= 29°12'05"
		C6	R =410.00'	L =67.63'	CH =67.56'	BRG. = N82°03'20" E	= 9°27'05"

PROPERTY LINE TABLE		
LINE	BEARING	DISTANCE
L1	S 78°58'36" E	101.63'
L2	S 70°13'15" E	80.96'
L3	N 48°32'02" E	39.87'
L4	N 57°34'47" E	77.71'
L5	S 57°34'47" W	47.63'

FLOOD DATA This property is in Zone "X", (non-shaded)
of the Flood Insurance Rate Map, Community Panel No. 100029-10005C0495-
and Community Panel No. 100029-10005C0513-K, which has an effective
date of MARCH 16, 2015 and IS NOT in a Special Flood Hazard Area.

DATE OF ORIGINAL: JUNE 03 2021	
REVISION: PER WETLAND SCIENTIST	DATE: AUGUST 17 2021
REVISION: PER WETLAND SCIENTIST	DATE: JANUARY 30 2024
REVISION: PER WETLAND SCIENTIST	DATE: AUGUST 01 2024
REVISION: PER WETLAND SCIENTIST	DATE: SEPTEMBER 09 2024
REVISION: SAMPLE POINTS	DATE: APRIL 11 2025
REVISION: PER WETLAND SCIENTIST	DATE: JUNE 30 2025
REVISION:	DATE: 2025
REVISION:	DATE: 2025
Drawn by: MICHAEL LOVELAND Checked by: GREGORY M. HOOK	

STANDARD LEGEND

These standard symbols will be found in the drawing

- POINT
- 3/4" PIPE (FD)
- 5/8" REBAR (SET)
- ✱ PK NAIL (SET)
- B4 WETLANDS FLAG (FD)
- U-1 DATA POINT

Wetland Delineation Survey

Lands of BAYARD COMMONS, LLC.

SEAI



**SIMPLER
SURVEYING
& ASSOCIATE, INC.**

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