

## DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT 1650 ARCH STREET PHILADELPHIA, PENNSYLVANIA 19103-2004

CENAP-OPR

April 1, 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),<sup>1</sup> NAP-2025-00071-103<sup>2</sup>

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

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

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

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

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

<sup>&</sup>lt;sup>3</sup> 33 CFR 331.2.

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

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

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

- 1. SUMMARY OF CONCLUSIONS.
  - a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
    - i. Ephemeral Drainage Channel, 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. 651, 143 S. Ct. 1322 (2023)
- 3. REVIEW AREA. The subject property consists of tax map parcel 134-11.00-27.00 located in the area of Dagsboro, Sussex County, Delaware (38.554868, -75.166792). The review area consists of 39.83 acres of the parcel, excluding the northwest portion of the property. The review area is labeled as 'Limit of Jurisdictional Determination Review Area' on the wetland delineation plans entitled "Wetland Delineation Plan West Beach Preserve Vines Creek Road (SCR 026)"; prepared by Davis, Bowen & Friedel, Incorporated; dated March, 2025; unrevised; 1 sheet. A site visit was conducted on February 27, 2025. The goal of the site visit was to assess the drainage feature (Ephemeral Drainage Channel) located within the agricultural fields of the property. During the site visit, the drainage feature did not contain any standing or flowing water, or an ordinary high water mark. Additionally, the feature contained dense vegetation growing within the channel. Due to the linear portions and abrupt turns of this feature, it was likely dug to drain the agricultural fields.
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS

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CONNECTED. Blackwater Creek. Blackwater Creek is influenced by the ebb and flow of the tide. <sup>6</sup>

- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Ephemeral Drainage Channel continues off-site to the east where it terminates into Blackwater Creek approximately 0.33 miles downstream.
- 6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup> N/A
- 7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
  - b. The Territorial Seas (a)(1)(ii): N/A

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

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

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

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- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- 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 within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup> N/A
  - b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).
    - Ephemeral Drainage Channel is an approximately 1198 linear foot ephemeral feature that originates to the west of the review area and continues off the review area to the east. During the site visit, Ephemeral Drainage Channel did not exhibit an ordinary high water mark, nor relatively permanent flow. Additionally, this feature contained dense vegetation growing within the channel. The feature was assessed under the Delaware Stream Jurisdictional Determination Field form, where under a generous score, the feature was still deemed ephemeral. Additionally, the linear portions and abrupt turns of this feature are typical of agricultural ditches dug for the purpose of draining the adjacent agricultural fields. Ephemeral Drainage Channel does not contain relatively permanent flow, thereby it does not meet the definition of an (a)(3) tributary and is not subject to CWA jurisdiction.

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

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- 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 February 24, 2025.
  - b. Wetland Delineation Plans entitled "Wetland Delineation Plan West Beach Preserve Vines Creek Road (SCR 026)"; prepared by Davis, Bowen & Friedel, Incorporated; dated March, 2025; unrevised; 1 sheet.
  - c. Wetland Delineation Report entitled "Wetland Delineation Report and Identification of Waters of the United States, Including Wetlands Subject to the Corps of Engineers Regulatory Program"; prepared by Environmental Resource Insights; dated March 19, 2025.
- 10. OTHER SUPPORTING INFORMATION. N/A
- 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.



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EPHEMERAL MAN MADE DRAINAGE CHANNEL		NAD	DELAWAR
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IRON ROD FOUND	IRF	$3 \rightarrow 1$	STA
IRON PIPE FOUND	O IPF		
COMPUTED POINT	•	D	GR
EASEMENT LINE			D
PROPERTY LINE			
EXISTING RIGHT-OF-WAY	EX-R/W		
EXISTING WOODS LINE	~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~		
EXISTING TOPOGRAPHIC CONTOUR	— 8 — —		
BOUNDARY OF EPHEMERAL DRAINAGE CHANNEL	·		
LIMIT OF JURISDICTIONAL DETERMINATION REVIEW AREA			
WETLAND FLAG	$\triangleright$		
DATA POINT AND LABEL			

SQ. FT.	ACRES				
LANDS WITHIN JURISDICTIONAL DETERMINATION REVIEW AREA					
1,224,198.11 ±	28.104 ±				
465,895.55 ±	10.695 ±				
25,173.58 ±	0.578 ±				
19,946.16 ±	0.458 ±				
1,735,213.40 ±	39.835 ±				
LANDS OUTSIDE OF JURISDICTIONAL DETERMINATION REVIEW AREA					
13,199.61 ±	0.303 ±				
699.94 ±	0.016 ±				
806.52 ±	0.019 ±				
479.40 ±	0.011 ±				
15,185.47 ±	0.349 ±				
1,750,398.87 ±	40.200 ±				
	SQ. F1. DN REVIEW AR ,224,198.11 ± 465,895.55 ± 25,173.58 ± 19,946.16 ± ,735,213.40 ± TION REVIEW 13,199.61 ± 699.94 ± 806.52 ± 479.40 ± 15,185.47 ± ,750,398.87 ±				

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NOTE: LINEAR FOOTAGE OF THE EPHEMERAL MAN MADE DRAINAGE CHANNEL WITHIN THE JURISDICTIONAL DETERMINATION REVIEW AREA = 1176.38 LINEAR FEET.

DRAINAGE CHANNEL LINE TABLE						
LINE	BEARING	DISTANCE				
C1	S 78°14'51" E	21.08'				
C2	S 76°33'14" E	39.46'				
C3	S 70°20'09" E	73.25'				
C4	S 70°27'06" E	60.51'				
C5	S 62°11'07" E	32.42'				
C6	S 57°00'23" E	157.62'				
C7	S 58°55'31" E	49.62'				
C8	S 69°58'48" E	41.26'				
C9	S 73°49'09" E	167.31'				
C10	S 73°13'05" E	171.96'				
C11	S 07°17'19" E	128.71'				
C12	S 06°43'27" E	109.05'				
C13	S 83°18'12" E	62.80'				
C14	S 84°47'10" E	86.83'				
C15	S 83°33'41" E	39.05'				
C16	S 78°43'50" E	9.41'				
C17	S 88°52'45" W	42.12'				
C18	N 86°37'25" W	42.92'				
C19	N 86°51'08" W	119.34'				
C20	N 38°40'39" W	13.19'				
C21	N 07°50'45" W	115.92'				
C22	N 09°22'32" W	101.59'				
C23	N 15°01'37" W	14.24'				
C24	N 66°57'16" W	34.63'				
C25	N 73°24'46" W	121.43'				
C26	N 74°25'07" W	154.05'				
C27	N 71°35'43" W	58.23'				
C28	N 60°25'42" W	45.19'				
C29	N 53°31'18" W	37.38'				
C30	N 55°10'18" W	95.81'				
C31	N 60°01'57" W	42.73'				
C32	N 69°17'13" W	40.41'				
C33	N 71°39'57" W	90.79'				
C34	N 63°36'09" W	36.71'				
C35	N 68°11'30" W	38.72'				
	TOTAL:	2.486.05'				

WETLAND LINE TABLE					
LINE	BEARING	DISTANCE			
WL1	S 39°45'28" E	51.11'			
WL2	N 76°33'14" W	9.69'			
WL3	N 78°14'51" W	21.08'			
WL4	N 04°34'47" W	32.85'			
	TOTAL:	114.73'			

## WETLANDS STATEMENT

I, <u>EDWARD M. LAUNAY, SPWS, STATE THAT THE BOUNDARY OF WATERS OF THE UNITED STATES INCLUDING WETLANDS WITHIN THE JURISDICTIONAL</u> DETERMINATION REVIEW AREA SUBJECT TO THE CORPS OF ENGINEERS REGULATORY PROGRAM AS SHOWN ON THIS PLAN WAS DETERMINED USING MY PROFESSIONAL JUDGMENT. THAT DETERMINATION IS BASED UPON THE METHODOLOGY OUTLINED IN THE 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL AND ALL CURRENTLY APPLICABLE SUPPLEMENTAL GUIDANCE INCLUDING THE ATLANTIC AND GULF COAST REGIONAL MANUAL (VERSION 2.0) INCLUDING THE 2023 WATERS OF THE U.S. RULE AS AMMENDED AUGUST 29, 2023, IN ACCORDANCE WITH (SACKETT V. EPA & RAPANOS V. U.S.) WHICH DEFINE THE JURISDICTION OF THE CLEAN WATER ACT OF 1972.

IN ACCORDANCE WITH THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL WETLAND MAPS, THERE ARE NO STATE (DNREC) REGULATED WETLANDS ON THIS SITE.

EDWARD M. LAUNAY, SENIOR PWS NO. 875 SOCIETY OF WETLANDS SCIENTISTS COBRIME OF CERICINE PROVIDER TO PROB WETLAND

DATE

			ARCHITECTS • ENGINEERS • SURVEYORS	EASTON, MARTIAND MILFORD, DELAWARE SALISBURY, MARTIAND 410.770.4744 302.424.1444 410.543.9091	
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COMMENTS					

Proj.No.: 0700A044

Dwg.No.:

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