



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

CENAP-OPR

11 April 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-2025-00124-103

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.² 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.³

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2025-00124-103

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland 1, non-jurisdictional
 - ii. Wetland 2, non-jurisdictional
 - iii. Wetland 3, non-jurisdictional
 - iv. Wetland 4, non-jurisdictional
 - v. Wetland 5, non-jurisdictional
 - vi. Wetland 6, non-jurisdictional
 - vii. Swale 1, 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 review area encompasses approximately 4.47 acres and is located along Cape Henlopen Drive approximately 2.03 miles northeast of Lewes, Sussex County, Delaware (38.781306, -75.102542). The subject site is identified as Sussex County Tax Parcels 335-5.00-12.00. The delineation plans entitled "Cape Henlopen State Park New Park Office Waters of the U.S. Delineation"; prepared by Century Engineering; 2 sheets, show the outlined review area of the property. A site visit was conducted April 2, 2025. The goal of the site visit was to confirm the delineation plans, specifically Wetland 1 was the aquatic resource that required field assessments. See SECTION 8(b)(1) for additional discussion regarding the jurisdiction of Wetland 1.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2025-00124-103

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Unnamed Tributary Draining to the L&R Canal. This UNT is influenced by the ebb and flow of the tide.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Swale 1 continues off site to the west where it dissipates into a wetland complex. This wetland complex drains to the north into an Unnamed Tributary that drains into the Lewes and Rehoboth Canal approximately 1.46 miles downstream. Only the downstream portion of this UNT is tidally influenced as shown by the DNREC Tidal Map DNR032 entitled "State of Delaware Wetlands Sussex County, Delaware; prepared by Salisbury State University; dated March 12, 1988.
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2025-00124-103

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): 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).⁷

1. Swale 1 is a 57 linear foot feature that continues off site to the west. Swale 1 is linear in nature. Based on historic aerials Swale 1 had been excavated in dry land but has not been maintained. A concrete pipe runs from Swale 1 to Wetland 1, however from the site visit this pipe was entirely below the existing grade and was filled with sediment and other fill material. This feature was likely created for stormwater management of the surrounding area and only contains water in response to precipitation. Swale 1 is characterized by low volume, infrequent, or short duration flow, thereby meeting the definition of a paragraph (b)(8) Swale.

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).

1. Wetland 1 is a 0.22 acre forested wetland entirely within the review area. A concrete pipe runs from Wetland 1 to Swale 1. The end of the pipe

⁷ 88 FR 3004 (January 18, 2023)

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2025-00124-103

located within Wetland 1 has a lower elevation than the end of the pipe located in Swale 1. This is evidence that Wetland 1 does not drain into Swale 1 via this concrete pipe. Additionally, this pipe has not been maintained and was found buried under the existing grade and filled with sediment and other material. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 1 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.

2. Wetland 2 is a 0.23 acre forested wetland entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 2 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.
3. Wetland 3 is a 0.06 acre forested wetland entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 3 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.
4. Wetland 4 is a 0.07 acre forested wetland entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 4 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.
5. Wetland 5 is a 0.02 acre forested wetland entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 5 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.
6. Wetland 6 is a 0.02 acre forested wetland entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resource, leaving it geographically separated. Because Wetland 6 does not have a continuous surface connection to an (a)(1) through (a)(3) waters it does not meet the definition of an (a)(4) adjacent wetland.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2025-00124-103

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 on April 2, 2025.
 - b. Wetland Delineation Plan entitled “Cape Henlopen State Park New Park Office Waters of the U.S. Delineation”; prepared by Century Engineering; 2 sheets.
 - c. Wetland Delineation Report entitled “Waters of the U.S. Delineation For Cape Henlopen State Park New Park Office and Entrance Improvements”; prepared by Century Engineering; dated October 2024.
 - d. Lidar imagery prepared by USACE entitled “2025-00124_Lidar”.
 - e. StreamStats imagery prepared by USACE entitled “2025-00124_StreamStats”.
 - f. DNREC Tidal Wetlands maps (DNR032 and DNR064) entitled ““State of Delaware Wetlands Sussex County, Delaware; prepared by Salisbury State University; dated March 12, 1988”.
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.

LEGEND

- LIMITS OF INVESTIGATION
- FLAGS
- SWALE
- PFO WETLAND
- PIPE

SITE DATA:
TOTAL AREA = 4.4741 +/- AC
TOTAL SWALE = 0.0182 +/- AC
TOTAL WATERS OF THE U.S. = 0.6388 +/- AC

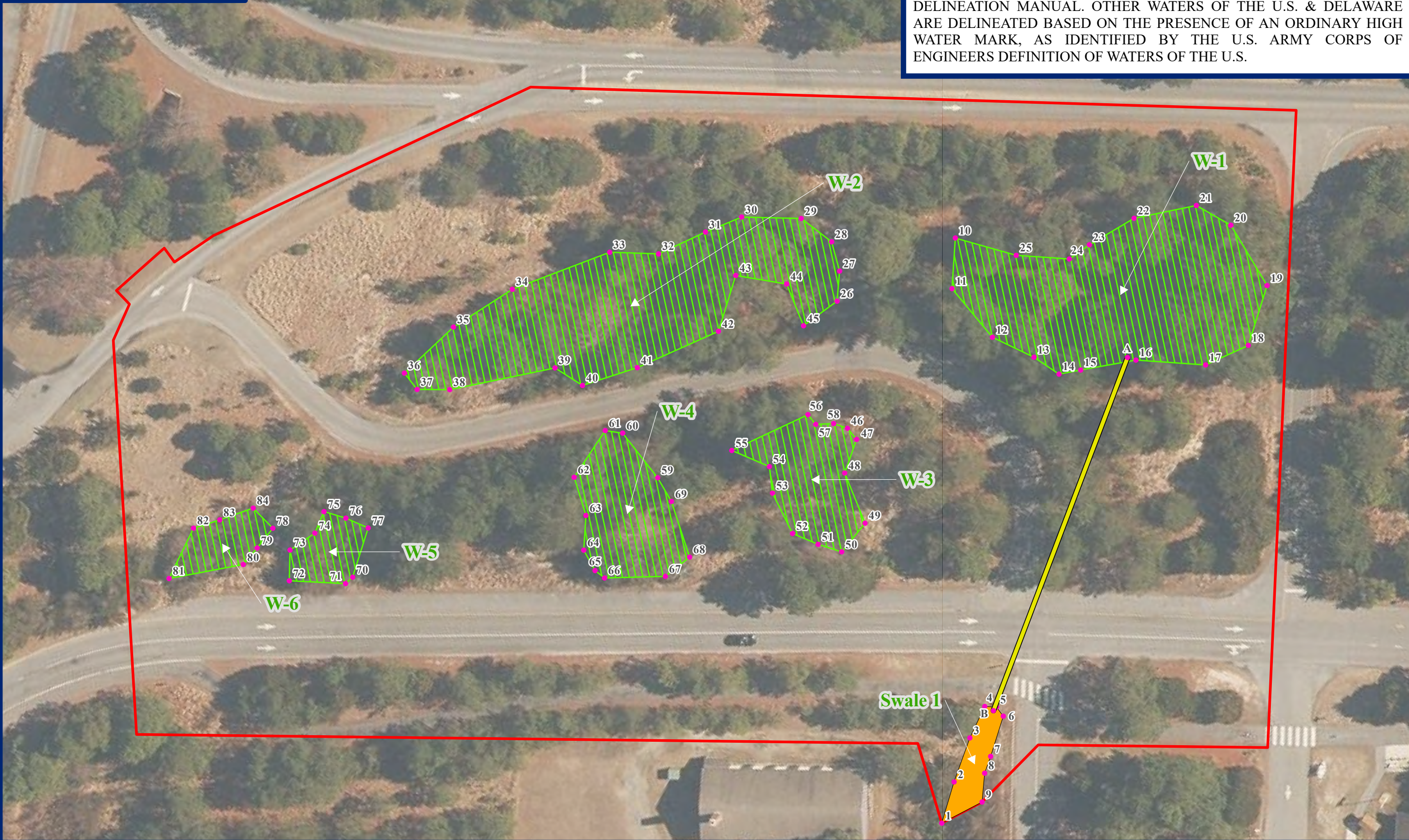
WETLANDS:
TOTAL PFO = 0.6388 +/- AC
TOTAL WETLANDS = 0.6388 +/- AC

NOTES:

1. BASE MAPPING OBTAINED FROM CENTURY ENGINEERING, LLC.

2. LIMITS OF WETLAND AND STREAMS DEPICTED ON THIS MAP WERE SURVEYED BY CENTURY ENGINEERING.

3. WETLANDS ARE DELINEATED IN ACCORDANCE WITH THE ROUTINE DETERMINATION FOR AREAS SMALLER THAN FIVE (5) ACRES AS OUTLINED IN THE 1987 U.S. ARMY CORPS OF ENGINEERS WETLAND DELINEATION MANUAL. OTHER WATERS OF THE U.S. & DELAWARE ARE DELINEATED BASED ON THE PRESENCE OF AN ORDINARY HIGH WATER MARK, AS IDENTIFIED BY THE U.S. ARMY CORPS OF ENGINEERS DEFINITION OF WATERS OF THE U.S.



1 inch = 50 feet

Project Manager:	AS
Drawn:	MF
Job Number:	175013.98
Revisions:	NONE

Swale 1

Approximate Area: 0.0182 AC

Approximate Linear Feet: 57.03 ft

Flag ID	Longitude (DD)	Latitude (DD)
1	-75.10293	38.78074
2	-75.10285	38.78076
3	-75.10277	38.78078
4	-75.10271	38.78078
5	-75.1027	38.78077
6	-75.1027	38.78075
7	-75.10278	38.78074
8	-75.10281	38.78073
9	-75.10286	38.78071

Wetland 1 (W-1)

Approximate Area: 0.2251 AC

Flag ID	Longitude (DD)	Latitude (DD)
10	-75.10202	38.78118
11	-75.10210	38.78115
12	-75.10213	38.78106
13	-75.10212	38.78100
14	-75.10213	38.78095
15	-75.10210	38.78093
16	-75.10203	38.78087
17	-75.10197	38.78078
18	-75.10189	38.78075
19	-75.10178	38.78077
20	-75.10173	38.78086
21	-75.10173	38.78092
22	-75.10181	38.78098
23	-75.10190	38.78102
24	-75.10194	38.78103
25	-75.10198	38.78110

Wetland 4 (W-4)

Approximate Area: 0.0711 AC

Flag ID	Longitude (DD)	Latitude (DD)
59	-75.10268	38.78136
60	-75.10265	38.78144
61	-75.10266	38.78146
62	-75.10276	38.78146
63	-75.10281	38.78142
64	-75.10287	38.78139
65	-75.10289	38.78136
66	-75.10289	38.78135
67	-75.10283	38.78127
68	-75.10277	38.78126
69	-75.10270	38.78132

Pipe

Approximate Linear Feet: 197.20 ft

Flag ID	Longitude (DD)	Latitude (DD)	Elevation
A	-75.10293	38.78074	1.19
B	-75.10285	38.78076	1.26

Wetland 2 (W-2)

Approximate Area: 0.2319 AC

Flag ID	Longitude (DD)	Latitude (DD)
26	-75.10223	38.78128
27	-75.10218	38.78130
28	-75.10215	38.78133
29	-75.10214	38.78139
30	-75.10220	38.78146
31	-75.10226	38.78149
32	-75.10234	38.78153
33	-75.10238	38.78159
34	-75.10253	38.78168
35	-75.10265	38.78172
36	-75.10277	38.78175
37	-75.10278	38.78172
38	-75.10275	38.78168
39	-75.10261	38.78157
40	-75.10261	38.78152
41	-75.10253	38.78147
42	-75.10240	38.78140
43	-75.10229	38.78142
44	-75.10226	38.78135
45	-75.10230	38.78130

Wetland 5 (W-5)

Approximate Area: 0.0242 AC

Flag ID	Longitude (DD)	Latitude (DD)
70	-75.10314	38.78165
71	-75.10315	38.78165
72	-75.10320	38.78172
73	-75.10316	38.78175
74	-75.10310	38.78173
75	-75.10306	38.78174
76	-75.10305	38.78170
77	-75.10304	38.78167

Wetland 3 (W-3)

Approximate Area: 0.0620 AC

Flag ID	Longitude (DD)	Latitude (DD)
46	-75.10242	38.78117
47	-75.10243	38.78115
48	-75.10249	38.78114
49	-75.10255	38.78107
50	-75.10261	38.78108
51	-75.10263	38.78111
52	-75.10263	38.78115
53	-75.10259	38.78121
54	-75.10255	38.78123
55	-75.10257	38.78129
56	-75.10244	38.78123
57	-75.10244	38.78121
58	-75.10242	38.78119

Wetland 6 (W-6)

Approximate Area: 0.0245 AC

Flag ID	Longitude (DD)	Latitude (DD)
78	-75.10314	38.78179
79	-75.10318	38.78179
80	-75.10322	38.78179
81	-75.10332	38.78187
82	-75.10322	38.78188
83	-75.10318	38.78186
84	-75.10313	38.78182