



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

CENAP-OPR

03 June 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-2025-00176-103²

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.

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. Swale, 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 includes approximately 4.57 acres of the entrance to the Delaware Air National Guard base, located at 1 Vavala Way, New Castle, New Castle County, Delaware (39.690676, -75.599635). Tax Parcel ID 1001800006. The delineation plans entitled “Delaware Air National Guard Relocate Main Gate Complex, Waters of the U.S. Delineation”; prepared by Century Engineering; 2 sheets, depict the limits of investigation within the property. A USACE site visit was conducted on May 16, 2025. The goal of the site visit was to determine if the swale within the review area contained relatively permanent flow. See ‘Section 8(b)(1)’ for additional discussion. Previous JDs have been conducted within the review area, however they were performed prior to the current WOTUS regulations.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Nonesuch Creek. Nonesuch Creek is influenced by the ebb and flow of the tide.⁶

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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Flow from the swale enters a pipe at the Commons Blvd and Spruance Drive intersection, eventually flowing into a unnamed tributary to Nonesuch Creek and then into Nonesuch Creek, a tidal waterway.
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.
 - 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): N/A

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.

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).⁹

1. Swale is a 550 linear foot ephemeral drainage feature located within the review area and continues off the review area to the northwest. This feature carries infrequent stormwater runoff from the Air National Guard base. It has been armored with riprap. This feature did not exhibit an ordinary high water mark, a defined bed and bank, nor relatively permanent flow. Additionally, Swale was excavated entirely in dry land, and drains only dry land. Swale is characterized by low volume, infrequent, or short duration flow, thereby meeting the definition of a (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). N/A

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 May 16, 2025.

b. Wetland Delineation plans entitled “Delaware Air National Guard Relocate Main Gate Complex, Waters of the U.S. Delineation”; prepared by Century Engineering; 2 sheets.

⁹ 88 FR 3004 (January 18, 2023)

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- c. Wetland Delineation Report entitled “Waters of the U.S. Delineation for DEANG Relocate Main Gate”; prepared by Century Engineering; dated August 2024.

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.

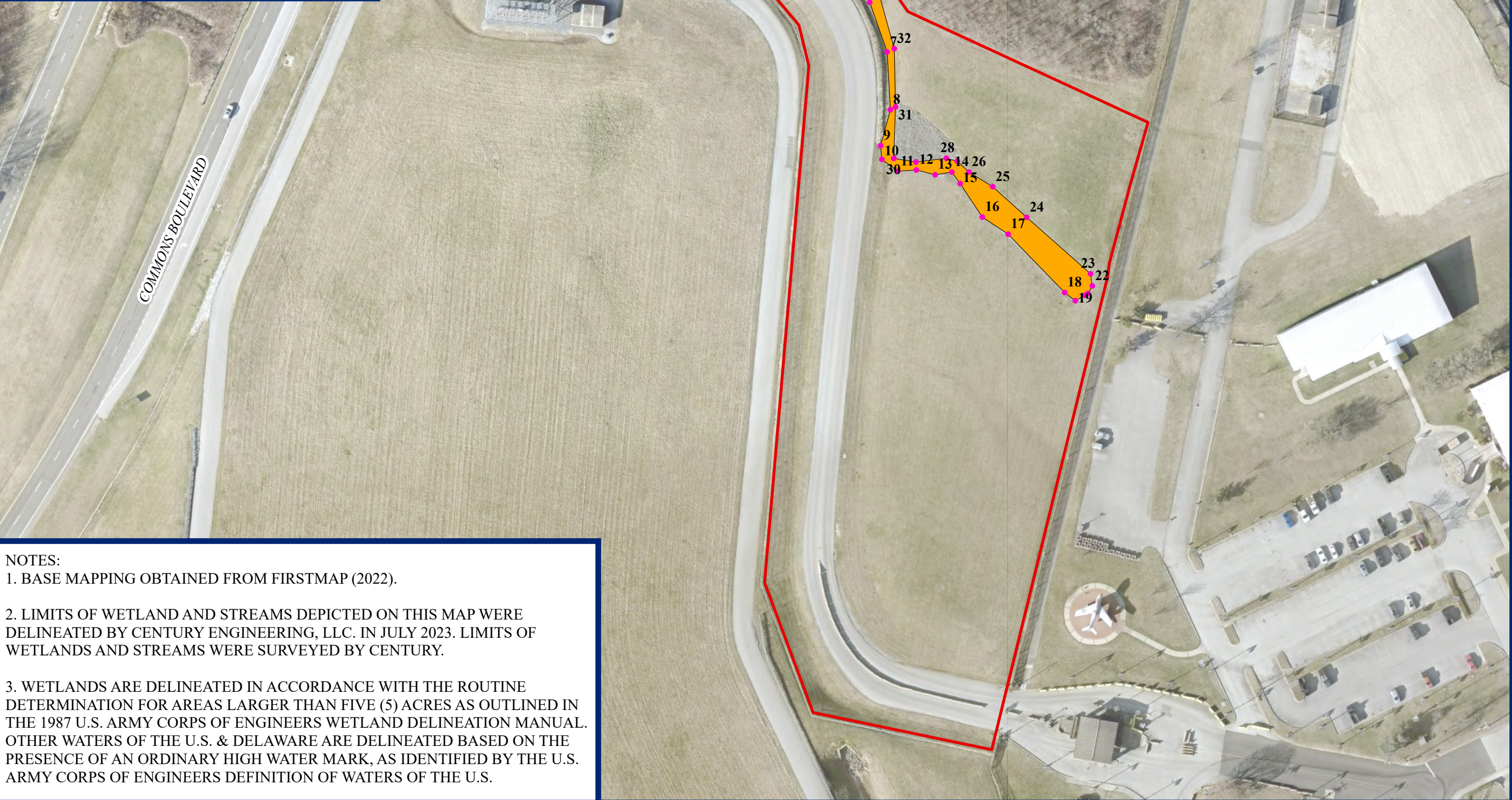
LEGEND

LIMITS OF INVESTIGATION

• FLAGS

SWALE

SITE DATA:
TOTAL LIMITS OF INVESTIGATION = 4.57 +/- AC
TOTAL SWALE = 0.1816 +/- AC




NOTES:

1. BASE MAPPING OBTAINED FROM FIRSTMAP (2022).

2. LIMITS OF WETLAND AND STREAMS DEPICTED ON THIS MAP WERE DELINEATED BY CENTURY ENGINEERING, LLC. IN JULY 2023. LIMITS OF WETLANDS AND STREAMS WERE SURVEYED BY CENTURY.

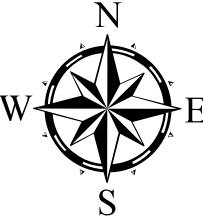
3. WETLANDS ARE DELINEATED IN ACCORDANCE WITH THE ROUTINE DETERMINATION FOR AREAS LARGER THAN FIVE (5) ACRES AS OUTLINED IN THE 1987 U.S. ARMY CORPS OF ENGINEERS WETLAND DELINEATION MANUAL. OTHER WATERS OF THE U.S. & DELAWARE ARE DELINEATED BASED ON THE PRESENCE OF AN ORDINARY HIGH WATER MARK, AS IDENTIFIED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



CENTURY
ENGINEERING
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DELAWARE AIR NATIONAL GUARD
RELOCATE MAIN GATE COMPLEX
WATERS OF THE U.S. DELINEATION
NEW CASTLE COUNTY, DELAWARE



1 inch = 100 feet

Project Manager:	AS
Drawn:	MF
Job Number:	20233502.008A
Revisions:	NONE

Swale 1

Approximate Area: 0.1816 AC

Approximate Linear Feet: 550.34 ft

Flag ID	Longitude (DD)	Latitude (DD)
1	-75.600489	39.691535
2	-75.600491	39.691516
3	-75.600426	39.691499
4	-75.600304	39.691448
5	-75.600195	39.69137
6	-75.600104	39.69127
7	-75.600044	39.69114
8	-75.600032	39.69098
9	-75.600066	39.69089
10	-75.600061	39.69085
11	-75.600006	39.69082
12	-75.599942	39.69082
13	-75.599877	39.69081
14	-75.59982	39.69082
15	-75.599791	39.69079
16	-75.599714	39.69070
17	-75.599625	39.69065
18	-75.599429	39.69050
19	-75.599392	39.69047
20	-75.599359	39.69049
21	-75.599348	39.69049
22	-75.599334	39.69051
23	-75.59934	39.69055
24	-75.59956	39.69070
25	-75.599678	39.69078
26	-75.59976	39.69082
27	-75.599801	39.69085
28	-75.599839	39.69085
29	-75.599944	39.69084
30	-75.60002	39.69085
31	-75.600015	39.69099
32	-75.600019	39.69115
33	-75.600071	39.69129
34	-75.60016	39.69139
35	-75.600213	39.69144