

JURISDICTIONAL DETERMINATION
U.S. Army Corps of Engineers

Revised 8/13/04

DISTRICT OFFICE: CENAP-OP-R

FILE NUMBER: CENAP-OP-R-200400652-24

PROJECT LOCATION INFORMATION:

State: DE
County: New Castle
Center coordinates of site (latitude/longitude): 39-46-44 N / 75-43-00 W
Approximate size of area (parcel) reviewed, including uplands: 11.8 acres.
Name of nearest waterway: Mill Creek
Name of watershed: White Clay Creek

JURISDICTIONAL DETERMINATION

Completed: Desktop determination Date:
Site visit(s) Date(s): 8 June 2004

Jurisdictional Determination (JD):

- Preliminary JD - Based on available information, *there appear to be* (or) *there appear to be no* "waters of the United States" and/or "navigable waters of the United States" on the project site. A preliminary JD is not appealable (Reference 33 CFR part 331).
- Approved JD - An approved JD is an appealable action (Reference 33 CFR part 331).
Check all that apply:
- There are* "navigable waters of the United States" (as defined by 33 CFR part 329 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: .
- There are* "waters of the United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: .
- There are* "isolated, non-navigable, intra-state waters or wetlands" within the reviewed area.
 Decision supported by SWANCC/Migratory Bird Rule Information Sheet for Determination of No Jurisdiction.

BASIS OF JURISDICTIONAL DETERMINATION:

A. Waters defined under 33 CFR part 329 as "navigable waters of the United States":

- The presence of waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

B. Waters defined under 33 CFR part 328.3(a) as "waters of the United States":

- (1) The presence of waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- (2) The presence of interstate waters including interstate wetlands¹.
- (3) The presence of other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters (check all that apply):
- (i) which are or could be used by interstate or foreign travelers for recreational or other purposes.
- (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- (iii) which are or could be used for industrial purposes by industries in interstate commerce.
- (4) Impoundments of waters otherwise defined as waters of the US.
- (5) The presence of a tributary to a water identified in (1) - (4) above.
- (6) The presence of territorial seas.
- (7) The presence of wetlands adjacent² to other waters of the US, except for those wetlands adjacent to other wetlands.

Rationale for the Basis of Jurisdictional Determination (applies to any boxes checked above). *If the jurisdictional water or wetland is not itself a navigable water of the United States, describe connection(s) to the downstream navigable waters. If B(1) or B(3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection (i.e., discuss site conditions, including why the waterbody is navigable and/or how the destruction of the waterbody could affect interstate or foreign commerce). If B(2, 4, 5 or 6) is used as the Basis of Jurisdiction, document the rationale used to make the determination. If B(7) is used as the Basis of Jurisdiction, document the rationale used to make adjacency determination:* The main wetland on the property ("WAN") begins as a seep from the base of a steep slope, which becomes a long, narrow wetland flowing mostly southward. It is 0.326 acre in size. A small stream channel forms partway down, which flows through two culvert pipes, and eventually joins a tributary to Mill Creek off the property. Mill Creek is a

tributary to White Clay Creek (National Wild and Scenic River), in the Christina River basin. Therefore, the stream and the adjacent wetlands are regulated as waters of the U.S. pursuant to 33 CFR 328.3(a)(5) and (7).

Wetland/water "WAN" flows via a culvert pipe under a driveway into water course "WAS," which is a small stream channel. It flows through another culvert pipe off the property, and eventually joins a tributary to Mill Creek. Therefore, it is waters of the U.S. pursuant to 33 CFR 328.3(a)(5).

Wetland "CO" is a part of a large complex of waters and wetlands, mostly off the property, which extends partly onto the subject property (approximately 0.016 acre on site). These wetlands are adjacent to a tributary to Mill Creek. As such, they are regulated as waters of the U.S. pursuant to 33 CFR 328.3(a)(7).

Area "WLG" is the upper end of "CO," which is partly on and partly off the property. It is a small stream channel, with adjacent wetlands (about 0.069 acre on site). The channel is a tributary to Mill Creek. As such, it is waters of the U.S. pursuant to 33 CFR 328.3(a)(5) and (7).

Area "OA" is a segment of ditch (approximately 0.030 acre in size), which has no normal connection to other waters. It is within a wooded area behind a building. Extreme flood flows may flow over land to adjacent waters as sheet flow, but there is no normal surface tributary connection to the tributary to Mill Creek. Therefore, it is isolated. The ditch is not a wetland (its bottom is not vegetated). The water course is not navigable in fact, since it is only a few feet wide, and does not contain flowing or standing water most of the time. There is no obvious nexus to interstate commerce for this ditch. Therefore, it is not regulated as waters of the U.S.

Area "OB" is a small, roughly 100 X 30' diameter stand of Phragmites (approximately 0.081 acre), which was saturated to the surface, with some standing water. The hydrology appeared to be coming from septic system overflow, which was discharged into the wetland via a small trench. The wetland was approximately 150 feet from where the stream channel begins within area "WAN." The water within this wetland did not have any normal surface connection with WAN or any other waterway. Any overflow made its way over the surface toward a parking lot to the south (away from WAN, which was the closest waterway). It has no habitat-based or hydrologic relation to WAN, because it is simply a man-induced wetland fed by septic run-off. Therefore, the wetland is isolated, and it is not adjacent to any waters of the U.S. It is not navigable in fact, and it has no obvious nexus to interstate commerce. As such, it is not regulated as waters of the U.S.

Area "WB" is a small (roughly 80 X 20' or approximately 0.041 acre) wetland area with standing water. It appeared to receive runoff from parking areas, and possibly from some of the mushroom processing activities on the property. It drained via a pipe into WAN near the point where it drains through the first culvert pipe. This wetland has a surface tributary connection, and is adjacent, to the stream channel flowing through area "WAN." Therefore, the wetland is regulated as waters of the U.S., pursuant to 33 CFR 328.3(a)(7).

Lateral Extent of Jurisdiction: (Reference: 33 CFR parts 328 and 329)

- Ordinary High Water Mark indicated by:
- clear, natural line impressed on the bank
 - the presence of litter and debris
 - changes in the character of soil
 - destruction of terrestrial vegetation
 - shelving
 - other:
- High Tide Line indicated by:
- oil or scum line along shore objects
 - fine shell or debris deposits (foreshore)
 - physical markings/characteristics
 - tidal gages
 - other:
- Mean High Water Mark indicated by:
- survey to available datum; physical markings; vegetation lines/changes in vegetation types.
- Wetland boundaries, as shown on the attached wetland delineation map and/or in a delineation report prepared by: Duffield Associates, dated May 2004

Basis For Not Asserting Jurisdiction:

- The reviewed area consists entirely of uplands.
- Unable to confirm the presence of waters in 33 CFR part 328(a)(1, 2, or 4-7).
- Headquarters declined to approve jurisdiction on the basis of 33 CFR part 328.3(a)(3).
- The Corps has made a case-specific determination that the following waters present on the site are not Waters of the United States:
 - Waste treatment systems, including treatment ponds or lagoons, pursuant to 33 CFR part 328.3.
 - Artificially irrigated areas, which would revert to upland if the irrigation ceased.
 - Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
 - Artificial reflecting or swimming pools or other small ornamental bodies of water created

- by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States found at 33 CFR 328.3(a).
- Isolated, intrastate wetland with no nexus to interstate commerce.
- Prior converted cropland, as determined by the Natural Resources Conservation Service. Explain rationale:
- Non-tidal drainage or irrigation ditches excavated on dry land. Explain rationale:
- Other (explain):

DATA REVIEWED FOR JURISDICTIONAL DETERMINATION (mark all that apply):

- Maps, plans, plots or plat submitted by or on behalf of the applicant.
- Data sheets prepared/submitted by or on behalf of the applicant.
- This office concurs with the delineation report, dated , prepared by (company):
- This office does not concur with the delineation report, dated May 2004, prepared by (company):
- Data sheets prepared by the Corps.
- Corps' navigable waters' studies:
- U.S. Geological Survey Hydrologic Atlas:
- U.S. Geological Survey 7.5 Minute Topographic maps:
- U.S. Geological Survey 7.5 Minute Historic quadrangles:
- U.S. Geological Survey 15 Minute Historic quadrangles:
- USDA Natural Resources Conservation Service Soil Survey:
- National wetlands inventory maps:
- State/Local wetland inventory maps:
- FEMA/FIRM maps (Map Name & Date):
- 100-year Floodplain Elevation is: (NGVD)
- Aerial Photographs (Name & Date): Aerials Express, May 2002
- Other photographs (Date):
- Advanced Identification Wetland maps:
- Site visit/determination conducted on: June 8, 2004
- Applicable/supporting case law:
- Other information (please specify): Consultant's delineation was adjusted during site visit June 8, 2004

¹Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

²The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.