



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

CENAP-OPR

01 MARCH 2024

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-2011-00306-103

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. SUMMARY OF CONCLUSIONS.

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.

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- 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. Waters #1, jurisdictional, Section 404
 - ii. Waters #2, jurisdictional, Section 404
 - iii. Waters #3, jurisdictional, Section 404
 - iv. Wetland Area #1, jurisdictional, Section 404
 - v. Wetland Area #2, jurisdictional, Section 404
 - vi. Wetland Area #3, jurisdictional, Section 404
 - vii. Wetland Area #4, jurisdictional, Section 404
 - viii. Wetland Area #5, jurisdictional, Section 404
 - ix. Wetland Area #6, jurisdictional, Section 404
 - x. Wetland Area #7, jurisdictional, Section 404
 - xi. Wetland Area #8, jurisdictional, Section 404
 - xii. Wetland Area #9, jurisdictional, Section 404
 - xiii. Wetland Area #10, jurisdictional, Section 404
 - xiv. Wetland Area #11, jurisdictional, Section 404
 - xv. Wetland Area #12, jurisdictional, Section 404

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))

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- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)
- 3. REVIEW AREA. The review area is comprised of 61.4 acre located at 39.841005, -75.543515, at the intersection of Route 202 and Watkin Avenue in Concord Township, Delaware County, Pennsylvania. The subject site is identified as Parcel ID: 13000096895. The site is comprised of agricultural fields, and forested areas containing tributaries and forested wetlands. There have been three previous jurisdictional determinations completed on this property. They were completed in 2012, 2018, and 2019 all under CENAP-OP-R-2011-00306-75. The previous JD's have the same conclusion, that all identified tributaries and their abutting wetlands are jurisdictional under Section 404.
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Brandywine Creek is 1.75 miles downstream of the review area (measured using United States Army Corp of Engineers National Regulatory Viewer).⁵
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The unnamed tributaries within the review area flow into Beaver Creek, which flows into Brandywine Creek.
- 6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ N/A

⁵ 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.

⁶ 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.

⁷ 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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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):
 - Waters #1: This 3,155 linear foot tributary flows from the east portion of the property and drains to the west portion of the property into Beaver Creek. Relatively permanent flow was exhibited in this tributary and it has a defined OHWM.
 - Waters #2: This 291 linear foot tributary flows directly into Waters #1 within the property. Relatively permanent flow was exhibited in the tributary and it has a defined OHWM.
 - Waters #3: This 450 linear foot tributary flows directly into Waters #1 and originates outside of the area of review. Relatively permanent flow was exhibited in the tributary and it has a defined OHWM.
 - f. Adjacent Wetlands (a)(4):
 - Wetlands #1: This 0.006 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.

- Wetlands #2: This 0.054 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #3: This 0.141 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #4: This 0.321 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #5: This 2.464 acre wetland has a continuous surface connection to three paragraph (a)(3) tributaries, Waters #1, Waters #2, and Waters #3.
- Wetlands #6: This 0.007 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #7: This 0.091 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #3.
- Wetlands #8: This 0.021 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #3.
- Wetlands #9: This 0.336 acre wetland has a continuous surface connection to two paragraph (a)(3) tributaries, Waters #1 and Waters #3.
- Wetlands #10: This 0.073 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #11: This 0.041 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.
- Wetlands #12: This 0.043 acre wetland has a continuous surface connection to a paragraph (a)(3) tributary Waters #1.

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

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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).⁸ 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).
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. Site visit by James Colligan – USACE and Jason Mease, on February 14, 2024, concurred with original findings.
- b. “Biological Assessment Plan – Overall”; prepared by Bohler Engineering; dated February 2, 2018; unrevised; 4 sheets.
- c. Lidar Aerial, accessed on the United States Army Corps of Engineers National Regulatory Viewer.
- d. Flow Path Aerial, prepared by USACE, accessed during the site visit.

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.

⁸ 88 FR 3004 (January 18, 2023)



WETLAND Area #1:
244 s.f. (0.006 Ac.)
(39°50'25"N 75°32'21"W)

WETLAND Area #2:
2,373 s.f. (0.054 Ac.)
(39°50'26"N 75°32'23"W)

WETLAND Area #3:
6,148 s.f. (0.141 Ac.)
(39°50'25"N 75°32'28"W)

WETLAND Area #4:
13,965 s.f. (0.321 Ac.)
(39°50'25"N 75°32'33"W)

WETLAND Area #5:
107,340 s.f. (2.464 Ac.)
(39°50'25"N 75°32'44"W)

WETLAND Area #6:
321 s.f. (0.007 Ac.)
(39°50'25"N 75°32'30"W)

WETLAND Area #7:
3,951 s.f. (0.091 Ac.)
(39°50'29"N 75°32'45"W)

WETLAND Area #8:
899 s.f. (0.021 Ac.)
(39°50'29"N 75°32'46"W)

WETLAND Area #9:
14,655 s.f. (0.339 Ac.)
(39°50'25"N 75°32'47"W)

WETLAND Area #10:
3,194 s.f. (0.073 Ac.)
(39°50'24"N 75°32'50"W)

WETLAND Area #11:
1,798 s.f. (0.041 Ac.)
(39°50'23"N 75°32'52"W)

WETLAND Area #12:
1,886 s.f. (0.043 Ac.)
(39°50'21"N 75°32'54"W)

TOTAL WETLAND Area:
156,774 s.f. (3.598 Ac.)

EXISTING WATERS

DRAWING LEGEND

- TRACT BOUNDARY
- EXISTING MONUMENT
- - - EXISTING NAIL / SPIKE / POST
- - - EXISTING CONTOUR w/ELEVATION
- - - EXISTING TREE LINE
- - - EXISTING FLOODPLAIN BOUNDARY
- * 587-13 EXISTING GRADE
- ===== EXISTING STORM SEWER
- G EXISTING GAS LINE
- W EXISTING WATER LINE
- E EXISTING ELECTRIC LINE
- T EXISTING TELEPHONE LINE
- OH EXISTING OVERHEAD LINE
- EXISTING WETLANDS
- EXISTING WATERS

WATERS #1:

51,958 s.f. (1.193 Ac.)

3,155 L.F.

WATERS #2:

2,570 s.f. (0.059 Ac.)

291 L.F.

WATERS #3:

4,976 s.f. (0.114 Ac.)

450 L.F.

TOTAL WATERS Area:

59,504 s.f. (1.366 Ac.)

TOTAL WATERS Length:

3,896 L.F.

EXISTING WATERS





