



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

OPR

November 27, 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) ,<sup>1</sup> NAP-2023-01212-103

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.<sup>2</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>3</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>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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<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>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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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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 3A, non-jurisdictional
  - ii. Ditch K, 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., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 61.45 acres located at 333 Ratledge Road, Townsend, New Castle County, Delaware, Tax Parcel 1401600013 (39.380316, -75.690089). The review area consists of the agricultural fields located on the west and north portions of the property. The forested area on the east portion of the property, as well as the northwest corner of the property is excluded from the review area. The review area is noted as Area of Interest (AOI) on the approved plan.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Blackbird Creek, approximately 3 miles downstream of the review area. Blackbird Creek 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. Ditch K is connected to an intermittent stream that flows off the review area to the west, eventually flowing into Barlow Branch, which flows into Blackbird Creek.

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6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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
  - 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

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<sup>5</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>6</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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## 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>7</sup>

- a. Ditch K is a 159 linear foot ephemeral feature that originates within the review area. During a USACE site visit on April 17, 2024, Ditch K did not exhibit an ordinary high water mark, defined bed and bank, nor relatively permanent flow. Additionally, Ditch K was excavated wholly in dry land and drains only dry land. Historic aerials show Ditch K being excavated between 1961 and 1968. Ditch K is characterized by low volume, infrequent, or short duration flow. Ditch K is an excluded aquatic feature meeting the (b)(3) exclusion.

- 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).

- a. Wetland 3A is a 0.96 acre emergent wetland that is entirely within the review area. This wetland lacks a continuous surface connection to any other aquatic resources, leaving it geographically separated. Because Wetland 3A does not have a continuous surface connection to any (a)(1) through (a)(3) waters, it does not meet the definition of an (a)(4) adjacent wetland. This wetland has formed within a depressional feature and is surrounded by uplands.

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 17, 2024.

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

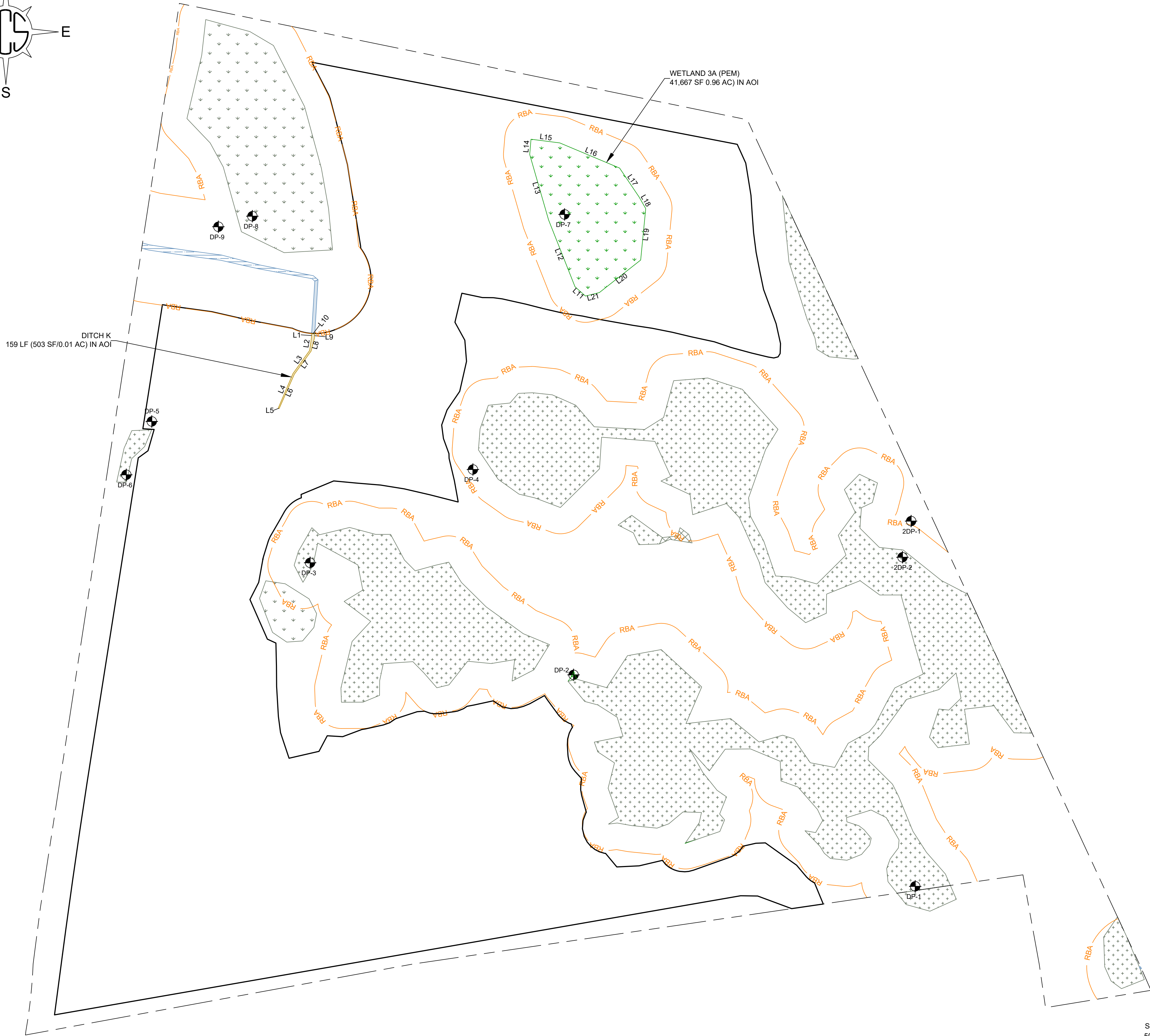
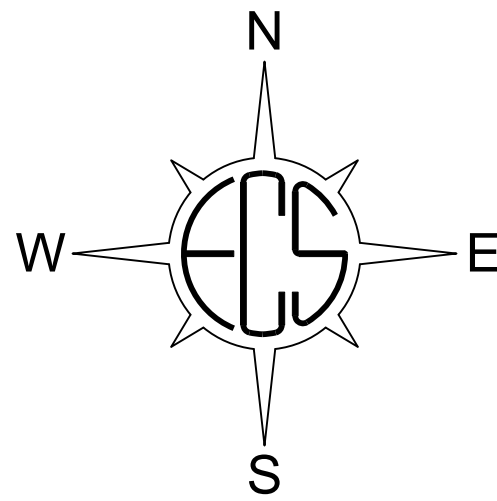
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- b. Wetland Delineation Plans; entitled “Chestnut Solar Dexter Corner Road New Castle County, Delaware”; prepared by ECS Mid-Atlantic, LLC; dated May 2, 2023; revised February 9, 2024, April 22, 2024, & November 14, 2024; 1 sheet.
- c. Wetland Delineation Report prepared by ECS Mid-Atlantic, dated May 17, 2024.
- d. Flow Path Plan entitled “2023-01212\_Flow\_Path”.

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**
- DITCH
  - PALUSTRINE EMERGENT (PEM) WETLAND
  - DITCH (OFFSITE)
  - INTERMITTENT STREAM CHANNEL (R4) (OFFSITE)
  - PALUSTRINE FORESTED (PFO) WETLAND (OFFSITE)
  - PALUSTRINE SCRUB-SHRUB (PSS) WETLAND (OFFSITE)
  - PALUSTRINE EMERGENT (PEM) WETLAND (OFFSITE)
  - APPROXIMATE WETLAND DATAPPOINT LOCATION
  - RIPARIAN BUFFER AREA (RBA)
  - PARENT PARCEL
  - AREA OF INTEREST (AOI)

\*WATER FEATURES WERE DELINEATED BY ECS ON APRIL 18, 2023 AND JANUARY 24, 2024 AND LOCATED USING A SUB-METER ACCURACY GPS UNIT.

\*\*WATER FEATURES DEPICTED HEREIN SHOULD BE CONSIDERED PRELIMINARY UNTIL CONFIRMED BY REGULATORY PERSONNEL.

Feature ID	Cowardin Classification	Linear Feet (LF)	Square Feet (SF)	Acres (AC)
Ditch K	-	159	503	0.01
Wetland 3A	PEM	-	41,667	0.96

Line	Distance	Bearing
L1	8.15	S03° 25" 59.66'W
L2	24.52	S07° 52" 09.85'W
L3	54.14	S35° 53" 38.52'W
L4	71.50	S23° 03" 44.35'W
L5	2.00	S66° 32" 13.25'E
L6	71.17	N23° 51" 55.77'E
L7	54.47	N35° 53" 38.52'E
L8	26.00	N14° 33" 18.89'E
L9	8.29	N03° 25" 59.66'E
L10	6.00	N87° 49" 30.20'W
L11	26.61	N48° 17" 46.72'W
L12	136.78	N21° 35" 32.25'W
L13	129.53	N16° 04" 31.03'W
L14	29.07	N04° 50" 34.04'E
L15	55.18	S82° 44" 10.49'E
L16	123.49	S67° 12" 39.80'E
L17	65.98	S34° 00" 08.51'E
L18	25.84	S29° 49" 04.25'E
L19	98.36	S05° 37" 22.77'W
L20	99.98	S51° 47" 58.94'W
L21	27.34	S75° 50" 58.92'W

