

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

OPR May 29, 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-2024-00037-1032

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.

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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. Jordan Branch, jurisdictional, Section 404
 - ii. PFO Wetland 1, jurisdictional, Section 404
- iii. PFO Wetland 2, jurisdictional, Section 404
- iv. PFO Wetland 3, jurisdictional, Section 404
- v. Agricultural Ditch, 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 148.65 acre review area is located 2.54 miles southwest of Kenton, Kent County, Delaware. The project area contains mainly agricultural field and forested land. The parcel is bound to the north by Suldersville Road, to the east by Jordan Branch, to the south by forested land, and to the west by forested land and agricultural land. Current structures on the property are limited to a single-family residence, associated outbuildings, and center pivot irrigation. The project area is located at 39.211822, -75.705829. This request was originally for a PJD (Preliminary Jurisdictional Determination) however after discussing with the applicant, they resubmitted as an AJD.
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS

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CONNECTED. Chester River. The Chester River is subject to the ebb and flow of the tide shoreward to the mean high water mark.

- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Jordan Branch flows northwest into Sewell Branch, which flows directly west into the Chester River.
- 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
- 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

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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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e. Tributaries (a)(3): Jordan Branch is an approximately 3000 linear feet perennial stream within the review area and originates outside of the review area. It exhibits relatively permanent flow. This is a main branch in Delaware's Tax Ditch program which is maintained to be able to support flow from the surrounding areas. Additionally, Jordan Branch has an OHWM, bed and bank, and intercepts groundwater providing a continuous hydrologic source.

f. Adjacent Wetlands (a)(4):

- a. PFO Wetland 1 is a 30 acre forested wetland that has a direct surface connection to an (a)(3) tributary (Jordan Branch) via an approximately 10 ft long culvert located at the southeastern portion of the wetland. This wetland continues off the review area.
- b. PFO Wetland 2 is an approximately 1 acre forested wetland that directly abuts an (a)(3) tributary (Jordan Branch) outside of the review area. This wetland continues off the review area.
- c. PFO Wetland 3 is an approximately 0.01 acre forested wetland that directly abuts an (a)(3) tributary (Jordan Branch). This wetland is within the review area to the east of Jordan Branch and continues off the review area.
- 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).8
 - a. Agricultural Ditch (b)(3) exclusion Within the supplied Wetland Delineation Report, the USGS Topo Quad map shows a linear water feature originating within the review area and continuing to the west. During the field visit USACE collected photographs of this feature to determine its classification as it pertains to waters of the United States. During the site visit this feature was holding water. However, it did not have a defined OHWM (ordinary high-water mark) (see DATA SOURCES

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^{8 88} FR 3004 (January 18, 2023)

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- f.) and was linear in nature. The water within the feature can be explained by a significant rain event of 2.5" two days prior to the site visit (see DATA SOURCES d.) Under ordinary conditions this feature does not hold water. Due to the feature being linear in nature and not holding water, it was likely an agriculture ditch. This ditch meets (b)(3) since it is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water. It was not delineated on the current plan.
- 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 field visit on March 25, 2024.
 - b. Wetland Delineation Report titled: "Waters of the U.S. Delineation EDF Renewables Solar Farm Projects Lady Bug Solar Farm"; prepared by Century Engineering; dated June 2022.
 - c. Wetland Delineation Plan titled: "EDF Renewables-Lady Bug Solar Farm Waters of the U.S. Delineation Kent County, Delaware"; prepared by Century Engineering; dated May 2, 2024.
 - d. Kenton Monthly Rainfall Data, obtained from the Delaware Environmental Observing System, dated March 26, 2024.
 - e. Flow Path Map, created by USACE via USACE National Regulatory Viewer.
 - f. Site Visit Photograph titled "Water Feature facing north", taken by USACE on March 25, 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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.







1 inch = 175 feet

225010.001A

05/02/2024