



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

CENAP-OPR

26 September 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-2024-00565-103

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 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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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. Vines Creek, jurisdictional, Section 404
 - ii. Wetland A, jurisdictional, Section 404
 - iii. Swale 1, non-jurisdictional
 - iv. Ditch 2, non-jurisdictional
 - v. Ditch 2a, non-jurisdictional
 - vi. Ditch 2b, non-jurisdictional
 - vii. Ditch 3, non-jurisdictional
 - viii. Ditch 4, non-jurisdictional
 - ix. Ditch 5, 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 includes 30.14 acres in Fankford, Sussex County, Delaware (38.5169, -75.2272). The property is identified as Tax Parcels 533-1.00-38.00 and 5-33.00-1.00-28.01. The review area in parcel 5-33.00-1.00-28.01 is limited to the portion of the parcel north of Memory Lane. The review area abuts an area assessed by a previous JD (NAP-2023-00744-103). NAP-2023-00744-103 reviewed the areas of agricultural field and agricultural ditches east of the review

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area. The entirety of NAP-2023-00744-103 was uplands and paragraph (b)(3) ditches.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Indian River Bay. This TNW 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 2, 3, 4, and 5 flow into Vines Creek, which flows Northeast into Pepper Creek, which flows into the Indian River Bay. This flow path takes approximately 7.4 miles to reach the Indian River Bay.
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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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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):

- a. Vines Creek is a 1575 linear foot perennial stream that originates outside the review area to the west and continues off site to the northeast where it eventually terminates into the Indian River Bay. The tributary has a defined bed, bank, an ordinary high water mark, and contained flowing water as shown in the Wetland Delineation Report. Review of USGS topographic maps show Waterbody A as a blue line stream. Additionally, historic aerial imagery shows Waterbody A containing standing or flowing water. Per the agencies' interpretation of relatively permanent tributaries, this tributary meets the relatively permanent standard due to having flowing or standing water year-round or continuously during certain times of the year.

f. Adjacent Wetlands (a)(4):

- a. Wetland A is 0.634 acre scrub-shrub wetland that abuts Vines Creek, an (a)(3) tributary. It also abuts Ditch 4. Wetland A has a continuous surface connection to an (a)(3) tributary, thereby meeting the definition of an (a)(4) adjacent wetland.

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).⁷

⁷ 88 FR 3004 (January 18, 2023)

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- a. Swale 1 is a 415 linear foot ephemeral feature that originates south of the review area adjacent to Memory Lane. During the USACE site visit on February 21, 2024, it was wetter than normal as shown by the APT. Despite the wetter than normal conditions, Swale 1 did not exhibit an ordinary high water mark, a defined bed and bank, nor relatively permanent flow. Additionally, Swale 1 was excavated entirely in dry land, and drains only dry land. It showed no distinguishable continuous surface connection to Vines Creek. Swale 1 is characterized by low volume, infrequent, or short duration flow, thereby meeting the definition of a (b)(8) Ditch.
- b. Ditch 2 is a 728 linear foot ephemeral feature that originates south of the review area within the adjacent agricultural field. From the adjacent agricultural field, it is connected under Memory Lane via an 18" HDPE. The JD performed in the adjacent parcel (NAP-2023-00744-103) classified the span of Ditch 2 southeast of Memory Lane (approximately 750 ft) as a paragraph (b)(3) excluded Ditch. During the USACE site visit on February 21, 2024, it was wetter than normal conditions as shown by the APT. There were signs of recent rainfall which included standing water in areas of the ditch. Despite the above average rainfall, when the Delaware Stream Jurisdictional Determination Field Form was completed Ditch 2 scored as an ephemeral feature with no relatively permanent flow. Additionally, Ditch 2 was excavated entirely in dry land, and drains only dry land. Ditch 2 drains into Vines Creek. Ditch 2 is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.
- c. Ditch 2a is a 172 linear foot ephemeral feature that originates within the review area. It is directly connected to Ditch 2. Ditch 2a did not exhibit an ordinary high water mark, a defined bed and bank, nor relatively permanent flow. Additionally, Ditch 2a was excavated entirely in dry land, and drains only dry land. Ditch 2a is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.
- d. Ditch 2b is a 105 linear foot ephemeral feature that originates within the review area. It is directly connected to Ditch 2. Ditch 2b did not exhibit an ordinary high water mark, a defined bed and bank, nor relatively permanent flow. Additionally, Ditch 2b was excavated entirely in dry land, and drains only dry land. Ditch 2b is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.

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- e. Ditch 3 is a 665 linear foot ephemeral feature that originates south of the review area within the adjacent agricultural field. From the adjacent agricultural field, it is connected under Memory Lane via a 12" CMP. The JD performed in the adjacent parcel (NAP-2023-00744-103) classified the offsite portion of Ditch 3 across Memory Lane (approximately 1272 ft) as a paragraph (b)(3) excluded Ditch. During the USACE site visit on February 21, 2024, it was wetter than normal conditions as shown by the APT. Despite the above average rainfall, when the Delaware Stream Jurisdictional Determination Field Form was completed Ditch 3 scored as an ephemeral feature with no relatively permanent flow. Additionally, Ditch 3 was excavated entirely in dry land, and drains only dry land. Ditch 3 drains into Vines Creek. Ditch 3 is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.
- f. Ditch 5 is a 672 linear foot ephemeral feature that originates south of the review area within the adjacent agricultural field. From the adjacent agricultural field, it is connected under Memory Lane via an 24" HDPE. The JD performed in the adjacent parcel (NAP-2023-00744-103) classified the offsite portion of Ditch 5 across Memory Lane (approximately 1053 ft) as a paragraph (b)(3) excluded Ditch. During the USACE site visit on February 21, 2024, it was wetter than normal conditions as shown by the APT. Despite the above average rainfall, when the Delaware Stream Jurisdictional Determination Field Form was completed Ditch 5 scored as an ephemeral feature with no relatively permanent flow. Additionally, Ditch 5 was excavated entirely in dry land, and drains only dry land. Ditch 5 drains into Vines Creek. Ditch 5 is excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.
- 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. Ditch 4 is a 699 linear foot non-relatively permanent water within the review area, that originates south of the review area within the adjacent agricultural field. The total reach of Ditch 4, extending outside the review area, is approximately 2273 linear feet and was identified using the Strahler Stream Order method. The JD performed in the adjacent parcel

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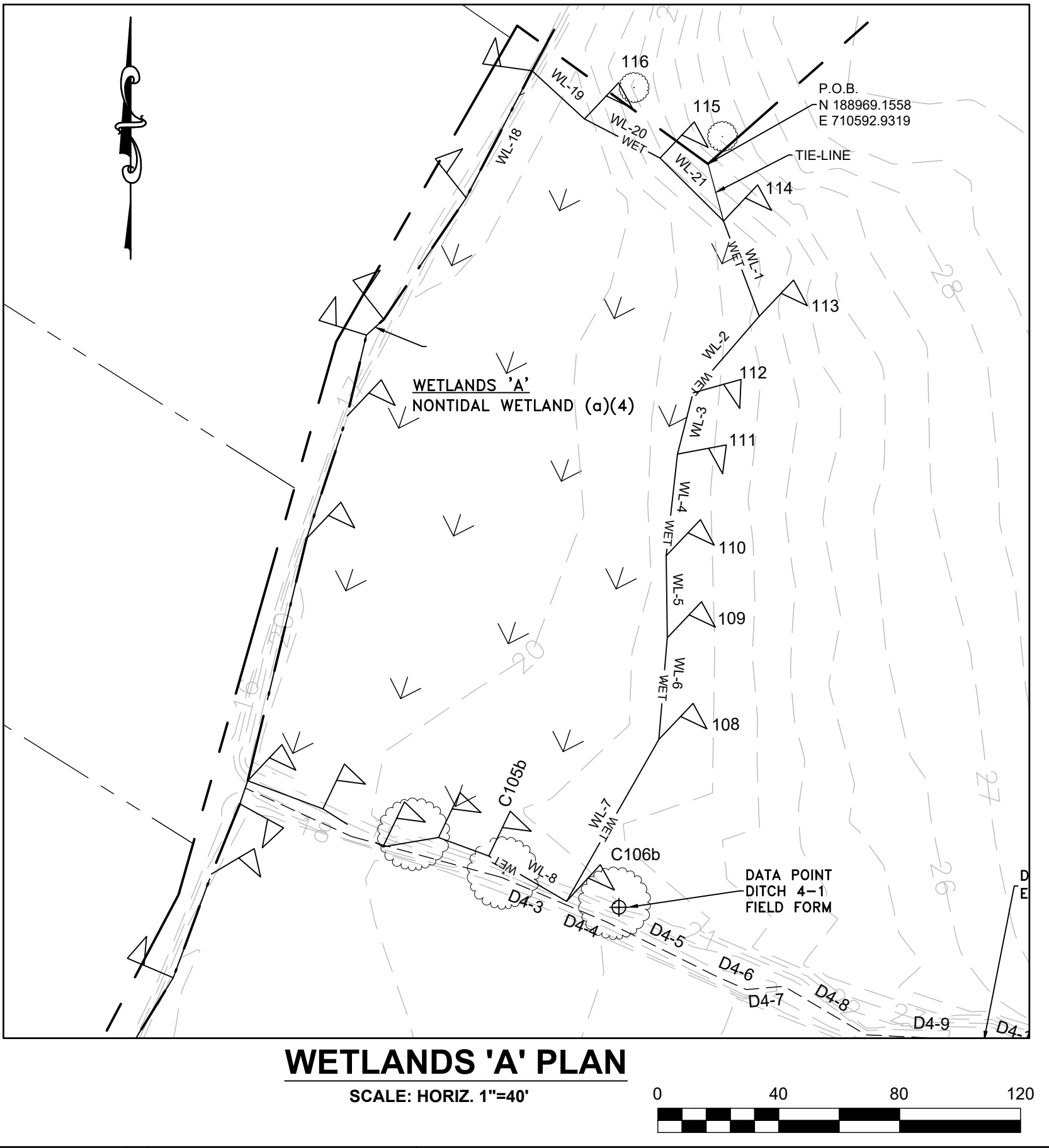
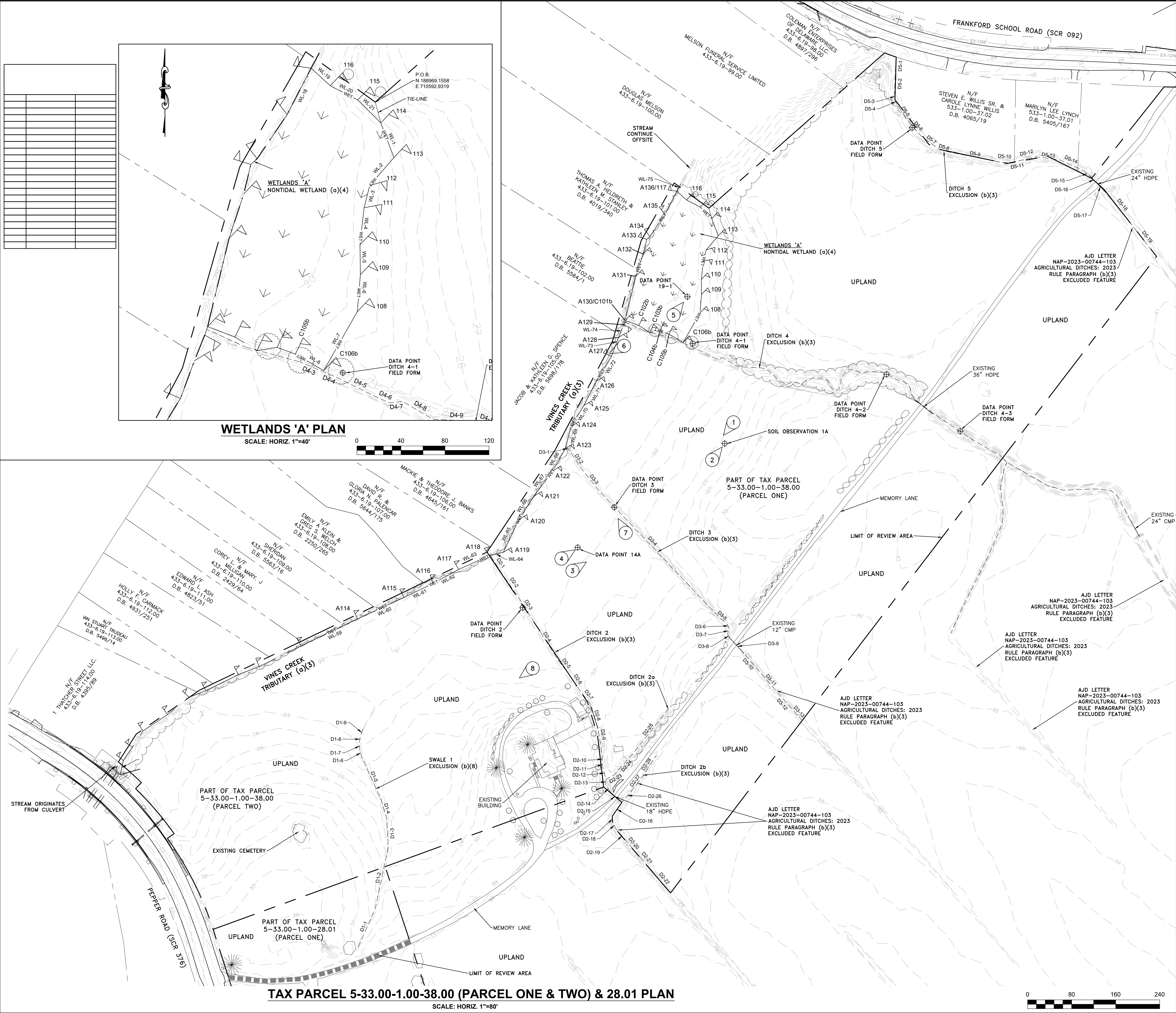
(NAP-2023-00744-103) classified the reach of Ditch 4 within the JD's review area (approximately 1200 ft) as a paragraph (b)(3) excluded Ditch. During the USACE site visit on February 21, 2024, it was wetter than normal as shown by the APT. Due to the seemingly natural sinuosity of this ditch, three total Delaware Stream Jurisdictional Determination Field Forms were completed. Despite the above average rainfall, when the forms were completed Ditch 4 scored as an ephemeral feature with no relatively permanent flow. On the northern most portion of Ditch 4, it abuts and carries flow from Wetland A into Vines Creek. This portion is approximately 115 linear feet. Using the Relatively Permanent Standard to assess the flow characteristics of Ditch 4, the flow characteristic that best characterized the entire feature is non-relatively permanent. 2158 linear feet was observed to be non-relatively permanent (94.9% of the total reach) and the portion draining wetlands was only 115 linear feet (5.1% of the total reach). Ditch 4 does not have relatively permanent, standing or continuously flowing water for the majority of its reach, thereby it is determined to be non-jurisdictional.

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 February 21, 2024
 - b. Wetland Delineation Plans titled "Vines Creek Crossing Parcel 5-33-1.00-38.00 (Parcel One and Two)"; prepared by Davis Bowen & Friedel, Incorporated; dated July 18, 2024; revised August 15, 2024; 2 sheets.
 - c. Wetland Delineation Report titled "Vines Creek Crossing"; prepared by Davis Bowen & Friedel, Incorporated; dated July 18, 2024; which includes the Delaware Stream Jurisdictional Determination Field Forms.
 - d. USACE Antecedent Precipitation Tool for February 21, 2024.
 - e. USACE Strahler Stream Order map, prepared by USACE using the National Regulatory Viewer.
 - f. USACE Stream Stats map, prepared by USACE using USGS Stream Stats.
 - g. USACE Flow Paths map, prepared by USACE.

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10. OTHER SUPPORTING INFORMATION. The Strahler Stream Order map was created referencing the Stream Stats of the site. Due to the large network of ditches, only the ditches that were calculated to drain into the review area were used for the Strahler Stream Order map.
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

- PROPERTY BOUNDARY LINE
- PROPOSED PROPERTY LINE
- EXISTING RIGHT-OF-WAY LINE
- ADJACENT PROPERTY LINE
- EXISTING CONTOURS
- EXISTING WOODSLINE

WATERS & WETLANDS

- WETLANDS LINE AND FLAG
- DATA POINT AND LABEL
- PHOTO LABEL AND DIRECTION
- LIMIT OF REVIEW AREA PER AID LETTER NAP-2023-00744-103
- DITCH AND DITCH/SWALE LINE

SWALE 1 LINE TABLE			DITCH 2 LINE TABLE		
LINE	BEARING	DISTANCE	LINE	BEARING	DISTANCE
D1-1	N 24°07'12" E	79.84	D2-1	S 31°58'54" E	39.07
D1-2	N 11°56'16" E	113.59	D2-2	S 35°10'11" E	52.18
D1-3	N 02°38'39" W	52.03	D2-3	S 32°20'01" E	43.94
D1-4	N 16°45'42" W	36.54	D2-4	S 32°14'30" E	90.55
D1-5	N 24°08'40" W	86.90	D2-5	S 37°15'45" E	34.10
D1-6	N 15°08'57" W	12.57	D2-6	S 33°48'58" E	33.27
D1-7	N 03°02'02" W	12.57	D2-7	S 37°18'35" E	34.25
D1-8	N 09°02'53" E	12.57	D2-8	S 17°03'03" E	43.86
D1-9	N 21°07'47" E	12.57	D2-9	S 08°46'39" E	51.42
			D2-10	S 02°29'13" W	11.62
			D2-11	S 04°14'52" E	7.80
			D2-12	S 14°31'52" E	24.12
			D2-13	S 02°16'39" W	9.23
			D2-14	S 31°01'31" E	17.40
			D2-15	S 49°10'35" E	26.88
			D2-16	S 34°48'52" W	30.52
			D2-17	S 02°49'48" E	10.77
			D2-18	S 25°24'32" E	13.53
			D2-19	S 40°41'29" E	34.66
			D2-20	S 39°19'30" E	17.74
			D2-21	S 41°19'18" E	48.64
			D2-22	S 39°30'35" E	52.24

DITCH 2a LINE TABLE			DITCH 2b LINE TABLE		
LINE	BEARING	DISTANCE	LINE	BEARING	DISTANCE
D2-23	N 61°01'03" E	17.12	D2-26	N 39°48'49" E	32.07
D2-24	N 41°31'20" E	50.52	D2-27	N 37°03'14" E	27.39
D2-25	N 38°21'20" E	104.36	D2-28	N 33°12'06" E	45.84

DITCH 3 LINE TABLE			DITCH 5 LINE TABLE		
LINE	BEARING	DISTANCE	LINE	BEARING	DISTANCE
D3-1	S 42°03'48" E	11.47	D5-1	S 03°38'51" W	27.08
D3-2	S 33°58'04" E	43.90	D5-2	S 01°55'19" W	35.97
D3-3	S 38°56'36" E	49.26	D5-3	S 05°18'03" E	10.84
D3-4	S 43°30'21" E	297.64	D5-4	S 17°22'36" E	8.43
D3-5	S 45°57'38" E	37.04	D5-5	S 34°30'22" E	41.41
D3-6	S 30°44'00" E	4.48	D5-6	S 30°56'28" E	31.61
D3-7	S 08°10'48" W	14.04	D5-7	S 53°31'09" E	39.90
D3-8	S 31°23'53" E	5.48	D5-8	S 72°23'01" E	17.71
D3-9	S 42°07'00" E	39.19	D5-9	S 78°52'51" E	99.04
D3-10	S 40°58'52" E	45.15	D5-10	S 96°04'57" E	12.48
D3-11	S 40°34'51" E	49.32	D5-11	N 79°56'40" E	20.93
D3-12	S 41°16'28" E	49.33	D5-12	N 76°49'49" E	31.52
D3-13	S 40°50'51" E	19.35	D5-13	S 82°36'41" E	42.90
			D5-14	S 85°24'05" E	49.83
			D5-15	S 49°12'19" E	12.67
			D5-16	S 43°42'22" E	20.54
			D5-17	S 43°42'22" E	20.54
			D5-18	S 38°42'14" E	71.31
			D5-19	S 38°15'07" E	77.88

VINES CREEK LINE TABLE		
LINE	BEARING	DISTANCE
WL-50	N 12°42'39" E	26.24
WL-51	N 34°21'48" E	29.23
WL-52	N 32°46'38" E	35.41
WL-53	N 56°28'11" E	53.78
WL-54	N 51°02'00" E	49.95
WL-55	N 68°43'00" E	32.78
WL-56	N 63°51'47" E	66.09
WL-57	N 68°46'47" E	40.42
WL-58	N 63°54'00" E	85.08
WL-59	N 64°18'06" E	113.30
WL-60	N 65°05'26" E	93.29
WL-61	N 64°35'05" E	58.49
WL-62	N 61°09'24" E	53.02
WL-63	N 65°53'07" E	61.03
WL-64	N 76°11'01" E	29.42
WL-65	N 25°26'51" E	66.16
WL-66	N 32°31'09" E	49.90
WL-67	N 36°53'33" E	58.15
WL-68	N 29°12'52" E	46.34
WL-69	N 14°05'32" E	41.23
WL-70	N 31°47'26" E	44.69
WL-71	N 26°52'41" E	49.41
WL-72	N 31°37'41" E	53.15
WL-73	N 20°14'38" E	36.55
WL-74	N 22°04'00" E	25.02
WL-14	N 18°38'52" E	8.09
WL-15	N 13°40'11" E	82.50
WL-16	N 18°17'40" E	42.65
WL-17	N 13°26'50" E	27.50
WL-18	N 47°48'40" E	7.78
WL-19	N 34°08'39" E	48.55
WL-20	N 27°23'54" E	47.36
WL-75	N 28°14'18" E	15.39

JURISDICTIONAL TABLE		
ID	DESCRIPTION	EXTENT
VINES CREEK	JURISDICTIONAL TRIBUTARY (a)(3)	1.575 FT.
WETLAND 'A'	ABUTTING WETLANDS (a)(4)	0.617 AC.

EXCLUSIONS		
ID	DESCRIPTION	LENGTH (LF)
(b)(3) DITCHES		
2	EPHEMERAL DITCH	728
2a	EPHEMERAL DITCH	172
2b	EPHEMERAL DITCH	105
3	EPHEMERAL DITCH	665
4	EPHEMERAL DITCH	699
5	EPHEMERAL DITCH	672

EXCLUSIONS		
ID	DESCRIPTION	LENGTH (LF)
(b)(8) SWALES		
1	EPHEMERAL SWALE	415'

NOTE: 1. SWALE 1 REPORTED LENGTH ON PARCEL 38.00 = 262 LF
2. SWALE 1 LENGTH EXTENDING ONTO PARCEL 28.01 = 153 LF

DAVIS BOWEN & FRIEDEL, INC.
ARCHITECTS • ENGINEERS • SURVEYORS
MILFORD, DELAWARE 19967
302.421.1471

VINES CREEK CROSSING
PARCEL 5-33-1.00-38.00 (PARCEL ONE & TWO) & 28.01
PEPPER RD. (SCR 376) & FRANKFORD SCHOOL RD. (092)
TOWN OF FRANKFORD, SUSSEX COUNTY, DELAWARE

DATE	COMMENTS
08-15-2024	U.S. ARMY CORPS COMMENTS (EMAIL 6/27/2024)
08-29-2024	U.S. ARMY CORPS COMMENTS (EMAIL 6/27/2024)

Date: JULY 18, 2024
Scale: AS NOTED
Dwn By: DJS
Proj No.: 0700C004

EXISTING CONDITIONS EXHIBIT

Dwg No.: **WL-101**

