



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

NAP

November 1, 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-2024-00748-85 MFR 1 of 1.²

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. Palustrine Forested Wetlands: Non-jurisdictional
 - ii. Palustrine Scrub Shrub Wetlands: 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 2.44 acres on tax map parcels 533-11.00-244.00, 533-11.00-245.00 and 533-11.00-246.00 along the southwest of the intersection of Zion Church Road and Deer Run Road in Selbyville, Sussex County, Delaware. The central coordinates for the site are 38.481731°N, 75.155039°W.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Nearest TNW (Dirickson Creek) is 1.22 miles east from the review area. Dirickson Creek was determined to be a TNW based on the National Wetland Inventory map identifying it as an estuarine water body subject to the ebb and flow of the tide. However, the aquatic resources within the review area lack a continuous surface connection to any other aquatic resources.⁶

⁶ 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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no flow path to a TNW as the aquatic resources on the site lack a continuous surface connection to any other aquatic resources.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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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f. Adjacent Wetlands (a)(4): N/A

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).⁹ 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).

Palustrine Forested Wetlands is approximately 0.585 acre and is part of the Palustrine Scrub Shrub Wetlands. Surface elevations within Palustrine Forested Wetlands ranges from approximately 13.9 feet to 15.3 feet. The elevation beyond the wetlands increases to approximately 17 feet. The topography is consistent with a depressional wetland that has no outlet. Palustrine Forested Wetlands is geographically separated from any other aquatic resource with no continuous surface connection to an (a)(1) through (a)(3) water. As such, Palustrine Forested Wetlands does not meet the definition of an (a)(4) adjacent wetland, nor does it meet the definition of a waters of the United States.

Palustrine Scrub Shrub Wetlands is approximately 0.026 acre and is part of the Palustrine Forested Wetlands. Surface elevations within Palustrine Scrub Shrub Wetlands ranges from approximately 13.9 feet to 15.3 feet. The elevation beyond the wetlands increases to approximately 17 feet. The topography is consistent with a depressional wetland that has no outlet. Palustrine Scrub Shrub Wetlands is geographically separated from any other aquatic resource with no continuous surface connection to an (a)(1) through (a)(3) water. As such, Palustrine Scrub Shrub Wetlands does not meet the definition of an (a)(4) adjacent wetland, nor does it meet the definition of a waters of the United States.

⁹ 88 FR 3004 (January 18, 2023)

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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 conducted on July 2, 2024.
 - b. U.S. Army Corps of Engineers (USACE) Request For Jurisdictional Determination (JD) ENG FORM 6247, dated October 27, 2024.
 - c. WETLAND DELINEATION REPORT TAX MAP PARCELS 533-11.00-244.00 (1.831 ± ACRES), 533-11.00-245.00 (0.334 ± ACRES), AND 533-11.00-246.00 (0.282 ± ACRES) BALTIMORE HUNDRED, SUSSEX COUNTY, DELAWARE, prepared by Edward Launay, Carina Christenbury and Kersey Walters of Environmental Resources, dated October 25, 2024.
 - d. WETLAND DELINEATION PLAN BOUNDARY, TOPOGRAPHIC & WETLAND DELINEATION SURVEY LAND H INVESTMENTS LLC TAX MAP PARCELS 533-11.00-244.00, 245.00, 246.00 BALTIMORE HUNDRED, SUSSEX COUNTY, DELAWARE, prepared by Axiom Engineering L.L.C. dated September 30, 2024. 1 sheet.
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.

