



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

CENAP-OPR

01 November 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-2024-00756-103

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.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00756-103

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. Ditch 4, non-jurisdictional
 - ii. Ditch 4a, non-jurisdictional
 - iii. Ditch 7, 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 116.32 acres in Frankford, Sussex County, Delaware (38.514203, -75.224077). The property is identified as Tax Parcel 533-4.00-28.00. A 6.12 acre portion of this parcel located to the southeast is being excluded from the review area as shown on the approved plans. This Jurisdictional Determination is an expansion of a previously verified JD (NAP-2023-00744-103). It is being reviewed under a new Department of the Army project number due to the change in ownership and the additional review areas. The two areas that are being included that were not within the previous review area are the southern forested upland plot, and a portion of the agricultural ditch system located in the north portion of the parcel. This MFR addresses only the new areas. This AJD will be combined with the NAP-2023-00744 AJD.

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 4 flows offsite into Vines

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00756-103

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
 - 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

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.

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00756-103

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
 - a. Ditch 4 is a 278 linear foot ephemeral feature that originates within the review area and continues outside the review area to the north, eventually flowing into Vines Creek. The majority of this features reach both upstream and downstream have been evaluated by two separate jurisdictional determinations (NAP-2024-00565-103, NAP-2023-00744-103) and was found to be non-relatively permanent and draining only uplands. The Delaware Stream Jurisdictional Determination Field Form was completed for Ditch 4 and was scored as an ephemeral feature. Ditch 4 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. Ditch 4a is a 333 linear foot ephemeral feature that originates within the review area and flows into Ditch 4. The majority of this features reach both upstream and downstream have been evaluated by two separate jurisdictional determinations (NAP-2024-00565-103, NAP-2023-00744-103) and was found to be non-relatively permanent and draining only uplands. The Delaware Stream Jurisdictional Determination Field Form was completed for Ditch 4a and was scored as an ephemeral feature. Ditch 4a 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 7 is comprised of line 7-1 and 7-2 which total 1044 linear feet and is an ephemeral feature within the review area. Ditch 7 runs along a forested upland and connects to agricultural ditches that have been evaluated by a previous jurisdictional determination (NAP-2023-00744-103) and were found to be non-relatively permanent and draining only uplands. Ditch 7 is excavated wholly in and draining only dry land and

⁷ 88 FR 3004 (January 18, 2023)

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00756-103

does not carry a relatively permanent flow of water, thereby meeting the definition of a (b)(3) Ditch.

Features evaluated under NAP-2023-00744-103 and labeled as such on the current plan:

- d. Ditch A is a complex of linear ephemeral agricultural ditches that were evaluated under NAP-2023-00744-103 as paragraph (b)(3) Ditches. Ditch A includes approximately 10000 linear feet of ditches through the majority of the agricultural fields in the review area. The majority of the branches within Ditch A convene into Ditch 4 within the review area, and flow north out of the review area terminating in Vines Creek. Two branches of Ditch A flow north off of the review area and terminate directly into Vines Creek. These ditches have been excavated entirely in uplands and drain only uplands. Additionally, these ditches do not exhibit relatively permanent flow. Ditch A 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.
 - e. Ditch B is a linear ephemeral agricultural ditch that were evaluated under NAP-2023-00744-103 as paragraph (b)(3) Ditch. Ditch B is approximately 2000 linear feet located on the northeast portion of the property. Ditch B flows north and terminates into Vines Creek outside the review area. Ditch B has been excavated entirely in uplands and drains only uplands. Additionally, Ditch B does not exhibit relatively permanent flow. Ditch B 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).
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 February 21, 2024

OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2024-00756-103

- b. Wetland Delineation Plans titled "Vines Creek Crossing Parcel 533-4.00-28.00"; prepared by Davis Bowen & Friedel; dated October 11, 2024; revised October 28, 2024; 2 sheets.
- c. Wetland Delineation Data Sheet prepared by Environmental Resources Incorporated, dated November 3, 2023.

10. OTHER SUPPORTING INFORMATION.

- a. USACE Jurisdictional Determination NAP-2023-00744-103
 - b. USACE Jurisdictional Determination NAP-2024-00565-103
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.



