



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT  
2 HOPKINS PLAZA  
BALTIMORE, MARYLAND 21201-2930

CENAB-OPR-S

26 September 2025

MEMORANDUM FOR RECORD

SUBJECT: United States 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> NAB-2025-00385-M53 (5962 Cokesbury Road /AJD)<sup>2</sup>

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>3</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>4</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*").

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

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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>5</sup> the 2023 Rule as amended, 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. D1: Agricultural drainage ditches (7,746 linear feet), non-jurisdictional
- ii. NTW2: Non-tidal wetlands (0.02 acres), non-jurisdictional
- iii. NTW3: Non-tidal wetlands (0.17 acres), non-jurisdictional
- iv. WB2: freshwater pond (0.41 acres), 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. 651, 143 S. Ct. 1322 (2023)

d. "Memorandum To the Field Between the United States Department of the Corps and The United States Environmental Protection Agency Concerning the Proper Implementation Of 'Continuous Surface Connection' Under the Definition Of waters of The United States Under the Clean Water Act" (March 12, 2025)

3. REVIEW AREA. The property is located at 9524 Mary Road, Berlin, Wicomico County, Maryland (38.331251, -75.177331) and is bounded to the north, east and west by riparian forest and to the south by an ongoing agricultural operation. The site is in the Newport Bay watershed<sup>6</sup> (HUC: 020403030401), approximately 32,236-acres (50.37 square miles) in drainage area. The review area is approximately 91.77-acres and is currently in active agricultural production. The site has a network of agricultural

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<sup>5</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.

<sup>6</sup> <https://mywaterway.epa.gov/community/020403030304/overview>

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drainage ditches which drain to Ayer Creek, a tributary of Newport Bay. The project site is the location of a proposed solar development.



Figure 1: Vicinity Map (Source: AJD exhibit, provided by Geo-Technology Associates, Inc dated 9/5/2025)

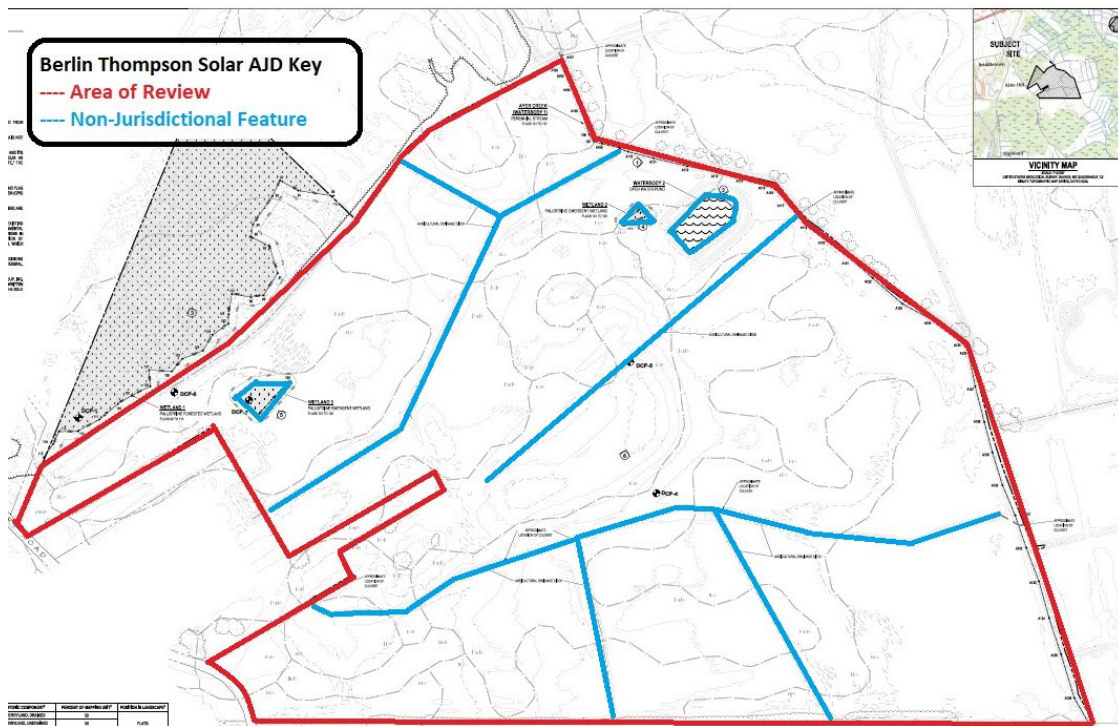


Figure 2: Area of review (red), non-jurisdictional features (blue).

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Newport Bay, a traditionally navigable Section 10 water subject to the ebb and flow of tide, and a tributary of Sinepuxent Bay.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The ditches on site drain to a Ayer Creek, which flows to Newport Bay, a traditionally navigable Section 10 water subject to the ebb and flow of tide, and a tributary of Sinepuxent Bay.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</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):

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<sup>7</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>8</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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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).<sup>9</sup>

i. D1 – The approximately 7,746 linear feet of agricultural drainage ditches are excluded from jurisdiction under the 2023 CWA Rule under paragraph (b)(3). The excluded features are ditches excavated in soils mapped as Mullica-Berryland complex, Fallsington and Hurlock; however, field conditions do not exhibit wetland vegetation, and the ditches do not carry relatively permanent flows of water. The ditches do not have more than a speculative/insubstantial effect on the chemical, physical, and biological integrity of the nearest TNW (Newport Bay).

ii. WB2 - This freshwater pond is not relatively permanent, standing or continuously flowing and does not have a continuous surface connection to a jurisdictional WOTUS. It is also excluded from jurisdiction under the 2024 Clean Water Act under paragraph b(5).

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).

i. NTW2 - This non-tidal wetland is a small, seasonally saturated flat (0.02 acres), surrounded by dry land. This wetland meets the standard 3 parameter approach required by the 1987 Manual and Atlantic and Gulf Coast Regional Supplement does not have a continuous surface connection to a jurisdictional feature.

ii. NTW3 - This non-tidal wetland is a small, seasonally saturated flat (0.17 acres), surrounded by dry land. This wetland meets the standard 3 parameter approach required by the 1987 Manual and Atlantic and Gulf Coast Regional Supplement does not have a continuous surface connection to a jurisdictional feature.

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<sup>9</sup> 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. Site Visit 3 September 2025: Ms. Jaclyn Kelleher (United States Army Corps of Engineers) participated in a site visit to verify Geo-Technology Associate's field delineation of the site. Ms. Kelleher inspected the drainage ditches, the non-tidal wetlands and the freshwater pond to determine their jurisdictional status.

b. Wetland Delineation Plan and Report dated 12 September 2025: The applicant provided USACE with the results of the field delineation in a Preliminary Wetland Delineation Plan and Report prepared by Geo-Technology Associates, Inc dated 12 September 2025, which denotes the presence of delineated aquatic resources.

c. Desktop Review: Desktop information reviewed included mapped wetland/streams feature via online geographic information systems, historic aerial imagery (1992 to present), United States Fish and Wildlife Service National Wetland Inventory Maps, and United States Geological Survey Stream Stats Webpage.

10. OTHER SUPPORTING INFORMATION:

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*Figure 3: Non-relatively permanent drainage feature running along wood line outside AOR (D1).*

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*Figure 4: Non-relatively permanent drainage feature on south end of property (D1).*

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*Figure 5: Non-jurisdictional, non-tidal wetlands (NTW2)*

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*Figure 6: Non-jurisdictional, non-tidal wetlands (NTW3)*

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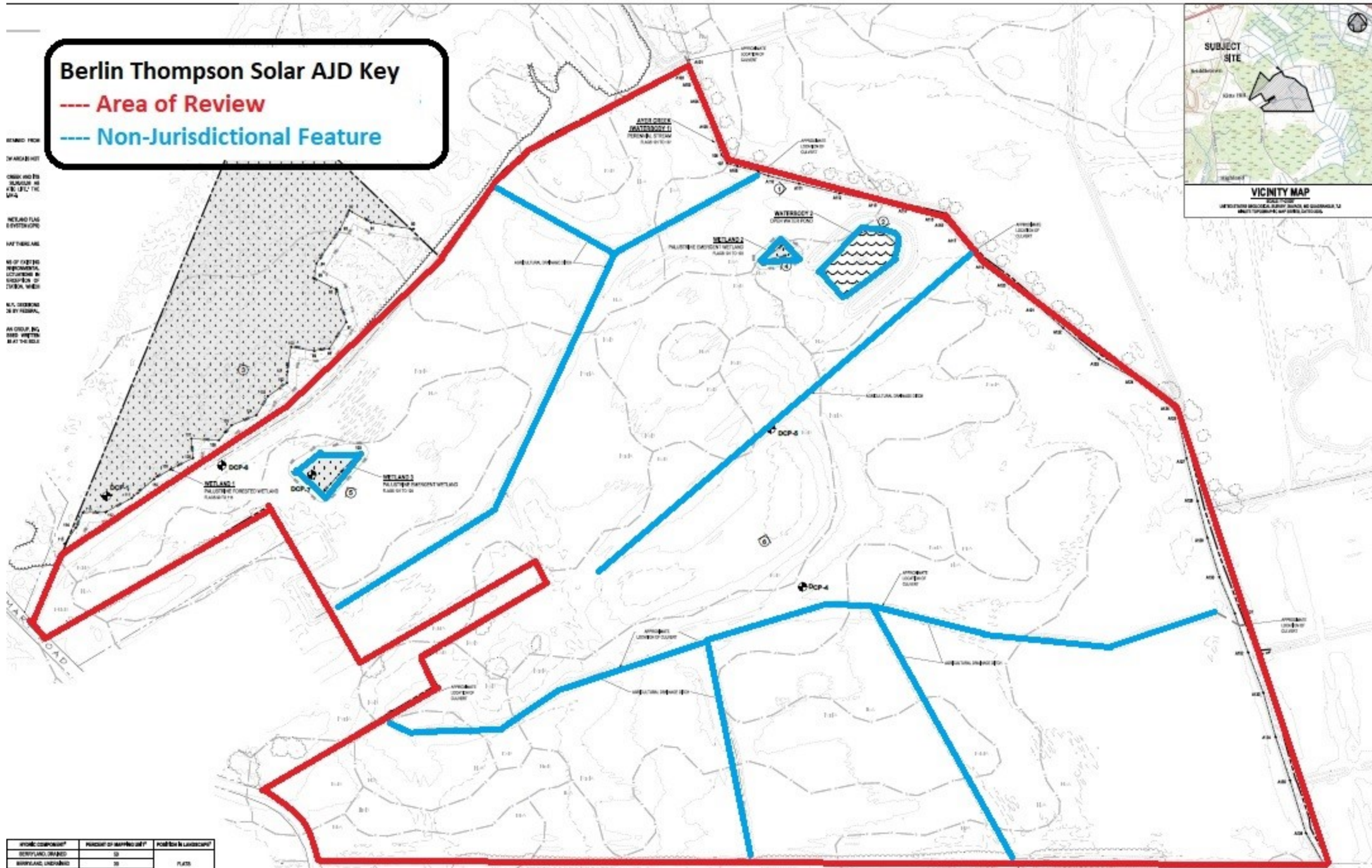
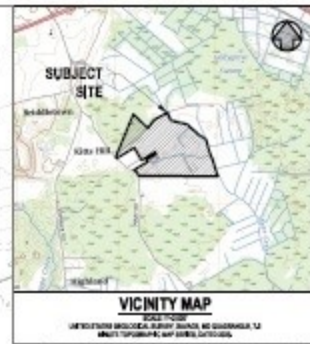
*Figure 7: Non-jurisdictional, freshwater pond (WB2)*

# Berlin Thompson Solar AJD Key

--- Area of Review

--- Non-Jurisdictional Feature

STANDARD FROM  
DRAINAGE DISTRICT  
CHECK AND TO  
CONFORM WITH  
THE MPA  
WETLAND FLAG  
SYMBOLS ARE  
HATCHED  
NO OF FEET TO  
WETLAND  
LOCATIONS IN  
VICINITY OF  
TRENCH, WEIR  
W/L, TRENCH  
OR BY PASSING  
AN OUP, BY  
AND WHETHER  
BY THE SOLE



Wetland Category	Percent of Area of A/R	Foot for the Location
Wetland 1 (Palustrine Forested)	10	100
Wetland 2 (Palustrine Emergent)	10	100
Wetland 3 (Palustrine Emergent)	10	100