



DEPARTMENT OF THE ARMY
U. S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT
ATTN: REGULATORY BRANCH
218 NORTH WASHINGTON STREET, SUITE 304
EASTON, MARYLAND 21601

CENAB-OPR-R P 1100B

9 September 2024

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) ,¹ NAB-2023-00485-M51 (Project Fairview/AJD).

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 jurisdictional determination 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 United States, 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. Ditch A – 1st Order; Jurisdictional; Section 404
- b. Ditch B – Non-jurisdictional.

Figure 1: Approximate location of aquatic resources and their jurisdictional status in relation to the approximate area of review (red)



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 United States, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The subject review area is a 20.51-acre area within a 40.05-acre parcel located on Ocean Gateway in East New Market, Dorchester County, Maryland (Latitude: 38.5560, Longitude: -75.9900; Figures 2 and 3).

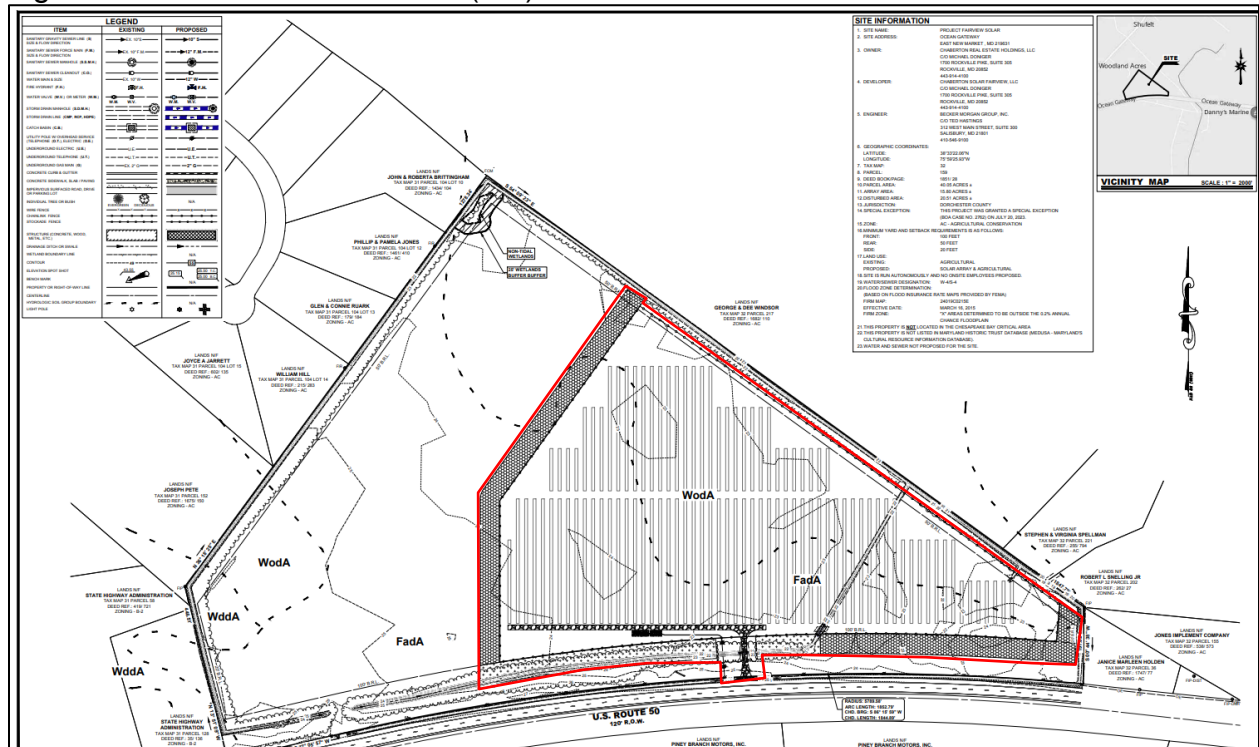
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Figure 2: Site Location Map; Provided by ECS Limited



Figure 3 20.51-acre review area (red).



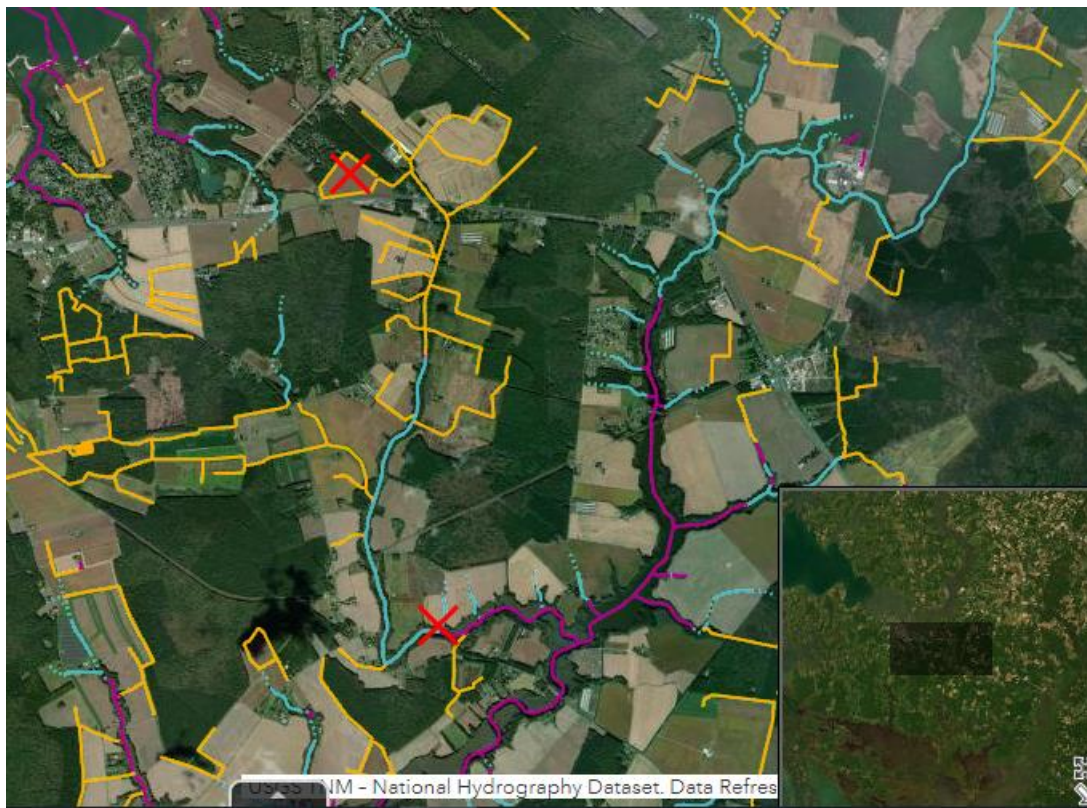
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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The nearest traditional navigable water (TNW) to the review area is an unnamed tidal tributary to the Transquaking River flowing from the northwest, west of Higgins Millpond. This tributary is an a(1) water under the “Revised Definitions of “Waters of the United States”; Conforming” 88 FR 61964 as it is subject to the ebb and flow of tide.

Figure 4: Study location (north red "X") and nearest a(1) water, a tidal tributary to the Transquaking River (south red "X").



5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

The property’s perimeter ditch flows through a series of ditches and streams for approximately 2.6 miles before reaching the a(1) unnamed tidal tributary to the Transquaking River (see Figure 2).

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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):
 - i. Ditch A – 1st Order: Approximately 430 linear feet

Ditch A meets the definition of a tributary, as described in the 2023 Conforming definitions of WOTUS, "tributaries of waters... that are relatively permanent, standing, or continuously flowing bodies of water." Ditch A carries flow to the 2nd order ditch/tributary

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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as shown in Figure 1, and eventually to the Transquaking River as described in Section 4. The Corps visited the site on October 31 and December 28, 2023 and June 11, 2024. Figures 5 and 6 shows that Ditch A contributes flow to the 2nd order tributary bordering the area of review.

Figure 2: Ditch A on December 28, 2023, showing contribution of flow to a 2nd order tributary.



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Figure 3: Ditch A on December 28, 2023.

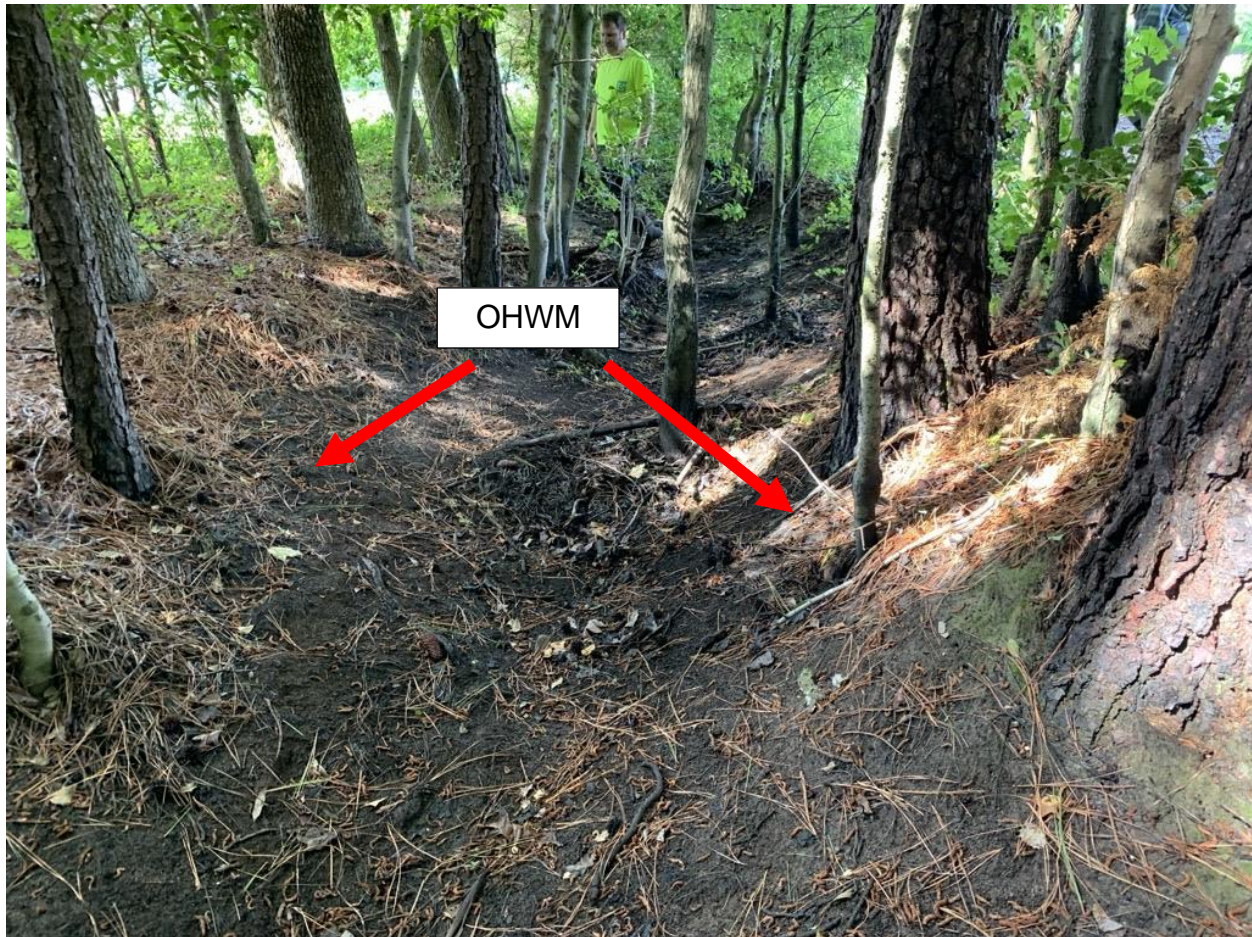


The Corps determined that Ditch A also meets the criteria of “relatively permanent, standing, or continuously flowing,” as evidenced by the presence of an ordinary high-water mark (OHWM). The Corps determined that certain physical characteristics of an OHWM, as described in Regulatory Guidance Letter 05-05, are present in Ditch A, including leaf litter disturbed or washed away and water staining (Figures 7 and 8).

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Figure 7: Ditch A on June 11, 2024, showing leaf litter disturbed or washed away and water staining on trees and leaves.



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Figure 4: Ditch A on June 11, 2024, showing water-stained leaves



The Corps therefore concluded Ditch A is jurisdictional under CWA Section 404 because it 1) contributes flow to an (a)(1) WOTUS and 2) is relatively permanent, standing, or continuously flowing as evidenced by the presence of an OHWM.

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).⁷

Ditch B is a non-jurisdictional aquatic feature. Ditches are excluded under the 2023 Conforming definition of WOTUS if they are excavated wholly in and draining only dry land, and if they carry a relatively permanent flow of water. Ditch B meets criteria for being an excluded feature because it is excavated wholly in and drains only dry land and does not carry a relatively permanent flow of water. The ditch is also not hydrologically connected to any jurisdictional water and is therefore not a tributary.

- 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. Corps site visits 31 October 2023, 26 December 2023, 11 June 2024.
- b. Desktop reviews 21 December 2023, 4 January 2024, 13 June 2024 and 30 August, 2024.
- c. NOAA Climatological Data for Royal Oak, MD, Accessed 21 December 2023.
- d. HistoricAerials.com, Accessed 21 December 2023.
- e. USGS 3D Elevation Program (3DEP) Bare Earth DEM, Accessed 21 December 2023 and 4 January 2024.
- f. USGS 3DEP Bare Earth Hillshade, Accessed 21 December 2023 and 4 January 2024.
- g. National Hydrography Dataset, Accessed 21 December 2023 and 4 January 2024.

⁷ 88 FR 3004 (January 18, 2023)

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- h. ECS Capitol Services. Project Fairview Waters of the United States Report. February 14, 2022, Revised March 29, 2022.
- i. Regulatory Guidance Letter 05-05

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.