U.S. ARMY CORPS OF ENGINEERS
REGULATORY PROGRAM
APPROVED JURISDICTIONAL DETERMINATION FORM (INTERIM)
NAVIGABLE WATERS PROTECTION RULE

I. ADMINISTRATIVE INFORMATION

Completion Date of Approved Jurisdictional Determination (AJD): 1/4/2021
ORM Number: LRB-2020-01436
Associated JDs: N/A
Review Area Location[1]: State/Territory: NY City: Hamburg County/Parish/Borough: Erie
Center Coordinates of Review Area: Latitude 42.681215 Longitude -78.773134

II. FINDINGS

A. Summary: Check all that apply. At least one box from the following list MUST be selected. Complete the corresponding sections/tables and summarize data sources.

- ☐ The review area is comprised entirely of dry land (i.e., there are no waters or water features, including wetlands, of any kind in the entire review area). Rationale: N/A or describe rationale.
- ☐ There are "navigable waters of the United States" within Rivers and Harbors Act jurisdiction within the review area (complete table in Section II.B).
- ☒ There are "waters of the United States" within Clean Water Act jurisdiction within the review area (complete appropriate tables in Section II.C).
- ☒ There are waters or water features excluded from Clean Water Act jurisdiction within the review area (complete table in Section II.D).

B. Rivers and Harbors Act of 1899 Section 10 (§ 10)[2]

§ 10 Name	§ 10 Size		§ 10 Criteria	Rationale for § 10 Determination
N/A.	N/A.	N/A	N/A.	N/A.

C. Clean Water Act Section 404

Territorial Seas and Traditional Navigable Waters ((a)(1) waters):[3]				
(a)(1) Name	(a)(1) Size		(a)(1) Criteria	Rationale for (a)(1) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

Tributaries ((a)(2) waters):				
(a)(2) Name	(a)(2) Size		(a)(2) Criteria	Rationale for (a)(2) Determination
Stream 1	160, on-site; 450, off-site.	linear feet	(a)(2) Intermittent tributary contributes surface water flow directly or indirectly to an (a)(1) water in a typical year.	Stream 1 is a naturally occurring surface water channel that contributes surface water flow to 18-Mile Creek, an (a)(2) water, in a typical year. The feature has an intermittent flow regime with surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts). Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous base flow for weeks or months at a time

[1] Map(s)/figure(s) are attached to the AJD provided to the requestor.
[2] If the navigable water is not subject to the ebb and flow of the tide or included on the District's list of Rivers and Harbors Act Section 10 navigable waters list, do NOT use this document to make the determination. The District must continue to follow the procedure outlined in 33 CFR part 329.14 to make a Rivers and Harbors Act Section 10 navigability determination.
[3] A stand-alone TNW determination 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. A stand-alone TNW determination should be completed following applicable guidance and should NOT be documented on the AJD Form.

Tributaries ((a)(2) waters):				
(a)(2) Name	(a)(2) Size		(a)(2) Criteria	Rationale for (a)(2) Determination
				even when it is not raining or has not very recently rained. Supporting information. Landscape position – the stream is located near the bottom (~ elevation 845') of a large northeast sloping hill (top elevation ~1300 feet). The stream receives flow input from drainage ditches intercepting runoff from the hillside, as well as precipitation and runoff from other portions of the watershed. Observations – A site visit to the adjacent upstream parcel and channel was made on Oct. 26, 2020 in the midst of an ongoing rain event. The stream channel is well-defined with an avg. channel bottom width of 3 feet, avg. bank-full width of 4 feet, and avg. bank-full depth of 2.5 feet. The water depth in the channel was approximately 10 inches. Erosion of banks within the channel indicate a flow regime that is more persistent than that associated with ephemeral flow solely from precipitation. A site visit to the subject parcel was made on Nov. 13, 2020 during another rain event. The bank channels across the site were regraded in the summer of 2020 to an approximate 3:1 slope; the slopes and channel bottom (approximately 3 feet wide) were lined with stone. Persistent flow was again observed through the channel and the depth of water was approximately 4-6 inches. Mr. Kennedy explained that his father-in-law dug this feature along with Ditch 1 when the area was an active farm many years ago. However, a review of multiple aerial photos suggests this section of stream historically occurred as a naturally occurring feature with a meandering channel. Resource review – The stream does not appear on USGS 1:24 topography maps or the National Hydrography Dataset layers. However, a review of historical aerial photos (1928, 1952, 1966) show the stream in the review area as an apparent, natural, meandering feature that receives water from various upgradient drainage ditches and run-off from fields. Based on the details discussed above, flow through the stream is determined to have intermittent flow and is regulated as a (a)(2) tributary.

Lakes and ponds, and impoundments of jurisdictional waters ((a)(3) waters):				
(a)(3) Name	(a)(3) Size		(a)(3) Criteria	Rationale for (a)(3) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size		(a)(4) Criteria	Rationale for (a)(4) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

D. Excluded Waters or Features

Excluded waters ((b)(1) – (b)(12)):[4]				
Exclusion Name	Exclusion Size		Exclusion[5]	Rationale for Exclusion Determination
Ditch 1	200	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	Ditch 1 – is a channel that was constructed to convey water from farm fields. Ditches are not considered tributaries under (a)(2) when at the time a ditch was originally constructed, the ditch did not relocate a tributary, was not constructed in a tributary, or was not constructed in an adjacent wetland, and as such, is not considered a tributary under (a)(2). Observations – Ditch 1 was reviewed during the site visit on Nov. 13, 2020 during another rain event. The ditch drains from west to east across the slope of a field behind the Kennedy parcel and is typical of a ditch constructed to intercept and divert water. The ditch continues off site to another drainage feature that flows north into Stream 1. The bank-full width and depth: approximately 3 feet x 2 feet. Water depth was approximately 4 inches with negligible flow and substrate comprised of silt, sediment, and leaves. Mr. Kennedy explained that Ditch 1 had been there since his father was a young child on the family farm. He maintained them in later years when he took over the farm. The land hasn't been farmed in many years and Ditch 1 is now lined with trees and woody shrubs. Resource Review: Soils – Ditch 1 is located in soils identified by the NRCS WEB Soil Survey as Rhinebeck silt loam (RgA), 0-3% slopes. The drainage classification is Somewhat poorly drained; however, the soil is not rated as a hydric soil. National Wetland Inventory (NWI) mapped wetlands do not appear in the area of Ditch 1. The ditch does not appear

[4] Some excluded waters, such as (b)(2) and (b)(4), may not be specifically identified on the AJD form unless a requestor specifically asks a Corps district to do so. Corps districts may, in case-by-case instances, choose to identify some or all of these waters within the review area.
[5] Because of the broad nature of the (b)(1) exclusion and in an effort to collect data on specific types of waters that would be covered by the (b)(1) exclusion, four sub-categories of (b)(1) exclusions were administratively created for the purposes of the AJD Form. These four sub-categories are not new exclusions, but are simply administrative distinctions and remain (b)(1) exclusions as defined by the NWPR.

Excluded waters ((b)(1) – (b)(12)):[4]				
Exclusion Name	Exclusion Size		Exclusion[5]	Rationale for Exclusion Determination
				to be constructed in an (a)(4) water. A review of USGS Topo Maps (1:24K) cited in Section IIIA show no stream features associated with the location of the ditch indicating it is not a relocated tributary; the ditch crosses the field parallel to topographic contours. Aerial photos suggest the, straight linear feature has been in place for many years. Based on the above information, Ditch 1 does not meet criteria to be an (a)(1) or (a)(2) water nor is it a ditch constructed in an (a)(4) water. The ditch is excluded as a (b)(5) excluded water.
Ditch 2	450	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	Ditch 2 – is a channel that was constructed to divert water from farm fields and away from Mr. Kennedy's residence. Ditches are not considered tributaries under (a)(2) when at the time a ditch was originally constructed, the ditch did not relocate a tributary, was not constructed in a tributary, or was not constructed in an adjacent wetland. Observations – Ditch 2 was reviewed during the site visit on Nov. 13, 2020 during another rain event. The ditch drains north from Ditch 1 along the west side of the Kennedy parcel and ultimately reaches Stream 1, north and west of the Kennedy parcel. It is typical of a ditch constructed to intercept and divert water. The ditch appears as a vegetated swale with no defined bed or bank. Mr. Kennedy explained that he dug the ditch after their home was constructed to divert runoff from the field away from the residence. Resource Review: Soils – Ditch 2 is located in soils identified by the NRCS WEB Soil Survey as Rhinebeck silt loam (RgA), 0-3% slopes. The drainage classification is Somewhat poorly drained; however, the soil is not rated as a hydric soil. National Wetland Inventory (NWI) mapped wetlands do not appear in the area of Ditch 2. The ditch does not appear to be constructed in an (a)(4) water. A review of USGS Topo Maps (1:24K) cited in Section IIIA show no stream features associated with the location of the ditch indicating it is not a relocated tributary; the ditch crosses the field draining along slightly sloping contours to Stream 1. A review of aerial photos shows the feature extending north and then northwest

Excluded waters ((b)(1) – (b)(12)):[4]				
Exclusion Name	Exclusion Size		Exclusion[5]	Rationale for Exclusion Determination
				across the adjacent field. Based on the above information, Ditch 2 does not meet criteria to be an (a)(1) or (a)(2) water nor is it a ditch constructed in an (a)(4) water. The ditch is excluded as a (b)(5) excluded water.

III. SUPPORTING INFORMATION

A. Select/enter all resources that were used to aid in this determination and attach data/maps to this document and/or references/citations in the administrative record, as appropriate.

☒ Information submitted by, or on behalf of, the applicant/consultant: Oral history given during site visit on Nov. 13, 2020.

This information is sufficient for purposes of this AJD.

Rationale: N/A or describe rationale for insufficiency (including partial insufficiency).

☐ Data sheets prepared by the Corps: Title(s) and/or date(s).

☒ Photographs: Aerial and Other: https://www2.erie.gov/aerial_photos/, HistoricAerials.com, https://explorer.pictometry.com/index.php?page=login, and site photos taken on Oct. 26 and Nov. 13, 2020.

☒ Corps site visit(s) conducted on: Nov. 13, 2020.

☐ Previous Jurisdictional Determinations (AJDs or PJDs): ORM Number(s) and date(s).

☒ Antecedent Precipitation Tool: *provide detailed discussion in Section III.B*.

☒ USDA NRCS Soil Survey: Web Soil Survey

☒ USFWS NWI maps: ORM Data layer

☒ USGS topographic maps: ORM - 1:24 K, NHD layer.

Other data sources used to aid in this determination:

Data Source (select)	Name and/or date and other relevant information
USGS Sources	N/A.
USDA Sources	N/A
NOAA Sources	N/A.
USACE Sources	N/A.
State/Local/Tribal Sources	N/A.
Other Sources	N/A.

B. Typical year assessment(s): The Antecedent Precipitation Tool (APT) pulls precipitation data from NOAA's Daily Global Hisitorical Climatology Network. The APT evaluates normal precipitation conditions based on the three 30-day periods preceding the observation date. For each period, a weighted condtion value is assigned by determining whether the 30-day precipitation total falls within, above, or below the 70th and 30th percentiles for totals from the same date range over the preceding 30 years. The APT then makes a determination of "normal," "wetter than normal," or "drier than normal" based on the condition values sum. The APT also displays results generated via the Palmer Drought Severity Index and the University of Deleware WebWIMP.

The subject parcel's latitude/longitude was entered into the APT to evaluate average precipitation, total precipitation over the 90 days preceding the Oct. 26 and Nov. 13, 2020 site visits. The nearest four weather stations used for the evaluation where – Wales, Hamburg 0.4 WSW, Colden 1 N, Colden 1W, and

Buffalo. The APT shows that the normal precipitation range for the site in the 30 days prior to Oct. 26, 2020 is between the 30th (3.9") and 70th (4.9") percentiles. The total observed precipitation for the period is 5.4", equating to a Wet Wetness Condition. Thirty to sixty days prior to Oct. 26, 2020, normal range is between the 30th (2.7") and 70th (3.8") percentiles. The total observed precipitation is 1.2", equating to a Dry Wetness Condition. Sixty to 90 days prior to Oct. 26, 2020, normal range is between the 30th (2.8") and 70th (4.0") percentiles. The total observed precipitation is 2.8", equating to a Normal Wetness Condition. The Final Condition Value (13), derived by using a weighted calculation, indicates Normal Conditions for the evaluation period.

For the Nov. 13, 2020 date, the APT shows that the normal precipitation range for the site in the preceding 30 days is between the 30th (3.4") and 70th (4.7") percentiles. The total observed precipitation for the period is 4.5", equating to a Normal Wetness Condition. Thirty to sixty days prior, the normal range is between the 30th (3.2") and 70th (4.6") percentiles. The total observed precipitation is 2.5", equating to a Dry Wetness Condition. Sixty to 90 days prior, normal range is between the 30th (2.8") and 70th (4.3") percentiles. The total observed precipitation is 2.1", equating to a Dry Wetness Condition. The Final Condition Value (9), derived by using a weighted calculation, indicates Drier than Normal Conditions for the evaluation period.

A third APT evaluation was performed for April 9, 2005 when water could be observed in Stream 1 from aerial photographs (https://explorer.pictometry.com/index). The APT shows that the normal precipitation range for the site in the preceding 30 days is between the 30th (3.0") and 70th (3.7") percentiles. The total observed precipitation for the period is 3.7", equating to a Normal Wetness Condition. Thirty to sixty days prior, the normal range is between the 30th (2.4") and 70th (3.5") percentiles. The total observed precipitation is 3.2", equating to a Noirmal Wetness Condition. Sixty to 90 days prior, normal range is between the 30th (2.3") and 70th (3.6") percentiles. The total observed precipitation is 2.6", equating to a Normal Wetness Condition. The Final Condition Value (12), derived by using a weighted calculation, indicates Normal Conditions for the evaluation period.

Conclusion – Flow in Stream 1 was observed during both site visit dates for which the APT evaluation reported Normal and Drier Than Normal Conditions for the 90 days preceding the site visits. While both observations occurred during precipitation events, the substantial flow observed on those dates is consistent with an intermittent flow regime that would persist beyond the direct response to precipitation events under both normal and drier than normal conditions. For the third evaluation, the month preceding April 9, 2005, showed a steady decline in precipitation and the 30-day rolling total was well below the 30 year normal range. A rain event just prior to April 9 brought the 30-day rolling total to the upper limits of the normal range (3.7"). The apparent amount of water in the stream channel on this date suggests the persitent flow days after a rain event is consistent with a flow regime receiving input from an elevated groundwater table, typical for a wet spring season, and not just a response to a single rain event as an ephemeral flow regime would indicate.

C. Additional comments to support AJD: Stream 1 flows approximately 500 linear feet from the site through a culvert under Back Creek Road and continues to it's confluence with the Eighteen Mile Creek, an (a)(2) tributary. The Eighteen Mile Creek flows generally west for approximately 18 miles to Lake Erie, an (a)(1) navigable waterway.