



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, NEW YORK DISTRICT
JACOB K. JAVITS FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10278

CENAN-OP-RE

07 MAY 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 NAN-2022-00349-EMI²

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.

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. Tidal Wetland 1 (TW1) – jurisdictional, Section 404
 - ii. Tidal Wetland 2 (TW2) – jurisdictional, Section 404
 - iii. Tidal Wetland 3 (TW3) – jurisdictional, Section 10/404
 - iv. Tidal Wetland 4 (TW4) – jurisdictional, Section 10/404
 - v. Tidal Wetland 5 (TW5) – jurisdictional, Section 10/404
 - vi. Tidal Wetland 6 (TW6) – jurisdictional, Section 10/404
 - vii. Tidal Wetland 7 (TW7) – jurisdictional, Section 404
 - viii. Freshwater Wetland 1 (FW1) – jurisdictional, Section 404
 - ix. Freshwater Wetland 2 (FW2) – non-jurisdictional
 - x. Ditch 1 – non-jurisdictional
 - xi. Water 1 – Arthur Kill, jurisdictional, Section 10/404
 - xii. Water 2 – Mill Creek, jurisdictional, Section 10/404

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.

Site is approximately 32 acres in size; 40.523091°, -74.241844°; Block 7620, Lot 1 and Block 7632, Lots 1, 6, 50, 150 & 151 - Borough of Staten Island, Richmond County, City of New York, New York

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

Water 1 is the Arthur Kill, a TNW. Water 2 is Mill Creek which is also a TNW.⁶

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

The ditch on site drains stormwater runoff from the adjacent roads via an outfall to the Arthur Kill. The seven (7) tidal wetlands on site are adjacent to either the Arthur Kill or Mill Creek, which are TNWs. FW1 appears to flow via the ditch to the Arthur Kill.

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

The two TNWs, Arthur Kill and Mill Creek, are all tidally influenced. Tidal Wetlands 1-7 are also tidally influenced. TW1 is approximately 0.04 acres, TW2 is approximately 0.11 acres, TW3 is approximately 0.01 acres, TW4 is approximately 0.01 acres, TW5 is approximately 0.02 acre, TW6 is approximately 0.06 acres, and TW7 is approximately 0.12 acres.

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,

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.

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.

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): Arthur Kill and Mill Creek are both tidally influenced. Tidal Wetlands 3, 4, 5, and 6 are at least partially located below Mean High Water and are considered to be “navigable in law”.
- 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): Tidal Wetlands 1 and 2, and the remaining portion of Tidal Wetland 3 (refer to 7a) abut the Arthur Kill, and Tidal Wetland 7 abuts Mill Creek; therefore, these aquatic features have a continuous surface connection to a TNW. TW1 is approximately 0.04 acres, TW2 is approximately 0.11 acres, TW3 is approximately 0.01 acres, and TW7 is approximately 0.12 acres.

FW1 is separated from the TNW by a berm but has a continuous surface connection to the Arthur Kill via the ditch that runs through FW1. FW1 is approximately 1.77 acres. FW1 is inclusive of the portions of Ditch 1 that are within the boundary of the wetland. FW1 surrounds and extends down to the limits of the ditch on site. While Ditch 1, itself is not jurisdictional (see 8.b. below), FW1 largely encompasses the majority of the ditch other than one small portion that exits the wetland as it drains to the Arthur Kill. The portions of Ditch 1 that are located outside the wetland are considered non-jurisdictional (see below 8.b.) There is an approximately 62 linear foot section of ditch that separates FW1 from the Spring High Water Mark of the Arthur Kill. The remaining approximately 840 linear feet runs through FW1.

While the ditch itself is not considered jurisdictional, as discussed in joint memorandums NAP-2023-01223 and SWG-2023-00284, there appear to be factual similarities between these JDs and this one currently being reviewed. As discussed in the memos, while not all ditches (or swales, as discussed in NAP-2023-01223) meet the continuous surface connection requirement, the observation of flow in the ditch provides evidence that flow is occurring between the wetland and the TNW.

- 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).

Ditch 1 – A stormwater outfall draining from Arthur Kill Road drains via the approximately 900 linear foot ditch to the Arthur Kill. The ditch only has flowing or standing water for a short duration in direct response to precipitation and therefore is not a Relatively Permanent Water (RPW). Approximately 840 linear feet of the ditch runs through FW1, which surrounds the ditch and extends further out from it. The wetland extends down to the limits of the ditch. For the purposes of this jurisdictional determination FW1 includes the area of the ditch as the wetland area extends down to the ditch. The portions of the ditch outside of FW1 are considered non-jurisdictional. The ditch drains into the Arthur Kill which is a tidal waterbody. The portion of the ditch that is below Spring High Water is included in the TNW. The ditch itself is not tidal.

Freshwater Wetland 2 – FW2 is approximately 1.49 acres and appears to be a depression on the site that collects precipitation during storm events. The limits of wetlands were delineated by the applicant using the 87 Manual/Regional Supplement. During the site visit on October 18, 2023, some ponding water was present within the wetlands. No culvert or permeable layer appeared to be located in the surrounding area connecting the wetland to the TNW or any other wetlands. FW2 is separated from FW1 via an unpaved road area that while does occasionally have ponding water, there does not appear to be a continuous surface connection between FW1 and FW2.

While FW1 and FW2 are located close to each other, based on the jointly signed memorandum for draft AJD LRB-2021-01386, dated February 16, 2024, there appear to be some factual similarities between the JDs, and the district has

⁹ 88 FR 3004 (January 18, 2023)

determined that the two wetlands are separate. As discussed in the joint memo, artificial structures do not necessarily sever adjacency and wetlands can be considered one wetland if a hydrologic connection is maintained between the divided portions. In this situation, the unpaved road separates the two wetlands but there is no culvert or apparent surface connection between FW1 and FW2. Upland vegetation exists along the unpaved road between FW1 and FW2. Further, after reviewing aerial imagery of the site over the last 10-15 years, it appears that the area between the two wetlands was always upland and over time, the upland area was used to form the unpaved access road on the site. Additionally, after reviewing prior files for a withdrawn proposal, it appears that a jurisdictional determination from 2008, NAN-2008-00806-EJE, also identified the site as containing two freshwater wetlands.

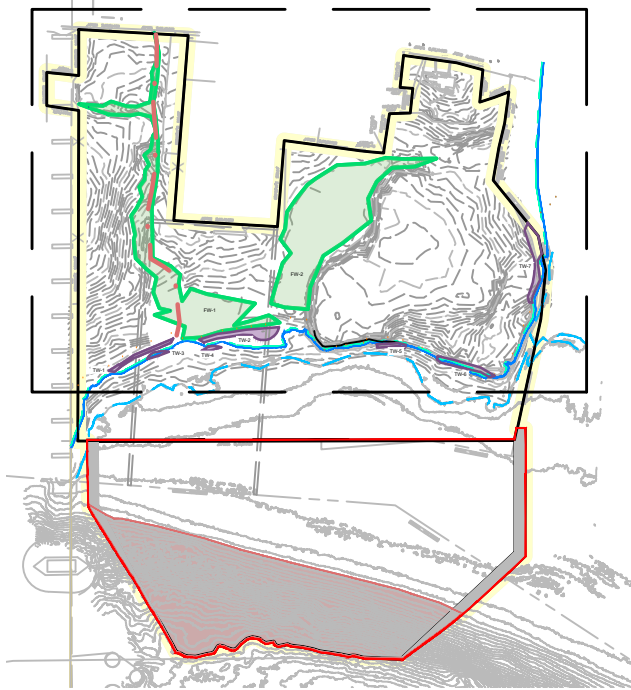
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Site Photographs taken on October 18, 2023;
- b. Google Earth Aerial Imagery between 2010-2024;
- c. "Site Plan Arthur Kill Terminal Project", prepared by Roux Associates, dated October 10, 2023;
- d. National Wetlands Inventory Map as part of the Transportation Project Report dated March 6, 2024;
- e. USDA Web Soil Survey

10. OTHER SUPPORTING INFORMATION

- a. Joint Memorandum regarding LRB-2021-01386
- b. Joint Memorandum regarding NAP-2023-01223
- c. Joint Memorandum regarding SWG-2023-00284

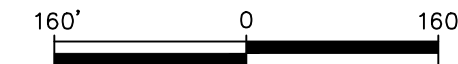
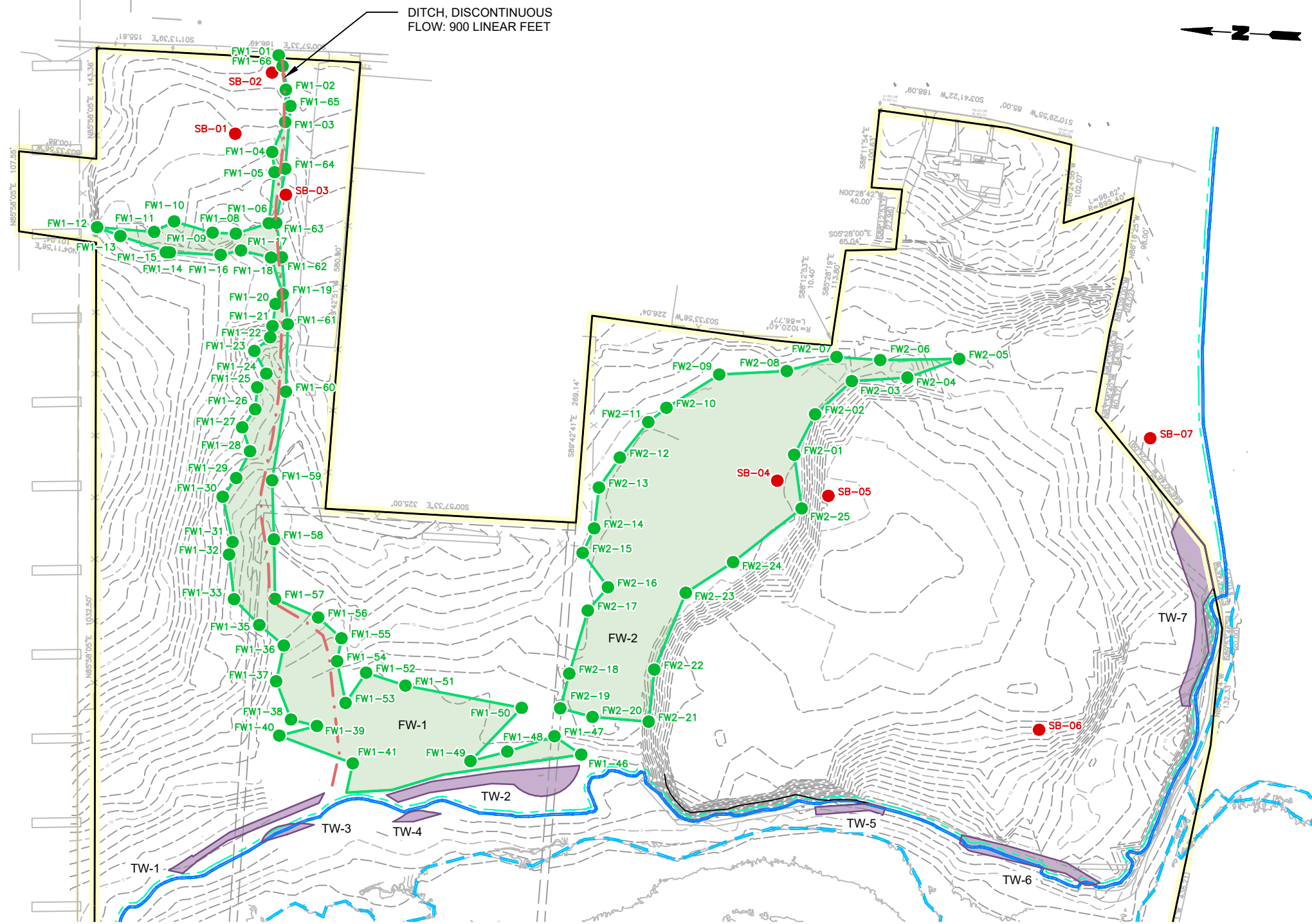
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



SITE PLAN
SCALE: 1" = 600'

LEGEND

- PROPOSED FILLING AND GRADING AREA (32.5 AC)
- EXISTING ELEVATION CONTOURS
- EXTENT OF FRESHWATER WETLANDS DELINEATED BY ROUX, NOVEMBER 8-10, 2021
- MHHW (MEAN HIGHER HIGH WATER) EL. 2.75 MHW (MEAN HIGH WATER) EL. 2.43
- MLW (MEAN LOW WATER) EL. -2.76, MLLW (MEAN LOWER LOW WATER) EL. -2.99
- SPRING HIGH WATER EL. 2.9
- FW1-01 LOCATION AND DESIGNATION OF FRESHWATER WETLAND POINTS FLAGGED BY ROUX USING A GNSS RECEIVER, BETWEEN NOVEMBER 8 AND 10, 2021
- SB-01 LOCATION AND DESIGNATION OF WETLAND DELINEATION SOIL PITS
- FRESHWATER WETLANDS
- VEGETATED TIDAL WETLANDS
- DRAINAGE DITCH



Area Description Identification	Area (acres)
Freshwater Wetland 1	1.77
Freshwater Wetland 2	1.49
Tidal Wetland 1	0.04
Tidal Wetland 2	0.11
Tidal Wetland 3	0.01
Tidal Wetland 4	0.01
Tidal Wetland 5	0.02
Tidal Wetland 6	0.06
Tidal Wetland 7	0.12

NOTES

1. ELEVATIONS REFERENCE NORTH AMERICAN VERTICAL DATUM 88.
2. HORIZONTAL DATUM REFERS TO STATE PLANE COORDINATE SYSTEM NAD 83.
3. SURVEY PREPARED BY NELSON & POPE, ENGINEERS AND SURVEYORS, 2022.
4. ECOLOGICAL COMMUNITY MAPPING BASED UPON SURVEY COMPLETED BY ROUX ENVIRONMENTAL ENGINEERING & GEOLOGY, DPC BETWEEN NOVEMBER 2021 AND JANUARY 2022.
5. FULL EXTENT OF PROPOSED DREDGE BASIN NOT DEPICTED IN DRAWING

Title: **SITE PLAN**
ARTHUR KILL TERMINAL
PROJECT

4927 ARTHUR KILL ROAD
STATEN ISLAND, NEW YORK

Prepared for: **ARTHUR KILL TERMINAL**

ROUX	Compiled by: K.S.	Date: 10OCT23	FIGURE 1
	Prepared by: G.M.	Scale: AS SHOWN	
	Project Mgr: K.S.	Project: 4234.0001Y000	
	File: 4234.0001Y103.01.DWG		

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