



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT  
STATE COLLEGE FIELD OFFICE  
1631 SOUTH ATHERTON STREET, SUITE 101  
STATE COLLEGE, PENNSYLVANIA 16801

NAB-2022-00333-P12

15 March 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),<sup>1</sup> NAB-2022-00333-P12(Hazelton Creek Proposed Industrial Complex Approved JD)

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>2</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>3</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*").

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>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

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Latitude 40.945685 N/ Longitude -75.993478 The site location is Southeast of the intersection of Crystal Ridge Road and Harwood Road in the City of Hazelton, Luzerne County, Pennsylvania. Two site visits were completed on February 15, 2023, and March 20, 2023. The existing investigation area has gone through extensive modifications through the years due to past coal mining and recent reclamation.

## 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).

The naming of the features are taken directly from the wetland delineations reports that were submitted.

i. Unnamed Tributary (UNT) 1 is not a waters of the U.S.

ii. UNT 2 is not a waters of the U.S.

iii. UNT 3 is not a waters of the U.S.

iv. Waters A is not a waters of the U.S.

v. Waters B is not a waters of the U.S.

vi. Wetland 1 is not a waters of the U.S.

vii. Wetland A is not a waters of the U.S.

viii. Wetland B is not a waters of the U.S.

ix. Wetland C is not a waters of the U.S.

x. Wetland D is not a waters of the U.S.

Further Explanation: The entire site has been impacted by past coal mining and reclamation activities which resulted in the elimination of the Cranberry Run channel, which at one time bisected the property (flowing in a south to northeast direction). In addition, the 8 acre site drains into a non-jurisdictional sink hole.

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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 XXXX (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The area of investigation is 61.8 acres (See Attached Map).

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

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

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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

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<sup>5</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>6</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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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. N/A

- 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
- 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). Wetlands A through D were created incidental to the reclamation grading that occurred on the old coal mine site.

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). UNT 1-3 are waterways that flow into a mine pit and goes subsurface (no discernable surface connection to a jurisdictional water). Wetland 1 abuts UNT 2 and 3 which flows subsurface in an old mining pit (no discernable surface connection to a jurisdictional water). Waters A is a man-made ditch that lacks any OHWM indicators and lacks any connection at its upper end with

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Cranberry Run (Non-jurisdictional man-made ditch). Waters B is a remnant swale created from the past mining activity that lacks an OHWM, and does not have a discernable surface connection to a regulated water (Non-jurisdictional swale). Wetlands A-D are created as a result of the mine reclamation. They have no surface connection to a regulated waters (no discernable surface connection to a jurisdictional water).

Size of the waters described above:

1. Unnamed Tributary (UNT) 1/ 403 linear feet long.
  2. UNT 2 /113 linear feet long.
  3. UNT 3 /54 linear feet long.
  4. Waters A /2755 linear feet long.
  5. Waters B / 47 linear feet long.
  6. Wetland 1/ 0.701 acres
  7. Wetland A /0.080 acres
  8. Wetland B /0.240 acres
  9. Wetland C/0.660 acres
  10. Wetland D/0.040 acres
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. My field views were February 15, 2023, and April 3, 2023.
  - b. Utilized the Pennsylvania Wetland Registry (PA WRR) for background information. Aerial imagery utilized June 8, 1959, 1985, 93-95, 2016, and 2020; LIDAR was utilized from PA WRR; USDA NRCS Soil Survey Custom Soil Resource Report for Luzerne County, Pennsylvania, October 14, 2022; NWI dated May 12, 2023; and Topographic Map, titled "Hazelton Quad" October 14, 2022.
  - c. The following wetland delineation reports were utilized: Wetland Delineation Report – Lot 1 – Crystal Ridge Manor Subdivision and Wetland, Watercourse From (Kingfisher), and Open Waterbody Delineation Report July 2022 from Kleinfelder.
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

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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.

