



**DEPARTMENT OF THE ARMY**  
U. S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT  
CARLISLE FIELD OFFICE  
401 EAST LOUTHER STREET, SUITE 205  
CARLISLE, PENNSYLVANIA 17013-2657

CENAB-OPR-R P 1100B

24 October 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) ,<sup>1</sup> NAB-2023-00448-P33 (Crossroads XOX-Black Creek Property/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.

---

<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.

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

The subject property is comprised of a total of 374-acres of land located on properties owned by Pasco Schiavo in Sugarloaf and Hazel Townships, and West Hazleton Borough, Luzerne County, Pennsylvania (40.971336, -76.041512). The Corps conducted several field reviews of the site on July 2-3, 2024.

## 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 Corps has determined that Mine Pool MP1-4, Watercourses C2, C4, C5, C7, and C20-22 are (a)(3) tributaries and are jurisdictional under Section 404 of the Clean Water Act and Watercourses C1, C9, C10, C14, C15, C19, C25, C26 are non-jurisdictional.

- b. Mine Pool 1 (MP1); (a)(3) tributary; Jurisdictional; Section 404
- c. Mine Pool 2 (MP2); (a)(3) tributary; Jurisdictional; Section 404
- d. Mine Pool 3 (MP3); (a)(3) tributary; Jurisdictional; Section 404
- e. Mine Pool 4 (MP4); (a)(3) tributary; Jurisdictional; Section 404
- f. Watercourse C1; non-jurisdictional
- g. Watercourse C2 (Black Creek); (a)(3) tributary; Jurisdictional; Section 404
- h. Watercourse C4; (a)(3) tributary; Jurisdictional; Section 404
- i. Watercourse C5; (a)(3) tributary; Jurisdictional; Section 404
- j. Watercourse C7; (a)(3) tributary; Jurisdictional; Section 404
- k. Watercourse C9; non-jurisdictional
- l. Watercourse C10; non-jurisdictional
- m. Watercourse C14; non-jurisdictional
- n. Watercourse C15; non-jurisdictional
- o. Watercourse C19; non-jurisdictional

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

- p. Watercourse C20; (a)(3) tributary; Jurisdictional; Section 404
- q. Watercourse C21; (a)(3) tributary; Jurisdictional; Section 404
- r. Watercourse C22; (a)(3) tributary; Jurisdictional; Section 404
- s. Watercourse C25; non-jurisdictional
- t. Watercourse C26; non-jurisdictional

The Corps has determined that Wetlands W5, W21, W22, W31, W35-36 and W39 are (a)(4) adjacent wetlands and are jurisdictional under Section 404 of the Clean Water Act. The Corps has determined that Wetlands W6, W23, W34, W38, W40-43 are non-jurisdictional.

- u. Wetland W5; (a)(4) adjacent wetland; Jurisdictional; Section 404
- v. Wetland W6; (a)(4) non-jurisdictional
- w. Wetland W21; (a)(4) adjacent wetland; Jurisdictional; Section 404
- x. Wetland W22; (a)(4) adjacent wetland; Jurisdictional; Section 404
- y. Wetland W23; non-jurisdictional
- z. Wetland W 31; (a)(4) adjacent wetland; Jurisdictional; Section 404
- aa. Wetland W34; non-jurisdictional
- bb. Wetland W35; (a)(4) adjacent wetland; Jurisdictional; Section 404
- cc. Wetland W36; (a)(4) adjacent wetland; Jurisdictional; Section 404
- dd. Wetland W38; non-jurisdictional
- ee. Wetland W39; (a)(4) adjacent wetland; Jurisdictional; Section 404
- ff. Wetland W40; non-jurisdictional
- gg. Wetland W41; non-jurisdictional
- hh. Wetland W42; non-jurisdictional

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

ii. Wetland W43; non-jurisdictional

There are three (3) stormwater management (SWM) ponds constructed in dry land with no surface connection, determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(5)).

jj. SWM 1; non-jurisdictional

kk. SWM 2; non-jurisdictional

ll. SWM 3; non-jurisdictional

The roadside ditch Watercourse C24 was determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(3)).

mm. Watercourse C24; Roadside Ditch; non-jurisdictional

The erosional features Watercourses C1, C9, C10, C14, C15, C19, C25, C26 were determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(8)).

nn. Watercourse C1; Erosional Feature; non-jurisdictional

oo. Watercourse C9; Erosional Feature; non-jurisdictional

pp. Watercourse C10; Erosional Feature; non-jurisdictional

qq. Watercourse C14; Erosional Feature; non-jurisdictional

rr. Watercourse C15; Erosional Feature; non-jurisdictional

ss. Watercourse C19; Erosional Feature; non-jurisdictional

tt. Watercourse C25; Erosional Feature; non-jurisdictional

uu. Watercourse C26; Erosional Feature; non-jurisdictional

## 2. REFERENCES.

a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

- 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)
- d. 1987 Corps of Engineers Wetland Delineation Manual
- e. Eastern Mountains & Piedmont Regional Supplement
- f. Field Indicators of Hydric Soils of the United States
- g. 2020 National Wetland Plant List

### 3. REVIEW AREA.

The Area of Review (AOR) comprises a total of 374 acres and consists primarily of broadleaf/coniferous terrestrial forest, broadleaf/coniferous terrestrial woodland, broadleaf terrestrial shrubland, terrestrial herbaceous opening, broadleaf palustrine forest, broadleaf palustrine woodland, palustrine shrubland and herbaceous wetland plant communities. The remainder of the site consists of an active utility pole yard with a paved entrance road, an active railroad and a small, maintained lawn area.

Most of the review area was historically used for coal mining; therefore, evidence of surface mining operations was abundant throughout the investigated area. This included evidence of strip mining and open pit mining processes. Spoil areas containing culm were widespread throughout the area. The review area is adjacent to Interstate 81. The center coordinates of the site are approximately 40.971336, -76.041512.

The entire length of Black Creek is considered by the Pennsylvania Department of Environmental Protection to be impaired by acid mine drainage, the main sources of which are the Gowen and Derringer deep mine discharges; a number of smaller sources of abandoned mine drainage also contribute to impairment of the Black Creek watershed.

The AOR is located within the Black Creek watershed and is designated by 25 PA Code, Chapter 93, Water Quality Standards as a cold-water fishery, migratory fishes. No existing use was found for this watershed and no Pennsylvania Fish & Boat Commission special trout designations were found for Black Creek.

An aerial image of the review area is shown in Figure 1 below. Detailed maps of the study area and all waters are shown in Figure 4.

Figure 1: Aerial Imagery of Study Area



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

The Susquehanna River is the nearest TNW to the project site located approximately 11.5 miles northwest of the project site, at the town of Nescopeck, Luzerne County, Pennsylvania (41.050325, -76.236274).

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

The flow path from the site starts with the unnamed tributary to Black Creek (RPW) which enters the site on the west side of I-81 and flows ~ 0.27 miles through Mine Pool (MP) 1-4 and confluences with Black Creek (40.971773, -76.047165). Black Creek (RPW) flows southwest, then north ~ 13 river miles to confluence with Nescopeck Creek (41.007680, -76.166500). Nescopeck Creek (RPW) then flows north to confluence with the Susquehanna River at the town of Nescopeck (41.050325, -76.236274). Note, a temporary break in the surface connection occurs where between MP1-2. Flows are contributed from MP2 into MP1 through a subsurface connection of ~170 linear feet.

Figure 2: Flow path of the unnamed tributary to Black Creek, a relatively permanent tributary. The red line indicates the temporary break in surface connection.



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 – there are no Section 10 waters in the review area.

6. 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

---

<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.



“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):

NA

e. Tributaries (a)(3):

All surface flows through the AOR enter and move through a series of surface drainage features (C4 and C3) and mine pools (MP1-4) because of historic disturbances associated with surface mining. C3 is an RPW tributary which eventually confluences with Black Creek in the southeastern corner of the property (outside of the AOR). The flow pattern thru the AOR is as follows: Flow enters the AOR at the eastern boundary carried by watercourse C4 [(a)(3) RPW tributary]. C4 contributes continuous surface flow (CSC) into and thru MP4. C4 reforms and conducts CSC into MP3. Flows move thru MP3 contributing CSC to MP2 via an artificial structure (pipe). Flows move west thru MP2 to a temporary break in surface flow and into MP1 which a portion is within the AOR. It is the determination of the Corps that flows are conveyed from MP2 into MP1 via a ~170-foot subsurface connection. The strip of land separating the two mine pools appears to be very porous mine spoil from the historic mining activities. It should also be noted that the water elevation in MP1 is elevated due to recent beaver activity damming both discharge areas from MP1 to the receiving tributary C3, an (a)(3) water. Corps observations during our field inspection revealed similar flow volumes entering the AOR at C4 and at the discharge point from



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

MP1 into C3. While it is obvious that groundwater and surface water inputs from the north contribute flow into the MPs, it is unlikely they would maintain the water levels observed during the inspection. Especially considering the recent drought conditions in 2024. Furthermore, a review of historic aerial photography and topographic mapping suggests that an unnamed tributary to Black Creek predates the mining activity (see Figure 3 below). The referenced 1893 topographic map shows a large wetland bisected by a perennial stream flowing in the same general direction and location as many of the aquatic features described above. The Corps has determined that the combination of C4, MPs1-4, and C3 are RPW standing or flowing bodies of water and are (a)(3) tributaries. All have an observed Ordinary High-Water Mark (OHWM).

Mine Pool 1 (MP 1): RPW [~ 5.21 acres and ~ 787 linear feet (inlet to outlet)]

MP1 is a mine pool located in the western portion of the AOR. MP1 has a continuous surface connection to Watercourse 3, an (a)(3) tributary outside of the AOR. This relatively permanent standing body of water provides flow to Black Creek.

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Photo 1: Mine Pool 1 showing beaver dam, photo taken by the Corps July 2, 2024.



Mine Pool 2 (MP 2): RPW [~ 18.6 acres and ~ 2,088 linear feet (inlet to outlet)]

MP2 is a mine pool located in the center of the AOR. Despite a temporary break in surface connection (~ 175 feet), MP2 provides flow through a sub-surface



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

hydrologic connection to MP1. MP2 is a relatively permanent body of water providing flow eventually to Black Creek.

Mine Pool 3 (MP 3): RPW [~ 2.4 acres and ~405 linear feet (inlet to outlet)]

MP3 is a mine pool that is located within the eastern portion of the AOR. Mine Pool MP3 has a continuous surface connection via pipe (~ 55 feet) to Mine Pool MP2. This relatively permanent body of water provides flow eventually to Black Creek.

Photo 2: Mine Pool 2 showing pipe from Mine Pool 3, photo taken by the Corps July 2, 2024.



Mine Pool 4 (MP 4): RPW [~ 2.0 acres and 416 linear feet (inlet to outlet)]

MP4 is a mine pool that is in the eastern portion of the AOR. MP4 has a continuous surface connection to MP3 through Watercourse C4, an (a) (3) water. This body of water (RPW) provides flow eventually to Black Creek.

Watercourse C2 (Black Creek): RPW [175 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C2 is a perennial stream that was located within the southern portion of the review area flowing west. The stream channel was approximately 15 to 65-feet-wide and 1 to 4 feet deep. Surface water flow within the stream channel was at an approximate depth of 0.5 to 3 feet with bottom substrate consisting of boulder, cobble, gravel, and pebble.

Watercourse C4: RPW [81 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C4 is a perennial stream that was located within the northeastern portion of the review area. The stream flowed southwest from an outlet that was located under Interstate 81. The stream flowed under an active railroad. The stream braided into 3 channels and flowed into MP4 and MP3. The stream channel was approximately 3 to 30-feet-wide and 2 to 8-feet-deep. Surface water flow within the stream channel was at an approximate depth of 6 to 18 inches with bottom substrate consisting of boulder, cobble, gravel, and pebble.

Watercourse C5: RPW [24 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C5 is an intermittent stream that was located within the northeastern portion of the AOR. The stream flowed southeast from Wetland W22 functioning as a drainage passage for excess hydrology that was discharged from the wetland. The stream channel was approximately 2 to 7-feet-wide and 1 to 3-feet-deep. Surface water flow within the stream channel was at an approximate depth of 1 to 2 inches with bottom substrate consisting of cobble, pebble, mud and vegetation.

Watercourse C7: RPW [90 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C7 is an intermittent stream that was located within the northeastern portion of the AOR. The stream flowed southeast from Wetland W5

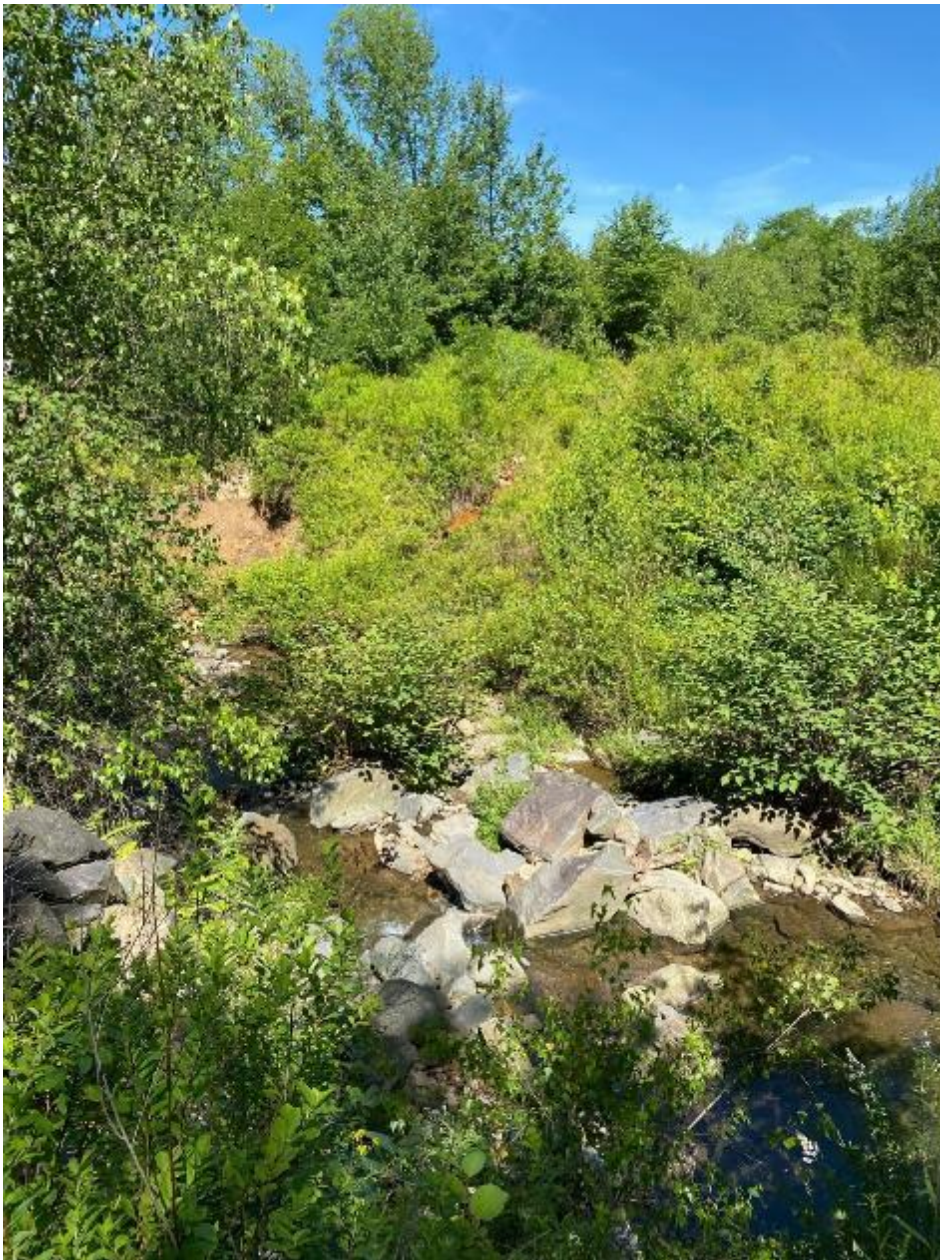


CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

functioning as a drainage passage for excess hydrology that was discharged from the wetland. The stream channel was approximately 3 to 6-feet-wide and 2 to 4-feet-deep. Surface water flow within the stream channel was at an approximate depth of 1 to 6 inches with bottom substrate consisting of boulder, cobble, gravel, mud, and vegetation.

Photo 3: Watercourses C4 & C7 in the background; taken by the Corps on July 2, 2024.



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Watercourse C20: RPW [472 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C20 is an intermittent stream that receives flow from W39 and provides freshwater to MP2. The stream channel was approximately 4 to 20-feet-wide and 1 to 4-feet-deep. Surface water flow within the stream channel was at an approximate depth of 0.5 to 2 inches with bottom substrate consisting of cobble, gravel, pebble, mud and sediment.

Photo 4: Source of Watercourse C20 (enclosure) which receives flow from Wetland W39. The staining provides OHWM and confirms RPW flow. Photo taken by Corps June 2, 2024.





CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Photo 5: Watercourse C20 south of the enclosure exhibiting OHWM and channel morphology. Photo taken by Corps June 2, 2024.



Watercourse C21: RPW [404 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C21 receives flow from W35 and is an intermittent stream flows confluences with watercourse C20 before entering MP2. The stream shared confluence with Watercourse C20. The stream channel was approximately 3 to 16-feet-wide and 1 to 2-feet0deep. Surface water flow within the stream channel



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

was at an approximate depth of 0.5 to 2 inches with bottom substrate consisting of cobble, gravel, pebble, and mud.

Watercourse C22: RPW [155 linear feet] – is a RPW that has a continuous surface connection to downstream waters and has an OHWM.

Watercourse C22 is an intermittent stream that was located within the center of the AOR. The stream flowed southwest from W36 functioning as a drainage passage for excess surface water discharged from this wetland. The stream flowed into MP2 providing freshwater to the mine pool. The stream channel was approximately 5 to 30-feet-wide and 2 to 6-feet-deep. Surface water flow within the stream channel was at an approximate depth of 0.5 to 2 inches with bottom substrate consisting of cobble, gravel, pebble, mud, and sediment.

f. Adjacent Wetlands (a)(4):

Wetland W5, Wetland W21, Wetland W22, Wetland W31, Wetlands W35-36 and W39 meet wetland parameters and directly abut (a)(3) tributaries.

Wetland W5: Palustrine Emergent & Scrub Shrub Wetland [2.96 acres]

Wetland W5 directly abuts and provides a continuous surface connection to Watercourse C7 that drains into Mine Pool MP4. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Photo 6: Wetland 5, Photo taken by the Corps June 2, 2024



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Wetland W21: Palustrine Forested/Emergent Wetland [0.10 acres]

Wetland W21 directly abuts and provides a continuous surface connection to Watercourse C5 that eventually drains into MP4. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Wetland W22: Palustrine Forested/Emergent Wetland [0.31 acres]

Wetland W22 directly abuts and provides a continuous surface connection to Watercourse C5 that eventually drains into MP4. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Wetland W31: Palustrine Forested Wetland [3.92 acres]

Wetland W31 directly abuts and provides a continuous surface connection to Watercourse C2, an (a)(3) tributary. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Wetland W35: Palustrine Emergent Wetland [0.31 acres]

Wetland W35 directly abuts and provides a continuous surface connection to Watercourse C21 that eventually drains into Mine Pool MP2. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Wetland 36: Palustrine Forested Wetland [0.39 acres]

W36 directly abuts and provides a continuous surface connection to Watercourse C22 that eventually drains into Mine Pool MP2. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

Wetland W39: Palustrine Scrub-Shrub/Emergent Wetland [4.88 acres]

Wetland W39 has a continuous surface connection via a 350-foot-long pipe that daylights as Watercourse C20 that eventually flows into MP2. The pipe is a type of feature that provides evidence that sufficient levels of surface flow are occurring between the wetland and the relatively permanent water (groundwater) to warrant construction of these features (MEMORANDUM ON NAP-2023-01223)

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

signed 25 June 2024). This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement.

g. Additional Waters (a)(5):

N/A

## 7. 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>7</sup>

There are 3 stormwater Management ponds (SWM) are manmade stormwater management facilities excavated in uplands, determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(5)). \*Figure 4 lists the SWM as Artificial Swim Ponds; added SWM 1-3 to map.

*“33 CFR 328.3(b)(5), Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.”*

SWM 1; meets the (b)(5) exclusion and is non-jurisdictional

SWM 1 is a stormwater management facility located in the central portion of the project area to the north of MP-2. SWM 1 was excavated wholly in uplands and does not impound other waters. SWM1 captures upland runoff from previous land use. SWM1 has no continuous surface connection (no CSC) to other waters, i.e., there is no outfall/outlet structure, stream, or discrete conveyance downslope of the pond.

---

<sup>7</sup> 88 FR 3004 (January 18, 2023)

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Photo 7: SWM 1, looking south. Taken by Corps on July 3, 2024.



SWM 2; meets the (b) (5) exclusion and is non-jurisdictional.

SWM 2 is a stormwater management facility located in the central portion of the project area to the north of MP-2. SWM 2 was excavated wholly in uplands and does not impound other waters. SWM 2 captures upland runoff from previous land use.



CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Photo 8: SWM 2, looking south. Taken by Corps on July 3, 2024.



SWM 3; meets the (b) (5) exclusion and is non-jurisdictional.

SWM 3 is a stormwater management facility located in the central portion of the project area to the north of MP-2. SWM 3 excavated wholly in uplands and does not impound other waters. SWM 3 captures upland runoff from previous land use.

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Photo 9: SWM 3, looking south. Taken by Corps on July 3, 2024.



*(33 CFR 328.3(b)(3), Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;)*

C24-Roadside ditch; meets the (b)(3) exclusion and is non-jurisdictional.

There is a manmade ditch adjacent to the main entrance to the abandoned mine. The ditch was excavated wholly in uplands and does not drain wetland areas. The ditch features grassy vegetation and no ordinary high water mark indicators. The roadside ditch near the main entrance (identified 'C24' on the Corps AJD Area of Review map), was determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(3)).

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

The erosional features (identified C1, C9, C10, C14, C15, C19, C25, C26 on the Corps AJD Area of Review map), was determined to be non-jurisdictional (excluded under 33 CFR 328.3(b)(8)).

*(33 CFR 328.3(b)(8), Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.*

C1, C9, C10, C14, C15, C19, C25, C26 -Erosional features; meet the (b)(8) exclusion and are non-jurisdictional.

There are 8 erosional features located throughout the AOR. The erosional features have no ordinary high water mark indicators and indicated low volume and infrequent flow.

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).

Wetland W6: Palustrine Emergent Wetland; non-jurisdictional [0.05 acres]  
\*Figure 4 is corrected to add W6.

Wetland W6 is a palustrine emergent (PEM) wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W6 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W23: Palustrine Forest/Emergent Wetland; non-jurisdictional [0.29 acres]

Wetland W23 a palustrine forested/emergent (PFO/PEM) wetland that is located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W23 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W34: Palustrine Emergent Wetland; non-jurisdictional [0.10 acres]



Wetland W34 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W34 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W38: Palustrine Emergent Wetland; non-jurisdictional [0.10 acres]

Wetland W38 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W38 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W40: Palustrine Emergent Wetland; non-jurisdictional [1.10 acres]

Wetland W40 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W40 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W41: Palustrine Emergent Wetland; non-jurisdictional [0.02 acres]

Wetland W41 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W41 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Wetland W42: Palustrine Emergent Wetland; non-jurisdictional [0.01 acres]

Wetland W42 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W42 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Wetland W43: Palustrine Emergent Wetland; non-jurisdictional [0.11 acres]

Wetland W43 is a palustrine emergent wetland that was located within the eastern portion of the AOR. This wetland meets the standard 3 parameter approach per the 1987 Manual and Eastern Mountains and Piedmont Regional Supplement. Wetland W43 has no continuous surface connection to other waters (no-CSC), i.e., there is no stream or discrete feature (swale, erosional feature, etc.) conveying flow from the feature to other waters.

Photo 10: Wetland W41, looking northeast. No continuous surface connection present between Wetland 41 and other waters. Photo taken by Corps on July 3, 2024.

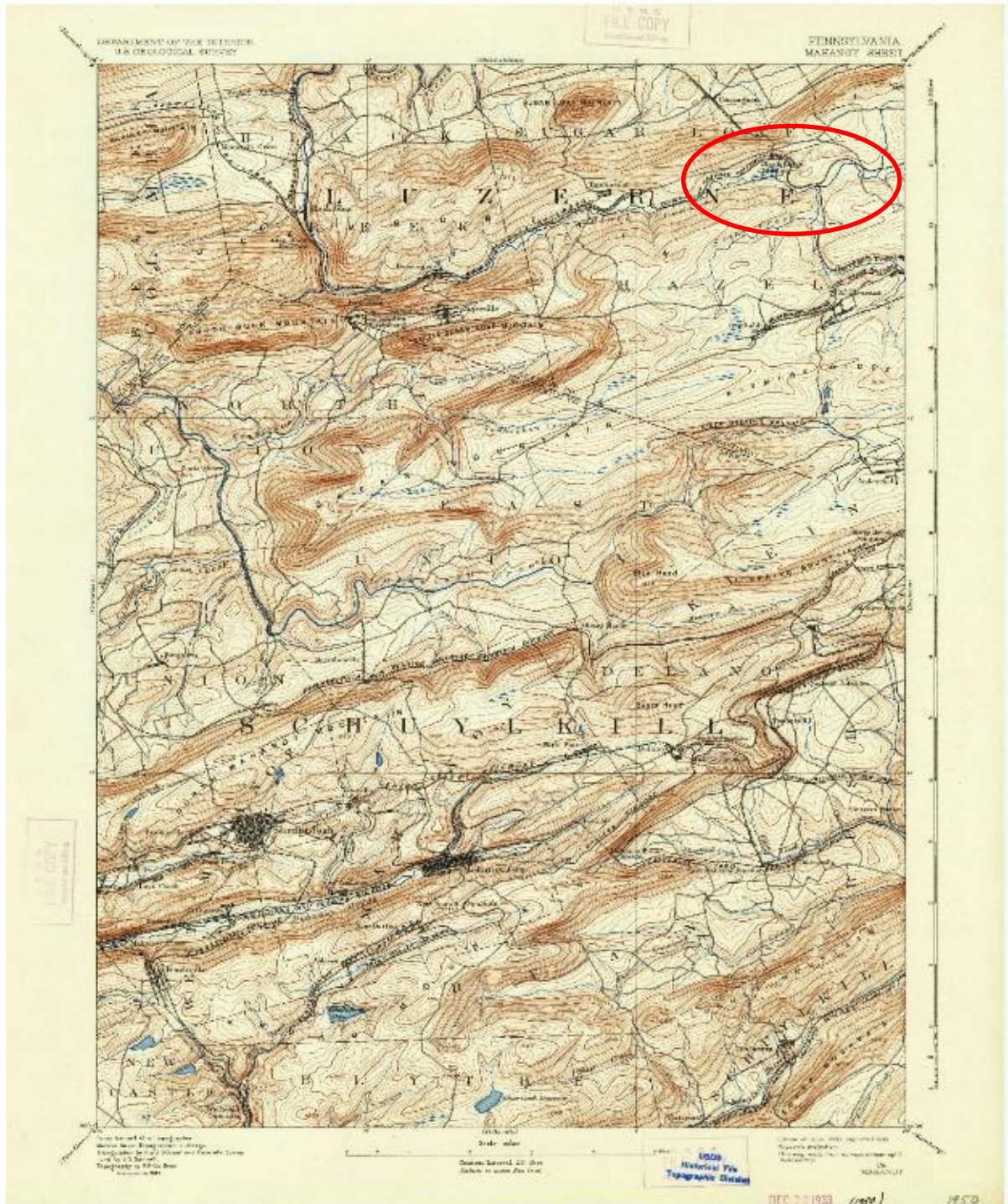




CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Figure 3a: U.S.G.S. Topographic mapping, Mahanoy sheet, Edition of 1893, reprinted in 1933

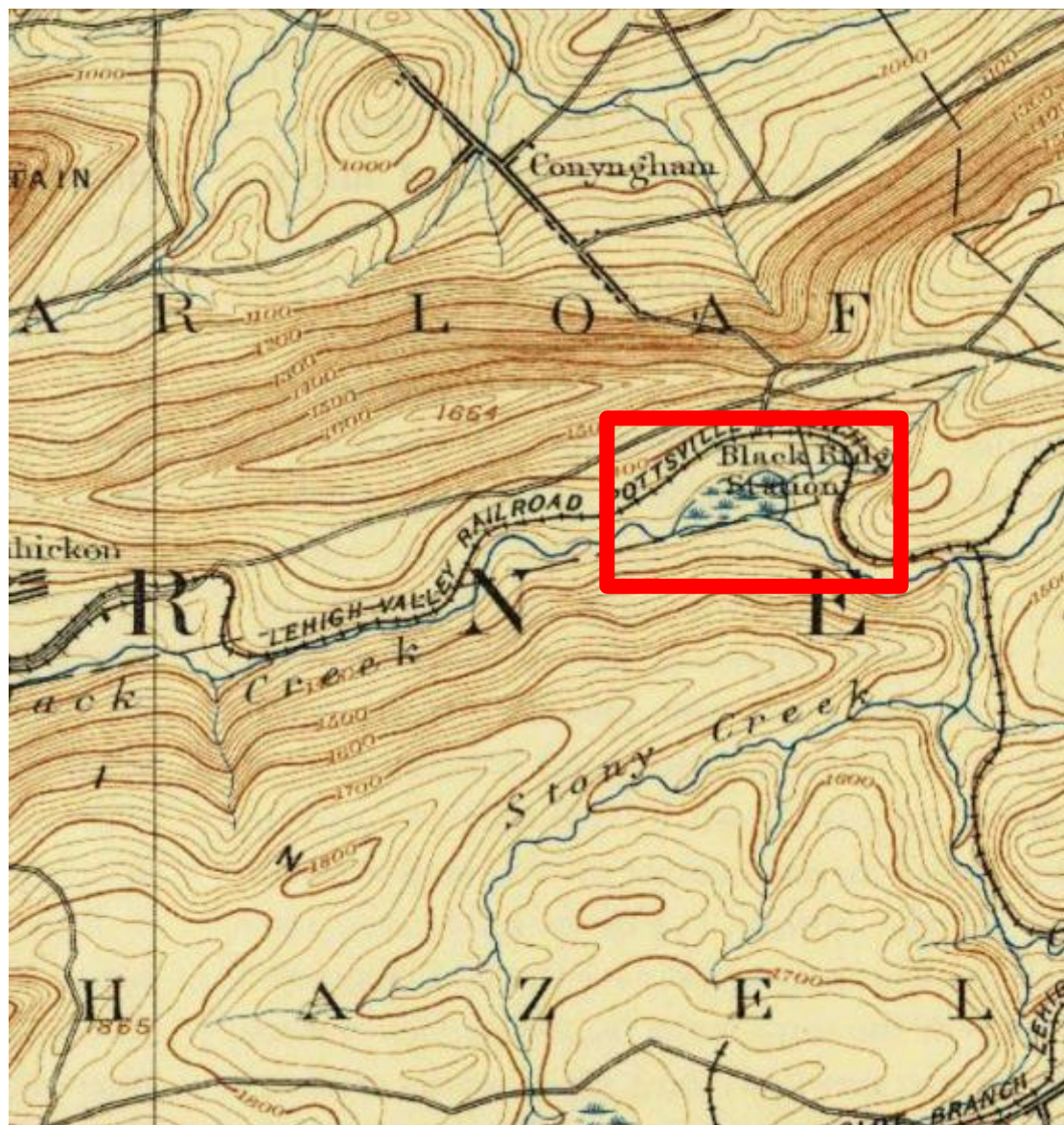




CENAB-OPR-P 1100B

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

Figure 3b: Figure 3a. U.S.G.S. Topographic mapping, Mahanoy sheet, Edition of 1893, reprinted in 1933. This enlargement of Figure 3a illustrates a large wetland area and perennial stream channel in the vicinity of the current Mine Pools.



8. 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 inspections by Corps personnel, July 2-3, 2024.

CENAB-OPR-P 1100B

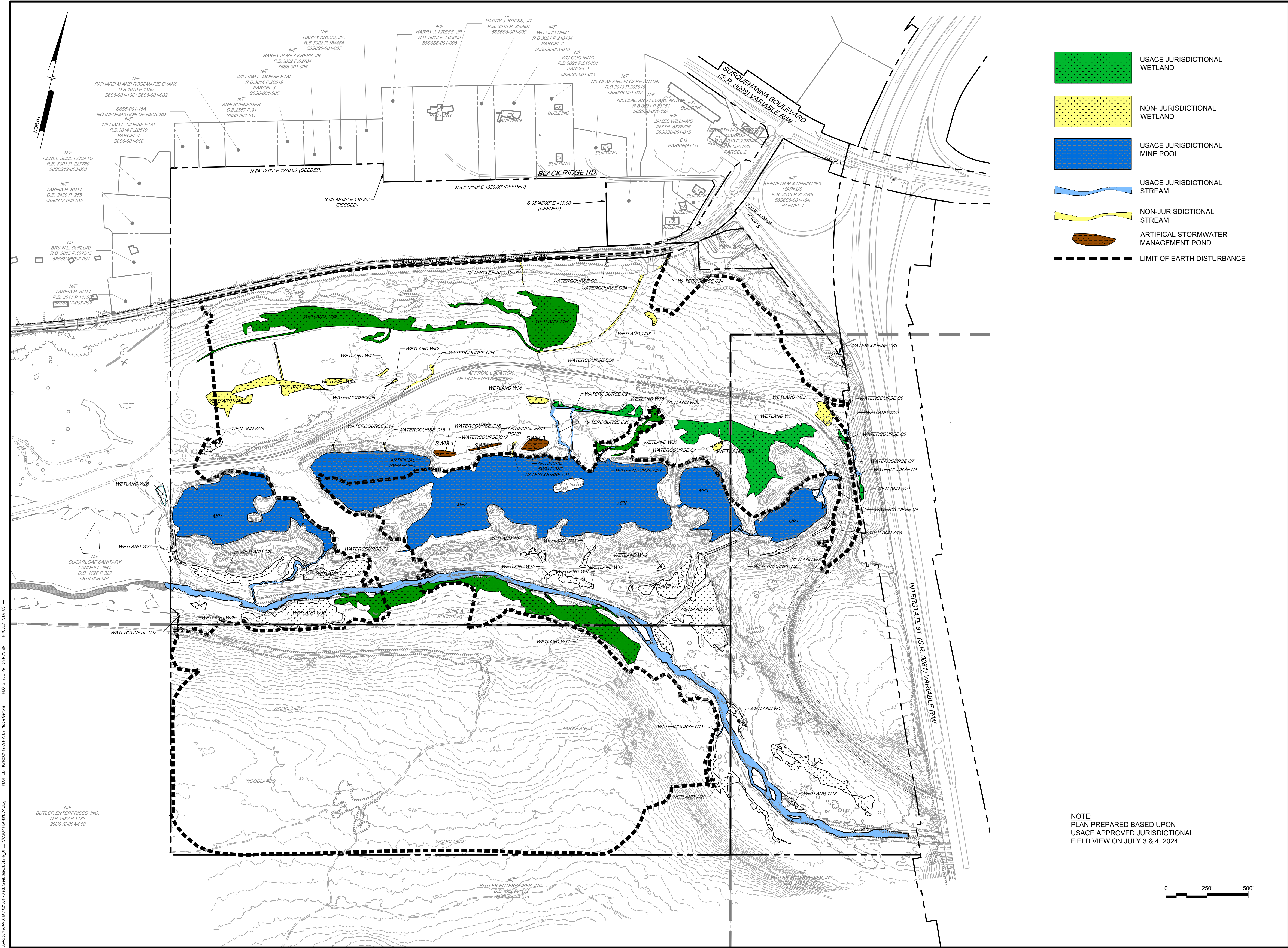
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2023-00448-P33]

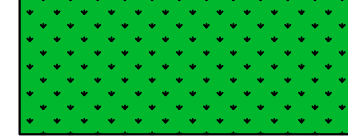




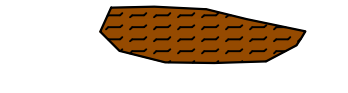

- b. Aerial Imagery, accessed via Google Earth.
- c. US FWS National Wetland Inventory (NWI) Mapping (<https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>).
- d. WOTUS Significant Nexus Viewer (<https://arcportal-ucop-corps.usace.army.mil/s0portal/apps/webappviewer/index.html?id=53a847df50374628ba3c3b31ddf1f214>).
- e. Watershed Resources Registry (<https://watershedresourcesregistry.org/states/pennsylvania.html>).
- f. Soils mapping, accessed via USDA Web Soils Survey Mapping (<https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>)
- g. [Historical Topographic Maps - Preserving the Past | U.S. Geological Survey \(usgs.gov\)](https://www.usgs.gov/programs/historical-topographic-maps)

9. OTHER SUPPORTING INFORMATION. N/A


10. 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.





-  USACE JURISDICTIONAL WETLAND
-  NON- JURISDICTIONAL WETLAND
-  USACE JURISDICTIONAL MINE POOL
-  USACE JURISDICTIONAL STREAM
-  NON-JURISDICTIONAL STREAM
-  ARTIFICIAL STORMWATER MANAGEMENT POND
-  LIMIT OF EARTH DISTURBANCE

NOTE:  
 PLAN PREPARED BASED UPON  
 USACE APPROVED JURISDICTIONAL  
 FIELD VIEW ON JULY 3 & 4, 2024.

**PENNONI ASSOCIATES INC.**  
 672 S. River Street  
 Suite 313  
 Plains, PA 18705  
 T 570.824.2200 F 570.824.0600

ALL DIMENSIONS MUST BE VERIFIED BY CONTRACTOR AND OWNER MUST BE NOTIFIED OF ANY DISCREPANCIES BEFORE PROCEEDING WITH WORK

**BLACK CREEK PROPERTIES**  
 TOMHICKEN ROAD - SUGARLOAF TOWNSHIP, HAZLE TOWNSHIP AND WEST HAZLETON BORO.  
 LUZERNE COUNTY, PENNSYLVANIA

**USACE APPROVED JURISDICTIONAL DETERMINATION MAPPING**

JVI, LLC  
 1265 MILLER ROAD  
 WIND GAP, PA 18091

NO.	DATE	REVISIONS	BY

ALL DOCUMENTS PREPARED BY PENNONI ASSOCIATES ARE INSTRUMENTS OF SERVICE IN RESPECT OF THE PROJECT. THEY ARE NOT INTENDED OR REPRESENTED TO BE SUITABLE FOR REUSE BY OWNER OR OTHERS ON THE EXTENSIONS OF THE PROJECT OR ON ANY OTHER PROJECT. ANY REUSE WITHOUT WRITTEN VERIFICATION OR ADAPTATION BY PENNONI ASSOCIATES FOR THE SPECIFIC PURPOSE INTENDED WILL BE AT OWNERS SOLE RISK AND WITHOUT LIABILITY OR LEGAL EXPOSURE TO PENNONI ASSOCIATES AND OWNER SHALL INDEMNIFY AND HOLD HARMLESS PENNONI ASSOCIATES FROM ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES ARISING OUT OF OR RESULTING THEREFROM.

PROJECT	JAVIX21001
DATE	2021-11-01
DRAWING SCALE	1"=50'
DRAWN BY	1005
APPROVED BY	JTG

I:\Admin\JAVIX\JAVIX21001 - Black Creek Remedial - SHEETS\CS\PLAN\EC-1.dwg  
 PLOTTED: 10/20/24 10:59 AM BY: Nisha Gamm  
 PROJECT STATUS: PLOTTED BY: Pennoni\NCS\ab

NF  
 BUTLER ENTERPRISES, INC.  
 D.B.1682 P.1172  
 2616V6-00A-018