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U. S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT
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CENAB-OPR- R P 1100B

16 September 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 NAB-2024-00295-P33 (Phoenix Landfill AJD).²

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, 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 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.

The subject of this approved jurisdictional determination is a 27.7-acre site located in Duncan Township, Tioga County, Pennsylvania (41.635778 N, -77.268683 W). Land use and land cover within the area of investigation consists of reclaimed strip mines, forestland, and existing landfill access roads. Topographically, the Project Area consists of mountainous land draining to the southeast. Runoff from the Project Area flows in a south direction towards an unnamed tributary of Babb Creek which flows into Pine Creek (Figure 1). Babb Creek is a major tributary of Pine Creek, entering the mainstream at the town of Blackwell, which is the downstream end of the gorge known as the Pennsylvania Grand Canyon.

The Corps received a request for a Department of the Army approved jurisdictional determination on 11 June 2024, for the subject site located in Duncan Township, Tioga County, Pennsylvania. The information provided in the request package, supplied by the consultant, included a USDA Natural Resources Conservation Service Soil Survey map, USGS topographic map, aerial imagery, USFWS National Wetland Inventory Map, USGS National Hydrography Dataset, a site map, and wetland data sheets. On 11 September 2024, the Corps conducted a site visit and walked the entire 27.7-acre area of review as identified on the enclosed drawing dated December 2023. The majority of the Corps area of review encompasses upland forested lands exhibiting low-lying areas in the southeastern portion of the project area that had surface hydrology. The project area has been heavily manipulated with prior evidence of reclaimed strip mines and landfill access roads. The soils on the site are mapped as Mardin channery silt Loam, Strip Mine, and Volusia channery silt loam (Tioga County Soil Survey map, 2024). These soils and their minor components are classified as non-hydric and contain hydric inclusions. The Corps observed a soil sample within the area of review and there was a positive hydric soil indicator of Depleted Matrix (F3). Based on field observations, supplemental information reviewed by the Corps, and in accordance with the protocol contained within the 1) Eastern Mountains and Piedmont Regional Supplement Version 2.0 and 2) 1987 Corps Delineation Manual, the Corps observed hydrophytic vegetation, hydric soils, and wetland hydrology indicators within the above-mentioned area of review. The Corps area of review (Figure 1) includes seven emergent wetlands (0.353-acre), three palustrine forested wetlands (1.22-acre), and two palustrine scrub/shrub wetlands (0.005-acre). The Corps determined that all the referenced wetlands do not have a surface connection to jurisdictional waters. These features have developed as a result of historic mining activity (Figure 2).

Figure 1: Project Area

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [NAB-2024-00295-P33 (Phoenix Landfill AJD)]

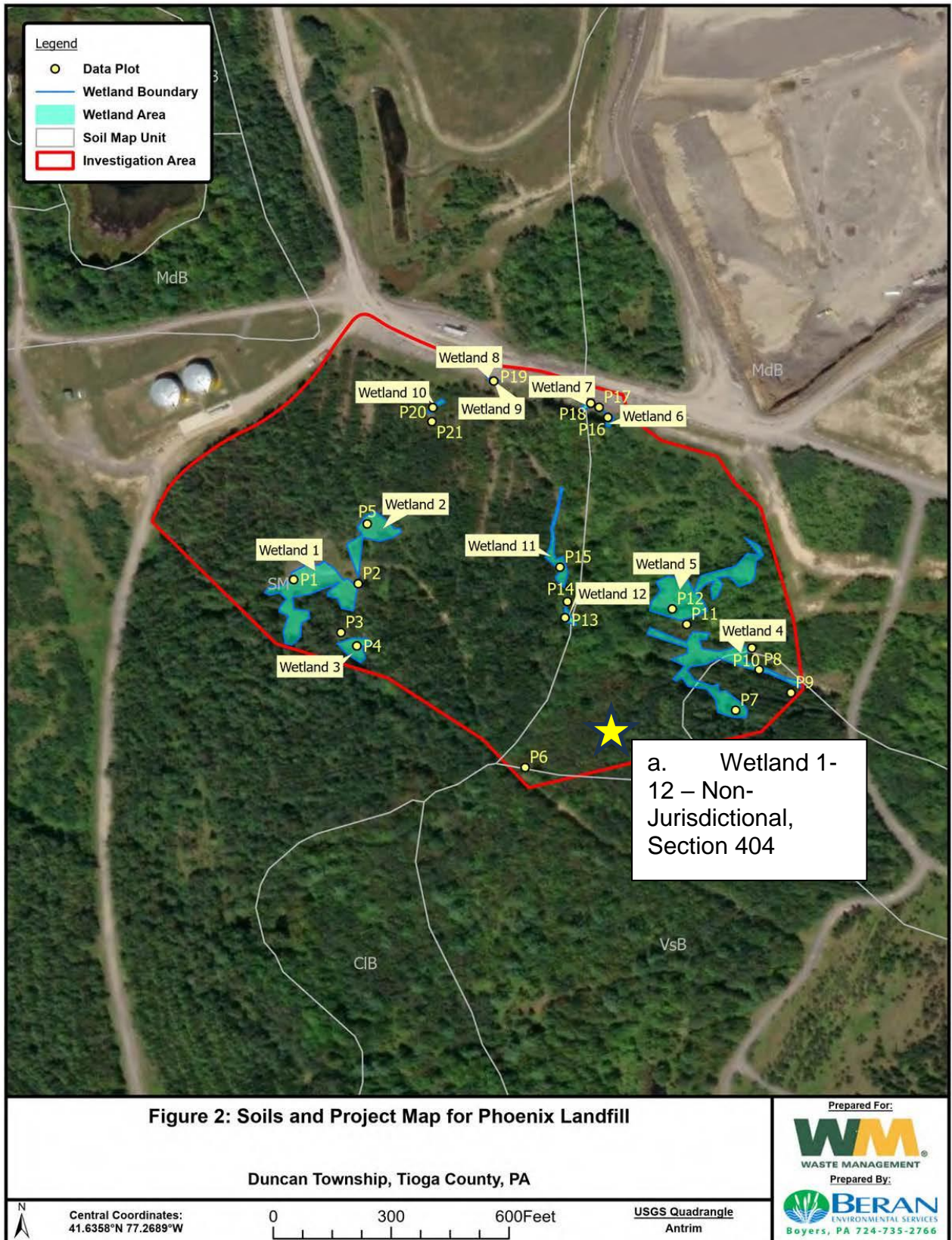




Figure 2: Example of a depressional area with no continuous surface connection to a jurisdictional water

1. SUMMARY OF CONCLUSIONS.

- a. Wetland 1 – Non-Jurisdictional, Section 404
- b. Wetland 2 – Non-Jurisdictional, Section 404
- c. Wetland 3 – Non-Jurisdictional, Section 404
- d. Wetland 4 – Non-Jurisdictional, Section 404
- e. Wetland 5 – Non-Jurisdictional, Section 404
- f. Wetland 6 – Non-Jurisdictional, Section 404
- g. Wetland 7 – Non-Jurisdictional, Section 404

- h. Wetland 8 – Non-Jurisdictional, Section 404
- i. Wetland 9 – Non-Jurisdictional, Section 404
- j. Wetland 10 – Non-Jurisdictional, Section 404
- k. Wetland 11 – Non-Jurisdictional, Section 404
- l. Wetland 12 – Non-Jurisdictional, Section 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 United States, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area (Figure 1) is comprised of approximately 27.7 acres, located in Duncan Township, Tioga County, Pennsylvania. (Coordinates: 41.635778 N, -77.268683 W). The area is comprised of reclaimed strip mines, forestland, and existing landfill access roads that had surface hydrology. There is no flow path from any delineated wetlands or waters on the site to any interstate water, TNW or the territorial seas, or interstate water.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. There is no flow path from any delineated wetlands or waters on the site to any interstate water, TNW or the territorial seas, or interstate water.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. None of the aquatic resources identified within the Area of Review have a flow path to interstate waters. There was no evidence of flow out of any of the existing aquatic resources.

6. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

⁶ 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.

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 10.⁷ 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): 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).⁸ N/A

⁷ 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.

⁸ 88 FR 3004 (January 18, 2023)

- 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). The Corps determined the Corps area of review includes seven emergent wetlands (0.353-acre), three palustrine forested wetlands (1.22-acre), and two palustrine scrub/shrub wetlands (0.005-acre); however, the wetlands do not have a continuous surface connection to a jurisdictional water and therefore are not adjacent wetlands. The wetlands have developed as a result of historic mining activity.

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. The Corps conducted a site visit on 11 September 2024, with a representative from Beran Environmental Services, Inc.
- b. USGS Topographic Map, provided by requestor, within December 2023 AJD request package.
- c. Aerial Image of Site, provided by requestor, within December 2023 AJD request package.
- d. USFWS NWI Map, provided by requestor, within December 2023 AJD request package.
- e. USDA NRCS Soil Survey Map, provided by requestor, within December 2023 AJD request package.

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.