

INFORMATION SHEET
 DETERMINATIONS OF NO JURISDICTION FOR ISOLATED, NON-NAVIGABLE, INTRA-STATE WATERS RESULTING
 FROM U.S. SUPREME COURT DECISION IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY
 V. U.S. ARMY CORPS OF ENGINEERS

DISTRICT OFFICE: Philadelphia

FILE NUMBER: CENAP-OP-R-200500695

REGULATORY PROJECT MANAGER: Kevin W. Dougherty Date: December 16, 2005

PROJECT REVIEW/DETERMINATION COMPLETED: In the office N (Y/N) Date: _____
 At the project site Y (Y/N) Date: July 20, 2005

PROJECT LOCATION INFORMATION:

State: Pennsylvania

County: Lehigh

Center coordinates of site by latitude & longitudinal coordinates: 40-30-17.59 N; 75-30-35.57 W

Approximate size of site/property (including uplands & in acres): 59.596

Name of waterway or watershed: Leibert Creek (Lehigh River)

SITE CONDITIONS:

Type of aquatic resource ¹	0-1 ac	1-3 ac	3-5 ac	5-10 ac	10-25 ac	25-50 ac	> 50 ac	Linear feet	Unknown
Lake	<input type="checkbox"/>								
River	<input type="checkbox"/>								
Stream	<input type="checkbox"/>								
Dry Wash	<input type="checkbox"/>								
Mudflat	<input type="checkbox"/>								
Sandflat	<input type="checkbox"/>								
Wetlands	0.018 ac	<input type="checkbox"/>							
Slough	<input type="checkbox"/>								
Prairie pothole	<input type="checkbox"/>								
Wet meadow	<input type="checkbox"/>								
Playa lake	<input type="checkbox"/>								
Vernal pool	<input type="checkbox"/>								
Natural pond	<input type="checkbox"/>								
Other water (identify type)	<input type="checkbox"/>								

¹Check appropriate boxes that best describe type of isolated, non-navigable, intra-state water present and best estimate for size of non-jurisdictional aquatic resource area.

Migratory Bird Rule Factors ¹ :	If Known		If Unknown Use Best Professional Judgment		
	Yes	No	Predicted to Occur	Not Expected to Occur	Not Able To Make Determination
Is or would be used as habitat for birds protected by Migratory Bird Treaties?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat by other migratory birds that cross state lines?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat for endangered species?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is used to irrigate crops sold in interstate commerce?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹Check appropriate boxes that best describe potential for applicability of the Migratory Bird Rule to apply to onsite, non-jurisdictional, isolated, non-navigable, intra-state aquatic resource area.

TYPE OF DETERMINATION: Preliminary Or Approved

ADDITIONAL INFORMATION SUPPORTING NJD (e.g., paragraph 1 – site conditions; paragraphs 2-3 – rationale used to determine NJD, including information reviewed to assess potential navigation or interstate commerce connections; and paragraph 4 – site information on waters of the U.S. occurring onsite):

1. SITE CONDITIONS

- a. The property consists of a mixture of active agricultural fields (corn) and woodlots underlain by well drained (Fleetwood and Chester Series) and moderately well drained (Readington) soils. There are no structures on the site. Surrounding land use is rural residential and agricultural to the south and east; an older residential area borders the site to the north and northwest (built between 1958 and 1987); and newer residential development borders the site to the southwest (built 1987-2004). Review of the aerial photography in the Soil Survey for Lehigh County Pennsylvania (1963) shows that nearly the entire tract was cultivated at the time of the base photography (1958). The largest current woodlot, located in the northern and northwestern corner of the site was wooded in 1958. The 1958 photography as annotated in the Soil Survey does not identify any streams or other drainage features on the property.
- b. Topographically the property lies nearly on the crest of South Mountain. The southern portion of the site lies on a knoll that steeply slopes down to the west. An arm of the knoll extends northeast as a narrow ridge that encompasses the majority of the currently cultivated area. This narrow ridge slopes down to the north, east and south forming a series of small spur and valley features along the sides of the ridge. To the north the knoll flattens out into a gently sloping saddle to the north and northwest. This saddle is largely wooded and includes the area wooded in 1958. All waters and wetlands identified on the tract are located in this area.
- c. Three areas are identified on the site as wetlands according to the criteria of the 1987 Corps of Engineers Wetland Delineation Manual. Two of these areas are waters of the United States as they are wetlands contiguous with small intermittent to ephemeral streams that are part of the surface tributary system of a water of the United States. One 0.018 acre area of forested wetland depression is isolated and without a nexus to interstate or foreign commerce and therefore is not a water of the United States.

2. RATIONALE FOR DETERMINATION

- a. The excluded area is a small (0.018 acre) wooded depression in the interfluvium of two small subdrainages. Based on the field data, the area is a seasonally saturated closed catchment located between the streams but it had no channel connection with either subdrainage. At its closest point, the wetland is approximately 100 feet from the poorly defined channel of an ephemeral/intermittent tributary (UNT 1) located northeast of the wetland and approximately 120 feet from a channelized ephemeral stream located to the northwest (UNT 2). Additionally, the land to the east slopes away from the closest tributary (UNT 1) thereby making a connection by overland flow to either UNT 1 or wetlands adjacent to this stream improbable. The flow path to the northwest (UNT 2) has a slope of approximately 1% making a connection by overland flow from the depression to this stream or its adjacent wetlands also improbable. Furthermore, the depression would need to fill with 0.75 to 1 foot of water before the water surface elevation would equal the ground surface to the west. Based upon the lack of physical connection with either stream or their adjacent wetlands, then the depression is neither contiguous nor bordering a water of the United States. Further considering that: 1) the distance separating this wetland from a surface tributary relative to the size of each; 2) that either tributary at this point is very small (1-3 feet wide); and, 3) that an overland connection under normal circumstances between the wetland and either tributary is improbable, then the wetland is not neighboring. As it is not neighboring, bordering or contiguous with either of the unnamed tributaries, it is not an adjacent wetland but is an isolated, intrastate wetland.
- b. To determine if jurisdiction could be asserted the following factors were considered:
 1. As the area has no permanent standing water, only shallow seasonal ponding, and that the depression is filled with woody vegetation, then the depression could not support for any type of vessel. The area is therefore not navigable in fact.
 2. The small size of the wetland and the lack of any unusual properties make it unlikely that the wetland could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The wetland supports neither fish nor shellfish and water from it could be used neither to irrigate crops nor for industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(ii)). The wetland does not contain merchantable timber, there are no known mineral deposits, and the area does not contain sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)).
- c. Based upon the factors considered above, the wetland is an isolated, intrastate wetland with no nexus to interstate or foreign commerce. As such, pursuant to 33 CFR 328.3, it is not a water of the United States, and is not subject to Section 404 of the CWA.

3. WATERS OF THE UNITED STATES

- a. Two areas were identified on the site that either contained channels with Ordinary High Water (OHW) lines or met the 1987 Corps Manual criteria for identification as wetlands. These areas included: 1) an area identified by flags W-200 and W-258 that consisted a series of ephemeral/intermittent channels (UNT 1) (1-3 feet wide and generally less than 0.5 feet deep) connected with a contiguous system of depressions and flats that met the wetland criteria of the 1987 Corps of Engineers Manual; and 2) an area identified by W-146 through W-103 that consisted of a similar system of channels (UNT 2), depressions, and flats. UNT 1 flows to a small channelized stream and swale that carry flows through the existing developed residential area to the northeast. Flow then discharges into a series of stormwater management ditches and culverts along the roadways. These channels eventually discharge into Leibert Creek. The northern portions of UNT 2 on the site appear to flow north into a second small channelized stream and swale that flows through the existing developed residential area to the northeast. Flow then discharges into a series of stormwater management ditches and culverts along the roadways. These channels also eventually discharge into either Leibert Creek or into an unnamed tributary of the Little Lehigh Creek. The southern portions of UNT 2 may flow by other channels to the southwest, eventually flowing into Leibert Creek. Leibert Creek is tributary to the Little Lehigh Creek which is tributary to the Lehigh River, an intrastate, navigable water of the United States pursuant to 33 CFR 328.3(a)(1). The Lehigh River is tributary to the Delaware River, an interstate navigable water of the United States pursuant to 33 CFR 328.3(a)(1) and 33 CFR 329.4. Thus, the unnamed tributaries on the site are part of the surface tributary system of a water of the United States and are therefore waters of the United States pursuant to 33 CFR 328.3(a)(5). The wetlands contiguous with the series of channels that comprise UNT 1 and 2 are therefore wetlands adjacent to a water of the United States (33 CFR 328.3(c)). Adjacent wetlands are waters of the United States pursuant to 33 CFR 328.3(a)(7).

4. OTHER COMMENTS

Several linear features identified from the topographic survey or from aerial photography were examined in the field. These features were found to be either: 1) old roadways including abandoned farm lanes; 2) rock outcrops, stone walls or earth berms; or 3) rills and gullies without a direct surface connection to a water of the United States. The rills and gullies generally originated within the cultivated fields and dissipated into sheet flow once they entered unplowed areas or once slopes decreased to less than 3-5%. These rills and gullies were considered to upland erosional features.

Enclosure 2