

**APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers**

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

- A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 28 Apr 2020**
- B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CENAP-2016-00238 Valley Industrial Properties Phase III and IV NO**
- C. PROJECT LOCATION AND BACKGROUND INFORMATION:** The project site is approximately 2,000 feet northwest of the intersection of North Broad Street and West Central Ave, East Bangor, Pennsylvania.

State: Pennsylvania County: Northampton City: Borough of East Bangor, Washington and Upper Bethel Twps.

Center coordinates of site (lat/long in degree decimal format): Lat. 40.881317° N, Long. -75.191034° W
Universal Transverse Mercator: Northing Easting

Name of nearest waterbody: Brushy Meadow Creek
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: None
Name of watershed or Hydrologic Unit Code (HUC):

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
- Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date: 16 Apr 2020
- Field Determination. Date(s): 26 Feb 2020

SECTION II: SUMMARY OF FINDINGS: This Approved Jurisdictional Determination is

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There are no "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

- Waters subject to the ebb and flow of the tide.
 - Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
- Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There are no waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- Impoundments of jurisdictional waters
- Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: width (ft) and/or acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain: This Approved Jurisdictional Determination (AJD) is only for the large abandoned quarry titled “Pond 1- Open Water Quarry”, the two intermittent streams titled, “Stream 1 Intermittent” and “Stream 2 Intermittent”, which flow into the quarry, and the wetland titled, Wetland 1 PEM”. Other aquatic features are shown on the drawing but are not part of this determination. This includes historic features which have already been filled under previous determinations and/or permits and current features not included.

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least “seasonally” (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW: There are no TNW’s within the project area.

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is “adjacent”: N/A

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under Rapanos have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are “relatively permanent waters” (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW.

There are no non-TNWs that flow directly or indirectly into a TNW in the project area. Both of the intermittent streams flow directly into the quarry. The quarry is surrounded by shear walls approximately 60 feet high, except for the access road which leads down the small landing that is approximately at the water level. The quarry does not have a direct surface hydrological connection to a downstream water and does not function as part of a larger tributary system.

(i) General Area Conditions:

Watershed size: **square miles**
Drainage area: **square miles**
Average annual rainfall: inches
Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

- Tributary flows directly into TNW.
- Tributary flows through tributary before entering TNW.

Project waters are _____ river miles from TNW.
 Project waters are _____ river miles from RPW.
 Project waters are _____ aerial (straight) miles from TNW.
 Project waters are _____ aerial (straight) miles from RPW.
 Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW⁵:
 Tributary stream order, if known:

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):
 Average width:
 Average depth:
 Average side slopes: _____

Primary tributary substrate composition (check all that apply):

<input type="checkbox"/> Silts	<input type="checkbox"/> Sands	<input type="checkbox"/> Concrete
<input type="checkbox"/> Cobbles	<input type="checkbox"/> Gravel	<input type="checkbox"/> Muck
<input type="checkbox"/> Bedrock	<input type="checkbox"/> Vegetation.	Type
<input type="checkbox"/> Other. Explain:		% cover:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain:
 Presence of run/riffle/pool complexes. Explain:
 Tributary geometry: _____
 Tributary gradient (approximate average slope):

(c) Flow:
 Tributary provides for:
 Estimate average number of flow events in review area/year:
 Describe flow regime:
 Other information on duration and volume:

Surface flow is: _____ Characteristics:

Subsurface flow: _____ Explain findings:
 Dye (or other) test performed:

Tributary has (check all that apply):

<input type="checkbox"/> Bed and banks	
<input type="checkbox"/> OHWM ⁶ (check all indicators that apply):	
<input type="checkbox"/> clear, natural line impressed on the bank	<input type="checkbox"/> the presence of litter and debris
<input type="checkbox"/> changes in the character of soil	<input type="checkbox"/> destruction of terrestrial vegetation
<input type="checkbox"/> shelving	<input type="checkbox"/> the presence of wrack line
<input type="checkbox"/> vegetation matted down, bent, or absent	<input type="checkbox"/> sediment sorting
<input type="checkbox"/> leaf litter disturbed or washed away	<input type="checkbox"/> scour
<input type="checkbox"/> sediment deposition	<input type="checkbox"/> multiple observed or predicted flow events
<input type="checkbox"/> water staining	<input type="checkbox"/> abrupt change in plant community
<input type="checkbox"/> other (list):	
<input type="checkbox"/> Discontinuous OHWM. ⁷ Explain:	

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

<input type="checkbox"/> High Tide Line indicated by:	<input type="checkbox"/> Mean High Water Mark indicated by:
<input type="checkbox"/> oil or scum line along shore objects	<input type="checkbox"/> survey to available datum;
<input type="checkbox"/> fine shell or debris deposits (foreshore)	<input type="checkbox"/> physical markings;
<input type="checkbox"/> physical markings/characteristics	<input type="checkbox"/> vegetation lines/changes in vegetation types.
<input type="checkbox"/> tidal gauges	
<input type="checkbox"/> other (list):	

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain:

Identify specific pollutants, if known:

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

(iv) Biological Characteristics. Channel supports (check all that apply):

- Riparian corridor. Characteristics (type, average width):
- Wetland fringe. Characteristics:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

- Wetland size:
- Wetland type. Explain:
- Wetland quality. Explain:

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: _____ Explain:

Surface flow is: **Not Present**

Characteristics:

Subsurface flow: _____ Explain findings:

- Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

- Directly abutting
- Not directly abutting
 - Discrete wetland hydrologic connection. Explain:
 - Ecological connection. Explain:
 - Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are _____ river miles from TNW.
 Project waters are _____ aerial (straight) miles from TNW.
 Flow is from: _____
 Estimate approximate location of wetland as within the _____ floodplain.

(ii) Chemical Characteristics:

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain:

(iii) Biological Characteristics. Wetland supports (check all that apply):

- Riparian buffer. Characteristics (type, average width):
- Vegetation type/percent cover. Explain: Emergent vegetation - 100% cover
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings: Likely home to small mammals, birds, reptiles, amphibians and insects.

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: _____

Approximately () acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N) Size (in acres) Directly abuts? (Y/N) Size (in acres)

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:

2. Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

3. Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW. Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 - TNWs: linear feet width (ft), Or, acres.
 - Wetlands adjacent to TNWs:

2. **RPWs that flow directly or indirectly into TNWs.**
 - Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
 - Tributaries of TNW where tributaries have continuous flow “seasonally” (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

Provide estimates for jurisdictional waters in the review area (check all that apply):

 - Tributary waters: linear feet width (ft).
 - Other non-wetland waters: acres.

Identify type(s) of waters:

3. **Non-RPW⁸ that flow directly or indirectly into TNWs.**

- Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- Tributary waters: linear feet width (ft).
 - Other non-wetland waters: acres.
- Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 - Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:
 - Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

Provide acreage estimates for jurisdictional wetlands in the review area: 0.100 acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: 0.13 acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from "waters of the U.S.," or
- Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- which are or could be used for industrial purposes by industries in interstate commerce.
- Interstate isolated waters. Explain:
- Other factors. Explain:

Identify water body and summarize rationale supporting determination:

⁸ See Footnote # 3.

⁹ To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
 - Other non-wetland waters: acres.
- Identify type(s) of waters:
- Wetlands:

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers

- Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in “*SWANCC*,” the review area would have been regulated based solely on the “Migratory Bird Rule” (MBR).
- Waters do not meet the “Significant Nexus” standard, where such a finding is required for jurisdiction. Explain: Two short intermittent streams that flow directly into the hydrologically isolated quarry pit. The two waters in question do not flow to a TNW or to an RPW.
- Other: (explain, if not covered above): Wetland adjacent to the hydrologically isolated quarry pit.

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): 0.006 acre (Intermittent Streams 1 and 2)
- Lakes/ponds: _____ acres.
- Other non-wetland waters: 10.77 acres. List type of aquatic resource: Flooded open pit quarry
- Wetlands: 0.006 acres

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the “Significant Nexus” standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet, _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____
- Wetlands: _____

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps:
- Corps navigable waters’ study:
- U.S. Geological Survey Hydrologic Atlas:
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: Stroudsburg, PA 1:24,000 quadrangle
- USDA Natural Resources Conservation Service Soil Survey. Citation: NRCS Web Soil Survey
- National wetlands inventory map(s). Cite name: _____
- State/Local wetland inventory map(s): _____
- FEMA/FIRM maps:
- 100-year Floodplain Elevation is: _____ (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): Google Earth Images: 20 Apr 2014, 17 Apr 2016, 17 Apr 2017, and 15 Jun 2018,
- Previous determination(s). File no. and date of response letter: CENAP 2016-00238, Dated 22 Jan 2018 and CENAP 2014-00217, Dated 4 Jun 2014
- Applicable/supporting case law:
- Applicable/supporting scientific literature:
- Other information (please specify): _____

B. ADDITIONAL COMMENTS TO SUPPORT JD:

The project site is located approximately 2,000 feet northeast of the intersection of West Central Avenue and North Broad Street, East Bangor, Northampton County, Pennsylvania. This Approved Jurisdictional Determination is only dealing with four aquatic resources on the overall project area of approximately 93 acres. The four aquatic features are: the large abandoned quarry titled "Pond 1- Open Water Quarry", the two intermittent streams titled, "Stream 1 Intermittent" and "Stream 2 Intermittent", which flow into the quarry, and the wetland titled, Wetland 1 PEM" adjacent to the quarry. Two previous AJD's had been performed for the overall project area. These previous AJD's did not include all of the four aquatic features discussed in this AJD. CENAP 2014-00217 was for a smaller quarry located to the east of the quarry discussed in this AJD. That quarry was determined to be non-jurisdictional based on the current jurisdictional guidance. Subsequently this smaller quarry was filled in by the applicant. CENAP 2016-00283 that was issued on 22 Jan 2018 dealt with wetlands and a residential pond located to the northeast of the current quarry and one wetland located further east of the smaller filled quarry. This small wetland located east of the small quarry was adjacent to the west side of North Broad Street. On the 22 Jan 2018 AJD the wetlands and pond located on the northeast corner of the property were found to be non-jurisdictional. The small wetland located west of North Broad Street was found to be adjacent to the impoundment of Brushy Meadow Creek located immediately on the east side of North Broad Street. All of the aquatic features dealt with in the 22 Jan 2018 AJD have been filled and the one jurisdictional wetland was also filled, and mitigated for, under a PASPGP-5 permit issued by the Pennsylvania Department of Environmental Protection (PADEP).

The applicant's overall goal is to fill and level the entire site and then construct a small industrial or business type park on the property. The overall project site originally contained two small and one larger abandoned slate quarries and associated spoil piles. The two intermittent streams and the wetland, currently under review, occur completely within the upper rim of the larger quarry. The two intermittent stream emerge from seeps and flow for a short distances before dropping off a vertical step in the quarry wall down to a lower level before sheet flowing into the pool of the quarry. The wetland is located along the bottom shelf just above the water level in the quarry. The water seeps out of a near vertical wall along the backside of the shelf and collects in linear depression along the wall. Excess water in the wetland can flow out of a channel and into the quarry.

Aerial photos from 1939 and 1958 show the area was subject to extensive amounts of development including the piling of slate mine tailings and earthmoving. More recent aerial photography dated 15 June 2018 show that the features identified in the 22 Jan 2018 AJD have been filled. These aerial photographs also demonstrate that is no, and it appears there never has been, a direct surface hydrologic connections that drains water from the quarry to a downstream navigable water of the United States.

The 2 Dec 2008 revised guidance titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" jointly issued by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency states on page 5, footnote 20: "33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3 (s)(1). The "(a) (1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., The Great Salt Lake, UT and Lake Minnetonka, MN). For purposes of CWA jurisdictional and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or,
 - A federal judge court has determined that the water body is navigable-in-fact under federal law, or
 - They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
 - They have historically been used for commercial navigation, including water-borne recreation, or
 - They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation.
- Susceptibility for future use may be determined by examining a number of factors, including they physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with "flashy" flow characteristics. In such circumstances, daily gauge data is more representative of flow characteristics.

Of the three waters being reviewed, the two intermittent streams are only about a foot wide and a few inches deep when they are flowing. Clearly these streams are not traditionally navigable waters. The quarry is large enough, 10.77 acres, to support small watercraft on it. However, there are no plans to open the quarry up to commercial navigation, including commercial water-borne recreation. To the contrary firm plans are in place to fill the quarry for a business/industrial park. Additionally, the quarry is private property with no public access and very limited access to the water level of the quarry. Except for one access road the quarry is surrounded on all sides by 60 foot high vertical sides. Lastly, the need for a commercial water-borne recreational feature in this area is very limited due to the proximity of much larger waterbodies that already have free public access launch facilities supported and maintained by the PA Fish and Bat Commission. The approximately 25 acre impoundment of Brushy Meadow Creek being located immediately adjacent to the subject property.