



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT
1650 ARCH STREET, FIFTH FLOOR
PHILADELPHIA, PENNSYLVANIA 19103-2004

[CENAP-OPR]

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
NAP-2023-00823-46 BIRCH RUN AT NEW BRITAIN

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.² 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.³

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 as defined in 33 CFR §331.2 for a Corps AJD for certain waters on the subject property on the subject property. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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.

CENAP-OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2020-00796-46

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).
 - i. “Ex. Stormwater Management Facility” – non-jurisdictional (AJD)
 - ii. “Wetland 1” – jurisdictional (AJD)

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 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Approximate 8.6 acre area surrounded by the property boundary as depicted on a single plan prepared by Geo-Technology Associates (GTA) dated June 28, 2023, entitled “Wetland Delineation Plan, BIRCH RUN AT NEW BRITAIN, New Britain Township, Bucks County, Pennsylvania,” Job number 31231232, Sheet 1 of 1, last revised January 30, 2024. The site is located north of County Line Road, East of Airy Avenue, west of West Butler Avenue (State Route 0202), identified as Tax Map Parcel 26-006-101-004, in New Britain Township, Bucks County, Pennsylvania.

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

The closest TNW would be the Neshaminy Creek which, in its lower reaches, is a traditional navigable water subject to the ebb and flow of the tide.

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

The stormwater basin and piping ultimately drain to the West Branch, Neshaminy Creek at an un-known location after joining the existing stormwater management system along County Line Road. The wetland drains by pipe to the stormwater management basin.

CENAP-OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2020-00796-46

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶

There are no waters subject to Section 10 in the review area.

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): **Wetland 1** – The limits of the wetland are adequately delineated by the agent in the referenced wetland delineation. As noted by the agent in their e-mail dated January 31, 2024, the wetland on site ultimately

⁵ 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.

⁶ 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.

contributes to other potentially jurisdictional resources through the storm drains depicted on the Revised Plan and the aforementioned stormwater facility. As a result, the wetland may be considered adjacent to 33 CFR 328.3 (a)(1) through (a)(3) features in accordance with the definition of “Adjacent” outlined in 33 CFR 328.3 (c)(2). Furthermore, the site as depicted in early topographic maps (1954 through 1969) depicts several waterway tributaries (broken blue lines) and topographic signatures (sharp pointed changes in elevation pointing to upstream upstream heads the meet broken blue-line streams) of the West Branch, Neshaminy Creek. Thus, the wetlands likely were associated with these tributaries and remain so even though, since the late 1990s (see topographic map dated 2001), the topographic quadrangles depict a wholly developed area with no streams identified. The existing municipal stormwater management piping in the vicinity (draining the above-mentioned basin) is likely a re-configuration and enclosure of the earlier stream systems to now constitute a stormwater management system for the adjacent roadway and development. As such, the wetland, which drains to the basin, ultimately drains to the Neshaminy Creek (a tidal TNW located further downstream in southeastern Bucks County).

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).⁷

i. **Man-Made Retention Basin and outfall pipe** – non-jurisdictional – 0.11 acre basin and piping are part of a stormwater management facility which constitutes an artificial lake or pond created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as... settling basins,” in accordance with 33 CFR 328.3 (b)(5). The agent has supplied documentation (e-mail dated January 31, 2024) that supports that the basin was constructed on uplands (aerial photography, topographic surveys, and soil survey that depicts no hydric soils or topographic waterway signatures in the specific location of the basin). Prior to 1958, the documentation suggests the basin site was used for agricultural purposes. In the 1971 aerial exhibit, the location of the stormwater facility was an apparent cleared and graded area, and appears to

⁷ 88 FR 3004 (January 18, 2023)

CENAP-OPR

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAP-2020-00796-46

have been in use by the nearby commercial facility. By 1981 the stormwater facility is visible, and may have been constructed in association with the apparent expansion of the commercial facility. The basin drains to the existing municipal and on-site stormwater system which is likely involved historic pipe enclosure and re-direction of an existing stream which now also picks up highway and adjacent development stormwater all draining to the Little Neshaminy Creek.

- 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). **N/A**
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) Letter dated July 20, 2023 the subject of which is entitled “Approved Jurisdictional Determination Request, *Birch Run at New Britain*, New Britain Township, Bucks County, Pennsylvania,” from Geo-Technology Associates, Incorporated prepared by C&H Environmental, Inc.
 - B) USDA National Resource Conservation Service Soil Survey – on-line access to the Survey for the site dated 2/12/24;
 - C) Aerial Photograph – Bing – Aerials from 1958 to 2023
- Penn Pilot – 0915328_ard_5r_25.tif
 - D) Topographic Maps – HistoricAerials.com (1954 through 2001)
 - E) E-mail (January 31, 2024) with agent’s discussion on support for basin non-jurisdiction and wetland jurisdiction.

10. OTHER SUPPORTING INFORMATION.

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.