



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT
STATE COLLEGE FIELD OFFICE
1631 SOUTH ATHERTON STREET, SUITE 101
STATE COLLEGE, PENNSYLVANIA 16801-6260

NAB

12 April 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-2023-00042-P12 (Dorrance Distribution Center)

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 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),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.

NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

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. W1, is not a water of the United States
 - ii. W2, is not a water of the United States
 - iii. W3 is a water of the United States – Section 404
 - iv. W4, is not a water of the United States
 - v. W5, is a water of the United States – Section 404
 - vi. W6, is not a water of the United States
 - vii. WA, is not a water of the United States
 - viii. WB, is not a water of the United States
 - ix. WC, is not a water of the United States
 - x. WD, is not a water of the United States
 - xi. WE, is not a water of the United States
 - xii. DF1, is not a water of the United States
 - xiii. Impoundment Balliet Run (PUB) – Section 404

The Corps site visit was February 16, 2023. A majority of the site is currently forested, with a large scrub-shrub area located within the interior of Wetland 3. The site had historic evidence of past mining (small pits) and logging (logging roads).

2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)

NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

- 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. “Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region” (Version 2.0) January 2012
 - e. “Wetland Delineation Report – Dorrance Distribution Center. Dorrance Township, Luzerne County, Pennsylvania”, completed by Kleinfelder, dated December 2022.
3. REVIEW AREA. Latitude 41.083651/ Longitude -75.957923 The site is located just north of Nescopeck Pass, in Dorrance Township, Luzerne County, Pennsylvania. The area of investigation is 156 acres. Please see attached maps.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the North Branch of the Susquehanna River which was deemed navigable based on historic interstate commercial use and current commercial recreational use.
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. W3 and W5 flow to Balliet Run, which flows into Big Wapwallopen and flows directly into the North Branch of the Susquehanna River (a TNW).
 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 N/A

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.

NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

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): Balliet Run is impounded prior to going into a culvert under South Main Road and discharging into a defined channel. Balliet Run is a relatively permanent waters (perennial) body of water that flows directly to a TNW (North Branch of the Susquehanna River). Balliet Run was determined to be perennial as it was shown on the Topographic Map to be a blue line stream. In addition, various aerials (1959, 1993, 2008, 2010, 2015, and 2016) as well as during my field view show that the area has been ponded for many years. The Pennsylvania Fish and Boat Commission has also classified Balliet Run as a Class A, Wild Trout Stream and Natural Trout Reproduction Stream designations. Balliet Run (W3 PUB) is part of a larger complex identified as W3 that includes not only the open water area (W3 PUB) but W3 PEM, PSS, and PFO areas which totals 11 acres in size within the area of review.
 - e. Tributaries (a)(3): N/A
 - f. Adjacent Wetlands (a)(4): W3 (11 acres) the entire aquatic resource complex abuts the impoundment of a relatively permanent water (Balliet Run) that flows via a continuous surface connection to the North Branch of the Susquehanna River (TNW) and W5 wetlands (0.5 acres) has a surface connection to waters of the United States ,through a swale, to a relatively permanent water (the impoundment of Balliet Run) that flows via a continuous surface connection to a TNW. My field view verified these connections.

NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

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 N/A
- 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).

1) W1, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.46 acres

2) W2, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.05 acres

3) W4, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.01 acres

4) W6, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.003 acres

5) WA, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.03 acres

6) WB, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.029 acres

7) WC, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.004 acres

8) WD, Non-Jurisdictional (lacks a continuous surface connection to a TNW) 0.009 acres

⁷ 88 FR 3004 (January 18, 2023)

NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

9) WE, Non-Jurisdictional (lacks a continuous surface connection to a TNW)
0.02 acres

10) DF1, Non-Jurisdictional (a swale that lacks an ordinary high water mark but act as a non-jurisdictional conveyance from W5 to W3) 98 linear feet.

Wetlands A – E are located within old logging roads (since abandoned), the result of vehicle compaction of soils. These wetlands, in addition to W1, W2, W4 and W6 has no direct surface connection to a regulated water that flows to a TNW.

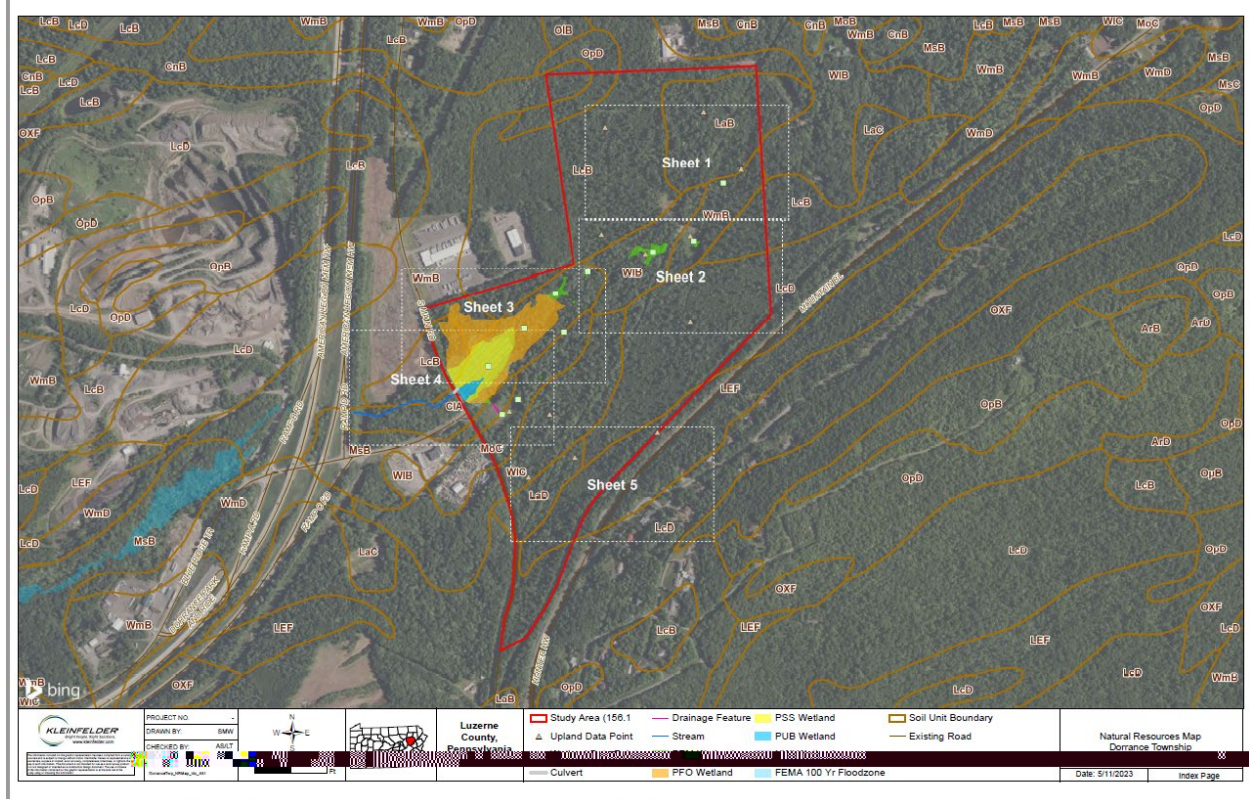
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
- a. Aerial Imagery - B&W (Penn Pilot) 1950 and 1959, B&W 93-95, NAIP 2010, NAIP 2015 [List the date(s) that any field visit(s) or office evaluation(s) were conducted].
 - b. LiDAR – Taken from the Pennsylvania Wetland Resource Registry.
 - c. USDA NRCS Soil Survey - Custom Soil resource Report for Luzerne County, Pennsylvania, October 14, 2022.
 - d. USGS Topographic Maps – Dorrance Township, October 2022.

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.

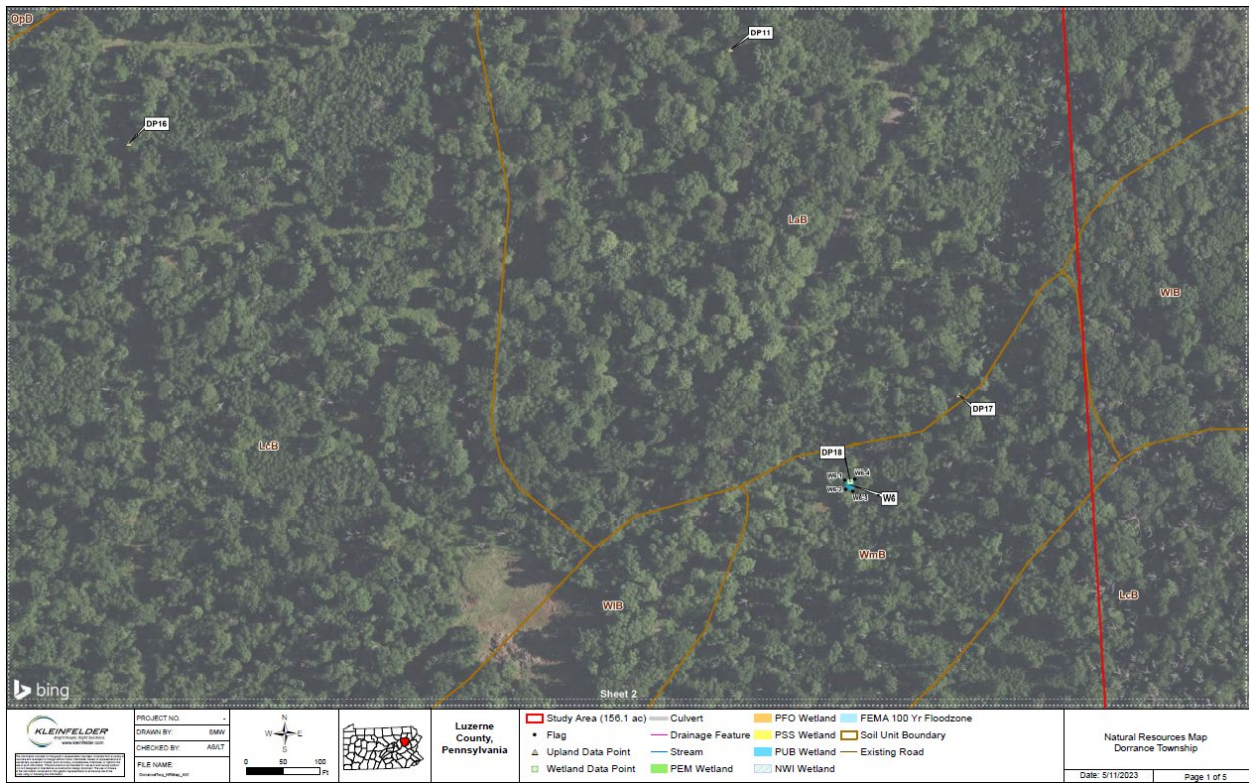
NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12



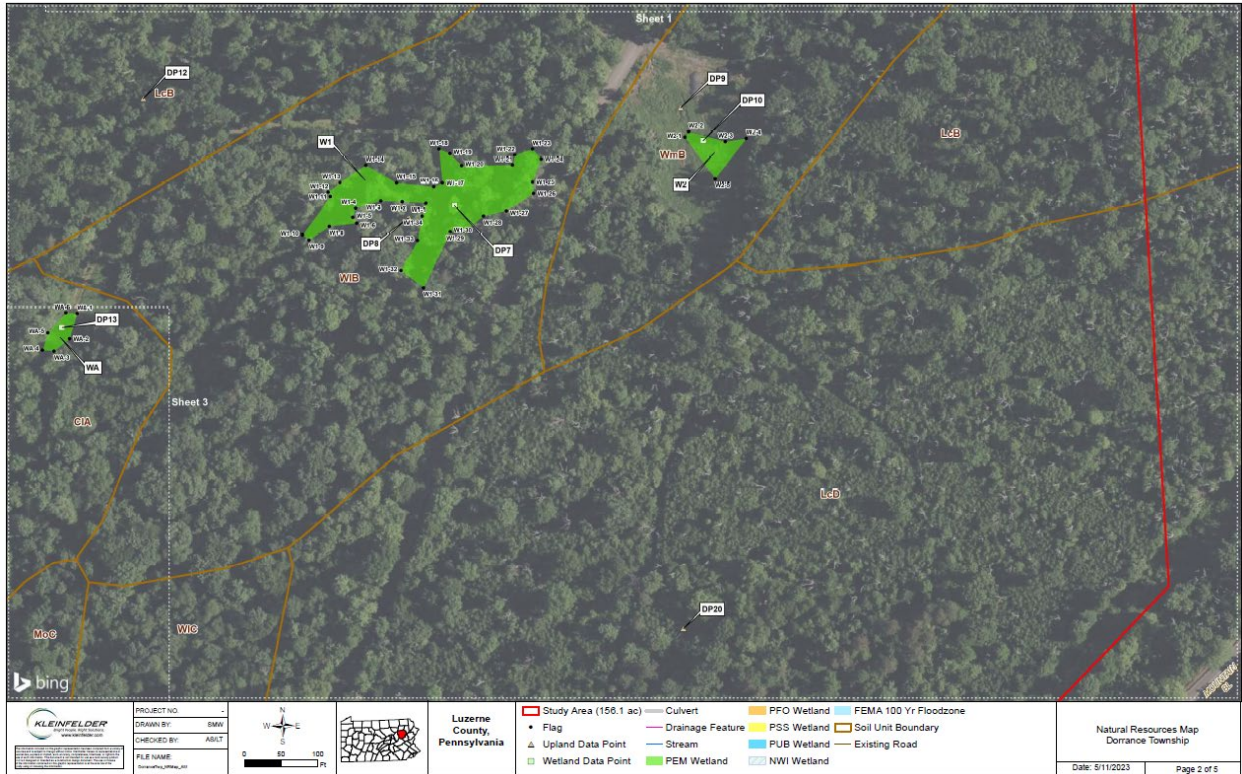
NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12



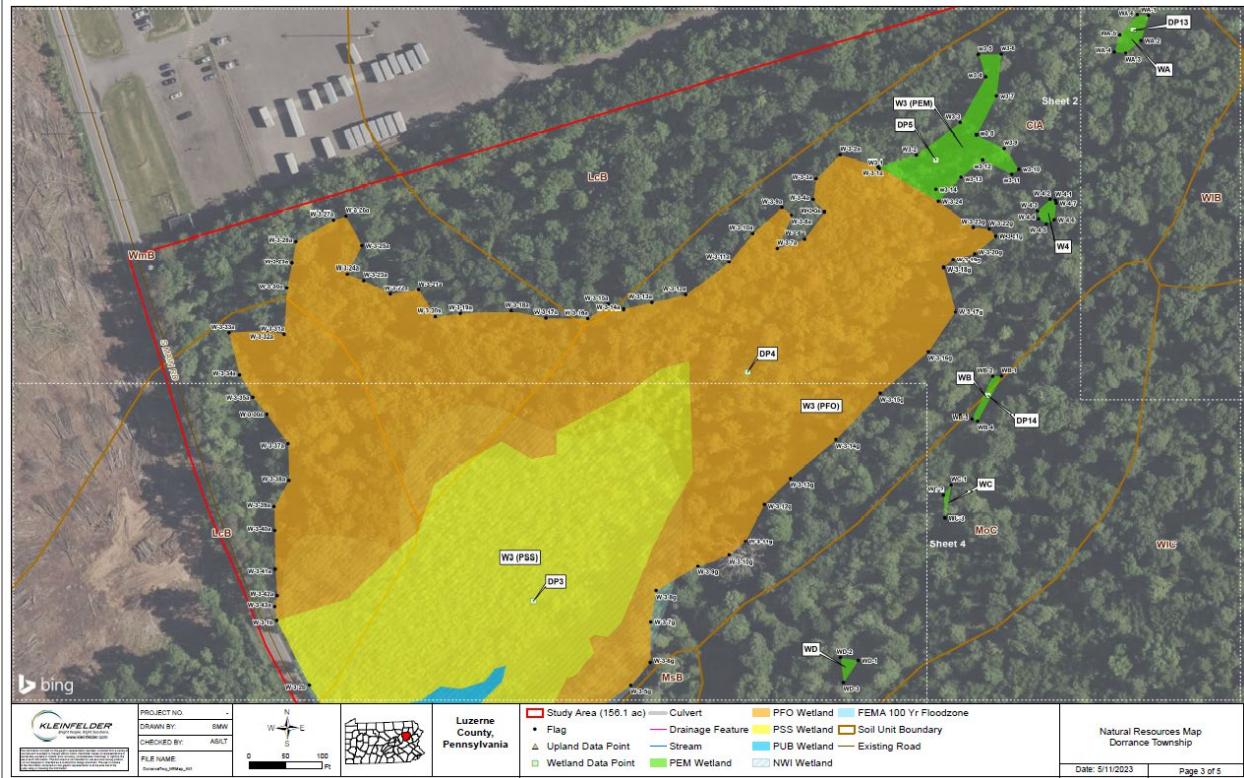
NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12



NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12



NAB

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), NAB-2023-00042-P12

