

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

Civil Action No. 88-6545

GIZELLA POZSGAI,

Defendant,

and

BRITTON REALTY OF BRIDGE STREET,
LLC,

Intervenor,

and

BRITTON INDUSTRIES, INC.,

Intervenor.

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers (“Corps”), filed the Complaint in this action against Defendants John (now deceased) and Gizella Pozsgai (collectively, “Defendants” or the “Pozsgais”),¹ alleging that Defendants violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), by discharging fill into protected wetlands on their jointly owned 14-acre tract of land in Bucks County (“the Site”) without a permit;

¹ Herein the individual term “Defendant” or “Pozsgai” shall refer only to Gizella Pozsgai.

WHEREAS, on January 8, 1990, Judge John P. Fullam of the Eastern District of Pennsylvania entered a final judgment against the Pozsgais, determining that the Site contained protected wetlands, declaring that the Pozsgais had filled protected wetlands in violation of the CWA, permanently enjoining the Pozsgais from further filling at the Site without a permit, and ordering restoration of the Site pursuant to a restoration plan submitted by the Army Corps of Engineers. *See United States v. Pozsgai*, No. 88-6545, 1990 WL 1432 (E.D. Pa. Jan. 8, 1990).

WHEREAS, the Third Circuit affirmed Judge Fullam's decision on June 25, 1993, *United States v. Pozsgai*, 999 F. 2d 719, 725–32 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994);

WHEREAS, the Pozsgais failed to comply with Judge Fullam's judgment and continued to discharge additional unauthorized fill into wetlands;

WHEREAS, on March 8, 2007, Judge Fullam entered an Order of Civil Contempt for John and Gizella Pozsgai's failure to comply with the January 8, 1990 Order, *see* Doc. 147 & 148 (the "2007 Contempt Order");

WHEREAS, the 2007 Contempt Order imposed several sanctions in the event of Defendants' non-compliance, including by failing to complete the required remediation;

WHEREAS, the Pozsgais did not complete the remediation required by the 2007 Contempt Order;

WHEREAS, on November 9, 2020, Judge Anita B. Brody of the Eastern District of Pennsylvania, entered a memorandum and order implementing the 2007 Contempt Order (the "2020 Order");

WHEREAS, in the 2020 Order, the Court found that Gizella Pozsgai had failed to complete remediation of the Site within 90 days of March 8, 2007, as required by the 2007 Contempt Order;

WHEREAS, in the 2020 Order, the Court implemented the 2007 Contempt Order by imposing the sanctions imposed in paragraphs 4.a. through 4.i. of that order, which sanctions included, among other things: 1) authorizing the Corps or its designees to enter the Site to remediate the property; 2) imposing a protective buffer in upland areas on the Site; and 3) imposing a deed restriction upon the Site;

WHEREAS, in the 2020 Order, the Court further directed that the deed restriction imposed by that Order shall be lifted if, by express written mutual agreement of the defendant and the United States, the Site is transferred to a third party that agrees to perform the remediation of the Site, as set forth in the 2007 Contempt Order.

WHEREAS, Britton Industries, Inc. and Britton Realty of Bridge Street, LLC (collectively, “Britton”) have been joined as parties in this matter for the purpose of facilitating the restoration and preservation of the Site by acquiring the Site subject to the conditions herein and conducting restoration actions on the Site as described herein;

WHEREAS, Britton and Gizella Pozsgai have entered into a Purchase and Sale Agreement, dated as of February 23, 2022 (the “Purchase Agreement”) pursuant to which Britton has agreed to purchase the Site in accordance with the terms detailed therein;

WHEREAS, Gizella Pozsgai represents that she has incurred expenses in excess of \$50,000 to prepare the property for restoration, mitigation, and preservation, consistent with the terms of this Consent Decree;

WHEREAS, this Consent Decree is intended to constitute a complete and final resolution of the United States' civil claims under the CWA set forth in the Complaint regarding the Site and under the Court's various orders entered against the Pozsgais, including without limitation the 2007 Contempt Order and the 2020 Order;

WHEREAS, the United States, Gizella Pozsgai, and Britton agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' civil claims in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Pozsgai in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the United States, Pozsgai, and Britton (collectively "the Parties") pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Eastern District of Pennsylvania, pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because Pozsgai and Britton do conduct and/or have conducted business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Court has entered a valid, final judgment pursuant to CWA Sections 301, 309, and 404, 33 U.S.C. §§ 1311, 1319, and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Pozsgai and Britton, and their successors and assigns and any person, firm, association, corporation, officer, director, employee, agents or servant who is, or will be, acting in concert or in participation with Pozsgai or Britton as to the Site whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Pozsgai and/or Britton, neither Pozsgai nor Britton shall raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm, or corporation acting in concert or participation with Pozsgai and/or Britton as to the Site, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the restoration and preservation areas identified on the Wetlands Restoration Plan (attached as Exhibit A) shall not alter or relieve Pozsgai of her obligation to comply with all of the terms of this Consent Decree that apply to her. Nor shall the transfer of ownership or other interest in the restoration or preservation areas identified on Exhibit A alter or relieve Britton of its obligation to comply with the terms of this Consent Decree that apply to Britton. At least fifteen (15) days prior to the transfer of ownership or other interest in any of the restoration or preservation areas identified on Exhibit A, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the Corps and the United States Department of Justice (“DOJ”) at the addresses specified in Section X below that

such notice has been given. As a condition to any such transfer, Pozsgai and Britton shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties provided in the Complaint, the final judgment, the 2007 Contempt Order, the 2020 Order, and other monetary or nonmonetary relief specified in the Court's subsequent orders, against Pozsgai under CWA Section 301 concerning the Site.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Pozsgai and Britton to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Pozsgai's and Britton's obligations under this Consent Decree are independent and set forth as to Pozsgai and Britton below.

9. Except as in accordance with this Consent Decree, Pozsgai, Britton, and Pozsgai's and Britton's agents, successors, and assigns are enjoined from discharging any pollutant on or from the Site into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

10. The parties acknowledge that Nationwide Permit 32, found at 86 Fed. Reg. 73522 (December 27, 2021) and attached as Exhibit B, authorizes any fill that was placed as of the date of entry of this Consent Decree in the areas identified on Exhibit A appended hereto, to remain in

place, subject to the conditions provided in the Nationwide Permit (which such conditions are attached as Exhibit B) and this Consent Decree, including the attached Wetlands Restoration Plan (attached as Exhibit A) and Wetland Restoration Guidelines (attached as Exhibit C). Any discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit consistent with the CWA and this Consent Decree.

11. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to CWA Sections 402 or 404, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

12. This Consent Decree in no way affects or relieves Pozsgai or Britton of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

13. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

14. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

15. Britton is hereby joined as parties to this action, pursuant to Fed. R. Civ. P. 19(a), solely for the purpose of acquiring the Site, performing the Restoration Project (as defined herein) in the manner and to the extent required by Paragraph 17 and the other provisions applicable to Britton, which effectuate such purpose, and to be bound by the other obligations

imposed by this Consent Decree regarding the Site. The Complaint in this action is hereby deemed amended to include Britton as parties to this action. Insofar as service of a summons and such amended complaint upon Britton would otherwise be necessary, Britton hereby waives service of the summons and such amended complaint.

IV. SPECIFIC PROVISIONS

Restoration, Mitigation, and Preservation

16. Pozsgai shall be responsible for ensuring that, on or before the closing of the Purchase Agreement, the Site is cleared of all property owned by Pozsgai or her tenants, including, but not limited to trucks, vehicles, trailers, heavy equipment, and/or temporary structures. Upon the closing of the Purchase Agreement or the final approval by the Court of this Consent Decree, whichever is later, Pozsgai shall have no further obligations to perform restoration and removal work at the Pozsgai site.

17. The Restoration Project.

a. The restoration work under this Consent Decree (collectively, the “Restoration Project”) is set forth in this Paragraph, the Wetlands Restoration Plan attached as Exhibit A to this Consent Decree, and the Wetland Restoration Guidelines attached as Exhibit C to this Consent Decree (the “Restoration Guidelines”). The Restoration Guidelines are incorporated as an enforceable term of this Consent Decree, and any design plans and schematic drawings approved by the Corps and agreed to in writing by Britton pursuant to the Restoration Guidelines are incorporated as enforceable terms of the Restoration Guidelines and this Consent Decree.

b. Britton shall undertake and complete the Restoration Project, pursuant to the terms, conditions, and schedules set forth for the Restoration Project in this Consent Decree and the Restoration Guidelines that has been approved by the Corps and agreed to in writing by Britton, including any design plans and schematic drawings approved by the Corps and agreed to in writing by Britton

c. After completing the tasks in Sections 1.0 and 2.0 of the Restoration Guidelines, Britton shall notify the Corps and the DOJ at the addresses in Section X below that the Restoration Project is complete. Upon conducting an inspection of the Site, the United States shall either notify Britton that the Restoration Project is not complete and specify the additional work necessary to obtain completion, or certify in writing that Britton's implementation of the Restoration Project is complete (at which point Britton shall have no further obligations with respect to the Restoration Project, other than the monitoring and reporting requirements described in Section 3.0 of the Restoration Guidelines).

18. Upon completion of the Restoration Project, Britton and its affiliates shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any area covered by the Restoration Project, except as approved by the Corps in writing.

19. Following completion of the tasks set forth in Sections 1.0 and 2.0 of the Restoration Guidelines, Britton shall monitor and maintain the Site in accordance with Section 3 of the Restoration Guidelines. Britton shall submit reports to the United States in accordance with and for the duration set forth in the Restoration Guidelines. Within 30 days of completion of

all monitoring and maintenance, Britton shall provide written notice to the Corps and DOJ at the addresses specified in Section X.

20. All areas described on Exhibit A as Existing Wetlands, Previously Restored Wetlands, Unauthorized Fill to be Removed & Restored, and Preserved Upland Buffer shall be protected by a Deed Restriction, in the form attached as Exhibit D, executed by Britton, and subject to the review and approval of the Corps and DOJ. The purpose of the Deed Restriction is to forever designate all waters, existing wetlands, previously and newly restored wetlands, and preserved woodlands shown on Exhibit A as open space and to confine the use of those areas to certain activities, as described in the Deed Restriction.

21. To ensure that the areas addressed by the Restoration Project and Deed Restriction are not disturbed, Britton shall, within fifteen (15) calendar days of entry of this Consent Decree and closing under the Purchase Agreement, provide the completed Deed Restriction for review and approval by the Corps and DOJ. Within fifteen (15) calendar days of approval by the Corps and DOJ, Britton shall record a certified copy of this Consent Decree and the Deed Restriction with the Prothonotary for Bucks County, Pennsylvania. Thereafter, each deed, title, or other instrument conveying an interest in any property identified in Exhibit A shall contain a notice stating that the property is subject to this Consent Decree and Deed Restriction and shall reference the recorded location of the Consent Decree and Deed Restriction and any restrictions applicable to the property under this Consent Decree.

22. Upon satisfaction of Paragraph 21 and the recording of the Consent Decree and Deed Restriction, the prior deed restriction imposed by the Court's January 8, 1990 order, the

2007 Contempt Order, and the 2020 Order shall be vacated and no longer have any force or effect.

Review and Approval Procedures

23. After receipt and review of any plan, program or other document that is required to be submitted by Britton for approval pursuant to this Consent Decree, the Corps may:

- a. approve, in whole or in part, the submission;
- b. approve the complete submission or portions of the submission upon specified conditions;
- c. disapprove the submission, in whole or in part, and direct that Britton modify the submission as described further in Paragraphs 25–27 below; or
- d. any combination of the above.

24. In the event of approval of the complete submission, Britton shall proceed to take any actions required by the plan, program or other approved document, as approved by the Corps.

25. In the event of approval of portions of the submission or approval upon specified conditions, Britton shall proceed to take the actions identified in the non-deficient portion of the plan, program, other document, or portion thereof, in accordance with any applicable conditions specified by the Corps, subject only to Britton’s right to invoke the Dispute Resolution procedures set forth in Section VII with respect to the conditions imposed. Implementation of any non-deficient portion of the submission shall not eliminate the potential of Britton to incur stipulated penalties pursuant to Section IX.

26. Upon receipt of a notice of disapproval by the Corps of all or part of a submission, Britton shall, within thirty (30) days (or such greater time frame as specified by the Corps in writing), correct the deficiencies as directed by the Corps' written comments and resubmit the plan, program or other document for approval. The aforementioned thirty (30) day period shall be extended to sixty (60) days provided Britton is diligently prosecuting a cure as to such deficiencies within the original thirty (30) day period. Any stipulated penalties applicable to the submission, as provided in Section IX, shall accrue during the 30-day period (or any such more extended time as is provided herein), but shall not be recoverable by the United States unless the resubmission is disapproved due to a material defect.

27. In the event that a resubmitted plan, program or other document, or portion thereof, is disapproved by the Corps, the Corps may again require Britton to correct the deficiencies in accord with Paragraphs 23, 25–27, or the Corps may modify the submission. Unless Britton invokes the Dispute Resolution Procedures set forth in Section VII, and the disapproval by the Corps of Britton's resubmission is overturned pursuant to that Section, Britton shall be deemed to have failed to submit such program, plan or other document timely and adequately and stipulated penalties shall accrue for such violation from the expiration of the aforementioned thirty- (30), or if extended, sixty- (60), day cure period.

28. All programs, plans or other documents required to be submitted by Britton pursuant to this Consent Decree shall become incorporated into and enforceable under this Consent Decree, upon the Corps' approval. In the event the Corps approves a portion of any program, plan or other document pursuant to this Section, then the approved portion shall become incorporated into and enforceable under this Consent Decree.

V. NOTICES AND OTHER SUBMISSIONS

29. In all notices, documents or reports submitted to the DOJ and the Corps pursuant to this Consent Decree, Britton shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information contained in or accompanying this (submission/document) is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

30. Until five years after termination of this Consent Decree, Britton shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the tasks in the Restoration Guidelines and this Consent Decree, regardless of any corporate retention policy to the contrary. Until five years after termination of this Consent Decree, Britton shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in the Restoration Guidelines and this Consent Decree. At the conclusion of the document retention period, Britton shall notify the DOJ and the Corps, at the addresses in Section X, at least 90 calendar days prior to the destruction of any such records or documents, and, upon request by the DOJ or the Corps, shall deliver any such records or documents to the DOJ or the Corps.

31. As an alternative to Paragraph 30, Britton shall, within 90 days after completion of the Restoration Project, provide to the DOJ and the Corps at the addresses in Section X, electronic copies all documents, records, and information of whatever kind, nature or description that are not protected by the attorney-client privilege or work product doctrine that relate to the performance of the tasks in the Restoration Guidelines and this Consent Decree and that are within the possession or control of Britton, and its contractors and agents. Britton shall simultaneously provide a certification that the electronic copies constitute a complete set of the documents, records, and information described in this Paragraph 31.

32. Britton may assert that certain documents, records and other information are privileged under the attorney-client privilege, or any other privilege recognized by federal law. If Britton asserts such a privilege or confidentiality, it shall provide the DOJ and the Corps with the following:

- a. the title of the document, record, or information;
- b. the date of the document, record, or information;
- c. the name and title of the author of the document, record, or information;
- d. the name and title of each addressee and recipient;
- e. a description of the subject of the document, record, or information; and
- f. a description the privilege asserted.

33. Notwithstanding paragraph 32, no final documents or reports generated pursuant to the requirements of the Consent Decree shall be withheld from the DOJ or the Corps on the grounds that they are privileged.

34. Until termination of this Consent Decree, the United States and its authorized representatives (including contractors) shall, at their sole risk, have authority at all reasonable times to enter the areas identified on Exhibit A to:

- a. monitor the activities required by this Consent Decree;
- b. verify any data or information submitted to the United States;
- c. obtain samples, photographs, data, or other evidence;
- e. inspect and evaluate the Restoration Project; and
- f. inspect and review any non-privileged records required to be kept under

the terms and conditions of this Consent Decree and the CWA.

35. The United States shall make reasonable efforts to provide at least 48 hours advance notice to Britton prior to entering the Site pursuant to paragraph 34. A representative of Britton may accompany the United States' representative on the visit, unless the United States, in its sole discretion, determines that the Britton representative is interfering with the activities authorized under paragraph 34.

36. Paragraph 34 is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States and its agencies to conduct inspections, to require monitoring and to obtain information as authorized by law.

VII. DISPUTE RESOLUTION

37. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and the party affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) calendar days beginning with

written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Pozsgai or the United States and Britton cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within thirty (30) calendar days after the end of the informal negotiations period, Pozsgai or Britton, as the case may be, file(s) a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) calendar days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Pozsgai or Britton shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that Pozsgai's or Britton's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

38. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. Pozsgai or Britton, as the case may be, shall have thirty (30) calendar days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Pozsgai or Britton, as the case may be, shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that Pozsgai's or Britton's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

39. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Pozsgai or Britton, under this Consent Decree, except as provided in Paragraph 47 below regarding payment of stipulated penalties by Pozsgai or Britton. However, if Britton joins in a joint motion for expedited resolution of the dispute by the Court, then the filing of such motion shall stay Britton's obligation to undertake any action that is the subject of dispute until the dispute is resolved.

VIII. FORCE MAJEURE

40. Except as the time limits may be modified pursuant to the dispute resolution procedures set forth in paragraphs 37 through 39, Britton shall perform the actions required of it under this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events that constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Britton, including its employees, agents, consultants and contractors, which could not be overcome by reasonable due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

41. If Britton believes that a Force Majeure event has affected its ability to perform any action required under this Consent Decree, then Britton shall notify the DOJ and the Corps

in writing within seven (7) calendar days after the event at the addresses listed in Section X.

Such notice shall include a discussion of the following:

- a. what action has been affected;
- b. the specific cause(s) of the delay;
- c. the length or estimated duration of the delay;
- d. any measures taken or planned by Britton to prevent or minimize the delay

and a schedule for the implementation of such measures; and

- e. Britton's rationale for attributing any delay to a force majeure event.

Britton may also provide to the DOJ and the Corps any additional information that it deems appropriate to support its conclusion that a Force Majeure event has affected its ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the DOJ and the Corps shall constitute a waiver of any claim of Force Majeure as to the event in question.

42. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Britton shall coordinate with the Corps to determine when to begin or resume the operations that had been affected by any Force Majeure event.

43. If the United States does not agree that a Force Majeure event has occurred, or does not agree to the extension of time sought by Britton, then the United States' position shall be binding, unless Britton invokes Dispute Resolution under Section VII of this Consent Decree, which Britton must do no later than fourteen (14) days after receiving the United States' decision.

44. Britton shall bear the burden of proving by a preponderance of the evidence (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Britton and any entity controlled by it, including its contractors and consultants; (2) that Britton or any entity controlled by it could not have foreseen and prevented such noncompliance; and (3) the number of calendar days of noncompliance that were caused by such circumstances.

IX. STIPULATED PENALTIES

45. After entry of this Consent Decree, if Britton fails to timely fulfill any obligation it is required to fulfill under this Consent Decree that is not the subject of the Dispute Resolution provisions in Section VII and subject to the cure provisions in Paragraph 26 above, then Britton shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- | | | |
|----|---|--------------------|
| a. | For Day 1 up to and including
Day 30 of non-compliance | \$500.00 per day |
| b. | For Day 31 up to and including
60 of non-compliance | \$1,000.00 per day |
| c. | For Day 61 and beyond
of non-compliance | \$1,500.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

46. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the affected parties pursuant to the Dispute Resolution provisions in Section VII shall be resolved upon motion to this Court as provided in Paragraphs 37 and 38.

47. The filing of a motion by Britton requesting that the Court resolve a dispute shall stay Britton's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree (subject to any applicable notice and cure periods). In the event that Britton does not prevail on the disputed issue, stipulated penalties shall be paid by Britton as provided in this Section.

48. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

49. Britton shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the DOJ account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (1988V01049) and the DOJ case number (DJ 90-5-1-1-17910). Payment shall be made in accordance with instructions provided by the Financial Litigation Unit of the United States Attorney's Office for the Eastern District of Pennsylvania. Any payments received by the DOJ after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, within 7 calendar days of payment of any stipulated penalties, Britton shall provide written notice, at the addresses specified in Section X.

50. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

X. ADDRESSES

51. All notices and communications required under this Consent Decree shall be made to the Parties through each of the following persons and addresses:

a. TO THE CORPS:

(1)

Chief, Regulatory Branch
100 Penn Square East
Wanamaker Building
Philadelphia, PA 19107

b. TO THE DOJ

(1)

Brian S. Uholik
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

(2)

Gregory B. David
Chief, Civil Division
U.S. Attorney's Office for the Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

c. TO BRITTON

(1)

Britton Industries, Inc.
PO Box 6499
Lawrenceville, NJ 08648
Attn: Pat Flannery, CFO

(2)

with a copy to: Epstein Becker & Green, P.C.
150 College Road West
Suite 301
Princeton, NJ 08540

Attn: Andrew Kaplan, Esquire

d. TO POZSGAI

(1) Gizella Pozsgai
538 W. Bridge Street
Morrisville, PA 19067

(2) with a copy to: The Kogan Law Group, P.C.
100 United Nations Plaza
Suite 14F
New York, NY 10017
Attn: Lawrence A. Kogan, Esq.

XI. COSTS OF SUIT

52. Each Party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Pozsgai or Britton subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, then Pozsgai or Britton, as the case may be (severally and not jointly), shall be liable for any costs or attorneys' fees incurred by the United States in any action against Pozsgai or Britton for noncompliance with or enforcement of this Consent Decree.

XII. PUBLIC COMMENT

53. The Parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the lodged Consent Decree is inappropriate,

improper, or inadequate. Pozsgai and Britton agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified them in writing that it no longer supports entry of the Consent Decree as proposed to the Court.

XIII. CONTINUING JURISDICTION OF THE COURT

54. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. In addition, the Court shall retain jurisdiction over this action to enforce any stipulated judgment(s) against any party, including any party named in the Complaint, that the United States may file regarding the guaranty of any payments required by this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

55. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing. No modification of this Consent Decree shall take effect unless signed by the United States and Britton, and approved by the Court; provided, however, that modifications to the Restoration Guidelines, including to the schedule, shall take effect without the requirement of Court approval if signed by the Corps and Britton.

XV. TERMINATION

56. After Britton has completed the requirements of the Restoration Guidelines included in Exhibit C of this Consent Decree and has paid any accrued stipulated penalties as required by this Consent Decree (if any), Britton may serve upon the United States a Request for Termination, stating that Britton has satisfied those requirements, together with all necessary supporting documentation.

57. Following receipt by the United States of Britton's Request for Termination, the United States and Britton shall confer informally concerning the Request for Termination and any disagreement that they may have as to whether Britton has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the United States and Britton shall submit, for the Court's approval, a joint stipulation terminating the Decree.

58. If the United States does not agree that the Decree may be terminated, Britton may invoke Dispute Resolution under Section VII. However, Britton shall not seek Dispute Resolution of any dispute regarding termination until 60 days after service of its Request for Termination.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2022.

United States District Judge

Dated:

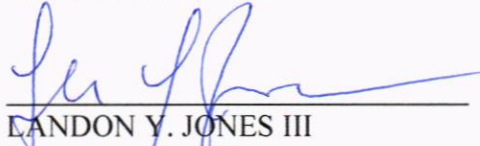
10/14/22



JACQUELINE C. ROMERO
United States Attorney



GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division



LANDON Y. JONES III
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
Counsel for the United States

Dated:

Lawrence A. Kogan
The Kogan Law Group, P.C.
100 United Nations Plaza
Suite #14F
New York, NY 10017
Counsel for Defendant Gisella Pozsgai

Dated:

Andrew Kaplan
Epstein Becker Green
150 College Road West, Suite 301
Princeton, New Jersey 08540
*Counsel for Britton Industries, Inc. and Britton
Realty of Bridge Street, LLC*

Dated:

JACQUELINE C. ROMERO
United States Attorney

GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division

LANDON Y. JONES III
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
Counsel for the United States

Dated:

Lawrence A. Kogan
The Kogan Law Group, P.C.
100 United Nations Plaza
Suite #14F
New York, NY 10017
Counsel for Defendant Gisella Pozsgai

Dated: *Oct. 11, 2022*



Andrew Kaplan
Epstein Becker Green
150 College Road West, Suite 301
Princeton, New Jersey 08540
*Counsel for Britton Industries, Inc. and Britton
Realty of Bridge Street, LLC*

Dated:

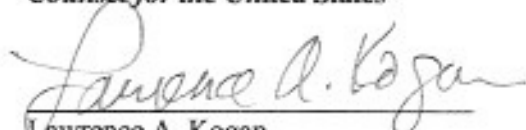
JACQUELINE C. ROMERO
United States Attorney

GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division

LANDON Y. JONES III
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
Counsel for the United States

Dated:

10/12/2022

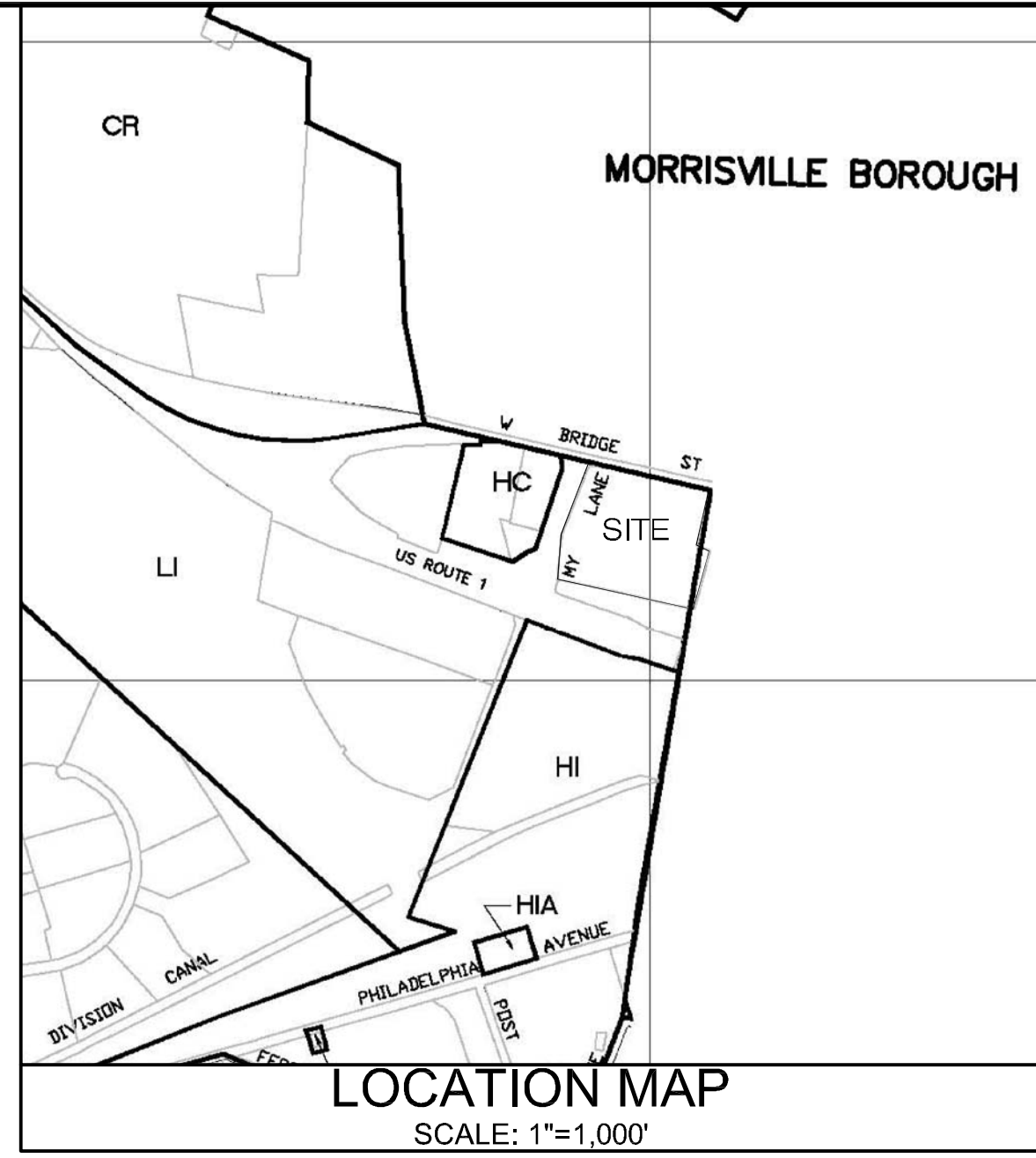
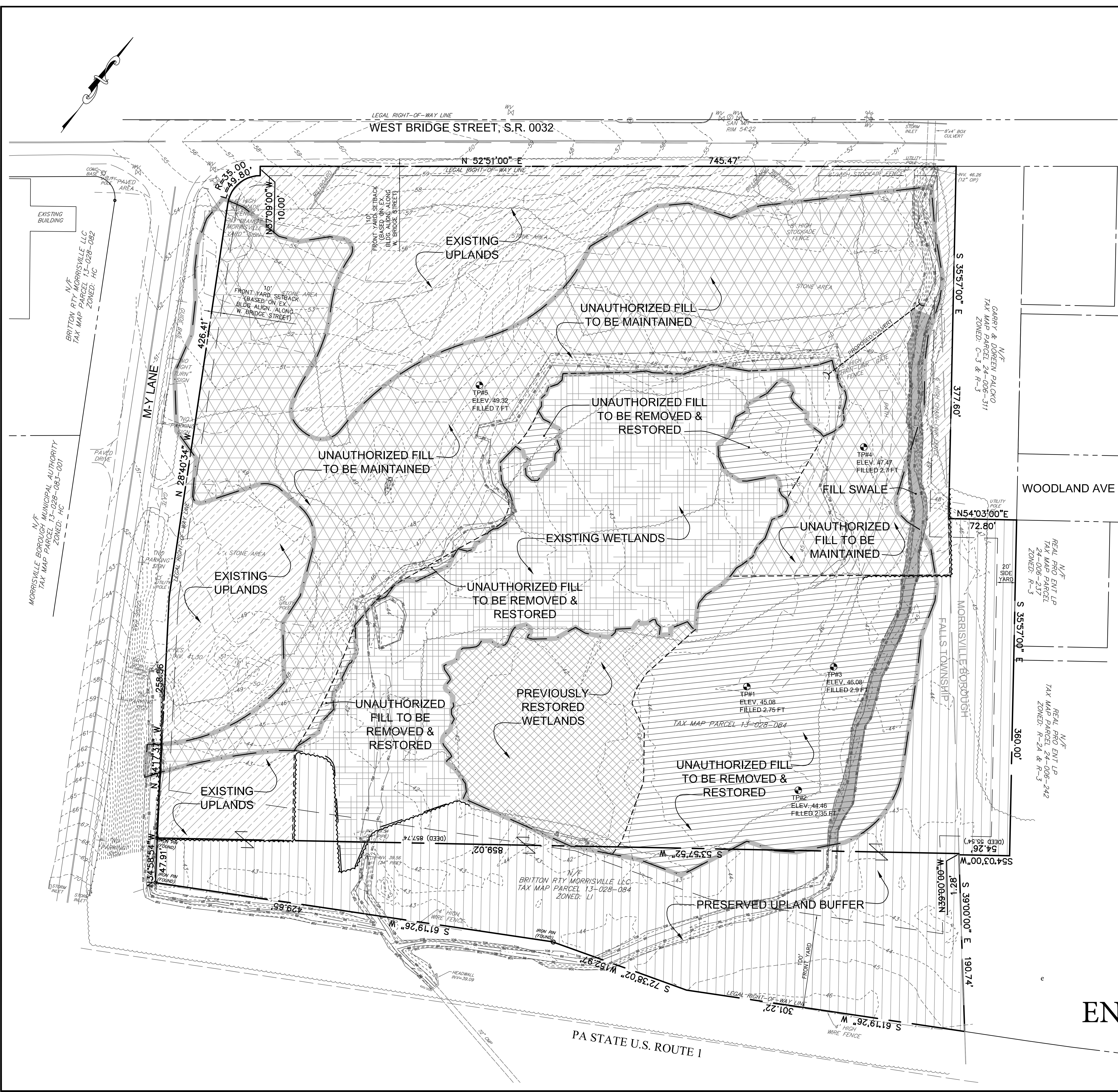


Lawrence A. Kogan
The Kogan Law Group, P.C.
100 United Nations Plaza
Suite #14F
New York, NY 10017
Counsel for Defendant Gizella Pozsgai

Dated:

Andrew Kaplan
Epstein Becker Green
150 College Road West, Suite 301
Princeton, New Jersey 08540
*Counsel for Britton Industries, Inc. and Britton
Realty of Bridge Street, LLC*

Exhibit A



- GENERAL NOTES:**
1. THE LOCATION OF EXISTING UNDERGROUND UTILITIES CONTAINED ON THESE PLANS HAVE BEEN OBTAINED BY FIELD SURVEY. COMPLETENESS OR ACCURACY OF THE LOCATION OF UTILITIES CANNOT BE GUARANTEED. THE CONTRACTOR SHALL VERIFY ALL EXISTING SITE CONDITIONS, SURFACE AND SUBSURFACE, AND SHALL NOTIFY THE ENGINEER IN THE EVENT OF DISCREPANCIES. IT IS THE CONTRACTOR'S RESPONSIBILITY TO NOTIFY UNDERGROUND UTILITY USERS FOR COMPLIANCE WITH PENNSYLVANIA ACT 2008-121.
 2. NO PORTION OF THE SITE IS LOCATED WITHIN THE 100-YEAR FLOODPLAIN BOUNDARY AS IDENTIFIED ON FEMA MAP #201700456J, EFFECTIVE DATE MARCH 16, 2015.
 3. TOPOGRAPHY AND ELEVATIONS BASED ON THE NORTH AMERICAN VERTICAL DATUM OF 1988 (NAVD88).

ALLOCATION OF LAND

EXISTING WETLANDS	= 2.46 AC
EXISTING UPLANDS	= 3.14 AC
PREVIOUSLY RESTORED WETLANDS	= 0.99 AC
PRESERVED UPLAND BUFFER	= 3.37 AC
UNAUTHORIZED FILL TO BE REMOVED & RESTORED	= 2.12 AC
UNAUTHORIZED FILL TO BE MAINTAINED	= 4.46 AC
TOTAL (EQUALS TOTAL TRACT AREA)	= 16.54 AC

LEGEND

EXISTING WETLANDS	
EXISTING SWALE TO BE FILLED IN	
PRESERVED UPLAND BUFFER	
UNAUTHORIZED FILL TO BE REMOVED & RESTORED	
PREVIOUSLY RESTORED WETLANDS	
EXISTING UPLANDS	
UNAUTHORIZED FILL TO BE MAINTAINED	
BOUNDARY OF PREVIOUSLY FILLED WETLANDS	

ENCLOSURE 1

SERIAL No. 2022-
CALL BEFORE YOU DIG!
 PENNSYLVANIA LAW REQUIRES
 3 WORKING DAYS NOTICE FOR
 CONSTRUCTION PHASE AND 10 WORKING
 DAYS IN DESIGN STAGE-STOP CALL
 PENNSYLVANIA ONE CALL SYSTEM, INC.
 1-800-242-1776

NOT VALID WITHOUT AN EMBOSSED
 SEAL OR SIGNATURE IN RED INK

PROFESSIONAL LAND SURVEYOR
 HEATH ALAN DUMACK
 SURVEYOR
 SU-054500-E
 PENNSYLVANIA
 HEATH A. DUMACK, P.E. & P.L.S.
 PA P.E. LICENSE No. PE-05665-E
 PA P.L.S. LICENSE No. SU-054500-E

DUMACK ENGINEERING
 ESTABLISHED IN 1984

DE

677 DURHAM ROAD
 P.O. BOX 487
 PENNS PARK, PA 18943
 PHONE: (215) 598-1230
 FAX: (215) 598-1232

A PROFESSIONAL CORPORATION
CIVIL - STRUCTURAL ENGINEERS & SURVEYORS
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REV. NO.	DATE	REVISION
1	JUNE 10, 2022	PER ARMY CORPS
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FOR CLIENT REVIEW

EXISTING PARCEL INFO:
 T.M.P. No. 13-028-083
 DEED BOOK: 2758 PAGE No. 0857

CURRENT ZONING: LI

OWNER OF RECORD:
 JOHN & GIZELLA POZGAI
 538 W BRIDGE STREET
 MORRISVILLE, PA 19067

APPLICANT:
 BRITTON RTY MORRISVILLE LLC
 227 BAKERS BASIN RD
 LAWRENCEVILLE, NJ 08648

50 0 25 50
 GRAPHIC SCALE

WETLANDS RESTORATION PLAN
 & AUTHORIZED BY NWP-32
 536 W BRIDGE STREET
 FALLS TOWNSHIP
 BUCKS COUNTY, PA

DRAWN BY: HAD
 CHECKED BY:

SCALE: 1"=50'
 PROJECT No: 7516

PLAN DATE: APR. 21, 2022
 SHEET No. 1 of 1

Exhibit B



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT
100 PENN SQUARE EAST
PHILADELPHIA PENNSYLVANIA 19107-3390

October 3, 2022

Regulatory Branch

SUBJECT: Nationwide Permit 32 Verification NAP-2000-00043 (51)
POZSGAI JOHN AND GIZELLA BU
Central coordinates (40.201919°, -74.784233°)

Mr. Pat Flannery
CFO
Britton Realty of Bridge Street, LLC
PO Box 6499
227 Bakers Basin Rd.
Lawrenceville, NJ 08648

Dear Mr. Flannery:

This letter is written with regard to your proposal to maintain approximately 4.46 acres of fill in wetlands for commercial development. This project is located at 536 W. Bridge St., Falls Township, Bucks County, Pennsylvania. Based upon our review of the information that has been provided, it has been determined that the proposed work is authorized by Department of the Army Nationwide Permit (NWP) 32 Resolution of Enforcement Actions pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344).

This verification of authorization under NWP 32 Resolution of Enforcement Actions, described in the Federal Register at 86 FR 2744 and 86 FR 73522, is based on your agreement to comply with the general conditions, regional conditions and project specific special conditions listed in this letter. NWP 32 states:

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or nonjudicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Authorities: Sections 10 and 404) Also included with this verification are lists of the NWP general conditions (Enclosure 4) and NWP regional conditions (Enclosure 5) to which the authorized activity is subject.

Federal permits require determination from the State that the activities are consistent with the State's coastal zone management (CZM) program if the activity is located within the State's coastal zone. Federal permits also require the State's certification of compliance with section 401 of the Clean Water Act through the receipt of a 401 Water Quality Certification (WQC) if the activity involves a Section 404 discharge. A CZM consistency concurrence is not required because this activity is not located within nor does it affect the State's coastal zone. A general water quality certification has been issued for this permit. Therefore, no further action is needed as part of the Federal review of your project, provided that you comply with all the terms and conditions of this NWP.

This verification of NWP authorization is valid until the 2021 Nationwide Permits expire on **March 14, 2026**, unless the NWP authorization is modified, suspended, or revoked prior to this date. In the event that the NWP authorization is modified during that time period, this expiration date will remain valid, provided the activity complies with any subsequent modification of the NWP authorization.

Activities which have commenced (i.e. are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

Special Conditions:

1. All work performed in association with the subject project shall be conducted in accordance with the **enclosed** project plans identified as Wetlands Restoration and Authorized by NWP-32, 536 W Bridge Street Falls Township Bucks County, Prepared by Dumack Engineering, Scale 1"=50", dated April 21, 2022, last revised August 5, 2022 (Enclosure 1) and the enclosed Wetland Restoration Guidelines identified as "United States v. Gizella Pozsgai, Action ID Number CENAP-OPR 2000-00043. Wetland Restoration Guidelines for Gizella Pozsgai Property, 536 W. Bridge Street, Falls Township, Bucks County, Pennsylvania. Prepared by Michael P. Leggiero, Biologist, Surveillance and Enforcement Section, Regulatory Branch, Philadelphia District, United States Army Corps of Engineers, Dated August 25, 2022. Last revised September 28, 2022. (Enclosure 2).
2. Construction activities shall not result in the disturbance or alteration of greater than 4.46 acres of waters of the United States., including wetlands.
3. Any deviation in construction methodology or project design from that shown on the enclosed project plans must be approved by this office, in writing, prior to performance of the work. All modifications to the enclosed project plans shall be approved, in writing, by this office. No work shall be performed prior to written approval of this office.
4. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your general permit.
5. Any conditions in your State authorization required for compliance with the State 401 WQC are conditions of this authorization by reference.

If you should have any questions or concerns regarding this matter, please contact Michael P. Leggiero, Biologist, Surveillance and Enforcement Section at (570)472-4515 or michael.p.leggiero@usace.army.mil.

Sincerely,

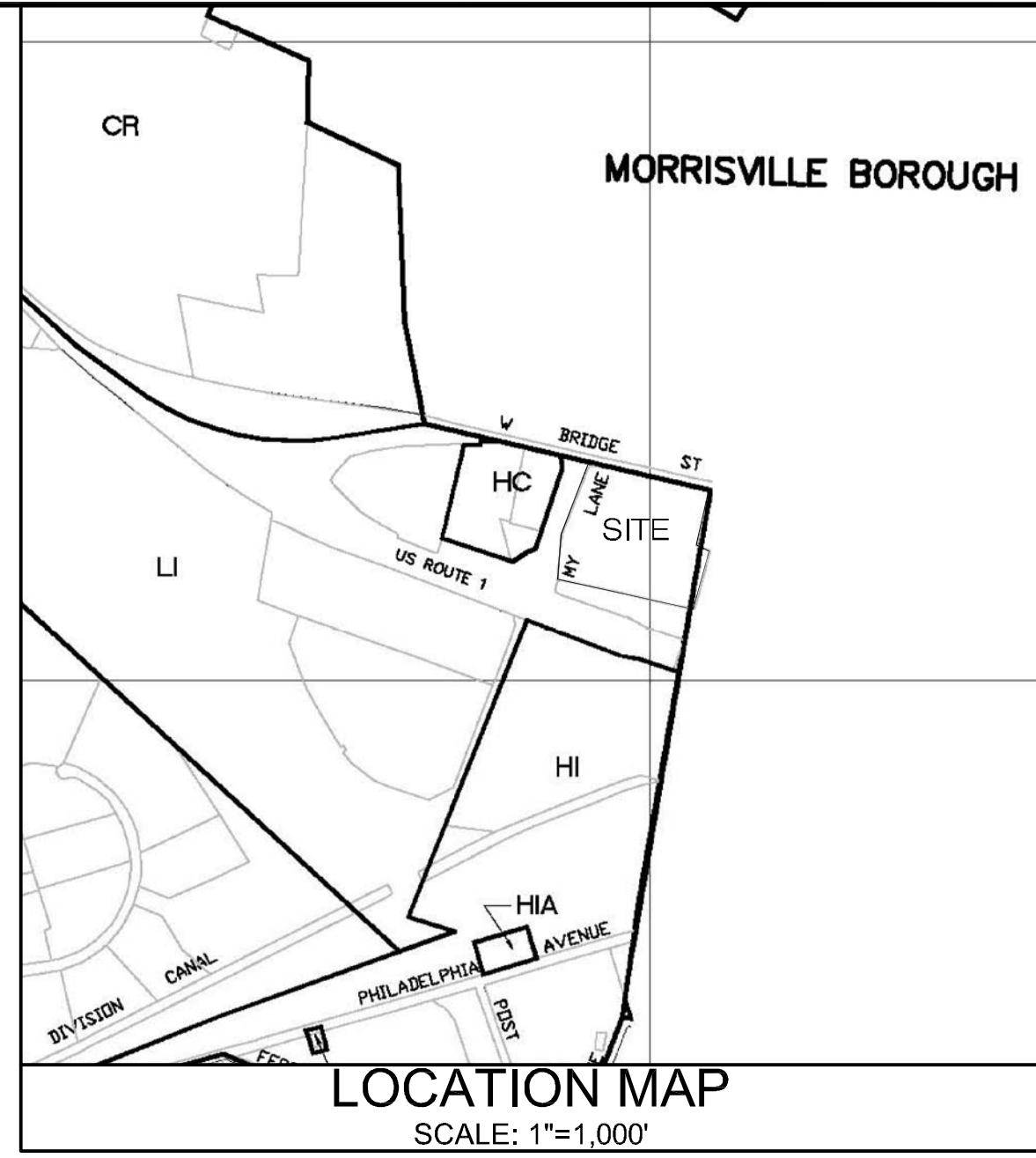
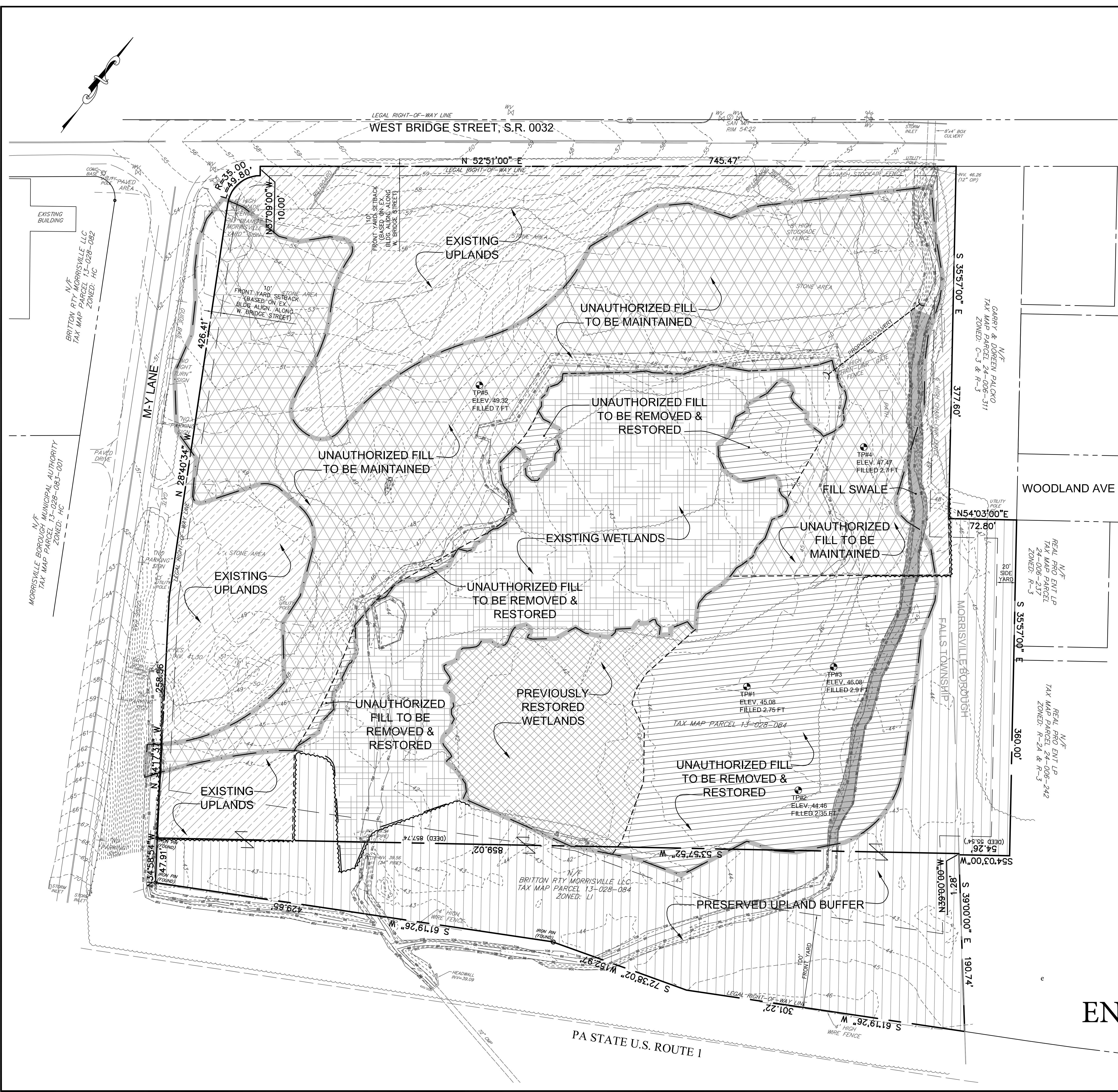
Todd A. Schaible
Chief, Regulatory Branch

Enclosures

cc:

US Department of Justice: Attn: Mr. Landon Jones
Southcentral Regional Office , PADEP: Attn: Mr. John Hohenstein
Bucks County Conservation District
USEPA Region III
The Kogan Law Group, PC: Attn: Mr. Lawrence Kogan
Epstein, Becker and Green: Attn: Mr. Andrew Kaplan

Enclosure 1 to NWP-32



- GENERAL NOTES:**
1. THE LOCATION OF EXISTING UNDERGROUND UTILITIES CONTAINED ON THESE PLANS HAVE BEEN OBTAINED BY FIELD SURVEY. COMPLETENESS OR ACCURACY OF THE LOCATION OF UTILITIES CANNOT BE GUARANTEED. THE CONTRACTOR SHALL VERIFY ALL EXISTING SITE CONDITIONS, SURFACE AND SUBSURFACE, AND SHALL NOTIFY THE ENGINEER IN THE EVENT OF DISCREPANCIES. IT IS THE CONTRACTOR'S RESPONSIBILITY TO NOTIFY UNDERGROUND UTILITY USERS FOR COMPLIANCE WITH PENNSYLVANIA ACT 2008-121.
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 3. TOPOGRAPHY AND ELEVATIONS BASED ON THE NORTH AMERICAN VERTICAL DATUM OF 1988 (NAVD88).

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UNAUTHORIZED FILL TO BE MAINTAINED	
BOUNDARY OF PREVIOUSLY FILLED WETLANDS	

ENCLOSURE 1

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 1-800-242-1776

NOT VALID WITHOUT AN EMBOSSED
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HEATH ALAN DUMACK
 PROFESSIONAL LAND
 SURVEYOR
 SU-054500-E
 HEATH A. DUMACK, P.E. & P.L.S.
 PA P.E. LICENSE No. PE-05665-E
 PA P.L.S. LICENSE No. SU-054500-E

DUMACK ENGINEERING
 ESTABLISHED IN 1964

DE

677 DURHAM ROAD
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 FAX: (215) 598-1232

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REV. NO.	DATE	REVISION
1	JUNE 10, 2022	PER ARMY CORPS
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FOR CLIENT REVIEW

EXISTING PARCEL INFO:
 T.M.P. No. 13-028-083
 DEED BOOK: 2756 PAGE No. 0857

CURRENT ZONING: LI

OWNER OF RECORD:
 JOHN & GIZELLA POZGAI
 538 W BRIDGE STREET
 MORRISVILLE, PA 19067

APPLICANT:
 BRITTON RTY MORRISVILLE LLC
 227 BAKERS BASIN RD
 LAWRENCEVILLE, NJ 08648

50 0 25 50
 GRAPHIC SCALE

WETLANDS RESTORATION PLAN
 & AUTHORIZED BY NWP-32
 536 W BRIDGE STREET
 FALLS TOWNSHIP
 BUCKS COUNTY, PA

DRAWN BY: HAD
 CHECKED BY:
 SCALE: 1"=50'
 PROJECT No: 7516
 PLAN DATE: APR. 21, 2022
 SHEET No. 1 of 1

Enclosure 2 to NWP-32



**US Army Corps
of Engineers**

Philadelphia District

Regulatory Branch

Surveillance and Enforcement Section

United States v. Gizella Pozsgai
Action ID Number CENAP-OPR-2000-00043

WETLAND RESTORATION GUIDELINES
for
GIZELLA POZSGAI PROPERTY
536 W. BRIDGE STREET
FALLS TOWNSHIP
BUCKS COUNTY
PENNSYLVANIA

PREPARED BY:

Michael P. Leggiero, Biologist
Surveillance and Enforcement Section
Regulatory Branch, Philadelphia District
United States Army Corps of Engineers

August 25, 2022
Last revised September 28, 2022



US Army Corps
of Engineers
Philadelphia District

WETLAND RESTORATION / CREATION REQUIREMENTS

1.0 Restoration Activities - All Areas

Whereas Britton Industries Inc. and Britton Realty of Bridge Street LLC (collectively, "Britton") are acting as an Intervenor for the owner, Mrs. Gizella Pozsgai, Britton shall adhere to the following general removal and restoration requirements for all areas to be restored:

1.1 General Requirements

1.1.1 All unauthorized fill material, including soil, stone, concrete, brick, asphalt, construction debris, wood chips, branches, logs, and other materials, shall be removed from the area subject to Federal jurisdiction as identified on the plan entitled "Wetlands Restoration and Authorized by NWP-32, 536 W Bridge Street Falls Township Bucks County, Prepared by Dumack Engineering, Scale 1"=50", dated April 21, 2022, last revised August 5, 2022" (Enclosure 1) and as described in the following Restoration/Creation Requirements.

1.1.2 All unauthorized fill being removed shall be disposed in an Army Corps of Engineers (Corps) approved, upland location.

1.1.3 All unauthorized dredged and/or fill material used at the Site prior to the Consent Decree shall be removed to the ground surface existing prior to the performance of unauthorized work. In the event that the ground surface existing prior to the performance of unauthorized work cannot be identified during removal and restoration activities, material shall be removed to the elevation of the adjacent undisturbed wetland surface. A representative from the Corps will be available during restoration to help equipment operators identify the pre-fill surface.

1.1.4 The Corps, or anyone designated by it, is authorized to enter upon and inspect the Pozsgai/Britton properties and the restoration work at such times as the Corps may choose, consistent with Paragraphs 34 through 36 of the Consent Decree.

1.1.5 Prior to the performance of removal or restoration work, all equipment operators shall attend a preconstruction meeting with a Corps representative on the site. No equipment operator shall perform removal or restoration work without first meeting with a Corps representative to review the removal and restoration requirements. During removal and restoration work, Corps staff will be available to help guide successful

removal/restoration efforts.

1.1.6 Prior to the preconstruction meeting, the location of the wetland/upland restoration line shown on Exhibit 1, i.e., the line between the unauthorized fill material to be removed from the wetlands, and the uplands and filled areas to remain, shall be identified, survey located, and staked on the ground by a licensed surveyor registered in the Commonwealth of Pennsylvania. A representative from the Corps will approve the location of the line, in writing, prior to the performance of restoration earthwork.

1.1.7 Prior to performing earthwork, it is the responsibility of Britton, or its representative, and/or contractor to call the utility mark-out hotline at (800)242-1776.

1.1.8 Heavy equipment is prohibited from entering the unfilled wetlands unless authorized by a Corps representative. All restoration earthwork shall be performed from already filled areas or from uplands. Restoration earthwork shall start at the waterward edge of the fill to be removed, working back towards uplands.

1.1.10 The upland wetland edge shall be graded to a slope no steeper than 2:1 (horizontal to vertical) and stabilized to prevent erosion. No portion of the toe of the wetland to upland slope shall be in the restored wetlands. The wetland to upland slope shall represent the restored wetland buffer.

1.1.11 Upon completion of restoration earthwork and the establishment of the sloped buffer between the existing/restored wetlands and the upland portions of the site, concrete "Jersey barrier" or other similar barrier shall be placed at top of slope/landward edge of buffer, in order to prevent future development activities from encroaching into the buffer area or the wetlands.

1.1.12 Stabilization of the wetland to upland buffer shall be accomplished by the placement of compost filter sock and/or placement of silt fencing along the toe of slope and seeding with a commercial seed mix to prevent erosion of sediment into restored areas.

1.1.13 All restored wetland areas shall be seeded with a variable seed mix suitable for wet areas following completion of fill material removal. Prior to planting or seeding, the restoration earthwork shall be approved, in writing, by the Corps. The Corps shall be notified within five days of completion of restoration earthwork to schedule an inspection of the restored areas.

1.1.14 Seeding of the wetland to upland buffer (commercial seed mix) and the restored wetlands (seed mix suitable for wet areas) shall be performed within five days of receipt of written verification that restoration earthwork has been completed to the satisfaction of the Corps.

1.1.15 In the event that weather conditions are not suitable for seeding

immediately following written verification of the successful completion of restoration earthwork, the Corps shall be contacted to establish an alternate date for seeding.

1.1.16 Within 20 days of the completion of restoration earthwork and receipt of written verification by the Corps, the restored wetland areas shall be planted with woody vegetation representative of adjacent, undisturbed areas; a total of at least 1,200 woody plants at least 18 inches in height. Planted stock shall be identified by red flagging prior to planting to facilitate future monitoring of plant survivability.

1.1.17 The following species of woody plants are recommended: winterberry holly (*Ilex verticillata*), smooth alder (*Alnus serrulata*), buttonbush (*Cephalanthus occidentalis*), silky dogwood (*Cornus amomum*), American elder (*Sambucus canadensis*), black willow (*Salix nigra*), spicebush (*Lindera benzoin*), arrowwood (*Viburnum recognitum*), red maple (*Acer rubrum*), sweetgum (*Liquidambar styraciflua*), and swamp white oak (*Quercus bicolor*).

1.1.18 Woody stock may be planted in straight rows for ease of monitoring, however, plant species should be mixed within the rows to add diversity and according to their growth requirements for hydrology, shading, etc.

1.1.19 Minor deviations from the restoration plan as identified in this document and referenced plans due to unforeseen circumstances or site conditions, shall be subject to prior approval by the Corps representative.

1.1.20 Britton shall adhere to the Erosion and Sediment (E&S) control plan approved by the state or county. Any work directed by the state or county, required to remain in compliance with the E&S plan, that involves the discharge of fill material into waters or wetlands on the Site, shall be performed as directed. Britton shall notify the Corps for approval within five days of performing the work.

1.1.21 Should Britton discover any buried solid waste during the performance of the restoration, all work within that area shall stop until such time as the Corps and the Pennsylvania Department of Environmental Protection, Bureau of Solid Waste Management can coordinate and develop a Corrective Action Plan for Britton to follow.

2.0 Restoration Requirements - Specific Areas

In addition to the above-noted general removal and restoration requirements, Britton shall adhere to the following specific area wetland creation and restoration requirements:

2.1 Linear Ditch along the eastern side of the Site

2.1.1 The linear ditch, which historically redirected existing stream flow along the eastern boundary of the Site shall be filled in order to redirect stream flow back into

its original, pre-violation alignment.

2.1.2 The 'upstream' limit of the ditch shall be stabilized and armored using either riprap rock or other geotechnical products, in order to prevent erosion and redirect stream flow. Whichever armoring method is used for stabilization, the armoring shall be covered with clean topsoil and planted with a native seed mix.

2.1.3 The remainder of the ditch shall be filled to match the elevation of the adjacent ground level. "Fill dirt" that is clean and free of contaminants may be used, but the ditch is required to be topped with a minimum of 8 inches of clean topsoil at the surface.

2.1.4 Britton shall reconnect existing stream flow from the northeastern corner of the Site into the existing wetlands at the area identified as "proposed culvert" on Enclosure 1 pursuant to installation of a culvert. The structure shall be sized to prevent the restriction of high flows and the bottom shall be recessed so as not to restrict the passage of aquatic organisms. Construction of this structure may not proceed until the design is approved, in writing, by the Corps.

3.0 Monitoring and Monitoring Reports

3.1 Monitoring

3.1.1 Britton or its representatives shall monitor the restored wetlands for a period of three full growing seasons following the completion of restoration earthwork and planting/seeding.

3.1.2 Seeded areas must achieve 85 percent areal coverage by the end of the first complete growing season (October 15) after the completion of the restoration earthwork. In the event that this vegetation coverage rate is not achieved, additional seeding in those areas not meeting 85 percent areal coverage shall be required the following spring.

3.1.3 Planted stock shall be monitored and a survival rate of 75% of planted stock must be achieved by the end of the first complete growing season. (October 15) following planting. In the event that this rate is not achieved, additional stock shall be planted the following spring to replace all stock that did not survive. Survivability of planted stock shall be identified as living material at least 18 inches in height and less than 50 percent die-back or herbivory of individual plants.

3.1.4 An end of growing season monitoring inspection shall be scheduled as a joint inspection with the Corps representative. Contact should be made with the Corps at least 14 days prior to the proposed monitoring to schedule this inspection.

3.1.5 In the event that the above noted work and success criteria have not

been performed satisfactorily, the performance of additional work, including slope stabilization, additional seeding, and/or additional planting may be required.

3.2 Monitoring Reports

3.2.1 A baseline report shall be submitted to the USACE prior to monitoring, and be followed by three subsequent annual monitoring reports by December 31 of each monitoring year. The reports shall identify the status of seeded areas and any re-seeding efforts. The monitoring reports shall include any identified problems that may arise and shall provide proposed solutions.

3.2.2 In the event that the wetland restoration and creation is not successful at the end of the three-year monitoring period, additional restoration and/or mitigation, i.e., earthwork and/or seeding, may be required at the discretion of the Corps.

4.0 Deed Restriction of Restoration Areas and Upland Buffers

4.1 Deed Restriction

4.1.1 All areas identified as “Existing Wetlands, Unauthorized Fill to be Removed and Restored, Previously Restored Wetlands, and Preserved Upland Buffer” on Exhibit 1 shall be protected, in perpetuity, by a Deed Restriction (Enclosure 3).

4.1.2 The Deed Restriction shall be recorded with the Prothonotary for Bucks County pursuant to Paragraphs 20 and 21 of the Consent Decree. A copy of the recorded Deed Restriction, showing the recording citations, shall be provided to the Corps within 10 days of its recording.

ENCLOSURE 2

Enclosure 3 to NWP-32

DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION

THIS DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION (hereinafter “Declaration”) made this [Click here to enter text.](#) day of [Click here to enter text.](#), 2022, by **Britton Realty of Bridge Street LLC and Britton Realty Morrisville, LLC**, (hereinafter “Grantor”);

WITNESSETH:

WHEREAS, Grantor is the fee simple owner of certain tracts of land located in Bucks County, Pennsylvania, and being a portion of the property conveyed to the Grantor by deed recorded in deed book *[insert LIBER FOLIO reference here]* in the land records of Bucks County, Pennsylvania, more particularly described in Exhibit(s) attached hereto and incorporated by reference, hereinafter referred to as the “Property”; and

*[**NOTE TO GRANTOR: The Grantor shall prepare and attach a legal description (i.e. metes and bounds of the Property, and if less than the whole property, also include a separate, clearly identifiable, legal description of the Conservation Area, all in an exhibit identified as “Exhibit A” to the Declaration. In addition, the Grantor will include an Exhibit B that shall be a scaled drawing of the area subject to the Declaration. The restricted area shall be clearly labeled on the plan as “Conservation Area” and be clearly identified by cross-hatching and shading. The Grantor shall also include on the drawing the location and extent of all known, pre-existing easements, rights of ways, utilities, drainage ditches, stormwater facilities, cattle crossings, and structures. For each such item that involves on-going or periodic operation and maintenance, a description of all anticipated and authorized maintenance work and the work boundaries for each item shall also be included. If the legal description(s) and drawing(s) can be legibly included on one exhibit, and whereas clause above for this instrument may be written to describe all of these are one exhibit. (i.e., “...more particularly described and shown in Exhibit A, attached hereto...”) A copy of the NWP-32 authorization must be attached to the document for recordation.]*

WHEREAS, the United States Army Corps of Engineers, through its Philadelphia District, Regulatory Branch, (hereinafter “Corps”), and the Grantor have agreed that the Grantor would make the portion of the Property hereinafter referred to as the “Conservation Area” subject to the conservation-based covenants described in this Declaration as a condition of the attached Department of the Army Permit issued in conjunction with the Consent Decree entered in the matter of U.S. v. Pozsgai, Civil Action No. 88-6545; and

WHEREAS, the Grantor agrees to the creation of these conservation-based covenants and intends the Conservation Area shall be preserved and maintained in a natural condition in perpetuity;

NOW, THEREFORE, in consideration of the mutually-held interests in preservation of the environment, as well as the terms, conditions, and restrictions contained herein, and pursuant

to the laws of the Commonwealth of Pennsylvania, Grantor does agree to the following terms and conditions:

1. PURPOSE

The purpose of this Declaration of Restrictive Covenants for Conservation is:

To preserve and protect the native flora, fauna, soils, water table and drainage patterns, and other conservation values of the Conservation Area;

To view the Conservation Area in its scenic and open condition; and in general,

To assure that the Conservation Area, including its air space and subsurface, will be retained in perpetuity in its natural condition as provided herein and to prevent any use of the Conservation Area that will impair or interfere with its natural resource functions and values. Grantor intends that this Declaration will confine the use of the Conservation Area to such activities as are consistent with the purpose of this Declaration.

To accomplish the purpose of this Declaration, the following rights are created in accordance with *Pennsylvania common law*:

A. To allow the Grantor or the Corps, the right to enter upon the Property to inspect the Conservation Area at reasonable times to monitor compliance with and otherwise enforce the terms of this Declaration; provided that, except in cases where Grantor determines that immediate entry is necessary to prevent, terminate, or mitigate a violation of this Declaration; such entry shall, when practicable, be upon reasonable prior notice to any successor or assign, and Grantor shall not unreasonably interfere with the successor's or assign's use and quiet enjoyment of the Property in accordance with the terms of this Declaration;

B. To allow the Grantor or the Corps to enforce the terms of this Declaration by appropriate legal proceedings in accordance with *Pennsylvania common law* so as to prevent any activity on or use of the Property that is inconsistent with the purpose of this Declaration and to require the restoration of such areas or features of the Conservation Area that may be damaged by any inconsistent activity or use; and

C. To allow the Grantor, or their authorized representatives, to enter upon the Property and its Conservation Area at reasonable times, upon prior notice to the property owner; and upon prior notice and written approval by the Corps to take any appropriate environmental or conservation management measures consistent with the terms and purposes of this Declaration, including:

- 1) Planting of native vegetation (i.e. trees, shrubs, grasses and forbs); or
- 2) Restoring, altering or maintaining: the topography; hydrology; drainage; structural integrity; streambed; water quantity; water quality; any relevant feature of any stream, wetland, water body, or vegetative buffer within the Conservation Area.

2. DURATION

This Declaration shall remain in effect in perpetuity, shall run with the land regardless of ownership or use, and is binding upon all subsequent property owners, declarants, their heirs, executors, administrators, successors, representatives, devisees, and assigns, as the case may be, as long as said party shall have any interest in any part of the Conservation Area.

3. PERMITTED USES

This Declaration will not prevent the Grantor; subsequent property owner(s); and the personal representatives, heirs, successors, and assigns of either the Grantor or subsequent property owner from making use of the area(s) that are not expressly prohibited herein and are not inconsistent with the purpose of this Declaration.

4. RESTRICTIONS

Any activity in or use of the Conservation Area inconsistent with the purpose of the Declaration by the Grantor; subsequent property owner(s); and the personal representatives, heirs, successors, and assigns of either the Grantor or subsequent property owner, is prohibited. Without limiting the generality of the foregoing, and except when an approved purpose under 1.C above, or as necessary to accomplish mitigation approved under the aforementioned permit, the following activities and uses are expressly prohibited in, on, over, or under the Conservation Area, subject to all of the express terms and conditions below:

- A. **Structures.** The construction of man-made structures including but not limited to the construction, removal, placement, preservation, maintenance, alteration, or decoration of any buildings, roads, utility lines, billboards, or other advertising. This restriction does not include deer stands, bat boxes, bird nesting boxes, bird feeders, duck blinds, and the placement of signs for safety purposes or boundary demarcation.
- B. **Demolition.** The demolition of fencing structures constructed for the purpose of demarcation of the Conservation Area or for public safety.
- C. **Soils.** The removal, excavation, disturbance, or dredging of soil, sand, peat, gravel, or aggregate material of any kind; or any change in the topography of the land, including any discharges of dredged or fill material, ditching, extraction, drilling, driving of piles, mining, or excavation of any kind.
- D. **Drainage.** The drainage or disturbance of the water level or the water table, except for pre-existing or approved project-related stormwater discharges and any maintenance associated with those stormwater discharges. All pre-existing or approved project-related drainage/stormwater discharge features should be shown on the accompanying plat map or approved plan and attached to this Declaration.

- E. **Waste or Debris.** The storage, dumping, depositing, abandoning, discharging, or releasing of any gaseous, liquid, solid, or hazardous waste substance, materials or debris of whatever nature on, in, over, or underground or into surface or ground water, except for pre-existing or approved project-related stormwater discharges and any maintenance associated with those stormwater discharges.
- F. **Non-Native Species.** The planting or introduction of non-native species.
- G. **Herbicides, Insecticides and Pesticides.** The use of herbicides, insecticides, or pesticides, or other chemicals, except for as may be necessary to control invasive species that threaten the natural character of the Conservation Area. State-approved municipal application programs necessary to protect the public health and welfare are not included in this prohibition.
- H. **Removal of Vegetation.** The mowing, cutting, pruning, or removal of any kind; disturbance, destruction, or the collection of any trees, shrubs, or other vegetation, except for pruning, cutting or removal for:
 - 1) safety purposes; or
 - 2) control in accordance with accepted scientific forestry management practices for diseased or dead vegetation; or
 - 3) control of non-native species and noxious weeds; or
 - 4) scientific or nature study.
- I. **Agricultural Activities.** Unless currently used for agricultural or similarly related purposes, conversion of, or expansion into, any portion of the Conservation Area for use of agricultural, horticultural, aquacultural, silvicultural, livestock production or grazing activities. This prohibition also includes conversion from one type of these activities to another (e.g., from agricultural to silvicultural).
- J. **Other:** Other acts, uses, excavation, or discharges which adversely affect fish or wildlife habitat or the preservation of lands, waterways, or other aquatic resources within the Conservation Area.

5. INSPECTION, ENFORCEMENT AND ACCESS RIGHTS

The Corps and its authorized representatives shall have the right to enter and go upon the Property, to inspect the Conservation Area and take actions necessary to verify compliance with this Declaration. When practicable, such entry shall be upon prior reasonable notice to the property owner. The grantor grants to the Corps, or the U.S. Department of Justice a discretionary right to enforce this Declaration in a judicial action against any person(s) or other entity(ies) violating or attempting to violate these restrictive covenants: provided, however, that no violation of these restrictive covenants shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing agency shall be entitled to a complete restoration for any

violation, as well as any other judicial remedy such as civil penalties. Nothing herein shall limit the right of the Corps to modify, suspend, or revoke the permit.

6. RECORDING AND EXECUTION BY PARTIES

The Grantor agrees to record a certified copy of this Deed Restriction with the Prothonotary for Bucks County, Pennsylvania within fifteen (15) calendar days of entry of the above-referenced Consent Decree and acquisition of said Property and to provide the Corps with proof of recordation within 20 days of restoration earthwork identified in “Wetlands Restoration and Authorized by NWP-32, 536 W Bridge Street Falls Township Bucks County, Prepared by Dumack Engineering, Scale 1”=50”, dated April 21, 2022, last revised August 5, 2022” (Exhibit 1). Further, if anticipated activities in the Conservation Area are agreed upon for future phases of the site, as spelled out in the “Reserved Rights”, the Grantor must submit plans to the Corps for review and approval prior to any work in the Conservation Area.

7. NOTICE OF TRANSFER OF PROPERTY INTERESTS

No transfer of the rights of this Declaration, or of any other property interests pertaining to the Conservation Area or the underlying property it occupies shall occur without sixty (60) calendar days prior written notice to the Corps.

8. MODIFICATIONS

The restrictions contained in this Declaration are required by the attached Department of the Army Permit for authorized use of said permit. There shall be no changes or alterations to the provisions in this Declaration without prior written approval from the appropriate District Commander of the Corps.

9. RESERVED RIGHTS

A. The Grantor and any holders of easements or other property rights for the operation and maintenance of pre-existing or project-related structures or infrastructure such as roads, utilities, drainage ditches, or stormwater facilities that are present on, over or under the Conservation Area reserve the right, within the terms and conditions of their permits, their agreements, and the law, to continue with such operation and maintenance. All pre-existing or approved project-related structures or infrastructure shall be shown on the accompanying plat map or approved plan and attached to this instrument.

B. If the authorized project requires any related or unanticipated infrastructure modifications, utility relocation, drainage ditches, or stormwater controls within the identified Conservation Area, or if situations require measures to remove threats to life or property within the identified Conservation Area, said activities must be approved in writing by the Corps subject to terms and conditions set forth in the written approval. Approval is subject to the Corps' sole discretion. If approved, said activities must be identified on amended Exhibits and must be recorded and specifically noted as an "amendment" and copies of the recorded amended Exhibits must be provided to the Corps within 60 days of Corps approval. Approval of said activity by the Corps is in addition to any Clean Water Act, Section 404 permit, or other authorization, which may be required in order to legally implement said activity. The Grantor accepts the obligation to place any other responsible party on reasonable prior notice of their need to request such Corps approval.

10. SEVERABILITY

If any portion of this Declaration, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

11. RESTORATION MONITORING

If the work required by a restoration plan including maintenance or remedial work, under the Department of Army permit for the authorized project occurs within the Conservation Area, then the Grantor is allowed to construct the restoration work in accordance with the authorized restoration plan, a copy of which is incorporated by reference.

IN WITNESS WHEREOF said GRANTOR has executed this Declaration the day and year first above written.

[COMPANY OR GOVERNMENT ENTITY NAME OF GRANTOR, IF APPLICABLE]

BY: _____
[TITLE OF OFFICER OF GRANTOR ENTITY, OR GRANTOR'S NAME, IF AN INDIVIDUAL]

COMMONWEALTH OF PENNSYLVANIA:
: SS
COUNTY OF [Click here to enter text.](#):
:

On [Click here to enter text.](#), before me, a Notary Public for the Commonwealth aforesaid, personally appeared [Click here to enter text.](#), who acknowledged himself/herself to be ***[TITLE OF OFFICER OF GRANTOR ENTITY, OR GRANTOR'S NAME, IF AN INDIVIDUAL]***, and that s/he, as ***[USE IF APPLICABLE: an officer of]*** the Grantor, being authorized to do so, executed, in my presence, the foregoing Declaration for the purposes herein contained

IN WITNESS WHEREOF, I have set my hand and official seal.

Notary Public
My commission expires:

[SEAL]

APPROVED AS TO LEGALITY AND FORM

[ONE OR MORE SIGNATURE BLOCKS HERE FOR THE ATTORNEY FOR THE GRANTOR, AND IF A COMPANY OR GOVERNMENT ENTITY, ANY OTHER NECESSARY OFFICIALS.]

NOTE: Some version of the following notarization will accompany the complete, executed, and recorded instrument. The version below is simply one example. Other versions may be used to follow local legal recordation practice, including, for example, but not limited to, those referring only to a Deedbook Volume and Page, or only to a Liber and Folio.]

COMMONWEALTH OF PENNSYLVANIA:

: SS

COUNTY OF [Click here to enter text.](#)

:

Recorded in the Office for Recording of Deeds

in and for aforesaid County, in

Deedbook [Click here to enter text.](#), Vol. [Click here to enter text.](#),

Page [Click here to enter text.](#)

Witness my hand and seal of Office

On _____

RECORDER OF DEEDS

GRANTOR

Enclosure 4 to NWP-32

2021 Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

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5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the preconstruction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the preconstruction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Structures and Fills.* Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to preconstruction elevations. The affected areas must be revegetated, as appropriate.

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14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”

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(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWP.

(e) Authorization of an activity by an NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.*, an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The

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word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If preconstruction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance

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with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the preconstruction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

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(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/ THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

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23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.*, on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require preconstruction notification, the district engineer may determine on a case-by case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100 acre and require preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100 acre or less that require preconstruction notification, the district engineer may determine on a case-by case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the

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stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWP, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

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(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (*e.g.*, resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived

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(see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires preconstruction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3 acre.

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(b) If one or more of the NWP's used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWP's cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2 acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

- (a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;
- (b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(1)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

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(c) The signature of the permittee certifying the completion of the activity and mitigation. The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the

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permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. (ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs. (iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project

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site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

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(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the preconstruction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat

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conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of preconstruction notifications to expedite agency coordination.

ENCLOSURE 4

Enclosure 5 to NWP-32

**ENCLOSURE 3: REGIONAL CONDITIONS TO THE 2021 NATIONWIDE PERMITS
IN THE COMMONWEALTH OF PENNSYLVANIA****I. Regional Conditions Applicable to Specific Nationwide Permits within the Commonwealth of Pennsylvania:****A. Nationwide Permit 3 Maintenance:**

For activities in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania¹, the permittee must submit a Pre-Construction Notification (PCN) to the District Engineer (see General Condition 32 and Regional General Condition 32) prior to commencing the activity for all tide gate replacements where a self-regulating tide gate is not being proposed. Self-regulating tide gates allow tidal flow and fish passage but can be set to close at a specified water level. For projects not proposing the use of self-regulating tide gates, the applicant shall demonstrate why it is not practicable to replace the tide gate with self-regulating tide gates and shall also provide documentation that the waterway above the proposed gate does not currently support diadromous fish migrations. The District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.

B. Nationwide Permit 5 Scientific Measurement Devices:

The construction or installation of subaqueous turbines or similar facilities is not authorized by this Nationwide Permit.

C. Nationwide Permit 6 Survey Activities:

1. Use of in-water explosives is not authorized under this Nationwide Permit.
2. The permittee shall ensure that all in-stream exploratory trenching is conducted under dry conditions and returned to preconstruction conditions and elevations.

D. Nationwide Permit 7 Outfall Structures and Associated Intake Structures: The following regional conditions are applicable only to the Philadelphia District Regulatory Area of Responsibility in Pennsylvania:

1. Intake structures should be equipped with screening (with mesh size no larger than 2mm) of wedge wire or another material of equal or better performance. In addition, intake velocities should not exceed 0.5 ft. /sec. This condition may be waived by the District Engineer if an applicant proposes to utilize new or improved technologies that meets or exceeds the “wedge wire” design technology.
2. The intake structure shall be positioned such that its design minimizes impingement and entrainment of aquatic species where feasible. This would

¹ District Boundaries can be found at the weblinks listed in Special Note 1.

include efforts that result in stream velocities over, around or past the intake structure that exceed the velocities through the intake structure.

E. Nationwide Permit 10 Mooring Buoys:

1. Water depths in the mooring area must be sufficient so that any moored vessels float at all stages of the tide or mean low water.
2. Mooring buoys are prohibited in areas containing submerged aquatic vegetation.

F. Nationwide Permit 11 Temporary Recreational Structures:

1. Prior to doing the work, permittees must submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).
2. Water depths in mooring areas must be sufficient so that any moored vessels float at all stages of the tide or mean low water.
3. This Nationwide Permit (NWP) does not authorize the placement of any temporary structures in any areas containing submerged aquatic vegetation.
4. For activities located in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania, NWP #11 is applicable only to structures associated with discrete or specific recreational events.

G. Nationwide Permit 13 Bank Stabilization: The following regional conditions are applicable only to the Philadelphia District Regulatory Area of Responsibility in Pennsylvania:

1. Any activity requiring a Pre-Construction Notification (PCN) to the District Engineer that does not utilize bioengineering, vegetative stabilization, or combinations of vegetative and structural bank stabilization methods must include an analysis demonstrating that such measures were not practicable and/or appropriate.
2. This Nationwide Permit may not be used to authorize any stabilization activity where no demonstrable erosion or threat of erosion is evident.
3. A PCN shall be provided to the Corps for all in-water structures, such as bioengineering, break waters, sills, gabion baskets, wave attenuation devices (WADs), or any combinations of bank stabilization techniques, placed offshore of the bank for the purpose of erosion control or prevention. The District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.

H. Nationwide Permit 14 *Linear Transportation Projects:*

1. Prior to doing the work, permittees shall submit a Pre-Construction Notification to the District Engineer, (see General Condition 32 and Regional General Condition 32) if a Section 10 permit is required.
2. For activities located in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania, stream or open water crossings shall be designed to maintain continuity of existing benthic habitats and to maintain existing stream flow patterns. This can be achieved through the use of elevated structures, bottomless culverts, or by depressing culverts below the stream bottom. This design requirement must include a site-specific evaluation of the particular stream or water body to determine if it is experiencing erosion or sedimentation rates that would alter the bottom elevation. Where a series of culverts are used, only those cells or culverts, which carry the base stream flow, shall be depressed. The bottom of any other culverts or cells shall be raised to pass and maintain existing and expected high flows. The dimension, pattern, and profile of the stream above and below the stream crossing shall not be permanently modified by changing the width or depth of the stream channel.

I. Nationwide Permit 18 *Minor Discharges:*

Prior to doing the work, permittees shall submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).

J. Nationwide Permit 19 *Minor Dredging:*

Prior to doing the work, permittees shall submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).

K. Nationwide Permit 23 *Approved Categorical Exclusions:*

Prior to commencing the activity, permittees shall submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).

L. Nationwide Permit 27 *Aquatic Habitat Restoration, Establishment, and Enhancement Activities:*

1. Prior to commencing the activity, permittees shall submit a Pre-Construction Notification (PCN) to the District Engineer. (See General Condition 32 and Regional General Condition 32).
2. Any activity involving shellfish seeding, such as the placement of shell material or any other habitat development or enhancement for shellfish, is restricted to shellfish species that are native to that waterbody.

3. For activities in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania, the District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.

M. Nationwide Permit 28 Modifications of Existing Marinas:

1. Prior to doing the work, permittees shall submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).
2. For projects in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania, this Nationwide Permit is only applicable to those marinas previously reviewed and approved by the District Engineer through the Individual Permit process.

N. Nationwide Permit 30 Moist Soil Management for Wildlife:

Prior to commencing the activity, permittees must submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).

O. Nationwide Permit 35 Maintenance Dredging of Existing Basins:

1. Permittees must submit a Pre-Construction Notification to the District Engineer. (See General Condition 32 and Regional General Condition 32).
2. For activities in the Philadelphia District Regulatory Area of Responsibility in Pennsylvania, this Nationwide Permit is only applicable to maintenance dredging of existing basins previously reviewed and approved by the District Engineer through the Individual Permit process.

P. Nationwide Permit 38 Cleanup of Hazardous and Toxic Waste:

For activities in the Philadelphia District Regulatory Area of Responsibility within Pennsylvania, a Pre-Construction Notification (PCN) is required, and the District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.

Q. Nationwide Permit 53 Removal of Low-Head Dams:

For activities in the Philadelphia District Regulatory Area of Responsibility within Pennsylvania, a Pre-Construction Notification (PCN) is required, and the District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.

R. Nationwide Permit 54 *Living Shorelines*: For activities located in the Philadelphia District Regulatory Area of Responsibility within Pennsylvania:

1. A Pre-Construction Notification (PCN) is required, and the District Engineer will coordinate review of the PCN with the National Marine Fisheries Service-Habitat and Ecosystem Services Division.
2. Fill or dredged material used for the purpose of establishing or re-establishing a vegetative plane must be of appropriate grain size to support plant growth and development.
3. Sills shall be constructed of riprap, gabion baskets, or clean broken concrete free of metal and re-bar. Alternative materials may be considered for use at the discretion of the District Engineer.
4. Sills shall be designed with at least one 5-foot window/gap per property and per every 100 linear feet of sill unless waived by the District Engineer.
5. The sill height shall be a maximum of +1 foot above mean high water and should be placed at a distance no greater than 30 feet from mean low water to the landward peak side of the sill unless waived by the District Engineer.
6. The total amount of vegetated wetlands which may be filled, graded, or excavated, in square feet, may not exceed the acreage of living shoreline establishment or re-establishment unless the District Engineer waives this criterion by making a written determination concluding that the project will result in minimal adverse effects. All temporary impacts to sub-tidal, inter-tidal, and/or existing wetland vegetation shall be restored to previous conditions and may require a wetland planting plan.
7. If the proposed project results in temporary impacts to existing wetland vegetation, then the permittee shall monitor the re-establishment of wetland vegetation until such time as the vegetation meets pre-disturbance conditions (i.e., coverage and density). If the wetland is not restored to previous conditions within two complete growing seasons, the permittee shall provide a modification request to the Corps and may be required to provide compensatory mitigation.

II. Regional Conditions Applicable to All 2021 Nationwide Permits within the State of Pennsylvania Unless Otherwise Stated:

Note: To qualify for Nationwide Permit (NWP) authorization, the permittee must comply with the following regional general conditions, as applicable, in addition to any specific NWP regional conditions identified above in Section I, the terms and conditions found in the issuance and reissuance of the NWPs published in the *Federal Register* on December 27, 2021 (86 FR 73522), and any activity-specific verification conditions imposed by the Corps.

A. Nationwide Permit Regional General Condition #2 Aquatic Life Movement:

1. For activities in the Philadelphia District Regulatory Area of Responsibility, in order to protect diadromous fish migrations, spawning activities, and EFH, in-water work shall be avoided in accordance with the following time of year restrictions, unless otherwise authorized by the District Engineer through the PCN process:
 - a. To protect diadromous fish migrations and spawning, in the Delaware River main stem from the Pennsylvania and Delaware State Borders to the U.S. Route 1 Bridge, in Morrisville, and ALL tributaries within this reach, in-water work shall be avoided from ***March 1 to June 30***. This time of year restriction is not applicable to waters of the United States located upstream of an obstruction that precludes fish passage.
 - b. To protect diadromous fish migrations and spawning in the Delaware River mainstem above the U.S. Route 1 Bridge, in Morrisville, and ALL tributaries north of this point, in-water work shall be avoided from ***March 1 to July 31***. This time of year restriction is not applicable to waters of the United States located upstream of an obstruction than precludes fish passage.
 - c. Work within cofferdams that fully enclose and dewater the project area can proceed any time during the year provided that the cofferdams are installed and removed outside of the seasonal work restriction and do not preclude the free movement of migrating and spawning aquatic species to ensure compliance with NWP General Condition 2 and 3.
 - d. A request for waiver from these timing restrictions may be requested by submitting a PCN to the Corps and shall include a written statement that clearly describes one or more of the following: (1) why the use of cofferdams cannot be implemented; (2) evidence documenting the waterway does not or has not historically supported migrations and/or spawning habitat; (3) what additional measures have been taken or are being proposed to avoid impacts; (4) and, why the activity must be conducted within the restricted time periods. Cost and logistics alone will not be sufficient. The Corps shall coordinate the request with the NMFS.
2. For activities in the Philadelphia and Baltimore Districts area of responsibility, all culverted road crossings of perennial and intermittent streams must meet the below culvert depression criteria, or a Pre-Construction Notification (PCN) is required to be submitted to the District Engineer for review and coordination with the National Marine Fisheries Service – Habitat and Ecosystem Services Division. Extensions of existing culverts that are not depressed below the stream bottom do not require a PCN.
 - a. Culverts measuring greater than 36 inches in diameter must be depressed 12 inches below the stream bottom; or

- b. Culverts measuring 36 inches or less in diameter must be depressed 6 inches below the stream bottom.
3. If depression of the culvert is not practicable in accordance with this depression criteria, the applicant must submit a Pre-Construction Notification, including a narrative documenting measures evaluated to minimize disruption of the movement of aquatic life, as well as specific documentation concerning site conditions and limitations on depressing the culvert, cost, and engineering factors that prohibit depressing the pipe/culvert. Options that need to be considered include the use of a bridge, bottomless pipe, partial depression, or other measures to provide for the movement of aquatic organisms. The documentation must also include photographs documenting site conditions. The Corps shall provide a copy of the PCN, including the supporting documentation, to the NMFS for any culvert which cannot be depressed as outlined in this Regional General Condition 2 for Aquatic Life Movements. The applicant may find it helpful to contact National Marine Fisheries Service for recommendations about the measures to be taken to allow for fish passage.

B. Nationwide Permit Regional General Condition #16 Wild and Scenic Rivers:

1. Permittees must provide a PCN if a proposed NWP activity will occur in the following officially designated National Wild and Scenic Rivers:
 - a. Allegheny River, from the Kinzua Dam mile 197.2, downstream approximately 7 miles to US Route 6 Bridge, at mile 190.7, in Warren, then from the Buckaloons Recreation Area in Allegheny National Forest at mile 181.7 downstream 47 miles to Alcorn Island just north of Oil City at river mile 133.7, and then continuing from the Franklin Wastewater Treatment Plant at mile 122.7, downstream 31 miles to the refinery at Elmenton mile 90.7;
 - b. Clarion River from mile 91.1 in the Borough of Ridgeway, Elk County, Pennsylvania, at the National Forest and State Game Lands boundary to mile 39.4 at the normal pool elevation of Piney Dam;
 - c. Upper Delaware Scenic and Recreational River, including the ¼ mile buffer from each bank, beginning at Hancock, New York, and continuing 73.4 river miles to Mill Rift, Pennsylvania;
 - d. Middle Delaware Scenic and Recreational River (from bank to bank) beginning approximately four miles below Port Jervis, extending downstream approximately to the boundary between Monroe and Northampton Counties in Pennsylvania (just below the Interstate 80 bridge);
 - e. Lower Delaware River beginning 7 river miles north of Belvidere, New Jersey, continuing to Washington Crossing, Pennsylvania, including Paunacussing Creek, within Solebury Township; all of the Tinicum Creek,

- including Rapp Creek and Beaver Creek Tributaries; and Tohickon Creek from the mouth to the Lake Nockamixon Dam, including a ¼ mile buffer from each bank. The towns of Belvidere, Phillipsburg, and Easton, as well as existing power plants, water supply intakes and wastewater outfalls are not included in the designated area; and
- f. White Clay Creek watershed including all of its tributaries.
2. For activities in the Philadelphia District Regulatory Area of Responsibility within Wild and Scenic Rivers, coordination between the prospective permittee and the National Park Service is required for any activity potentially affecting a component of the National Wild and Scenic Rivers System or a river under official study status. No work shall begin until the National Park Service has determined in writing that the proposed activity will not adversely affect the designation or study status. Documentation of coordination and National Park Service concurrence shall be forwarded to the Corps of Engineers. Additional coordination between the Corps of Engineers, the prospective permittee, and National Park Service may be necessary on a case-by-case basis to address identified Wild and Scenic River issues.

National Park Service correspondence shall be sent to the following addresses:

- a. For projects located within the Upper Delaware Scenic and Recreational River, the applicant shall send all correspondences to: Natural Resources Chief, Upper Delaware Scenic and Recreational River, 274 River Road, Beach Lake, Pennsylvania 18405-9737.
- b. For projects located within the Middle Delaware Scenic and Recreational River, the applicant shall send all correspondences to: Chief of Resource Management & Science Division, National Park Service, Delaware Water Gap National Recreation Area, 1978 River Road, P.O. Box #2, Bushkill, Pennsylvania, 18324.
- c. For projects located within the Lower Delaware River and White Clay Creek Wild and Scenic, the applicant shall send all correspondence to: The National Park Service, Interior Region 1, 1234 Market Street, Philadelphia, Pennsylvania, 19107.
3. For activities in the Pittsburgh District Regulatory Area of Responsibility within Wild and Scenic Rivers, prior to the prospective permittee performing any activity in waters of the U.S., U.S Forest Service approval shall be obtained for the project by the Pittsburgh District prior to Nationwide Permit verification.

C. Nationwide Permit Regional General Condition #18 *Endangered Species*:**1. U.S. Fish and Wildlife Service (USFWS) Endangered Species Act (ESA) Requirements:**

- a. Prior to commencing the activity, the applicant must complete a Pennsylvania Natural Diversity Inventory (PNDI) project screening for federally listed threatened and endangered species. The PNDI Environmental Review Tool is located at: <https://conservationexplorer.dcnr.pa.gov/>. If the PNDI receipt identifies a “Potential Impact” or “Avoidance Measure” relevant to a listed or eligible for listing USFWS species, then the applicant must submit a PCN to the District Engineer and forward the PNDI to the USFWS (see General Condition 32 and Regional General Condition 32), prior to doing work. **(See Addresses in Special Note below)**. The applicant shall provide evidence that a duplicate copy of the PCN has been submitted to, and received by the USFWS (e.g., copy of certified/registered mail receipt or email). A USFWS letter (issued pursuant to the ESA) serves as evidence that the permittee has contacted the USFWS.
- b. Prior to any work within the **Delaware River** whereby the regulated activities extend across State Boundaries (PA/NJ), the applicant shall document that they have followed the consultation guidance published on the New Jersey Field Office website: <http://www.fws.gov/northeast/njfieldoffice/Endangered/consultation.html> to determine if a proposed NWP activity may affect a listed species. The permittee shall generate a list of federally listed species for the action area using the USFWS’s Information for Project Planning and Conservation (IPaC) at the following website <https://ecos.fws.gov/ipac/>. Upon your review of IPaC report, the proposed activity shall be screened for potential adverse effects to any listed species using the screening procedures published on the New Jersey Field Office website, or other more specific screening procedures that have been developed by the New Jersey Field Office for particular agencies, organizations, activities, or species. The permittee shall follow the guidance provided on the New Jersey Field Office website. If necessary, contact the New Jersey Field Office for further coordination prior to applying (PCN) to the District Engineer for an NWP verification.

2. National Marine Fisheries Service- Endangered Species Act Requirements (Applicable in the Philadelphia District Regulatory Area of Responsibility within Pennsylvania)

- a. Prior to any work, the prospective permittee shall generate a list of federally-listed species by accessing the NOAA Fisheries ESA Section 7 Mapper found at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-species-critical-habitat-information-maps-greater#esa-section-7-mapper>. If upon completion of this review the species list determination indicates there are listed, proposed, or candidate species found in the action area, the prospective permittee

is *required* to submit a PCN to the Corps of Engineers to determine if the action will result in an “EFFECT” to the listed species, except in the following waterways:

- i. Delaware River mainstem above the U.S. Route 202 Bridge in New Hope, Pennsylvania; and
 - ii. ALL tributaries above the U.S. Route 202 Bridge in New Hope, Pennsylvania, located off of the Delaware River mainstem.
- b. Additional technical consultation guidance to determine if a proposed NWP activity may affect a listed species can be found on the NOAA Fisheries Website: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-consultation-technical-guidance-greater-atlantic>.

D. Nationwide Permit Regional General Condition #32 Pre-Construction Notification:

The following regional general conditions are incorporated as part of the terms and conditions of NWP General Condition 32, *Pre-Construction Notification*. These regional general conditions are applicable to all NWPs where a PCN is submitted to the District Engineer. This includes the following: (a) those NWPs that require a PCN, (b) those NWPs requiring notification to the District Engineer pursuant to NWP General Conditions 18 and 22, (c) those NWPs requiring notification to the District Engineer pursuant to a regional condition, and (d) any other pre-constriction notifications to the District Engineer where an applicant has requested verification of an NWP authorization.

1. **For PCN activities in the Philadelphia District Regulatory Area of Responsibility:** The prospective permittee shall notify the Philadelphia District Corps of Engineers in accordance with NWP General Condition 32, *Pre-Construction Notification* by using a signed pre-construction notification form (Form ENG 6082).
2. **Conditions for Waters Containing Submerged Aquatic Vegetation (SAV) Beds:** The prospective permittee shall submit a PCN to the District Engineer for any NWP activity that is proposed within **50 feet** of SAV beds, or mapped SAV habitat. Additional avoidance and minimization measures, such as relocating a structure or time-of-year restrictions (TOYR) may be required to reduce impacts to SAV habitat.
3. All PCNs to the District Engineer shall be completed using the established District Engineer permit application procedures for that locality (For Philadelphia District see Section II.D.1., above; For Pittsburgh District see: <https://www.lrp.usace.army.mil/Missions/Regulatory/Forms-and-Publications/>; For Baltimore District see: <https://www.nab.usace.army.mil/Missions/Regulatory/Permits-PA/>). Preferably all PCN information can be submitted electronically using district-specific procedures; alternatively, a hard copy may be sent to the Corps. All PCNs to the District

Engineer shall include the following information, where applicable, in addition to the information specified in the NWP conditions, including General Condition 32:

- a. For projects located in the vicinity of a Federal navigation channel, the location and depth of any Federal navigation channel shall be shown in relation to the proposed project.
- b. Copy of response from the FWS concerning any federally listed Threatened and Endangered Species that may be affected by the proposed activity. Completion of the required screening identified in General Regional Conditions #18, *Endangered Species*, and submission of the required documents of the PCN serves as compliance with this condition.
- c. Copy of response from the SHPO concerning historic properties that may be affected by the proposed activity.
- d. Documentation from the appropriate state agency indicating whether the proposed project is located within a State Natural Heritage site (<https://www.dcnr.pa.gov/Communities/HeritageAreas/Pages/default.aspx#:~:text=Pennsylvania%20Route%206%20Alliance,Susquehanna%20National%20Heritage%20Area>), Outstanding National Resource Water, or National Estuarine Research Reserve (<https://coast.noaa.gov/nerrs/>). For further information, reference NWP General Condition 22.

E. Nationwide Permit Regional General Conditions A for Certain Activities in Navigable Waters:

1. The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the United States Coast Guard for new fixed bridges, in the vicinity of the proposed aerial transmission line. These clearances are based on the low point of the line under conditions producing the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code:

Nominal System Voltage (kV)	Minimum additional clearance (ft.) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750-765	45

- a. The PCN for aerial transmission lines over navigable waters must include the nominal system voltage and the additional clearance above low steel for bridges, if available, or above maximum high water elevation;
 - b. District Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power communication lines over District Engineer lake projects. In instances where both this regional condition and ER 1110-2-4401 apply, the greater minimum clearance is required; and
 - c. Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings must be a minimum of ten feet above clearances required for bridges, unless specifically authorized otherwise by the District Engineer.
2. Within 60 days of completing an activity that involves an aerial transmission line, submerged cable, or submerged pipeline across a navigable water of the United States (i.e., Section 10 waters), the permittee shall furnish the District Engineer and the National Oceanic and Atmospheric Administration, Nautical Data Branch, N/CS26, Station 7317, 1315 East-West Highway, Silver Spring, Maryland, 20910 with professional, certified as-built drawings, to scale, with control (i.e., latitude/longitude, state plane coordinates), depicting the alignment and minimum clearance of the aerial wires above the mean high water line at the time of survey or depicting the elevations and alignment of the buried cable or pipeline across the navigable waterway.
 3. Aids to Navigation: If the Corps or the U.S. Coast Guard determine that private aids to navigation are required to mark the project area, the permittee must prepare and provide for United States Coast Guard (USCG) approval (address below) using a Private Aids to Navigation Application (CG-2554), and the approval must be received prior to commencement of the authorized work. The form can be found at this link:
https://www.navcen.uscg.gov/pdf/AIS/CG_2554_Paton.pdf.
Within 30 days of the date of receipt of the USCG approval, the permittee must provide a copy to the applicable Corps District.

F. Nationwide Permit Regional General Condition B *Poured Concrete into Forms:*

Activities that involve the discharge of poured concrete must be contained within cells or watertight forms until the concrete is set.

G. Nationwide Permit Regional General Condition C *Temporary Impacts to Streams:*

Following completion of construction, temporarily affected stream beds shall have bottom contours restored using clean, native materials, where practicable.

H. Section 401 Water Quality Certification Conditions:

1. Prior to beginning any activity authorized by the Corps under a NWP, the applicant shall obtain from the Pennsylvania Department of Environmental Protection (PADEP) all necessary environmental permits or approvals, and submit to PADEP environmental assessments and other information necessary to obtain the permits and approvals, as required under State law, including The Clean Streams Law (35 P.S. §§ 691.1-691.1001), the Dam Safety and Encroachments Act (32 P.S. §§ 693.1-693.27), the Floodplain Management Act (32 P.S. §§ 679.101-679.601), the Oil and Gas Act (58 Pa.C.S. §§ 3201-3274), the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1-1396.19b), the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 3301-3326), the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. §§ 1406.1-1406.21), the Coal Refuse Disposal Control Act (52 P.S. §§ 30.51-30.66), the Solid Waste Management Act (35 P.S. §§ 6018.101-6018.1003), the Hazardous Sites Cleanup Act (35 P.S. §§ 6020.101-6020.1305), the Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101-6026.908), 58 Pa.C.S. §§ 3201-3274 (relating to development), the Sewage Facilities Act 35 P.S. §§ 750.7b and 750.9, the Air Pollution Control Act (35 P.S. §§ 4001-4015) and the regulations promulgated thereunder, including 25 Pa. Code Chapters 16, 71, 77, 78, 78a, 86-91, 92a, 93, 95, 96, 102, 105, 106, 127, 245, and 260a-299.
2. Fill Material may not contain any waste as defined in the Solid Waste Management Act.
3. Applicants and projects eligible for these NWPs must obtain all State permits or approvals, or both, necessary to ensure that the project meets the state's applicable water quality standards, including a project-specific State Water Quality Certification.*

*The scope of the issuance of this State Water Quality Certification (SWQC) is related only to the scope and applicability of the proposed NWPs. Any activity or project requiring PADEP to issue 401 SWQC that is beyond the scope of these proposed NWPs will require the applicant to obtain a project-specific SWQC from PADEP. This would include any activity or project requiring a SWQC associated with an authorization, permit or license issued by a Federal agency, such as FERC or NRC. Such activities or projects include, but are not limited to, an interstate natural gas pipeline, a gas storage field or a nuclear or hydroelectric project.

I. Coastal Zone Management Act Consistency Determination Condition:

The Pennsylvania Department of Environmental Protection, Pennsylvania Coastal Resource Management (CRM) Program concurs that the NWP's and Pennsylvania Regional Conditions are consistent with the Pennsylvania CRM Program's enforceable policies, subject to the following condition applicable to NWP's 26 and 59:

Prior to beginning any activity authorized by the Corps under a NWP, the applicant shall obtain from the Department all necessary environmental permits or approvals, and submit to the Department environmental assessments and other information necessary to obtain the permits and approvals, as required under State law, including the Dam Safety and Encroachments Act (32 P.S. §§ 693.91-693.27) and 25 Pa. Code Chapter 105.

SPECIAL NOTES:

1. The Philadelphia District Area of Responsibility can be found at:
<http://www.nap.usace.army.mil/Missions/Regulatory/District-Boundaries/>
The Baltimore District Area of Responsibility can be found at:
<http://www.nab.usace.army.mil/Missions/Regulatory/Baltimore-District-Regulatory-Boundary-Map/>
The Pittsburgh District Area of Responsibility can be found at:
https://www.lrp.usace.army.mil/Portals/72/Regulatory_District_Map_Poster%2020190925_0921.pdf
2. As required, the District Engineer shall coordinate a PCN with the following Federal and State agencies:

Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

U.S. Fish and Wildlife Service
Pennsylvania Field Office
110 Radnor Road, Suite 101
State College, Pennsylvania 16801
Email: IR1_ESPenn@fws.gov

National Marine Fisheries Service
Habitat and Ecosystem Services Division
74 Magruder Road
Highlands, New Jersey 07732
<https://www.fisheries.noaa.gov/contact/greater-atlantic-region-habitat-and-ecosystem-services-division>

NOAA Fisheries Greater Atlantic Regional Fisheries Office
Protected Resources Division

55 Great Republic Drive
Gloucester, MA 01930
Nmfs.gar.esa.section7@noaa.gov

Pennsylvania Historical & Museum Commission
State Historic Preservation Office
Commonwealth Keystone Building
400 North Street, 2nd floor
Harrisburg, Pennsylvania 17120

Pennsylvania Department of Environmental Protection
Bureau of Waterways Engineering and Wetlands
Division of Wetlands & Encroachments
Rachel Carson State Office Building
P.O. Box 8460
Harrisburg, Pennsylvania 17105-8775

Pennsylvania Fish and Boat Commission
North Central Law Enforcement
595 Rolling Ridge Drive
Bellefonte, Pennsylvania 16823-9616

Pennsylvania Game Commission
2001 Elmerton Avenue
Harrisburg, Pennsylvania 17110-9797

ENCLOSURE 5

Exhibit C



**US Army Corps
of Engineers**

Philadelphia District

Regulatory Branch

Surveillance and Enforcement Section

United States v. Gizella Pozsgai
Action ID Number CENAP-OPR-2000-00043

WETLAND RESTORATION GUIDELINES
for
GIZELLA POZSGAI PROPERTY
536 W. BRIDGE STREET
FALLS TOWNSHIP
BUCKS COUNTY
PENNSYLVANIA

PREPARED BY:

Michael P. Leggiero, Biologist
Surveillance and Enforcement Section
Regulatory Branch, Philadelphia District
United States Army Corps of Engineers

August 25, 2022
Last revised September 28, 2022



US Army Corps
of Engineers
Philadelphia District

WETLAND RESTORATION / CREATION REQUIREMENTS

1.0 Restoration Activities - All Areas

Whereas Britton Industries Inc. and Britton Realty of Bridge Street LLC (collectively, "Britton") are acting as an Intervenor for the owner, Mrs. Gizella Pozsgai, Britton shall adhere to the following general removal and restoration requirements for all areas to be restored:

1.1 General Requirements

1.1.1 All unauthorized fill material, including soil, stone, concrete, brick, asphalt, construction debris, wood chips, branches, logs, and other materials, shall be removed from the area subject to Federal jurisdiction as identified on the plan entitled "Wetlands Restoration and Authorized by NWP-32, 536 W Bridge Street Falls Township Bucks County, Prepared by Dumack Engineering, Scale 1"=50", dated April 21, 2022, last revised August 5, 2022" (Enclosure 1) and as described in the following Restoration/Creation Requirements.

1.1.2 All unauthorized fill being removed shall be disposed in an Army Corps of Engineers (Corps) approved, upland location.

1.1.3 All unauthorized dredged and/or fill material used at the Site prior to the Consent Decree shall be removed to the ground surface existing prior to the performance of unauthorized work. In the event that the ground surface existing prior to the performance of unauthorized work cannot be identified during removal and restoration activities, material shall be removed to the elevation of the adjacent undisturbed wetland surface. A representative from the Corps will be available during restoration to help equipment operators identify the pre-fill surface.

1.1.4 The Corps, or anyone designated by it, is authorized to enter upon and inspect the Pozsgai/Britton properties and the restoration work at such times as the Corps may choose, consistent with Paragraphs 34 through 36 of the Consent Decree.

1.1.5 Prior to the performance of removal or restoration work, all equipment operators shall attend a preconstruction meeting with a Corps representative on the site. No equipment operator shall perform removal or restoration work without first meeting with a Corps representative to review the removal and restoration requirements. During removal and restoration work, Corps staff will be available to help guide successful

removal/restoration efforts.

1.1.6 Prior to the preconstruction meeting, the location of the wetland/upland restoration line shown on Exhibit 1, i.e., the line between the unauthorized fill material to be removed from the wetlands, and the uplands and filled areas to remain, shall be identified, survey located, and staked on the ground by a licensed surveyor registered in the Commonwealth of Pennsylvania. A representative from the Corps will approve the location of the line, in writing, prior to the performance of restoration earthwork.

1.1.7 Prior to performing earthwork, it is the responsibility of Britton, or its representative, and/or contractor to call the utility mark-out hotline at (800)242-1776.

1.1.8 Heavy equipment is prohibited from entering the unfilled wetlands unless authorized by a Corps representative. All restoration earthwork shall be performed from already filled areas or from uplands. Restoration earthwork shall start at the waterward edge of the fill to be removed, working back towards uplands.

1.1.10 The upland wetland edge shall be graded to a slope no steeper than 2:1 (horizontal to vertical) and stabilized to prevent erosion. No portion of the toe of the wetland to upland slope shall be in the restored wetlands. The wetland to upland slope shall represent the restored wetland buffer.

1.1.11 Upon completion of restoration earthwork and the establishment of the sloped buffer between the existing/restored wetlands and the upland portions of the site, concrete "Jersey barrier" or other similar barrier shall be placed at top of slope/landward edge of buffer, in order to prevent future development activities from encroaching into the buffer area or the wetlands.

1.1.12 Stabilization of the wetland to upland buffer shall be accomplished by the placement of compost filter sock and/or placement of silt fencing along the toe of slope and seeding with a commercial seed mix to prevent erosion of sediment into restored areas.

1.1.13 All restored wetland areas shall be seeded with a variable seed mix suitable for wet areas following completion of fill material removal. Prior to planting or seeding, the restoration earthwork shall be approved, in writing, by the Corps. The Corps shall be notified within five days of completion of restoration earthwork to schedule an inspection of the restored areas.

1.1.14 Seeding of the wetland to upland buffer (commercial seed mix) and the restored wetlands (seed mix suitable for wet areas) shall be performed within five days of receipt of written verification that restoration earthwork has been completed to the satisfaction of the Corps.

1.1.15 In the event that weather conditions are not suitable for seeding

immediately following written verification of the successful completion of restoration earthwork, the Corps shall be contacted to establish an alternate date for seeding.

1.1.16 Within 20 days of the completion of restoration earthwork and receipt of written verification by the Corps, the restored wetland areas shall be planted with woody vegetation representative of adjacent, undisturbed areas; a total of at least 1,200 woody plants at least 18 inches in height. Planted stock shall be identified by red flagging prior to planting to facilitate future monitoring of plant survivability.

1.1.17 The following species of woody plants are recommended: winterberry holly (*Ilex verticillata*), smooth alder (*Alnus serrulata*), buttonbush (*Cephalanthus occidentalis*), silky dogwood (*Cornus amomum*), American elder (*Sambucus canadensis*), black willow (*Salix nigra*), spicebush (*Lindera benzoin*), arrowwood (*Viburnum recognitum*), red maple (*Acer rubrum*), sweetgum (*Liquidambar styraciflua*), and swamp white oak (*Quercus bicolor*).

1.1.18 Woody stock may be planted in straight rows for ease of monitoring, however, plant species should be mixed within the rows to add diversity and according to their growth requirements for hydrology, shading, etc.

1.1.19 Minor deviations from the restoration plan as identified in this document and referenced plans due to unforeseen circumstances or site conditions, shall be subject to prior approval by the Corps representative.

1.1.20 Britton shall adhere to the Erosion and Sediment (E&S) control plan approved by the state or county. Any work directed by the state or county, required to remain in compliance with the E&S plan, that involves the discharge of fill material into waters or wetlands on the Site, shall be performed as directed. Britton shall notify the Corps for approval within five days of performing the work.

1.1.21 Should Britton discover any buried solid waste during the performance of the restoration, all work within that area shall stop until such time as the Corps and the Pennsylvania Department of Environmental Protection, Bureau of Solid Waste Management can coordinate and develop a Corrective Action Plan for Britton to follow.

2.0 Restoration Requirements - Specific Areas

In addition to the above-noted general removal and restoration requirements, Britton shall adhere to the following specific area wetland creation and restoration requirements:

2.1 Linear Ditch along the eastern side of the Site

2.1.1 The linear ditch, which historically redirected existing stream flow along the eastern boundary of the Site shall be filled in order to redirect stream flow back into

its original, pre-violation alignment.

2.1.2 The 'upstream' limit of the ditch shall be stabilized and armored using either riprap rock or other geotechnical products, in order to prevent erosion and redirect stream flow. Whichever armoring method is used for stabilization, the armoring shall be covered with clean topsoil and planted with a native seed mix.

2.1.3 The remainder of the ditch shall be filled to match the elevation of the adjacent ground level. "Fill dirt" that is clean and free of contaminants may be used, but the ditch is required to be topped with a minimum of 8 inches of clean topsoil at the surface.

2.1.4 Britton shall reconnect existing stream flow from the northeastern corner of the Site into the existing wetlands at the area identified as "proposed culvert" on Enclosure 1 pursuant to installation of a culvert. The structure shall be sized to prevent the restriction of high flows and the bottom shall be recessed so as not to restrict the passage of aquatic organisms. Construction of this structure may not proceed until the design is approved, in writing, by the Corps.

3.0 Monitoring and Monitoring Reports

3.1 Monitoring

3.1.1 Britton or its representatives shall monitor the restored wetlands for a period of three full growing seasons following the completion of restoration earthwork and planting/seeding.

3.1.2 Seeded areas must achieve 85 percent areal coverage by the end of the first complete growing season (October 15) after the completion of the restoration earthwork. In the event that this vegetation coverage rate is not achieved, additional seeding in those areas not meeting 85 percent areal coverage shall be required the following spring.

3.1.3 Planted stock shall be monitored and a survival rate of 75% of planted stock must be achieved by the end of the first complete growing season. (October 15) following planting. In the event that this rate is not achieved, additional stock shall be planted the following spring to replace all stock that did not survive. Survivability of planted stock shall be identified as living material at least 18 inches in height and less than 50 percent die-back or herbivory of individual plants.

3.1.4 An end of growing season monitoring inspection shall be scheduled as a joint inspection with the Corps representative. Contact should be made with the Corps at least 14 days prior to the proposed monitoring to schedule this inspection.

3.1.5 In the event that the above noted work and success criteria have not

been performed satisfactorily, the performance of additional work, including slope stabilization, additional seeding, and/or additional planting may be required.

3.2 Monitoring Reports

3.2.1 A baseline report shall be submitted to the USACE prior to monitoring, and be followed by three subsequent annual monitoring reports by December 31 of each monitoring year. The reports shall identify the status of seeded areas and any re-seeding efforts. The monitoring reports shall include any identified problems that may arise and shall provide proposed solutions.

3.2.2 In the event that the wetland restoration and creation is not successful at the end of the three-year monitoring period, additional restoration and/or mitigation, i.e., earthwork and/or seeding, may be required at the discretion of the Corps.

4.0 Deed Restriction of Restoration Areas and Upland Buffers

4.1 Deed Restriction

4.1.1 All areas identified as “Existing Wetlands, Unauthorized Fill to be Removed and Restored, Previously Restored Wetlands, and Preserved Upland Buffer” on Exhibit 1 shall be protected, in perpetuity, by a Deed Restriction (Enclosure 3).

4.1.2 The Deed Restriction shall be recorded with the Prothonotary for Bucks County pursuant to Paragraphs 20 and 21 of the Consent Decree. A copy of the recorded Deed Restriction, showing the recording citations, shall be provided to the Corps within 10 days of its recording.

ENCLOSURE 2

Exhibit D

DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION

THIS DECLARATION OF RESTRICTIVE COVENANTS FOR CONSERVATION (hereinafter “Declaration”) made this [Click here to enter text.](#) day of [Click here to enter text.](#), 2022, by **Britton Realty of Bridge Street LLC and Britton Realty Morrisville, LLC**, (hereinafter “Grantor”);

WITNESSETH:

WHEREAS, Grantor is the fee simple owner of certain tracts of land located in Bucks County, Pennsylvania, and being a portion of the property conveyed to the Grantor by deed recorded in deed book *[insert LIBER FOLIO reference here]* in the land records of Bucks County, Pennsylvania, more particularly described in Exhibit(s) attached hereto and incorporated by reference, hereinafter referred to as the “Property”; and

*[**NOTE TO GRANTOR: The Grantor shall prepare and attach a legal description (i.e. metes and bounds of the Property, and if less than the whole property, also include a separate, clearly identifiable, legal description of the Conservation Area, all in an exhibit identified as “Exhibit A” to the Declaration. In addition, the Grantor will include an Exhibit B that shall be a scaled drawing of the area subject to the Declaration. The restricted area shall be clearly labeled on the plan as “Conservation Area” and be clearly identified by cross-hatching and shading. The Grantor shall also include on the drawing the location and extent of all known, pre-existing easements, rights of ways, utilities, drainage ditches, stormwater facilities, cattle crossings, and structures. For each such item that involves on-going or periodic operation and maintenance, a description of all anticipated and authorized maintenance work and the work boundaries for each item shall also be included. If the legal description(s) and drawing(s) can be legibly included on one exhibit, and whereas clause above for this instrument may be written to describe all of these are one exhibit. (i.e., “...more particularly described and shown in Exhibit A, attached hereto...”) A copy of the NWP-32 authorization must be attached to the document for recordation.]*

WHEREAS, the United States Army Corps of Engineers, through its Philadelphia District, Regulatory Branch, (hereinafter “Corps”), and the Grantor have agreed that the Grantor would make the portion of the Property hereinafter referred to as the “Conservation Area” subject to the conservation-based covenants described in this Declaration as a condition of the attached Department of the Army Permit issued in conjunction with the Consent Decree entered in the matter of U.S. v. Pozsgai, Civil Action No. 88-6545; and

WHEREAS, the Grantor agrees to the creation of these conservation-based covenants and intends the Conservation Area shall be preserved and maintained in a natural condition in perpetuity;

NOW, THEREFORE, in consideration of the mutually-held interests in preservation of the environment, as well as the terms, conditions, and restrictions contained herein, and pursuant

to the laws of the Commonwealth of Pennsylvania, Grantor does agree to the following terms and conditions:

1. PURPOSE

The purpose of this Declaration of Restrictive Covenants for Conservation is:

To preserve and protect the native flora, fauna, soils, water table and drainage patterns, and other conservation values of the Conservation Area;

To view the Conservation Area in its scenic and open condition; and in general,

To assure that the Conservation Area, including its air space and subsurface, will be retained in perpetuity in its natural condition as provided herein and to prevent any use of the Conservation Area that will impair or interfere with its natural resource functions and values. Grantor intends that this Declaration will confine the use of the Conservation Area to such activities as are consistent with the purpose of this Declaration.

To accomplish the purpose of this Declaration, the following rights are created in accordance with *Pennsylvania common law*:

A. To allow the Grantor or the Corps, the right to enter upon the Property to inspect the Conservation Area at reasonable times to monitor compliance with and otherwise enforce the terms of this Declaration; provided that, except in cases where Grantor determines that immediate entry is necessary to prevent, terminate, or mitigate a violation of this Declaration; such entry shall, when practicable, be upon reasonable prior notice to any successor or assign, and Grantor shall not unreasonably interfere with the successor's or assign's use and quiet enjoyment of the Property in accordance with the terms of this Declaration;

B. To allow the Grantor or the Corps to enforce the terms of this Declaration by appropriate legal proceedings in accordance with *Pennsylvania common law* so as to prevent any activity on or use of the Property that is inconsistent with the purpose of this Declaration and to require the restoration of such areas or features of the Conservation Area that may be damaged by any inconsistent activity or use; and

C. To allow the Grantor, or their authorized representatives, to enter upon the Property and its Conservation Area at reasonable times, upon prior notice to the property owner; and upon prior notice and written approval by the Corps to take any appropriate environmental or conservation management measures consistent with the terms and purposes of this Declaration, including:

- 1) Planting of native vegetation (i.e. trees, shrubs, grasses and forbs); or
- 2) Restoring, altering or maintaining: the topography; hydrology; drainage; structural integrity; streambed; water quantity; water quality; any relevant feature of any stream, wetland, water body, or vegetative buffer within the Conservation Area.

2. DURATION

This Declaration shall remain in effect in perpetuity, shall run with the land regardless of ownership or use, and is binding upon all subsequent property owners, declarants, their heirs, executors, administrators, successors, representatives, devisees, and assigns, as the case may be, as long as said party shall have any interest in any part of the Conservation Area.

3. PERMITTED USES

This Declaration will not prevent the Grantor; subsequent property owner(s); and the personal representatives, heirs, successors, and assigns of either the Grantor or subsequent property owner from making use of the area(s) that are not expressly prohibited herein and are not inconsistent with the purpose of this Declaration.

4. RESTRICTIONS

Any activity in or use of the Conservation Area inconsistent with the purpose of the Declaration by the Grantor; subsequent property owner(s); and the personal representatives, heirs, successors, and assigns of either the Grantor or subsequent property owner, is prohibited. Without limiting the generality of the foregoing, and except when an approved purpose under 1.C above, or as necessary to accomplish mitigation approved under the aforementioned permit, the following activities and uses are expressly prohibited in, on, over, or under the Conservation Area, subject to all of the express terms and conditions below:

- A. **Structures.** The construction of man-made structures including but not limited to the construction, removal, placement, preservation, maintenance, alteration, or decoration of any buildings, roads, utility lines, billboards, or other advertising. This restriction does not include deer stands, bat boxes, bird nesting boxes, bird feeders, duck blinds, and the placement of signs for safety purposes or boundary demarcation.
- B. **Demolition.** The demolition of fencing structures constructed for the purpose of demarcation of the Conservation Area or for public safety.
- C. **Soils.** The removal, excavation, disturbance, or dredging of soil, sand, peat, gravel, or aggregate material of any kind; or any change in the topography of the land, including any discharges of dredged or fill material, ditching, extraction, drilling, driving of piles, mining, or excavation of any kind.
- D. **Drainage.** The drainage or disturbance of the water level or the water table, except for pre-existing or approved project-related stormwater discharges and any maintenance associated with those stormwater discharges. All pre-existing or approved project-related drainage/stormwater discharge features should be shown on the accompanying plat map or approved plan and attached to this Declaration.

- E. **Waste or Debris.** The storage, dumping, depositing, abandoning, discharging, or releasing of any gaseous, liquid, solid, or hazardous waste substance, materials or debris of whatever nature on, in, over, or underground or into surface or ground water, except for pre-existing or approved project-related stormwater discharges and any maintenance associated with those stormwater discharges.
- F. **Non-Native Species.** The planting or introduction of non-native species.
- G. **Herbicides, Insecticides and Pesticides.** The use of herbicides, insecticides, or pesticides, or other chemicals, except for as may be necessary to control invasive species that threaten the natural character of the Conservation Area. State-approved municipal application programs necessary to protect the public health and welfare are not included in this prohibition.
- H. **Removal of Vegetation.** The mowing, cutting, pruning, or removal of any kind; disturbance, destruction, or the collection of any trees, shrubs, or other vegetation, except for pruning, cutting or removal for:
 - 1) safety purposes; or
 - 2) control in accordance with accepted scientific forestry management practices for diseased or dead vegetation; or
 - 3) control of non-native species and noxious weeds; or
 - 4) scientific or nature study.
- I. **Agricultural Activities.** Unless currently used for agricultural or similarly related purposes, conversion of, or expansion into, any portion of the Conservation Area for use of agricultural, horticultural, aquacultural, silvicultural, livestock production or grazing activities. This prohibition also includes conversion from one type of these activities to another (e.g., from agricultural to silvicultural).
- J. **Other:** Other acts, uses, excavation, or discharges which adversely affect fish or wildlife habitat or the preservation of lands, waterways, or other aquatic resources within the Conservation Area.

5. INSPECTION, ENFORCEMENT AND ACCESS RIGHTS

The Corps and its authorized representatives shall have the right to enter and go upon the Property, to inspect the Conservation Area and take actions necessary to verify compliance with this Declaration. When practicable, such entry shall be upon prior reasonable notice to the property owner. The grantor grants to the Corps, or the U.S. Department of Justice a discretionary right to enforce this Declaration in a judicial action against any person(s) or other entity(ies) violating or attempting to violate these restrictive covenants: provided, however, that no violation of these restrictive covenants shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing agency shall be entitled to a complete restoration for any

violation, as well as any other judicial remedy such as civil penalties. Nothing herein shall limit the right of the Corps to modify, suspend, or revoke the permit.

6. RECORDING AND EXECUTION BY PARTIES

The Grantor agrees to record a certified copy of this Deed Restriction with the Prothonotary for Bucks County, Pennsylvania within fifteen (15) calendar days of entry of the above-referenced Consent Decree and acquisition of said Property and to provide the Corps with proof of recordation within 20 days of restoration earthwork identified in “Wetlands Restoration and Authorized by NWP-32, 536 W Bridge Street Falls Township Bucks County, Prepared by Dumack Engineering, Scale 1”=50”, dated April 21, 2022, last revised August 5, 2022” (Exhibit 1). Further, if anticipated activities in the Conservation Area are agreed upon for future phases of the site, as spelled out in the “Reserved Rights”, the Grantor must submit plans to the Corps for review and approval prior to any work in the Conservation Area.

7. NOTICE OF TRANSFER OF PROPERTY INTERESTS

No transfer of the rights of this Declaration, or of any other property interests pertaining to the Conservation Area or the underlying property it occupies shall occur without sixty (60) calendar days prior written notice to the Corps.

8. MODIFICATIONS

The restrictions contained in this Declaration are required by the attached Department of the Army Permit for authorized use of said permit. There shall be no changes or alterations to the provisions in this Declaration without prior written approval from the appropriate District Commander of the Corps.

9. RESERVED RIGHTS

A. The Grantor and any holders of easements or other property rights for the operation and maintenance of pre-existing or project-related structures or infrastructure such as roads, utilities, drainage ditches, or stormwater facilities that are present on, over or under the Conservation Area reserve the right, within the terms and conditions of their permits, their agreements, and the law, to continue with such operation and maintenance. All pre-existing or approved project-related structures or infrastructure shall be shown on the accompanying plat map or approved plan and attached to this instrument.

B. If the authorized project requires any related or unanticipated infrastructure modifications, utility relocation, drainage ditches, or stormwater controls within the identified Conservation Area, or if situations require measures to remove threats to life or property within the identified Conservation Area, said activities must be approved in writing by the Corps subject to terms and conditions set forth in the written approval. Approval is subject to the Corps' sole discretion. If approved, said activities must be identified on amended Exhibits and must be recorded and specifically noted as an "amendment" and copies of the recorded amended Exhibits must be provided to the Corps within 60 days of Corps approval. Approval of said activity by the Corps is in addition to any Clean Water Act, Section 404 permit, or other authorization, which may be required in order to legally implement said activity. The Grantor accepts the obligation to place any other responsible party on reasonable prior notice of their need to request such Corps approval.

10. SEVERABILITY

If any portion of this Declaration, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

11. RESTORATION MONITORING

If the work required by a restoration plan including maintenance or remedial work, under the Department of Army permit for the authorized project occurs within the Conservation Area, then the Grantor is allowed to construct the restoration work in accordance with the authorized restoration plan, a copy of which is incorporated by reference.

IN WITNESS WHEREOF said GRANTOR has executed this Declaration the day and year first above written.

[COMPANY OR GOVERNMENT ENTITY NAME OF GRANTOR, IF APPLICABLE]

BY: _____
[TITLE OF OFFICER OF GRANTOR ENTITY, OR GRANTOR'S NAME, IF AN INDIVIDUAL]

COMMONWEALTH OF PENNSYLVANIA:
: SS
COUNTY OF [Click here to enter text.](#):
:

On [Click here to enter text.](#), before me, a Notary Public for the Commonwealth aforesaid, personally appeared [Click here to enter text.](#), who acknowledged himself/herself to be ***[TITLE OF OFFICER OF GRANTOR ENTITY, OR GRANTOR'S NAME, IF AN INDIVIDUAL]***, and that s/he, as ***[USE IF APPLICABLE: an officer of]*** the Grantor, being authorized to do so, executed, in my presence, the foregoing Declaration for the purposes herein contained

IN WITNESS WHEREOF, I have set my hand and official seal.

Notary Public
My commission expires:

[SEAL]

APPROVED AS TO LEGALITY AND FORM

[ONE OR MORE SIGNATURE BLOCKS HERE FOR THE ATTORNEY FOR THE GRANTOR, AND IF A COMPANY OR GOVERNMENT ENTITY, ANY OTHER NECESSARY OFFICIALS.]

NOTE: Some version of the following notarization will accompany the complete, executed, and recorded instrument. The version below is simply one example. Other versions may be used to follow local legal recordation practice, including, for example, but not limited to, those referring only to a Deedbook Volume and Page, or only to a Liber and Folio.]

COMMONWEALTH OF PENNSYLVANIA:

: SS

COUNTY OF [Click here to enter text.](#)

:

Recorded in the Office for Recording of Deeds

in and for aforesaid County, in

Deedbook [Click here to enter text.](#), Vol. [Click here to enter text.](#),

Page [Click here to enter text.](#)

Witness my hand and seal of Office

On _____

RECORDER OF DEEDS

GRANTOR