



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT  
696 VIRGINIA ROAD  
CONCORD MA 01742-2751

CENAE-RDNH/VT

6 February 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023),<sup>1</sup> NAE-2010-01130.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>2</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>3</sup>

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

- a. There is a total of nine (9) delineated aquatic resource features within the project's review area:
  - i. Wetland A (42,185 sq. ft.), Wetland B (61,372 sq. ft.), Wetland C (11,624 sq. ft.), and Wetland E (13,405 sq. ft.) are (a)(4) adjacent wetlands and are jurisdictional under Section 404 of the Clean Water Act.
  - ii. Wetland D (2,016 sq. ft.), Wetland F (2,633 sq. ft.), Wetland G (17,502 sq. ft.), Wetland H (7,866 sq. ft.), and Wetland I (16,113 sq. ft.) are non-jurisdictional wetlands.

## 2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. \_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The AJD Review Area (Figure 1) consists of about 47.67 acres off the west side of VT Route 116 in Hinesburg, Vermont (Latitude/Longitude Coordinates: 44.336774°, -73.115806°). The original farm house with barn is located off VT Route 116 and has been subdivided out of the Review Area. The southern property line parallels Patrick Brook which flows into the La Platte River which is located on the abutting parcel. The perennial brook was ditched to improve past agricultural use of both parcels. The western side of the Review Area is occupied by town recreational fields which were constructed in 2018. The land along the northern boundary is a mix of residential and commercial lots. An unnamed stream follows along the northern property line, then to the west of the recreational fields before draining into Patrick Brook, just outside of the Review Area. The subject parcel is an open field that is still hayed by a local farmer.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Lake Champlain is the nearest TNW.<sup>5</sup>

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<sup>5</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland A, B, C and E are directly abutting Patrick Brook which flows into the La Platte River, then into Lake Champlain, the nearest TNW.
6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>7</sup> N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
  - b. The Territorial Seas (a)(1)(ii): N/A
  - c. Interstate Waters (a)(1)(iii): N/A
  - d. Impoundments (a)(2): N/A
  - e. Tributaries (a)(3): N/A

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<sup>6</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>7</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

f. Adjacent Wetlands (a)(4): The field delineated and surveyed portion of Wetland A is about 42,185 sq. ft. and directly abuts Patrick Brook. Wetland A continues west towards the portion of the property outside of the review area. Wetland C is about 11,624 sq. ft. and directly abuts Patrick Brook. Wetland E is about 13,405 sq. ft. and to continue from the open field to Patrick Brook. Additionally, the southwestern edge of Wetland E connects to an erosional channel that has a continuous surface connection to Patrick Brook. Wetland B is about 61,372 sq. ft. and directly abuts Patrick Brook. Based on a 24 October 2023 site visit, Wetlands A, B, C and E are palustrine emergent wetlands dominated by reed canary grass (*Phalaris arundinacea*) and directly abut Patrick Brook. The perennial stream flows into the La Platte River and then into Lake Champlain, the nearest TNW.

g. Additional Waters (a)(5): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>8</sup> N/A

b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland D is about 2,016 sq. ft. and is located in the open field about 220' north of Patrick Brook. Wetland F is about 2,633 sq. ft. and is located in the open field about 55' north of Patrick Brook. Wetlands G, H, I are 17,502 sq. ft., 7,866 sq. ft. and 16,113 sq. ft., respectively. These wet meadow wetlands are situated out in the open field between 225' and 300' from Patrick Brook. The five wetlands are located in shallow depressions surrounded by upland. There was no evidence of flow out of the wetlands. Based on a 24 October 2023 site visit, there are no continuous surface connections from Wetlands D, F, G, H, and I to a water identified in paragraph (a)(1)-(3) of the 2023 rule.

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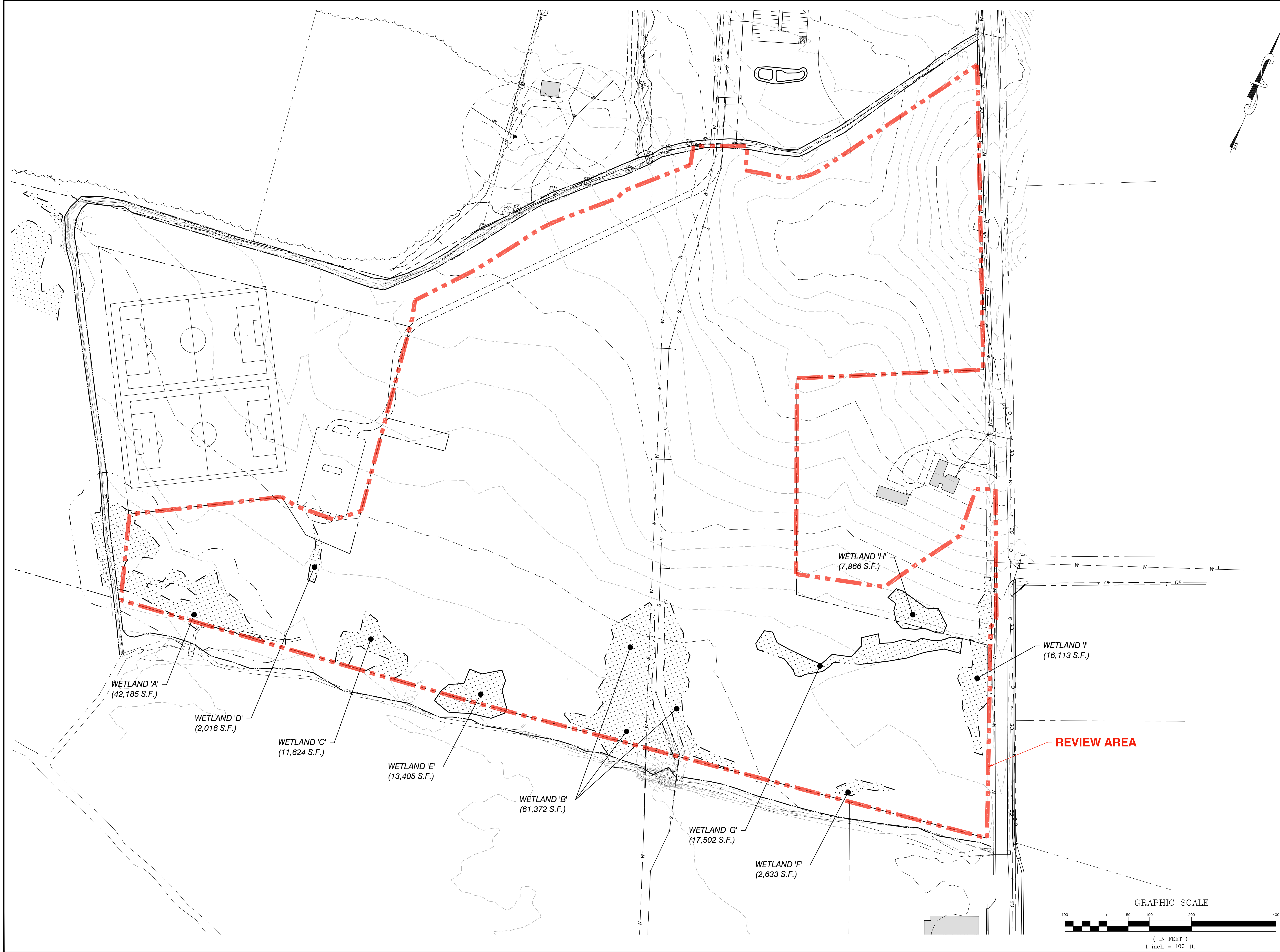
<sup>8</sup> 88 FR 3004 (January 18, 2023)

CENAE-RDNH/VT

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2010-01130

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Overall Plan View of Review Area submitted by Civil Engineering Associates, Inc. titled "EXISTING WETLAND PLAN", dated "NOV., 2022" (Figure 1).
  - b. Additional remote tools and mapping resources were used to analyze the review area:
    - a. Figure 2 a-d: Location Maps from VT Natural Resources Atlas
    - b. Figure 3. USGS StreamStats
    - c. Figure 4. Google Earth Photos
    - d. Figure 5. National Regulatory Viewer – Lidar view of Review Area.
    - e. Figure 6. Site Visit Photos
  - c. A site visit was conducted by USACE staff on 24 October 2023. See additional details of the visit in the administrative record in a memorandum, dated 15 November 2023, and attached photos.
10. OTHER SUPPORTING INFORMATION. N/A
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.





SITE ENGINEER:



**CIVIL ENGINEERING ASSOCIATES, INC.**  
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DRAWN <b>SAL</b>	
CHECKED <b>DSM</b>	
APPROVED <b>DSM</b>	

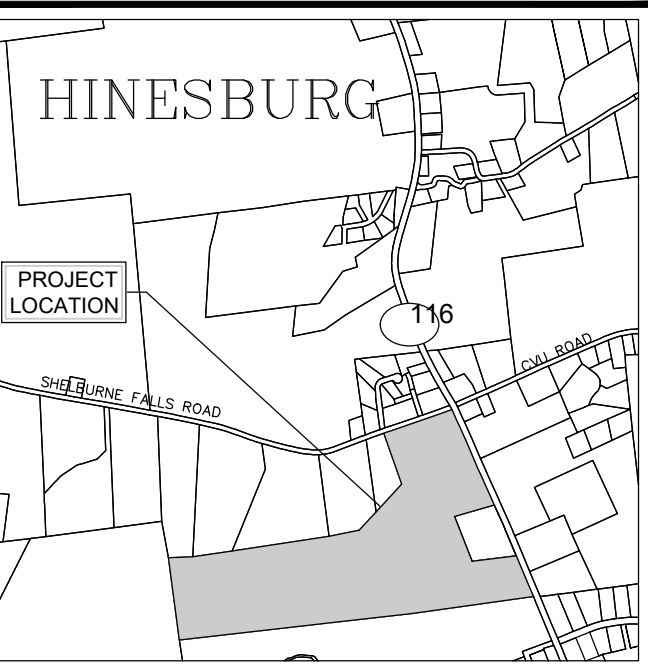
OWNER:  
**HAYSTACK  
CROSSING, LLC**  
c/o JOSEPH BISSONETTE

68 RANDALL STREET  
SOUTH BURLINGTON, VT 05403

APPLICANT:  
**BLACKROCK  
CONSTRUCTION, LLC**  
68 RANDALL STREET  
SOUTH BURLINGTON, VT 05403

PROJECT:  
**HAYSTACK  
CROSSING**

SHELBURNE FALLS ROAD  
VERMONT ROUTE 116  
HINESBURG, VERMONT 05461



LOCATION MAP  
1" = 2000'

DATE	CHECKED	REVISION
2/9/24	DSM	REVISED REVIEW AREA LIMITS

**EXISTING WETLAND  
PLAN**

Figure 1

DATE NOV., 2022	DRAWING NUMBER <b>W-1</b>
SCALE 1" = 100'	
PROJ. NO. 13127	