



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT
696 VIRGINIA ROAD
CONCORD MA 01742-2751

CENAE-RDNH/VT

11 July 2024

MEMORANDUM FOR RECORD

SUBJECT: U.S. Army Corps of Engineers (USACE) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (18 Jan 23) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 Sep 23),¹ NAE-2005-01926.

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

On 18 Jan 23, 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 (18 Jan 23) ("2023 Rule"). On 8 Sep 23, 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 USACE AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

2. SUMMARY OF CONCLUSIONS

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

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

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

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a. There are two (2) delineated aquatic resource features within the project's review area:

- i. Wetland "A Series" (5,736 sq. ft.) is a non-jurisdictional wetland.
- ii. Wetland "B, C, & AX Series" is an (a)(4) adjacent wetland and is jurisdictional under Section 404 of the Clean Water Act.

3. 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)

4. REVIEW AREA: The AJD Review Area (Figure 1) includes proposed Lots 21, 22 and 23 which consist of about 1.31 acres off Deso Drive Extension in Alburgh, Vermont (Latitude/Longitude Coordinates: 44.974095°, -73.304681°). On 9 January 2006, USACE authorized the placement of fill in about 13,730 sq. ft. (0.31 acre) of wet meadow in conjunction with the construction of a 26-lot residential subdivision off Lake Street in Alburgh. Homes were not constructed on Lots 21, 22 and 23, along with several other lots which the landowner hasn't requested a jurisdictional determination for.

5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED: Lake Champlain the nearest TNW is about 1,400' west of the Review Area.⁵

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

⁵ 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.

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Wetland “B, C, & AX Series” continues off the west side of Lot 23 onto developed Lot 24 (outside of the Review Area). This wet meadow wetland directly flows into a stormwater basin constructed in wetland authorized in 2006. The stormwater basin discharges into a ditch that flows directly into Lake Champlain, the nearest TNW.

7. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ N/A

8. 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

⁶ 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.

⁷ 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.

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e. Tributaries (a)(3): N/A

f. Adjacent Wetlands (a)(4): The field delineated and surveyed portion of Wetland “B, C, & AX Series” within the Review Area is about 14,315 sq. ft. and directly abuts and flows into the on-site stormwater pond outside of the Review Area. Although this wetland boundary has been revised since 2006, a similar shaped wetland was previously delineated and shown on the project plans. The palustrine emergent wetland functions include surface and ground water protection, and water storage for flood water and storm runoff. The overflow of the pond discharges to a ditch that flows directly into Lake Champlain.

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

9. 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).⁸ 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 “A Series” is about 5,736 sq. ft. and is located on Lots 21 and 22. This palustrine emergent wetland drains west towards developed Lot 20 and abruptly transitions to upland lawn. Based on the previously issued permit and original verification of the wetland boundaries on the overall parcel in 2005, Wetland “A Series” has developed since then. Based on a 13 May 2024 site visit, the wetland is located in a shallow depression on the site, which may have been created during the original construction of the cul-de-sac road, installation of underground utilities and prepping of the lots to install modular homes. There is no flow out of this wetland and there are no continuous surface connections from the wetland to a water identified in paragraph (a)(1)-(3) of the Conforming 2023 Rule.

⁸ 88 FR 3004 (January 18, 2023)

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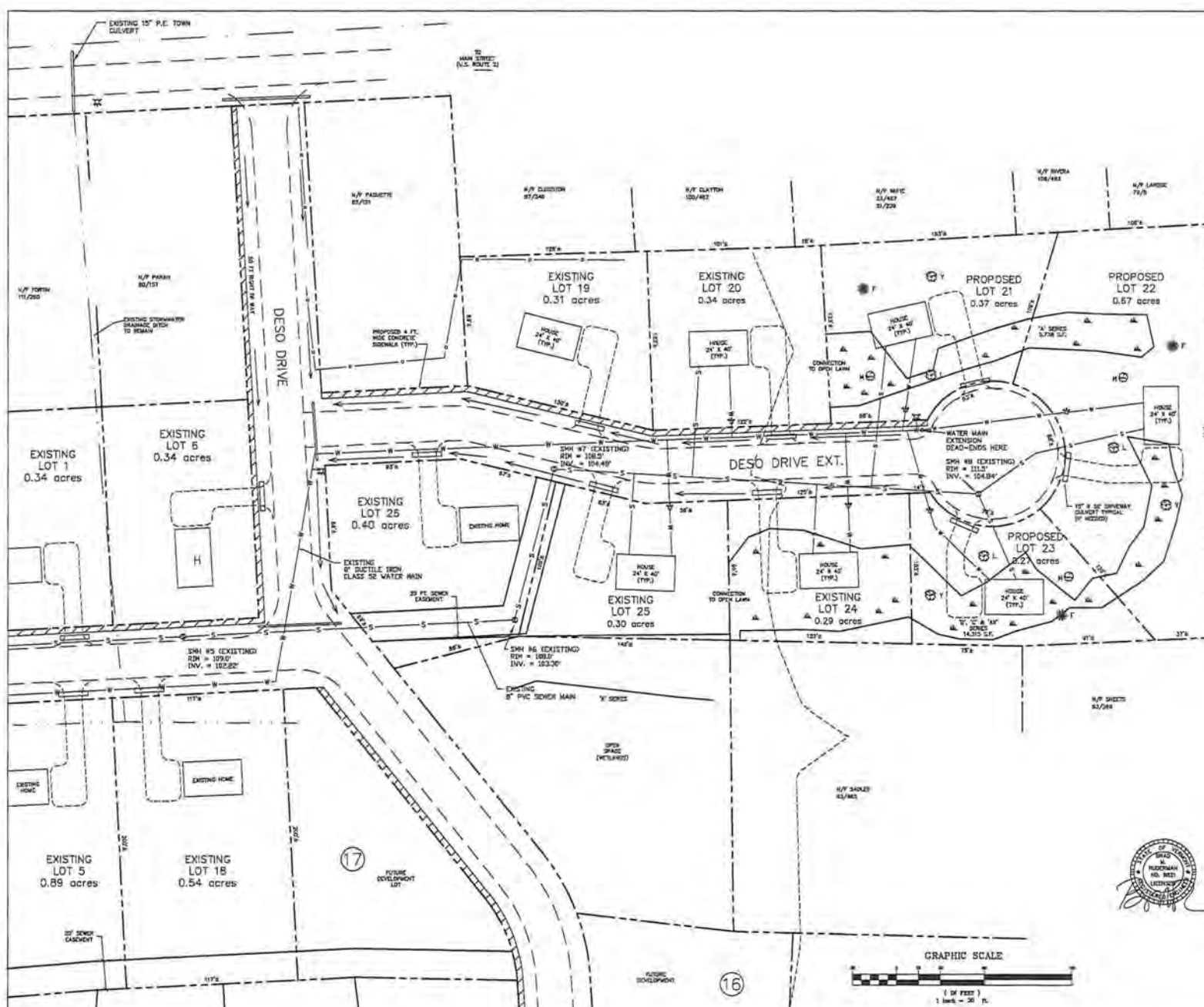
10. DATA SOURCES: List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Overall Plan View of Review Area drafted by Brad M. Ruderman, P.E., titled "PHASE 4 SITE PLAN LOTS 21, 22 & 23", dated "AUGUST 23, 2012", last revised "12/11/17" (Figure 1).
- b. Additional remote tools and mapping resources were used to analyze the review area:
 - a. Figure 2 a-c: Location Maps from National Regulatory Viewer & VT Natural Resources Atlas
 - b. Figure 3. USGS StreamStats
 - c. Figure 4. Google Earth Photos
 - d. Figure 6. Site Visit Photos

A site visit was conducted by USACE staff on 13 May 2024. See additional details of the visit in the administrative record in a memorandum, dated 15 May 2024, and attached photos.

11. OTHER SUPPORTING INFORMATION: N/A

12. 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.



● PPF	HIGH FIRE SOUND
● RPF	IRON ROD SOUND
● DMF	GRANITE MONUMENT FOUND
● IRS	IRON ROD SET W/ YELLOW "THETFORD" CAP
● FNP	FENCE POST
▲	CALCULATED POINT
→	PROPOSED UTILITY POLE W/LIGHT
⋈	EXISTING FIRE HYDRANT
⊕	WATER SHUT-OFF
—	PROPERTY LINE
—	EDGE OF GRAVEL ROAD/DRIVE
—	WIRE FENCE
—	SEWER LINE
—	WATER LINE
—	EDGE OF EASEMENT
—	BUILDING SETBACK LINE
—	GRASED DRAINAGE SWALE
—	CENTERLINE OF DRAINAGE SWALE
● H	MAPLE
● F	FR
● Y	YEW
● L	LEAC

1. THE 8-INCH WATER MAIN, 8-INCH SEWER MAIN AND THREE SEWER MANHOLES FOR THIS PHASE OF THE PROJECT WERE CONSTRUCTED IN GENERAL CONFORMANCE WITH THE APPROVED PLANS BY JOHN H. THEFTROD & ASSOCIATES, INC., DATED JANUARY 2009, LAST REVISED APRIL 23, 2009.

CHAMPLAIN ESTATES SUBDIVISION OFF LAKE STREET ALBURG, VERMONT
PHASE 4 SITE PLAN LOTS 21, 22 & 23
BRAD M. RUDERMAN & ASSOCIATES, INC. CIVIL ENGINEERS * LAND SURVEYORS HARTLAND, VERMONT

SCALE 1" = 30'	APPROVED BRAD M. RUDERMAN, P.E.	DRAWN BMR
DATE AUGUST 23, 2012		SHEET 2 OF 3

