



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

CENAE-RDC

03 March 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322
(2023),¹ NAE-2023-02400 MFR 1 of 1²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ While the Supreme Court’s decision in *Sackett* 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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland A non-jurisdictional. This wetland is a PSS1E (56,443 square feet). Its hydrology support comes from snowmelt and forested surface runoff. It doesn't have a hydrologic surface connection. The wetland is surrounded by scrub oak, white pine and red oak species. The wetland is a natural concave depression with overflow culverts present and no inlet/outlet streams. This wetland has been labeled as having vernal pool primary and secondary habitat indicator species present. This wetland does not have a continuous surface connection to an (a)(1), (a)(2), and/or (a)(3) water and is therefore non jurisdictional.
 - ii. Wetland B non-jurisdictional. This isolated wetland is a PFO1E (3,054 square feet). Its hydrology comes from the surrounding pervious natural forested surface run-off. The vegetation is sparse to nonexistent in the herbaceous stratum due to extensive shading. This wetland is not a vernal pool and has no culverts or any other hydrological connection to other wetlands.
 - iii. Wetland E non-jurisdictional. This man-made wetland is a PFO1 E (5,226 square feet). Its hydrology is from a man made ditch (4 feet wide) that receives stormwater runoff from a 15" RCP culvert that eventually discharges into a man made detention basin. This wetland does not have a continuous surface connection to an (a)(1), (a)(2), and/or (a)(3) water and is therefore non jurisdictional. Dominant willow, buckthorn, and dogwood shrubs are present. This wetland was created by excavation activities due to excavation business operations.
 - iv. Wetland F non-jurisdictional. This wetland is a PSS1 E (30,152 square feet). Its hydrology comes from snowmelt and one (1) intermittent stream runoff entering the wetland from westside (coming from wetland H). However, there is no hydrological surface connection to a traditional navigable water present. It has been timbered, but not grubbed. Some small areas have been excavated in the wetland. The wetland is surrounded by scrub oaks, big-tooth aspen and a gravel haul road for quarry staging areas. This wetland discharges out on its' eastside through an existing 15" RCP culvert. This wetland does not have a continuous surface connection to an (a)(1), (a)(2), and/or (a)(3) water and is therefore non jurisdictional.
 - v. Wetland H non-jurisdictional. The isolated wetland is a PFO1 E (326 square feet). Its hydrology is from an intermittent (2-3 foot wide) ditch that transports

stormwater runoff from Wetland "J" and Wetland "F". It is surrounded by herbaceous strata and shrub-scrub that has been disturbed due to current logging activities. Originally, a small pocket "stopover" wetland, it has been diminished due to current excavation business operations.

- vi. Wetland J non-jurisdictional. This isolated wetland is a PSS1 E (40,402 square feet). Its hydrological support comes from snow melt and natural forested surface runoff. It is surrounded by scrub oak, white pine and red oak species. The wetland is a natural concave depression with culverts entering the wetland. This wetland has not been disturbed by logging, filling or excavating. This wetland does not have a continuous surface connection to an (a)(1), (a)(2), and/or (a)(3) water and is therefore non jurisdictional.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The site is a 185 acre lot. The center of the review area coordinates are 42.794194, -71.418609 which is located at 85 Greeley Street, Hudson, NH. This location is part of property owned by a gravel mining operation. Adject land comprises of mined property along with forested and residential development.

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

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

6. 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
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 pre-2015 regulatory regime and 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 pre-2015 regulatory regime. 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. TNWs (a)(1): N/A
 - b. Interstate Waters (a)(2): N/A
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): N/A
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): N/A
 - g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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.

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁸ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. NA
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.

Wetland A is a PSS1E wetland 56,443 square feet in size.

Wetland B is a PFO1E wetland 3,054 square feet in size.

Wetland E is a PFO1E wetland 5,226 square feet in size.

Wetland F is PSS1E wetland 30,152 square feet in size.

Wetland H is a PFO1E wetland 326 square feet in size.

Wetland J is a PSS1E wetland 40,402 square feet in size.

These wetlands are non-jurisdictional as they are wetlands that do not have a continuous surface connection to a relatively permanent body of water connected to traditional interstate navigable waters. Nor are they adjacent waters that are bordering, contiguous, or neighboring to a water of the United States even when taking into separation by barriers, river berms, or beach dunes.

- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic

⁸ 51 FR 41217, November 13, 1986.

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resource or feature, and how it was determined to be an “isolated water” in accordance with SWANCC. N/A

- f. 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 pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (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 is a PSS1E wetland 56,443 square feet in size.
Wetland B is a PFO1E wetland 3,054 square feet in size.
Wetland E is a PFO1E wetland 5,226 square feet in size.
Wetland F is PSS1E wetland 30,152 square feet in size.
Wetland H is a PFO1E wetland 326 square feet in size.
Wetland J is a PSS1E wetland 40,402 square feet in size.

These wetlands do not meet the pre-2015 regulatory regime definition of waters of the United States as defined by 40 CFR 230.3 (s) including Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of 40 CFR 230.3 (s); waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

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. National Wetland Inventory Mapper dated January 5, 2023
 - b. USGS Topographic Map
 - c. EXISTING CONDITIONS PLAN dated 23 DECEMBER 2024
 - d. Wetland Delineation sheets on 37 pages dated 7/23/2024, 5/18/23, and 12/30/24 (There were some errors in the forms however the errors were not going to change the delineation determination.)
 - e. Photographs of the wetlands during a December 20, 2024 site walk.

10. OTHER SUPPORTING INFORMATION. N/A

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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.

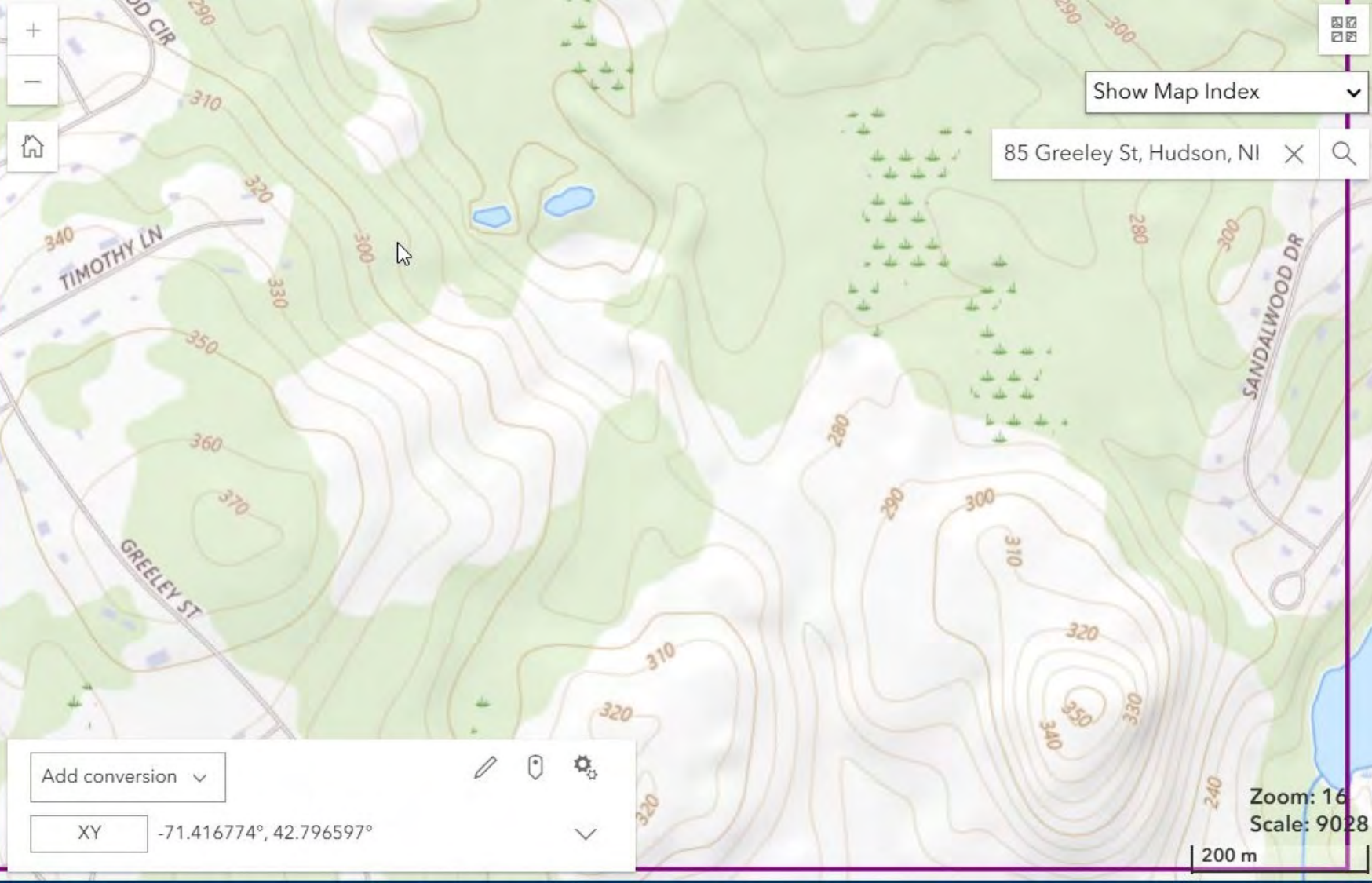


January 5, 2023

Wetlands

- | | | |
|--------------------------------|-----------------------------------|----------|
| Estuarine and Marine Deepwater | Freshwater Emergent Wetland | Lake |
| Estuarine and Marine Wetland | Freshwater Forested/Shrub Wetland | Other |
| | Freshwater Pond | Riverine |

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.



Show Map Index

85 Greeley St, Hudson, NJ

Add conversion

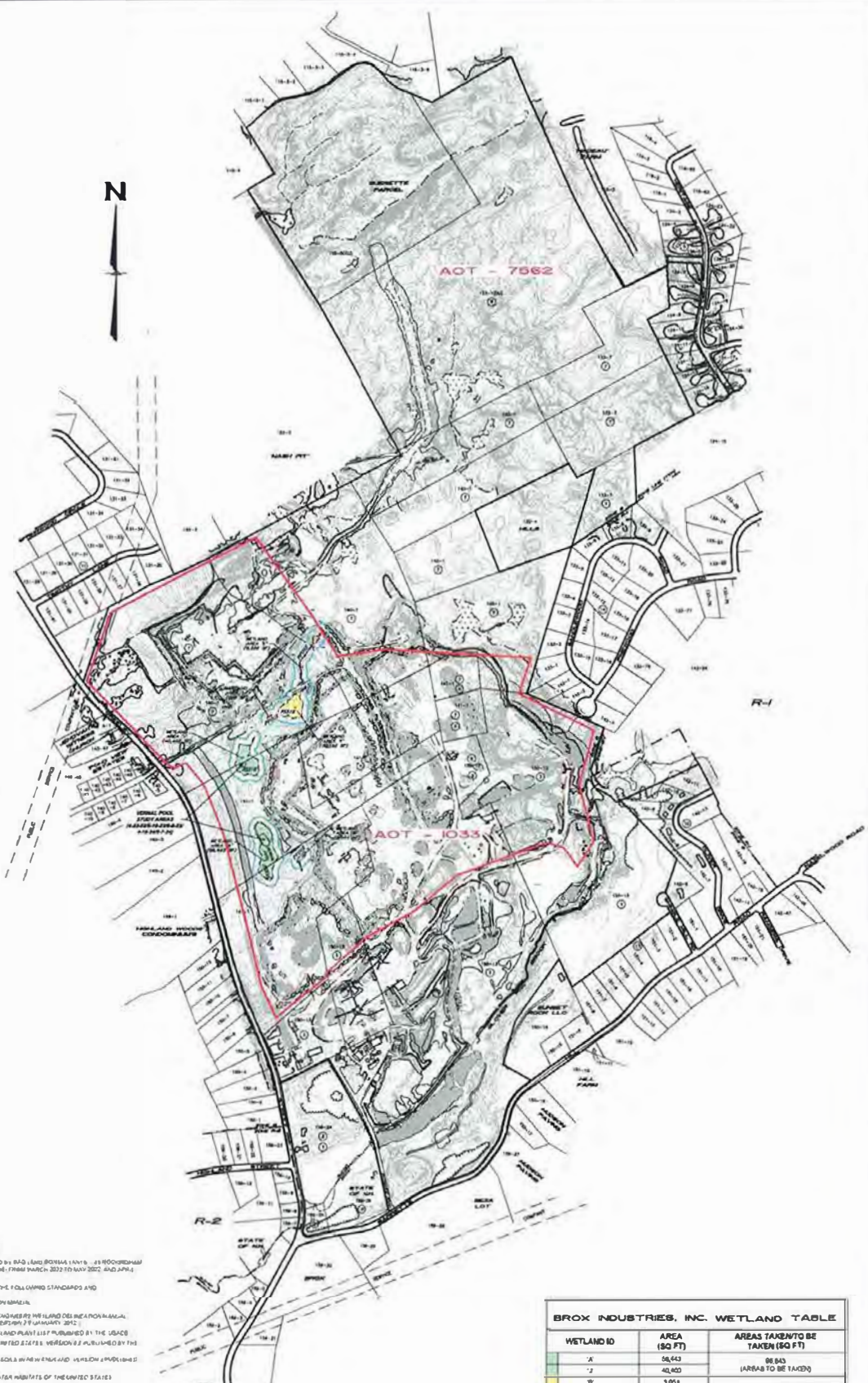
XY

-71.416774°, 42.796597°

Zoom: 16

Scale: 9028

200 m



WETLAND CERTIFICATION

THE WETLANDS ON THIS PROJECT WERE Delineated by RAG, Ltd. (R01141-1111) - 43 ROODHAW
STREET, CARBORO WISCONSIN 53001, CIVIL PE, FROM MARCH 2022 TO MAY 2022, AND APRIL
2021 TO MAY 2021.

WETLAND BOUNDARIES WERE PREPARED UTILIZING THE FOLLOWING STANDARDS AND
METHODS:

- 1. CORRECTION OF THE WETLAND AND Delineation MAPS.
- 2. REGIONAL SUPPLEMENT TO THE COMPS OF ENGINEERS WETLAND DELINEATION MANUAL,
NORTH-CENTRAL AND NORTH-EAST REGION, VERSION 2.0 (JANUARY 2012).
- 3. NORTH-CENTRAL AND NORTH-EAST REGIONAL WETLAND PLANT LIST PUBLISHED BY THE USACE.
- 4. FIELD INDICATORS OF WETLANDS IN THE UNITED STATES, VERSION 3.0 PUBLISHED BY THE
USACE.
- 5. FIELD INDICATORS FOR SELECT WETLANDS IN THE WETLAND AND DELINEATION MANUAL
BY THE USACE.
- 6. CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES
(EDWARDS ET AL. 1979, REVISED 1980).
- 7. HIGHER-LEVEL PHOTOGRAPHIC SURVEILLANCE (HLS) FOR WETLANDS (US
FUNCTIONS AND USES).

WETLAND STUDY VERIFICATION

ON APRIL 19, 2024 AND MAY 2, 2024, A VERNAL POOL STUDY WAS PERFORMED ON THE 11.1 ACRE AREA "A"
BY BRUCE GILBERT, CIVIL AND CHEMICAL ENGINEER, QUALIFIED AS A VERNAL POOL STUDY VERIFICATION
THROUGHOUT THE DRY POOL AREAS AND MORE SPECIFICALLY IN AREAS WITH STANDING WATER
PRIMARY WETLAND POOL, SPECIES WERE OBSERVED AND DOCUMENTED IN THE WETLAND AS LA 1, ONLY.



BROX INDUSTRIES, INC. WETLAND TABLE		
WETLAND ID	AREA (SQ FT)	AREAS TAKEN TO BE TAKEN (SQ FT)
A	58,543	86,843
B	40,400	(AREAS TO BE TAKEN)
C	3,051	
D	329	36,766
E	30,192	(PREVIOUSLY TAKEN PER NHCORE PERMIT # 2023-05173)
F	8,728	
TOTAL	130,600 SQ FT (3.11 AC)	

HESI
Hudson Engineering & Surveying, Inc.
1000 ROUTE 100, SUITE 100
CARBORO, NH 03001
TEL: 603-938-4000
FAX: 603-938-4001
WWW.HESI-NH.COM
2024 JULY 2024

EXISTING CONDITIONS PLAN
BROX INDUSTRIES, INC.
65 GREELEY STREET
HUDSON, NEW HAMPSHIRE

PREPARED FOR:
BROX INDUSTRIES, INC.
1000 ROUTE 100, SUITE 100
CARBORO, MASSACHUSETTS 01901 (508) 434-9105

1	WETLAND	ADD WETLAND PERMIT CONSIDERATION	0.00
2	BROOKS	UPDATE AREA BASE ADD WETLAND	0.00
3	TOTAL	WETLAND AREA	0.00
4	WETLAND	WETLAND AREA	0.00
5	WETLAND	WETLAND AREA	0.00
6	WETLAND	WETLAND AREA	0.00
7	WETLAND	WETLAND AREA	0.00
8	WETLAND	WETLAND AREA	0.00
9	WETLAND	WETLAND AREA	0.00
10	WETLAND	WETLAND AREA	0.00