



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

CENAE-RD

14 June 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),<sup>1</sup> NAE-2023-00338

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.<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 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),<sup>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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.

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## 2. 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).

(1) Wetland A (1.137 acre) – Wetland A is a mix of forested, scrub shrub, and emergent wetland that drains northwesterly into Wetland A12 via a culvert beneath Welcome Center Road. Wetland A is hydrologically connected to Wetland A12 via the culvert. Wetland A12 is a linear wetland feature with no defined outlet. Wetland A and A12 do not connect to any surface tributaries. Wetland A is not adjacent to an (a)(1) water and is not adjacent to a relatively permanent, standing, or continuously flowing body of water identified in paragraph (a)(2) or (a)(3) of the rule. Wetland A does not have a continuous surface connection to such waters. Due to this lack of surface connection to waters of the U.S., Wetland A is not jurisdictional.

(2) Wetland A12 (0.086 acre) – Wetland A12 is a linear palustrine forested wetland feature and does not have a defined outlet. The wetland dissipates into upland forest. Wetland A12 is not adjacent to an (a)(1) water and is not adjacent to a relatively permanent, standing, or continuously flowing body of water identified in paragraph (a)(2) or (a)(3) of the rule. Wetland A12 does not have a continuous surface connection to such waters. Due to this lack of surface connection to waters of the U.S., Wetland A12 is not jurisdictional.

(3) Wetland B (0.345 acre) – Wetland B is a vernal pool with no defined outlet. The feature is surrounded by upland forest and does not have a continuous surface connection to a water of the U.S. Wetland B is not jurisdictional.

(4) Wetland C (0.154 acre) – Wetland C is a palustrine emergent stormwater feature constructed in upland. The wetland is dominated by *Phragmites australis* and is located adjacent to I-89 and the U.S. Route 7 overpass. The wetland drains to a culvert beneath the U.S. Route 7 overpass. This feature is a roadside ditch/swale excavated wholly in and draining only dry land. The wetland treats stormwater from the surrounding upland development and roadways. The feature does not carry a relatively permanent flow of water and meets the definition of an excluded (b)(3) water. Wetland C is not jurisdictional.

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(5) Ditch D (0.022 acre) – Ditch D is a stormwater feature constructed in upland. It consists of a vegetated swale and treats stormwater from the surrounding upland development and roadways. The feature does not carry a relatively permanent flow of water and meets the definition of an excluded (b)(3) water. Ditch D is not jurisdictional.

(6) Ditch E (0.037 acre) – Ditch E is a stormwater feature constructed in upland. It consists of a stone-lined ditch and treats/conveys stormwater from the surrounding upland development and roadways. The ditch enters a 30" corrugated metal pipe culvert which continues to additional subsurface stormwater infrastructure. The feature does not carry a relatively permanent flow of water and meets the definition of an excluded (b)(3) water. Ditch E is not jurisdictional.

(7) Wetland F (0.019 acre) – Wetland F is a seasonally ponded palustrine forested wetland. The wetland does not have a defined outlet and is not connected to any other surface waters. Wetland F is not jurisdictional.

(8) Wetland G (0.095 acre) – Wetland G is a palustrine emergent wetland with a palustrine forested and scrub shrub fringe. The feature is a vernal pool with no defined outlet and is not connected to any other surface waters. Wetland G is not jurisdictional.

(9) Wetland H (0.149 acre) – Wetland H is a palustrine forested wetland situated on a rocky landscape and does not have a defined outlet. The feature is not connected to any other surface waters. Wetland H is not jurisdictional.

(10) Wetland I (0.519 acre) – Wetland I is palustrine forested and is situated at the intersection of U.S. Route 7 and Welcome Center Road. The feature is partially ponded and drains to a roadside swale. The roadside swale adjoins to a culvert beneath Welcome Center Road. There is no relatively permanent water at the outlet of the culvert and surface hydrology dissipates into upland on the south side of the road. Wetland I is not adjacent to an (a)(1) water and is not adjacent to a relatively permanent, standing, or continuously flowing body of water identified in paragraph (a)(2) or (a)(3) of the rule. Wetland A does not have a continuous surface connection to such waters. Wetland I is not jurisdictional.

(11) Wetland J (0.213 acre) – Wetland J is a vernal pool and does not have a defined outlet. The feature is not connected to any other surface waters. Wetland J is not jurisdictional.

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(12)Wetland K (0.074 acre) – Wetland K is seasonally ponded, does not have a defined outlet and is not connected to any other surface waters. Wetland K is not jurisdictional.

(13)Wetland L (0.146 acre) – Wetland L is a vernal pool and does not have a defined outlet. The feature is not connected to any other surface waters. Wetland L is not jurisdictional.

(14)Wetland M (0.055 acre) – Wetland M is a linear palustrine forested feature and is not connected to any other surface waters. Wetland M is not jurisdictional.

(15)Wetland N (0.0291 acre) – Wetland N is palustrine forested, does not have a defined outlet and is not connected to any other surface waters. Wetland N is not jurisdictional.

### 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 review area is 77.38 acres in size, located at the Highgate Springs Land Port of Entry (LPOE) at Latitude 45.0123105°, Longitude -73.0878177°. The site address is 480 Welcome Center Road, Highgate, Franklin County, Vermont. USACE conducted a site visit on 16 April 2024 to review aquatic resources at the site and was accompanied by staff with the U.S. Customs and Border Protection, Vermont Department of Environmental Conservation Wetlands Program, General Services Administration, and Langen Engineering, Environmental Surveying, Landscape Architecture, and Geology, D.P.C. (see MFR dated 4/16/2024 and accompanying photos).

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5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED: N/A. The aquatic resources are not connected to a TNW, the territorial seas, or interstate waters.<sup>5</sup>

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER: N/A. The aquatic resources are not connected to a TNW, the territorial seas, or interstate waters.

7. 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

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

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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.

<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.

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- 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
- f. Adjacent Wetlands (a)(4): N/A
- 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).<sup>8</sup>

Wetland C is 0.154 acre in size. This wetland is a stormwater feature constructed in upland. The wetland is dominated by *Phragmites australis* and is located adjacent to I-89 and the U.S. Route 7 overpass. The wetland drains to a culvert beneath the U.S. Route 7 overpass. This feature consists of a roadside ditch excavated wholly in and draining only dry land. Wetland C functions to treat stormwater from the surrounding upland development and roadways. The feature does not carry a relatively permanent flow of water and is an excluded (b)(3) water. Wetland C is not jurisdictional.

Ditch D is 0.022 acre in size. This feature is a stormwater swale constructed in upland. See Section 2 above.

Ditch E is 0.037 acre in size. This wetland consists of a stormwater feature constructed in upland. See Section 2 above.

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

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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, A12, B, F, G, H, I, J, K, L, M, and N are wetlands and waters that do not have a continuous surface connection to a jurisdictional water. See details in Section 2 above. These wetlands and waters are not jurisdictional.

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. 16 April 2024 site visit (see MFR dated 16 April 2024, and accompanying photographs).

b. Report compiled by Langen Engineering, Environmental, Surveying, Landscape Architecture and Geology (Langen) titled "Wetland Delineation Report" and dated "14 November 2023" including the following figures:

- a. "USGS Site Location Map" dated "8/30/2023"
- b. "Vicinity Map" dated "8/30/2023"
- c. "NWI Wetlands Map" dated "9/18/2023"
- d. "Vermont Wetlands Map" dated "9/18/2023"
- e. "Aerial Photograph 1963," "Aerial Photograph 1995," "Aerial Photograph 2008," "Aerial Photograph 2009," "Aerial Photograph 2013," "Aerial Photograph 2016," "Aerial Photograph 2018," and "Aerial Photograph 2021" dated "11/14/2023."

c. USGS Stream Stats Map, accessed 16 April 2024

d. National Regulatory Viewer Map with Lidar (undated)

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.

