



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

CENAE-R
NAE-2023-01729

28 Feb 2025

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),¹ NAE-2023-01729

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

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.

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

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 B is not a water of the United States nor is it a navigable water of the United States.
 - ii. Wetland C is not a water of the United States nor is it a navigable water of the United States.
 - iii. Wetland I is not a water of the United States nor is it a navigable water of the United States.
 - iv. Wetland J is not a water of the United States nor is it a navigable water of the United States.
 - v. Wetland K is not a water of the United States nor is it a navigable water of the United States.
 - vi. Wetland L is not a water of the United States nor is it a navigable water of the United States.
 - vii. Wetland P is not a water of the United States nor is it a navigable water of the United States.
 - viii. Wetland Q is not a water of the United States nor is it a navigable water of the United States.
 - ix. Wetland R is not a water of the United States nor is it a navigable water of the United States.
 - x. Wetland T is not a water of the United States nor is it a navigable water of the United States.
 - xi. Wetland U is not a water of the United States nor is it a navigable water of the United States.
 - xii. Wetland V is not a water of the United States nor is it a navigable water of the United States.

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. 651, 143 S. Ct. 1322 (2023)

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

3. REVIEW AREA.

The 153-acre property is located off West Street in Bridgewater, Massachusetts and encompasses parcels 19, 20, 21, and 33 on town assessor's map 36. The majority of the property was delineated as federal wetlands by the consultant but only twelve discrete wetland features totaling 3.4 acres in size are within the review area. These twelve wetland features are labeled as Wetlands B, C, I, J, K, L, P, Q, R, T, U, and V on the site plan titled "Isolated Wetland Locations- Jurisdictional Determination Rear West Street- West Bridgewater, MA" and dated 6/19/2024. There is an extension of Old West Street running north-south in the middle of the property and ending in a cul-de-sac. The road appears to have been installed in association with a planned subdivision that was never built. There are currently solar panels in the cleared area to the west of this road, while the majority of the wetlands in the review area are to the east of this road.

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

The nearest TNW to the twelve wetland features is the Taunton River although there is no continuous surface connection from any of the twelve wetlands in question to this river.

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

There is no continuous surface connection and therefore no flow path from any of the twelve wetland features to a TNW, the territorial seas, or an interstate water.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶

⁵ 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.

⁶ 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.

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

Wetlands B, C, I, J, K, L, P, Q, R, T, U, and V are not jurisdictional under Section 10 of the Rivers and Harbors Act of 1899.

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

f. Adjacent Wetlands (a)(4): N/A

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).⁷ N/A

⁷ 88 FR 3004 (January 18, 2023)

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

- 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 B is a 1.08-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02686 N, 71.04667 W.

Wetland C is a 1.45-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02591 N, 71.04671 W. It is located just east of the Old West Road extension and south of Wetland B. There is a large ditch feature within Wetland C that extends east and south towards other wetland features.

Wetland I is a 0.02-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02735 N, 71.04566 W.

Wetland J is a 0.09-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02752 N, 71.04592 W.

Wetland K is a 0.006-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02445 N, 71.04494 W.

Wetland L is a 0.13-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02468 N, 71.04549 W.

Wetland P is a 0.02-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02292 N, 71.04582 W.

Wetland Q is a 0.04-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02433, -71.04553 W.

Wetland R is a 0.38-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02507 N, 71.04643 W.

Wetland T is a 0.14-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02444 N, 71.04695 W.

Wetland U is a 0.04 acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02254 N, 71.04543 W.

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

Wetland V is a 0.009-acre freshwater forested and/or scrub-shrub wetland and the center coordinates are 42.02280 N, 71.04562 W.

USACE reviewed the submitted AJD materials and the following GIS layers in the Mass Mapper, an interactive website for Massachusetts, to help determine if there was a continuous surface connection from any of the twelve wetlands to an (a)(1)-(3) water:

- Topography
- NWI Wetlands
- DEP Wetlands Hydrologic Connections
- Elevation and Shaded Relief from Lidar

A review of the submitted information and online tools suggested that the majority of the wetlands did not have any continuous surface connections to an (a)(1)-(3) water. However, there was a ditch feature originating in Wetland C, a cart path feature related to Wetlands L and Q and a culvert related to Wetland T that merited further investigation. USACE attended a joint site visit with EPA, the requester, and the consultant on 11/18/24. Afterwards, USACE requested additional information including photos of the ditch and cart path features after rain events and a plan showing the drainage system that had been installed for the subdivision that was never built.

A review of the requested information submitted on 12/18/24 indicated that the ditch, cart path, and culvert did not provide a continuous surface connection from any of the wetlands to an (a)(1)-(3) water.

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. Jurisdictional determination request document submitted to USACE by Goddard Consulting, LLC on 08/02/23
 - b. Updated AJD materials submitted by Goddard Consulting on 06/24/24 in response to an additional information request from USACE on 02/09/24. These materials included paired USACE wetland determination forms for each of the twelve wetlands in the review area (one data point in the wetland and the other data point in the corresponding upland).
 - c. Site visit on 11/18/24 attended by USACE, EPA, AJD requester, and consultant.

CENAE-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-01759

- d. Photos of the ditch and cart path after rain events and old subdivision drainage plan submitted by consultant on 12/18/24.
- e. Mass Mapper GIS website:
<https://maps.massgis.digital.mass.gov/MassMapper/MassMapper.html>

10. OTHER SUPPORTING INFORMATION.

In accordance with the updated December 2023 USACE Tribal consultation policy, USACE coordinated with the Narragansett Indian Tribe, the Wampanoag Tribe of Gayhead (Aquinnah) and the Mashpee Wampanoag Tribe regarding this AJD on 08/10/24. USACE asked if the tribes had any indigenous knowledge of hydrology in the vicinity that would be useful for this AJD process. No response was received from any of the tribes within the 30 day comment period.

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.