

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

CENAE-RD-CTRI NAE-2023-02230 09 October 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),¹ NAE-2023-02230 MFR 1 of 1.²

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

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),⁵ the 2023 Rule as amended,

³ 33 CFR 331.2.

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 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, the territorial seas, or interstate water 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.).

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.

CENAE-RD-CTRI

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-02230

as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

- 1. SUMMARY OF CONCLUSIONS.
 - a. There are two delineated aquatic resources within the project's review area:
 - i. Wetland 3 (7,464 square feet/0.17-acre), non-jurisdictional
 - ii. Intermittent Watercourse 1-20 (715 linear feet), non-jurisdictional

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 review area consists of five adjoining parcels which together total 75.16 acres. The subject resource areas occur on a 37.15-acre parcel located on Myrtle Drive in Norwich, New London County, Connecticut 06360 (Latitude/Longitude Coordinates: 41.567841, -72.121341) and identified by the unique parcel ID # 041-001-005.000-0000 (Figure 1: Site Location Map). The overall site is undeveloped and primarily forested with oak-hardwood and hemlock cover types. It occurs on a west-facing till slope from the ridgetop near Myrtle Drive down to Elisha Brook and New Park Drive which occur near the lowest elevations on the site along the northern and western boundaries. The surrounding area is made up of residential and industrial use. Four wetlands meeting both the Connecticut and federal jurisdictional requirements and three intermittent watercourses meeting Connecticut only jurisdictional requirements were delineated as summarized in Table 1: Summary of Wetlands Delineated, Cover Types, and Connectivity and illustrated in Figure 2: Wetlands Map. As noted, only Wetland 3 and its associated contributing Intermittent Watercourse 1-20 (IW1-20) were requested for AJD review.

Project Review Area

The Project Review Area is outlined in Figure 2: Wetlands Map (black outline) with a center point at latitude/longitude: 41.567730N, 72.120664W, depicting the layout of the delineated wetland (green polygon) and intermittent watercourse (blue line) on

CENAE-RD-CTRI SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-02230

the project site and lines indicating distance from the downstream jurisdictional wetland (Wetland 1) and watercourse (Elisha Brook).

Historic aerial photographs show that the land and surrounding area does not appear to be modified from 1934 until at least 1970. The residential developments along Myrtle Drive appear in aerial imagery from 1974. Present Day aerial imagery (Figure 6) shows no modifications to the Project Review Area (red outline).

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

Neither of the aquatic resources within the project's Review Area possess a continuous surface connection to a downstream TNW. The nearest TNW is the Yantic River, and the nearest Navigable Waterway is the Thames River. The Thames River is formed by the confluence of the Shetucket and Yantic rivers in Norwich and flows south for 12 miles to New London Harbor. It serves (in upstream order) commercial and recreational waterfronts in the communities of New London, Groton, Waterford, Ledyard, Montville, and Norwich. A 25-foot-deep channel, about 10.5 miles long, extending from the area east of Mamacoke Cove in New London (almost two miles north of the New London Highway Bridge) to Norwich, at the mouth of the Shetucket River.⁶

- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.
 - a. Wetland 3 and IW1-20 (within the Review Area): Delineated wetland and watercourse areas do not physically abut or touch an (a)(1), (a)(2), or (a)(3) water, nor do they possess a continuous surface connection to such waters via a non-jurisdictional conveyance (e.g., swale, culvert, storm drain) (Photos 5, 6, 9 & 10).
 - b. Wetlands 1, 2, 4 and Intermittent Watercourses 1C-13C and 1D-7D (outside of the Review Area): Delineated wetlands and watercourses directly abut relatively permanent waters flowing indirectly or directly to TNW (Figure 2; Photos 1-4, 7, 8).

⁶ 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.

CENAE-RD-CTRI SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-02230

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸

There are no resources subject to Section 10 of the Rivers and Harbors Act of 1899 in the review area.

- 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): Not applicable.
 - b. The Territorial Seas (a)(1)(ii): Not applicable.
 - c. Interstate Waters (a)(1)(iii): Not applicable.
 - d. Impoundments (a)(2): Not applicable.
 - e. Tributaries (a)(3): Not applicable.

⁷ 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.

⁸ 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-RD-CTRI

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-02230

- f. Adjacent Wetlands (a)(4): Not applicable.
- g. Additional Waters (a)(5): Not applicable.

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).⁹

The applicant did not identify or delineate any non-jurisdictional excluded water features in the project Review Area. Aerial imagery from 1934 onward do not depict any farmland or drainage features within the project Review Area.

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 3: We evaluated the 0.17-acre resource feature identified as Wetland 3 for potential landscape connectivity and a continuous surface connection to waters described in Section 4 above. The consultant characterized Wetland 3 as an isolated forested wetland within saturated hydrology. Wetland 3 is situated on a mid-slope terrace and is fed by IW1-20 originating from a storm water outfall system along Myrtle Drive. The wetland has a marginal hydrology with a poorly drained soil profile that is trending towards a moderately well drained soil. The wetland has a perched water table. The lower half of the wetland becomes steep with concentrated flow developing but then dissipating at the western low-slope terminus where the topography levels. The dominant tree cover is *Tsuga canadensis*, the shrub cover is essentially non-existent, and the ground cover is sparse, consisting of only a few patches of *Microstegium vimenium*. Refer to Figure 2, Figure 3, and Photos 1 - 5.

IW1-20: We evaluated the approximately 715 linear feet intermittent waterway feature identified as IW1-20 characterized by a 3 – 5ft average channel width,

⁹ 88 FR 3004 (January 18, 2023)

flowing down a steep rocky slope. It has braided flow in places where the channel banks become poorly defined (generally in the mid and low slopes). The primary source of hydrology is a stormwater outfall at Myrtle Drive, but this feature likely captures some groundwater discharge during the spring high groundwater period.

To determine the potential for Wetland 3 and IW1-20 to possess a continuous surface connection to waters of the U.S., staff reviewed aerial photographs from 1934 to 1990 which showed when development began in the area but did not demonstrate a continuous surface connection via IW1-20. We analyzed the U.S. Fish and Wildlife Service National Wetlands Inventory which did not label Wetland 3 or IW1-20 on the mapper but Elisha Brook and the Yantic River and associated wetlands are labeled (Figure 8). Soil profiles within, and around, the perimeter of the wetland is described as partially hydric (5%) (Figure 9).

Site visits were performed by the consultants on August 8, 2023 and USACE on June 27, 2024 (Photos 11-19). No continuous surface connections to wetlands abutting a RPW or TNW were observed. Consequently, we evaluated these same field visit dates for antecedent precipitation and compared the precipitation values to a normal range. Our antecedent precipitation analysis result (Figures 10 and 11) revealed that the conditions observed during the wetland delineation was wet conditions during the dry season and normal conditions during our site visit. Photographs (Photos 17-19) taken on June 27, 2024 depict a distinct dry land separation between Wetland 3 and Wetland 1 or Wetland 2, which abut RPWs of Elisha Brook and the Yantic River. To validate this concept, staff analyzed the State of Connecticut 2016 LiDAR elevation data (Figure 7). Our evaluation revealed evidence of IW1-20 draining into Wetland 3 and showed that a continuous surface connection to Wetland 1 and RPWs is unlikely to occur. Wetland area 1/2 does not physically abut or touch an (a)(1), (a)(2) or (a)(3)water, nor does it possess a continuous surface connection to such waters via a non-jurisdictional conveyance (e.g., swale or culvert). Consequently, the wetland areas do not contribute flow to TNW's, territorial seas, interstate waters or a relatively permanent (a)(3) tributary.

- 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. Field visit completed on 27 June 2024
 - b. CT ECO UCONN Aerial and Lidar Elevation Viewers (2019, 2012, 2009, 2004, and 1934 Aerial Photographs and 2016 Elevation)
 - c. National Wetlands Inventory Mapper

CENAE-RD-CTRI

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAE-2023-02230

- d. USDA Hydric Soils Class
- e. Report on the Navigable Status of the Yantic River, Connecticut, USACE New England District
- f. Antecedent Precipitation Tool
- 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.

PREPARED BY:

Andr<u>ea Williams</u>

Date: 10/09/2024

Andrea Williams Project Manager

APPROVED BY:

Kevin R Kotelly

10/09/2024 Date:_____

Kevin R. Kotelly Chief, CT/RI Section

Figure 1: Site Location Map



Figure 2: Wetlands Map



Figure 3: Wetland 3 Map



Figure 4: NAE-2023-02230 Aerial 1934

1934 B&W Spring 255

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NAE-2023-02230 Aerial 1934

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Figure 5: NAE-2023-02230 Aerial 1990



NAE-2023-02230 Aerial 1990

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Figure 7: Connecticut Elevation Mapper



Connecticut Elevation

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CT ECO Esri Community Maps Contributors, MassGIS, UConn/CTDEEP, @ OpenStreetMap, Microsoft, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census

Figure 8: Wetland Mapper



National Wetlands Inventory (NWI) This page was produced by the NWI mapped

Figure 9: Soils Mapper





Figure 10: Antecedent Precipitation Tool Results for 8-8-2023

Figure 11: Antecedent Precipitation Tool Results for USACE Site Visit 6-27-2024



Photos 1-10: Site photos from August 8, 2023



Photo 1: Wetland 1, view of Elisha Brook looking east.



Photo 2: Wetland 1, view of south-central portion of wetland. Note gentle slope, overall saturated hydrology, and young red maple tree cover.



Photo 3: Wetland 2, view of Vernal pool looking north.



Photo 4: Wetland 2, view of Vernal pool looking south.



Photo 5: Wetland 3, looking upslope from southern end of wetland.



Photo 6: Wetland 3, upslope segment.



Photo 7: Wetland 4, view of wetland extending beyond Site boundary.



Photo 8: Wetland 4, view into Site looking west.



Photo 9: IW 1-20; view of upper reaches near stormwater outfall at Myrtle Drive.



Photo 10: IW 1D-7D, view of upper reaches where channel begins at edge of sewer ROW.

Photos 11-19: USACE Site Visit Photo Log June 27, 2024

Photo 11: Storm drain off of Myrtle Drive (41.567244N, 72.119109W)



Photo 12: Storm drain outlet into beginning of intermittent watercourse (41.567182N, 72.119301W)



Photo 13: Facing NE of stormdrain outlet (41.567182N, 72.119301W)



Photo 14: Additional PVC rainwater drainage pipe from parking lot of residential complex on Myrtle Drive (41.567232N, 72.119695W)



Photo 15: End of Wetland 3 facing Elisha Brook (41.567802N, 72.120997W)



Photo 16: Wetland 3 substrate, some standing water present (41.567802N, 72.120997W)



Photo 17: Facing upslope towards Wetland 3 (41.567671N, 72.122524W)



Photo 18: Old stone wall downslope of Wetland 3; between Wetland 3 and Wetland 1 (41.567671, 72.122524W)



Photo 19: Beginning of Wetland 1, approximately 280 feet from the northernmost end of Wetland 3 (41.568507N, 72.122751W)



Table 1: Summary of Wetlands Delineated, Cover Types, and Connectivity

Wetlands (#), Perennial Watercourses, and Rivers	Cover Types	Connectivity to Traditional Navigable Waters ("TNW")			
1 (Wetland 1 includes Elisha Brook and Yantic River which are embedded)	PFO1B, PFO1C, R2UB2	 Wetland 1: Wetland directly abutting Relatively Permanent Water ("RPW") Yantic River: RPW flowing directly to TNW Elisha Brook: RPW flowing indirectly to TNW 			
2	PFO1B	RPW flowing indirectly to TNW			
3	PF01E	Isolated			
4	PFO1E	Potential off-site connection to RPW			
Intermittent Watercourses (CT Jurisdiction only)					
IW 1-20 (Drains into Wetland 3)					
IW 1C-13C (Drains out of Wetland 2)					
IW 1D-7D (Drains into Wetland 1)					

*BOLD indicates resource areas subject to AJD