



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

CENAE-RDNH/VT

15 August 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-2024-01647.

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 (1,860 sq. ft.) and Wetland B (14,545 sq. ft.) are non-jurisdictional wetland.

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 a 28000 sq. ft. parcel owned by the Town of Berlin at 108 Shed Road in Berlin, Vermont (Latitude/Longitude Coordinates: 44.2114031°, -72.577765°). On 31 July 2024, USACE conducted a site visit to review the aquatic resources at the site and was accompanied by staff from Dubois & King, Inc.

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.⁵

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.

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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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
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): 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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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).

(1) Wetland A is a palustrine emergent wetland that is about 1,860 sq. ft. in size located along the southern property line. The narrow shaped wetland is located in a shallow depression, with a berm between it and a stormwater pond on its north side. There is upland lawn to the south on the abutting property. The wetland is likely the result of development on the site and is now retaining precipitation and run-off from the adjacent lawn area. 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. Wetland A is not jurisdictional.

(2) Wetland B is a palustrine emergent wetland that is about 14,545 sq. ft. in size located south of the parking lot on the parcel. This wetland was created about 2008 by excavating the area to create an outdoor ice arena. The entire feature is surrounded by the parking lot slope and berms which were constructed from the excavated material. 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. Wetland B is 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. Overall Plan View of Review Area drafted by Dubois & King, Inc., titled “Berlin Town Office – Wetland Delineation Map”, dated “5/9/2024” (Figure 1).

⁸ 88 FR 3004 (January 18, 2023)

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- b. Additional remote tools and mapping resources were used to analyze the review area:
 - a. Figure 2. Location Map from VT Natural Resources Atlas
 - b. Figure 3. USGS StreamStats
 - c. Figure 4. Google Earth Photos
 - d. Figure 5. Site Visit Photos

A site visit was conducted by USACE staff on 31 July 2024. See additional details of the visit in the administrative record in a memorandum, dated 1 August 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.