



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

CENAE-RD

9 September 2025

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-2025-00957

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.

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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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) SW 1, SW 2, SW 3, SW 4, SW 5, SW 6, and SW 7 are non-jurisdictional.

(2) SW 8 is jurisdictional (Section 404).

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)

d. Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act (March 12, 2025)

4. REVIEW AREA: The review area is located along Route 101 in Ashburnham, Worcester County, Massachusetts, and was limited to the features noted above (SW 1, SW 2, SW 3, SW 4, SW 5, SW 6, SW 7, and SW 8). SW 1 through SW 7 are sections of an approximately 977-foot-long roadside swale located at 42.606509°, -71.947254°. SW 8 is an approximately 220-foot-long roadside feature located at 42.62201°, -71.92900°. See Figures 1.1, 1.2, 1.3, and 2 attached.

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5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED⁵: Merrimack River

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER: SW 8 flows to an unnamed intermittent stream via a culvert below Route 101. The intermittent stream flows to an unnamed perennial stream, which flows to the Whitman River, which flows to the Nashua River, which flows to the Merrimack River.

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.

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.

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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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): SW 8 is a relatively permanent tributary that contributes flow indirectly to the Merrimack River (TNW) via a series of other tributaries. SW 8 is a roadside channel measuring approximately 220 feet long and 1-1.5 feet wide located between Route 101 to the south and a forested hill to the north. It has an Ordinary High Water (OHW) mark discernible by a clear transition from a sandy/pebbly bed to vegetated banks. At the time of the Corps site visit on 5/28/2025, the channel contained 1-2 inches of flowing water, flowing in an east to west direction along the side of the road. Flow was observed entering a culvert below Route 101 which flows directly into an unnamed intermittent stream on the opposite side of the road. Review of aerial photos, wetland mapping, and other remote tools demonstrates that the intermittent stream connects to an unnamed perennial stream, which in turn connects to the Whitman River, which flows to the Nashua River, which flows to the Merrimack River. Photographs taken at various other times of year, including October 2011 (Google Streetview), May 2019 (Bing Streetside), and June 2024 (provided by consultant in the request for AJD), all show the channel containing standing or flowing water, while one photograph taken August 2024 (provided by consultant) shows the channel dry, which supports an intermittent flow regime. An assessment using the Corps Beta Streamflow Duration Assessment (SDAM) Version 1.1 classified this water body as “less than perennial”, which further supports the conclusion that the channel carries intermittent streamflow. Based on the above, the channel qualifies as a relatively permanent water (RPW), which includes tributaries that have flowing or standing water year-round or continuously during certain times of year (i.e. seasonally).

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

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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).

SW 1, SW 2, SW 3, SW 4, SW 5, SW 6, and SW 7 are sections of a non-relatively permanent tributary. Based on a review of historic aerial photographs provided by the consultant, these seven features are sections of a roadside swale that was excavated when the adjacent houses were constructed. The swale passes under the driveways to these houses via a series of culverts that divide the swale into seven sections. The sections are oriented along a hill, with SW 1 at the top and SW 7 at the bottom. Approximately one inch of water was observed within the swale during the site visit, which was actively flowing downhill from SW 1 to SW 7. The channel is generally very narrow, measuring approximately 10—12 inches wide. SW 1 and SW 2 appeared to be unmaintained and contained a dense cover of hydrophytes, including shrubs and saplings. SW 3 contained only herbaceous hydrophytes, suggesting it is maintained. SW 4, SW 5, and SW 6 appeared to have been recently mowed. SW 7 is a riprap-lined basin. Flow was observed entering SW 7 but dispersed halfway through the feature. Two round plastic culverts are located at the end of SW 7, passing below the final driveway and emptying into a rip-rapped channel upgradient from a forested wetland. No water was observed in either culvert during the site visit, or in the channel upgradient of the forested wetland. An analysis conducted with the Corps Antecedent Precipitation Tool (APT) indicates the site visit was conducted at a time of “Wetter than Normal” conditions. Two inches of rain were recorded five days before the site visit. Despite these wetter conditions and recent heavy rainfall, observed water in the swale was shallow, with flow not reaching the final culvert or the downgradient wetland at the time of the site visit, suggesting the swale and any hydrologic connection between the swale and wetland is ephemeral, flowing only after heavy rainfall events. An assessment using the Corps Beta SDAM Version 1.1 also classified this water body as “ephemeral”, which further supports the field observations. Based on the above, the swale appears to be ephemeral, carrying flow after rainfall events, and to not meet the definition of a relatively permanent tributary.

⁸ 88 FR 3004 (January 18, 2023)

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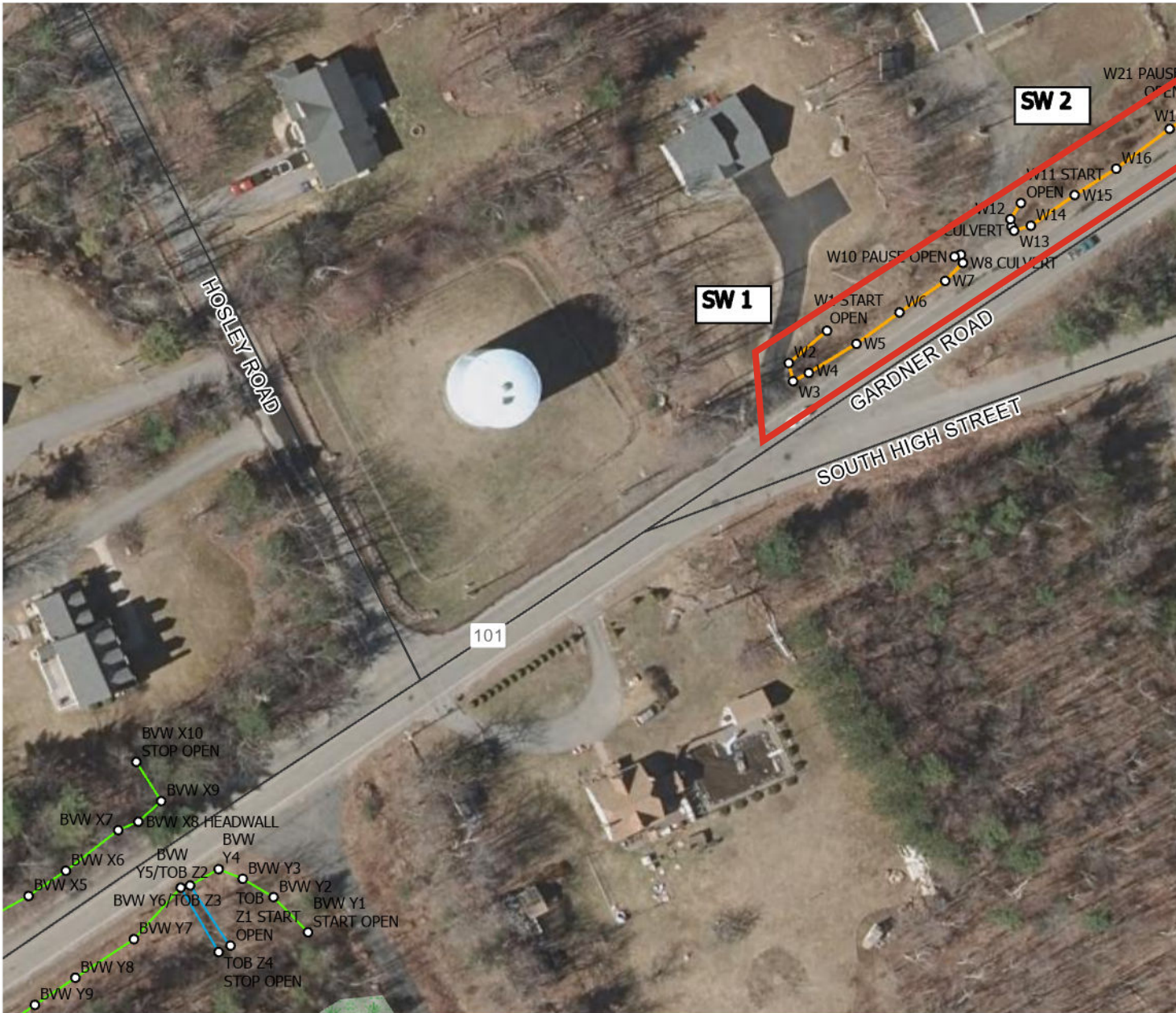
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10. DATA SOURCES: List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Field visit conducted 5/28/2025
- b. Aquatic Resource Maps (delineation plans) provided by consultant (Weston & Sampson), 4/24/2025
- c. Antecedent Precipitation Tool (APT), accessed 5/30/2025
- d. Beta Streamflow Duration Assessment (SDAM), accessed 5/29/2025 and 5/30/2025
- e. U.S. Geological Survey StreamStats, accessed 5/29/2025 and 5/30/2025
- f. MassGIS MassMapper (USGS topographic maps, aerial imagery, National Wetland Inventory, DEP Wetlands, and DEP Wetland Hydrologic Connections layers), accessed 5/30/2025
- g. Google Maps and Bing Maps, accessed 4/21/2025
- h. Aerial photographs and site photographs provided by consultant, 4/11/2025

11. 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 Gay Head (Aquinnah), and the Mashpee Wampanoag Tribe regarding this AJD on 6/3/2025. 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 15-day comment period.

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.



- Flag Labels
- Road Side Drainage Ditch
- Bordering Vegetated Wetland
- Intermittent Stream
- Perennial Stream
- MassDOT Roads

DEP Wetland Areas

- Marsh/Bog
- Wooded marsh
- Cranberry Bog
- Salt Marsh
- Open Water
- Reservoir (with PWSID)
- Tidal Flats
- Beach/Dune

Area of Review

FIGURE 1.1

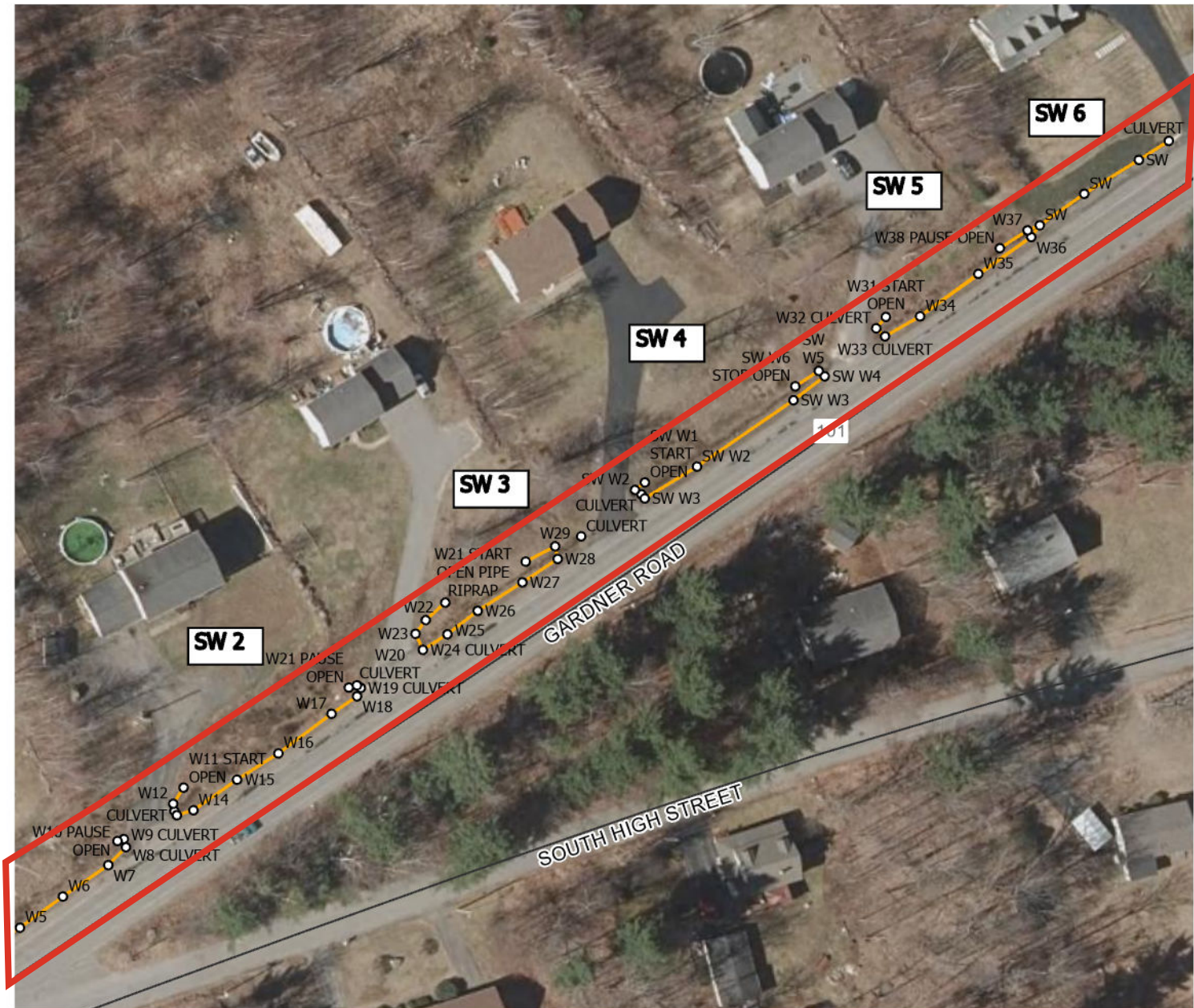
Route 101
Ashburnham, MA

Aquatic Resource Maps
Features SW-1 through SW-7



Data Source: Office of Geographic and Environmental Information (MassGIS),



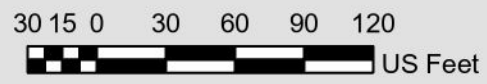


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Area of Review



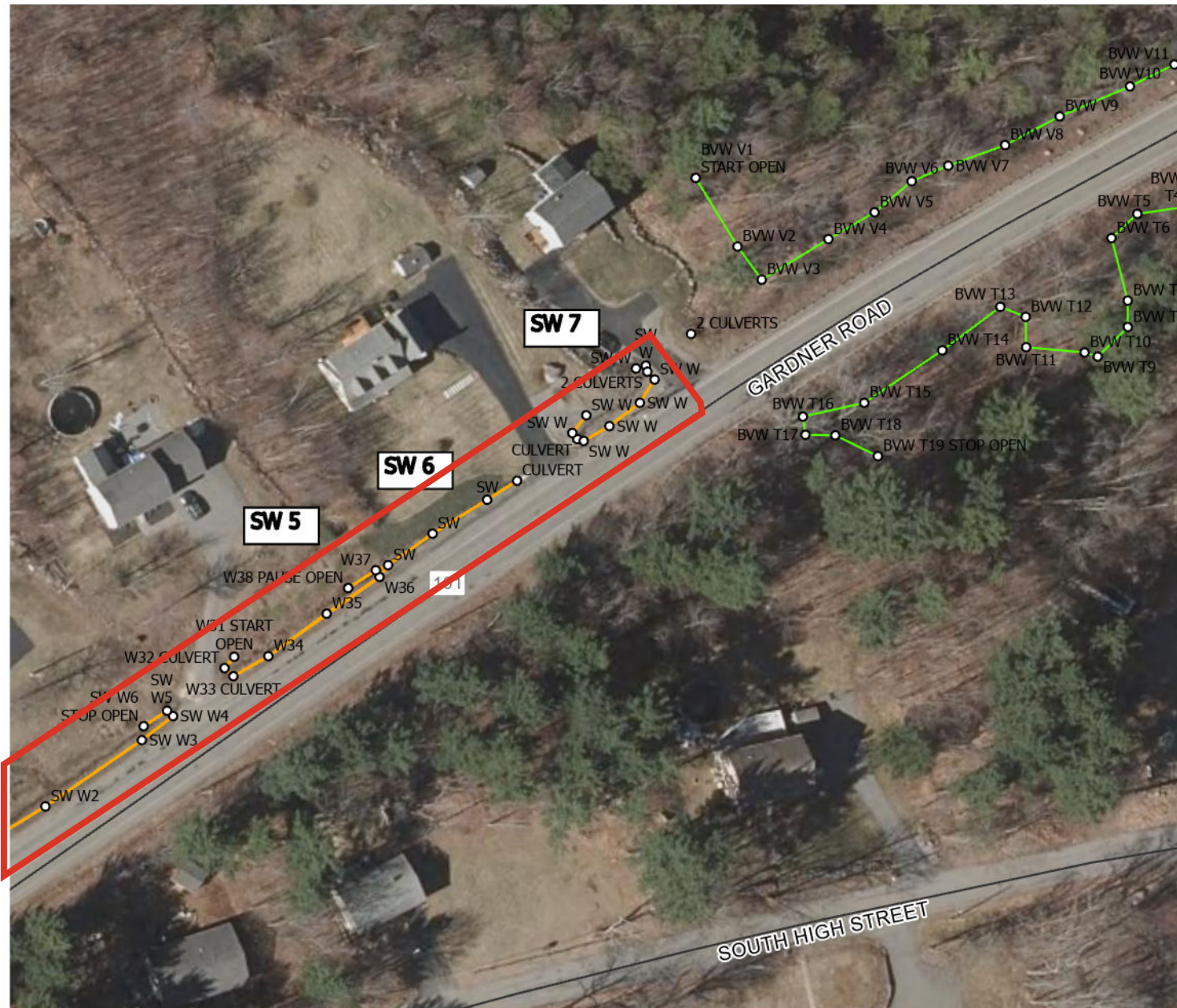
Data Source: Office of Geographic and Environmental Information (MassGIS),

FIGURE 1.2

Route 101
Ashburnham, MA

Aquatic Resource Maps
Features SW-1 through SW-7





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DEP Wetland Areas

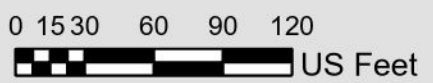
- Marsh/Bog
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Area of Review

FIGURE 1.3

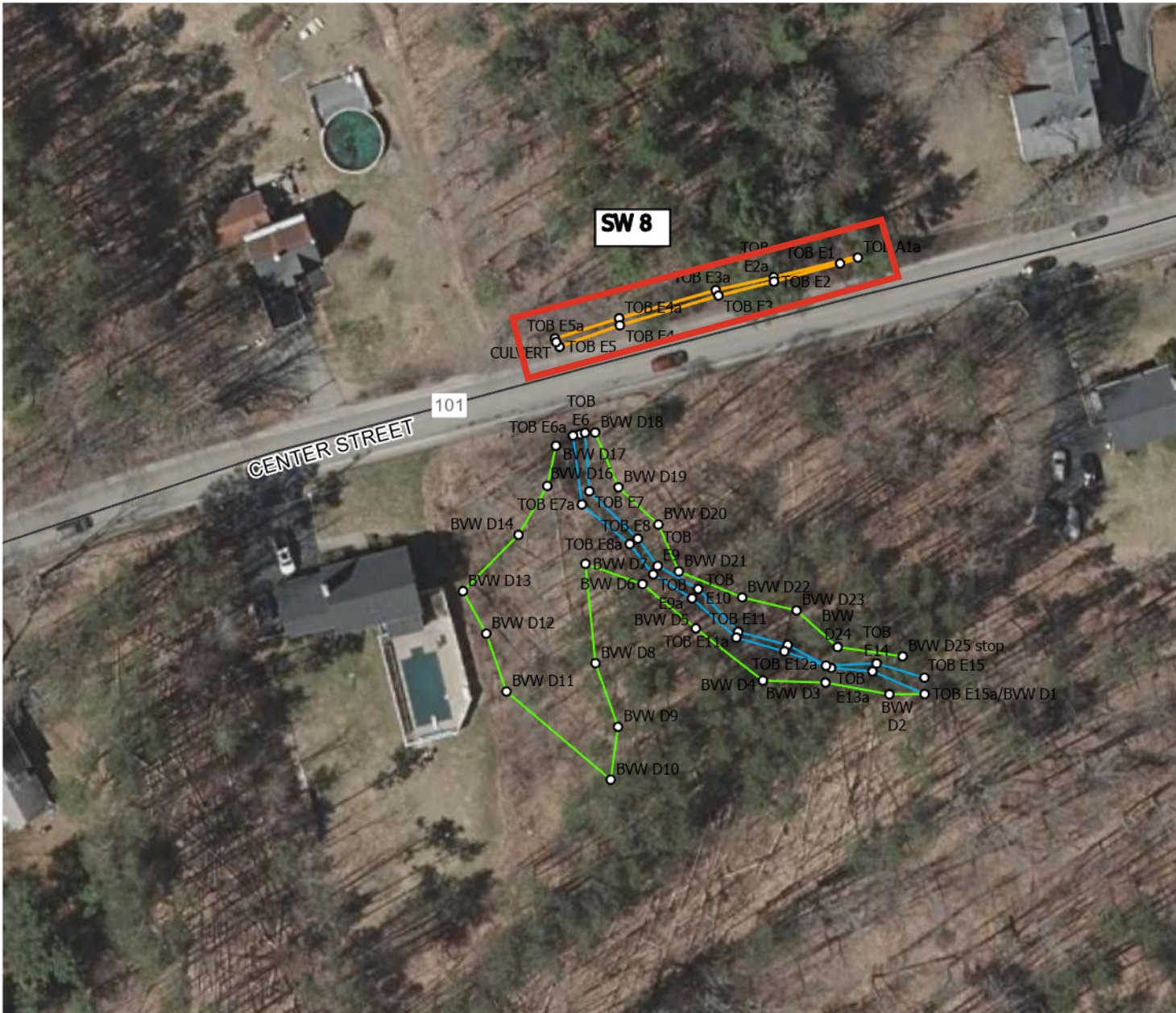
Route 101
Ashburnham, MA

Aquatic Resource Maps
Features SW-1 through SW-7



Data Source: Office of Geographic and Environmental Information (MassGIS)





- Flag Labels
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DEP Wetland Areas

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Area of Review

FIGURE 2

Route 101
Ashburnham, MA

Aquatic Resource Map
Feature SW-8



Data Source: Office of Geographic and Environmental Information (MassGIS),

