



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

CENAE-RD

30 January 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),<sup>1</sup> NAE-2025-02346

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.

2. SUMMARY OF CONCLUSIONS

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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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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 Identified by Flag series E1-E40, and D1-D32 is non-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)

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 east of Sophia Drive and west of Honeysuckle Road in Worcester, Worcester County, Massachusetts with the project being centered at Latitude: 42.227419, Longitude: -71.807555.

5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED: Blackstone River, an Interstate water is located approximately 1 mile to the west of the review area. The Blackstone River flows from the state of Massachusetts into the state of Rhode Island, and into the Atlantic Ocean through the Seekonk, and Providence Rivers where it is subject to the head of the tide.

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER: The subject aquatic resources under review in this MFR are considered non-jurisdictional and have no flow path through a relatively permanent water to a TNW.

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7. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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
- 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

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<sup>5</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>6</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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## 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>7</sup> 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).

Wetland Identified by Flag series E1-E40, and D1-D32 is an approximately 1.95 acre-wetland centered around residential development. The wetland has been extensively modified from the installation of stormwater management facilities to support the surrounding development. Historic aerials show the installation of the stormwater management system within the early 1990’s. Permit data identifies that there were wetland conditions within the review area prior to the installation of the stormwater management system. The identified wetland is connected to downstream waters through what appears to be a drainage swale believed to be constructed in uplands. This swale has been extensively modified and passes through a constructed culvert under Sophia Drive and extends southwest where it discharges into an unnamed tributary. This upland swale receives its flow from the overflow of rainwater and surface runoff that is directed through the stormwater system within the identified wetland. There is no apparent baseflow or apparent features that identify seasonal consistent flow, and it is apparent that this swale only receives flow during precipitation events. Based on the data sources listed in section 10 of this document, this upland swale does not provide a relatively permanent flow that could provide a continuous surface connection from the identified wetland to a downstream relatively permanent water. The wetland identified by flag series E1-E40, and D1-D32 is a non-jurisdictional feature that does not have a continuous surface connection to a paragraph (a)(1) water or to a relatively permanent paragraph (a)(2) impoundment or paragraph (a)(3) tributary.

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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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.

- Aquatic Resources delineation submitted by the consultant on behalf of the applicant: Arboretum Village Worcester and Auburn MA, Phase 3, Honeysuckle Road, Holly Terrace, Lilac Lane, & Pearlbush Path.
- Wetland field data sheets: Consultant, Dated: DEP Bordering Vegetated Wetland (310 CMR 10.55) Delineation Field Form, Dated 24 October 2019.
- Photographs: Photographic Log, Consultant, 21 January 2026.
- Aerial Imagery: Exhibit A, Consultant, 5 October 2025.
- LIDAR: NAE-2025-02346\_LIDAR, USACE, 13 January 2026.
- USFWS NWI maps: NAE-2025-02346\_NWI, USACE, 13 January 2026.
- USGS topographic maps, Consultant, USGS TOPOGRAPHIC MAP WORCESTER SOUTH QUADRANGLE 1:25,000 Scale, Metric, 1983.
- USGS NHD data/maps: NAE-2025-02346\_NHD, USACE, 13 January 2026.
- Antecedent Precipitation Tool: USACE, 31 May 2023, 23 February 2024, 25 October, 2024.

11. OTHER SUPPORTING INFORMATION: MA DEP Wetland Protections Act Order of Conditions issued 20 April 1984.

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.

# ARBORETUM VILLAGE

Worcester and Auburn, Ma

## Phase 3

Honeysuckle Road, Holly Terrace, Lilac Lane, & Pearlbush Path



Annotated by USACE 30 January 2026