



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

CENAE-RDNH/VT

15 March 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-2017-02842.

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 is a total of eight (8) delineated aquatic resource features within the project's review area:

1. Stream 1 (1717 linear feet) and Stream 2 (1655 linear feet) are (a)(3) tributaries of (a)(1) waters and are jurisdictional under Section 404 of the Clean Water Act.
2. Wetland 1 (5.33 acres), Wetland 2 (3.22 acres), Wetland 3 (0.68 acre) and Wetland L (0.01 acre) are (a)(4) adjacent wetlands and are jurisdictional under Section 404 of the Clean Water Act.
3. Wetland I (0.04 acre), Wetland J (0.12 acre) and Wetland K (0.10 acre) are non-jurisdictional wetlands.

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) consists of about 63.4 acres of land at the northeast corner of US Routes 2 & 7 and Severance Road in Colchester, Vermont (Latitude/Longitude Coordinates: 44.529156° N, -73.17058° W). The parcel is located in a designated town growth center. The subject parcel is made up of open fields and a mix softwood and hardwood forest. On 27 July 2006, 5 October 2007, 8 November 2017, 9 July 2020 and 1 November 2023 the Corps conducted field visits to review the wetland delineations and to discuss the proposed project. During these field visits flowing water was observed within the (a)(3) waters onsite. The proposed development on this parcel was most recently authorized under the Vermont General Permits on 3 June 2021. This authorization expired before any construction on the site started. An AJD was previously issued on 13 August 2020. State and local authorizations are still pending.

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5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED: Lake Champlain is the nearest TNW.⁵

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER: Wetlands 2 and 3 directly abut Stream 2 which is a naturally occurring perennial surface water channel that flows north off the site and drains directly into Lake Champlain, a TNW. Wetlands 1 and L directly abut Stream 1 which is a naturally occurring perennial surface water channel that drains into Stream 2, which flows into Lake Champlain, a TNW.

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): Based on field visits made by the Corps and photographs provided by the applicant's agent surface water flow has been observed flowing continuously during the year in the Streams 1 (1717 LF) and 2 (1655 LF), (a)(3) waters on the site. Water is visible in Google earth aerial photography. USGS topography and NRCS Stream Stats show Streams 1 and 2. Stream 1 flows into Stream 2 off site north of the parcel. There are no breaks in flow in Stream 2 between the project site and where it drains into Malletts Bay of Lake Champlain, a TNW. Streams 1 and 2 are naturally occurring surface water channels that contributes water flow to an (a)(1) waters in a typical year. The Corps has concluded that the streams are perennial.

f. Adjacent Wetlands (a)(4): Wetland 1 (5.33 acres) and Wetland L (0.01 acre) (off-site) directly abuts ordinary high water of Stream 1 and is therefore an adjacent wetland, (a)(4) waters. Wetland 2 (3.22 acres) and 3 (0.68 acre) (off-site) directly abut ordinary high water of Stream 2 and are therefore adjacent wetlands, (a)(4) waters.

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 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

⁸ 88 FR 3004 (January 18, 2023)

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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland I is a palustrine emergent wetland that is about 0.04 acre in size located in a depression off the shoulder of US Route 2 and 7. The wetland is separated by upland from Stream 1 and adjacent Wetland 1 approximately 300' away. Wetland I is about 40' higher in elevation than the closest reach of Stream 1 and would not be inundated by flooding of Stream 1 in a typical year.

Wetland J is a palustrine emergent/forested wetland that is about 0.12 acre in size. This wetland is located atop of a hill between Stream 1 and 2. The wetland is physically separated from the streams by forested upland and is about 50' higher in elevation than the streams. Typical year water flows in the streams would not inundate Wetland J.

Wetland K is a palustrine emergent wetland that is about 0.10 acre in size. The wetland is naturally separated by upland from Wetland 2 and does not physically abut Stream 2 which is approximately 420' away. Wetland K is about 30' higher in elevation than the closest reach of Stream 2 and would not be inundated by flooding of Stream 2 in a typical year.

There are no hydrological connections between Wetlands I, J and K to on-site Streams 1 and 2, or to Lake Champlain. Lake Champlain, a TNW is about two miles away "as the crow flies". The wetlands are clearly non-navigable, non-adjacent and intrastate. There is no evidence of flow out of the wetlands. Based on several site visits, there are no continuous surface connections from Wetlands I, J and K to a water identified in paragraph (a)(1)-(3) of the 2023 rule.

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 submitted by TCE titled "Existing Conditions", dated "6-2-2020" (Figure 1).
- b. Additional remote tools and mapping resources were used to analyze the review area:
 - a. Figure 2 a-c: Location Maps from VT Natural Resources Atlas and National Regulatory Viewer
 - b. Figure 3. USGS StreamStats

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- c. Figure 4. Google Earth Photos
- d. Figure 5. Site Visit Photos

c. Most recent site visit was conducted by USACE staff on 1 November 2023. See additional details of this and other site visits in the administrative record.

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.

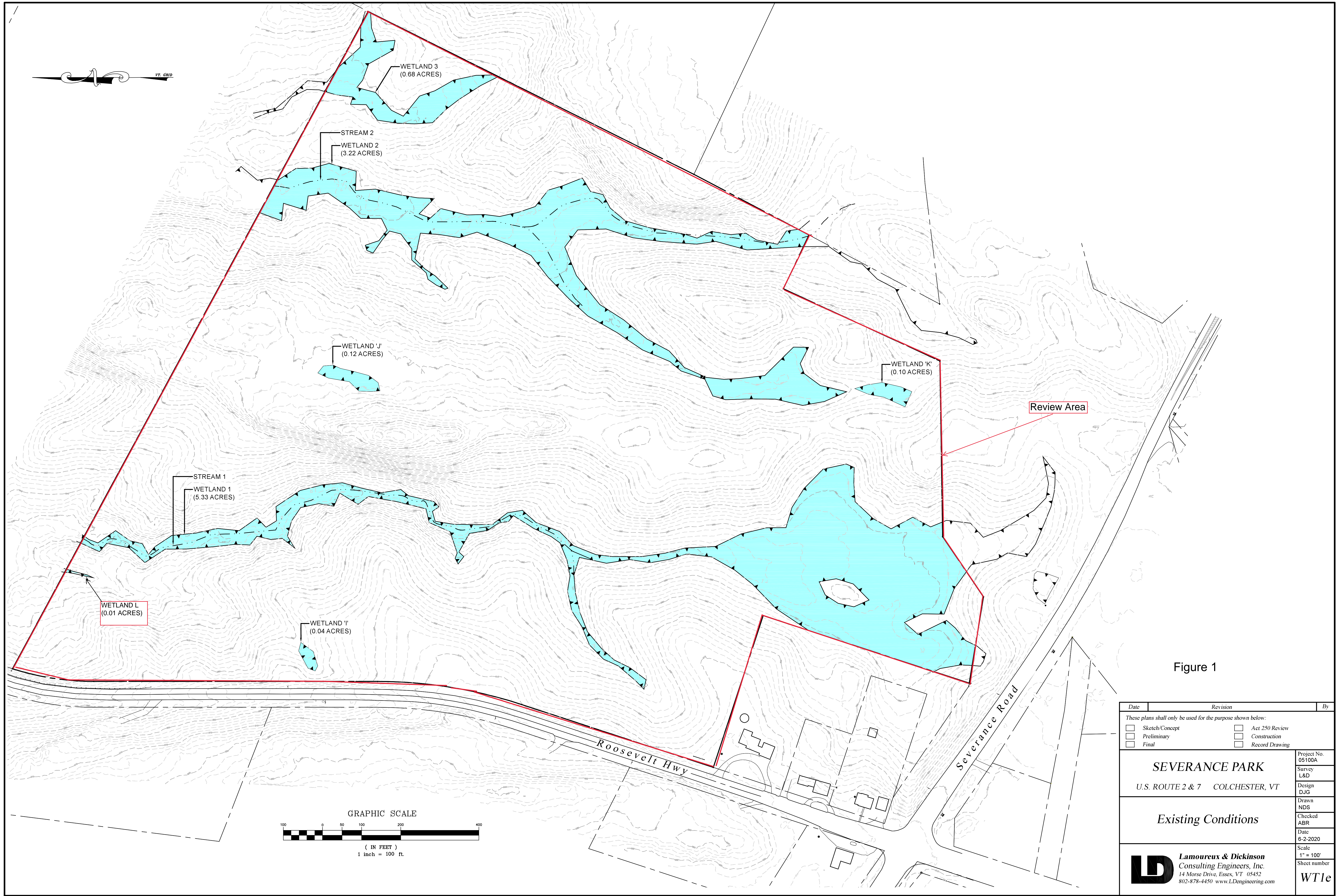



Figure 1

Date	Revision	By
These plans shall only be used for the purpose shown below:		
<input type="checkbox"/> Sketch/Concept	<input type="checkbox"/> Act 250 Review	
<input type="checkbox"/> Preliminary	<input type="checkbox"/> Construction	
<input type="checkbox"/> Final	<input type="checkbox"/> Record Drawing	
SEVERANCE PARK		Project No. 05100A
U.S. ROUTE 2 & 7 COLCHESTER, VT		Survey L&D
Existing Conditions		Design DJG
		Drawn NDS
		Checked ABR
		Date 6-2-2020
		Scale 1" = 100'
 Lamoureux & Dickinson Consulting Engineers, Inc. 14 Morse Drive, Essex, VT 05452 802-878-4450 www.LDengineering.com		Sheet number
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