



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, NEW YORK DISTRICT
26 FEDERAL PLAZA, ROOM 16-406
NEW YORK, NEW YORK 10278-0090

CENAN-OP-R

02 JANUARY 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 NAN-2023-00801-WOR.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,

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.).

³ 33 CFR 331.2.

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.

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAN-2023-00801-WOR.

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

1. 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).
 - i. Wetland A, jurisdictional, Section 10/404
 - ii. Wetland B, non-jurisdictional
 - iii. Wetland C, jurisdictional, Section 10/404
 - iv. Stream D, jurisdictional, Section 404
 - v. Stream E, jurisdictional, Section 10/404

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))

3. REVIEW AREA. Review area size 33.91 acres, 41.2994, -73.9383, Town of Cortlandt, Westchester County, New York.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Wetland A includes a portion of Annsville Creek, at its confluence with the Hudson River, which is a TNW. As Annsville Creek is tidally influenced at this location, Annsville Creek is also a TNW.⁶

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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

Wetlands A and C, as well as Streams D and E, flow directly into Annsville Creek. At the project boundary location, Annsville Creek is at its confluence with the Hudson River.

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 Wetlands A and C, as well as Stream E are tidally influenced, as they directly abut Annsville Creek at its confluence with the Hudson River.

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): This project is located near the confluence of Annsville Creek and the Hudson River, both of which are tidally influenced and are TNWs.

b. The Territorial Seas (a)(1)(ii): N/A

c. Interstate Waters (a)(1)(iii): N/A

d. Impoundments (a)(2): N/A

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.

- e. Tributaries (a)(3): Streams D and E are intermittent streams that flow from culverts under US Route 6, directly into Annsville Creek, as evidenced by aerial photography, observed bed and banks, ordinary high-water marks and flowing water during most times of the year.
- f. Adjacent Wetlands (a)(4): Wetland A and C are adjacent to Annsville Creek, which is a TNW. The limits of wetlands were delineated by the applicant using the 87 Manual/Regional Supplement.
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

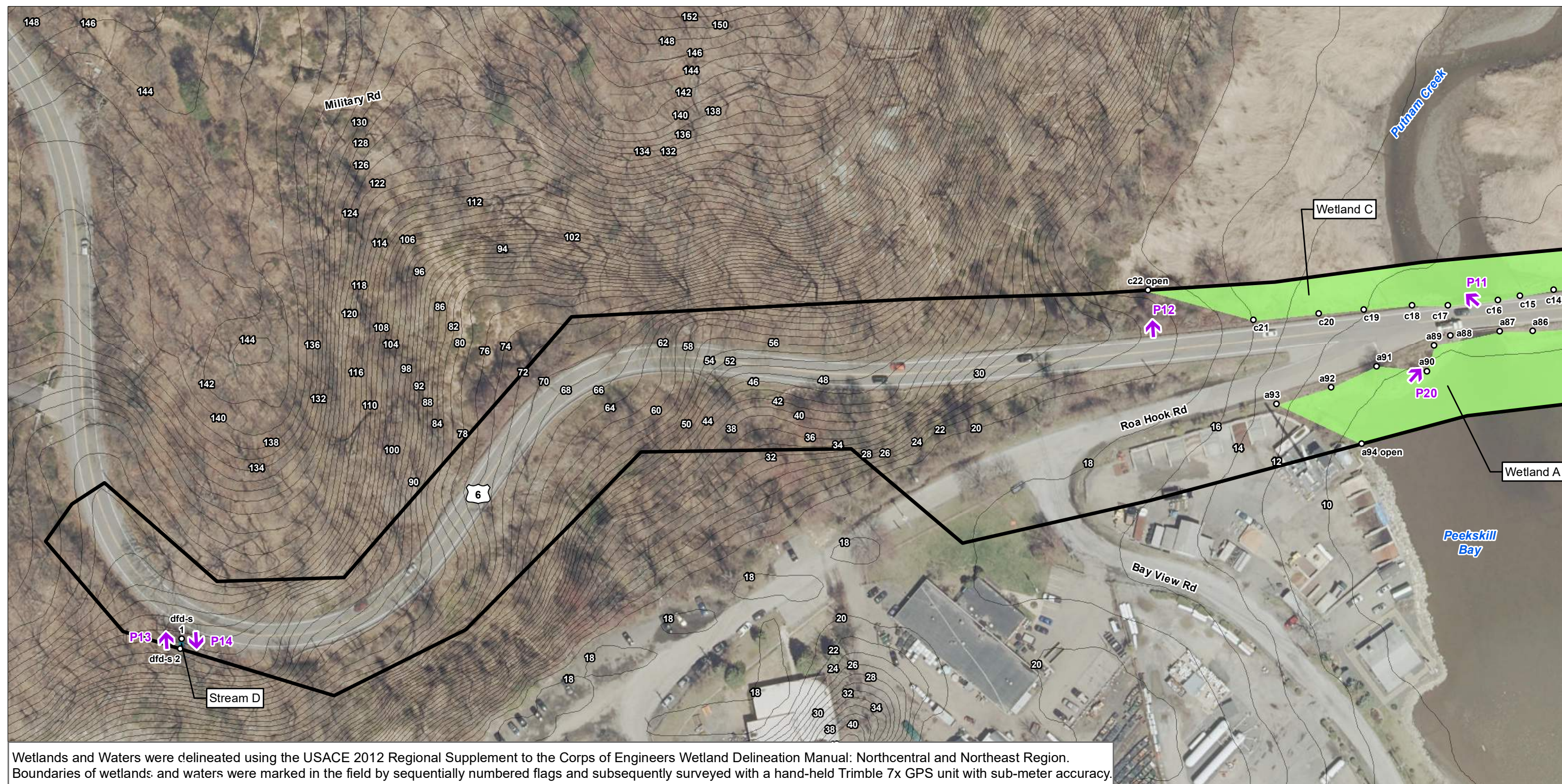
- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic 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 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 B is located within the Annsville Traffic Circle, which is the intersection between US Routes 6 and 9. Hydrology within Wetland B appears to be from precipitation and road runoff, but no other hydrologic source. The limits of wetlands were delineated by the applicant using the 87 Manual/Regional Supplement. During the site visit of November 15, 2023, approximately 6 inches of water was standing within Wetland B, and Wetland A was experiencing high tide. No culvert or permeable layer appeared to be located within the roadbed, such that no water appeared to be passing through the roadbed, which is located between Wetlands A and B. Approximately 3 hours later, the site was revisited. The water level within Wetland A had fallen some, but there was still 6 inches of water in Wetland B. Wetland B is located approximately 60 feet from and 2 feet higher in elevation than Wetland A, with no apparent continuous surface connection.

⁹ 88 FR 3004 (January 18, 2023)

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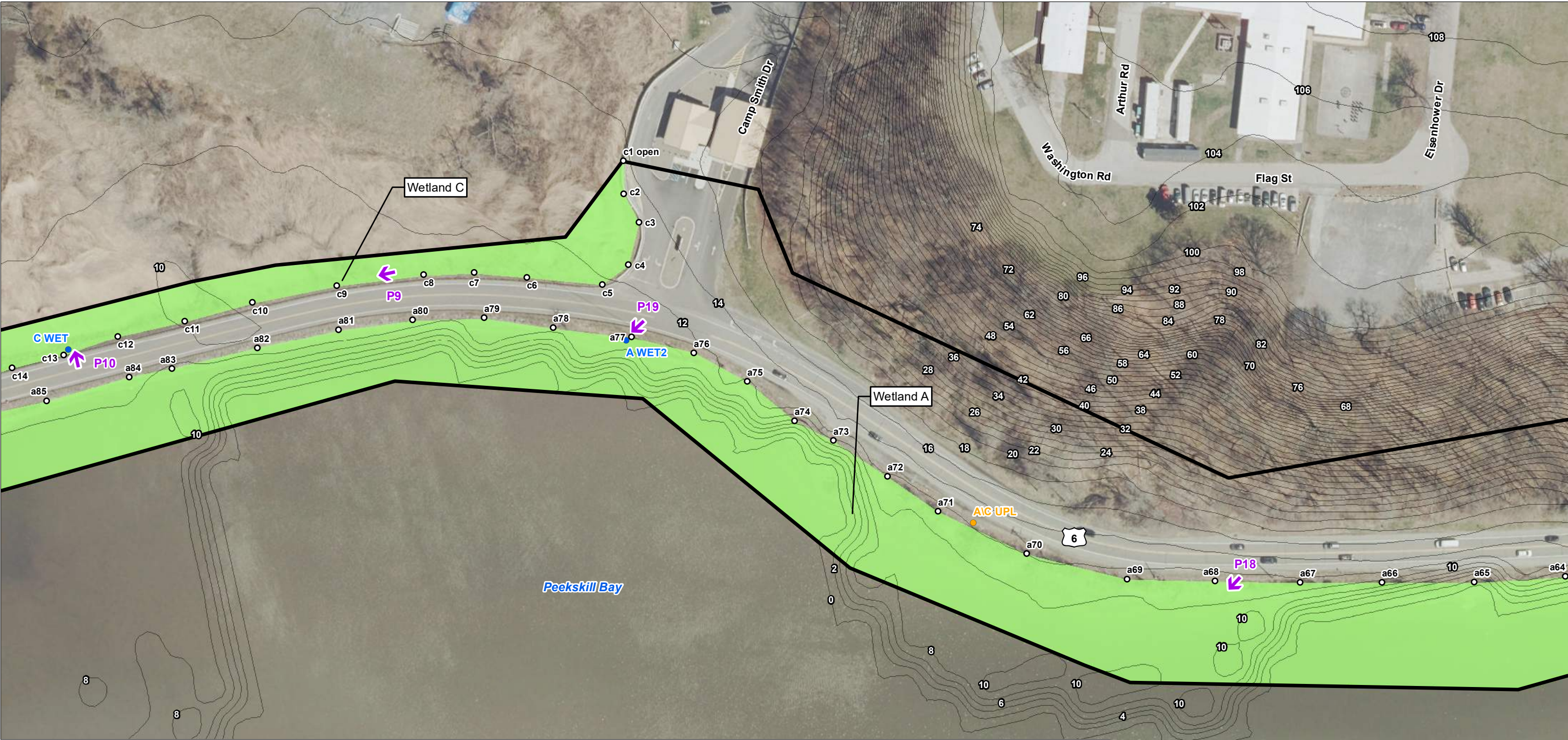
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NAN-2023-00801-WOR.

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. Site visit conducted on November 15, 2023, including color, ground-level photographs
 - b. "Transportation Project Report – Wetland Delineation Report – US Route 6: Annsville Circle to Camp Smith Road Flood Mitigation Project Identification Number (PIN): 8392.09 Town of Cortlandt Westchester County", prepared by the New York State Department of Transportation, dated January 2022, updated by letter dated October 12, 2023
 - c. National Wetland Inventory Map as part of the Transportation Project Report dated October 12, 2023
 - d. USDA Web Soil Survey as part of Transportation Project Report dated October 12, 2023
 - e. USGS Peekskill, NY topographic map
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.



 Project Area = 33.91 Acres

Name	Total Acres	Total Linear Feet
Wetland A	6.83	
Wetland B	0.42	
Wetland C	0.92	
Stream D		10
Ditch E		86



Wetlands and Waters were delineated using the USACE 2012 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region. Boundaries of wetlands and waters were marked in the field by sequentially numbered flags and subsequently surveyed with a hand-held Trimble 7x GPS unit with sub-meter accuracy.

Project Area = 33.91 Acres

Photo Location and Direction

2' Contour

WOTUS

Wetland

Stream

Wetland/Stream Flag

Upland Data Point

Wetland Data Point

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Sources:
BING Imagery Map Service;
WSP, 2021.

Coordinate System:
State Plane NY East
NAD 1983

January 6, 2022

US ROUTE 6, ANNSVILLE CIRCLE - CAMP SMITH
ROAD FLOOD MITIGATION

NEW YORK
STATE OF
OPPORTUNITY

Department of
Transportation

0100200

Feet

N

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US ROUTE 6, ANNSVILLE CIRCLE - CAMP SMITH
ROAD FLOOD MITIGATION

Wetland Delineation Plan



0 100 200
Feet





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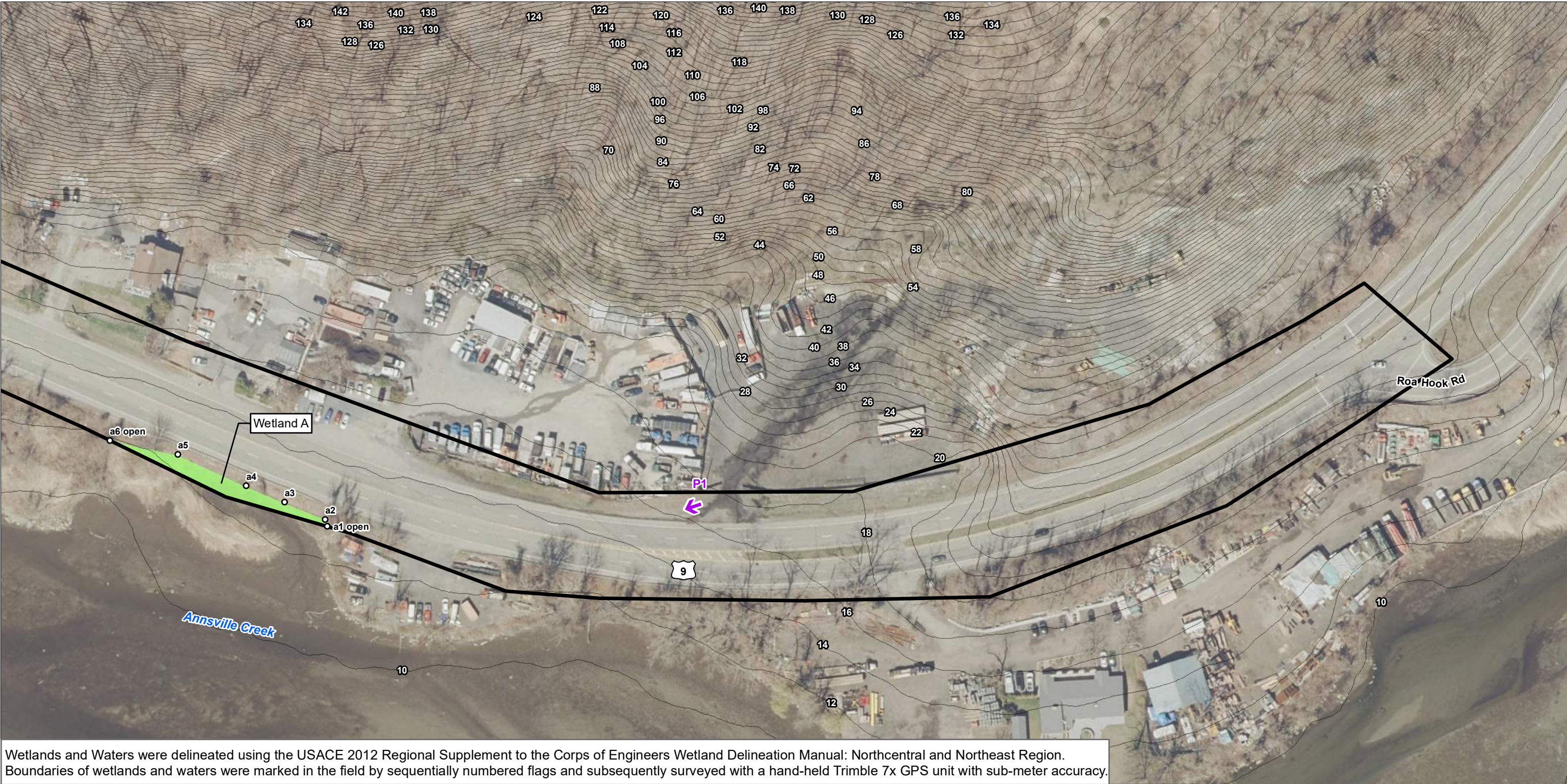
NEW YORK
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Feet

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ROAD FLOOD MITIGATION

Wetland Delineation Plan



0 100 200
Feet

