



**DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ATTN: CENAN-OP-RU
UPSTATE REGULATORY FIELD OFFICE
1 BUFFINGTON ST., BUILDING 10, 3RD FL. NORTH
WATERVLIET, NEW YORK 12189-4000**

CENAN-OP-RU

28 MAY 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-2023-00973-ULA.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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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 No. 1A, non-jurisdictional
 - ii. Wetland No 2, non-jurisdictional

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))
- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Review area size 4.76 acres, 42.7232, -73.82134, Town of Colonie, Albany County, New York
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Neither Wetland 1A nor Wetland 2 are connected to any TNW, the territorial seas, or interstate waters.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The subject aquatic resources do not flow directly into any TNW, the territorial seas, or interstate water.

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.

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 N/A
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): 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

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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.

- 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 No. 1A is surrounded by uplands along its north and northwestern boundaries with no surficial connection to any other waters through these uplands. Where Wetland No. 1A continues offsite to the southeast, it terminates into an upland field. Wetland No 1A flows south under an unnamed private road through a culvert to an outlet that empties into an ephemeral stream, referred to as Eph. Str. 1, located outside the boundaries of the jurisdictional review area, and flows into Wetland No. 2. Wetland No. 2 is confined by topography and roadway on all sides and abuts mowed lawn located at 37 South Family Drive. A 30 inch diameter culvert is buried below Wetland No. 2. However, this stormwater conveyance pipe appears to be completely separated from the wetland. A camera inspection was carried out on October 12, 2023, that confirmed there are no inlets or other underground or surface level connections between this pipe and Wetland No. 2. No surficial connection is made between these waterbodies and any TNW or tributary. Wetland No. 1A is approximately 1.78 acres; Wetland No. 2 is approximately 0.09 acres.
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 December 20, 2023 by representatives of USACE, Christina Campo and Adam Labatore.
 - b. Wetland Delineation Drawing entitled “No. 886 Watervliet Shaker Road”, prepared by Hershberg & Hershberg, and dated October 13, 2023.

⁹ 88 FR 3004 (January 18, 2023)

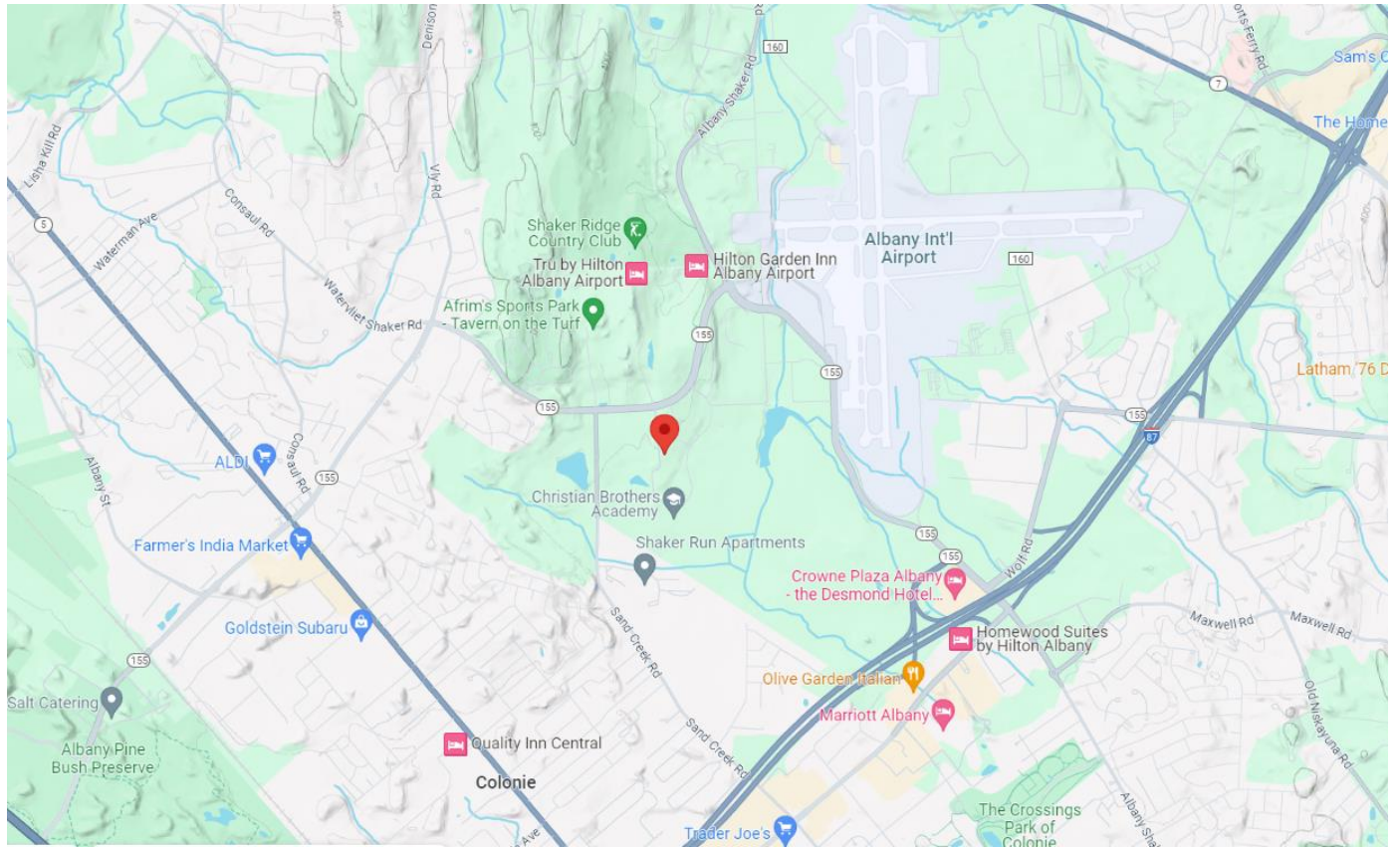
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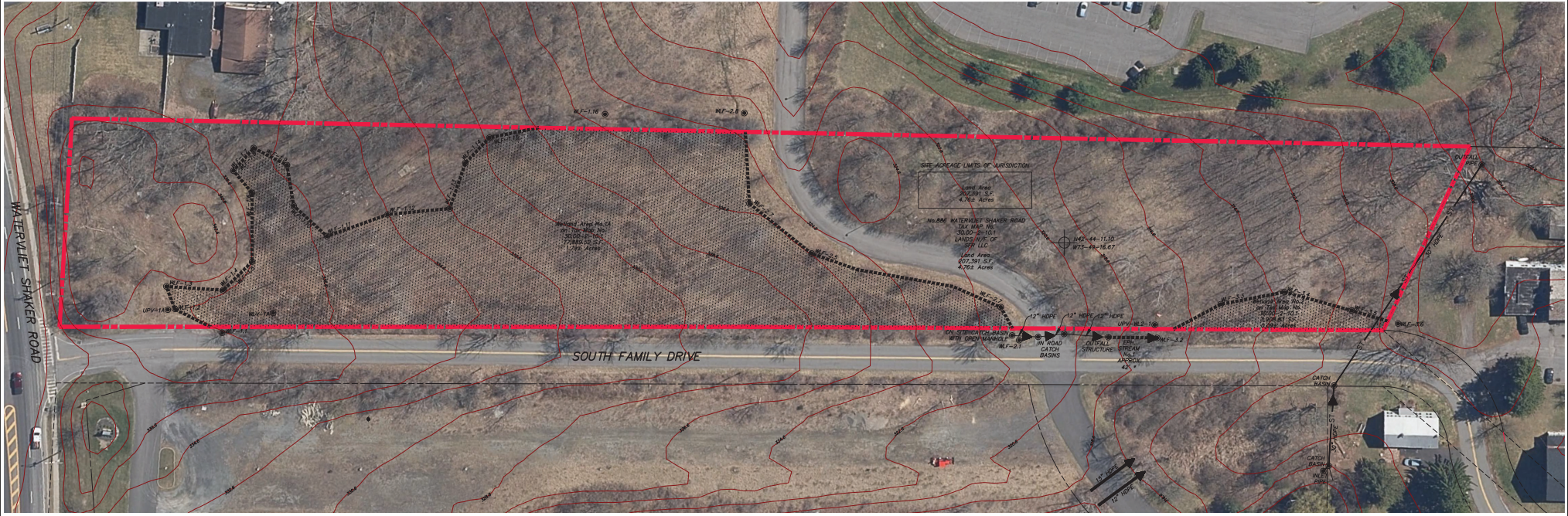
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- c. Aerial and ground level photographs provided with JD request submittal, dated October 24, 2023.
- d. National Wetland Inventory generated map entitled "Figure 10" provided with JD request submittal, dated October 24, 2023.
- e. New York State Dept. of Environmental Conservation Environmental Resource Mapper generated map entitled "Figure 11" provided with JD request submittal, dated October 24, 2023.
- f. USDA NRCS Web Soil Survey generated on October 10, 2023.
- g. Wetland Determination Forms completed by applicant's agent.
- h. Pipeline Inspection Report, dated October 12, 2023.

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.





LEGEND			
NO.	NUMBER	LIMIT OF JURISDICTION	
S.F.	SQUARE FEET	PROPERTY BOUNDARY	
N/F	NOW OR FORMERLY		
L	LIBER		
P	PAGE		
W/O	WINDHOLE		
C	CATCH BASIN		

OWNER/APPLICANT
SFR LLC
NO. 200 HARBORSIDE DRIVE
SCHENECTADY, N.Y. 12305
REPRESENTATIVE
BRANDON STABLER
PHONE NO. 518-944-0885
SITE COORDINATES
NAD 83 44-11-10/N 73-49-16.67
AQUATIC RESOURCE ACREAGE
AREA No. 1A 77,889.52 S.F. & 1.794 ACRES MORE OR LESS
AREA No. 2 3,908.83 S.F. & 0.090 ACRES MORE OR LESS
TOTAL PROPERTY ACREAGE LIMITS OF JURISDICTION
207,391 S.F. & 4.78 ACRES MORE OR LESS

WETLAND SUMMARY TABLE			
AREA	ACREAGE	STREAM LENGTH	COVER TYPE
No. 1A	77,889.52 S.F. & 1.794 ACRES	NONE	PEM/SS
No. 2	3,908.83 S.F. & 0.090	NONE	PEM/SS
EPH STR. 1*	N/A	42 FEET ±	N/A
TOTAL	88,503.51 S.F. & 1.674		
* = EPHEMERAL STREAM IS LOCATED OFF SITE WITHIN THE SOUTH FAMILY DRIVE RIGHT-OF-WAY			

HERSBERG & HERSBERG
Consulting Engineers
and Land Surveyors
18 Locust Street
Albany, New York 12203
Phone No. 518-459-3096

MAP SHOWING WETLAND BOUNDING ON:
No. 886
WATERVLIET SHAKER ROAD
TOWN OF COLONE, COUNTY OF ALBANY, STATE OF NEW YORK

ALTERNATION OF THIS DOCUMENT, EXCEPT BY A LICENSED PROFESSIONAL ENGINEER OR LAND SURVEYOR, IS ILLEGAL.
REVISIONS:
DATE: 10/13/2023 SCALE: 1"=40' BY: AVC CHK: GRT MAP NO.: BOCES 2023-0001

