



**U.S. ARMY CORPS OF ENGINEERS
REGULATORY PROGRAM
APPROVED JURISDICTIONAL DETERMINATION FORM (INTERIM)
NAVIGABLE WATERS PROTECTION RULE**

I. ADMINISTRATIVE INFORMATION

Completion Date of Approved Jurisdictional Determination (AJD): 10/26/2020
 ORM Number: LRB-2020-01248
 Associated JDs: N/A
 Review Area Location¹: State/Territory: New York City: Amherst County/Parish/Borough: Erie
 Center Coordinates of Review Area: Latitude 43.01426 N Longitude -78.78357 W

II. FINDINGS

A. Summary: Check all that apply. At least one box from the following list MUST be selected. Complete the corresponding sections/tables and summarize data sources.

- The review area is comprised entirely of dry land (i.e., there are no waters or water features, including wetlands, of any kind in the entire review area). Rationale: N/A or describe rationale.
- There are “navigable waters of the United States” within Rivers and Harbors Act jurisdiction within the review area (complete table in Section II.B).
- There are “waters of the United States” within Clean Water Act jurisdiction within the review area (complete appropriate tables in Section II.C).
- There are waters or water features excluded from Clean Water Act jurisdiction within the review area (complete table in Section II.D).

B. Rivers and Harbors Act of 1899 Section 10 (§ 10)²

§ 10 Name	§ 10 Size	§ 10 Criteria	Rationale for § 10 Determination
N/A.	N/A.	N/A.	N/A.

C. Clean Water Act Section 404

Territorial Seas and Traditional Navigable Waters ((a)(1) waters): ³			
(a)(1) Name	(a)(1) Size	(a)(1) Criteria	Rationale for (a)(1) Determination
N/A.	N/A.	N/A.	N/A.

Tributaries ((a)(2) waters):			
(a)(2) Name	(a)(2) Size	(a)(2) Criteria	Rationale for (a)(2) Determination
Unnamed Tributary to Ellicott Creek (Stream 2)	158	linear feet	(a)(2) Intermittent tributary contributes surface water flow directly or indirectly to an (a)(1) water in a typical year.
			Stream 2 is a channelized stream that has the channel located in deep banks, 4 to 6 feet deep. The stream is located on the subject parcel in the eastern most corner, flowing from the northwest to southeast, then south west towards Ellicott Creek. Ellicott Creek is a large stream that can be observed on multiple resources as flowing perennially and ultimately flowing into the Niagara River, a Section 10 of the River Harbors Act Navigable Waterway, making it an (a)(2) stream that is located approximately 260 linear feet to the southwest of the

¹ Map(s)/figure(s) are attached to the AJD provided to the requestor.

² If the navigable water is not subject to the ebb and flow of the tide or included on the District’s list of Rivers and Harbors Act Section 10 navigable waters list, do NOT use this document to make the determination. The District must continue to follow the procedure outlined in 33 CFR part 329.14 to make a Rivers and Harbors Act Section 10 navigability determination.

³ A stand-alone TNW determination 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. A stand-alone TNW determination should be completed following applicable guidance and should NOT be documented on the AJD Form.



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Tributaries ((a)(2) waters):				
(a)(2) Name	(a)(2) Size		(a)(2) Criteria	Rationale for (a)(2) Determination
				subject parcel. During the 30SEP2020 site visit, Stream 2 was flowing and had approximately 1 foot of water depth in the channel. Majority of the channel had vegetation growth throughout the center of it, indicating that flow is limited or lessened during certain times of the year allowing the vegetation to grow. Considering the resources, the water resources report titled "Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA" dated September 4, 2020, and the 30SEP2020 site visit, Stream 2 has intermittent flow that directly flows into an (a)(2) water. Therefore, Stream 2 has been determined to be an (a)(2) intermittent tributary.

Lakes and ponds, and impoundments of jurisdictional waters ((a)(3) waters):				
(a)(3) Name	(a)(3) Size		(a)(3) Criteria	Rationale for (a)(3) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size		(a)(4) Criteria	Rationale for (a)(4) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

D. Excluded Waters or Features

Excluded waters ((b)(1) – (b)(12)): ⁴				
Exclusion Name	Exclusion Size		Exclusion ⁵	Rationale for Exclusion Determination
Wetland 1	1.52	acre(s)	(b)(1) Non-adjacent wetland.	Wetland 1 does not meet the definition of an (a)(1), (a)(2), (a)(3), or (a)(4) water. Wetland 1 does meet the definition of a wetland, but does not abut an (a)(1)-(a)(3) water, is not separated from an (a)(1)-(a)(3) water by a natural berm or barrier, and is not separated from another water by a man made feature that has an engineered mechanism for water exchange in a typical year. Specifically, through the review of the submitted water resources report titled "Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA" dated September 4, 2020, the wetland boundary was completely surrounded by uplands with no surface water

⁴ Some excluded waters, such as (b)(2) and (b)(4), may not be specifically identified on the AJD form unless a requestor specifically asks a Corps district to do so. Corps districts may, in case-by-case instances, choose to identify some or all of these waters within the review area.

⁵ Because of the broad nature of the (b)(1) exclusion and in an effort to collect data on specific types of waters that would be covered by the (b)(1) exclusion, four sub-categories of (b)(1) exclusions were administratively created for the purposes of the AJD Form. These four sub-categories are not new exclusions, but are simply administrative distinctions and remain (b)(1) exclusions as defined by the NWPR.



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Excluded waters ((b)(1) – (b)(12)): ⁴			
Exclusion Name	Exclusion Size	Exclusion ⁵	Rationale for Exclusion Determination
			<u>connections observed. The nearest water is an (a)(2) stream (stream 2) and is approximately 120 linear feet to the east from Wetland 1’s location. The wetland and surrounding uplands do not show any evidence of flood waters connecting the wetland, nor was it separated with a natural or artificial barrier preventing flows. An APT assessment was conducted supporting that no waters from (a)(2) inundate the wetland at any time. Therefore, it has been determined that Wetland 1 is a (b)(1) non-adjacent wetland.</u>
Wetland 2	0.22	acre(s)	(b)(1) Non-adjacent wetland. <u>Wetland 2 does not meet the definition of an (a)(1), (a)(2), (a)(3), or (a)(4) water. Wetland 2 does meet the definition of a wetland, but does not abut an (a)(1)-(a)(3) water, is not separated from an (a)(1)-(a)(3) water by a natural berm or barrier, and is not separated from another water by a man made feature that has an engineered mechanism for water exchange in a typical year.. Specifically, through the review of the submitted water resources report titled “Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, the wetland boundary was completely surrounded by uplands with no surface water connections observed. The nearest water is an (a)(2) stream (stream 2) and is approximately 100 linear feet to the east from Wetland 2’s location. The wetland and surrounding uplands do not show any evidence of flood waters connecting the wetland, nor was it separated with a natural or artificial barrier preventing flows. An APT assessment was conducted supporting that no waters from (a)(2) inundate the wetland at any time. Therefore, it has been determined that Wetland 2 is a (b)(1) non-adjacent wetland.</u>
Wetland 3	0.12	acre(s)	(b)(1) Non-adjacent wetland. <u>Wetland 3 does not meet the definition of an (a)(1), (a)(2), (a)(3), or (a)(4) water. Wetland 3 does meet the definition of a wetland, but does not abut an (a)(1)-(a)(3) water, is not separated from an (a)(1)-(a)(3) water by a natural berm or barrier, and is not separated from another water by a man made feature that has an engineered mechanism for water exchange in a typical year.. Specifically, through the review of the submitted</u>



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Excluded waters ((b)(1) – (b)(12)): ⁴			
Exclusion Name	Exclusion Size	Exclusion ⁵	Rationale for Exclusion Determination
			<u>water resources report titled “Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, the wetland boundary was completely surrounded by uplands with no surface water connections observed. The nearest water is an (a)(2) stream (stream 2) and is approximately 250 linear feet to the east from Wetland 3’s location. The wetland and surrounding uplands do not show any evidence of flood waters connecting the wetland, nor was it separated with a natural or artificial barrier preventing flows. An APT assessment was conducted supporting that no waters from (a)(2) inundate the wetland at any time. Therefore, it has been determined that Wetland 3 is a (b)(1) non-adjacent wetland.</u>
Wetland 4	0.07	acre(s)	(b)(1) Non-adjacent wetland. <u>Wetland 4 does not meet the definition of an (a)(1), (a)(2), (a)(3), or (a)(4) water. Wetland 3 does meet the definition of a wetland, but does not abut an (a)(1)-(a)(3) water, is not separated from an (a)(1)-(a)(3) water by a natural berm or barrier, and is not separated from another water by a man made feature that has an engineered mechanism for water exchange in a typical year.. Specifically, through the review of the submitted water resources report titled “Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, the wetland boundary was completely surrounded by uplands with no surface water connections observed. The nearest water is an (a)(2) stream (stream 2) and is approximately 100 linear feet to the southeast from Wetland 4’s location. The wetland and surrounding uplands do not show any evidence of flood waters connecting the wetland, nor was it separated with a natural or artificial barrier preventing flows. An APT assessment was conducted supporting that no waters from (a)(2) inundate the wetland at any time. Therefore, it has been determined that Wetland 3 is a (b)(1) non-adjacent wetland.</u>
Wetland 5	0.04	acre(s)	(b)(1) Non-adjacent wetland. <u>Wetland 5 does not meet the definition of an (a)(1), (a)(2), (a)(3), or (a)(4) water. Wetland 5 does meet the definition of a wetland, but does</u>



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Excluded waters ((b)(1) – (b)(12)): ⁴			
Exclusion Name	Exclusion Size	Exclusion ⁵	Rationale for Exclusion Determination
			<p><u>not abut an (a)(1)-(a)(3) water, is not separated from an (a)(1)-(a)(3) water by a natural berm or barrier, and is not separated from another water by a man made feature that has an engineered mechanism for water exchange in a typical year.. Specifically, through the review of the submitted water resources report titled “Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, the wetland boundary was completely surrounded by uplands with no surface water connections observed. The nearest water is an (a)(2) stream (stream 2) and is approximately 570 linear feet to the east from Wetland 5’s location. The wetland and surrounding uplands do not show any evidence of flood waters connecting the wetland, nor was it separated with a natural or artificial barrier preventing flows. An APT assessment was conducted supporting that no waters from (a)(2) inundate the wetland at any time. Therefore, it has been determined that wetland 5 is a (b)(1) non-adjacent wetland.</u></p>
Stream 1	656	linear feet	<p><u>(b)(3) Ephemeral feature, including an ephemeral stream, swale, gully, rill, or pool. Stream 1 is located through the middle of the subject parcel and appears to be an excavated channel/drainage ditch through the site. The bottom is completely made of silt and no saturation, inundation, or flow was observed during the site visit. The lack of vegetation and leaf litter in the channel was the only evidence of flow. An ATP report assessment was conducted to determine typical year for the resources looked at. Although the September 2020 resources indicated mild drought and the evidence of the channel including no saturation in the channel of Stream 1, no clear line pressed along the bank indicating ordinary high water mark, and no substrate, indicates that of ephemeral flow in a typical year. Considering all of the resources reviewed, the 30Sept2020 site visit, and the water resources report titled “Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, it has been determined that Stream 1 is a (b)(3) ephemeral feature, excluded water.</u></p>



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III. SUPPORTING INFORMATION

A. Select/enter all resources that were used to aid in this determination and attach data/maps to this document and/or references/citations in the administrative record, as appropriate.

- Information submitted by, or on behalf of, the applicant/consultant: [“Wetland and Waterbodies Delineation Report for 2635-2691 North Forest Road, Town of Amherst, Erie County, New York for CHA” dated September 4, 2020, submitted by Earth Dimensions, Inc.](#)

This information is sufficient for purposes of this AJD.

Rationale: N/A

- Data sheets prepared by the Corps: [Title\(s\) and/or date\(s\)](#).
- Photographs: [Aerial and Other: Oblique aerial imagery from https://explorer.pictometry.com/index.php – dates 2MAY2020 and 27APR2016.](#)
- Corps site visit(s) conducted on: [30SEP2020.](#)
- Previous Jurisdictional Determinations (AJDs or PJDs): [ORM Number\(s\) and date\(s\)](#).
- Antecedent Precipitation Tool: [provide detailed discussion in Section III.B.](#)
- USDA NRCS Soil Survey: https://websoilsurvey.sc.egov.usda.gov/WssProduct/obaqnalvxsksd2izctziqok0/obaqnalvxsksd2izctziqok0/20201013_13165701467_21_Hydric_Rating_by_Map_Unit.pdf – accessed on 13OCT2020.
- USFWS NWI maps: <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/> - accessed 13OCT2020.
- USGS topographic maps: <https://livingatlas.arcgis.com/topoexplorer/index.html> – accessed 13OCT2020. Reviewed USGS topographics from 1985 (Quad:NY – Lockport) and 1965 (Quad: NY – Tonawanda East).

Other data sources used to aid in this determination:

Data Source (select)	Name and/or date and other relevant information
USGS Sources	N/A.
USDA Sources	N/A.
NOAA Sources	N/A.
USACE Sources	N/A.
State/Local/Tribal Sources	N/A.
Other Sources	N/A.

B. Typical year assessment(s): The APT pulls precipitation data from NOAA’s Daily Global Historical Climatology Network. The APT evaluates normal precipitation conditions based on the three 30-day periods preceding the observation date. For each period, a weighted condition value is assigned by determining whether the 30-day precipitation total falls within, above, or below the 70th and 30th percentiles for totals from the same date range over the preceding 30 years. The APT then makes a determination of “normal,” “wetter than normal,” or “drier than normal” based on the condition value sum. The APT also displays results generated via the Palmer Drought Severity Index (PDSI) and the University of Delaware WebWIMP.

An APT evaluation was run for the on-site Corps of Engineers’ inspection of 30SEP2020, associated Oblique Aerial Imagery for 2May2020 and 27APR2016, and the date of the wetland delineation performed by Earth Dimensions, Inc., 1SEP2020. The evaluation was run for weather stations in the vicinity of the site. Results indicate mild drought for September 2020 with a ATP result of drier than normal conditions. For May 2020, moderate wetness was observed and normal conditions were reported for the ATP result. For the April 2016 report, the report indicated



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that incipient drought was occurring and normal conditions were present. All resources were considered during the wet season.

Latitude	Longitude	Date	PDSI Value	PDSI Class	Season	ARC	Score	Antecedent Precip	Condition
43.01426	-78.78357	9/30/2020	-1.49	Mild drought	Wet Season		9	Drier than Normal	
43.01426	-78.78357	9/1/2020	-1.49	Mild drought	Wet Season		9	Drier than Normal	
43.01426	-78.78357	4/17/2016	-0.83	Incipient drought	Wet Season		14	Normal Conditions	
43.01426	-78.78357	5/2/2020	2.13	Moderate wetness	Wet Season		12	Normal Conditions	

Due to the channelization of Stream 2 and the sidecast berm adjacent to it, even in a typical year flow does not exchange between the wetlands and Stream 2, or even Stream 1 and Stream 2, which supports the exclusion of Wetlands 1 through 5 for non-adjacency and Stream 1 for ephemeral flow.

- C. Additional comments to support AJD:** Based on the in-office resource review, including aerial imagery, USGS resources, among others stated above, and the waters and wetlands delineation submitted by Earth Dimensions, Inc. dated 4SEP2020, it has been determined that Stream 2 is a (a)(2) regulated water, Wetland 1, 2, 3, 4, 5 are (b)(1) excluded non-adjacent wetlands, and Stream 1 is a (b)(3) excluded ephemeral feature under the Navigable Waters Protection Rule.