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): 1/28/2021
ORM Number: LRB-2020-01369
Associated JDs: N/A
Review Area Location[1]: State/Territory: New York City: Amherst County/Parish/Borough: Erie
Center Coordinates of Review Area: Latitude 43.0825 N Longitude -78.70027 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.	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.	N/A.

Tributaries ((a)(2) waters):				
(a)(2) Name	(a)(2) Size		(a)(2) Criteria	Rationale for (a)(2) Determination
N/A.	N/A.	N/A.	N/A.	N/A.

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
2020-01369 Wetland A	20.75	acre(s)	(a)(4) Wetland separated from an (a)(1)-(a)(3)	Wetland A was identified within the 30.27-acre study area, occupying a large-portion of the site and extending off-site to the south and west as

[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.

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size		(a)(4) Criteria	Rationale for (a)(4) Determination
			water only by an artificial structure allowing a direct hydrologic surface connection between the wetland and the (a)(1)-(a)(3) water, in a typical year.	determined from on-site observations of hydrology and hydrophytic vegetation during the 21OCT2020 Corps site inspection and as recorded on sheet 3 of 3 (W1-85 and W1-86). The wetland meets the three criteria defining it as wetland, as described in the "Wetland and Waterbodies Delineation Report for 5600 Millersport Highway and 4525 Tonawanda Creek Road, in the Town of Amherst, New York for Arista Development," dated October 8, 2020 and prepared by Earth Dimensions, Inc. Wetland A does not abut, nor does it receive flood waters from an (a)(1), (a)(2), or (a)(3) water. Wetland A is not naturally separated from an (a)(1), (a)(2), or (a)(3) water. Wetland A is separated from an (a)(2) water by an artificial structure, an upland barrier that parallels the west side of the study area, that allows for a direct hydrologic surface connection between the wetland and the (a)(2) water, in a typical year. This upland barrier separating the wetland from the (a)(2) water is manmade, in which material from the (a)(2) water was historically sidecast and spread along the eastern bank and is regularly maintained through mowing. Throughout this maintained upland area (barrier) there are low spots that have 8 to 12-inch culverts installed in them connecting the wetland to the tributary. These culverts are in at least three low areas within the artificial barrier and appear to be where old agricultural furrows extend through the wetland to the east, as observed during the 21OCT2020 Corps site inspection. A couple of the culverts did not show much evidence of flow through them, but one did have a well-defined silt marking within it and minimal standing water on the wetland end of the culvert. The (a)(2) water on the west side of the study area is a maintained unnamed stream that was channelized and ditched historically, is located just outside of the study area and is separated by a maintained (mowed) upland area. The water from the tributary is mapped as a drainage way on the Erie County Soil Survey dated 1978. Based on in-office resources listed in item III of this form and due to the linear nature of this tributary, the unnamed tributary was likely a manmade ditch channelizing a portion of a tributary towards the south of the property (where Millersport Highway now exists) to drain wetlands for agriculture. The tributary is visible

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size		(a)(4) Criteria	Rationale for (a)(4) Determination
				in aerials dating back to 1972, which also show saturations signatures in the agricultural fields suggesting farmed wetland that would have been adjacent wetlands under the NWPR. It is shown mapped on multiple USGS quadrangles and is mapped on the NY- Clarence Center quadrangle as early as 1950. This water originates along Millersport Highway and flows north along the west side of the study area, through a culvert under Tonawanda Creek Road where it extends for another 890 linear feet before entering Tonawanda Creek. During the 21OCT2020 Corps site inspection, this tributary was flowing to the north and the channel contained at least 10-inches of water depth in all areas observed. Based on this information, it has been determined that this water is an (a)(2) tributary because it flows intermittently to the north contributing water to Tonawanda Creek (another (a)(2) water – perennial tributary at this location). According to the Antecedent Precipitation Tool (APT) report, the date of the site inspection was during a period of normal conditions during the wet season. However, it was noted that the month of September was a period of drought and the PDSI data indicated incipient drought for the date of the site inspection. This supports that flow is typical even during dryer periods, supporting intermittent flow regime for the stream and flow occurrences within a typical year between the wetland and (a)(2) water. The indication of drought conditions could be why evidence of flow through all the culverts within the artificial barrier was not prominent at the time of the site inspection. An APT report was also conducted for aerial imagery and oblique imagery dates (see Section III for more information). All the dates indicated normal conditions except for 16MAR2017, which was wetter than normal. Each of these aerials showed water conveyance in the ditch constructed along Millersport Highway, which the wetland contributes flow to the (a)(2) water from the wetland within a typical year. Water is visible in all aerial imagery noted in Item III (Supporting Information) of this form, supporting that at least intermittent flow is typical of the maintained stream, further enforcing that the maintained stream on the west side of the study area is an (a)(2) water. The report for these resources, supports that hydrology from the wetland reaches the (a)(2) water which

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size		(a)(4) Criteria	Rationale for (a)(4) Determination
				contributes at least intermittent flow from the wetland, which is conveyed via a direct hydrologic connection to the (a)(2) tributary located on the west side of the study area. Based on the above information, it has been determined that the wetland is an (a)(4) wetland that has a direct hydrologic surface connection between the wetland and the (a)(2) unnamed tributary, contributing flow to an (a)(2) water at least once in a typical year.

D. Excluded Waters or Features

Excluded waters ((b)(1) – (b)(12)):[4]				
Exclusion Name	Exclusion Size		Exclusion[5]	Rationale for Exclusion Determination
N/A.	N/A.	N/A.	N/A.	N/A.

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 5600 Millersport Highway and 4525 Tonawanda Creek Road, in the Town of Amherst, New York for Arista Development," dated October 8, 2020 and prepared by Earth Dimensions, Inc.

This information is not sufficient for purposes of this AJD.

Rationale: Based on a review of the submitted report, it recommended that the wetland was non-jurisdictional citing that it lacked a direct surface connection from the wetland to any (a)(2) waters. However, as described on this form, it has been determined that the wetland does have a direct surface water connection to an (a)(2) water that contributes water within a typical year, and is therefore an (a)(4) wetland.

☐ Data sheets prepared by the Corps: Title(s) and/or date(s).

☒ Photographs: Aerial and Other: Aerial imagery from Google Earth Pro, dates – 3MAY2009, 5OCT2011, 16MAR2017, 22SEP2018. Oblique Imagery from Connect Explorer (https://explorer.pictometry.com), dates – 16APR2016 and 25APR2020. Erie County historic aerials – 1927. Historicaerials.com - 1972.

☒ Corps site visit(s) conducted on: 21OCT2020.

☐ 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/App/WebSoilSurvey.aspx – accessed on 23DEC2020.

[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.

☒ USFWS NWI maps: https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/ - accessed 23DEC2020.

☒ USGS topographic maps: https://livingatlas.arcgis.com/topoexplorer/index.html – accessed 23DEC2020. Reviewed USGS topographics from 1950, 1965, and 1980 (Quad:NY – Clarence Center).

Other data sources used to aid in this determination:

Data Source (select)	Name and/or date and other relevant information
USGS Sources	StreamStats Application - https://streamstats.usgs.gov/ss/
USDA Sources	N/A.
NOAA Sources	N/A.
USACE Sources	N/A.
State/Local/Tribal Sources	N/A.
Other Sources	Erie County, NY GIS - https://gis.erie.gov/Html5Viewer/index.html?viewer=ErieCountyNY.HTML5_2_11_0

B. Typical year assessment(s): 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.,

Latitude	Longitude	Date	PDSI Value	PDSI Class	Season	ARC Score	Antecedent Precip Condition
43.0825	-78.70027	4/25/2020	-0.16	Normal	Wet Season	13	Normal Conditions
43.0825	-78.70027	4/16/2016	-0.83	Incipient drought	Wet Season	14	Normal Conditions
43.0825	-78.70027	3/16/2017	1.22	Mild wetness	Wet Season	15	Wetter than Normal
43.0825	-78.70027	9/22/2018	0.78	Incipient wetness	Dry Season	11	Normal Conditions
43.0825	-78.70027	10/5/2011	3.41	Severe wetness	Wet Season	14	Normal Conditions
43.0825	-78.70027	5/3/2009	2.3	Moderate wetness	Dry Season	14	Normal Conditions
43.0825	-78.70027	10/21/2020		Incipient Drought	Wet Season	11	Normal Conditions

The APT report was conducted at single point coordinates for the study area for the date of the site inspection, and for the dates of the aerial and oblique imagery identified in Section III above, excluding the historic aerials that did not have specific dates, just years.

The report indicated at the time of the site inspection (21OCT2020), the area had normal conditions during the wet season though the PDSI value indicated incipient drought. The data for 21OCT2020 also indicated that during September the area was in a period of drought. This supports that water flowing observations made at the time of the site inspection was at least intermittent flow and would occur through a typical year.

All of the aerial and oblique imagery noted in Section III of this form (above) showed water presence in the unnamed ditch located outside of the study area to the west and the ditch along Millersport Highway to the south of the study area. For all of the aerial and oblique imagery dates, the APT report indicated normal conditions with the exception of 16MAR2017. Most of these resources were during the wet season, but the

22SEP2018 and 3MAY2009 aerial images were during the dry season. This data and the fact that flow was observed during the site inspection supports that a direct surface flow connection exists in a typical year since all aerial and oblique images contained water during wet and dry times of the year, typically showing normal conditions, as discussed in the rationale for Wetland A.

C. **Additional comments to support AJD:** Based on the above documentation and rationale, it has been determined that the study area includes one jurisdictional (a)(4) wetland – 2020-01369 Wetland A. All of the above documentation supports this determination.