

Appendix 3-B: Jurisdictional Determination



DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
JACOB K. JAVITS FEDERAL BUILDING
NEW YORK, N.Y. 10278-0090

JAN 13 2010

REPLY TO
ATTENTION OF:

Regulatory Branch

SUBJECT: Permit Application Number NAN-2009-01043
by Cricket Valley Energy Center, LLC

Ms. Lynn Gresock
ARCADIS
Two Executive Drive, Suite 303
Chelmsford, MA 01824

Dear Ms. Gresock:

On August 31, 2009, the New York District of the U.S. Army Corps of Engineers received a request for a Department of the Army jurisdictional determination for the above referenced project. This request was made by ARCADIS, as consultants for Cricket Valley Energy Center, LLC. The site consists of approximately 57.21-acres along Swamp River in the Town of Dover, Dutchess County, New York. The original request was for a jurisdictional determination of the entire 131-acre property. This determination is limited to the 57.21-acre project area located east of the Metro-North Commuter Railroad.

In the letter received on August 31, 2009, your office submitted a proposed delineation of the extent of waters of the United States within the project boundary. A site inspection was conducted by representatives of this office on October 28, 2009, in which it was agreed that changes would be made to the delineation and that the modified delineation would be submitted to this office. On December 22, 2009, this office received the modified delineation.

Based on the material submitted and the observations of the representatives of this office during the site visit, this site has been determined to contain jurisdictional waters of the United States based on: the presence of wetlands determined by the occurrence of hydrophytic vegetation, hydric soils and wetland hydrology according to criteria established in the 1987 "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1 that are either adjacent to or part of a tributary system; the presence of a defined water body (e.g. stream channel, lake, pond, river, etc.) which is part of a tributary system; and the fact that the location includes property below the ordinary high water mark, high tide line or mean high water mark of a water body as determined by known gauge data or by the presence of physical markings including, but not limited to, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter or debris or other characteristics of the surrounding area.

These jurisdictional waters of the United States are shown on

the drawings entitled "Army Corps of Engineers Jurisdictional Determination Drawing Survey of Property Prepared for Cricket Valley Energy Center LLC, Sheet 1, prepared by ARCADIS, dated June 3, 2009 and last revised December 3, 2009. These drawings indicate that there are three (3) principal wetland areas with a total of 9.14-acres on the project site that are considered to be waters of the United States.

Wetland 2 is located in the northern section of the property and is approximately 8.69-acres within the subject property. Wetland 3B is located in the southern section of the property and is approximately 0.41-acres within the subject property. The wetland identified as Intermittent Stream is located in the southern section of the property and is approximately 0.04-acres within the subject property.

It should be noted that, in light of the U.S. Supreme Court decision (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178, January 9, 2001), the wetland areas designated as Wetland 1 and Wetland 3A, as shown on the above referenced drawing, do not meet the current criteria of waters of the United States under Section 404 of the Clean Water Act. The Court ruled that isolated, intrastate waters can no longer be considered waters of the United States, based solely upon their use by migratory birds.

This determination regarding the delineation shall be considered valid for a period of five years from the date of this letter unless new information warrants revision of the determination before the expiration date.

This determination was documented using the Approved Jurisdictional Determination Form, promulgated by the Corps of Engineers in June 2007. A copy of that document is enclosed with this letter, and will be posted on the New York District website at:

<http://www.nan.use.army.mil/business/buslinks/regulat/jurisdiction/index.htm>.

This delineation/determination has been conducted to identify the limits of the Corps Clean Water Act jurisdiction for the particular site identified in this request. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR Part 331. Enclosed is a combined Notification of Appeal Process (NAP) and Request For Appeal (RFA) form. If you request to appeal this determination you must submit a completed RFA form to the North Atlantic Division Office at the following address:

Michael G. Vissichelli, Administrative Appeals Review Officer
North Atlantic Division, U.S. Army Engineer Division
Fort Hamilton Military Community
General Lee Avenue, Building 301
Brooklyn, New York 11252-6700


In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by MAR 14 2010. It is not necessary to submit an RFA form to the Division Office if you do not object to the determination in this letter.

This delineation/determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

It is strongly recommended that the development of the site be carried out in such a manner as to avoid as much as possible the discharge of dredged or fill material into the delineated waters of the United States. If the activities proposed for the site involve such discharges, authorization from this office may be necessary prior to the initiation of the proposed work. The extent of such discharge of fill will determine the level of authorization that would be required.

If any questions should arise concerning this matter, please contact Stephan Ryba, of my staff, at (917) 790-8512.

Sincerely,



Christopher S. Mallery, PhD
Chief, Western Permits Section

Enclosures

**APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers**

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 07-Jan-2010

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: New York District, NAN-2009-01043-JD1

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State : NY - New York
 County/parish/borough: Dutchess
 City: Dover Plains
 Lat: 41.741
 Long: -73.57652
 Universal Transverse Mercator Folder UTM List

UTM list determined by folder location

- NAD83 / UTM zone 37S

Waters UTM List

UTM list determined by waters location

- NAD83 / UTM zone 37S

Name of nearest waterbody: Great Swamp North Flow
 Name of nearest Traditional Navigable Water (TNW): Swamp River
 Name of watershed or Hydrologic Unit Code (HUC): Housatonic, Connecticut, Massachusetts, New York

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
 Check if other sites (e.g., offsite mitigation sites, disposal sites, etc.) are associated with the action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION:

- Office Determination Date:
 Field Determination Date(s): 28-Oct-2009

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION

There "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area.

- Waters subject to the ebb and flow of the tide.
 Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area.

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area:¹

Water Name	Water Type(s) Present
Wetland 1	Isolated (interstate or intrastate) waters, including isolated wetlands
Wetland 3A	Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Area: (m²)
 Linear: (m)

c. Limits (boundaries) of jurisdiction:

based on: 1987 Delineation Manual.

OHWM Elevation: (if known)

2. Non-regulated waters/wetlands:³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain:
 The 1.73-acre wetland (Wetland 1) and 0.13-acre wetland (Wetland 3A) present on-site in the eastern portion of the site and central portion of the site, respectively, were determined not to be jurisdictional because each was considered to be isolated. Wetland 1 is surrounded by upland non-hydric soils, upland plant and does not contain any evidence of direct surface inputs or drainages that would connect it to a TNW. Likewise, Wetland 3A appears to be surrounded by upland soils and vegetation and not contain any evidence of direct surface inputs or drainages that would connect it to a TNW. The nearest water course is indentified by the NYSDEC as the Great Swamp North Flow and is located on the western border of the property. No hydrologic connection to any waters of the U.S. are present on site form these wetlands. The wetlands under review are not present on the NWI and USGA maps for this area. Therefore these wetlands are determined to isolated.

SECTION III: CWA ANALYSIS**A. TNWs AND WETLANDS ADJACENT TO TNWs****1. TNW**

Not Applicable.

2. Wetland Adjacent to TNW

Not Applicable.

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):**1. Characteristics of non-TNWs that flow directly or indirectly into TNW****(i) General Area Conditions:**

Watershed size: []

Drainage area: []

Average annual rainfall: inches

Average annual snowfall: inches

(ii) Physical Characteristics**(a) Relationship with TNW:** Tributary flows directly into TNW. Tributary flows through [] tributaries before entering TNW.

:Number of tributaries

Project waters are [] river miles from TNW.

Project waters are [] river miles from RPW.

Project Waters are [] aerial (straight) miles from TNW.

Project waters are [] aerial(straight) miles from RPW.

 Project waters cross or serve as state boundaries.**Explain:**Identify flow route to TNW:⁵

Tributary Stream Order, if known:

Not Applicable.

(b) General Tributary Characteristics:

Tributary is:

Not Applicable.

Tributary properties with respect to top of bank (estimate):

Not Applicable.

Primary tributary substrate composition:

Not Applicable.

Tributary (conditions, stability, presence, geometry, gradient):

Not Applicable.

(c) Flow:

Not Applicable.

Surface Flow is:

Not Applicable.

Subsurface Flow:

Not Applicable.

Tributary has:

Not Applicable.

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction:

High Tide Line indicated by:

Not Applicable.

Mean High Water Mark indicated by:

Not Applicable.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Not Applicable.

(iv) Biological Characteristics. Channel supports:

Not Applicable.

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Not Applicable.

(b) General Flow Relationship with Non-TNW:

Flow is:

Not Applicable.

Surface flow is:

Not Applicable.

Subsurface flow:

Not Applicable.

(c) Wetland Adjacency Determination with Non-TNW:

Not Applicable.

(d) Proximity (Relationship) to TNW:

Not Applicable.

(ii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Not Applicable.

(iii) Biological Characteristics. Wetland supports:

Not Applicable.

3. Characteristics of all wetlands adjacent to the tributary (if any):

All wetlands being considered in the cumulative analysis:
Not Applicable.

Summarize overall biological, chemical and physical functions being performed:
Not Applicable.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Significant Nexus: Not Applicable

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE:**1. TNWs and Adjacent Wetlands:**

Not Applicable.

2. RPWs that flow directly or indirectly into TNWs:

Not Applicable.

Provide estimates for jurisdictional waters in the review area:

Not Applicable.

3. Non-RPWs that flow directly or indirectly into TNWs:⁸

Not Applicable.

Provide estimates for jurisdictional waters in the review area:

Not Applicable.

4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.

Not Applicable.

Provide acreage estimates for jurisdictional wetlands in the review area:

Not Applicable.

5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs:

Not Applicable.

Provide acreage estimates for jurisdictional wetlands in the review area:

Not Applicable.

6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs:

Not Applicable.

Provide estimates for jurisdictional wetlands in the review area:

Not Applicable.

7. Impoundments of jurisdictional waters:⁹

Not Applicable.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS:¹⁰

Waters Name	Interstate\Foreign Travelers	Fish/Shellfish Commerce	Industrial Commerce	Interstate Isolated	Explain	Other Factors	Explain
Wetland 1	-	-	-	-	-	-	-
Wetland 3A	-	-	-	-	-	-	-

Identify water body and summarize rationale supporting determination:

Water Name	Adjacent To TNW Rationale	TNW Rationale
Wetland 1	-	-
Wetland 3A	-	-

Provide estimates for jurisdictional waters in the review area:

Water Name	Type	Size (Linear) (m)	Size (Area) (m ²)
Wetland 1	Isolated (interstate or intrastate) waters, including isolated wetlands	-	7001.06088
Wetland 3A	Isolated (interstate or intrastate) waters, including isolated wetlands	-	526.09128
Total:		0	7527.15216

F. NON-JURISDICTIONAL WATERS. INCLUDING WETLANDS

If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements:

Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce:

Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR):

Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (Explain):

Other (Explain):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (ie., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment:

Water Name	Type	Size (Linear) (m)	Size (Area) (m ²)
Wetland 1	Isolated (interstate or intrastate) waters, including isolated wetlands	-	7001.06088
Wetland 3A	Isolated (interstate or intrastate) waters, including isolated wetlands	-	526.09128
Total:		0	7527.15216

Provide acreage estimates for non-jurisdictional waters in the review area, that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction.
Not Applicable.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD

(listed items shall be included in case file and, where checked and requested, appropriately reference below):
Not Applicable.

B. ADDITIONAL COMMENTS TO SUPPORT JD:

Not Applicable.

¹-Boxes checked below shall be supported by completing the appropriate sections in Section III below.

²-For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³-Supporting documentation is presented in Section III.F.

⁴-Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵-Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

⁶-A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷-Ibid.

⁸-See Footnote #3.

⁹-To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰-Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 07-Jan-2010

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: New York District, NAN-2009-01043-JD2

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State : NY - New York
County/parish/borough: Dutchess
City: Dover Plains
Lat: 41.741
Long: -73.57652
Universal Transverse Mercator: Folder UTM List
UTM list determined by folder location
Waters UTM List
UTM list determined by waters location

Name of nearest waterbody: Great Swamp North Flow
Name of nearest Traditional Navigable Water (TNW): Swamp River
Name of watershed or Hydrologic Unit Code (HUC): Housatonic, Connecticut, Massachusetts, New York

- Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
Check if other sites (e.g., offsite mitigation sites, disposal sites, etc.) are associated with the action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION:

- Office Determination Date:
Field Determination Date(s): 28-Oct-2009

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION

There [] "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area.

- Waters subject to the ebb and flow of the tide.
Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There [] "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area.

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area:1

Table with 2 columns: Water Name, Water Type(s) Present. Rows include Wetland 2, Wetland 3B, and Intermittent Stream.

b. Identify (estimate) size of waters of the U.S. in the review area:

Area: (m²)
Linear: (m)

c. Limits (boundaries) of jurisdiction:

based on: 1987 Delineation Manual.
OHWM Elevation: (if known)

2. Non-regulated waters/wetlands:3

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: The 1.73-acre wetland (Wetland 1) and 0.13-acre wetland (Wetland 3A) present on-site in the eastern portion of the site and central portion of the site, respectively, were determined not to be jurisdictional because they are isolated.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

1. TNW
Not Applicable.

2. Wetland Adjacent to TNW
Not Applicable.

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: []
 Drainage area: []
 Average annual rainfall: inches
 Average annual snowfall: inches

(ii) Physical Characteristics

(a) Relationship with TNW:

Tributary flows directly into TNW.
 Tributary flows through [] tributaries before entering TNW.
 :Number of tributaries

Project waters are [] river miles from TNW.
 Project waters are [] river miles from RPW.
 Project Waters are [] aerial (straight) miles from TNW.
 Project waters are [] aerial(straight) miles from RPW.

Project waters cross or serve as state boundaries.

Explain:

Identify flow route to TNW:⁵

Tributary Stream Order, if known:

Order	Tributary Name
-	Intermittent Stream

(b) General Tributary Characteristics:

Tributary is:

Tributary Name	Natural	Artificial	Explain	Manipulated	Explain
Intermittent Stream	-	-	-	-	-

Tributary properties with respect to top of bank (estimate):

Tributary Name	Width (ft)	Depth (ft)	Side Slopes
Intermittent Stream	4	2	2:1

Primary tributary substrate composition:

Tributary Name	Silt	Sands	Concrete	Cobble	Gravel	Muck	Bedrock	Vegetation	Other
Intermittent Stream	X	-	-	-	-	X	-	X	-

Tributary (conditions, stability, presence, geometry, gradient):

Tributary Name	Condition	Stability	Run/Riffle/Pool Complexes	Geometry	Gradient (%)
Intermittent Stream	Appeared to have flow from existing building areas towards wetlands along rail line.		-	Relatively straight	-

(c) Flow:

Tributary Name	Provides for	Events Per Year	Flow Regime	Duration & Volume
Intermittent Stream	Intermittent but not seasonal flow	11-20	-	-

Surface Flow is:

Tributary Name	Surface Flow	Characteristics
Intermittent Stream	Discrete and confined	-

Subsurface Flow:

Tributary Name	Subsurface Flow	Explain Findings	Dye (or other) Test
Intermittent Stream	Unknown	-	-

Tributary has:

Tributary Name	Bed & Banks	OHWM	Discontinuous OHWM ⁷	Explain
Intermittent Stream	-	X	-	-

Tributaries with OHWM⁶ - (as indicated above)

Tributary Name	OHWM	Clear	Litter	Changes in Soil	Destruction Vegetation	Shelving	Wrack Line	Matted/Absent Vegetation	Sediment Sorting	Leaf Litter	Scour	Sediment Deposition	Flow Events	Wat Stain
Intermittent Stream	X	-	X	-	-	-	-	X	-	-	X	-	-	X

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction:

High Tide Line indicated by:
 Not Applicable.

Mean High Water Mark indicated by:
 Not Applicable.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Tributary Name	Explain	Identify specific pollutants, if known
Intermittent Stream	Water appeared to be clear.	-

(iv) Biological Characteristics. Channel supports:

Tributary Name	Riparian Corridor	Characteristics	Wetland Fringe	Characteristics	Habitat
Intermittent Stream	-	4	-	-	-

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland Name	Size (Acres)	Wetland Type	Wetland Quality	Cross or Serve as Str
Wetland 2	8.69	Emergent wetland with open water and forested wetlands.	The wetland quality of the majority of this wetland was good. The southern most edge of wetland appeared to have white/yellow clouded water and staining in soil. Hydrology ranged from standing water to saturated soils within the 12 inches of the ground surface.	n/a
Wetland 3B	.41	Emergent wetland dominated by Phragmites.	Good	n/a

(b) General Flow Relationship with Non-TNW:

Flow is:

Wetland Name	Flow	Explain
Wetland 2	Perennial flow.	-
Wetland 3B	Perennial flow.	-

Surface flow is:

Wetland Name	Flow	Characteristics
Wetland 2	Discrete and confined	-
Wetland 3B	Discrete and confined	-

Subsurface flow:

Wetland Name	Subsurface Flow	Explain Findings	Dye (or other) Test
Wetland 2	Unknown	-	-
Wetland 3B	Unknown	-	-

(c) Wetland Adjacency Determination with Non-TNW:

Wetland Name	Directly Abutting	Discrete Wetland Hydrologic Connection	Ecological Connection	Separated by Berm/Barrier
Wetland 2	No	X	-	X
Wetland 3B	Yes	-	-	-

(d) Proximity (Relationship) to TNW:

Wetland Name	River Miles From TNW	Aerial Miles From TNW	Flow Direction	Within Floodplain
Wetland 2	1 (or less)	1 (or less)	Wetland to navigable waters	50 - 100-year
Wetland 3B	1 (or less)	1 (or less)	Wetland to navigable waters	50 - 100-year

(ii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Wetland Name	Explain	Identify specific pollutants, if known
Wetland 2	-	-
Wetland 3B	-	-

(iii) Biological Characteristics. Wetland supports:

Wetland Name	Riparian Buffer	Characteristics	Vegetation	Explain
Wetland 2	-	-	X	Tree/20% cover Shrub/10% cover Herbaceous/100% Majority was Phragmites
Wetland 3B	-	-	X	-

3. Characteristics of all wetlands adjacent to the tributary (if any):

All wetlands being considered in the cumulative analysis:

Not Applicable.

Summarize overall biological, chemical and physical functions being performed:

Not Applicable.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they sign chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequ in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any speci (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of sig

Significant Nexus: Not Applicable

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE:

1. TNWs and Adjacent Wetlands:
Not Applicable.

2. RPWs that flow directly or indirectly into TNWs:

Wetland Name	Flow	Explain
Intermittent Stream	PERENNIAL	Stream flows to west from existing buildings to the rail bed.

Provide estimates for jurisdictional waters in the review area:

Wetland Name	Type	Size (Linear) (m)	Size (Area) (m ²)
Intermittent Stream	Relatively Permanent Waters (RPWs) that flow directly or indirectly into TNWs	-	161.87424
Total:		0	161.87424

3. Non-RPWs that flow directly or indirectly into TNWs:⁸
Not Applicable.

Provide estimates for jurisdictional waters in the review area:

Not Applicable.

4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.

Wetland Name	Flow	Explain
Wetland 2	PERENNIAL	Hydrology indicators throughout wetland include open water transitioning to forested wetlands and ground surface/soils were either inundated or saturated.
Wetland 3B	PERENNIAL	Hydrology indicators throughout wetland include open water transitioning to forested wetlands and ground

Provide acreage estimates for jurisdictional wetlands in the review area:

Wetland Name	Type	Size (Linear) (m)	Size (Area) (m ²)
Wetland 2	Wetlands directly abutting RPWs that flow directly or indirectly into TNWs	-	35167.17864
Wetland 3B	Wetlands directly abutting RPWs that flow directly or indirectly into TNWs	-	1659.21096
Total:		0	36826.3896

5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs:
Not Applicable.

Provide acreage estimates for jurisdictional wetlands in the review area:
Not Applicable.

6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs:
Not Applicable.

Provide estimates for jurisdictional wetlands in the review area:
Not Applicable.

7. Impoundments of jurisdictional waters:⁹
Not Applicable.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, I WATERS:¹⁰
Not Applicable.

Identify water body and summarize rationale supporting determination:
Not Applicable.

Provide estimates for jurisdictional waters in the review area:
Not Applicable.

F. NON-JURISDICTIONAL WATERS. INCLUDING WETLANDS

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements:
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce:
- Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR):
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (Explain):

Other (Explain):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (ie., presence of migratory birds, presence of endangered irrigated agriculture), using best professional judgment:
Not Applicable.

Provide acreage estimates for non-jurisdictional waters in the review area, that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction.
Not Applicable.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (listed items shall be included in case file and, where checked and requested, appropriately reference below):

Data Reviewed	Source Label	Source Description
-Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant	-	-

-Data sheets prepared/submitted by or on behalf of the applicant/consultant	-	-
-Office concurs with data sheets/delineation report	-	-
-U.S. Geological Survey map(s)	Dover Plains, NY Conn.	-
-National wetlands inventory map(s)	-	-
-State/Local wetland inventory map(s)	-	-

B. ADDITIONAL COMMENTS TO SUPPORT JD:
Not Applicable.

-
- ¹-Boxes checked below shall be supported by completing the appropriate sections in Section III below.
 - ²-For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
 - ³-Supporting documentation is presented in Section III.F.
 - ⁴-Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
 - ⁵-Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.
 - ⁶-A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
 - ⁷-Ibid.
 - ⁸-See Footnote #3.
 - ⁹-To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
 - ¹⁰-Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction.

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Cricket Valley Energy Center, LLC	File Number: NAN-2009-01043	Date: JAN 13 2010
Attached is:		See Section Below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of Permission)	B
<input type="checkbox"/>	PERMIT DENIAL	C
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	D
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/CECW/Pages/reg_permit.aspx or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the New York District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations (JD) associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the New York District Engineer. Your objections must be received by the New York District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the New York District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the New York District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the New York District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the North Atlantic Division Engineer, ATTN: CENAD-PD-PSD-O, Fort Hamilton Military Community, Building 301, General Lee Avenue, Brooklyn, NY 11252-6700. This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the North Atlantic Division Engineer, ATTN: CENAD-PD-PSD-O, Fort Hamilton Military Community, Building 301, General Lee Avenue, Brooklyn, NY 11252-6700. This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the North Atlantic Division Engineer within 60 days of the date of this notice with a copy furnished to the New York District Engineer.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:
Richard L. Tomer
U.S. Army Corps of Engineers, New York District
Jacob K. Javits Federal Building
New York, NY 10278-0090
(917) 790-8510

If you only have questions regarding the appeal process you may also contact:
Michael G. Vissichelli, Administrative Appeals Review Officer
North Atlantic Division, U.S. Army Engineer Division
Fort Hamilton Military Community
General Lee Avenue, Building 301
Brooklyn, NY 11252-6700
(718) 765-7163
E-mail: Michael.G.Vissichelli@usace.army.mil

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.	Date:	Telephone number:
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