

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

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 1/12/2023

B. ST PAUL, MN DISTRICT OFFICE, FILE NAME, AND NUMBER: 2016-02880-TKO

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: **WI** County/parish/borough: **Waukesha** City: **New Berlin**

Center coordinates of site (lat/long in degree decimal format): Lat. **43.0124° N**, Long. **-88.1044° E**

Universal Transverse Mercator: **16**

Name of nearest waterbody: **Deer Creek**

Name of watershed or Hydrologic Unit Code (HUC): **Pewaukee River-Fox River 0712000601**

☒ 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 this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☒ Office (Desk) Determination. Date: **12/05/2022**

☐ Field Determination. Date(s):

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There are no “*navigable waters of the U.S.*” within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area.

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There are no “*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.: N/A

2. Non-regulated waters/wetlands (check if applicable):¹

- ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: **The review area includes five wetlands, labeled W-1 (2.99 ac), W-1A (0.19 ac), and W-2 (0.04 ac), ditched portion of W-3 (approximately 0.3 ac) and W-6 (0.01.) totaling 3.53 acres. These wetlands are non-jurisdictional, based on a review of the August 2022 Heartland Ecological Group delineation report and other materials, including USDA soils, Wisconsin Wetland Inventory, WI DNR DEM and Hillshade, Google Earth aerial photos and street view, ground level photos, and historic aerial imagery. Based on the delineation report and topographic contours, wetlands W-1, 1A, and 2 are located in depressional features, are surrounded by upland (confirmed by data points and review of imagery showing a lack of wet signatures), and do not have any inlets or outlets connecting them to WOTUS. There are no other surface or shallow subsurface connections to downstream waters, confirmed by reviewing of the above-mentioned resources. The ditched portion of W-3 and the entirety of W-6 are roadside ditch conveyance swales that were constructed in upland.**

Wetlands 1 and 1A are in a complex which sits in a north/south oriented valley in the eastern portion of the study area. A road, constructed in the 1970's, bisects the complex though the wetlands are connected to one another by a culvert. This complex sits in a depressional feature with boundaries transiting to uplands on the east, west, and north. This is evident when viewing DEM and hillshade layers, as well as Waukesha 1 ft contours, and is supported by upland sample points along the identified boundary. A topographic feature extends northwest from W-1A towards W-4. Review of historic arial images show no persistent wet signatures or a continuation of hydrophytic vegetation which indicates this feature does not serve as an outlet or confined connection between these wetlands. USDA soil data shows the area along the western wetland boundary, mapped as non-hydric. A portion of the complex extends outside of the study area to the east, but the above resources show containment along contours. A culvert to the south of the complex provides stormwater input from a subdivision adjacent to the study area. No wet signatures are identified

¹ Supporting documentation is presented in Section III.F.

as outlets, and no outlets connect this drainage area to any other waters. Topographic breaks and several sample points define the wetland boundaries.

W-2 is an isolated wetland sitting in a slight depression just west of the center of W-1. Boundaries transition to uplands on the north, south, east, and west as indicated while viewing hillshade, DEM, and contour layers. USDA soil data shows the majority of the wetland sitting in an area mapped as non-hydric, with a small portion to the west mapped in predominantly non-hydric soils. This is also supported by upland sample points on the east and west of the wetland. The delineation report states historic fill was noted to the east, separating W-2 from W-1. An artificial berm or roadway sits to the north however this does not separate W-2 from any other waters.

There are no discrete surface or subsurface connections from the above-mentioned wetlands to any other waters. The nearest downstream tributary is Deer Creek, a tributary to the Fox River, which is located approximately 1,300 feet to the west.

The wetlands do not border, are not neighboring to or contiguous with another water of the US. They are not separated from another water of the US by man-made barriers, dikes or berms. Due to existing and surrounding land use (disturbed upland in transportation corridors and use) and proximity to other waters, there are no ecological connections to other wetlands or waters. These aquatic resources do not support a link to interstate or foreign commerce; are not known to be used by interstate or foreign travelers for recreation or other purposes; do not produce fish or shellfish that could be taken and sold in interstate or foreign commerce; and are not known to be used for industrial purposes by industries in interstate commerce. Therefore, the Corps has determined that Wetlands 1, 1A, and 2 are not regulated by the Corps under Section 404 of the Clean Water Act.

Both the ditched portion of W-3 and W-6 are roadside ditch conveyance swales that were constructed as part of road improvements for South Moorland Rd. sometime between 1963-70. The ditches do not carry relatively permanent flow (based on aerial photos), and were constructed in upland (based on 1) delineation report and historic aerial images showing a lack of wet signatures prior to road expansion, and 2) a lack of hydric soils in this area), and drain only upland (as shown by the delineation report's wetland boundaries). No wet signatures are visible within the borders of these wetlands prior to road construction identified in 1970.

In accordance with the preamble to the 1986 Corps Regulations (33 CFR Parts 320-330), the Corps does not generally consider the following activities to be waters of the United States; non-tidal drainage and irrigation ditches excavated on dry land. Further clarification is provided in the December 2, 2008 Revised Guidance on Clean Water Act Jurisdiction following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* issued jointly by the Corps and EPA which indicates that ditches excavated wholly in and draining only uplands and do not carry a relatively permanent flow are not waters of the United States.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs: N/A

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

C. SIGNIFICANT NEXUS DETERMINATION: N/A

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY): N/A

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 (CHECK ALL THAT APPLY): N/A

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- ☐ 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, if not covered above): **See Section II.B.2 above**

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

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☒ Wetlands: **3.22** acres.

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 (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: **August 2022 Heartland Ecological Group, Inc.**

☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.

☒ Office concurs with data sheets/delineation report.

☐ Office does not concur with data sheets/delineation report.

☐ Data sheets prepared by the Corps:

☐ Corps navigable waters' study:

☒ U.S. Geological Survey Hydrologic Atlas:

☒ USGS NHD data.

☐ USGS 8 and 12 digit HUC maps.

☒ U.S. Geological Survey map(s). Cite scale & quad name: **1:24,000 New Berlin Quad**

☒ USDA Natural Resources Conservation Service Soil Survey. Citation: **Waukesha County**

☒ National wetlands inventory map(s). Cite name: **Surface Waters and Wetlands**

☒ State/Local wetland inventory map(s): **WI Wetland Inventory**

☐ FEMA/FIRM maps:

☐ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)

☒ Photographs: ☒ Aerial (Name & Date): **Google Earth 2000-2022**

or ☒ Other (Name & Date): **Applicant provided ground level 8/2022**

☐ Previous determination(s). File no. and date of response letter:

☐ Applicable/supporting case law:

☐ Applicable/supporting scientific literature:

☒ Other information (please specify): **WI DNR DEM and Hillshade viewed on NRV**

Waukesha County Historic Aerials: 1941-2017

Waukesha County Mapping, 1ft contours

B. ADDITIONAL COMMENTS TO SUPPORT JD: