

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): March 16, 2023

B. ST PAUL, MN DISTRICT OFFICE, FILE NAME, AND NUMBER: 2023-00182-MWM SE of Intersection of STH 67 and USH 18, Wetland A, Wetland B/Ditch, Wetland C and Wetland F.

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Wisconsin County/parish/borough: Waukesha City: Dousman

Center coordinates of site (lat/long in degree decimal format): Lat. 43.0186° N, Long. -88.4584° W.

Universal Transverse Mercator: 16

Name of nearest waterbody: Bark River (WBIC 813500)

Name of watershed or Hydrologic Unit Code (HUC): 0709000203

- ☒ 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: February 23, 2023.
☐ 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 contains four aquatic resources, Wetland A (3,075 square feet), Wetland B/Ditch (2,628 square feet), Wetland C (227,407 square feet), and Wetland F (7,131 square feet). The nearest aquatic resource is the Bark River located approximately 1,200 feet to the northwest.**

Wetland A (3,075 square feet) is located on the western edge of the site, directly abutting a portion of the Glacial Drumlin State Trail within a minor depression. There are no culverts or similar structures within or near the wetland, the feature is isolated on the landscape. Along the trail, within the wetland area, a linear ditch is present and can be seen on Lidar images accessed on National Regulatory Viewer (NRV). The linear feature is not consistent along the trail and is not present immediately adjacent past the boundary of the wetland on the north or south side. Lidar images do not show a confined surface path within or near the wetland that could offer a surface water connection to a downstream TNW, specifically to the Bark River. Aerial photos reviewed within the wetland delineation report (2006-2008, 2010, 2014, 2015, 2017, 2018, and 2021) showed wetness signatures within the wetland 4 out of the 10 years reviewed. In the years a wetness signature was seen, it does not continue past the wetland boundary. Wetland F (7,131 square feet) is located on the northern edge of the site, directly abutting a portion of the Glacial Drumlin State Trail at the toe of a steep slope, approximately 2-3 lower than the surrounding landscape to the west and approximately 30 feet lower than the surrounding landscape to the east. There are no culverts or similar structures within or near the wetland, the feature is isolated on the landscape.

Wetland C (227,407 square feet) is located in the southwestern portion of the site and south of Wetland A. The western edge of the feature directly abuts a portion of the Glacial Drumlin State Trail, within a minor depression. There are no culverts or similar structures within or near the wetland, which suggests the

¹ Supporting documentation is presented in Section III.F.

feature is isolated on the landscape. Aerial photos reviewed within the wetland delineation report (2006–2008, 2010, 2014, 2015, 2017, 2018, and 2021) did not show consistent wetness signatures within the area, even in aerials with the leaves off. In the years a wetness signature was seen, it does not continue past the wetland boundary. Ground level photos included in the delineation report did not show standing water within the wetland. Lidar images and topographic maps show a ridge along the southern border of the feature, containing the boundary within the site. Lidar images do not show a confined surface path within or near the wetland that could offer a surface water connection to a downstream TNW, specifically to the Bark River.

Wetland F is within a forested area, in aerial photos reviewed without leaves on the trees, (1941, 1950, 1980, 2000, 2007, 2014, and 2018) no wetness signature can be seen within the wetland. Lidar images and topographic maps do not show a confined surface connection within the wetland that could offer a surface water connection to a downstream TNW, specifically to the Bark River.

These wetlands do not border, neighbor, nor are contiguous with another water of the U.S. They are not separated from other waters of the United States (WOUS) by man-made dikes, barriers, or berms. The surrounding land use consists of scattered residential and industrial development, with undeveloped land consisting of agriculture fields or forested land. Due to their size and position on the landscape, Wetland A and F provide limited habitat functions to WOUS and surrounding areas and provide no ecological connection.

These aquatic resources do not support a link to interstate 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 these aquatic features are not regulated by the Corps under Section 404 of the Clean Water Act.

Wetland B (2,628 square feet) is a linear non-tidal ditch located on the western edge of the site, immediately adjacent to the Glacial Drumlin State Trail, that was constructed in upland and drains only upland. The ditch was cut as part of construction of the recreational trail between 1980 and 1990. In aerial photos reviewed prior to the ditch being cut, specifically in 1941, 1950, and 1970, wetland characteristics, like wetness signatures or differing vegetation than the surrounding landscape, cannot be seen. Additionally, Wetland B is positioned in a topographic depression and does not have relatively permanent flow based on site photos and aerial photos include in the wetland delineation.

In accordance with the 2008 Rapanos guidance and the preamble to the 1986 Corps Regulations (33 CFR Parts 320-330), the Corps does not generally consider the following to be waters of the U.S.; 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 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: **Wetland A: 0.07 acres, Wetland C: 5.2 acres Wetland F: 0.16 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: **Wetland delineation report conducted by Wetland and Waterway Consulting, LLC on October 10, 2021.**
- ☒ 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: **24K USGS Quad Index Topographic Map accessed on Surface Water Data Viewer and Waukesha County GIS Topographic Map included in the referenced report.**
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: **Web Soil Survey included in the referenced report.**
- ☐ National wetlands inventory map(s). Cite name:
- ☒ State/Local wetland inventory map(s): **Wisconsin Wetland Inventory accessed Surface Water Data Viewer included in the referenced report.**
- ☐ FEMA/FIRM maps:
- ☐ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date): **Aerial photos from 1941, 1950, 1963, 1970, 1980, 1990, 2000, 206, 2007-2008, 2010, 2013-2015, 2017, 2018, 2020, and 2021 included in the referenced report.**
- or ☒ Other (Name & Date): **Ground level photos included in the referenced delineation**
- ☐ Previous determination(s). File no. and date of response letter:
- ☐ Applicable/supporting case law:
- ☐ Applicable/supporting scientific literature:
- ☐ Other information (please specify): **Wisconsin DEM and Hillshade Lidar layers accessed on National Regulatory Viewer on February 23, 2023 by the Corps.**

B. ADDITIONAL COMMENTS TO SUPPORT JD: N/A