

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): January 25, 2023

B. ST PAUL, MN DISTRICT OFFICE, FILE NAME, AND NUMBER: 2022-02249-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. 43.0024° N, Long. -88.1426° W

Universal Transverse Mercator: Zone 16N

Name of nearest waterbody: Poplar Creek

Name of watershed or Hydrologic Unit Code (HUC): Poplar Creek (071200060101)

☒ 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: January 9, 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 includes six wetlands, labeled W-1A (846 sq ft), W-2 (215 sq ft), and W-3 (1,384 sq ft), W-4C (9,590 sq ft), W-4D (7,399 sq ft) and W-5 (47 sq ft.) totaling 19,481 sq ft (0.45 acres). These wetlands are non-jurisdictional, based on a review of the February 2022 raSmith 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 the above-mentioned resources, wetlands W-1A, W-2, W-3, W-4C, W-4D, and W-5 are roadside ditch conveyance swales that were constructed in upland.

Wetland W-1A sits at the far west end of the review area. The north/south running portion of W-1A was created incidental to ongoing construction activity according to an October 2021 AJD (2011-02597-AJK). The portion of W-1A in this review area is a roadside ditch conveyance swale that was constructed along Lincoln Ave. sometime prior to 1941. The ditch does not carry relatively permanent flow (based on aerial photos) and was constructed in upland (based on the delineation report and historic aerial images showing a lack of wet signatures) and drains only upland (as shown by the delineation report’s wetland boundaries).

W-2 is a roadside ditch conveyance swale that was constructed, sometime between 1963-70, as part of a driveway improvement to the commercial site that is now Suburban Asphalt. The ditch does not carry relatively permanent flow (based on aerial photos) and was constructed in upland (based on 1) delineation report and historic aerial images showing a lack of wet signatures prior to construction of the driveway, and 2) the soils being predominantly non-hydric in this area) and drains only upland (as shown by the delineation report’s wetland boundaries). No wet signatures are visible within the borders of these wetlands prior to driveway improvements identified between 1963-70.

¹ Supporting documentation is presented in Section III.F.

Wetlands labeled W-3, W-4C, W-4D, and W-5 are roadside ditch conveyance swales that were constructed along Lincoln Ave. sometime prior to 1941. The ditches do not carry relatively permanent flow (based on aerial photos) and were constructed in upland (based on the delineation report and historic aerial images showing a lack of wet signatures) and drain only upland (as shown by the delineation report's wetland boundaries).

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; 1) water-filled depressions created in dry land incidental to construction activities, and 2) 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: 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: **February, 2022 delineation report by raSmith**
- ☒ 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: **New Berlin Quadrangles**
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: **Waukesha County**
- ☒ National wetlands inventory map(s). Cite name: **Viewed on NRV**
- ☒ State/Local wetland inventory map(s): **Wisconsin Wetland Inventory**
- ☐ FEMA/FIRM maps:
- ☐ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date): **Historic aerial photos (1941, 1950, 1963, 1970, 1980, 1990, 2000-2020) viewed on Waukesha County GIS**
 - or ☒ Other (Name & Date): **Ground level site photos from delineation report**
- ☐ Previous determination(s). File no. and date of response letter:
- ☐ Applicable/supporting case law:
- ☐ Applicable/supporting scientific literature:
- ☒ Other information (please specify): **WI DEM and Hillshade layers viewed on NRV, 1-foot contours**

B. ADDITIONAL COMMENTS TO SUPPORT JD: