



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
ST. PAUL OFFICE, EAST BRANCH
332 MINNESOTA STREET SUITE E1500
ST. PAUL MINNESOTA 55101

MVP

December 10, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ MVP-2007-03052-LAH MFR 1 of 1.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland Area 2	Non-Jurisdictional	Exclusionary (b)(5) Artificial Lakes or Ponds

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

- a. Project Area Size (in acres): The review area is about 1.5 acres in size and is identified by the blue polygon in the attached 2007-03052-LAH Figures 1 of 2 through 2 of 2.
- b. Location Description: The project/review area is located in Section 20, Township 21N, Range 17E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.276840 Longitude: -88.468500
- d. Nearest City or Town: Appleton
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):
There are no other JDs associated with the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A

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6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
 - b. The Territorial Seas (a)(1)(ii): N/A
 - c. Interstate Waters (a)(1)(iii): N/A
 - d. Impoundments (a)(2): N/A
 - e. Tributaries (a)(3): N/A
 - f. Adjacent Wetlands (a)(4): N/A
 - g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

⁵ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁶ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷

Wetland Area 2 is an artificial pond created in an undeveloped, shrubby fallow field. The wetland is located centrally within the review area and is surrounded by fallow field to the north, commercial facilities to the west and south, and N Westfield Dr and Highway 41 to the east. The review area is located within a highly developed area of Appleton. Through the review of historic aerial images, wetland indicators such as soil saturation and standing water were not historically present in the Wetland Area 2 prior to commercial development activities to the south occurring around 2007. Additionally, NRCS soil layers show non-hydric soils in the area of this wetland. A wetland concurrence was completed in 2007 including the review area that shows no existing wetland within the area of Wetland Area 2. The delineation report indicates this wetland was excavated in upland to collect and retain water, serving as a stormwater basin for the development to the south. Based on the above factors, Wetland Area 2 is an artificial pond excavated in dry land and therefore is non-jurisdictional and considered a (b)(5) exclusion of the 2023 Rule, as Amended.

- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Office evaluation conducted and completed on December 5, 2024.
 - b. Martenson & Eisele, Inc. Wetland Delineation Report prepared for Furniture Row USA, LLC dated October 26, 2023.

⁷ 88 FR 3004 (January 18, 2023)

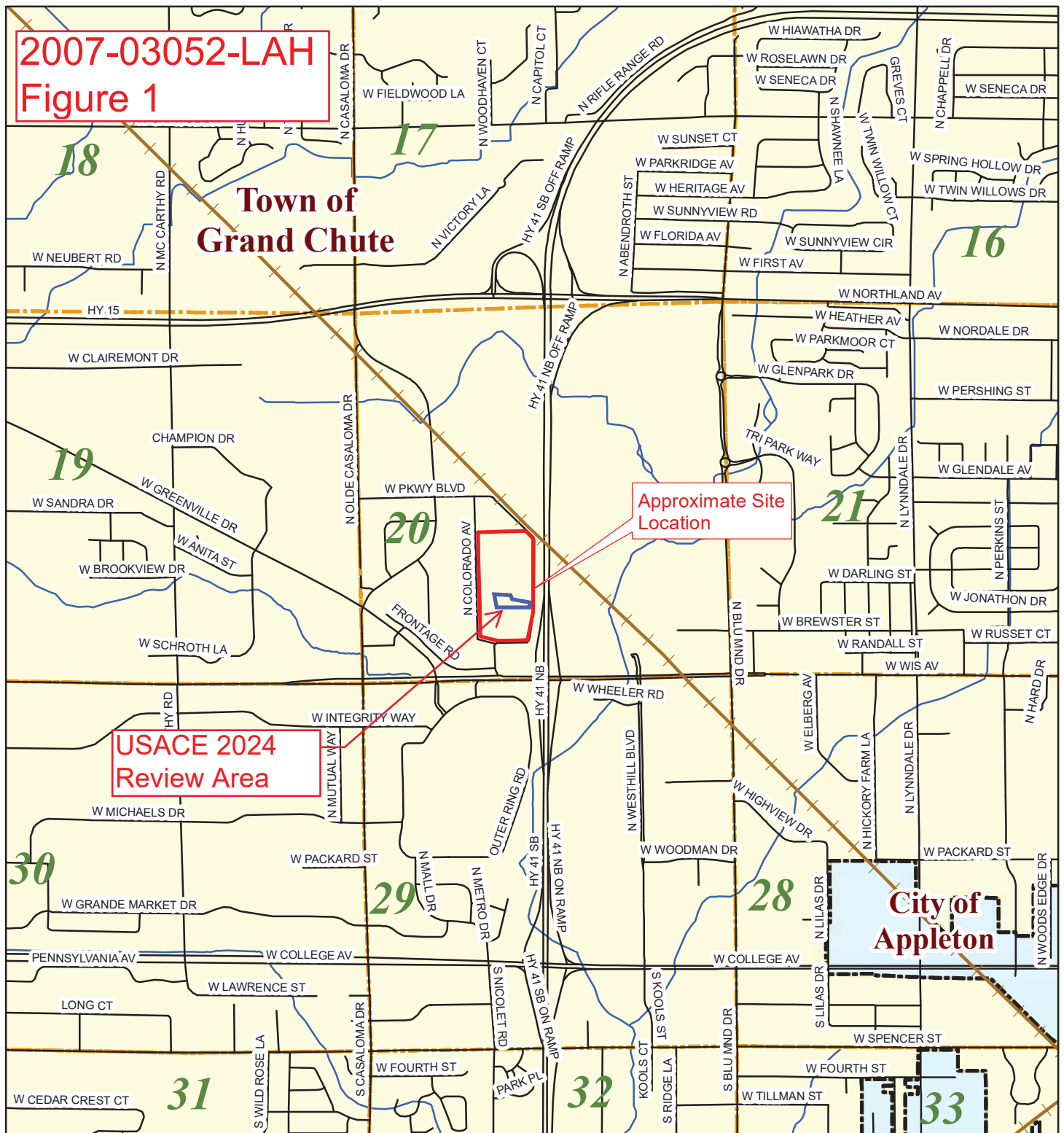
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- c. Mississippi Valley Division NRV, WDNR DEM, Hillshade, and 2-Foot Contour layers LiDAR imagery accessed December 5, 2024.
- d. Google Earth imagery accessed December 5, 2024.
- e. Historic aerial imagery accessed at [HistoricAerials.com](https://www.historicaerials.com) on December 5, 2024.

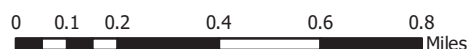
10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Appendix A Project Location Map

1:24,000



The base map was created with data from Outagamie County Development & Land Services Department who in no event assumes any liability regarding fitness of use of the information and any application by others, is the responsibility of the user.
arcgis_outagamie_cnty.mxd_03/11/2024

1480 N Colorado Ave, Appleton, WI
Parcel ID #s 101090500, 101090301
101090300, 101090302 and 101090501
all in Section 20, T21N, R17E
Town of Grand Chute
Outagamie County, Wisconsin

2007-03052-LAH Figure 2



Appendix B

Surveyed Wetland Boundary

1480 N Colorado Ave.
Section 20, T21N, R17E
Town of Grand Chute
Outagamie County, Wisconsin
For: Furniture Row USA, LLC

Legend

- Boring Locations
- Wetlands
- Wetland Line
- Approximate Site Location

WETLAND AREA 1 = 37,094.8 S.F. (4.768 AC)
WETLAND AREA 2 = 36,740.80 S.F. (0.843 AC)
STORMWATER POND = 14,765.92 S.F. (0.337 AC)
SITE LOCATION AREA = 1,169,830 S.F. (26.856 AC)

NOTE: AERIALS ARE NOT TIED TO COUNTY COORDINATES AND PHOTOS ARE APPROXIMATE. (FOR REFERENCE USE ONLY)



Scale 1" = 200'



This base map information was obtained from the Outagamie County Development & Land Services and is intended to be used as a reference. They assume no liability for the accuracy of this map or its use or misuse.

Martenson & Eisele, Inc.

1377 Midway Road
Menasha, WI 54952
www.martenson-eisele.com
info@martenson-eisele.com
920.731.0381 1.800.236.0381
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Environmental
Surveying
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