



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
ST. PAUL DISTRICT OFFICE  
332 MINNESOTA STREET, SUITE E1500  
ST. PAUL MN 55101-1323

CE-MVP-RD

September 27, 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),<sup>1</sup> MVP-2009-01358-CJB, MFR 1 of 1.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> 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.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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.

as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 1. SUMMARY OF CONCLUSIONS.

- 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 A (0.187 acres)	Non-Jurisdictional	N/A
Wetland A-1 (0.195 acres)	Non-Jurisdictional	N/A
Wetland B-1 (0.115 acres)	Non-Jurisdictional	N/A
Wetland D-1 (0.012 acres)	Non-Jurisdictional	N/A

## 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. Review Area Size (in acres): 1.90 acres
- b. Location Description: The project/review area is located in Section 27, Township 22N, Range 22E, Brown County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.34179 Longitude: -87.82155
- d. Nearest City or Town: Denmark
- e. County: Brown
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
N/A	N/A	N/A

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</sup> 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.

<sup>8</sup> 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.

- 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

- 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).<sup>9</sup> N/A
- 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).

The wetlands named Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1, as identified on the attached figures labeled MVP-2009-01358-CJB Figure 2-3 of 3, were determined to be non-jurisdictional wetlands that do not have a continuous surface connection to a jurisdictional water.

Based on review of the wetland delineation reports that were submitted with the JD request, Wetland A and Wetland A-1 are the same wetland that was delineated at different times. Wetland A is the northern portion of this wetland and was delineated October 21, 2023, and Wetland A-1 is the southern portion of this wetland and was delineated April 25, 2024. Therefore, these wetlands were reviewed as one wetland for this JD. Based on the delineation reports that were submitted to the Corps, these wetlands are located near the center of the site. Topographic maps and LiDAR indicate these wetlands are located within a depression with topographic rises on all sides except for the northeast area of Wetland A. To the northeast of Wetland A, similar topography appears to exist;

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

however, based on review of aerial images, street level images, and LiDAR, there does not appear to be any discrete features that would provide Wetland A or Wetland A-1 with discrete conveyance to a downstream water.

Wetland B-1 is located in the southeastern portion of the site, is generally sloped to the southeast, and is bordered by Wisconsin Avenue on its eastern side and a topographic rise on its western side. Based on review of aerial photos and LiDAR, the Wisconsin Avenue roadside ditch has the potential to provide discrete conveyance to the south and outside the review area so that area was also reviewed. The Wisconsin Avenue roadside ditch appears to extend to the south from Wetland B-1 approximately 75 feet until it reaches County Road-R. Based on review of Brown County culvert locations, ground level site photos, and LiDAR, no discrete water conveyance features were observed beyond the Wisconsin Ave and County Road R junction that would provide Wetland B-1 discrete conveyance to a downstream water.

Wetland D-1 is located in the west central area of the site and near the western delineated boundary of Wetland A-1. Based on review of LiDAR and site topography, the area to the southwest of Wetland D-1 has the potential to provide discrete conveyance to the south of Wetland D-1 for approximately 70 feet before reaching the County Road R roadside ditch. This ditch is generally sloped to the southeast continuing for approximately 680 feet until reaching the intersection with Wisconsin Ave. As previously indicated, no discrete features were located at this intersection; therefore, Wetland D-1 does not have a discrete physical connection to a downstream water.

Based on review of the wetland delineation reports and landscape position depicted in aerial imagery, Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1 are not TNWs, territorial seas, or interstate waters; therefore, these waters are not category (a)(1) waters. These wetlands are not tributaries and have not been created by impounding a water of the U.S.; therefore, these wetlands are not category (a)(2) or (a)(3) waters. Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1 do not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule, and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform, and are not connected to a paragraph (a)(1) or relatively permanent water by a discrete feature. Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1 are non-tidal wetlands that do not have a continuous surface connection to a relatively permanent jurisdictional water and as such does not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetlands. Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1 are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as an (a)(5)

waters: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, Wetland A, Wetland A-1, Wetland B-1, and Wetland D-1 are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

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, September 23, 2024
  - b. Wetland Delineation Report, Bates Soil & Water Testing Services, LLC., dated October 21, 2023
  - c. Wetland Delineation Report, Bates Soil & Water Testing Services, LLC., dated April 25, 2024
  - d. BrownDog Culverts Layer, Brown County WI GIS, accessed September 23, 2024
  - e. USACE National Regulatory Viewer, Layers to include 3DEP 2-ft Contour, 3DEP Digital Elevation Model, 3DEP Hillshade, WI DNR Imagery – Latest Leaf Off, and WI 24k Hydro Flowlines Stream Order, accessed September 23, 2024
  - f. Google Earth Street View Images, accessed September 23, 2024

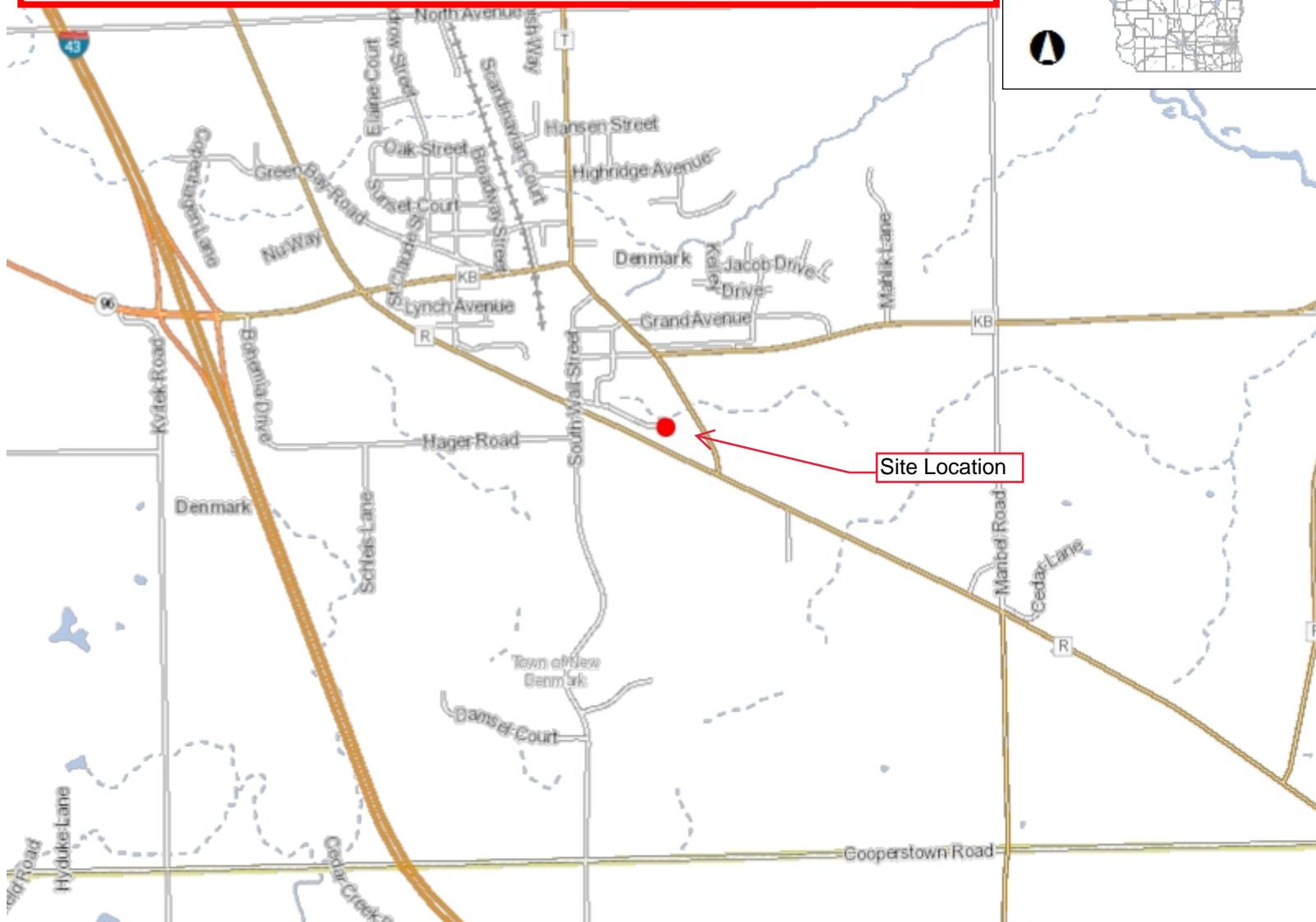
10. OTHER SUPPORTING INFORMATION. N/A

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.



# Surface Water Data Viewer Map

MVP-2009-01358-CJB Figure 1 of 3



## Legend

- Municipality
- State Boundaries
- County Boundaries
- Major Roads
  - Interstate Highway
  - State Highway
  - US Highway
- County and Local Roads
  - County HWY
  - Local Road
- Railroads
- Tribal Lands
- Rivers and Streams
- Intermittent Streams
- Lakes and Open water

0.8 0 0.38 0.8 Miles

NAD\_1983\_HARN\_Wisconsin\_TM

1: 23,760

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

## Notes



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## LEGEND:

- = BORING TEST PIT
- = AREA OF INTEREST
- = EXISTING WETLANDS
- ♦ = CULVERTS



## CAROW LAND SURVEYING CO., INC.

615 N. LYNNDAL DRIVE, P.O. BOX 1297  
APPLETON, WISCONSIN 54912-1297  
PHONE: (920)731-4168 FAX: (920)731-5673

SCALE
1" = 200'
DRAWN BY
AW
PROJECT NO.
A2305.101-23



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