



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

MVP

February 12, 2025

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> 2016-04212-RJH [[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.

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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).

- |                                                |                                                  |
|------------------------------------------------|--------------------------------------------------|
| 1. South Amended-Wetland 1<br>(4,320 sqft)     | 10. South Original – Wetland 20<br>(10,591 sqft) |
| 2. South Amended- Wetland 2<br>(12,183 sqft)   | 11. North Wetland 1 (6,107 sqft)                 |
| 3. South Amended- Wetland 3<br>(22,548 sqft)   | 12. North- Wetland 5 (913 sqft)                  |
| 4. South Original- Wetland 3 (4,570<br>sqft)   | 13. North-Wetland 4 (1918 sqft)                  |
| 5. South Original- Wetland 6 (402<br>sqft)     | 14. North -Wetland 6 ( 10,755 sqft)              |
| 6. South Original- Wetland 10<br>(24,122 sqft) | 15. North -Wetland 7 (10,432 sqft)               |
| 7. South Original – Wetland 12<br>(4,528 sqft) | 16. Site A- Wetland 4 (1,461 sqft)               |
| 8. South Original-Wetland 18<br>(3,192)        | 17. Site A- Wetland 1 (1,730 sqft)               |
| 9. South Original -Wetland 19<br>(2,596 sqft)  | 18. Site B- Wetland 1 (4,424 sqft)               |
|                                                | 19. Site B- Wetland 2 (1,175 sqft)               |
|                                                | 20. Site B -Wetland 3 (1,293 sqft)               |
|                                                | 21. Site B- Wetland 4 (1,597 sqft)               |
|                                                | 22. Site B- Wetland 5 (2,422 sqft)               |
|                                                | 23. Site B- Wetland 6 (1,059 sqft)               |
|                                                | 24. Site B-Wetland 7 (1,285 sqft)                |
|                                                | 25. Site B- Wetland 8 (5,332 sqft)               |

## 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)
- d. Memorandum on NWP-2023-602
- e. Memorandum on NWP-2023-923

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3. REVIEW AREA.

- a. Project Area Size (in acres): 290
- b. Location Description: The project/review area is located in Section 12, Township 021N, Range 017E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.304489 Longitude: -88.387793
- d. Nearest City or Town: Appleton
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

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

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

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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>7</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

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<sup>6</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>7</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.

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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

- 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>8</sup>

We have reviewed and evaluated the historical photography (1938-present), Google Earth photography, soil mapping, and the Wetland Delineation report submitted by the applicant for the following wetlands:

South Amended-Wetland 1 (4,320 sqft)  
South Amended- Wetland 2 (12,183 sqft)  
South Original- Wetland 3 (4,570 sqft)  
South Original- Wetland 6 (402 sqft)  
South Original -Wetland 19 (2,596 sqft)  
Site B- Wetland 1 (4,424 sqft)

Site B- Wetland 2 (1,175 sqft)  
Site B -Wetland 3 (1,293 sqft)  
Site B- Wetland 4 (1,597 sqft)  
Site B-Wetland 7 (1,285 sqft)  
North -Wetland 6 (10,758 sqft)  
North-Wetland 4 (1,918 sqft)  
Site B – wetland 8 (5,338 sqft)  
Site B- Wetland 6 (1,059 sqft)

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

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Site A- Wetland 4 (1,461 sqft)

Site A- Wetland 1 (1,730 sqft)

Prior to construction of the current Thrivent building (approximately 1980), it appears many of these ditches were constructed prior to 1938 and then regraded periodically until 1970. Additional ditches were cut between 1970 and 1980 to accommodate the construction of the current Thrivent building, including an expansion of the stormwater ponds and drainage ways connecting to a unnamed tributary to Apple Creek. 'South amended Wetland 1' is a feature that was constructed in uplands and has been labeled as a tributary, in the WDNR Surface Water Data Viewer, however historic imagery indicates this was originally a ditch in uplands and has since, not been maintained and no longer has tributary characteristics. Based on evaluation of the available data, lack of wetland signatures in historical aerials, and the lack of hydric soils surrounding the above listed wetland areas, we have determined that these wetlands are ditches that were excavated wholly in and draining only dry land and do not carry a relatively permanent flow of water. The resources listed above are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States': Conforming" 88 FR 61964 Final Rule.

- 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).

We have reviewed and evaluated the historical photography, Google Earth photography, soil mapping, and the Wetland Delineation report submitted by the applicant for the following wetlands:

South Original-Wetland 18  
(3,192 sqft)  
South Original – Wetland 20  
(10,591 sqft)  
South Amended- Wetland 3  
(22,548 sqft)  
North Wetland 1 (6,107 sqft)

Site B- Wetland 5 (2,422 sqft)  
North- Wetland 5 (913 sqft)  
North -Wetland 7 (10,432 sqft)  
South Original – Wetland 12  
(4,528 sqft)  
South Original- Wetland 10  
(24,122 sqft)

Review of the Digital Elevation Model layer of the National Regulatory Viewer indicate that these wetland features do not have any discrete or confined conveyance features connecting them to a relatively permanent water. Minor excavations associated with past farming practices and

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previous grading activities have separated these resources from any relatively permanent water. Lidar imaging indicates the presence of a berm between Wetland 3 and the ponds, severing any hydrologic connection. Additionally, lidar review indicates a swale is present along N. Baird Road which intersects with 'South Original -Wetland 10', Google street level photos indicates that Apple Creek Trail severs connection to the tributary north of the trail. Old drain tile network has been found within the review area and present within some of the above wetlands, however connection from this drain tile network to a RPW is untraceable and no continuous connection is present. Per the information presented in Memorandum NWP-2023-602, subsurface flows that have multiple laterals and more than minor subsurface interruption do not qualify as a continuous surface connection.

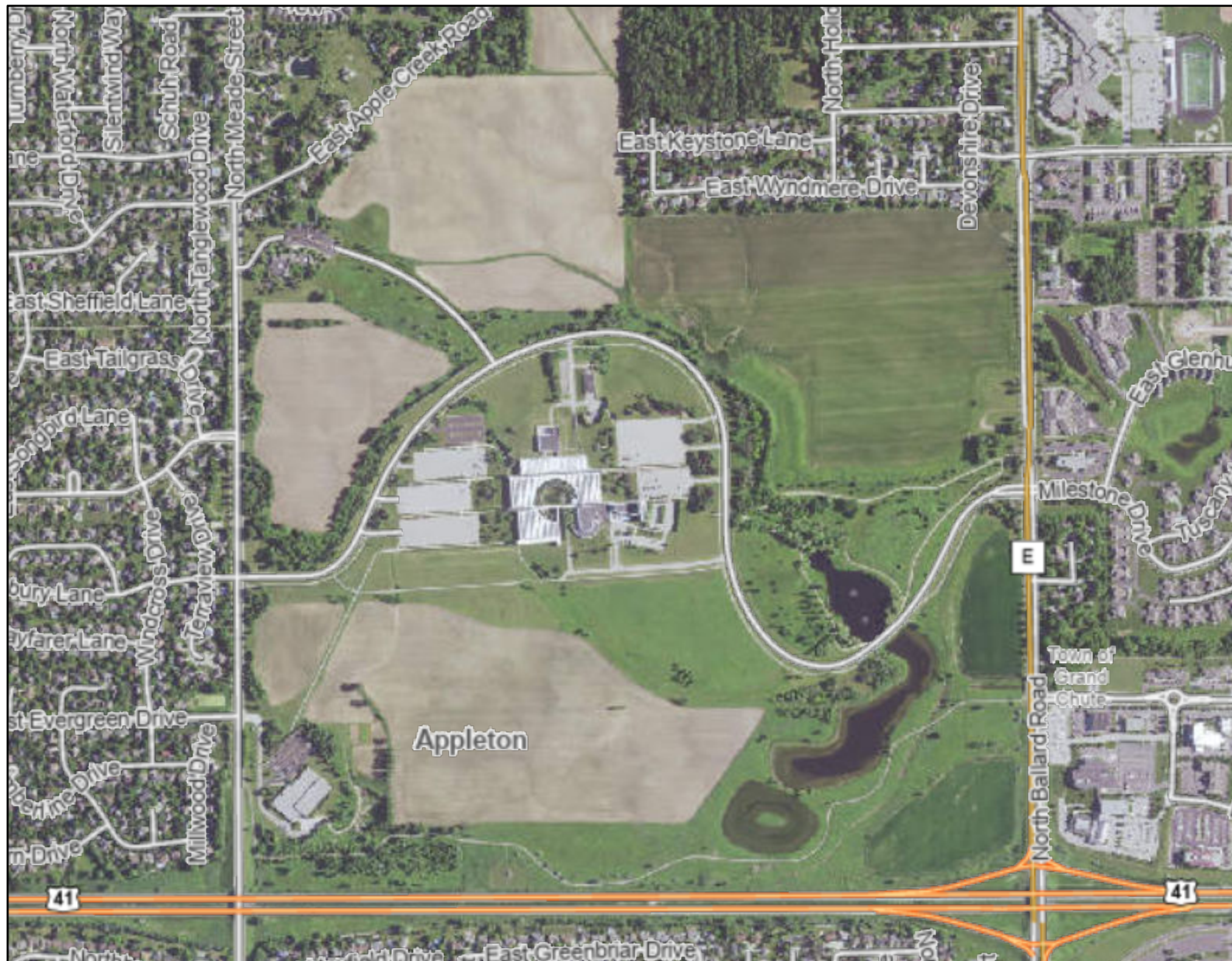
The wetlands listed under 8.b are not TNW, territorial seas, or interstate waters and therefore are not (a)(1) waters. The wetlands are depressional, surrounded by uplands. These wetlands do not extend to any tributaries and are not drained by any discrete/confined surface water conveyances. The wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform.

The review area for 'South Original -Wetland 18' is approximately 953 linear feet north of an unnamed tributary of Apple Creek. There are no ditches, swales, pipes, or culverts present within the wetlands that connect to downstream jurisdictional waters. The wetlands listed under 8.b are non-tidal wetlands that do not have a discrete continuous surface water connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands; therefore, the wetlands listed under 8.b 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. [\[Office evaluation conducted 12 February 2025\]](#)





### Legend: (some map layers may not be displayed)

- City or Village
- County Boundaries
- Major Roads
  - US Highway
- County and Local Roads
  - County HWY
  - Local Road
- Latest Leaf On Imagery
- City or Village
- County Boundaries
- Major Roads
  - US Highway
- County and Local Roads
  - County HWY
  - Local Road

### Notes:



Map: 0 920 1,840 Feet  
0 270 540 Meters

Service Layer Credits:  
EN Basic Basemap WTM Ext: , 2022 Leaf On: , Cities, Roads & Boundaries:

Map projection: NAD 1983 HARN Wisconsin TM

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- b. [[National Regulatory Viewer – USA Soils Hydric Class layer](#), [National Wetland Inventory layer](#), [Hillshade layer](#) and [DEM layer](#) accessed on 12 February 2025]
- c. [[Wetland Delineation Report](#), Prepared by Evergreen Consultants LLC Dated October 2024]

10. OTHER SUPPORTING INFORMATION. NA

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.