



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

MVP

31 May 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-2019-02139-JLK 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 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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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).
 - i. Wetland 3 (0.04 acre), non-jurisdictional
 - ii. Wetland 4 (0.06 acre), non-jurisdictional
 - iii. Ditch 1 (0.04 acre), non-jurisdictional
 - iv. Ditch 2 (0.01 acre), non-jurisdictional

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. There are four review areas identified by the yellow polygons on the attached Figure 2. The review areas are located at or near 44.21931 N, -88.35520 W in the Village of Harrison, Calumet County, Wisconsin. There are no other JDs associated with these review areas.

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

6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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.

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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

- 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

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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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷

Based on a review of the wetland delineation report and historical aerial photos provided via Google Earth Pro, Ditches 1 and 2 meet the definition of a category (b)(3) exclusion for ditches excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. Aerial photos show Ditch 1 traverses south to north approximately 50 feet where it then makes a 90-degree turn heading east approximately 80 feet where it transitions to uplands. Aerial photos also show Ditch 2 extends towards the west away from a wetland outside of the review area where the ditch then makes a 90 degree turn to the south. Historical aerial photos show both ditches were constructed sometime before 1953, to provide drainage between two agricultural fields to the west and east, and residential development to the north. Further review of historical aerial photos demonstrates a lack of wet signatures and other wetland indications (standing water, repeated vegetation stress, etc.) in the location of Ditches 1 and 2, suggesting these areas were uplands prior to construction. Additionally, the Wisconsin Surface Water Data Viewer indicates no mapped wetlands within the footprint of the ditches. Therefore, Ditches 1 and 2 are not jurisdictional under the 2023 Revised Definition of “Waters of the United States”: confirming 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).

Wetlands 3 and 4 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Topographic maps and Google Earth aerial imagery indicates these wetlands are depressional wetlands, surrounded by uplands. They 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. Wetland 3 is in a forested area approximately 30 feet west of a ditch running north to south. However, the delineation report shows the area between Wetland 3 and this ditch are uplands. Additionally, further review of Lidar data does not indicate any evidence suggesting a hydrological surface connection is present. The delineation report shows Wetland 4 is in the west/central portion of an actively farmed agricultural field. Further review of aerial photos and Lidar data shows no wet signatures or

⁷ 88 FR 3004 (January 18, 2023)

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other evidence displaying a hydrological surface connection is present. The review areas are approximately 0.32 miles north of the nearest tributary. There are no ditches, swales, pipes, or culverts that connect Wetlands 3 and 4 to downstream jurisdictional waters. These wetlands are non-tidal wetlands that do not have a continuous surface 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, Wetlands 3 and 4 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.

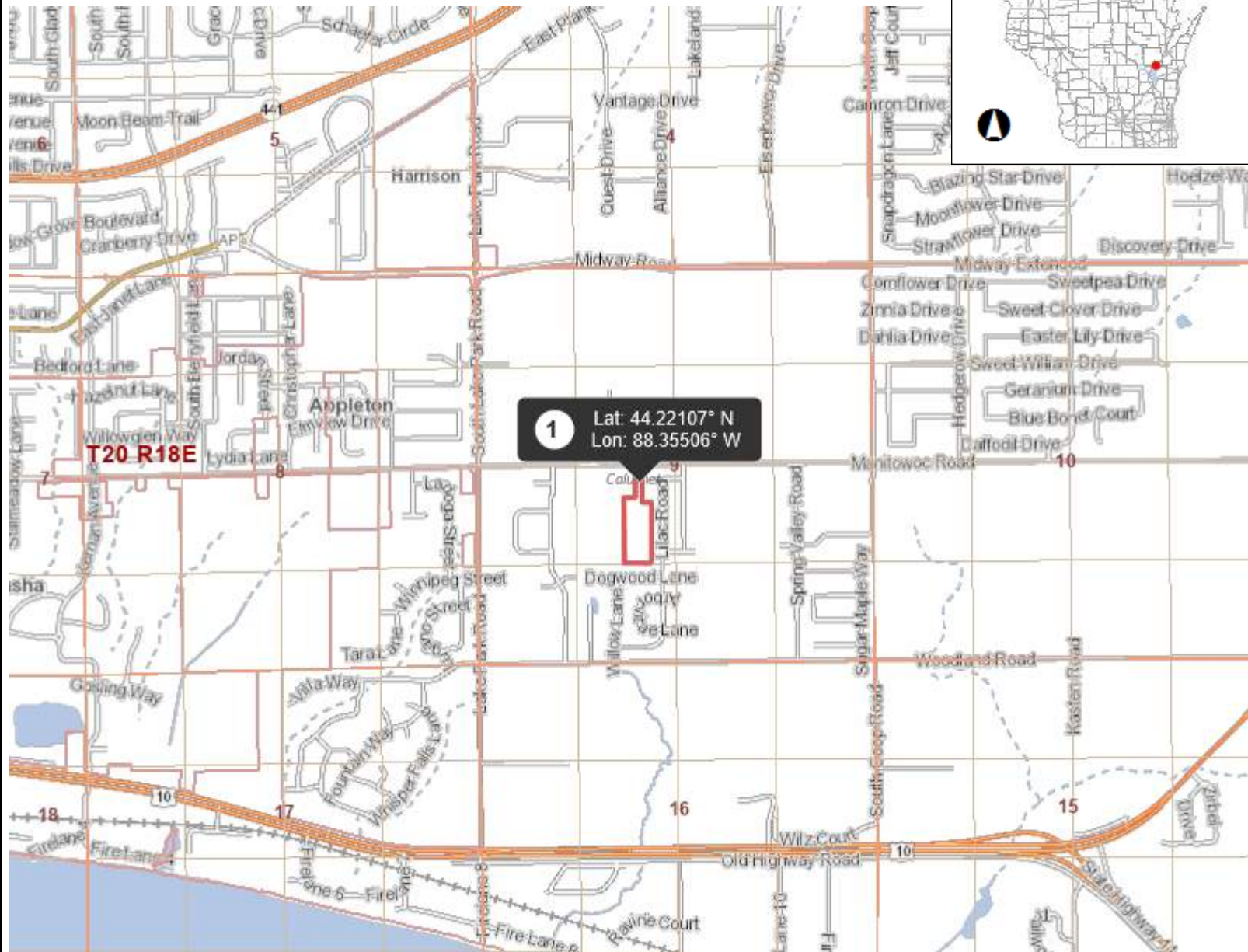
- a. Office evaluation conducted on May 14, 2024.
- b. Gohl Property – Parcels 33408 & 33418, Village of Harrison, Calumet County Wetland Delineation Report prepared by Davel Engineering & Environmental, dated March 20, 2024.
- c. National Regulatory Viewer-Lidar Data assessed on May 14, 2024.
- d. Site visit completed May 29, 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



Legend

- Township
- Section
- Quarter-Quarter
- County Boundary
- Cities, Towns & Villages
 - City
 - Village
 - Civil Town
- 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

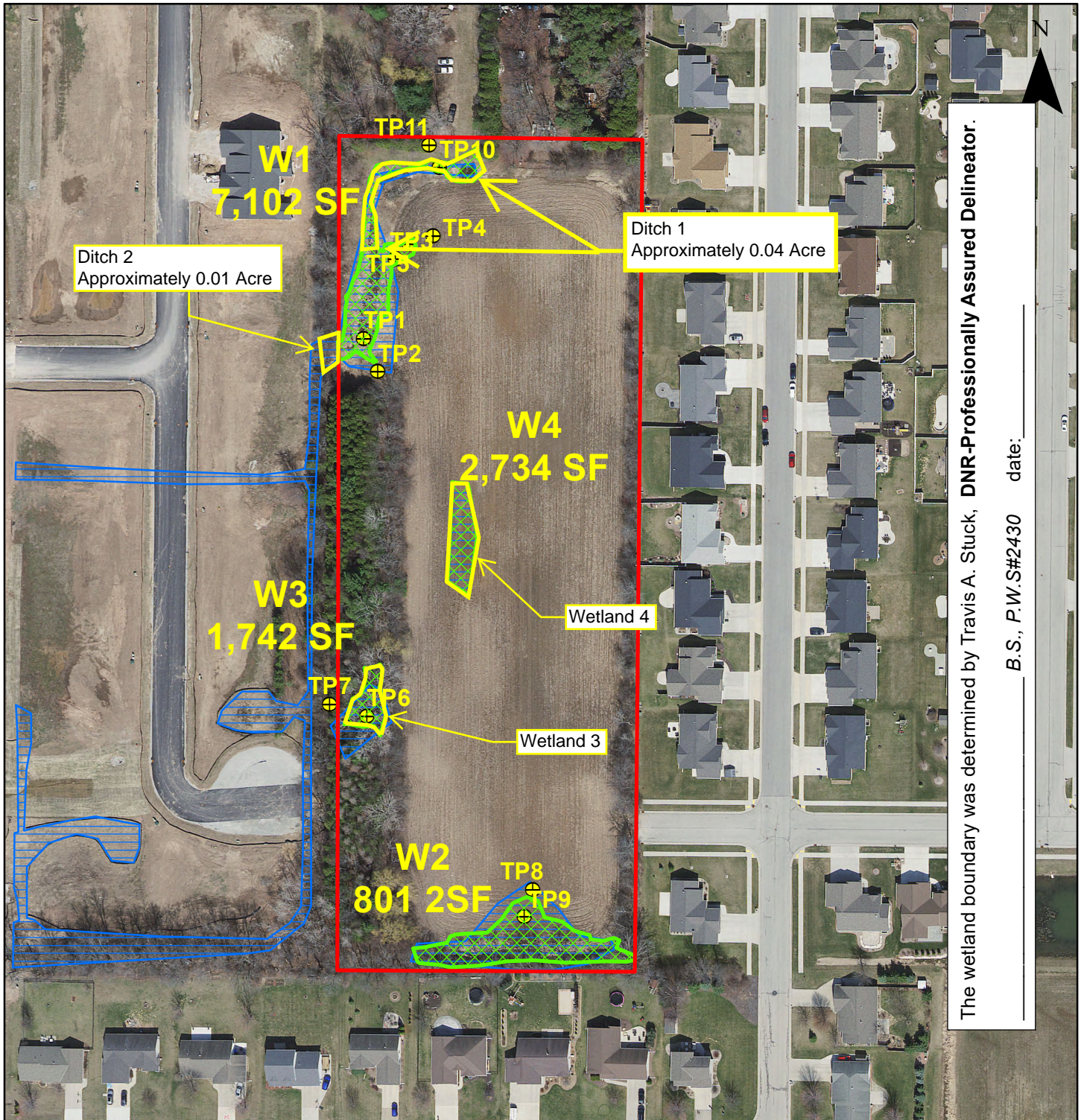
Routine Wetland Delineation Overview Map (2024)

Gohl Property

Part of Sec. 9, T21N, R18E, Village of Harrison, Calumet County, WI

For: Kent Gross

2021 Aerial



The project scope limits shown on this map is not intended to be the parcel boundary.

Legend

- Project Scope
- 2024 Wetland Boundary
- Test Plots (2024)
- Wetland- McMahon (expired)



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