



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

CE-MVP-RD

30 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-2019-02289-CJB, MFR 1 of 1²

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.³ 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.⁴

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),⁵ the 2023 Rule as amended,

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2019-02289-CJB

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).
 - i. Wetland 1 (0.12 acre), non-jurisdictional
 - ii. Wetland 3 (0.05 acre), non-jurisdictional
 - iii. Wetland 7 (0.10 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. The review area for this JD request is approximately 2.5 acres in size and is identified on the figure labeled 2019-02289-CJB Figure 2. The center of the review area is located at 44.44342, -87.91089, Town of Bellevue, Brown County, Wisconsin. 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.⁶ N/A

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

⁶ 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.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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.

- 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).⁹ 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 review area contains three wetlands identified as Wetland 1 (0.12 acre), Wetland 3 (0.05 acre), and Wetland 7 (0.10 acre) on the figure labeled 2019-02289-CJB Figure 2. Based on review of the wetland delineation report that was submitted with the JD request, these wetlands are located within an agricultural field with the topography at the site generally sloping to the south. An unnamed tributary to Spring Creek is located near the eastern boundary of the review area.

Wetland 1 is situated near the northern boundary of the review area. The STH 29 roadway ditch is located approximately 20 feet to the north of Wetland 1, so desktop resources were reviewed for a potential connection between Wetland 1 and the ditch. Based on review of LiDAR using Hillshade and Digital Elevation Models (DEM), and aerial photography, a topographic break appears to be located between Wetland 1 and the ditch and there does not appear to be a discrete connecting feature that would connect Wetland 1 to the ditch. Any exchange of hydrology between Wetland 1 and the ditch would likely be through overland sheet flow. Wetland 1 is also located approximately 175 feet to the northwest of the unnamed tributary. After further review of Hillshade, DEM, and aerial photos, no discrete features were observed along the exterior boundary of Wetland 1 that would provide this wetland with a continuous surface connection to the unnamed tributary or to any other downstream water.

Wetland 3 is situated near the southern boundary of the review area with a ditch feature located approximately 40 feet to the south and the unnamed tributary located approximately 50 feet to the east. Desktop resources were reviewed for potential discrete connections to these features. The wetland delineation report indicated the Wisconsin Department of Natural Resources Surface Water Data

⁹ 88 FR 3004 (January 18, 2023)

Viewer was identifying an aquatic resource that flows through the southeast corner of the review area and within Wetland 3. However, this does not appear to reflect current Surface Water Data Viewer mapping or current site conditions. Current Surface Water Data Viewer mapping does not indicate the presence of an intermittent stream within the review area and site photos from the delineation report do not identify a potential intermittent stream in or near Wetland 3. Based on review of historic Google Earth aerial photos, sometime around 2006 the unnamed tributary appears to have been diverted south. Based on current site conditions, the unnamed tributary appears to be located approximately 50 feet to the east of Wetland 3 and does not appear to be located within the review area. Based on review of Hillshade and aerial photography, no discrete features were observed that would provide Wetland 3 a continuous surface connection to the ditch to the south, the unnamed tributary to the east, or to any other downstream jurisdictional water. The DEM layer does indicate Wetland 3 has similar elevations with uplands immediately to the east of Wetland 3. However, no discrete water conveyance features were observed within the upland area immediately to the east of Wetland 3. Therefore, any exchange of hydrology from Wetland 3 through the upland area immediately to the east of Wetland 3 would likely be through overland sheet flow and would not be discrete conveyance.

Wetland 7 is located near the center of the review area approximately 170 feet to the west of the unnamed tributary. Based on review of LiDAR and aerial photos, no discrete features were observed that would provide Wetland 7 with a continuous surface connection to the unnamed tributary or to any other downstream jurisdictional water. Based on review of DEM and site topography, it appears there is the potential for Wetland 7 to have an exchange of hydrology to the south with Wetland 3. However, as previously indicated, Wetland 3 did not appear to have a continuous surface with a downstream jurisdictional water. Therefore, any exchange of hydrology between Wetland 3 and Wetland 7 would not result in a continuous surface connection with a jurisdictional water.

Based on review of the wetland delineation report and landscape position depicted in aerial imagery, Wetland 1, Wetland 3, and Wetland 7 are not TNWs, territorial seas, or interstate waters; therefore, Wetland 1, Wetland 3, and Wetland 7 are not category (a)(1) waters. Wetland 1, Wetland 3, and Wetland 7 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. These wetlands do not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule, 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 1, Wetland 3, and Wetland 7 are non-tidal wetlands that do not

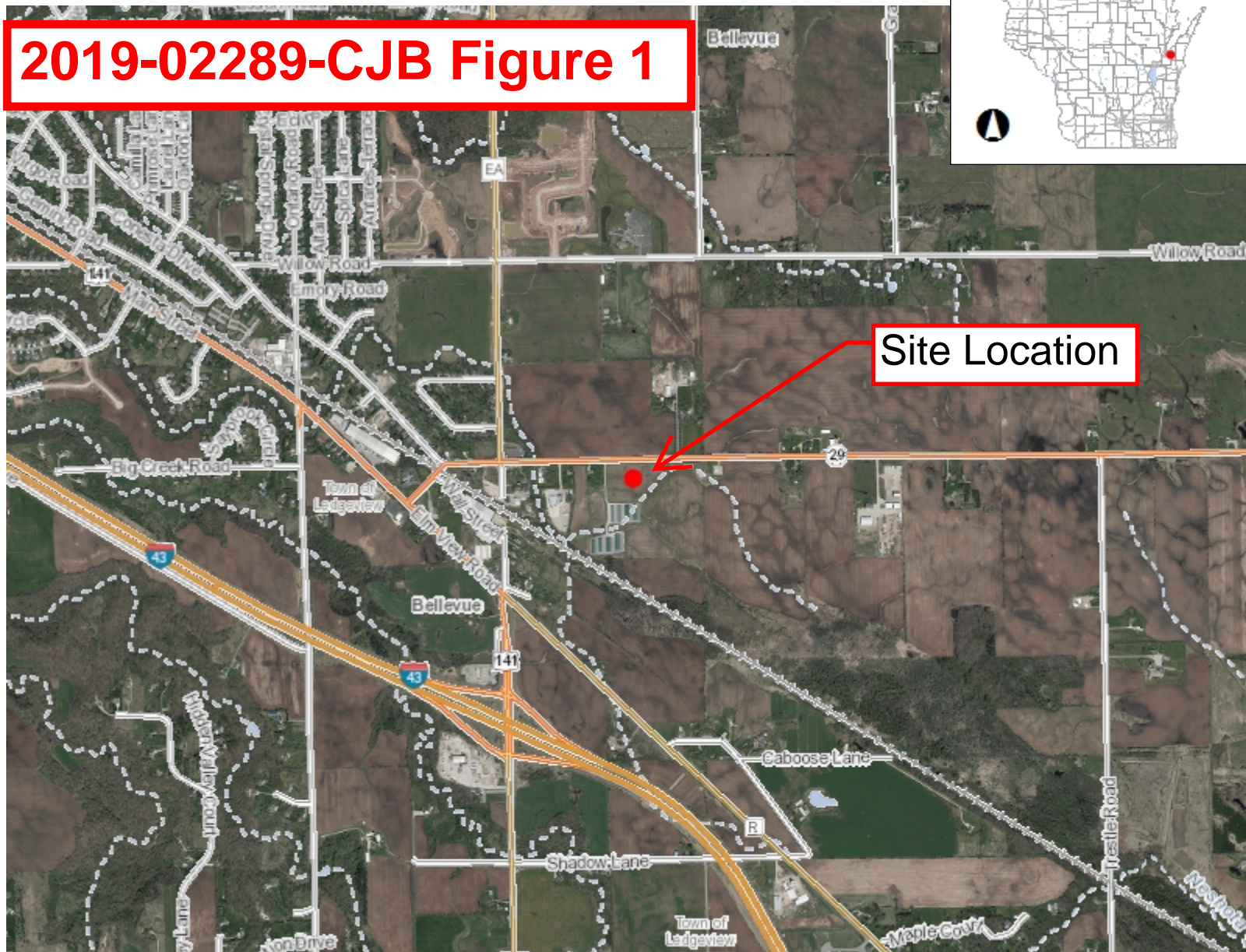
have a continuous surface connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands. Wetland 1, Wetland 3, and Wetland 7 are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as (a)(5) waters: lakes and ponds not identified in (a)(1) – (a)(4). Therefore, Wetland 1, Wetland 3, and Wetland 5 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 May 16, 2024
 - b. Hillshade, DEM, and 24K Hydro Flowlines Layers, USACE Wisconsin Regulatory Viewer, May 17, 2024
 - c. Wetland Delineation Report, George & Holdt LLC, Dated October 30, 2023
 - d. Google Earth Aerial Images from 2005 and 2006
 - e. Wisconsin Department of Natural Resources Surface Water Data Viewer, May 21, 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

2019-02289-CJB Figure 1



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

2019-02289-CJB Figure 2

This aerial map illustrates a 30-acre project area, outlined in black, situated near S.T.H 29 and Delmar Lane. The map features several wetland areas, each identified by a number and its corresponding area in square feet or acres. An intermittent stream is shown flowing through the site, with its course determined by surface water data. A specific region is highlighted as the 'AJD Review Area' with a red outline and arrow. The map also shows surrounding land parcels owned by various entities, including Kropp Properties LLC, Greatens Gale A & Patricia D Revocable Trust, Lefevre R J & Co LLC, Kewaunee Development LLC, Pleasant Valley Properties of Wisconsin LLC, and Town & Country Storage LLC. The project area is labeled 'B-D110'.

Wetland ID	Area
Wetland #1	5112 Sq Ft
Wetland #2	1.74 Ac
Wetland #3	2117 Sq Ft
Wetland #4	6248 Sq Ft
Wetland #5	0.89 Ac
Wetland #6	0.46 Ac
Wetland #7	4141 Sq Ft

Project Area: 30 Ac.

Intermittent Stream: Per Surface Water Data Viewer

AJD Review Area: (Red outline)

Surrounding Land Owners:

- KROPP PROPERTIES LLC
- GREATENS GALE A & PATRICIA D REVOCABLE TRUST
- LEFEVRE R J & CO LLC
- KEWAUNEE DEVELOPMENT LLC
- PLEASANT VALLEY PROPERTIES OF WISCONSIN LLC
- TOWN & COUNTRY STORAGE LLC

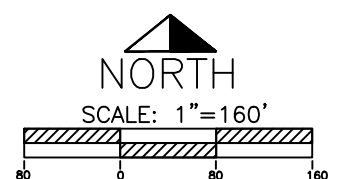
Map Labels:

- S.T.H 29
- Delmar Lane
- B-D110

Key

● Transect Point

Wetland Boundary



DAVID A. GEORGE

AARON HOLDT

Kewaunee Road Development
3255 Yaeger Drive
Green Bay, WI 54311

Town & Country Storage
1855 Cottonwood Court
De Pere, WI 54115

Tax Parcel # B-D113-1, B-D110
NE,NE,S26,T23N-R21E
Village of Bellevue
Brown County

Site Location: 3455 Delmar Lane