

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

MVP

March 16, 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-2021-01709-TKO 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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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 (W-1), non-jurisdictional (1.39-ac. Lat/Long:43.3703, -88.1511)
 - ii. Wetland 2 (W-2), non-jurisdictional (0.07-ac. Lat/Long:43.3723, -88.1507)
 - iii. Wetland 2a (W-2a), non-jurisdictional (0.38-ac. Lat/Long: 43.3731, -88.1546)
 - iv. Wetland 3 (W-3), non-jurisdictional (0.55-ac. Lat/Long: 43.3722, -88.1522)
 - v. Wetland 10 (W-10), non-jurisdictional (0.02-ac. Lat/Long: 43.3714, -88.1543)
 - vi. Wetland 15/1a (W-15/1a), non-jurisdictional (2.35-ac. Lat/Long: 43.3711, -88.1537)

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 is approximately 37 acres in size and is located northeast of the intersection of South River Road and County Highway NN in the City of West Bend. The review area sits within an actively cropped agricultural field, and adjacent woodland, and is identified by a red polygon on the attached Figures 1 5 of 5. There are no other JDs associated with the review area. Two (2) delineations were conducted for separate portions of the review area. The northern portion of W-15/1a and W-2a were the subjects of the second delineation and are identified in the attached figures. The review area is located in Section 31, Township

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11 N, Range 20 E, Washington County, WI. See attached figures, labeled 2021-01709-TKO Figures 1-5 of 5. HUC: Jackson Marsh State Wildlife Area-Cedar Creek (040400030303). Lat/Long:43.3715, -88.1547

- NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [N/A]
- 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.

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.

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.

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- 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).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).

Wetlands W-1, W-2, W-2a, W-3, W-10, and W-15/1a are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Review of June and August 2020 Evergreen Consultants delineation reports, Google Earth and historic aerial images, Washington County GIS, and LiDAR (hillshade and DEM) GIS layers (from the Mississippi Valley Division Regulatory Viewer) indicate that wetlands W-1, W-2, W-2a, W-3, W-10, and W-15/1a are depressional wetlands, surrounded by upland. These 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 assessed wetlands range in distances of approximately 1,100 to 2,300 feet from the closest tributary (Unnamed Tributary

⁹ 88 FR 3004 (January 18, 2023)

to Evergreen Creek) to the south. However, there are no ditches, swales, pipes, or culverts that connect these wetlands to downstream jurisdictional waters. WWI and NWI have this intermittent stream mapped running northwest to southeast through Wetland 15/1a and exiting the review south towards Cty Hwy NN. However, the delineation report does not identify this feature, and has classified this area outside of the delineated wetland boundaries as upland. This has been confirmed by several upland sample points and the lack of bed and bank characteristics observed in aerial photos. The report states the feature may have possessed stream history, but W-15/1a has since been channelized and drained by tile. Based off review of the above-mentioned material, this feature appears to be a low gradient depressional swale, and does not exhibit bed and bank characteristics until approximately 1,500 feet down slope from the delineated boundary of W-15/1a.

Wetland 1 is a forested wetland located within a (NE-SW running) depressional area in the southeast of the review area. Wetland boundaries transition to delineated upland in all directions. Review of the delineation report, WWI, and NWI shows a small portion of the wetland extends offsite to the northeast. Review of aerial images, contours, and LiDAR shows an identifiable drainage feature extending from the southwest boundary of the wetland. This swale continues for approximately 120 feet where drainage then widens into an upland depressional area approximately 0.4 acres in size. A discrete feature extends from the northwest portion of this depressional area, though it does not serve as a continuous surface connection to downstream waters. Topography within this low gradient depressional area slopes up for approximately 85 feet exiting the wetland before continuing downslope to the southwest. Flow through this area would be overland sheet flow.

Four wetlands (W-2, W-2a, W-3, and W-10) sit within the agricultural field northwest of Wetland 1. Topography in this area generally slopes down to the south-southwest. Each wetland sits in a slight depression with boundaries that follow topographic breaks within the depressions. W-2a sits in the northern portion of the review area. A lobe of the wetland extends to the southeast where topography slopes down. Various years of aerial imagery show periodic wetness signature extending through this area though it is delineated as upland and review of contours and LiDAR show no continuous surface connections extending beyond the delineated boundary. Review of aerial images and LiDAR shows a discrete drainage feature running northeast to southwest through the field, southwest of W-3 and east of W-10. This feature does not have a continuous surface connection to any of the wetlands. Review of the delineation reports (including ground level photos) indicate all wetland boundaries transition to uplands in all directions, while aerial and ground level images along with LiDAR show no continuous surface connections from any of these wetlands to downstream waters.

Wetland 15/1a sits within a depressional swale in the western portion of the review area. Portions of this wetland have been identified in both delineation reports by different names (Northwest portion in June 20'=W-1a, Southeast portion in August 20'=W-15). The single aquatic resource is split by parcel boundaries and will be identified as Wetland 15/1a (W-15/1a) in this AJD. The wetland is bound at the northwest by fill material from South River Road, and boundaries transition to uplands on the southwest and northeast boundaries as topography slopes up in both directions. Fill material from a storm water pond bounds the wetland to the north. Review of contours and LiDAR shows topography sloping down from the northwest. Review of aerial and ground level photos shows culverts/pipes entering the wetland at the northwest and along the boundary with the retention pond. These connections serve as hydrologic inlets as they drain into the wetland. As the wetland continues to the southeast, the swale widens, losing definition and wetland characteristics as hydric soils and hydrology are no longer observed (data point T8B). Topography continues to slope down to the southeast, exiting the review area through a low gradient depressional area. Water conveyance from the wetland to any downstream waters would be via overland sheet flow as no discrete feature is evident that would serve as a continuous surface connection, as indicated by review of aerial and ground level imagery, contours, and LiDAR layers.

The above-mentioned wetlands are non-tidal wetlands that do not have continuous surface connections to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetlands. The wetlands 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, the wetlands 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. No field visits were conducted. Desktop review evaluation was conducted on 02/26/2024.
 - b. AJD Application "2021-01709-TKO 20240104 APP.pdf" in the administrative record.

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- c. Mississippi Valley Division Regulatory Viewer, 02/26/2024.
- d. Wisconsin DNR Surface Water Data Viewer, 02/26/2024.
- e. Washington County GIS Interactive Mapping, 02/26/2024.
- 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.





Legend Site Boundary • Tile Outlet Wetland Line - Culvert Wetland & Pond O Culvert - Pond Tile Break Parcels

West Bend Business Park TID 14 - Phase 3 Wetland Delineation Map (Overall) County Highway NN City of West Bend Washington County, WI

Project: WSH20-010-01

Wetland Delineation was conducted by Chad Fradette, EP, Chem, WDNR Professionally Assured Wetland Delineator with assistance from Benjamin LaCount, PLS, Wetland Scientist, WDNR Professionally Assured Wetland Delineator and Shyann Banker, Environmental Specialist.

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Legend	West Bend Business Park TID 14- F
Site Boundary	Wetland Delineation Map
Wetland Line	County Highway NN
Parcels	City of West Bend
★ Sample Point	Washington County Wiscons
Picture Location	
Wetland Delineation was conducted by Chad Fradette, EP, Chem, WDNR Professionally Assured Wetland Delineator with assistance from Shyann Banker, Environmental Specialist	Project: WSH20-008-01 0 100 200 400