



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

CEMVP-RD

August 23, 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-2022-01222-TKO 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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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.

## 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-1 (0.40-acre)	Non-Jurisdictional	None

## 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 (approximately 1.85-acre) sits along the south and east roadsides of an actively cropped agricultural field at 3855 Finger Road, in the City of Green Bay. The review area is identified by a blue polygon on the attached Figures 1 - 2. There are no other JDs associated with the review area. The review area is located in Section 01, Township 23 N, Range 21 E, City of Green Bay, Brown County, WI. See attached figures, labeled 2024-01222-TKO Figures 1-2 of 2. HUC 10: Bear Creek – Wolf River (0403020214).

- a. Project Are Size (in acres): 9.31-acre
- b. Location Description: The project/review area is located in Section 01, Township 023N, Range 021E, Brown County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.488530 Longitude: -87.888530
- d. Nearest City or Town: Green Bay
- e. County: Brown
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes): N/A
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 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 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

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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.

- 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>

Wetland 1 (0.40-acre) sits within constructed roadside drainage ditches which run along the south and east roadsides of an actively cropped agricultural field at 3855 Finger Road. The ditches were constructed to drain surface water from the adjacent ag field and roadways. As described in the June 2024 Merjent delineation report, the ditch carries flow to the south, along South Northview Rd., then west along Finger Rd., before draining to a culvert beneath the roadway which discharges to a wetland complex south of Finger Rd. Wetland 1 extends to the northwest (continuing outside the review area) at the western portion of the review area. This portion of the wetland is a linear drainage feature constructed to drain surface water from the adjacent ag fields. Wetland 1 fits under the definition of a b(3) water, from 33 CFR 328.3(b), as it was excavated wholly in and drains only dry land and does not carry a relatively permanent flow of water. This is evident through review of historic aerial imagery. The earliest available aerial imagery (1938) shows the ditch in its current alignment. Review of aerial imagery (1938-2024) shows sporadic wetness signature in the adjacent ag field, though no persistent wetness signature or any other indication of wetland presence (standing water, repeated vegetative stress, distinct variation of vegetation) is evident within the area immediately surrounding Wetland 1. Review of imagery also shows the ditches do not carry a relatively permanent flow of water. Review of contours and elevation data (NRV's Elevation Profile tool and LiDAR GIS layers) indicate the ditches were excavated in areas that sit approximately 2 feet higher in elevation than the surrounding wetland complex to the south. Additionally, USDA soil map data indicates the areas encompassing Wetland 1 consist of predominantly non-hydric soils, with no mapped wetlands

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

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(WWI and NWI), further supporting Wetland 1 being constructed in upland. Lastly, Wetland 1 sits within an area mapped outside of the WI DNR's "Wetland Indicators & Soils" GIS layer. Therefore, Wetland 1 is not a Water of the U.S.

- 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).

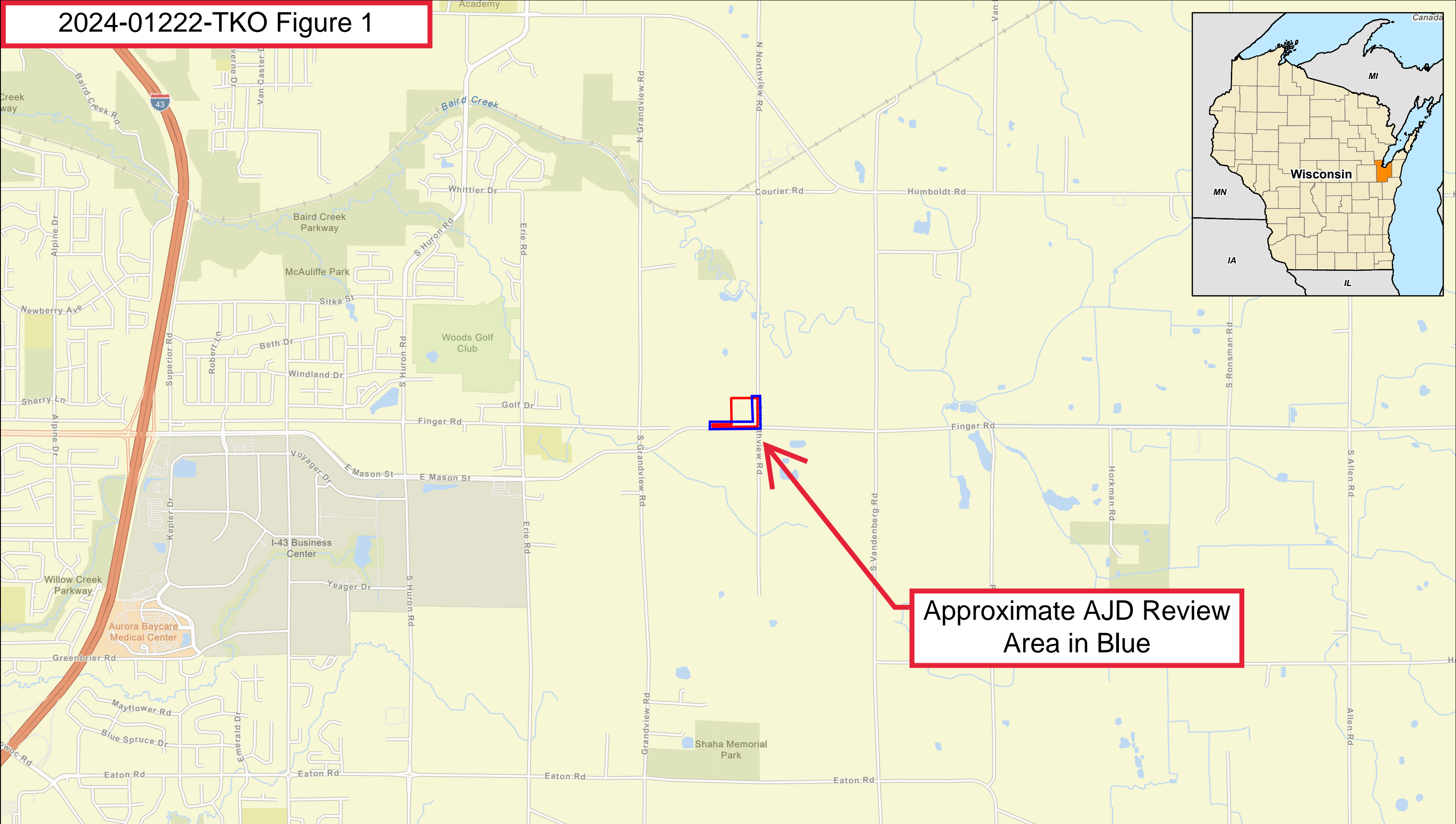
N/A

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 08/20/2024.
- b. Application "2022-01222-HSR 20240712 APP.pdf" in the administrative record, 08/20/2024.
- c. Mississippi Valley Division Regulatory Viewer, 08/20/2024.
- d. Wisconsin DNR Surface Water Data Viewer, 08/20/2024.
- e. Brown County GIS Mapping, 08/20/2024.
- f. Google Earth Aerial/Street View Imagery, 08/20/2024
- g. Historic Aerials Webpage, 08/20/2024

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.



Approximate AJD Review Area in Blue

0 1,000 2,000 Feet  
1 inch = 2,000 feet

**Figure 1. Project Location**  
3855 Finger Rd., Green Bay  
Mach IV  
Brown County, Wisconsin

Survey Area

For Environmental Review Purposes Only

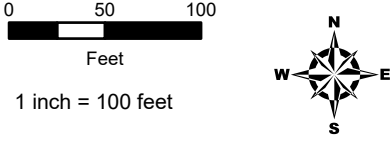
Date: (5/1/2024)



AJD Review Area in Blue



**Figure 5. Wetland Delineation**  
3855 Finger Rd., Green Bay  
Mach IV  
Brown County, Wisconsin



- Wetland Data Point
- Photo Point
- Culvert

- Delineated Wetlands
- Fresh (Wet) Meadow
  - Shallow Marsh
- Survey Area

