



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

21 November 2023

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-2023-00897-HSR 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 1, 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 is approximately 42 acres in size and is identified by the black polygon on the attached Figure 1. Wetland 1 is also identified on Figure 1, as a labeled red polygon. The review area is located at in the Town of Kaukauna, Outagamie 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.

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 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

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.

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.

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).⁷

Based on a review of the wetland delineation by McMahon Associates, Inc. on September 27, 2021, Google Earth historical aerial imagery, USDA-NRCS soils maps, Wisconsin Department of Natural Resources Wetland Inventory maps, and Wisconsin Department of Natural Resources topographic maps provided by McMahon Associates, Inc; as well as Wisconsin Department of Natural Resources Surface Water Data Viewer and the Army Corps of Engineers’ National Regulatory Viewer data, Wetland 1—as identified on the attached MVP-2023-00897-HSR: Figure 1—is a drainage ditch excavated wholly in and draining only dry land.

The review area consists largely of an active agricultural field. On the north half of the review area, there is a north-south area of concentrated flow directing water south. The north-south ditch intersects with an east-west ditch directing water east and out of the review area. On the south half of the review area, an area of concentrated flow directs water northwest to southeast. The Wisconsin Surface Water Data Viewer indicates no previously mapped wetlands within the review area, and Outagamie County Soil Survey maps report five soil types within the review area, all nonhydric or predominately nonhydric.

Wetland 1 is approximately 1.45 acres (63,162 square feet) and is characterized in the wetland delineation report as a ruderal wet meadow. According to resources consulted (see 9.a., b., and c.), Wetland 1 is a series of humanmade ditches excavated wholly in uplands—to drain only dry land—for the purpose of ongoing agricultural development. For example, aerial photographs from 1985 through 2023 indicate the review area was historically cropland. At or around 1992, the northern north-west portion of the wetland is visible on aerial photos, and it appears to be human-made, indicated by the linear nature and lack of apparent natural meandering (see MVP-2023-00897-HSR: Figure 4). From 1992 to 2005, the northern and southern ditch features appear more prominent, presumably due to maintenance. For example, imagery from November 2010

⁷ 88 FR 3004 (January 18, 2023)

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(shown in MVP-2023-00987-HSR: Figure 3) shows mowing of the southern portion of Wetland 1, and imagery from October 2010 (shown in MVP-2023-00987-HSR: Figure 2) shows grading of the southern portion of Wetland 1—both of which suggest upland drainage maintenance.

For the above and referenced reasons, Wetland 1 is a 33 CFR 328.3(b)(3) feature (ditch) and is not jurisdictional under the “2023 Revised Definition of ‘Waters of the United States’ ”; 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).

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. A wetland delineation conducted by McMahon Associates, Inc. on September 27, 2021, was utilized.
- b. An office review—utilizing USDA-NRCS soils maps, Wisconsin Department of Natural Resources Wetland Inventory maps, and USGS topographic maps provided by McMahon Associates, Inc., as well as Wisconsin Department of Natural Resources Surface Water Data Viewer, Army Corps of Engineers’ National Regulatory Viewer data, and Google Earth historical aerial imagery—was conducted on November 15, 2023.
- c. Aerial imagery dated 1992, 1993, 1994, 1996, 1997, 2005, 2006, 2008, 2010, 2011, 2015, 2017, 2018, and 2021 accessed and submitted by McMahon Associates, Inc., were also utilized.

10. OTHER SUPPORTING INFORMATION.

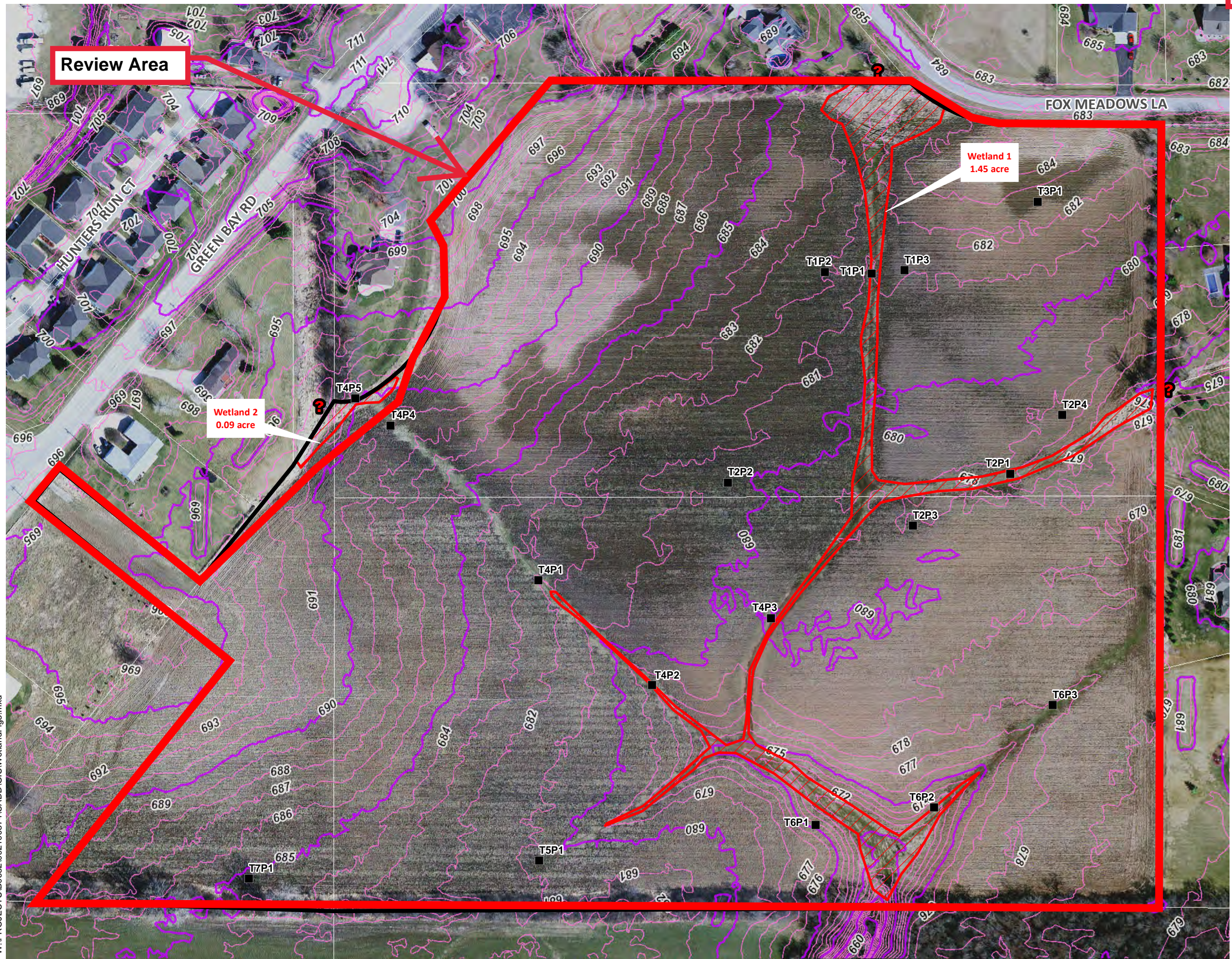
N/A

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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Mapped Features

- Review Area (42 acres)
- T1P1 Transect Line Number & Sample Point Number
- Wetland Area (1.54-acres)
- Wetlands Extend Beyond Review Area
- Parcel Line
- Index Contour (5 ft.)
- Intermediate Contour (1 ft.)

Source: Outagamie County, 2020-21.

Disclaimer: The property lines, right-of-way lines, and other property information on this drawing were developed or obtained as part of the County Geographic Information System or through the County property tax mapping function. McMAHON ASSOCIATES, INC does not guarantee this information to be correct, current, or complete. The property and right-of-way information are only intended for use as a general reference and are not intended or suitable for site-specific uses. Any use to the contrary of the above stated uses is the responsibility of the user and such use is at the user's own risk.



0 150 300
Feet
(at original document size - 11x17)

McMAHON
ENGINEERS ARCHITECTS
McMAHON ASSOCIATES, INC.

FIGURE 3
WETLAND DELINEATION MAP
BOWERS SUBDIVISION
TOWN OF KAUKAUNA
OUTAGAMIE COUNTY, WISCONSIN