



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

MVP

13 March 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-2023-01511-LAH 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.<sup>2</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>3</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>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

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- 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. W-1, non-jurisdictional
  - ii. W-2, non-jurisdictional
  - iii. W-3, non-jurisdictional
  - iv. W-4, non-jurisdictional
  - v. W-5, non-jurisdictional
  - vi. W-6, 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 40 acres in size and is identified by the red polygon in the attached 2023-01511-LAH Figures 1 of 3 through 3 of 3. The review area is located at 42.631450, -87.958223 in the Town of Paris, Kenosha County, Wisconsin. No other JDs have been reviewed regarding this area of interest.
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

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6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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
  - 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

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<sup>5</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>6</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.

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- 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>7</sup> 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 through W-6 are not TNWs, territorial seas, or interstate waters, and therefore are not (a)(1) waters. A review of topographic maps, Google Earth aerial imagery, delineation report, and Mississippi Valley Division NRV WDNR Digital Elevation Model and Hillshade indicate that wetlands W-1 through W-6 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. These wetlands are approximately 800 feet to the east of the Kilbourn Road Ditch which continues to the Des Plaines River, and the resources listed above do not maintain a continuous surface connection to this jurisdictional water.

Wetlands W-1 and W-4, both containing similar vegetation such as narrowleaf cattail and river bulrush, appear to be isolated, cropped wetlands within the southern border of the review and agricultural area. A review of aerial imagery indicates these wetlands developed in response to activities occurring on the property bordered to the south, specifically expansion of the concrete holding yard and driveway.

Review of wetland W-2 is a topographically low area surrounded by uplands to the west and south. On the east side of this wetland, it abuts a roadside ditch that appears to drain into a culvert located under the utility driveway located on the north side of W-2. This culvert connects W-2 to a large, depressional area to the north beyond the review location. Connection of this depressional wetland was considered in relation to the roadside ditch to the east. LiDAR shows a berm separating the depressional area from the ditch with no visible structures present

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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to offer a discrete or confined connection to the ditch. This depressional area is surrounded entirely by upland, agricultural fields and also have no discernable, discrete outlets. Therefore, W-2 holds no continuous surface connections to downstream jurisdictional waters.

Topography surrounding wetlands W-3, W-5, and W-6 is flat agricultural upland with isolated depressions. W-3, W-5, and W-6 are historically shown to exhibit wetland signatures and no connection to any additional wetlands or waterways. Ground level observations show flat, cropped fields that would not support consistent wetland conditions and, according to the delineation report, have had varying row cropping success. As a result, there are no continuous surface connections of these wetlands to downstream jurisdictional waters.

Based on a review of available data including aerial imagery, WWI mapping, etc., there are no ditches, swales, pipes, or culverts that connect wetlands W-1 through W-6 to downstream 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, these wetlands are not jurisdictional under the 2023 Revised Definition of "Waters of the United States" Conforming 88 FR 61964 Final Rule.

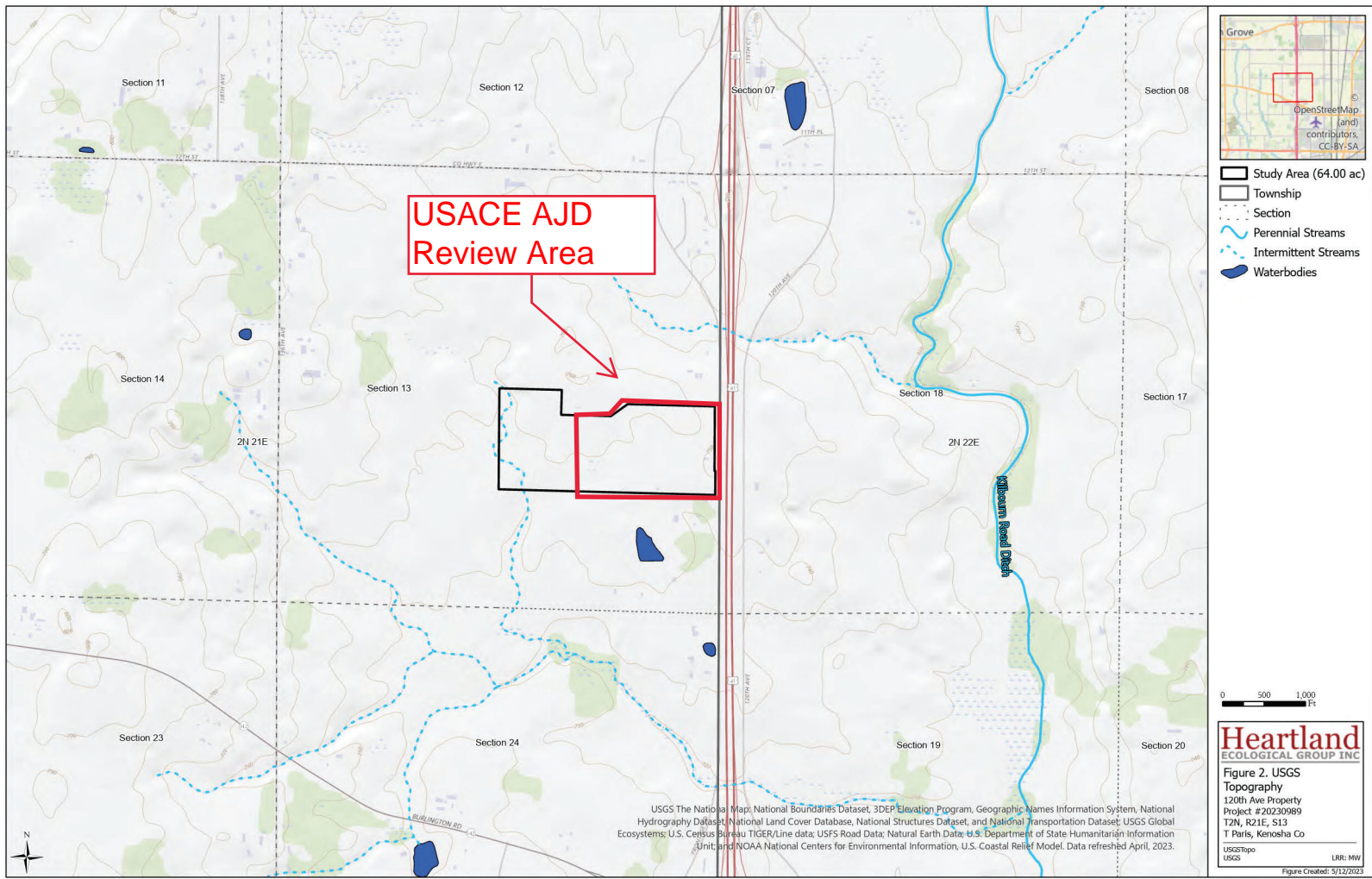
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Office evaluation conducted and completed on February 14, 2024.
  - b. Heartland Ecological Group Inc. Assured Wetland Delineation Report prepared for Pinnacle Engineering Group dated August 7, 2023.
  - c. Mississippi Valley Division NRV, WDNR Digital Elevation Model and Hillshade imagery accessed December 27, 2023.
  - d. Google Earth Ground Level View accessed December 27, 2023.
  - e. Google Earth imagery dated 1992, 2000, 2005, 2006, 2008, 2010, 2011, 2014, 2015, 2017, 2018, 2021, and 2023.
10. OTHER SUPPORTING INFORMATION. N/A

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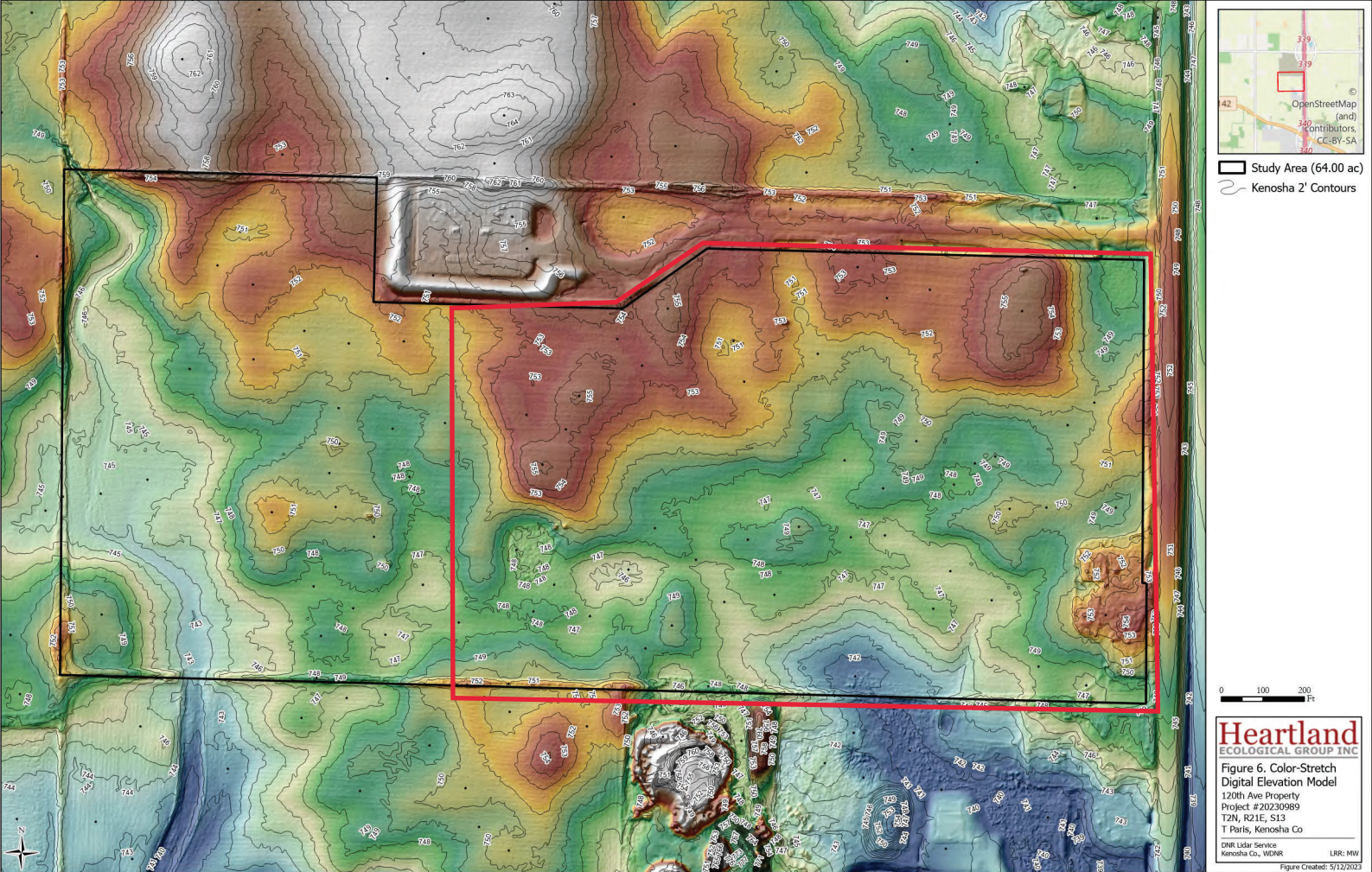
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

2023-01511-LAH  
Figure 1  
Review Area 2023





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Figure 2  
Topography of  
Review Area





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Figure 3  
Delineated Wetlands  
included in Review

