



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

MVP

01 April 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-2023-01576-JLK 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.

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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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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 W2 (0.95 acre), non-jurisdictional
  - ii. Wetland W4 (0.18 acre), non-jurisdictional
  - iii. Wetland W5 (0.24 acre), non-jurisdictional
  - iv. Wetland W6 (0.09 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 areas are approximately 3.50 acres in size and are identified by the red polygons on the attached figures. The review areas are located at or near 44.13632 N, -88.48794 W and are proposed for development in the City of Neenah, Winnebago County, Wisconsin. There are no other JDs associated with the review areas.

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>
  - 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 W2, W4, W5, and W6 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Topographic maps and Google Earth aerial imagery indicate all above listed wetlands are depressional wetlands, surrounded by uplands. A review of Lidar data provided by the National Regulatory Viewer and topographic maps demonstrate a topographic increase associated with a constructed berm separating the two review areas that extends west and east beyond the review areas. Additionally, Lidar data and topographic maps show a rapid topographic increase immediately west of Wetland W2 associated with a berm constructed along a commercial property. These berms effectively confine Wetlands W2 and W4 within the delineated wetland boundaries. Wetlands W2, W4, W5, and W6 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 nearest tributary is an unnamed tributary approximately 0.01 mile north of the northernmost review area boundary. There are no ditches, swales, pipes, or culverts that connect Wetlands W2, W4, W5, and W6 to downstream jurisdictional 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.

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

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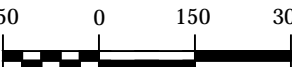

- a. Office evaluation conducted on March 14, 2024.
- b. Muttart Road Parcel, City of Neenah, Wetland Delineation Report prepared by Stantec Consulting Services, Inc., dated November 13, 2019 and Dixie Road Parcel, City of Neenah, Wetland Delineation Report prepared by Stantec Consulting Services, Inc., dated August 24, 2022.
- c. National Regulatory Viewer-Lidar Data assessed on March 14, 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.





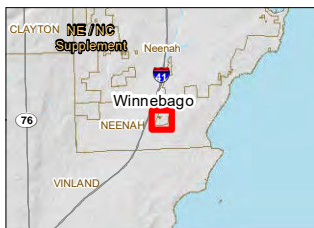
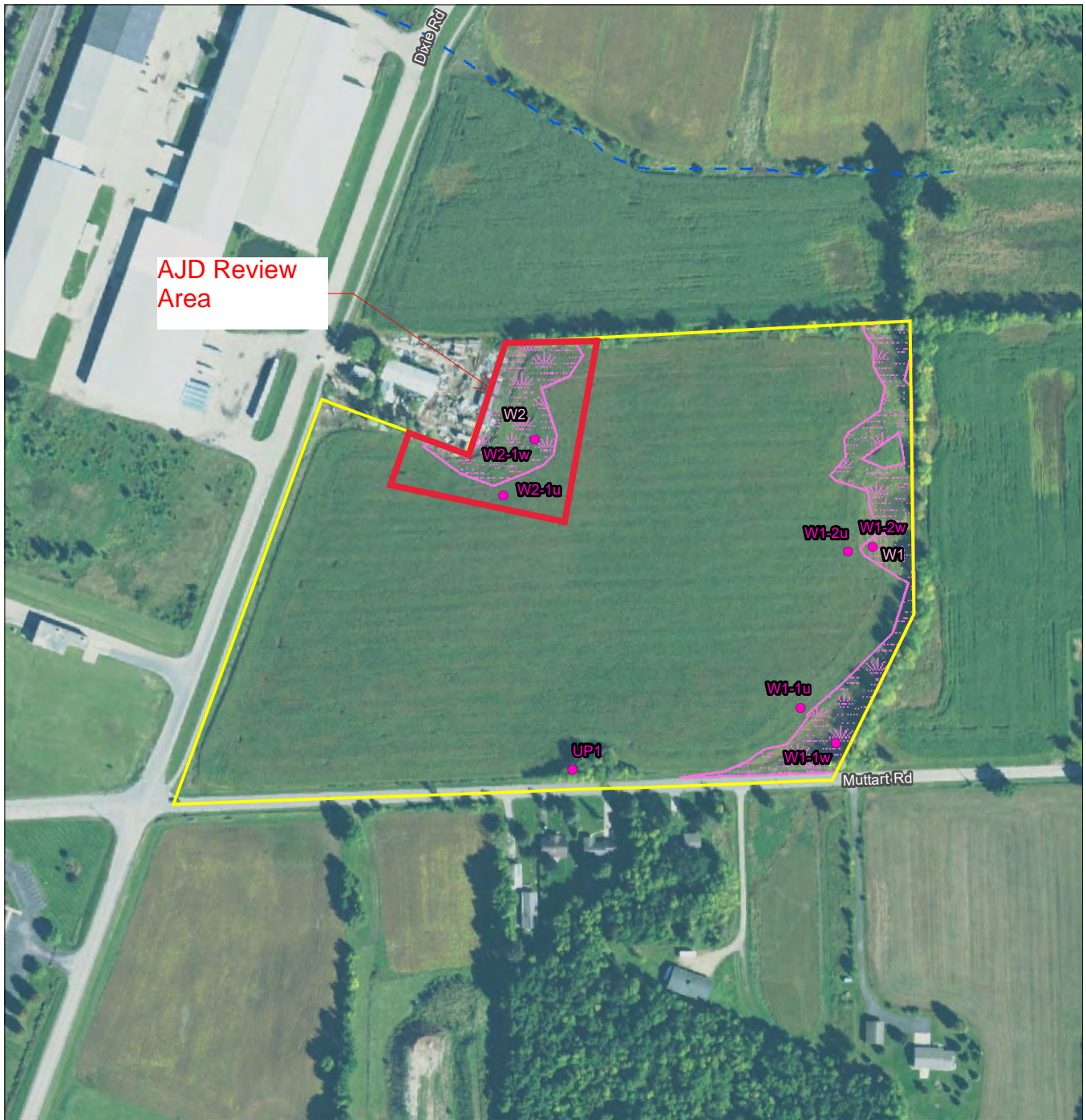
|   |   |   |                           |          |
|---|---|---|---------------------------|----------|
| <div><p>SCALE IN FEET</p><p>150 0 150 300</p></div> | <div><p>LEGEND</p><p> APPROXIMATE PROPERTY LINE</p></div> | PROPERTY LAYOUT   |                           |          |
|   |   | CITY OF NEENAH PROPERTY<br>1712 DIXIE ROAD<br>NEENAH, WISCONSIN |                           |          |
| DATE: 07/30/13  | DRAWN BY: JRB   | PROJECT MANAGER: LPC  | PROJECT NUMBER: 193702104 | FIGURE 2 |

2023-01576-JLK (Figure 1 of 3)









- Notes**
1. Coordinate System: NAD 1983 StatePlane Wisconsin South FIPS 4803 Feet
  2. Data Sources Include: Stantec, WisDOT, WDNR
  3. Orthophotography: NAIP 2018

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**Legend**

- Approximate Project Boundary
- Sample Point
- Field Delineated Wetland
- DNR 24k Hydrography
- ~ Perennial Stream
- - - Intermittent Stream
- Waterbody

Figure No.  
**5**

**Field Collected Data**

Client/Project  
City of Neenah  
Muttart Road Parcel  
Wetland Delineation

Project Location: T19N, R17E, S08, C. of Neenah, Winnebago Co., WI  
Prepared by MZ on 2019-10-17  
Technical Review by JDP on 2019-10-17  
Independent Review by XXX on 2019-XX-XX

0 150 300 Feet  
1:3,600 (at original document size of 8.5x11)

