



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

CEMVP-RD

9 October 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-2024-00852-KME MFR 1 of 1.²

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 (0.18 acres; 8,092 sf); 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 0.34 acres in size and is identified by the polygon on the attached figures, pages 1-4 of 4. The review area is located at the street address of 5307 Cummings Avenue, Latitude: 46.675429 and Longitude, -92.097193 in the City of Superior, Douglas County, Wisconsin.

4. 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 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.

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.
 - 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

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.

- 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).

The study area is the last undeveloped lot along the terminal end of Cummings Avenue. As per the wetland delineation performed at the site, only the southern portion of the property contains wetlands. The site generally slopes north to south with a wetland located in a concave area in the southern half of the site. The wetland is characterized as a mixture of sedge meadow and shrub-carr wetlands. The ground surface is raised along the western property boundary and uplands are present. A narrow ditch is located outside of the review area to the east and drains from north to south through culverts under adjoining properties/driveways. The consultant provided site-specific information, including LiDAR contours and site photos, showing there is no continuous surface connection between Wetland 1 and the narrow roadside ditch.

Wetland 1 is not a TNW, territorial sea, or interstate water and therefore is not a category (a)(1) water. Topographic maps w/Lidar and Google Earth aerial imagery indicate that Wetland 1 is a depressional wetland, surrounded by upland. The wetland does not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform.

Wetland 1 is located approximately 1.4 miles northeast of the Pokegama River and 1.12 miles northwest of the Nemadji River, the nearest Relatively Permanent Waters (RPW). There are no ditches, swales, pipes, or culverts that provide a continuous surface connection from Wetland 1 to either the Pokegama or the Nemadji Rivers. Wetland 1 is a non-tidal

⁹ 88 FR 3004 (January 18, 2023)

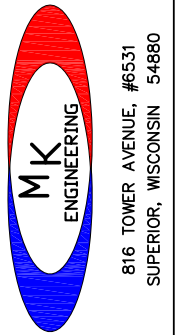
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wetland that does not have continuous surface connection to a relatively permanent jurisdictional water and as such does not meet the definition of adjacent, and cannot be evaluated as an (a)(4) adjacent wetland; therefore, Wetland 1 is not jurisdictional 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 on October 7, 2024.
 - b. Wetland Delineation Report from MK Engineering dated July 24, 2024, which included the following maps: USGS Topographic Map with site location, Douglas County 2-foot Contour Map, and Douglas County USDA Soils Map.
 - c. Site photos from the wetland delineation report taken May 30, 2024.
 - d. Aerial imagery from Delineation Report for historical record using Google Earth imagery dated 1998, 2003, 2010, 2017, and 2021.
 - e. USACE Regulatory Viewer accessing Wisconsin DNR 2ft Contour and 3DEP Elevation Accessed October 7, 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.





I hereby certify that this plan, specification or report was prepared by me or under my supervision and that I am a duly licensed PROFESSIONAL ENGINEER under the laws of the State of WISCONSIN.

Date: _____ Lic. No. _____

	AERIAL WITH PROPERTY BNDYRS FROM
	DOUGLAS COUNTY WEBSITE
7/23/24	ORIGINAL SUBMISSION
	REVISIONS DESCRIPTION
	DATE

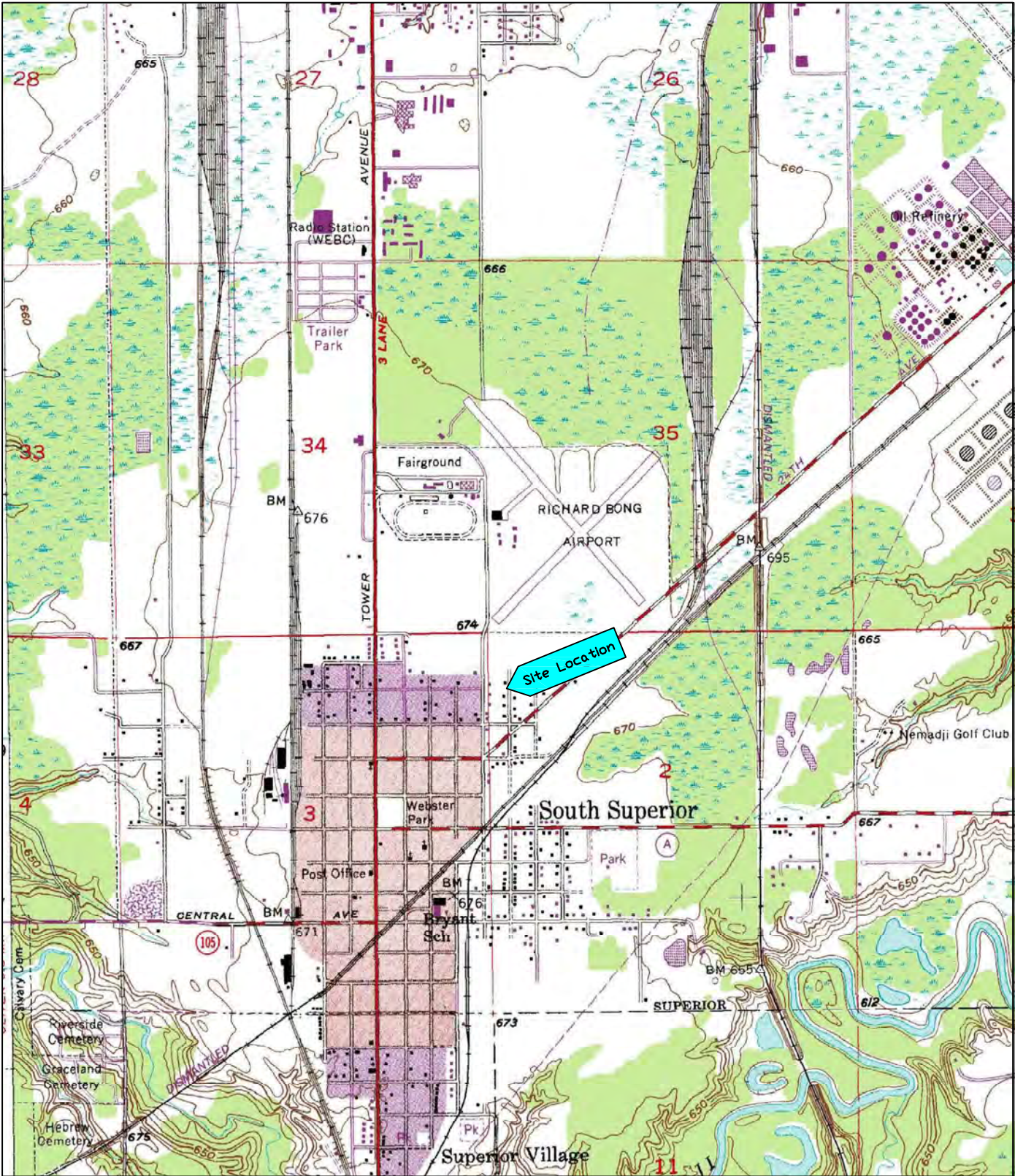
5307 CUMMINGS AVENUE
SUPERIOR, WISCONSIN
MKE PROJECT #102024006

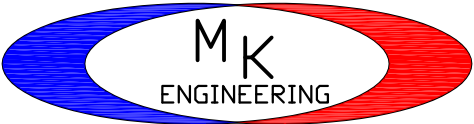
WETLAND DELINEATION MAP

SHEET NO.

2

OF



 <p>816 TOWER AVENUE, #6531 SUPERIOR, WISCONSIN 54880</p>	Scale = 1:24,000 USGS Topographic Map SUPERIOR, WI QUADRANGLE	SHEET 1	
		5307 CUMMINGS AVENUE SUPERIOR, WISCONSIN	
		SITE LOCATION MAP	
		CREATED BY: MLK	DRAWN BY: MLK
		DATE: 7/23/24	PROJECT # 102024006

