



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

MVP

October 3, 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-2024-00947-ALH [[MFR 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,

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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.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).

The Wisconsin Department of Natural Resources Surface Water Data Viewer (SWDV) shows an unnamed waterbody (WBIC 5020411) to Devils River within the review area beginning approximately 950 linear feet north of Church Road. The feature exists within an agricultural area dominated by a mix of upland and facultative grasses.

Based on an evaluation of recent photos of WBIC 5020411 within the review area, we determined that the feature lacks flow, bed and bank features, and does not have a defined channel. The feature identified as a tributary is not present. The Soil Class layer of the National Regulatory Viewer shows the soils to be partially hydric (4%). Onsite photos and desktop resources also show the landscape position of the site would not support wetland hydrology. No wetlands were identified within the review area, and it contains only uplands.

The Corps has determined that there are no “*waters of the U.S.*” within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area.

## 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 0.5-acres in size and is identified by the red polygon on the attached Figure 2. The review area is located at 44.3358 N, -87.8828 W in the Town of New Denmark, Brown County, Wisconsin. There are no other JDs associated with the review area.

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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.

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- 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> [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). [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. [Office evaluation conducted 27 September 2024]
- b. [Gerald Kozlovsky Grassed Waterway & Stream Crossing Project Existing Site Photos. Brown County Land & Water Conservation Department. Dated September 17, 2024.]
- c. [National Regulatory Viewer – USA Soils Hydric Class layer, Hillshade layer and DEM layer accessed on 27 September 2024.]
- d. [Wisconsin Department of Natural Resources, Surface Water Data Viewer. Accessed 30 September 2024]

## 10. OTHER SUPPORTING INFORMATION. [N/A]

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

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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.



CONSTRUCTION PLAN

PRACTICE 412 - GRASSED WATERWAY, 468 - LINED WATERWAY & 578 STREAM CROSSING  
LANDOWNER GERALD KOZLOVSKY  
ADDRESS 4737 CHURCH ROAD, DENMARK, WI 54208  
LANDOWNER PHONE NO. 920-639-8940 COUNTY BROWN  
TOWNSHIP NEW DENMARK (ND-661) T 22 N, R 22 E, Sec. 31  
FIELD OFFICE BROWN COUNTY LWCD TELEPHONE NO. 920-391-4620

NOTICE TO LANDOWNERS AND EXCAVATORS

Any representation made by Brown County LWCD as to the approximate location or nonexistence of above or under ground hazards does not relieve the owner of the property or the excavator that is hired to complete construction, from notifying Diggers Hotline of the pending construction. You will be liable for damages resulting from construction activities.

Call Diggers Hotline! Ticket Number \_\_\_\_\_

CONSTRUCTION DRAWINGS AND SPECIFICATIONS ACCEPTANCE

I have reviewed and understand the construction plans and specifications and agree to complete the work accordingly. Failure to meet these plans and specifications may jeopardize any continued LWCD technical assistance or program cost sharing applied for. I understand that it is my responsibility to secure all necessary permits and licenses, and to complete the work in accordance with all local, state, and federal laws. Modification of these construction plans or specifications must be approved by Brown County LWCD before installation. I assume all responsibility for negotiations and contract agreements with the construction contractors.

Signed: Gerald Kozlovsky Date: 1-15-23  
Designed by: JAN.HOSPER Date: 1/25/2023  
Checked by: Drew Zelle Date: 1/27/23  
Approved by: Drew D Zelle Date: 1/27/23

The installed practices comply with applicable NRCS technical standards and specifications. The "redlined" construction plans (as-built drawings) reflect changes made during construction.

Construction Approved by: \_\_\_\_\_ Date: \_\_\_\_\_  
Job Approval Class 412(II), 468(III), 578(II)



LOCATION MAP

DIGGERS HOTLINE

Call 3 Work Days  
Before You Dig!

Nationwide  
811

Toll Free  
1-800-242-8511

TDD  
1-800-542-2289

Website  
www.diggershotline.com

Date1/25/2023

DesignedJAN.HOSPER

Drawn

Checked

Approved

COVER SHEET

OWNER: GERALD KOZLOVSKY

COUNTY: BROWN

Brown County

LAND & WATER CONSERVATION DEPARTMENT

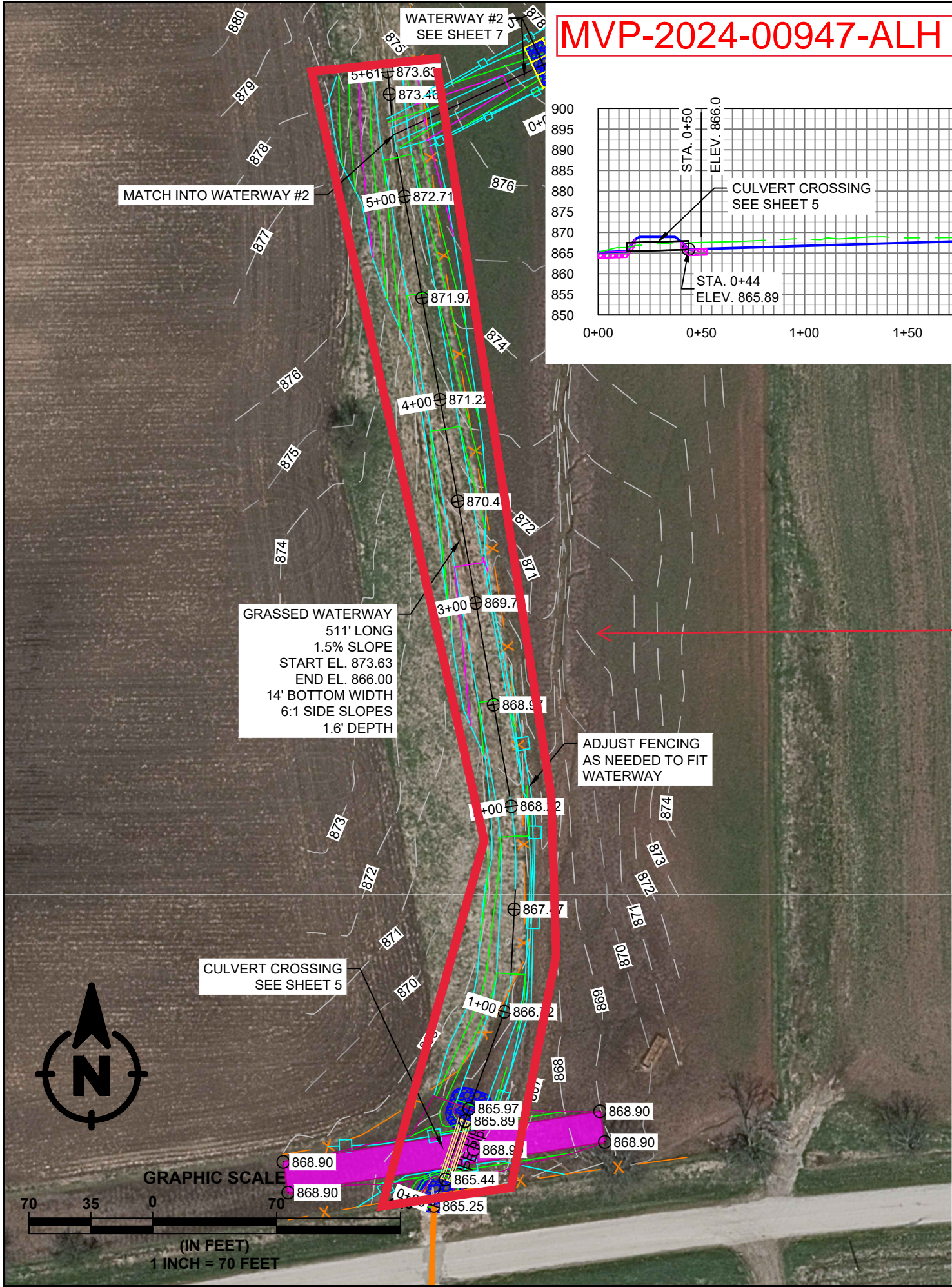
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Date1/25/2023

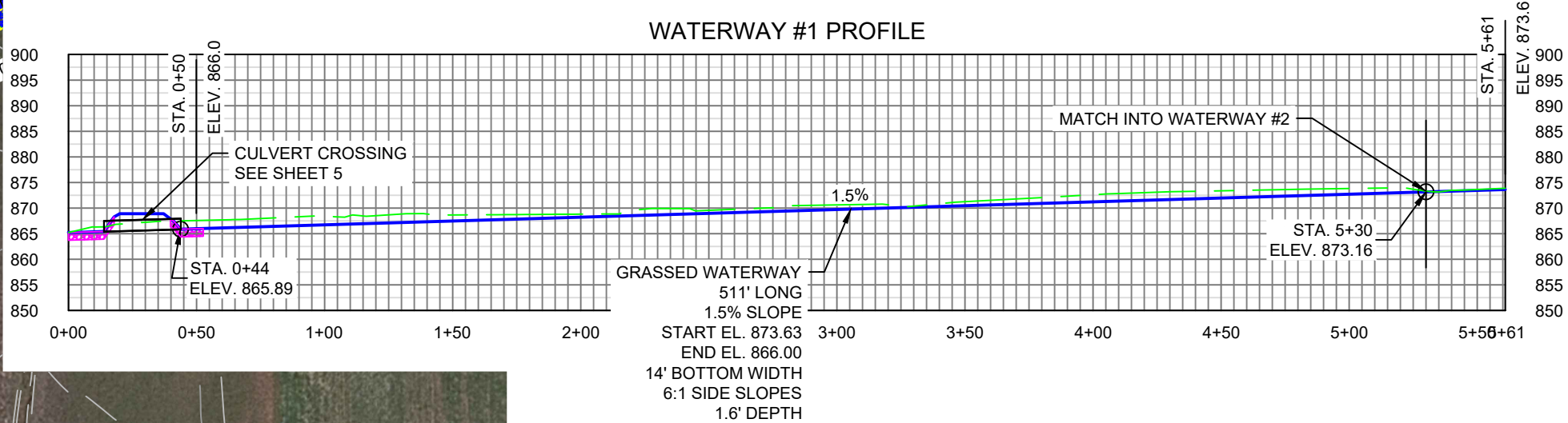
Sheet1 of 11



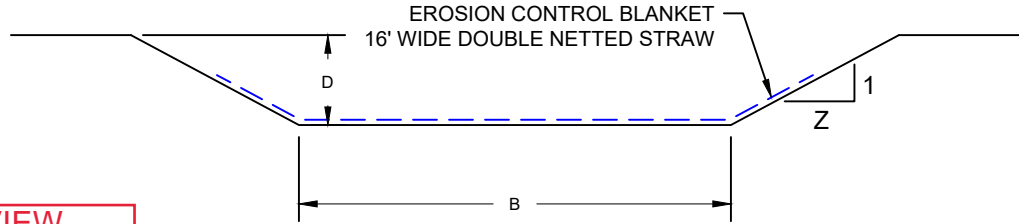
MVP-2024-00947-ALH Figure 2 of 2



WATERWAY #1 PROFILE



REVIEW  
AREA



TRAPEZOIDAL CROSS SECTION

CONSTRUCTION DETAILS							
WATERWAY NUMBER	REACH		CHANNEL SLOPE (%)	BOTTOM WIDTH (B) FEET	DEPTH (D) FEET	SIDE SLOPE (Z)	LENGTH FEET
	FROM	TO					
WW1	0+50	5+61	1.5%	14'	1.6'	6:1	511'

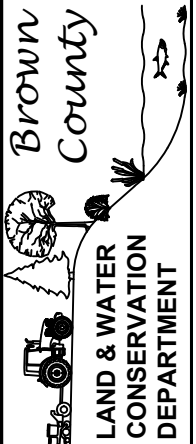
NOTES AND SPECIFICATIONS:

1. TOPSOIL SHALL BE STOCKPILED AND RESPREAD ON THE WATERWAY WHEN NEEDED TO FACILITATE REVEGETATION.
2. PLACE SPOIL WHERE IT WILL NOT INTERFERE WITH SURFACE WATER FLOW INTO THE WATERWAY.
3. MAINTENANCE ITEMS - REPAIR AREAS OF DAMAGED VEGETATION. DO NOT USE THE WATERWAY FOR A TRAVEL LANE. DO NOT PLOW INTO THE WATERWAY SIDES.

Date	7/17/2024
Designed	KEVIN CORBETT
Drawn	
Checked	
Approved	

PLAN & PROFILE  
WATERWAY #1

OWNER: GERALD KOZLOVSKY  
COUNTY: BROWN



Drawing Name  
GKozlovsky 6-10-24  
LivestockXingAdded.dwg

Date  
7/17/2024