



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

MVP

November 19, 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-2024-01165-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.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. SUMMARY OF CONCLUSIONS.

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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- 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).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland A, 0.12 acre	Non-Jurisdictional	none

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.

- a. Project Area Size (in acres): The review area is approximately 1 acre in size and is identified with a red polygon in 2024-01165-LAH Figures 1 of 2 through 2 of 2.
- b. Location Description: The project/review area is located in Section 23, Township 7N, Range 20E, Waukesha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 43.046170 Longitude: -88.097510
- d. Nearest City or Town: Elm Grove
- e. County: Waukesha
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):
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

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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

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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.

- 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 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).

Wetland A is not a TNW, territorial sea, or interstate water, and therefore is not defined as an (a)(1) water. A review of topographic maps, LiDAR, aerial imagery, the delineation report, and NRV indicates that this wetland is depressional and surrounded by upland. The review area is comprised of a cleared residential yard area surrounded by additional trees and shrubs, residential homes, and associated infrastructure. Wetland A does not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and is not separated from jurisdictional waters by natural berms, banks, dunes, or similar natural landforms. Underwood Creek is located about 0.8 miles east of the review area. This wetland does not maintain a continuous surface connection to this jurisdictional water.

Wetland A is located within the northern half of the review area and is contained within the review area apart from a northern extension out of the review area. Wetland A is described in the delineation report as consisting of drainage pathways, resulting from neighboring waterflow from the north and roof spouts, located on a hillslope, and terminating at a low, eastern spot within the review area. Through a historic aerial review, the area of Wetland A was a part of a larger farmed agricultural field. Wetland A was formed as a basin formation once residential development began to occur around the 1970s. Through LiDAR observations, Wetland A is located within a topographically low, closed depression. The delineation report stated that there are no apparent outlets from the wetland. There are no discrete flow paths creating a continuous surface connection to jurisdictional (a)(1)-(a)(3) waters. There are no ditches, swales, pipes, or culverts that connect Wetland A to downstream waters. This wetland is non-tidal and does not have a continuous surface connection to relatively

⁷ 88 FR 3004 (January 18, 2023)

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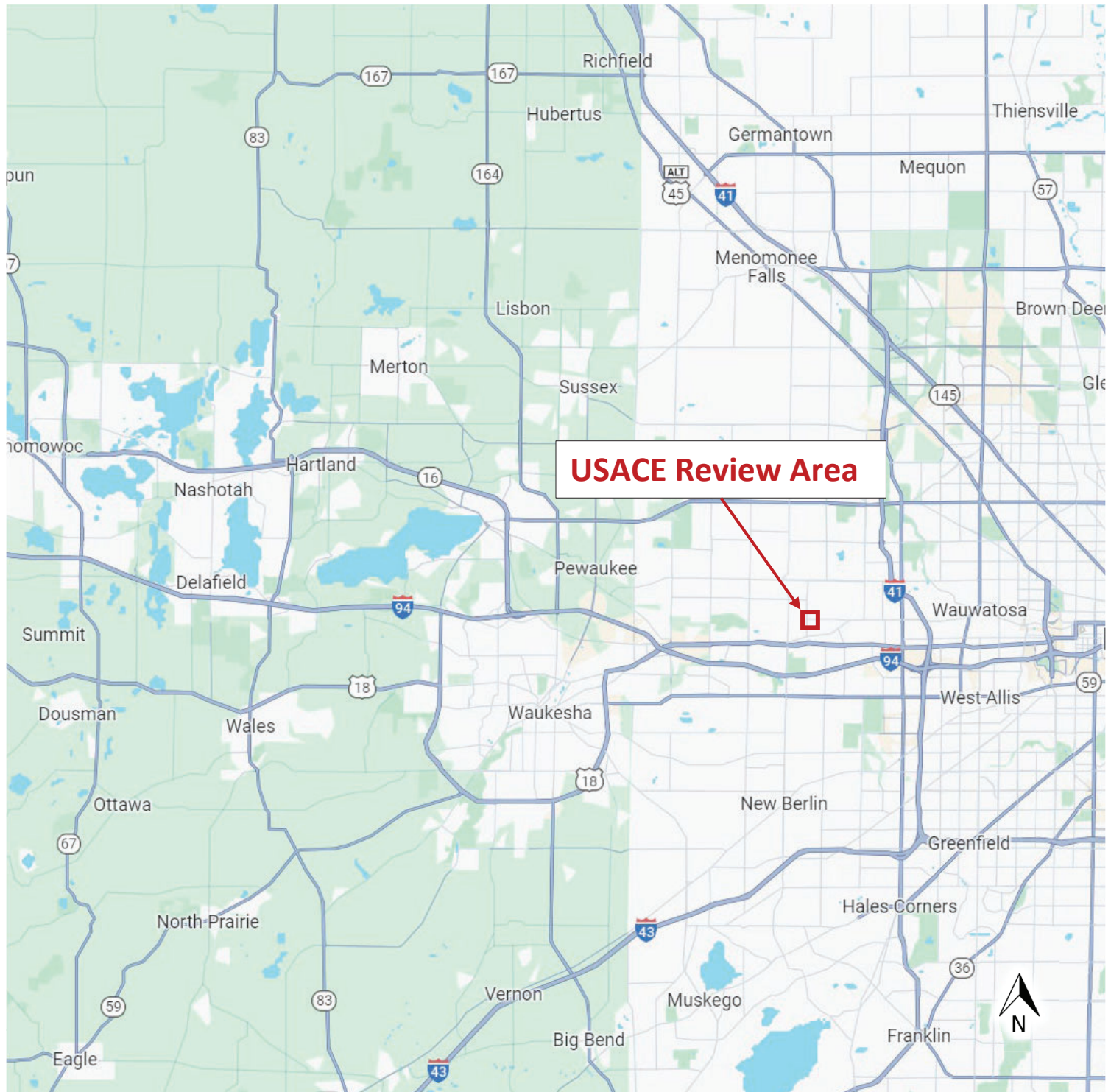
permanent jurisdictional waters and as such does not meet the definition of adjacent. Wetland A cannot be evaluated as an (a)(4) adjacent wetland; therefore, Wetland A is not jurisdictional under the 2023 Revised Definition of "Waters of the United States" Conforming 88 FR 61964 Final Rule.

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 and completed on October 31, 2024.
- b. LandCO2 Wetland Delineation Report completed for Noby Ventures dated September 18, 2024.
- c. Mississippi Valley Division NRV, LiDAR Wisconsin DNR DEM and Hillshade layers accessed October 31, 2024 (layer data created March 2021).
- d. Google Earth aerial imagery accessed October 31, 2024.
- e. Historic aerial imagery available at www.historicaerials.com/viewer accessed October 31, 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.



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FIGURE 1. LOCATION MAP

Source: Google Maps, 2024

2024-01165-LAH
Figure 2
Delineated Wetland A

WETLAND A
0.12 acre
5,187 SF

Review Area

WETLANDS DELINEATED BY K. SHERFINSKI OF LANDCO2 ON SEPTEMBER 17, 2024.

FIGURE 9