



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

MVP-2024-01283-MMP

January 27, 2025

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-2024-01283-MMP.

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).

- i. Wetland w05, 1.15 acres. Excluded water, not a Water of the US.

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 6194 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area for this determination includes one stormwater basin identified as Wetland w05 on the attached figures labeled MVP-2024-01283-MMP Figures 1-2 of 2.

- a. Project Area Size (in acres): 1.15.
- b. Location Description: The review area is located in Section 4, Township 21 North, Range 19 East, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.321935 Longitude: -88.209677
- d. Nearest City or Town: Wrightstown
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes): N/A

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 WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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.

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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

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

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.

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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷

The feature within the review area is Wetland w05, as shown on Figure 2 in the attached figures. Wetland w05, an excluded feature, fits the definition of a b(5) water as the feature was created by excavating dry land to collect and retain water.

Wetland w05 is a constructed storm water retention basin that was constructed in 2003 and is associated with the Fox Energy Center. In a review of historic aerial photographs and topographic maps of the area prior to disturbance, no wet signatures or drainage features are seen within the area of Wetland w05. North of the feature, a waterway is present that drains to the north. This waterway is the only aquatic resource visible on historic aerial imagery within the vicinity of the review area. A Wetland Delineation Report, with associated maps detailing aquatic resources, was completed by Merjent, Inc. (Stacey Caplan) and submitted to the Corps for review. The figures within the report identified the waterway and confirmed the location is consistent with the location mapped on United States Geological Survey (USGS) and Wisconsin Department of Natural Resources Surface Water Data Viewer (SWDV) maps. However, through our evaluation, we confirmed that Wetland w05 was constructed in upland and not within the waterway.

Considering the information above, Wetland w05 is a Paragraph b(5) excluded water not subject to Section 404 of the Clean Water Act (CWA).

- 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. Wetland Delineation Maps completed by Merjent, Inc. (Stacey Caplan) on October 17, 2024.
 - b. USGS Topographic Maps from 1972, 1984, 1992, and 2010.

⁷ 88 FR 3004 (January 18, 2023)

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- c. Historic Aerials by Netronline images from 1951, 1957, 1982, 1986, and 1992.
- d. National Wetland Inventory from U.S. Fish and Wildlife Service accessed on the National Regulatory Viewer (NRV).
- e. 3DEP 2-ft Contour, 3DEP 5-ft Contour, 3DEP 10-ft Contour, 3DEP 25-ft Contour, and 3DEP Digital Elevation Model (DEM) from USGS 3D Elevation Program accessed on the NRV.
- f. 24K Intermittent Streams and Stream Order layers from the SWDV.

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.



**Approximate AJD
Review Area**

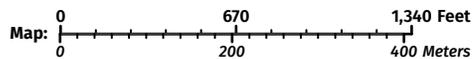
Legend: (some map layers may not be displayed)

- 24K Lakes and Open Water
- 24K Streams and Rivers
- 24K Intermittent Streams
- Cities, Towns & Villages
 - City
 - Village
 - Civil Town
 - City or Village
- County Boundaries
 - County Boundaries
- Major Roads
 - State Highway
 - US Highway
- County and Local Roads
 - Local Road
 - Railroads
- Latest Leaf On Imagery
 - City or Village
 - County Boundaries
- Major Roads

Notes:

MVP-2024-01283 Fox Energy Center

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Figure 1 of 2**



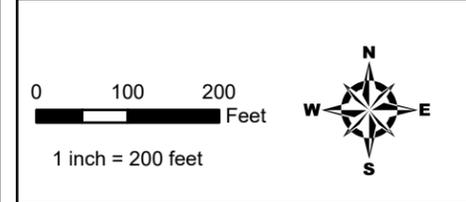
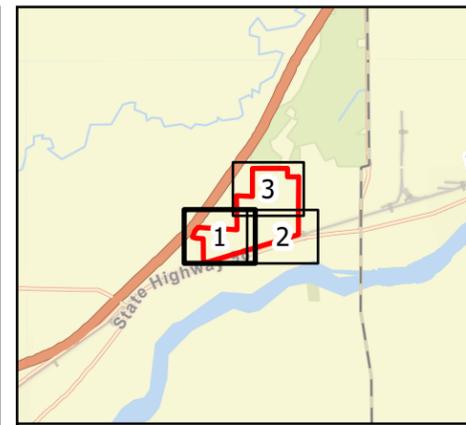
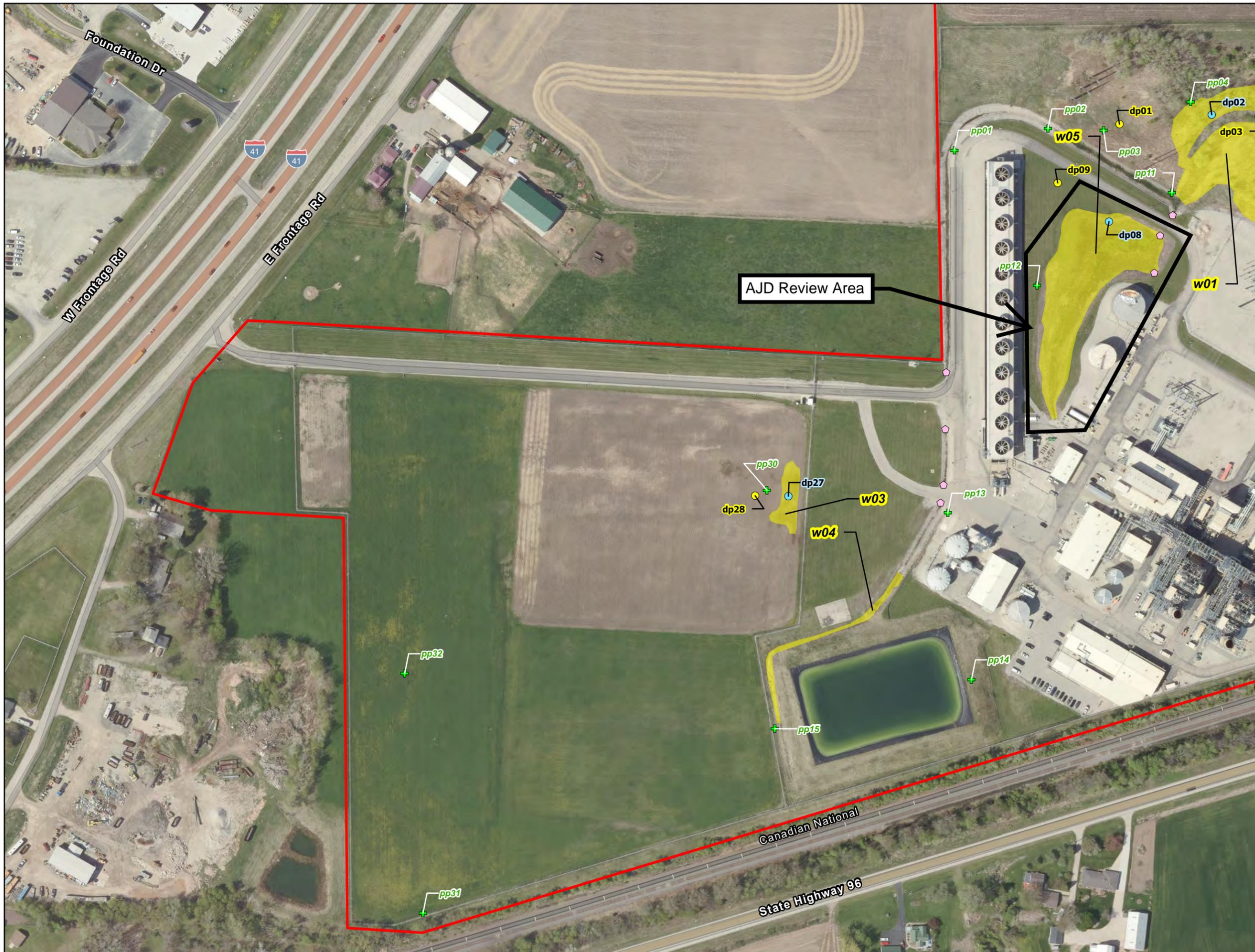
Service Layer Credits:
EN Basic Basemap WTM Ext: , 2022 Leaf On: , Cities, Roads & Boundaries:

Map projection: NAD 1983 HARN Wisconsin TM

This map is a product generated by a DNR web mapping application.

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- Project Area
 - ~ Waterway (WDNR 24k)
 - ◆ Culvert Point
 - + Photo Point
 - Upland Data Point
 - Wetland Data Point
- Delineated Wetland
- Fresh (Wet) Meadow
 - Hardwood Swamp
 - Shrub-Carr

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Figure 2 of 2

Figure 5
Wetland Delineation
Fox Energy Center
Wisconsin Public Service
Outagamie County, Wisconsin

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