



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

MVP

28 April 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) ,<sup>1</sup> MVP-2025-00102-MJG, 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.

1. SUMMARY OF CONCLUSIONS.

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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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- 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, 0.21 acres, non-jurisdictional
  - ii. Wetland 2, 0.03 acres, 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. 651, 143 S. Ct. 1322 (2023)
- d. "Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of 'Continuous Surface Connection' Under The Definition Of 'Waters Of The United States' Under The Clean Water Act" (March 12, 2025).

3. REVIEW AREA. The review area is identified by the red polygon in the enclosed figures labeled MVP-2025-00102-MJG AJD Page 2 of 2. The review area is located on the Oak Creek Site project (Parcels #9779003001, #9779002000, and #9779999001) in Section 31, Township 5 North, Range 22 East, Milwaukee County, Wisconsin. (Lat: 42.84905, Long: -87.949382). The review area is surrounded by tree lines, agricultural fields, single family homes, and roadways. 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 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.

- 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>

Wetland 1 is a roadside ditch constructed in uplands within the West Elm Road right-of-way (ROW), as reviewed using US Geological Service topographic maps, 3DEP Hillshade, 2-ft Contour, and DEM maps; Wetlands Inventory (WWI) maps; And NRCS soil maps and hydric soils data. NRCS Soil Survey shows silt loam (Ozaukee) soils, with 2-6 percent slopes, and is moderately well drained (partially hydric, 6 percent). Historic aerial imagery shows this area as being frequently farmed, and no wet signatures are visible for this feature prior to 2020. Recent aerial imagery shows Wetland 1 was created during earthwork activities in 2020, when West Elm Road was constructed and when wet signatures became apparent. Based on the desktop resources reviewed, wetland 1 was excavated wholly in and draining only uplands and does not carry a flow of water. Therefore, according to the exclusion (b)(3) of the 2023 rule, as amended, Wetland 1 is not a water of the United States.

- 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 2 is not a TNW, territorial sea, or intrastate water, and therefore, is not an (a)(1) water. Wetland 2 does not physically abut a paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. The Wisconsin Wetlands Inventory (WWI), National Hydrography Dataset (NHD), USGS topographic maps, and hillshade do not display Wetland 2 and do not show any tributaries that abut Wetland 2. Based on topographic, hillshade, and elevation modeling mapping, this wetland is a depressional wetland that does not abut a tributary and is surrounded by upland. The closest tributary based off of desktop resources is an unnamed intermittent stream located approximately 250 linear feet east of the review area. Wetland 2 does not abut a relatively permanent water, and as such, cannot be evaluated as (a)(4) adjacent wetland. Therefore,

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

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Wetland 2 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 and virtual field visit completed on April 24, 2025.
  - b. "Oak Creek Site" prepared by Kimley Horn Inc. dated May 2024.
  - c. National Regulatory Viewer accessed April 24, 2025.
  - d. USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic service, Hillshade & DEM & 2-ft Contours, accessed April 24, 2025.
  - e. Wisconsin Wetlands Inventory accessed April 24, 2025.
  - f. USDA NRCS Soil Survey USDA-NCSS SSURGO and STATGO accessed April 24, 2025.
  - g. National Hydrography Dataset (NHD) accessed April 24, 2024.
  - h. USGS Topographic maps years 2016, 2020, and 2022 accessed April 24, 2024.
  - i. Google Earth Imagery years 2025, 2024, 2022, 2020, 2018, 2016, 2011, and 2007, and street view accessed April 24, 2025.
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.



