

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the matter of the appeal of

Maier Farms Real Estate, LLC

Regarding the property located at:

Tax Parcel Nos. 0909-212-8140-0 & 0909-212-8500-7
Town of Vienna, Dane County, Wisconsin

DECLARATION OF JEFFREY D. KRAEMER

I, Jeffrey D. Kraemer, declare as follows:

1. I am an adult resident of the state of Wisconsin and make this declaration in support of Maier Farms Real Estate, LLC's (hereafter, "Maier") appeal of the Zoning Administrator's determination articulated in a letter dated March 20, 2024.

2. I am the Principal Scientist for and Vice President of Heartland Ecological Group, Inc., an environmental consulting group. I hold a Master's degree from the University of Wisconsin – Milwaukee in Biological Sciences with an emphasis in Wetland Ecology and a Bachelor's Degree from the University of Wisconsin – La Crosse in Biological Sciences with an emphasis in Aquatic Biology. I have been recognized by the Wisconsin Department of Natural Resources ("WDNR") Wetland Delineation Assurance Program for nearly 20 years and am the longest standing assured wetland delineator in the state of Wisconsin. I have also been appointed by Governor Evers to the state's Wetland Study Council. The Council was created by the Wisconsin Act 183 and is made up of nine members appointed by the Governor. The Council is directed to research and make recommendations on a variety of wetland issues and provide guidance to the state legislature and the WDNR.

3. I was hired by Maier to advise regarding wetland regulatory matters as applicable to the Dane County Parcel Nos. 0909-212-8140-0 and 0909-212-8500-7 (the “Property”).

4. As part of my work for Maier, I conducted an analysis of the Property and produced a field map, a true and accurate copy of which is attached to my declaration as Exhibit 1.

5. Exhibit 1 depicts the boundary line of the wetland on the Property, the location of the replacement tile main, and the original location of the pump.

6. I worked with Maier to get WDNR approval for its drainage system. As part of its review of the drainage system, the WDNR required Maier to relocate the pump outside of the delineated wetland boundary and to connect the tile line to the pump outside of the delineated wetland. The WDNR had no other concerns regarding the Property or Maier’s installation of the drainage system, which replaced a previously installed and broken drainage system.

7. Attached to my declaration as Exhibit 2 is a true and correct copy of a map, approved by the WDNR, which depicts the modifications that the WDNR required Maier to make to the drainage system. Maier has not yet relocated the pump outside of the wetland boundary until the matter with Dane County is resolved.

8. The Property has been classified by the Natural Resources Conversation Service (“NRCS”) of the United States Department of Agriculture as a Prior Converted Cropland / Non-Wetland. The Prior Converted Cropland / Non-Wetland classification from the NRCS indicates that a wetland existed some time on the Property prior to December 23, 1985, but that the wetland has been drained and that the remaining area does not exhibit important wetland values.

9. My analysis of the Property is consistent with the NRCS’s classification of the Property as Prior Converted / Non Wetland. Specifically, the soils in the part of the Property which are labeled as wetland on the Wisconsin Wetland Inventory are sable soils, which develop only

under wetland conditions. The fact that the Sable soils exist in a field that has been dedicated to successful non-wetland crop cultivation supports the fact that the Property has been drained, which is consistent with the NRCS determination of Prior Converted / Non Wetland. Sable soils cannot be farmed with traditional upland row crops without the use of a drainage system.

10. As part of reviewing the Maier project and working with the WDNR, I collected historical aerial photographs of the Property from the USDA, state of Wisconsin, and Dane County, the earliest of which is from 1937. Attached to my declaration as Exhibit 3 are true and correct copies of aerial photographs of the Property, from 1937 to 2022, which I presented at the Dane County Zoning and Land Regulation Committee in support of Maier's application to rezone the Property outside of inland-wetland zoning.

11. As depicted in the photographs constituting Exhibit 3, surface water accumulation on a portion of the Property has been an issue since approximately 2008, which is consistent with the failure of a drainage system.

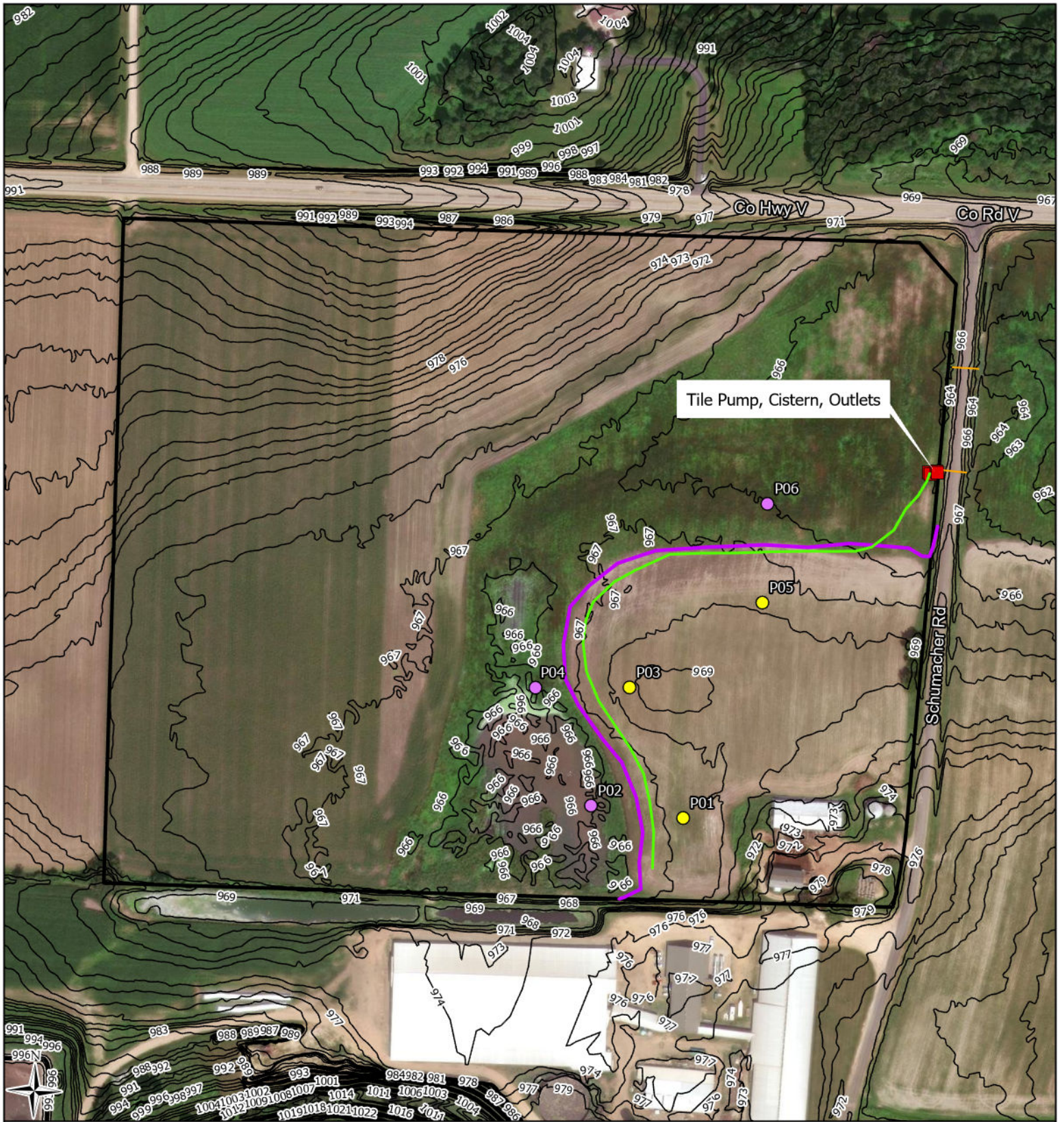
12. On behalf of Maier, I requested an Approved Jurisdiction Determination for the Property from the United States Army Corps of Engineers (the "Army Corps"). In a letter dated October 11, 2024, the Army Corps determined that the Property did not contain waters of the United States subject to Army Corps jurisdiction. A true and correct copy of the Army Corps letter is attached to my declaration as Exhibit 4.

I declare under penalty of false swearing under the law of Wisconsin that the foregoing is true and correct.

Dated this 4 day of February, 2025.



Jeffrey D. Kraemer



- Study Area (44.95 ac)
- Dane Co 1' Contours
- Culverts
- Wetland Boundary
- Approx. Tile Main Location
- Drain Tile Features

Sample Points

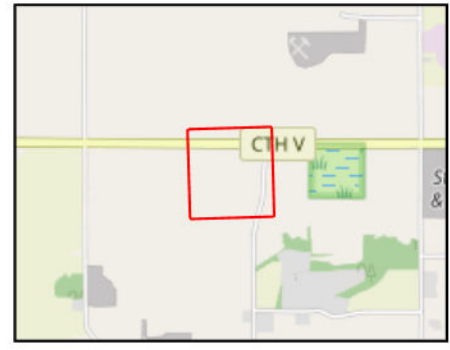
- Upland
- Wetland

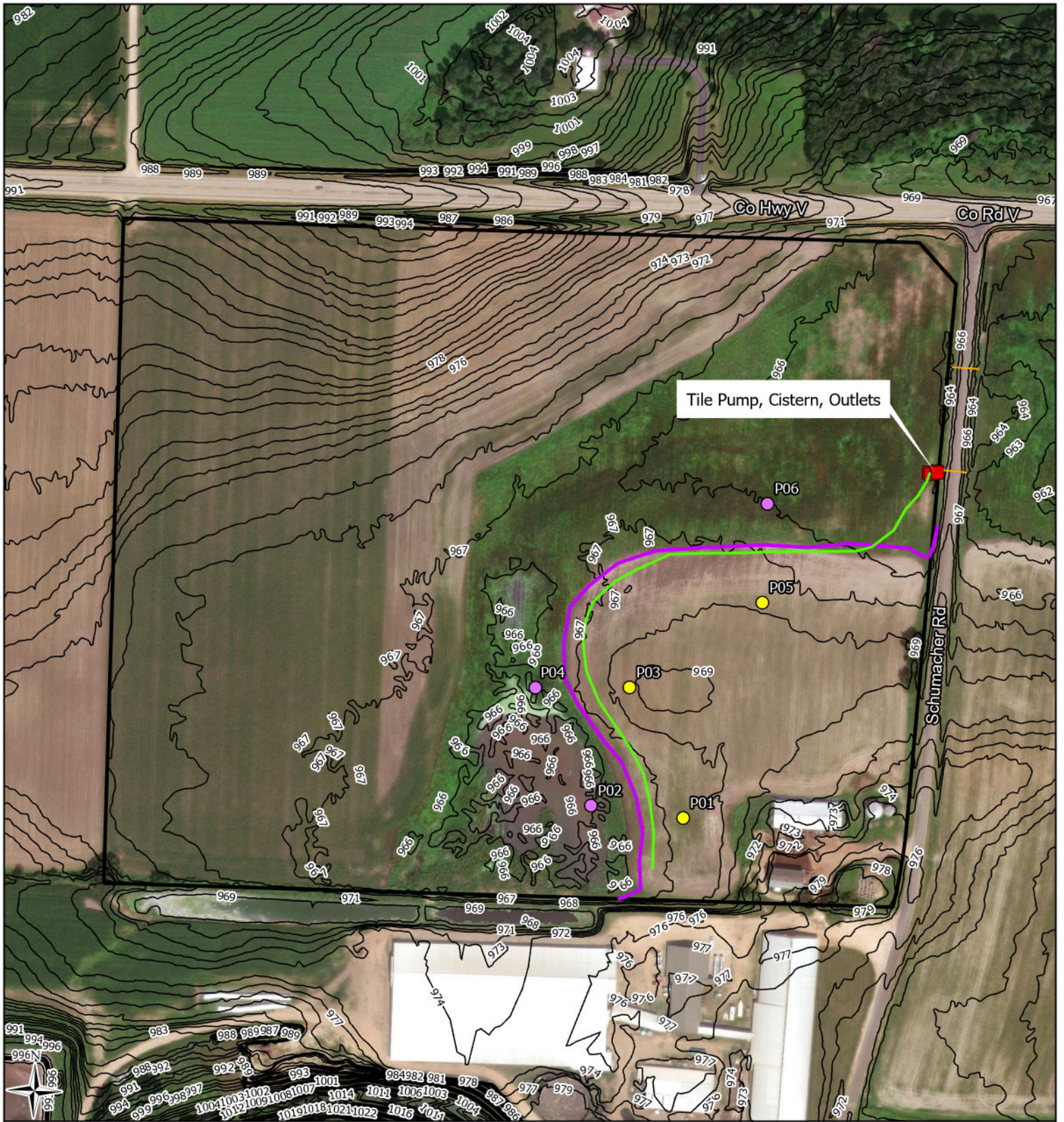


Figure 7. Field Map

Maier Farm
 Project #20200322
 T9N, R9E, S21
 T Vienna, Dane Co

2018 Orthophoto
 Dane Co, HEG
 LRR: NCNE
 Figure Created: 3/5/2024





- Study Area (44.95 ac)
- Dane Co 1' Contours
- Culverts
- Wetland Boundary
- Approx. Tile Main Location
- Drain Tile Features

Sample Points

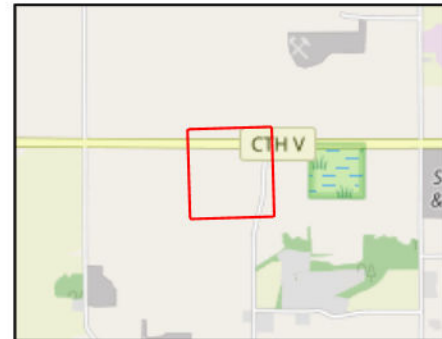
- Upland
- Wetland

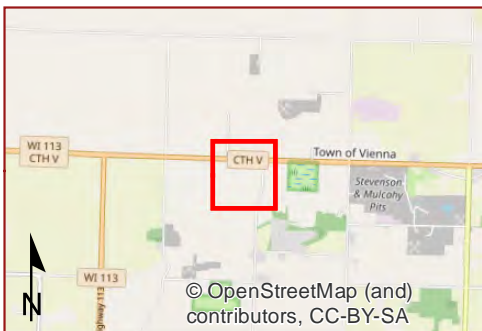


Figure 7. Field Map

Maier Farm
 Project #20200322
 T9N, R9E, S21
 T Vienna, Dane Co

2018 Orthophoto
 Dane Co, HEG LRR: NCNE





 Study Area (45.19 ac)

0 175 350
Ft

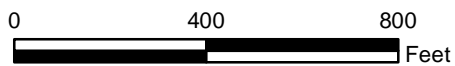
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**Appendix: 1937
Orthophoto**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

1937 Orthophoto
Data: WI St. Cart. Office 5/29/2020

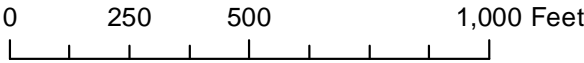
NW 1/4 sec. 21 T9N, R9 E (Vienna)
1955 Photo





1968 Dane County Aerial Imagery



May 29, 2020



Dane County Mask

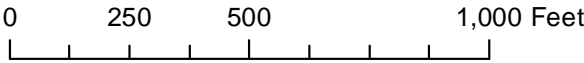
-  Dane County Mask
-  Parcels





1974 Dane County Aerial Imagery



May 29, 2020



Dane County Mask

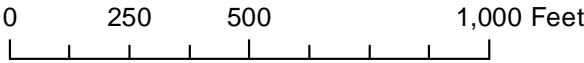
-  Dane County Mask
-  Parcels





1976 Dane County Aerial Imagery



May 29, 2020



Dane County Mask

-  Dane County Mask
-  Parcels



1979 FSA Slide



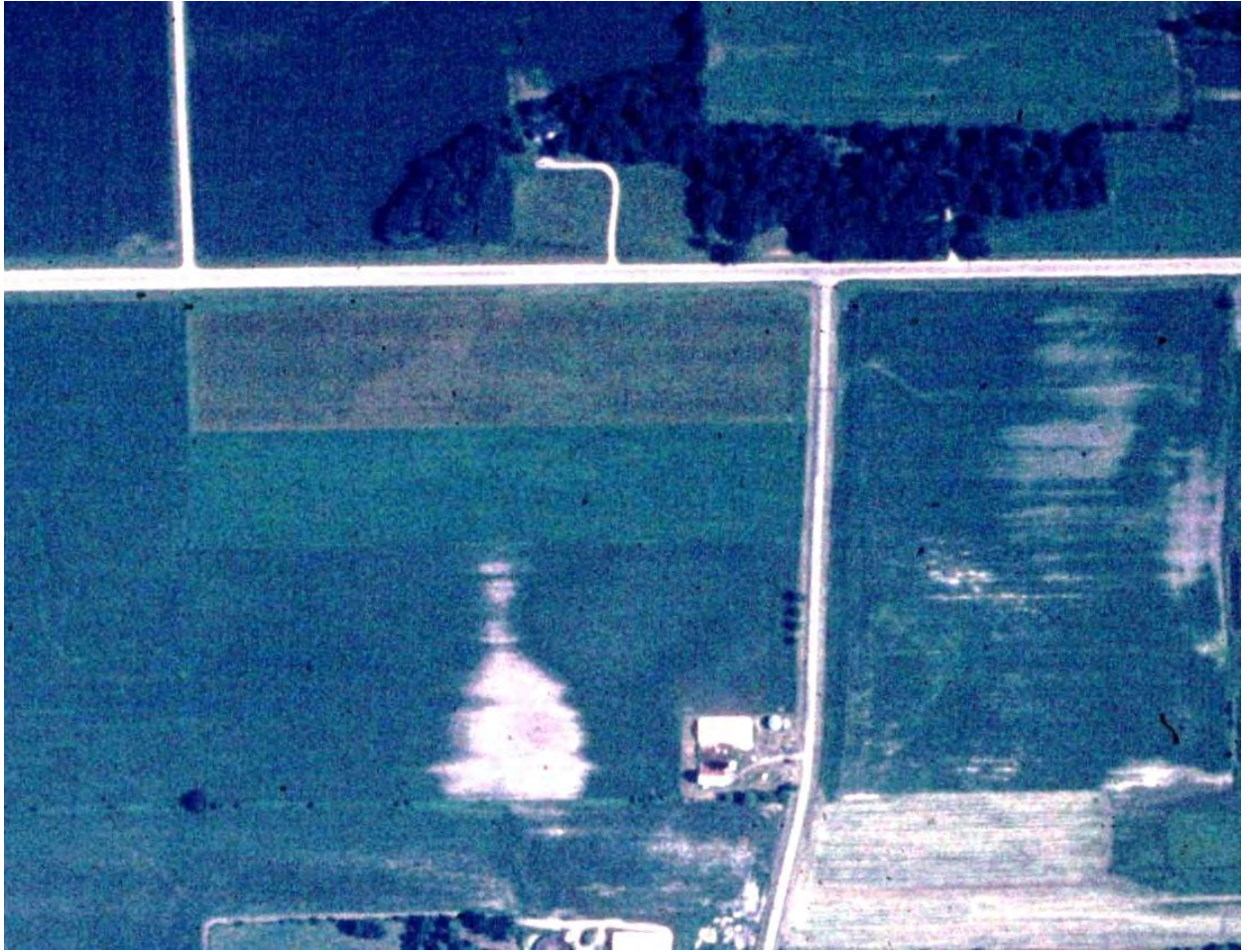
1982 FSA Slide



1983 FSA Slide



1984 FSA Slide



1985 FSA Slide



1994 FSA Slide



1995 FSA Slide



1996 FSA Slide



1997 FSA Slide



1998 FSA Slide



1999 FSA Slide



2000 FSA Slide



2001 FSA Slide

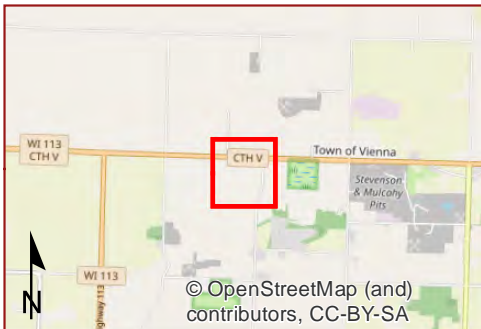


2002 FSA Slide



2003 FSA Slide





 Study Area (45.19 ac)

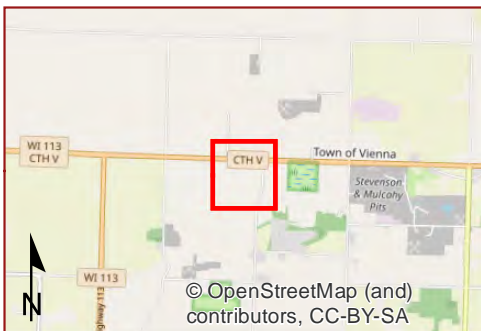
0 175 350
Ft

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**Appendix: 2004-07-15
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2004 NAIP
Data: USDA 5/29/2020



© OpenStreetMap (and contributors, CC-BY-SA)

 Study Area (45.19 ac)

0 175 350
Ft

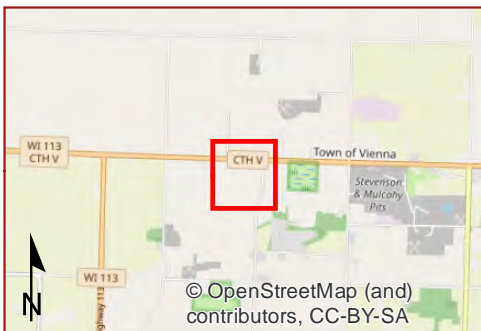
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**Appendix: 2005-07-08
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2005 NAIP
Data: USDA

5/29/2020



© OpenStreetMap (and) contributors, CC-BY-SA

 Study Area (45.19 ac)

0 175 350
Ft

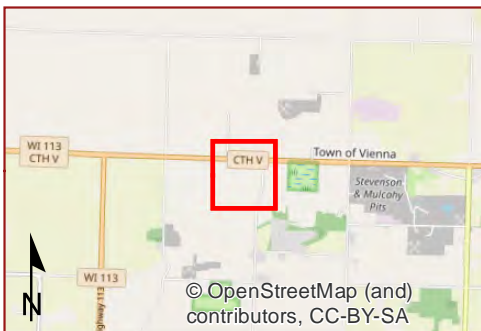
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**Appendix: 2006-07-15
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2006 NAIP
Data: USDA

5/29/2020



© OpenStreetMap (and contributors), CC-BY-SA

 Study Area (45.19 ac)

0 175 350
Ft

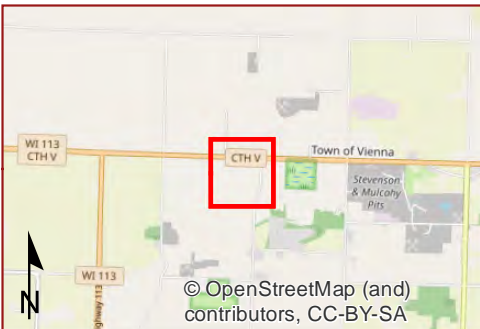
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**Appendix: 2008-07-09
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2008 NAIP
Data: USDA

5/29/2020



© OpenStreetMap (and contributors), CC-BY-SA

 Study Area (45.19 ac)

0 175 350
Ft

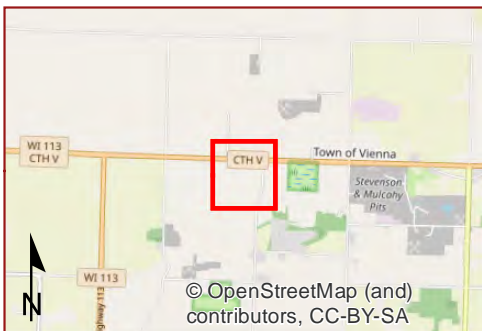
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**Appendix: 2010-07-02
NAIP Aerial Imagery**

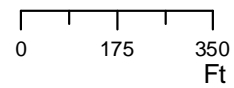
Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2010 NAIP
Data: USDA

5/29/2020



 Study Area (45.19 ac)

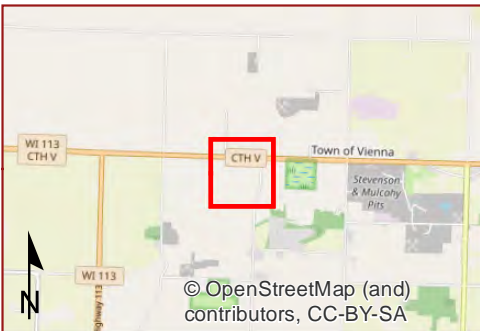


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**Appendix: 2013-07-04
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2013 NAIP
Data: USDA 5/29/2020



 Study Area (45.19 ac)

0 175 350
Ft

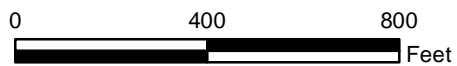
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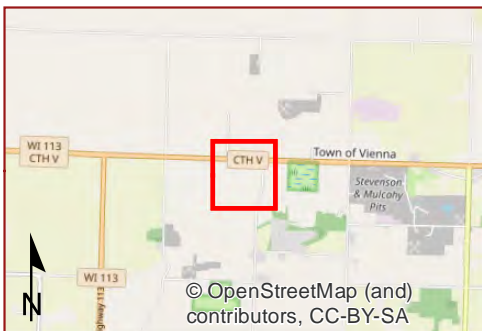
**Appendix: 2015-10-11
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2015 NAIP
Data: USDA 5/29/2020

NW 1/4 sec. 21 T9N, R9 E (Vienna)
2017 Photo





 Study Area (45.19 ac)

0 175 350
Ft

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**Appendix: 2017-09-03
NAIP Aerial Imagery**

Maier Farms
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co, WI

2017 NAIP
Data: USDA

5/29/2020



 Study Area (44.95 ac)

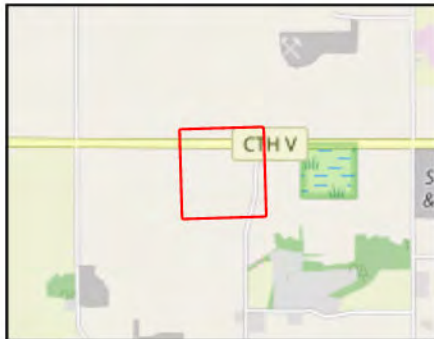
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Appendix: 2018-10-04
NAIP Aerial Imagery

Maier Farm
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co

2018 NAIP
USDA





 Study Area (44.95 ac)

0 250
Ft

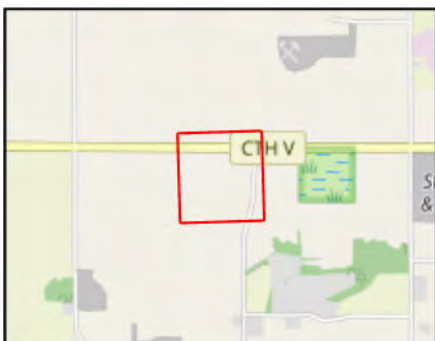
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Appendix: 2020-08-30
NAIP Aerial Imagery

Maier Farm
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co

2020 NAIP
USDA

Figure Created: 2/26/2024





 Study Area (44.95 ac)

0 250
Ft

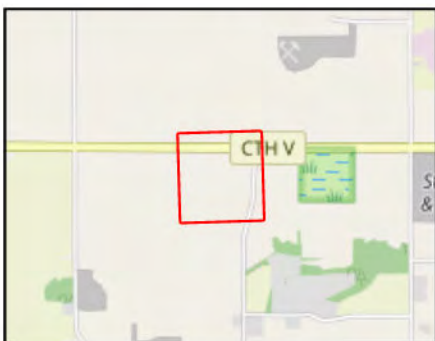
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Appendix: 2022-06-26
NAIP Aerial Imagery

Maier Farm
Project #20200322
T9N, R9E, S21
T Vienna, Dane Co

2020 NAIP
USDA

Figure Created: 2/26/2024





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

October 11, 2024

Regulatory File No. MVP-2024-00919

Heartland Ecological Group
c/o Jeff Kraemer
506 Springdale Street
Mount Horeb, Wisconsin 53572
jeff@heartlandecological.com

Dear Jeff Kraemer,

This letter contains an Approved Jurisdictional Determination (AJD) for the area(s) identified below, located on the Maier Farm in Section 21, Township 09, Range 09 East, Dane County, Wisconsin. The review area for this determination is identified on the enclosed figure labeled: MVP-2024-00919, AJD Figure 1.

Non-Jurisdictional Area(s):

We have determined that the following area(s) are not waters of the United States subject to Corps of Engineers (Corps) jurisdiction under Section 404 of the Clean Water Act or Sections 9 or 10 of the Rivers and Harbors Act:

- Prior Converted Cropland, (84.5 acres)

You are not required to obtain Corps authorization within the area(s) listed above. This determination only applies to the area(s) identified above and is based on a reasonable approximation of their location and boundaries. The basis for this determination is provided in the enclosed Memorandum for Record.

Agricultural Lands Information:

This approved jurisdictional determination includes areas that meet the USDA NRCS definition of prior converted cropland at 7 C.F.R. § 12.2 and are documented as meeting the Clean Water Act exclusion for prior converted cropland at 33 C.F.R. § 328.3(b)(2). Although AJDs are only valid for five years as a matter of current Corps policy, the Clean Water Act prior converted cropland exclusion for such lands remains valid as long as the covered land area is not subjected to a "change in use" that would make the land unavailable for the production of an agricultural commodity. Any prior converted cropland exclusion in this AJD shall be extinguished for a proposal or plan that would result in a "change in use" of the land to a non-agricultural use, including but not limited to industrial, commercial, mining, energy infrastructure, or residential uses. Recipients may request reverification of prior converted cropland exclusion status for expired AJDs.

This determination has been conducted to identify the location and extent of the aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This determination may not be valid for the Wetland Conservation Provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should discuss the applicability of an NRCS Certified Wetland Determination with the local USDA service center, prior to starting work.

Appeal Process:

If you object to this approved jurisdictional determination, you may request an administrative appeal under Corps regulations at 33 CFR 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination, you must submit a completed RFA form to the Mississippi Valley Division Office at the address shown on the form. In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR 331.5, and that it has been received by the Division Office within 60 days of the date of the enclosed NAP.

It is not necessary to submit an RFA form to the division office if you do not object to the determination in this letter.

AJD Expiration:

This AJD may be relied upon for five years from the date of this letter. However, the Corps reserves the right to review and revise the determination in response to information that was not considered during our initial review.

Contact Information:

If you have any questions, please contact me in our me at Stevens Point or kyle.d.zibung@usace.army.mil. In any correspondence or inquiries, please refer to the Regulatory file number shown above.

Sincerely,



Kyle Zibung
Lead Project Manager

Enclosures
Figure 1, AJD MFR, Appeals Form

cc:
Tom Nedland, WDNR (thomas.nedland@wisconsin.gov)



United States
Department of
Agriculture

All WC Determinations Map

Farm: 19554

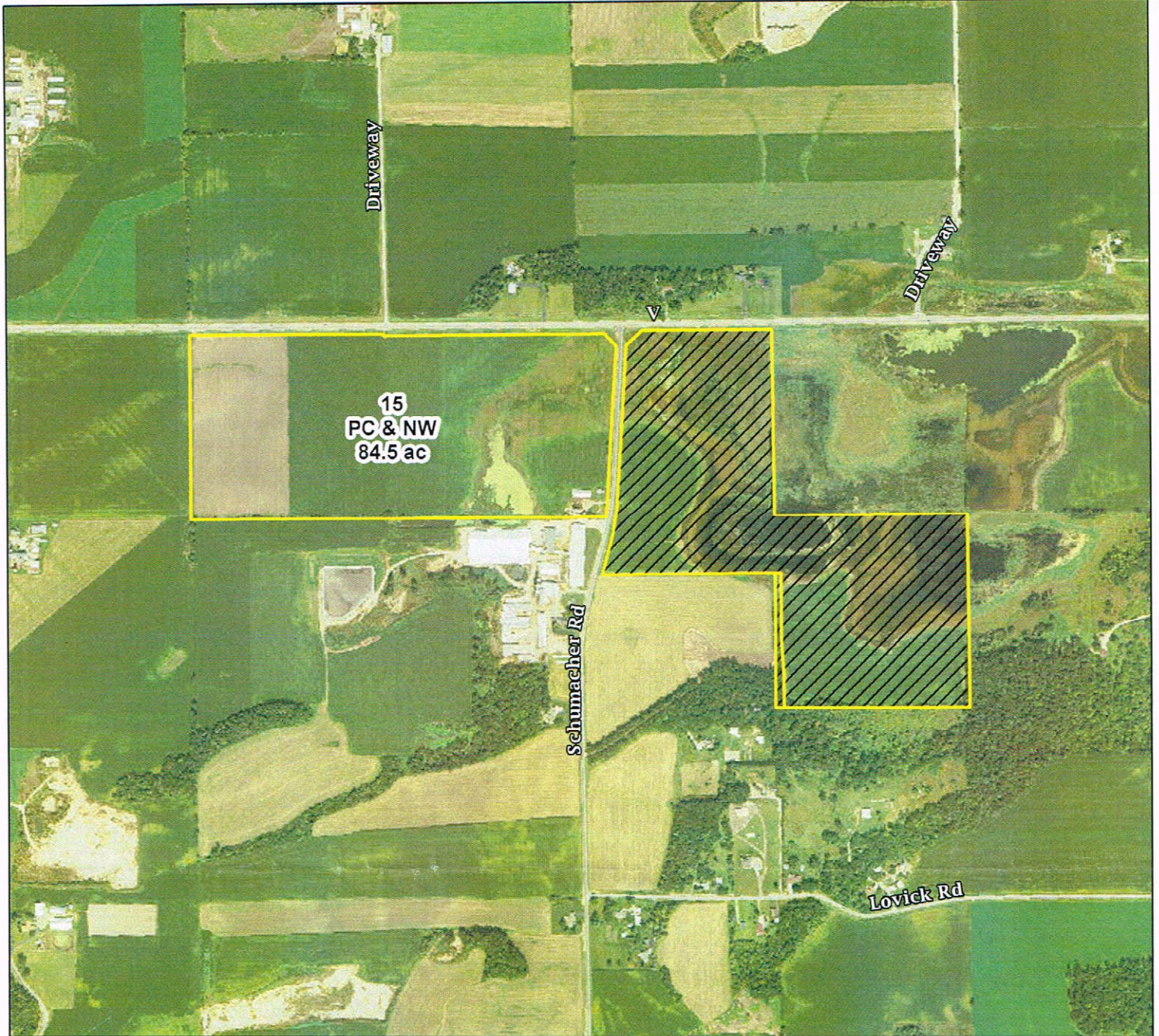
Tract: 12854

Owner: Koch Family Farm LLC

Geographic County: Dane, WI



Operator: James Koch T9N R9E S20,21

FSA Admin County: Dane, WI



Base Map Image: 2017 NAIP
Map Prepared By: Carol Miller
Map Production Date: 7/22/2019

This map shows all completed WC determinations for the site. It is the responsibility of all program participants to not convert obvious wetlands regardless of map interpretation. Newly completed and previously certified areas are shown on this map. Other areas are marked as, "Not Evaluated."

-  Technical Determination Extents
-  Not Evaluated

Note: Acres shown on this map may not match official FSA CLU acres due to differences in rounding or the scale at which the work was completed. Previously certified areas retain their labels and certified status.



1:12,214

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Heartland Ecological Group Inc c/o Jeff Kraemer	File Number: MVP-2024-00919	Date: October 11, 2024
Attached is:		See Section below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
<input type="checkbox"/>	PERMIT DENIAL WITHOUT PREJUDICE	C
<input type="checkbox"/>	PERMIT DENIAL WITH PREJUDICE	D
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	E
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	F

SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable

You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial

You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.
- **RECONSIDERATION:** You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable

You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision you may contact:

U.S. Army Corps of Engineers
St. Paul District
Regulatory Division
332 Minnesota Street, Suite E1500
St. Paul, MN 55101-1323
Phone: 651-290-5525

If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:

Brian Oberlies
Administrative Appeals Review Officer
Mississippi Valley Division
P.O. Box 80 (1400 Walnut Street)
Vicksburg, MS 39180-0080
Phone: 601-634-5820
Email: brian.m.oberlies@usace.army.mil

SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:
Email address of appellant and/or agent:	Telephone number:



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

MVP-2024-00919

11 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-2024-00919 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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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.

MVP-2024-00615-DDP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00919.

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. Prior Converted Cropland (84.5 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. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA:

The review area is limited to 84.5 acres of Prior converted Cropland and is identified by the red polygon on the attached figure. The review area is located at (43.248392, -89.438578) in Dane County, Wisconsin. There are no other JDs associated with the review area. See the enclosed Figure labeled MVP-2024-00919, AJD Figure 1.

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. 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

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.

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.

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

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

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.

MVP-2024-00615-DDP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00919.

exclusions listed in 33 CFR 328.3(b).⁹ The review area for this determination is comprised of approximately 84.5 acres. An August 2024 wetland delineation completed by Heartland Ecological Group Inc identified 12.09 acres of wetlands present within the review area. The AJD requestor (Heartland Ecological Group Inc) stated in their request that the property is currently in an agricultural use and would remain in an agricultural use. A Certified Wetland Determination completed by the USDA-NRCS on July 24, 2019, determined the entire 84.5 acres in the review area to be Prior Converted Cropland and Non-Wetland. In accordance with 33 CFR § 328.3 (b)(2), the Corps does not consider Prior Converted Cropland to be waters of the U.S.

- 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. July 24, 2019, USDA-NRCS Certified Wetland Determination (Koch Family Farm LLC)
- b. August 2024 Heartland Ecological Group Inc Wetland Delineation
- c. USACE Regulatory Viewer Accessed October 11, 2024
- d. WDNR - Surface Water Data Viewer Accessed October 11, 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.

⁹ 88 FR 3004 (January 18, 2023)