

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
LAFAYETTE DIVISION

|                                  |   |                        |
|----------------------------------|---|------------------------|
| HOOSIER ENVIRONMENTAL            | ) |                        |
| COUNCIL, et. al.,                | ) |                        |
|                                  | ) |                        |
| Plaintiffs,                      | ) |                        |
|                                  | ) | Case No. 4:19-CV-00071 |
| v.                               | ) |                        |
|                                  | ) |                        |
| NATURAL PRAIRIE INDIANA          | ) |                        |
| FARMLAND HOLDINGS, LLC, et. al., | ) |                        |
|                                  | ) |                        |
| Defendants.                      | ) |                        |

**Joint Notice of Issuance of Revised Approved  
Jurisdictional Determination and Request for Status Conference**

The Parties hereby jointly notify the Court of the U.S. Army Corps of Engineers' ("Corps") issuance of a revised Approved Jurisdictional Determination ("AJD") and request a status conference to address case management issues. In support, the Parties state as follows:

1. On Saturday, March 18, 2023, the Corps issued a revised AJD regarding Natural Prairie's land that is at issue in this litigation. The revised AJD is attached hereto as Exhibit A.

2. On Monday, March 20, 2023, the Court issued an order denying the Plaintiffs' motion for partial summary judgment with leave to renew as appropriate and staying the case pending the Corps' issuance of a revised jurisdictional determination.

[ECF 127 at pp. 1 & 9.] In doing so, the Court noted that the Plaintiffs' "CWA claim—

that Natural Prairie filled and tiled nearly half a mile of the Bogus Island Ditch without a permit and that it altered a jurisdictional wetland without a permit—are all informed by the Corps’ jurisdictional determination” and, thus, a stay of the case is warranted pending a revised AJD under the doctrine of primary jurisdiction. [*Id.* at p. 8.]

3. The Plaintiffs and Natural Prairie have reviewed the Corps’ revised AJD and are currently considering whether to initiate administrative review, in the case of Natural Prairie, or to seek judicial review under the Administrative Procedure Act (“APA”), in the case of Plaintiffs.

4. Under the Corps’ administrative appeal process, Natural Prairie, as the applicant, has sixty (60) days from the issuance of the AJD in which to initiate the appeal process (i.e., until May 17, 2023). *See* 40 C.F.R. §§ 331.5 & 331.6; *see also* Ex. A at p. 4 of 25.

5. Once the revised AJD becomes final (either after the expiration of the 60-day administrative appeal deadline or after the resolution of the administrative appeal process), the Plaintiffs and/or Natural Prairie may appeal under the APA.

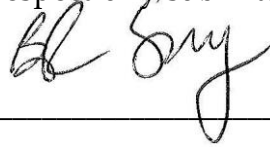
6. As such, the parties have conferred and believe that extending the stay of the case for at least sixty (60) days is warranted (i.e., until May 22, 2023).

7. The parties also believe that a status conference to discuss case management is warranted and respectfully request the Court to set a remote status conference on or after April 17, 2023.

8. Counsel for Plaintiffs and the Corps have reviewed this filing and have consented to filing jointly.

WHEREFORE, the Parties respectfully request the Court to continue the stay in this litigation until May 22, 2023, and to schedule a remote status conference on or after April 17, 2023.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "BR Sugarman", is written over a horizontal line.

Bradley R. Sugarman  
Andrew M. McNeil  
Daniel P. McNerny  
Bose McKinney & Evans, LLP  
111 Monument Circle, Suite 2700  
Indianapolis, Indiana 46204

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, a copy of the foregoing document was served on the following parties by electronic mail, an accepted form of service in this case.



---

Daniel Dertke  
Wayne T. Ault  
U.S. Department of Justice  
Envtl. & Natural Res. Def. Section  
P.O. Box 7611  
Washington, D.C. 20009  
[Daniel.Dertke@usdoj.gov](mailto:Daniel.Dertke@usdoj.gov)  
[Wayne.ault@usdoj.gov](mailto:Wayne.ault@usdoj.gov)  
[Teresa.diller@usdol.gov](mailto:Teresa.diller@usdol.gov)

*Counsel for U.S. Army Corps of Engineers  
Defendants*

Kim E. Ferraro  
Jeffrey B. Hyman  
Conservation Law Center  
116 South Indiana Avenue  
Bloomington, IN 47408  
[kimferra@iu.edu](mailto:kimferra@iu.edu)  
[jbyhyman@iu.edu](mailto:jbyhyman@iu.edu)

*Counsel for Plaintiffs*



DEPARTMENT OF THE ARMY  
DETROIT DISTRICT, CORPS OF ENGINEERS  
REGULATORY OFFICE  
MICHIANA BRANCH  
2422 VIRIDIAN DRIVE SUITE # 200  
SOUTH BEND, IN 46628

REPLY TO  
ATTENTION OF:

March 17, 2023

Regulatory Branch  
File No. LRE-2018-00719-156-A18

Will Dejong  
Natural Prairie Indiana Farmland Holdings, LLC  
P.O. Box 659  
Hartley, Texas 79044

Dear Mr. Dejong:

This is in response to a request regarding the Corps of Engineers' (Corps) jurisdiction on property at 4500 West 400 North near Lake Village, Indiana (Section 6, Township 30N, Range 9W, Newton County). We inspected the property and determined it contains waters on the property under the Corps' jurisdiction which are depicted on the enclosed drawing.

In Lawler and Bogus Island Ditch, as in all waters of the United States, including their adjacent wetlands, any discharge of dredged and/or fill material must be authorized by the Department of the Army. The authority of the Corps of Engineers to regulate the discharge of dredged and/or fill material is contained in Section 404 of the Clean Water Act and regulations promulgated pursuant to that Act. Filling and grading work, mechanized landclearing, the sidecasting of excavated material, and the installation of certain pile-supported structures constitute or otherwise involve discharges of dredged and/or fill material under the Corps' regulatory authority.

If you anticipate discharging any dredged or fill material into Lawler or Bogus Island Ditch, you will need to apply for and receive authorization from the Corps prior to starting such work. The necessary permit application can be found on our website at <http://www.lre.usace.army.mil/Missions/RegulatoryProgramandPermits.aspx>. Please complete and return the application following the procedures set forth in the application. Plan view and cross-sectional view drawings, in 8½" x 11" format, should accompany the application. Drawings and a narrative on the form should specifically identify and describe all of the structures, work, and discharges which we regulate as described above, including temporary or construction measures.

Our assertion of jurisdiction is based on our documentation that the waterbody in question is a water of the United States and recognition that the use, degradation, or destruction of this waterbody could affect interstate commerce. The lateral limit of jurisdiction for Lawler and Bogus Island Ditch is the Ordinary High Water Mark.

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The delineation included herein has been conducted to identify the location and extent of the aquatic resource boundaries and/or the jurisdictional status of aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This delineation and/or jurisdictional 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 a certified wetland determination with the local USDA service center, prior to starting work.

This letter contains an approved jurisdictional determination for the property in question. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 Code of Federal Regulations (CFR) Part 331. We have enclosed a Notification of Appeal Process (NAP) fact sheet and a Request for Appeal (RFA) form. If you intend to appeal this determination, you must submit a completed RFA form to the Corps' Great Lakes and Ohio River Division (Division) office, preferably via E-Mail at [katherine.a.mccafferty@usace.army.mil](mailto:katherine.a.mccafferty@usace.army.mil), or to the following address:

Katherine A. McCafferty  
Regulatory Administrative Appeals Officer  
U.S. Army Corps of Engineers,  
Great Lakes and Ohio River Division  
550 Main Street, Room 10780  
Cincinnati, Ohio 45202-3222

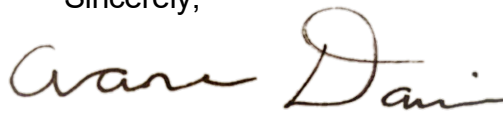
In order for an RFA to be accepted by the Corps, the Corps must determine that the RFA is complete, that it meets the criteria for appeal under 33 CFR Part 331.5, and that it has been received by the Division office within 60 days of the date of the NAP sheet. If you decide to submit an RFA form, it must be received at the above address by May 15, 2023. It is not necessary to submit an RFA form to the Division office if you do not object to the determination in this letter. You may contact the Appeals Review Officer at (513) 684-2699 and send a facsimile at (513) 684-2460.

This jurisdiction determination is valid for a period of five years from the date of this letter unless new information warrants revision of the delineation before the expiration date. Should you have any questions, please contact me at the above address, by E-Mail at [Aaron.W.Damrill@usace.army.mil](mailto:Aaron.W.Damrill@usace.army.mil), or by telephone at (574) 232-1952 Ext. 21961. In all communications, please refer to File Number LRE-2018-00719-156-A18.

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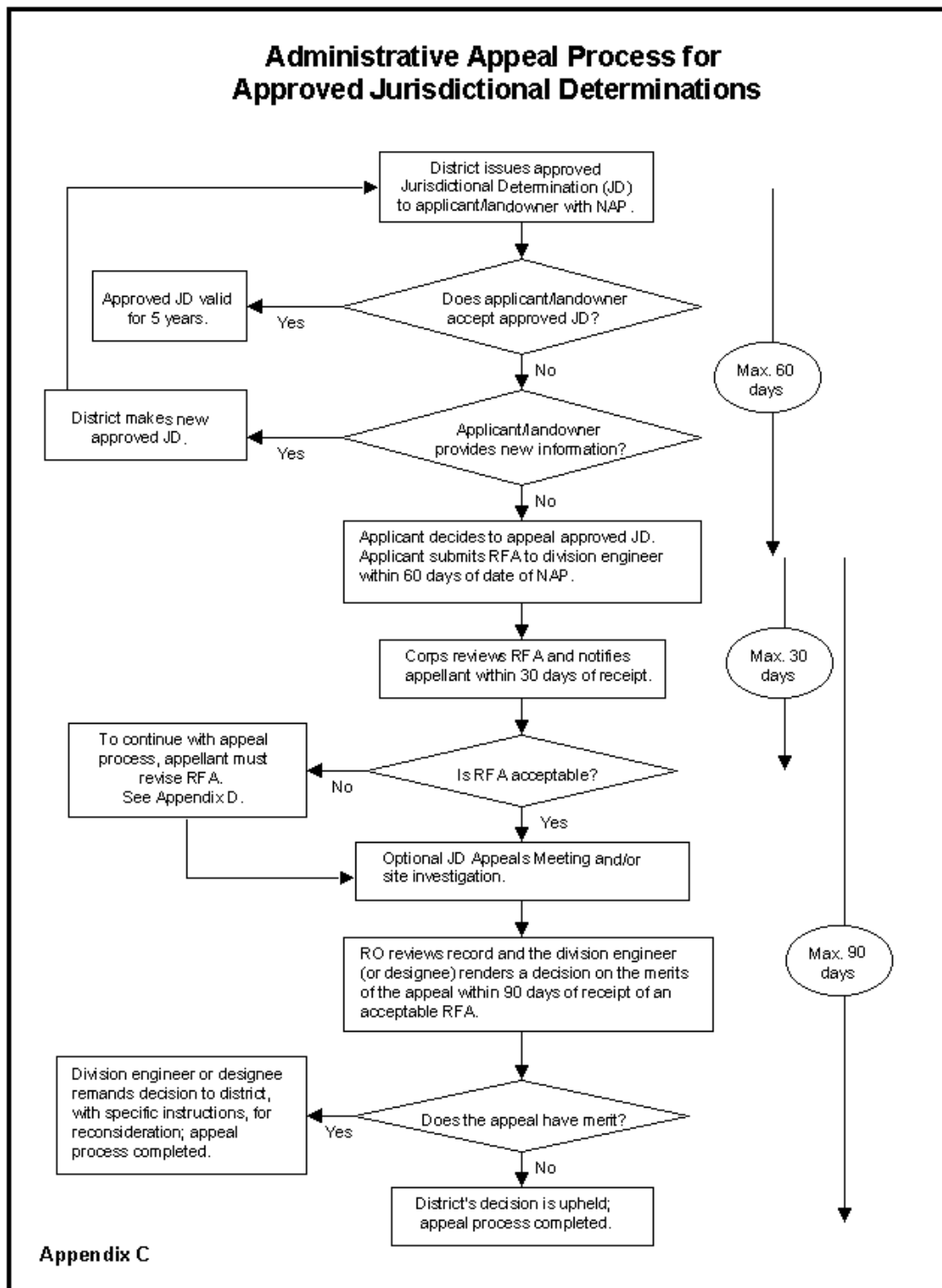
We are interested in your thoughts and opinions concerning your experience with the Detroit District, Corps of Engineers Regulatory Program. If you are interested in letting us know how we are doing, you can complete an electronic Customer Service Survey from our web site at: <https://regulatory.ops.usace.army.mil/customer-service-survey/>. Alternatively, you may contact us and request a paper copy of the survey that you may complete and return to us by mail or fax. Thank you for taking the time to complete the survey, we appreciate your feedback.

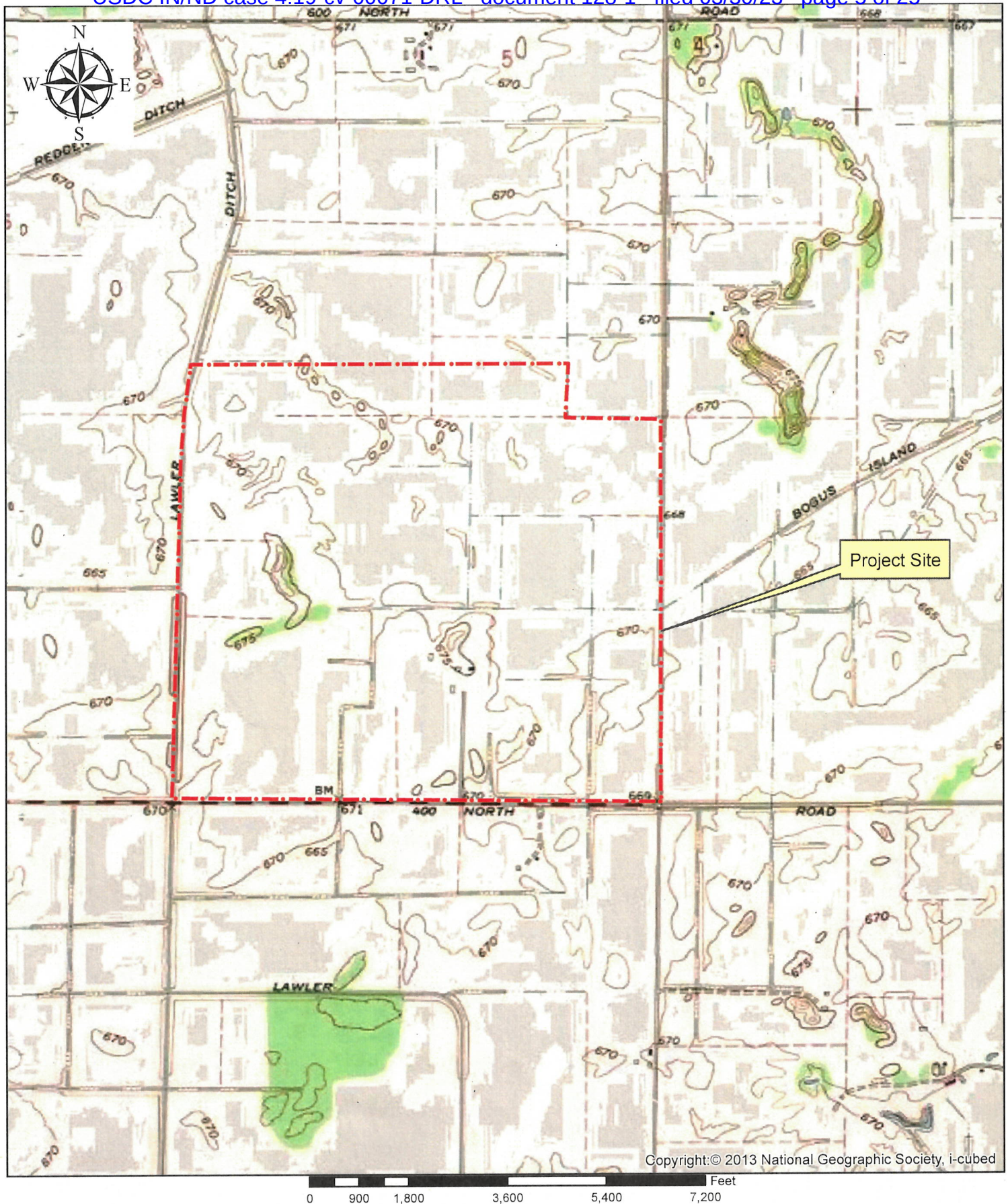
Sincerely,

A handwritten signature in brown ink, appearing to read "Aaron Damrill". The signature is fluid and cursive, with the first name "Aaron" and last name "Damrill" clearly distinguishable.

Aaron W. Damrill  
Chief, Michiana Section  
Regulatory Branch

Enclosure





All Measurements are approximate.



US Army Corps of Engineers  
**BUILDING STRONG®**

2018-00719-156-A18  
Natural Prairie Indiana Farmland Holdings  
Will DeJong  
4500 West 400 N  
Newton, IN

Aaron Damrill  
July 19, 2018

**APPROVED JURISDICTIONAL DETERMINATION FORM**  
**U.S. Army Corps of Engineers**

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

**SECTION I: BACKGROUND INFORMATION**

**A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):** March 18, 2023

**B. DISTRICT OFFICE, FILE NAME, AND NUMBER:** M Detroit District, Natural Prairie Indiana Farmland, 2018-00719-156-A18

**C. PROJECT LOCATION AND BACKGROUND INFORMATION:**

State: Indiana County/parish/borough: Newton City: Lake Village  
 Center coordinates of site (lat/long in degree decimal format): Lat. 41. 065699° **N**, Long. -87.480355° **W**.  
 Universal Transverse Mercator: 16

Name of nearest waterbody: Lawler Ditch

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Kankakee River

Name of watershed or Hydrologic Unit Code (HUC): 07120001

☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

**D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):**

☒ Office (Desk) Determination. Date: August 17, 2018

☒ Field Determination. Date(s): July 19, 2018 & June 23, 2022

**SECTION II: SUMMARY OF FINDINGS**

**A. RHA SECTION 10 DETERMINATION OF JURISDICTION.**

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

☐ Waters subject to the ebb and flow of the tide.

☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.  
 Explain: .

**B. CWA SECTION 404 DETERMINATION OF JURISDICTION.**

There **Are** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

**1. Waters of the U.S.**

**a. Indicate presence of waters of U.S. in review area (check all that apply):** <sup>1</sup>

- ☐ TNWs, including territorial seas
- ☐ Wetlands adjacent to TNWs
- ☒ Relatively permanent waters<sup>2</sup> (RPWs) that flow directly or indirectly into TNWs
- ☐ Non-RPWs that flow directly or indirectly into TNWs
- ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- ☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- ☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- ☐ Impoundments of jurisdictional waters
- ☐ Isolated (interstate or intrastate) waters, including isolated wetlands

**b. Identify (estimate) size of waters of the U.S. in the review area:**

Non-wetland waters: linear feet: width (ft) and/or acres.

Wetlands: acres.

**c. Limits (boundaries) of jurisdiction based on:** **Established by OHWM.**

Elevation of established OHWM (if known): not known.

**2. Non-regulated waters/wetlands (check if applicable):**<sup>3</sup>

☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.  
 Explain: **see narrative in IV.B.**

<sup>1</sup> Boxes checked below shall be supported by completing the appropriate sections in Section III below.

<sup>2</sup> For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

<sup>3</sup> Supporting documentation is presented in Section III.F.

**SECTION III: CWA ANALYSIS****A. TNWs AND WETLANDS ADJACENT TO TNWs**

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

**1. TNW**

Identify TNW: .

Summarize rationale supporting determination: .

**2. Wetland adjacent to TNW**

Summarize rationale supporting conclusion that wetland is “adjacent”: .

**B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):**

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are “relatively permanent waters” (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody<sup>4</sup> is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

**1. Characteristics of non-TNWs that flow directly or indirectly into TNW****(i) General Area Conditions:**

Watershed size: **Pick List**

Drainage area: **Pick List**

Average annual rainfall: inches

Average annual snowfall: inches

**(ii) Physical Characteristics:****(a) Relationship with TNW:**

☐ Tributary flows directly into TNW.

☐ Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.

Project waters are **Pick List** river miles from RPW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Project waters are **Pick List** aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain: .

Identify flow route to TNW<sup>5</sup>: .

Tributary stream order, if known: .

<sup>4</sup> Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

<sup>5</sup> Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: ☐ Natural  
☐ Artificial (man-made). Explain: .  
☐ Manipulated (man-altered). Explain: .

Tributary properties with respect to top of bank (estimate):

Average width: feet  
 Average depth: feet  
 Average side slopes: **Pick List**.

Primary tributary substrate composition (check all that apply):

☐ Silts ☐ Sands ☐ Concrete  
☐ Cobbles ☐ Gravel ☐ Muck  
☐ Bedrock ☐ Vegetation. Type/% cover:  
☐ Other. Explain: .

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: .

Presence of run/riffle/pool complexes. Explain: .

Tributary geometry: **Pick List**

Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: **Pick List**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime: .

Other information on duration and volume: .

Surface flow is: **Pick List**. Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .

☐ Dye (or other) test performed: .

Tributary has (check all that apply):

☐ Bed and banks  
☐ OHWM<sup>6</sup> (check all indicators that apply):  
☐ clear, natural line impressed on the bank ☐ the presence of litter and debris  
☐ changes in the character of soil ☐ destruction of terrestrial vegetation  
☐ shelving ☐ the presence of wrack line  
☐ vegetation matted down, bent, or absent ☐ sediment sorting  
☐ leaf litter disturbed or washed away ☐ scour  
☐ sediment deposition ☐ multiple observed or predicted flow events  
☐ water staining ☐ abrupt change in plant community  
☐ other (list):  
☐ Discontinuous OHWM.<sup>7</sup> Explain: .

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

☒ High Tide Line indicated by: ☐ Mean High Water Mark indicated by:  
☐ oil or scum line along shore objects ☐ survey to available datum;  
☐ fine shell or debris deposits (foreshore) ☐ physical markings;  
☐ physical markings/characteristics ☐ vegetation lines/changes in vegetation types.  
☐ tidal gauges  
☐ other (list):

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: .

Identify specific pollutants, if known: .

<sup>6</sup>A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

<sup>7</sup>Ibid.

(iv) **Biological Characteristics. Channel supports (check all that apply):**

- ☐ Riparian corridor. Characteristics (type, average width): .
- ☐ Wetland fringe. Characteristics: .
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings: .
  - ☐ Fish/spawn areas. Explain findings: .
  - ☐ Other environmentally-sensitive species. Explain findings: .
  - ☐ Aquatic/wildlife diversity. Explain findings: .

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:

Properties:

Wetland size: acres

Wetland type. Explain: .

Wetland quality. Explain: .

Project wetlands cross or serve as state boundaries. Explain: .

(b) General Flow Relationship with Non-TNW:

Flow is: **Pick List**. Explain: .

Surface flow is: **Pick List**

Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .

☐ Dye (or other) test performed: .

(c) Wetland Adjacency Determination with Non-TNW:

☐ Directly abutting

☐ Not directly abutting

☐ Discrete wetland hydrologic connection. Explain: .

☐ Ecological connection. Explain: .

☐ Separated by berm/barrier. Explain: .

(d) Proximity (Relationship) to TNW

Project wetlands are **Pick List** river miles from TNW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Flow is from: **Pick List**.

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: .

Identify specific pollutants, if known: .

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

- ☐ Riparian buffer. Characteristics (type, average width): .
- ☐ Vegetation type/percent cover. Explain: .
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings: .
  - ☐ Fish/spawn areas. Explain findings: .
  - ☐ Other environmentally-sensitive species. Explain findings: .
  - ☐ Aquatic/wildlife diversity. Explain findings: .

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

All wetland(s) being considered in the cumulative analysis: **Pick List**

Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)      Size (in acres)      Directly abuts? (Y/N)      Size (in acres)

Summarize overall biological, chemical and physical functions being performed: .

### C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

**Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:**

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: .
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

### D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:

☐ TNWs: linear feet width (ft), Or, acres.  
☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

☒ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: Lawler Ditch is depicted on the USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Lawler Ditch by mapping it has a stream/canal. The NHD map also shows that flow in Lawler Ditch is relatively permanent. Water is evident in Lawler Ditch in aerials reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005, June 2008, September 2013, May 2015, and April 2017. Water was observed flowing in Lawler Ditch during the July 19, 2018 and June 23, 2022 site visit. In addition to the observed water flow, other OHWM indicators described in RGL 05-05 were observed including a line impressed on the bank and shelving. Bogus Island Ditch is depicted on the on the

USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Bogus Island Ditch by mapping it has a stream/canal. The NHD map also shows that flow in Bogus Island Ditch is relatively permanent. Water is evident in Bogus Island Ditch in aerials reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005, June 2008, September 2013, May 2015, and April 2017. Water was observed flowing in Bogus Island Ditch during the July 19, 2018 and June 23, 2022 site visit along with a defined bed and bank. In addition to the observed water flow other OHWM indicators including a line impressed on the and bank and shelving which are described in RGL 05-05 were also observed. Bogus Island Ditch is also a county regulated drain.

- ☐ Tributaries of TNW where tributaries have continuous flow “seasonally” (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).  
☐ Other non-wetland waters: acres.  
 Identify type(s) of waters: .

**3. Non-RPWs<sup>8</sup> that flow directly or indirectly into TNWs.**

- ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).  
☐ Other non-wetland waters: acres.  
 Identify type(s) of waters: .

**4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.  
☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .  
☐ Wetlands directly abutting an RPW where tributaries typically flow “seasonally.” Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

**5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

**6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- ☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

**7. Impoundments of jurisdictional waters.<sup>9</sup>**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- ☐ Demonstrate that impoundment was created from “waters of the U.S.,” or  
☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or  
☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

<sup>8</sup>See Footnote # 3.

<sup>9</sup> To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

**E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):<sup>10</sup>**

- ☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.
- ☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☐ which are or could be used for industrial purposes by industries in interstate commerce.
- ☐ Interstate isolated waters. Explain: .
- ☐ Other factors. Explain: .

**Identify water body and summarize rationale supporting determination:** .

Provide estimates for jurisdictional waters in the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).
- ☐ Other non-wetland waters: acres.
- ☐ Identify type(s) of waters: .
- ☐ Wetlands: acres.

**F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):**

- ☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- ☐ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
- ☐ Prior to the Jan 2001 Supreme Court decision in “*SWANCC*,” the review area would have been regulated based solely on the “Migratory Bird Rule” (MBR).
- ☐ Waters do not meet the “Significant Nexus” standard, where such a finding is required for jurisdiction. Explain: .
- ☒ Other: (explain, if not covered above): **irrigation canals in agricultural uplands, see additional comments.**

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the “Significant Nexus” standard, where such a finding is required for jurisdiction (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☐ Wetlands: acres.

**SECTION IV: DATA SOURCES.****A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):**

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Delineation prepared by Cardno dated July 16, 2018 and maps submitted on July 2, 2018 by Agent.
- ☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
- ☒ Office concurs with data sheets/delineation report.
- ☐ Office does not concur with data sheets/delineation report.
- ☒ Data sheets prepared by the Corps: A. Damrill & A. Frohlich, dated June 23, 2022.
- ☐ Corps navigable waters’ study: .
- ☒ U.S. Geological Survey Hydrologic Atlas: .
- ☒ USGS NHD data.
- ☐ USGS 8 and 12 digit HUC maps.
- ☒ U.S. Geological Survey map(s). Cite scale & quad name: 1:24000 Enos Quad, 1:250,000 1953, Chicago Quad, 1:24000, 1962 Enos Quad, and 1:100,000, 1984 Kankakee Quad.

<sup>10</sup> Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: NRCS-USDA Soil Survey for Newton County & 1905 Bureau of Soils, Newton County Soil Map obtained from IU Bloomington, Image Collections Online (<https://webapp1.dlib.indiana.edu/images/item.htm?id=http://purl.dlib.indiana.edu/iudl/images/VAC3073/VAC3073-M-00047&scope=images/VAC3073#>).
- ☒ National wetlands inventory map(s). Cite name:US FWS On-Line Wetland Mapper.
- ☐ State/Local wetland inventory map(s): .
- ☐ FEMA/FIRM maps: .
- ☐ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date):FSA: August 24, 1951, June 22, 1963, & April 29, 1977; USGS: April 21, 1953, August 30, 1971, July 11, 1976, August 11, 1976, May 26, 1983, April 28, 1984, April 12, 1988, & April 17, 1993; EDR: July 10, 1957; HGI: March 27, 1973; NHAP: November 17, 1981; NRCS: July 1980, August 1982, July 1985, September 1986, August 1987 & 1990; Indiana Historical Aerial Photo Index: 1939, 1952, 1963, 1971.
- or ☒ Other (Name & Date):Site photos taken June 23, 2022; GoogleEarth Images: April 1998, February 2005, June 2008, September 2013, May 2015 & April 2017.
- ☒ Previous determination(s). File no. and date of response letter: 2018-00719-156-A18, letter dated August 28, 2018.
- ☒ Applicable/supporting case law: Hoosier Environmental Council v. Natural Prairie Indiana Farmland Holding, LLC et al. Case 4:19-cv-00071-DRL-JEM filed 9/29/21 .
- ☐ Applicable/supporting scientific literature: .
- ☒ Other information (please specify): Jase L. Hixson, Preliminary Expert Report, August Mack Environmental Inc, Dated June 13, 2022, James A. Berndt, Preliminary Expert Report, August Mack Environmental Inc, Date June 13, 2022, and Brian P. Wilson, Preliminary Expert Report, August Mack Inc., Date June 10, 2022, Antecedent Precipitation Tool <https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>; NRCS form "NRCS-CPA-026E dated December 13, 2002 .

**B. ADDITIONAL COMMENTS TO SUPPORT JD:** An AJD was completed for this property in 2018, a case followed, the Court found the AJD to be arbitrary and capricious, on remand we are issuing this new AJD, additional explanation for the Corps' conclusions are included in the attached narrative and summarized below.

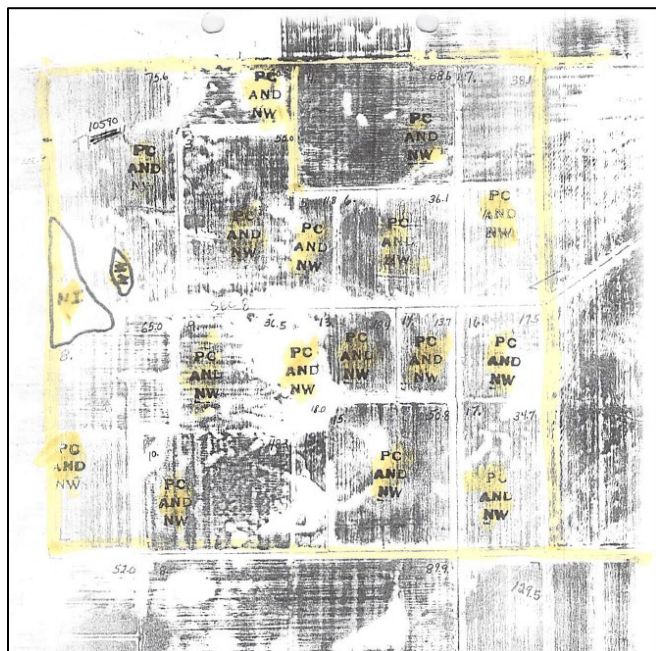
The NRCS made a PCC determination on March 15, 1995, and certified it on October 6, 1997, that the property that now comprises the Natural Prairie site was Prior Converted Cropland. Land determined to be PCC is not considered a Water of the United States per 33 CFR 328.3(a)(8). The project area has irrigation canals that were mapped on the NHD Maps. Based on the review of applicable resource maps and other available information the irrigation canals were excavated out of uplands and drain only uplands. The irrigation canals do not have the required Relatively Permanent Flow regime to be considered a jurisdictional tributary. Canals and ditches excavated out of uplands and draining only uplands are not considered Waters of the United States. Therefore, the irrigation canals do not meet the definition of an a(1)-a(6) water as defined in 33CFR Part 328 and are not considered Waters of the United States. The NWI map for the site indicated the presence of a potential wetland area where NRCS map showed a Not Inventoried (NI) area in the same general location of the NWI polygon. A wetland delineation performed by the consultant Cardno on the NWI mapped wetland did not find any areas meeting wetland criteria as defined in the 1987 U.S. Army Corp of Engineers Wetland Delineation Manual and appropriate Regional Supplement. This was also supported by the Corps review of the area and findings documented on data sheets dated June 23, 2022. For additional information refer to Attachment A supporting the findings of this AJD.

This document is an attachment to the Approved Jurisdiction Determination Form (AJD) to provide supporting data. The document outlines the consideration of information in the US Army Corps of Engineers' (Corps) jurisdiction determination. Corps employees Aaron Damrill and Al Frohlich re-visited the site on June 23, 2022. Other data sources are noted on the AJD form (see Section IV.A, Data Sources).

## Section I: Wetlands

### A. Property Covered by Prior Converted Cropland Designation

The applicant provided new information as part of this jurisdiction determination. The new information consisted of a Prior Converted Cropland (PCC) determination by the Natural Resource Conservation Service (NRCS) for the Natural Prairie project area. (See NRCS form "NRCS-CPA-026E and corresponding map.) The Prior Converted Cropland relevant to this AJD is defined by the NRCS to be converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for a farmed wetland (Food Security Act of 1985). The property that now comprises the Natural Prairie project area was certified by NRCS to be PCC on October 6, 1997, and January 23, 2003, with most of the site certified on the October 1997 date. NRCS applied the PCC designation to the area indicated on the following map:



The Corps generally relies on NRCS PCC determinations. This is found in 33 CFR 328 pg. 45033, August 25, 1993, "...recognizing SCS's expertise in making these PC cropland determinations, we will continue to rely generally on determinations made by the SCS." (The SCS, i.e. Soil Conservation Service, was later renamed the Natural Resource Conservation Service or NRCS.) The Corps regulations at 33 CFR 328.3(a)(8) state that a Water of the United States (WOTUS) does not include Prior Converted Cropland.

Therefore, an area determined to be PCC is not subject to regulation under Section 404 of the Clean Water Act (CWA). A PCC area would not return to Clean Water Act

jurisdiction unless and until the area is abandoned and wetland conditions return (33 CFR 328 pg. 45034, August 25, 1993 Federal Register)<sup>1</sup>.

Evidence in the administrative record supports that wetland conditions have never returned and never existed on the Natural Prairie site. It is well documented that Natural Prairie installed tiles in 2018 that could improve drainage. However, the majority of the project site was certified as PCC on October 6, 1997, which pre-dates the installation of the tiles by approximately 20 years. For NRCS to make a PCC determination, the site must meet certain criteria<sup>2</sup>, one of which addresses hydrology. The Food Security Act of 1985 (FSA) hydrologic criteria for an area to meet the PCC definition states: "If the area is not a pothole, playa, or pocosin, inundation is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more) (FSA 514.30)." The NRCS hydrology standard defined in the Food Security Act of 1985 (514.6) generally aligns with the Corps Hydrology Standard described in the Army Corps of Engineers 1987 Wetland Delineation Manual and Regional Supplements, which states that: "Fourteen (14) or more consecutive days of flooding, ponding, or a water table 12in (30 cm) or less below the soil surface during the growing season at a minimum frequency of 5 years in 10 (50% or higher probability)." Based on both the PCC hydrologic criteria and the wetland hydrology standard, NRCS determined in 1997 and 2003 that the property that comprises the Natural Prairie site did not have the requisite hydrology approximately 20 years prior to the drainage modifications in 2018.

To address the 2021 court decision, the Corps reconsidered the wetland determination at the site to ascertain if wetland hydrology existed prior to the NRCS PCC determination and the 2018 tile installation. In situations where hydrology is or has potentially been altered or destroyed by human activities, the Corps must evaluate what the hydrology was prior to the alteration. To determine if the tiles installed in 2018 are suppressing the site's current hydrology, the Corps first must establish if hydrology was present prior to the installation of the tiles in 2018 and the NRCS PCC determination completed in 1997 and 2003 (NRCS via their procedures determined the site did not have the required hydrology). The Corps evaluated the hydrology in accordance with the hydrology indicators B7 and C9 of the Army Corps of Engineers 1987 Wetland Delineation Manual, and both the Midwest, and NorthCentral and Northeast Regions

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<sup>1</sup> The 2005 Corps and NRCS memo that described how a "change in use" of a site could bring an area back into Clean Water Act jurisdiction was rescinded on January 28, 2020. Since the "change in use" concept was not codified in the 1993 regulations, the concept is no longer applicable. The Corps has been instructed to use the 2 July 2020, "Memorandum to the field between the U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), the U.S. Department of the Army, Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) concerning issues related to implementation of Section 404 of the Clean Water Act (CWA) and the Food Security Act of 1985, as amended (FSA)" for Pre-2015 JD. Per the 2020 memo a PCC area would come back under CWA 404 jurisdiction when it is abandoned, and wetland conditions have returned.

<sup>2</sup> 1) The land was cleared, drained or otherwise manipulated to make it possible to plant a crop, 2) Cropped prior to December 23, 1985 with an agricultural commodity, 3) The land has continued to be used for agricultural purposes (cropping, haying or grazing)

Regional Supplements. In addition, the Corps followed the procedures described in Chapter 5, Difficult Wetland Situations, in both the Midwest, and NorthCentral and Northeast Regions Regional Supplements to the Army Corps of Engineers 1987 Wetland Delineation Manual. Specifically, the Corps also followed the procedures outlined in Section 3(f) of the Regional Supplement, *Wetlands that periodically lack indicators of wetland hydrology*.

The Corps independently reviewed aerial photos from 1997 and older, along with other relevant historical resources. Table 1 lists the 22 aerial photos reviewed including the date the photo was taken, when available. If a date was available, it was entered into the Corps Antecedent Precipitation Tool or APT (APT-<https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>). The APT results were used to determine the precipitation status when the photo was taken. Table 1 also includes a summary of the ATP results and if indicators of hydrology were observed on the photos.

All 22 aerial photos were taken prior to the October 1997 PCC certification date. Fourteen of the photos had information on the month, day and year that the photo was taken. Of the fourteen aerial photos, twelve were taken during the growing season and six were taken when precipitation was normal per the APT. Three photos, the August 24, 1951, July 10, 1957, and August 30, 1971, photos were taken during wetter than normal conditions when compared to the 30-year rolling average. The June 22, 1963, July 11, 1976, and August 11, 1976, photos were taken in drier than normal conditions when compared to the 30-year rolling average. Two of the photos, the March 27, 1973, and November 17, 1981, photos were not taken during the growing season<sup>3</sup> and thus were excluded from the analysis.

Five aerial photos for the Natural Prairie site had the month and year the photo was taken, but not a specific day of the month. These photos, provided by the NRCS, were from: July 1980, August 1982, July 1985, September 1986, and August 1987. While these five photos did not have specific date information, they can be used to help fill in gaps in the photo record. By looking at the precipitation data for the month the photo was taken and then looking at the previous three months, an estimate of whether the precipitation was normal, drier than normal, or wetter than normal can be determined. Of the five, three photos from July 1985, September 1986, and August 1987 were taken during months with normal precipitation. The other two photos, August 1982 and July 1980 were from months which were drier than normal. None of the 5 NRCS photos contained evidence of hydrology or wetness.

Four of the 14 photos that had month, day and year information demonstrated signatures of wetland hydrology/wet signature<sup>4</sup>, which could indicate the presence of

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<sup>3</sup> Per the Newton County Soil Survey the growing season typically starts in April and ends in September.

<sup>4</sup> Potential indicators for hydrology in aerial photos includes; observed surface water, flooded or drowned out crops, stressed crops due to wetness (typically discolored or stunted), saturated soils (have a dark appearance).

wetlands. However, the locations of the signatures were not consistent in all four. In the April 21, 1953, photos the potential areas are located on the north and east side of the project site, while the potential areas in the July 11 and August 11, 1976, aeriels are located near the southern edge of the project site. It is likely that the potential areas observed in both photos are bare soil<sup>5</sup> that could not support plant growth due to a lack of rainfall. In the fourth photo dated April 17, 1993<sup>6</sup>, the potential signatures are spread throughout the site, mainly located on the western half of the project site. To meet hydrology indicator B7, C9 and the process described in Chapter 5 of the Regional Supplements, wet signatures need to be observed in more than half of the photos used in the analysis for wetland hydrology to be present. The Natural Prairie site did meet the threshold of wet signatures observed in more than half of the photos used in the analysis. Therefore, there is no evidence to support that wetland conditions, specifically, the required wetland hydrology, was present within the Natural Prairie project site prior to the NRCS PCC<sup>7</sup> determination and installation of the drainage tiles.

In addition to the aerial photos, other sources were identified to determine if wetlands existed on the project site prior to the NRCS PCC determination. Sources identified included a 1955 Kankakee Quad, 1:250,000 USGS topographic map, a 1962 Enos Quad, 1:24,000 USGS topographic map, and a 1984 Kankakee Quad, 1:100,000 USGS topographic map. None of the maps indicated that wetlands were present or may have been present in the project area when the maps were made. A soil survey map from 1905 was also reviewed. The soil survey did not identify wetlands within the project site. Evidence is lacking to support that the Natural Prairie project site contained wetlands subject to Section 404 of the Clean Water Act prior to the NRCS determination in 1997 and going back as far as 1905. Per Regulatory Guidance Letter 86-09 (RGL 86-09) "... it is our intent under Section 404 to regulate discharges of dredge or fill material into the aquatic system as it exists and not as it may have existed over a record period of time." RGL 86-09 further states that "We do not intend to assert jurisdiction

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During dry rainfall years, in potential wetland areas crops appear darker in color due to moisture when compared to crops outside the wetland area.

<sup>5</sup> The predominant NRCS mapped soil is a Granby loamy fine sand which per the soil description is very dark in the upper 14". The soils series description states; 0-10", 10yr 2/1 – dark greyish brown and 10-14", 10yr 3/1-very dark grey. The dark color of the soil series may explain the observed dark signatures in the aerial photos.

<sup>6</sup> The April 17, 1993 photo was likely not taken during the growing season. This is based on review of historical weather data obtained from the National Weather Service. Between Dec 1, 1992 and April 14, 1993 the area had 30" of snow, 6" more than normal and 1" of snow fell on April 12. The APT does not track snow only rainfall. Given the extra snow and frozen ground, water would be expected to pond on the surface. Since the growing season had not started and the presence of additional water, potential hydrology/wetland signatures should not be relied upon.

<sup>7</sup> "By definition, PCC has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PCC no longer performs the functions or has values that the area did in its natural condition. PCC has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA." ( 33 CFR 328 pg. 45032, August 25, 1993

over those areas that once were wetlands and part of an aquatic system, but which in the past have been transformed into dry land for various purposes.”

#### B. Property Not Covered by Prior Converted Cropland Designation

The NRCS form NRCS-CPA-026E and corresponding map did identify one area not evaluated by NRCS. This is indicated by the nomenclature NI or Not Inventoried on the form. Since this area was not evaluated by NRCS when completing their PCC determination, the NI area was assessed using the Army Corps of Engineers 1987 Wetland Delineation Manual and Midwest Regional Supplement<sup>8</sup> to determine if it met wetland criteria.

The NRCS Soil Survey for Newton County maps the NI site as an Oakville Fine Sand. This series is not considered to be a hydric soil per the local NRCS Hydric Soil list generated from the NRCS Web Soil Survey. Review of aerial photos show that the NI mapped area has been subject to agricultural activities off and on over the years. Aerial photos from the following years, 1939, 1952, 2007, 2008, 2010, 2012, 2015, and 2017 show agricultural activity which is evident by the appearance of row cropping in the photos. However, row cropping was not observed in aerial photos from 1963, 1971, 1998, 2005 and 2018. Interpretation of the aerial photos support a mix of potential shrubs, other woody vegetation present or bare soil. The agricultural activity likely disturbed the upper 12” of the soil surface (12” from the surface is the typical plow zone for most agricultural work). However, the soil profile observed and recorded at Data Point 2 (DP 2) had little if any “mixing” of the soil profile that is common within the tilled zone. The observed soil profile at Data Point 2 was:

| *Depth (inches) | Matrix Color | Percent | Redox | Texture |
|-----------------|--------------|---------|-------|---------|
| 0-12            | 10yr 6/4     | 100     | None  | Sandy   |
| 12-24           | 10yr 6/4     | 80      | None  | Sandy   |
|                 | 10yr 5/8     | 20      |       | Sandy   |
| 24-30           | 5yr 5/6      | 100     |       | Sandy   |

\*For detailed soil profile see Data Point 2 (DP 2).

The profile description above is consistent with the description for the Oakville Fine Sand described in the NRCS, Newton County Soil Survey. Since the soil profile taken at DP 2 is not significantly disturbed, analyzing the soil, and the general area of the NI mapped area, described in Chapter 5 of the Midwest, is not warranted. The soils at DP 2 do not meet any of the hydric soil indicators described in Version 8.2 of the *NRCS Field*

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<sup>8</sup> The Natural Prairie site does fall within the boundaries of Northcentral & Northeast Regional Supplement. However, the Midwest Regional Supplement aligns better with the Natural Prairie site. When working in transitional areas the Regional Supplement allows the investigator to choose the appropriate manual to use. The Midwest Supplement was chosen because the discussion in the physical and biological characteristics of region fits the Natural Prairie site better. Also, in a previous wetland determination Cardno used the Northcentral & Northeast Regional Supplement, by using the Midwest the results could be compared.

*Indicators Hydric Soils in the United States.* The dominant matrix color is a chroma 4 and many of the hydric soil indicators require a chroma 2 or less which the soil at DP 2 did not have. This is consistent with the findings of the Cardno data point DP01 taken on June 27, 2018. Cardno data point DP01 was taken near DP 2 and the Cardno soil profile also did not meet a hydric soil indicator. This was confirmed in person by Corps staff during the July 20, 2018 site visit. There are hydric soil indicators for use in the Midwest Region that require a chroma 2 or higher, such as High Chroma Sands (S11), but this indicator is not applicable to the Natural Prairie site since it is not located in a coastal zone or dune-swale complex. (See v8.2 of the *NRCS Field Indicators Hydric Soils in the United States.*)

Within the NRCS mapped NI boundary, the soil profile did not meet a hydric soil indicator and the mapped soil series is not considered a hydric soil, therefor evaluating hydrology for wetland conditions is not necessary based on the lack of hydric soils (Army Corps of Engineers 1987 Wetland Delineation Manual and Midwest Regional Supplement). The soil colors observed are not indicative of an area that has been subject to prolonged wetness from flooding, ponding or saturation for any length of time. If the NI area was subject to repeated, long-term wetness, the soil colors described in v8.2 of the NRCS Field Indicators Hydric Soils in the United States should be evident. A PCC analysis of this area is not warranted since this area does not meet the three wetland criteria as described in the Army Corps of Engineers 1987 Wetland Delineation Manual and Midwest Regional Supplement. As such, the NI area is considered upland and not subject to Section 404 of the CWA.

## **Section II: Ditches**

The preamble to the Regulations at 33 CFR 328.3, Definition of Waters of the United States (pg. 41217) states: "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States'...(a) Non-tidal drainage and irrigation ditches excavated on dryland." The 2008 EPA and Corps document titled, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (2008 Rapanos Guidance), provides the Corps direction on how to determine whether a ditch would be jurisdictional per 33 CFR 328. The 2008 Rapanos Guidance states that the jurisdictional status of a ditch should be evaluated on three criteria. The three criteria are: (1) Does the feature have a relatively permanent flow (meaning does the feature have flow year-round or have continuous seasonal flow, which is typically three months); (2) was the feature excavated wholly in uplands (no portion was dug in a jurisdictional wetland or other jurisdictional water); and (3) is the feature draining only uplands (if the ditch conveys flow between two or more WOTUS then it is not draining only uplands). The Corps evaluated Lawler Ditch, Bogus Island Ditch, and the irrigation ditches, which are now tiled laterals, in accordance with 33 CFR 328 and the 2008 Rapanos Guidance.

#### A. Lawler Ditch and Bogus Island Ditch

Lawler Ditch is depicted on the USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Lawler Ditch by mapping it as a stream/canal. The National Hydrography Dataset (NHD) map also shows that flow in Lawler Ditch is relatively permanent. Water is evident in Lawler Ditch in aeriels reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005, June 2008, September 2013, May 2015, and April 2017. Water was observed flowing in Lawler Ditch during the July 19, 2018 and June 23, 2022 site visit. In addition to the observed water flow, OHWM indicators described in RGL 05-05 were observed, including a line impressed on the bank and shelving. Accordingly, the Corps determined that Lawler Ditch is a jurisdictional water.

Bogus Island Ditch is depicted on the USGS 1:24000 topo map as a blue line stream which indicates a relatively permanent flow. The USDA-NRCS Soil Survey for Newton County also indicates the presence of Bogus Island Ditch by mapping it as a stream/canal. The NHD map also shows that flow in Bogus Island Ditch is relatively permanent. Water is evident in Bogus Island Ditch in aeriels reviewed from the following years; 1939, 1952, 1963 and Google Earth images taken in April 1998, February 2005, June 2008, September 2013, May 2015, and April 2017. Water was observed flowing in Bogus Island Ditch during the July 19, 2018 and June 23, 2022 site visit along with a defined bed and bank. In addition to the observed water flow, a line impressed on the and bank and shelving were observed, which are both OHWM indicators described in RGL 05-05. As such, the Corps determined that Bogus Island Ditch is a jurisdictional water.

#### B. Lateral Ditches

Prior to the first site visit on July 19, 2018, most of the ditch features within the project area were tilled/enclosed (this per Will Dejung during the July 2018 site meeting). During the 2018 site visit representative irrigation ditches were evaluated to help inform the jurisdictional determination. This same process of using a representative irrigation ditch to inform a decision on the jurisdictional status was also used during the June 23, 2022, site visit (Using a representative example is in accordance with Corps practice when the resource in question cannot be evaluated directly).

Prior to the June 23, 2022, site visit, resource maps of the area (aerial photos, soil survey and USGS map) were reviewed to determine representative ditches that could be used. Two irrigation ditches just north of the stormwater pond (labeled Ditch A & Ditch B) and one ditch (labeled Ditch C) west of the stormwater pond were identified as possible representative examples, due to their similar landscape setting and location in a similar soil series to the tiled ditches. Ditch C is located the closest to the tiled irrigation ditches and is a better representative example of what they resembled prior to tiling. Ditch C also has a similar aerial signature when compared to the irrigation

ditches that were tilled. The similarity includes, being roughly the same width and lacking a consistent dark signature within the channel (dark signature within the channel could indicate the presence of water).

Based on the June 23, 2022 site visit and the available resources identified on the AJD form (see Section IV.A, Data Sources), the Corps concludes that Ditch C did not have the required relatively permanent flow regime. Prior to the June 23, 2022 site visit, the Corps checked the precipitation and climatic conditions using the Corps Antecedent Precipitation Tool (APT- <https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>). APT results indicated that precipitation was normal based on the 30-year rolling average and climatic conditions trended wet (the Palmer Drought Severity Index indicated incipient wetness).

Ditch C did not have any water within the channel and was heavily vegetated with herbaceous vegetation. The dominant vegetation observed within the ditch was *Asclepias syriaca* (\*Common milkweed – FACU), *Sonchus oleraceus* (\*Common sow-thistle – FACU), *Chenopodium album* (\*Lamb's-Quarters – FACU), *Bromus inermis* (Smooth brome – FACU), *Ambrosia artemisiifolia* (Annual ragweed – FACU), *Urtica dioica* (Stinging nettle – FACW), and *Rumex crispus* (Curly dock – FAC). Most of the observed plants within the channel were FACU species, which support that Ditch C does not have adequate flow regime. If Ditch C had the requisite flow regime, the observed plants would not be present, and it would likely have OHWM indicators. No Ordinary High-Water Mark (OHWM) indicators, described in Regulatory Guidance Letter 05-05 (RGL 05-05) were observed within the Channel of Ditch C during the site visit.

Since the APT indicated that precipitation was normal, it is reasonable to expect that water would be flowing and present in Ditch C if it truly had relatively permanent flow. Based on review of the available aerial photos, the Corps concluded that water was not observed within the channel of Ditch C. Based on the information gathered during the review of Ditch C, it does not have the required flow regime per the 2008 Rapanos Guidance. Since the representative irrigation ditch (Ditch C) is found in a similar landscape setting and located in a similar soil series to the tilled irrigation ditches, the tilled irrigation ditches on the Natural Prairie site do not have the required relatively permanent flow regime needed to satisfy the 2008 Rapanos Guidance and regulations at 33 CFR 328.

A number of sources were reviewed to determine if the tilled irrigation ditches on the Natural Prairie site satisfied the remaining two 2008 Rapanos criteria, which are: (2) were they excavated out of a jurisdictional wetland(s)/waters, or (3) are they draining only uplands. To summarize the findings in Section I A and B, review of the applicable resource maps, NRCS information, historical aeriels, and other relevant information, it could not be established that wetlands were present prior to the NRCS certification. Therefore, based on the available information, the irrigation ditches on the site were not excavated out of jurisdictional wetlands/waters, but rather non-wetland areas. Since the

evidence does not support that the Natural Prairie site was wetland, the irrigation ditches meet the third criteria of draining only uplands.

To conclude, the irrigation ditches located within the Natural Prairie project site are not tributaries and are non-jurisdictional ditches. Per the 2008 Rapanos Guidance, a significant nexus analysis is not necessary for ditches, because "...ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters" (page 12 of the December 02, 2008 Rapanos Guidance).

Accordingly, the only waters determined to be jurisdictional are Lawler Ditch and Bogus Island Ditch. (See Section III.D.2 of the Approved JD Form.)

| Source                                                                                                                                                 | Year | Month/Day   | Growing Season | Precipitation Data | Observations                                                                                                                                                                                                                                                                                                                                                                                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|------|-------------|----------------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <sup>1</sup> FSA                                                                                                                                       | 1951 | August 24   | Y              | Wetter than normal | No evidence of hydrology observed. Row cropping is evident.                                                                                                                                                                                                                                                                                                                                        |
| <sup>4</sup> IHAPI                                                                                                                                     | 1952 | -           | -              | -                  | -                                                                                                                                                                                                                                                                                                                                                                                                  |
| <sup>1</sup> USGS                                                                                                                                      | 1953 | April 21    | Y              | Normal             | Potential hydrology signature observed. Dark areas can be seen on the north and east side of the property. These areas could be present due to preparations for planting. Parallel lines can be seen which suggests row cropping.                                                                                                                                                                  |
| <sup>1</sup> EDR                                                                                                                                       | 1957 | July 10     | Y              | Wetter than normal | No evidence of hydrology observed. Row cropping was present.                                                                                                                                                                                                                                                                                                                                       |
| <sup>1</sup> FSA                                                                                                                                       | 1963 | June 22     | Y              | Drier than normal  | No evidence of hydrology observed. Row cropping is evident.                                                                                                                                                                                                                                                                                                                                        |
| <sup>2</sup> USGS                                                                                                                                      | 1971 | August 30   | Y              | Wetter than normal | No evidence of hydrology observed. Row cropping is evident.                                                                                                                                                                                                                                                                                                                                        |
| <sup>4</sup> IHAPI                                                                                                                                     | 1971 | -           | -              | -                  | -                                                                                                                                                                                                                                                                                                                                                                                                  |
| <sup>1</sup> HGI                                                                                                                                       | 1973 | March 27    | No             | -                  | -                                                                                                                                                                                                                                                                                                                                                                                                  |
| <sup>2</sup> USGS                                                                                                                                      | 1976 | July 11     | Y              | Drier than normal  | Small, dark areas can be observed near the southern project boundary. Observed areas are not in the same location has the potential signatures observed in the April 21, 1953 aerial.                                                                                                                                                                                                              |
| <sup>2</sup> USGS                                                                                                                                      | 1976 | August 11   | Y              | Drier than normal  | Small, dark areas can be observed near the southern project boundary. Observed areas are not in the same location has the potential signatures observed in the April 21, 1953 aerial.                                                                                                                                                                                                              |
| <sup>1</sup> FSA                                                                                                                                       | 1977 | April 29    | Y              | Normal             | No evidence of hydrology observed. Row cropping is evident.                                                                                                                                                                                                                                                                                                                                        |
| <sup>3</sup> NRCS                                                                                                                                      | 1980 | July        | Y              | Drier than normal  | No evidence of hydrology. Two bare areas along the southern project boundary similar to what is observed in the July 11 and August 11, 1976 aerails, but no conclusive evidence this is due to water. No soil discoloration, stressed crops, etc.. is observed. Also no crop stress or discoloration observed in the potential wet areas observed in the April 21, 1953 or April 17, 1993 aerails. |
| <sup>1</sup> NHAP                                                                                                                                      | 1981 | November 17 | N              | -                  | -                                                                                                                                                                                                                                                                                                                                                                                                  |
| <sup>3</sup> NRCS                                                                                                                                      | 1982 | August      | Y              | Drier than normal  | No evidence of hydrology. Two bare areas along the southern project boundary similar to what is observed in the July 11 and August 11, 1976 aerails, but no conclusive evidence this is due to water. No soil discoloration, stressed crops, etc.. is observed. Also no crop stress or discoloration observed in the potential wet areas observed in the April 21, 1953 or April 17, 1993 aerails. |
| <sup>2</sup> USGS                                                                                                                                      | 1983 | May 26      | Y              | Normal             | Dark areas are observed. Rectangler in apperance which does not suggest that the areas are water. Early season photos dark areas likley soil discoloration associated with preperation for planting.                                                                                                                                                                                               |
| <sup>2</sup> USGS                                                                                                                                      | 1984 | April 28    | Y              | Normal             | Dark areas are observed. Rectangler in apperance which does not suggest that the areas are water. Early season photos dark areas likley soil discoloration associated with preperation for planting.                                                                                                                                                                                               |
| <sup>3</sup> NRCS                                                                                                                                      | 1985 | July        | Y              | Normal             | No evidence of hydrology. Bare areas evident throughtout the project area, but no conclusive evidence this is due to water. No soil discoloration, stressed crops, etc.., is observed. Also no crop stress or discoloration observed in the potential wet areas observed in the April 21, 1953 or April 17, 1993 aerails.                                                                          |
| <sup>3</sup> NRCS                                                                                                                                      | 1986 | September   | Y              | Normal             | No evidence of hydrology. Two bare areas along the southern project boundary similar to what is observed in the July 11 and August 11, 1976 aerails, but no conclusive evidence this is due to water. No soil discoloration, stressed crops, etc.. is observed. Also no crop stress or discoloration observed in the potential wet areas observed in the April 21, 1953 or April 17, 1993 aerails. |
| <sup>3</sup> NRCS                                                                                                                                      | 1987 | August      | Y              | Normal             | No evidence of hydrology. No soil discoloration, stressed crops, etc... Also no crop stress or discoloration observed in the potential wet areas observed in the April 21, 1953 or April 17, 1993 aerails.                                                                                                                                                                                         |
| <sup>2</sup> USGS                                                                                                                                      | 1988 | April 12    | Y              | Normal             | No evidence of hydrology observed. Row cropping is evident.                                                                                                                                                                                                                                                                                                                                        |
| <sup>3</sup> NRCS                                                                                                                                      | 1990 | -           | -              | -                  | -                                                                                                                                                                                                                                                                                                                                                                                                  |
| <sup>2</sup> USGS                                                                                                                                      | 1993 | April 17    | Y              | Normal             | Early season aerial. Dark areas are observed which could be indicators of hydrology, like standing water. When compared to aerails with dark areas, these are located in diffrenet locations when compaared to the April 21, 1953, July 11, 1976, August 11, 1976, May 26, 1983 and April 28, 1984 photos.                                                                                         |
| <sup>1</sup> Images obtained from the August Mack Report, titled <i>Brian P. Wilson Preliminary Expert Report</i> , dated June 10, 2022                |      |             |                |                    |                                                                                                                                                                                                                                                                                                                                                                                                    |
| <sup>2</sup> Images obtained from USGS EarthExplorer; <a href="https://earthexplorer.usgs.gov/">https://earthexplorer.usgs.gov/</a>                    |      |             |                |                    |                                                                                                                                                                                                                                                                                                                                                                                                    |
| <sup>3</sup> Images provided by the NRCS, email dated April 30, 2022                                                                                   |      |             |                |                    |                                                                                                                                                                                                                                                                                                                                                                                                    |
| <sup>4</sup> Images obtained from Indiana Historical Aerial Photo Index; <a href="https://igws.indiana.edu/IHAPI/">https://igws.indiana.edu/IHAPI/</a> |      |             |                |                    |                                                                                                                                                                                                                                                                                                                                                                                                    |

## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

|                                                                 |                                                                    |                         |
|-----------------------------------------------------------------|--------------------------------------------------------------------|-------------------------|
| Applicant:<br>Natural Prairie Indiana<br>Farmland Holdings, LLC | File Number:<br>LRE-2018-00719-156-A18                             | Date:<br>March 17, 2023 |
| Attached is:                                                    |                                                                    | See Section below       |
|                                                                 | INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission) | A                       |
|                                                                 | PROFFERED PERMIT (Standard Permit or Letter of permission)         | B                       |
|                                                                 | PERMIT DENIAL                                                      | C                       |
| <b>XX</b>                                                       | APPROVED JURISDICTIONAL DETERMINATION                              | D                       |
|                                                                 | PRELIMINARY JURISDICTIONAL DETERMINATION                           | E                       |

**SECTION I** - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at [http://www.usace.army.mil/cecw/pages/reg\\_materials.aspx](http://www.usace.army.mil/cecw/pages/reg_materials.aspx) 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. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. 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:** 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.

**D: APPROVED JURISDICTIONAL DETERMINATION:** You may accept or appeal the approved JD or provide new information.

- **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.

**E: PRELIMINARY JURISDICTIONAL DETERMINATION:** 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.

## **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. 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.

### **POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

If you have questions regarding this decision and/or the appeal process you may contact:

Aaron Damrill  
U.S. Army Corps of Engineers  
Regulatory Office  
Michiana Branch  
2422 Viridian Drive Suite # 200  
South Bend, IN 46628

(574) 232-1952 Ext. 21961

If you only have questions regarding the appeal process you may also contact:

Katherine A. McCafferty  
Regulatory Administrative Appeals Officer  
U.S. Army Corps of Engineers,  
Great Lakes and Ohio River Division  
550 Main Street, Room 10780  
Cincinnati, Ohio 45202-3222

e-mail: katherine.a.mccafferty@usace.army.mil

Tel. (513) 684-2699 Fax (513) 684-2460

**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:

Telephone number: