

CE-MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2013-00542-CJB

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June 5, 2025

## MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023)),<sup>1</sup> MVP-2013-00542-CJB, MFR 1 of 1<sup>2</sup>

**BACKGROUND.** An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup>

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) published the “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”). On September 8, 2023, the agencies published the “Revised Definition of ‘Waters of the United States’; Conforming”, which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (“*Sackett*”).

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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<sup>1</sup> While the Revised Definition of “Waters of the United States”; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 2 (0.05 acre)	Non-Jurisdictional	N/A
Wetland 3 (0.03 acre)	Non-Jurisdictional	N/A
Wetland 4 (0.01 acre)	Non-Jurisdictional	N/A
Wetland 5 (0.13 acre)	Non-Jurisdictional	N/A
Wetland 6 (0.01 acre)	Non-Jurisdictional	N/A
Wetland 7 (0.01 acre)	Non-Jurisdictional	N/A
Wetland 8 (0.04 acre)	Non-Jurisdictional	N/A
Wetland 9 (0.02 acre)	Non-Jurisdictional	N/A

2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- d. “Memorandum To the Field Between the U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of ‘Waters Of The United States’ Under The Clean Water Act” (March 12, 2025)

3. REVIEW AREA.

- a. Total Review Area Size (in acres): 0.30
- b. Location Description: The project/review area is located in Section 07, Township 18N, Range 16E, Winnebago County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)

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Latitude: 44.043240 Longitude: -88.625910

- d. Nearest City or Town: Town of Algoma
- e. County: Winnebago
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
N/A	N/A	N/A

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup>

N/A

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

N/A

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup>

N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court’s decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as “navigable in law” even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>8</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

that the aquatic resource meets the relevant category of “waters of the United States” in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

N/A

- a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

#### 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup>

N/A

- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

The site for this AJD review is the location of a former quarry, which was in operation from the 1950's until sometime around 2020. Based on the delineation report that was provided with the AJD request, wetland hydrology is a function of a perched aquifer due to high bedrock and a wetland system located upslope. The review areas contain eight wetlands (Wetlands 2-9). These wetlands are located near an open water resource that makes up a large portion of the overall site. This open water resource contains an outlet near its northern boundary that appears to allow water to flow approximately 1,563 feet to the east before reaching Lake Butte des Morts, a category (a)(1) water. Wetlands 2-9 were reviewed individually for potential connections to this open water resource, or to any other aquatic resources, and are described collectively as to why they do not meet one or more categories of waters of the United States under the 2023 Rule as amended.

Based on the wetland delineation report that was provided with the AJD request, current and historic aerial images, LiDAR resources (Hillshade and DEM GIS layers from the National Regulatory Viewer), and the Wisconsin Wetland Inventory, wetlands 2-9 are depressional wetlands surrounded by uplands. Based on review of historic aerial imagery, wetlands 2-9 do not have a relatively permanent connection to another aquatic resource. Review of these resources indicate these wetlands are not, and do not physically abut, a jurisdictional water. These wetlands are not TNW's, territorial seas, or interstate waters and therefore are not category (a)(1) waters. Wetlands 2-9 do not physically abut a relatively permanent category (a)(2) impoundment or a jurisdictional category (a)(3) tributary. These wetlands are non-tidal wetlands that do not abut a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as category (a)(4) adjacent wetlands. Wetlands 2-9 are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as category (a)(5) waters: lakes or ponds not identified in (a)(1) – (a)(4). Therefore, wetlands 2, 3, 4, 5, 6, 7, 8, and 9 are not jurisdictional under the 2023 "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Office Desktop Evaluation, May 30 and June 2, 2025
  - b. Wetland Delineation Report, completed by Davel Engineering & Environmental, Inc., dated November 11, 2024
  - c. USACE National Regulatory Viewer, layers consisting of LiDAR (Hillshade & DEM) and Wisconsin Wetland Inventory, accessed May 30 and June 2, 2025

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- d. Historic Aerial Photos from ESRI World Imagery Wayback, years 2014, 2015, 2016, 2016, 2020 – 2024, Accessed June 3, 2025

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

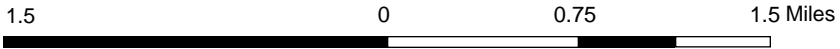


# Surface Water Data Viewer Map

## MVP-2013-00542-CJB Figure 1 of 2



- Legend**
- Township
  - Section
  - County Boundary
  - Cities, Towns & Villages
    - City
    - Village
    - Civil Town
  - Municipality
  - State Boundaries
  - County Boundaries
  - Major Roads**
    - Interstate Highway
    - State Highway
    - US Highway
  - County and Local Roads**
    - County HWY
    - Local Road
  - Railroads
  - Tribal Lands
  - Rivers and Streams
  - Intermittent Streams
  - Lakes and Open water



NAD\_1983\_HARN\_Wisconsin\_TM

1: 47,520

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

**Notes**

# Wetland Delineation Map

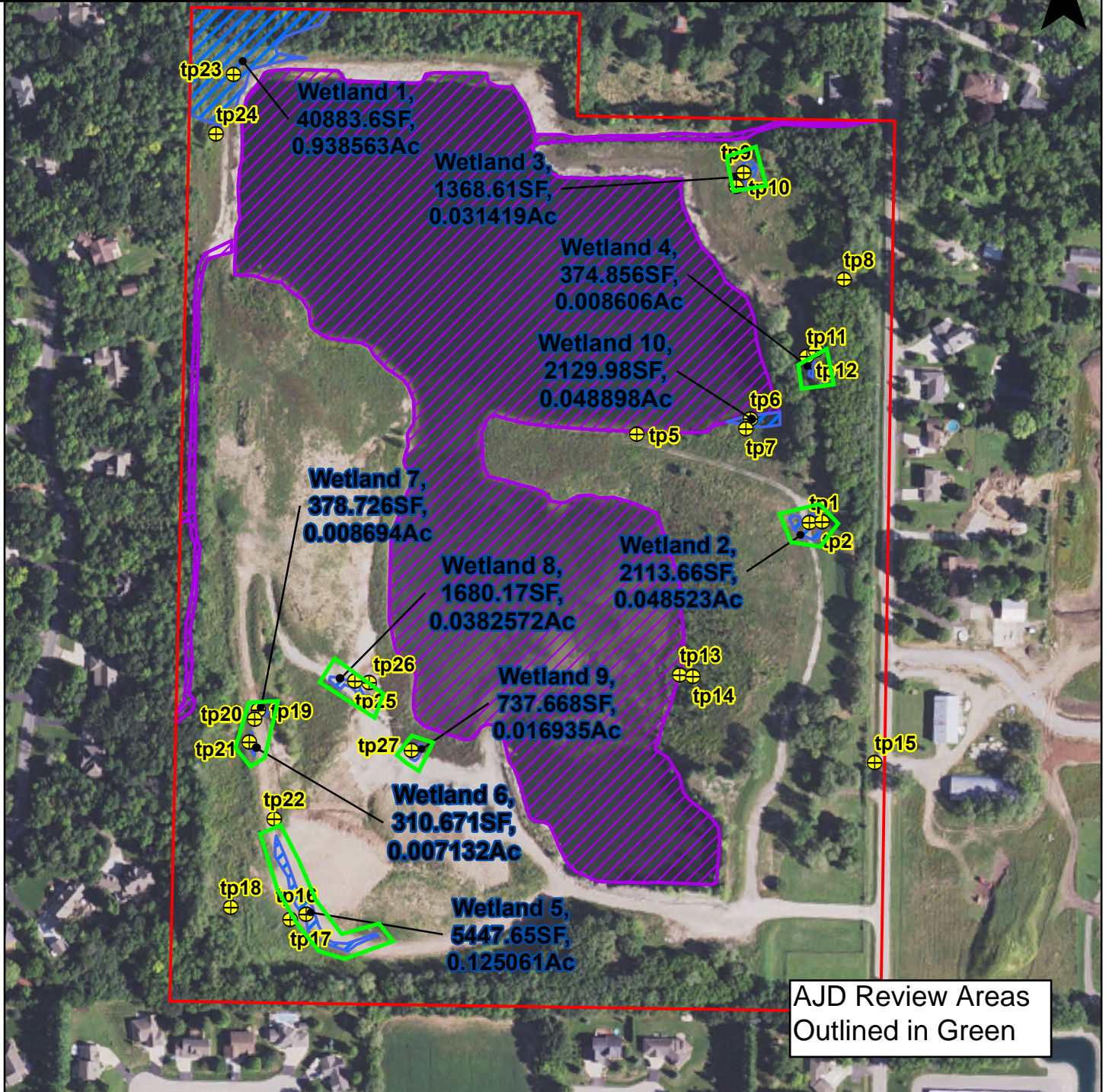
Leonard Point Road

Part of Sec. 7, T18N, R18E, Town of Algoma, Winnebago County, WI

For: Springhetti Real Estate

Winnebago Co. Aerial - 2020

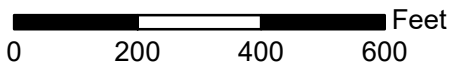
**MVP-2013-00542-CJB Figure 2 of 2**



The project scope limits shown on this map is not intended to be the parcel boundary.



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**Legend**

- Project Scope
- ⊕ Test Plot
- Delineated Wetland
- Open Water