

CE MVP- RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2013-01590-TKO

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May 21, 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023),¹ MVP-2013-01590-TKO (MFR 1 of 1)²

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

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

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on

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

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

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. 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
W-1	Non-Jurisdictional	N/A
W-2	Non-Jurisdictional	N/A
W-5	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. Project Area Size (in acres): ~13.50-acre
- b. Location Description: The project/review area is located in Section 23, Township 05N, Range 21E, Milwaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42.8751 Longitude: -87.9838
- d. Nearest City or Town: Franklin
- e. County: Milwaukee

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

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f. State: Wisconsin

g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2006-03477-RMG	PJD	An unidentified wetland area east of W-1 (no delineation report or map), noted as containing sample points 5 and 7, was determined to be WOTUS and part of the tributary system of the Root River (via unnamed tributary)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A]⁶

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

6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸

N/A

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

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

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

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

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).⁹

[Wetland 1 is an artificial lake/pond constructed in upland that is not a water of the U.S. W-1 was excavated in uplands at some point between 1985-90. Prior to excavation the location containing W-1 exhibited no signs of wetland presence (standing water, repeated crop/vegetation stress, distinct variation of vegetation) within the delineated wetland boundary. Additionally, USDA soil map data indicates the review area consists of predominantly non-hydric soils, with no mapped wetlands (WWI and NWI) in the location, further supporting the feature was excavated in uplands. An intermittent tributary is mapped as flowing through W-1; however, this original channel can be seen as being relocated along the southern parcel line by 1956. The earliest available imagery containing the excavation (1990) shows a pair of excavated channels at the southeast and southwest of W-1 connecting it to the tributary. These channels were confirmed to not be excavations along the prior channel but were cut through uplands connecting the feature to the tributary. These channels fit the definition of (b)(3) waters, from 33 CFR 328.3(b),

⁹ 88 FR 3004 (January 18, 2023)

as they were excavated wholly in upland and do not carry a relatively permanent flow of water. By 2000, the channels appear to have been mostly filled, removing the direct connection to the tributary. Review of LiDAR currently shows evidence of the channels extending from W-1 however, aerial imagery confirms a lack of hydrology or relative permanence of water within these features. W-1 fits under the definition of a b(5) water, from 33 CFR 328.3(b), as it is an artificial basin excavated in dry land to collect and retain water and is used exclusively as a settling basin.]

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

[Wetland 2 and Wetland 5 (W-2, W-5) are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Review of a 2025 Stantec delineation report, historic aerial images, County GIS mapping, WI Surface Water Data Viewer, and LiDAR (hillshade and DEM GIS layers from the Mississippi Valley Division Regulatory Viewer) indicate that W-2 and W-5 are depressional wetlands, surrounded by upland. Review of these resources indicate W-2 and W-5 do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. W-2 and W-5 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 (a)(4) adjacent wetlands. W-2 and W-5 are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as (a)(5) waters: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, W-2 and W-5 are not jurisdictional under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule.

Wetland 2 (W-2) is located within the western portion of the review area, north of the mapped intermittent tributary. W-2 sits in a depressional area where topography slopes up, transitioning to delineated uplands, at the wetland’s east, south, and west boundaries. At the north. W-2 continues outside the review area where the northern lobe of the wetland’s basin extends approximately 45 feet north of the review boundary. No outlets are present at this location as topography abruptly rises along the west, north, and east of the depressional area. Topography surrounding W-2 generally slopes to the southwest towards a discrete drainage feature, though the wetland does not abut any downstream waters.

Wetland 5 (W-5) is located in the north of the AJD review area, north of West Cobblestone Way. W-5 sits within a depression to the southwest of an east/west running elongated topographic rise, which appears to be excess fill material or excavated spoils from earlier construction operation. Prior to 2000, this area was located in the backyard

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of a now demolished residential home. The home was removed to make way for the current alignment of West Cobblestone Way. Since 2004, this area has remained unchanged and left to revegetate. Topography within this area generally slopes down to the southwest with boundaries transitioning to delineated upland to the east and south of W-5. Fill material from prior construction bounds W-5 to the north and topography levels off to the west before gradually sloping down to the roadway. Here, wetland characteristics are lost and gradually transition to upland as you move west/southwest from W-5. W-5 does not abut any downstream waters. Review of elevation data show the area identified as wetland sitting lower than the surrounding uplands. Wetland boundaries are consistent with aerial imagery showing a lack of wetness signature or any other indication of wetland presence (standing water, repeated vegetation stress, distinct variation of vegetation) outside of the delineated wetland boundaries.]

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. No field visits were conducted. Desktop review evaluation was conducted on 05/19/2025.
 - b. AJD Application “2013-01590-TKO 20250501 APP.pdf” in the administrative record.
 - c. Mississippi Valley Division Regulatory Viewer, 05/19/2025.
 - d. Wisconsin DNR Surface Water Data Viewer, 05/19/2025.
 - e. Milwaukee County GIS Interactive Mapping, 05/19/2025.
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.



MVP-2013-01590-TKO Figure 1

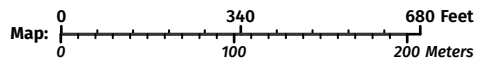


Legend: (some map layers may not be displayed)

- Wetland Class Points
 - Wetland too small to delineate
- Wetland Class Areas
- Filled Areas
 - Y
- Wetland Indicators
- Rivers and Streams
- Intermittent Streams
- Open Water
- 24K Intermittent Streams
- 24K Lakes and Open Water
- 24K Streams and Rivers
- City or Village
- County Boundaries
- Major Roads
 - State Highway
 - County and Local Roads
 - Local Road
- Latest Leaf Off Imagery

Approximate AJD Review Area

Notes:



Service Layer Credits:
Latest Leaf Off: , Wetland Indicators & Soils: Surface Water Data Viewer Team, Wisconsin Wetland Inventory NWI (Dynamic): Calvin Lawrence, Dennis Weise, Nina Rihn, Cities, Roads & Boundaries: , Surface Water (Cached): WiDNR, USGS, and other data

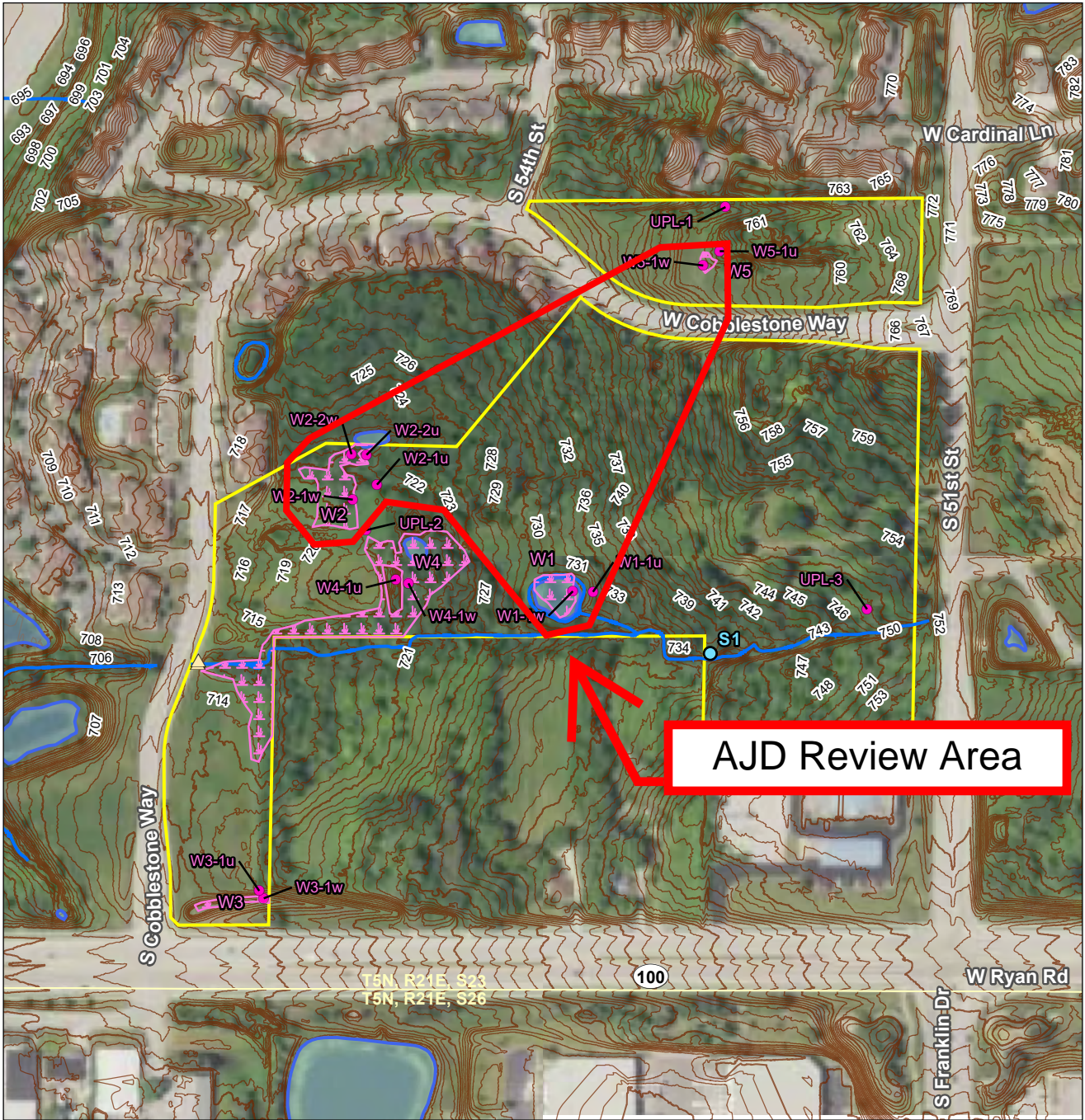
Map projection: NAD 1983 HARN Wisconsin TM

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

This map is for informational purposes only and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. The user is solely responsible for verifying the accuracy of information before using for any purpose. By using this product for any purpose user agrees to be bound by all disclaimers found here: <https://dnr.wisconsin.gov/legal>

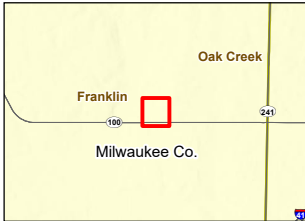
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MVP-2013-01590-TKO Figure 2



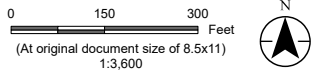
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AJD Review Area



Legend

- Approximate Project Boundary
- Sample Point
- ▲ Culvert
- Field Delineated Waterway Point
- ◌ Field Delineated Wetland
- MCLIO Cadastral Waterway Line
- MCLIO Planimetric Water Polygon
- MCLIO 2' Elevation Contour
- Index
- Intermediate



Project Location
T5N, R21E, S23
C. of Franklin, Milwaukee Co., WI

Prepared by
MNK on 2025-04-24
TR by JS on 2025-04-21
IR by BL on 2025-04-21

Client/Project
Burke Properties
9351 S 51st St Wetland Delineation
Delineation Report

Figure No.
4

Title
Field Collected Data

Notes
1. Coordinate System: NAD 1983 HARN WISCRS Milwaukee County Feet
2. Data Sources: Stantec, Esri, USCB, USGS
3. Background: NAIP 2022

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