

CE MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2022-00656-TKO

CE MVP-RD

May 12, 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-2022-00656-TKO [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

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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.

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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.

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-2c	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): ~3.0-acre
- b. Location Description: The project/review area is located in Section 22, Township 22N, Range 18E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.3692      Longitude: -88.3040
- d. Nearest City or Town: Freedom
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

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<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.

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Action ID	Type	Outcome
MVP-2022-00656-TKO (October 27, 2023)	AJD	Wetland 2a and Wetland 2b (west of Ethan Dr.) were determined to be non-jurisdictional under the AJD

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

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 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]

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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.

- 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).

[Review of a 2020 Cedar Corporation delineation report, historic aerial images, WI Surface Water Data Viewer, and LiDAR (hillshade and DEM GIS layers from the Mississippi Valley Division Regulatory Viewer) indicate that the area identified as Wetland 2c (W-2c) in the attached figures is a depressional wetland, surrounded by upland. Review of these resources indicate the assessed wetland is not, and does not physically abut, a jurisdictional water.

Wetland 2c sits at the southeast of the intersection of Ethan Drive and Khloe Lane within the recently constructed Country Fields sub-division. Prior to development, W-2c was part of a larger continuous wetland complex, partially comprised of excavated linear drainage features, within an agricultural field. The larger complex has since been severed

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

into smaller segmented wetlands. Corps Individual Standard Permit MVP-2022-00656-SJW (issued 06/06/2023) authorized the discharge of fill material into 0.90-acre of wetland for the construction of roadways and infrastructure associated with the development. Fill material from the newly constructed roadbeds have bound W-2c at its north and west. Fill material from Ethan Dr. forms the new wetland boundary to the west. No culverts exist beneath the roadway which would serve as a continuous surface connection. At the southwest, W-2c connects to a small discrete drainage feature. Review of elevation data shows this channel slopes down into the wetland and would not serve as an outlet to any downstream waters. A culvert is present at the north, which discharges to the storm sewer and on-site detention pond. At the east, topography slopes up where it transitions to delineated uplands, while the wetland continues outside of the wetland delineation's study area at the south. Here topography gradually slopes down to the south and east towards an off-site mapped wetland (National and Wisconsin Wetland Inventories (NWI, WWI)). The area between the two known wetlands is mapped as containing partly hydric soils, though no mapped wetlands are present in this area. Review of aerial imagery shows a lack of persistent wetness signature or any other indication of wetland presence (standing water, repeated vegetation stress, distinct variation of vegetation) within this area. Furthermore, a section of upland field, approximately 300 feet in width, sit between the downstream identified wetland and the nearest relatively permanent water to the south. Review of aerial imagery shows a lack of wetness signature, further supporting the area lacks wetland characteristics.

Wetland 2c is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. W-2c does not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. W-2c is a non-tidal wetland that does not abut relatively permanent jurisdictional waters and as such does not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland. W-2c is not an intrastate lake or pond that meets the relatively permanent standard and cannot be evaluated as an (a)(5) water: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, Wetlands 2c is not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.]

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. No field visits were conducted. Desktop review evaluation was conducted on 05/12/2025.
  - b. AJD Application "2022-00656-TKO 20250402 APP.pdf" in the administrative record.
  - c. Mississippi Valley Division Regulatory Viewer, 05/12/2025.

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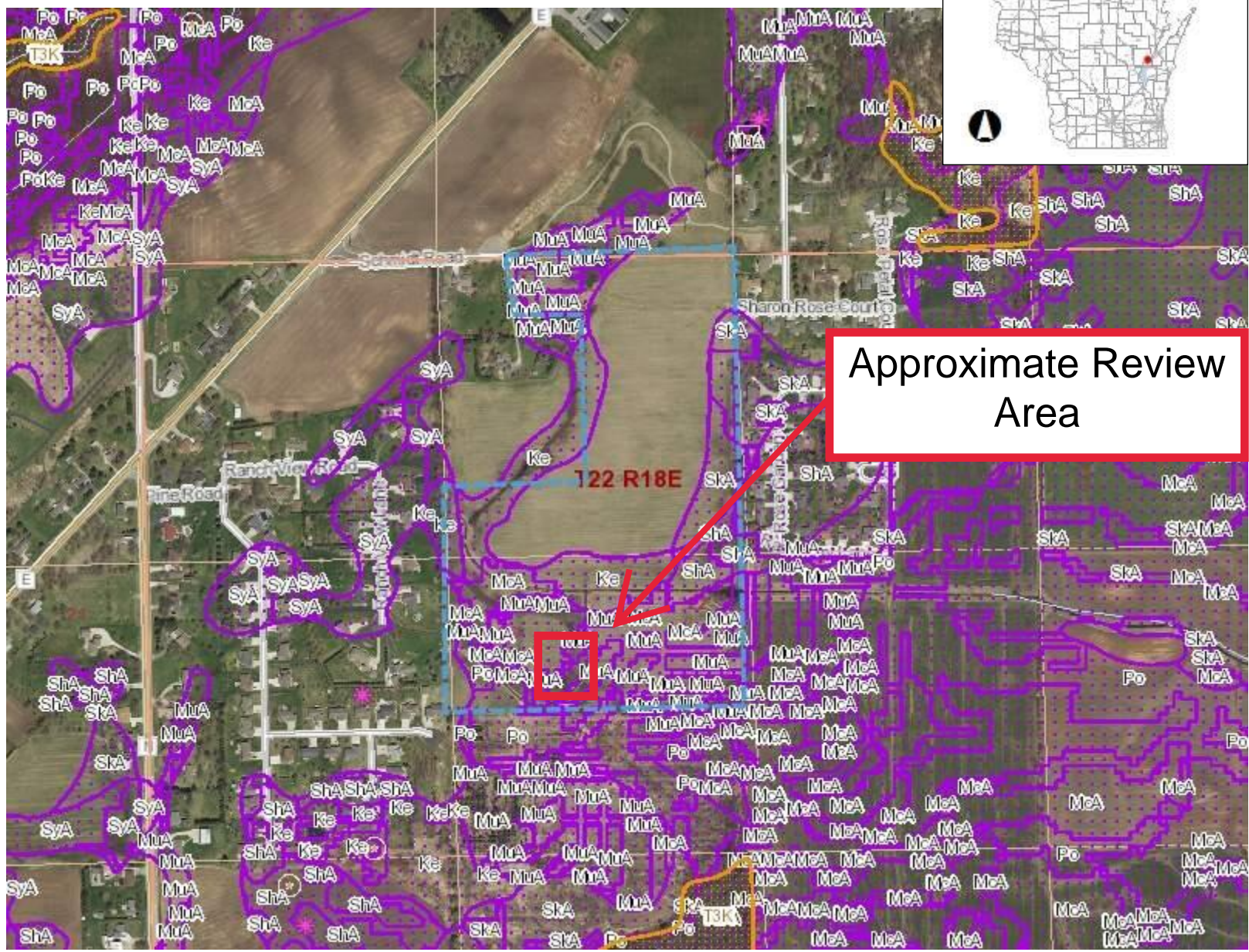
- d. [Wisconsin DNR Surface Water Data Viewer, 05/12/2025.](#)
- e. [Google Earth Pro, 05/12/2025.](#)

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.

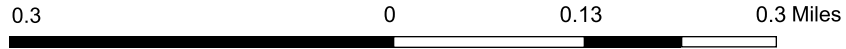


# MVP-2022-00656-TKO Figure 1



Approximate Review Area

- Legend**
- ◆ Wetland Identifications and Confirmations
  - Wetland Class Points**
    - ▲ Dammed pond
    - ◻ Excavated pond
    - ◻ Filled excavated pond
    - ▲ Filled/draind wetland
    - Wetland too small to delineate
  - ▨ Filled Points
  - Wetland Class Areas**
    - ▨ Wetland
    - ◻ Upland
  - ▨ Filled Areas
  - Wetland Class Points**
    - ▲ Dammed pond
    - ◻ Excavated pond
    - ◻ Filled excavated pond
    - ▲ Filled/draind wetland
    - Wetland too small to delineate
  - ▨ Filled Points
  - Wetland Class Areas**
    - ▨ Wetland
    - ◻ Upland
  - ▨ Filled Areas
  - ✳ NRCS Wetspots
  - ◻ Maximum Extent Wetland Indicators
  - ◻ Township
  - ◻ Section
  - ◻ Quarter-Quarter
  - ◻ County Boundary
  - Cities, Towns & Villages**
    - ◻ City
    - ◻ Village
    - ◻ Civil Town



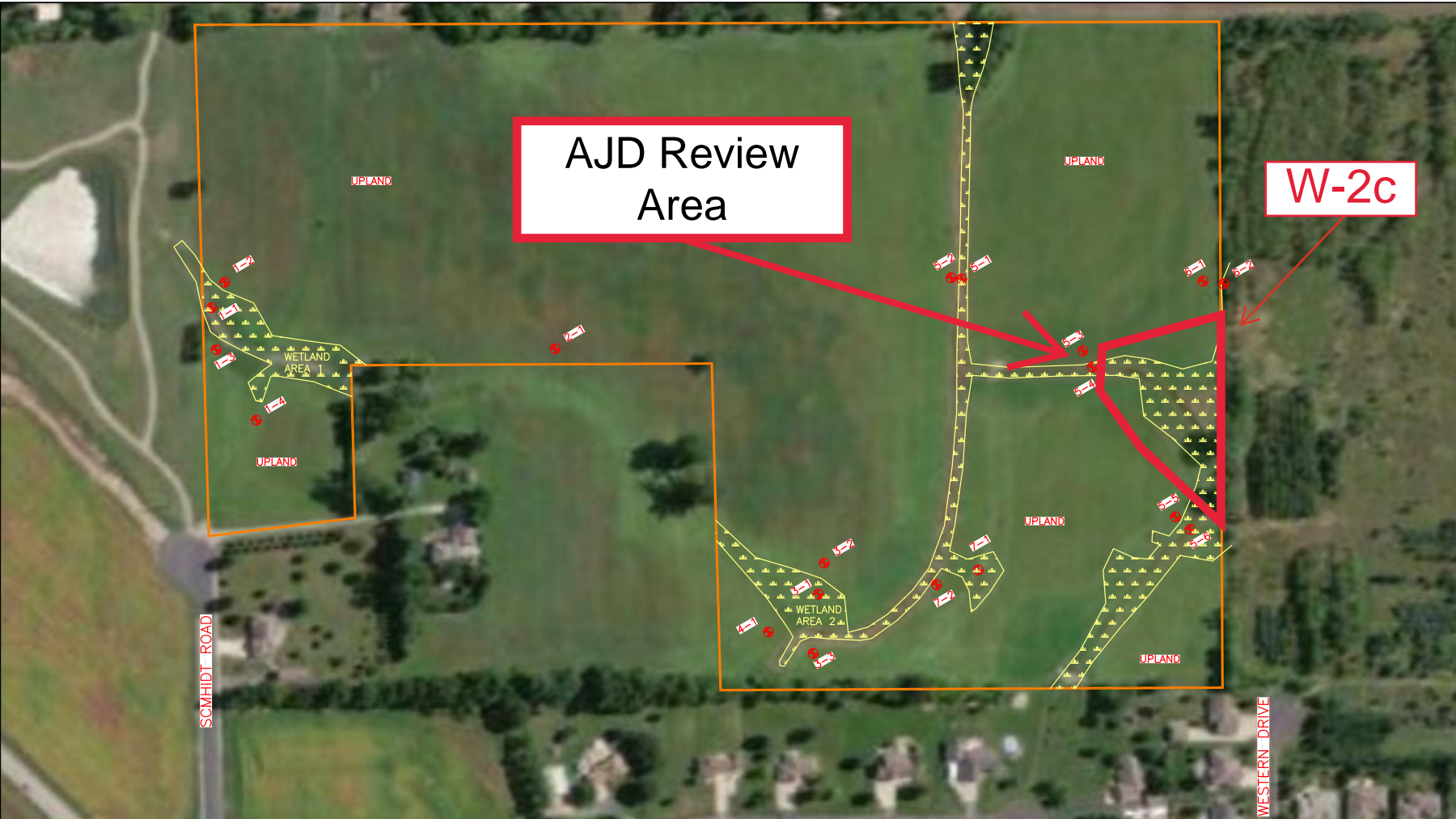
NAD\_1983\_HARN\_Wisconsin\_TM

1: 7,920

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

# MVP-2022-00656-TKO Figure 2



AJD Review Area

W-2c

WETLAND AREA 1 = 28,728 S.F. (0.66 AC)  
 WETLAND AREA 2 = 132,089 S.F. (3.03 AC)  
 TOTAL WETLAND AREA = 160,817 S.F. (3.69 AC)  
 TOTAL SITE AREA = 2,123,927 S.F. (48.76 AC)

- LEGEND**
- ⊕ BORING LOCATION
  - PROJECT BOUNDARY
  - WETLAND LINE
  - ||||| WETLANDS



NOTE: AERIALS ARE NOT TIED TO COUNTY COORDINATES, AND PHOTOS ARE APPROXIMATE. (FOR REFERENCE ONLY)

JOB NO.	6268-005
SCALE	1"=200'
DRAWN BY	L.LUCHT
CHECKED BY	S.JEPSON
DATE	8/24/2020
REVISIONS	
REFERENCE FILE	
DRAWING FILE	6268-005WET

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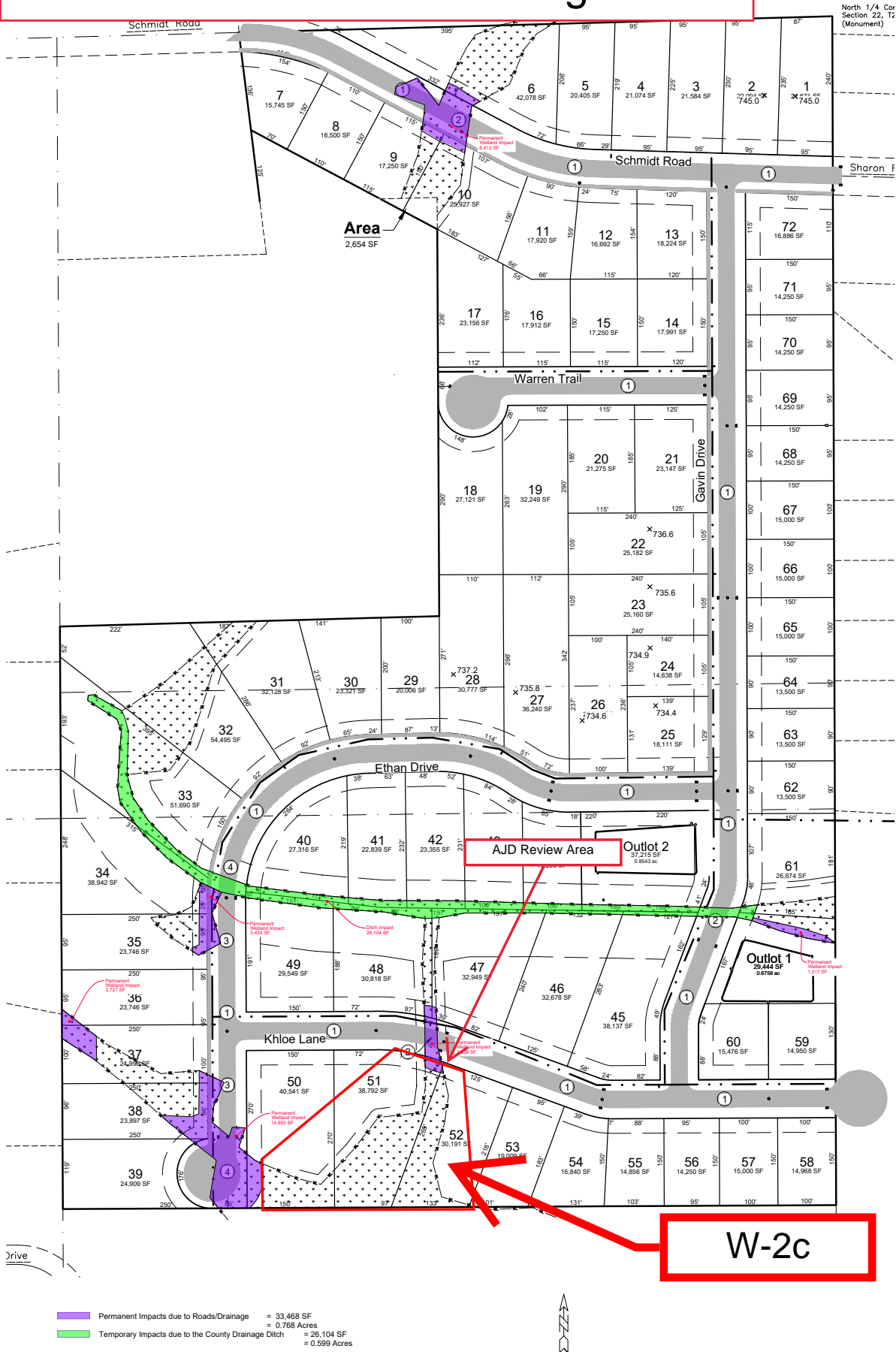
WETLAND LOCATION MAP  
 SCHMIDT PROPERTY  
 PART OF SECTION 22, TOWNSHIP 22 NORTH, RANGE 18 EAST,  
 TOWN OF FREEDOM, OUTAGAMIE COUNTY, WISCONSIN



MVP-2022-00656-TKO Figure 3



# MVP-2022-00656-TKO Figure 4



Preliminary

10/13/2022 8:26:09 AM J:\Projects\7009fox\dwg\Civil\_3D\7009Concept3.dwg Printed by: johnatho

Drawn: JDP  
Checked: JDP  
Date: 10/13/2022  
Project: 7009Concept3.dwg

**Country Fields**  
Town of Freedom, Outagamie County, WI  
For: Tom Dercks

**WETLAND IMPACT  
PLAN**



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