

CEMVP-RD E

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2011-05116-TKO

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Aug 7, 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-2011-05116-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 Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended,

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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.

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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-4 Ditch	Non-Jurisdictional	N/A
W-6	Non-Jurisdictional	N/A
W-7	Non-Jurisdictional	N/A
W-8	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 Are Size (in acres): ~6-acre
- b. Location Description: The project/review area is located in Section 11, Township 18N, Range 15E, Winnebago County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.0517 Longitude: -88.6645
- d. Nearest City or Town: Omro
- e. County: Winnebago
- f. State: Wisconsin

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g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2011-05116-JRS (January 18, 2012)	AJD	A PJD was conducted, assuming jurisdiction of Lake Butte des Morts

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.

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- 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>

The ditched portion of Wetland 4 (W-4 Ditch) is a constructed (excavated) drainage feature that is not a water of the U.S. The feature was excavated in uplands to provide drainage for the access roadway and associated recreational area (boat ramp). W-4 Ditch is a linear drainage ditch which runs north/south through the review area and sits along the east of the boat ramp access road. This aquatic feature fits under the definition of a b(3) water, from 33 CFR 328.3(b), as it was excavated wholly in and drains only dry land and does not carry a relatively permanent flow of water. Review of historic documents shows the recreational area being developed in 1982. Historic aerial imagery shows the area containing the roadway and ditch as being undeveloped land prior to the first signs of large-scale disturbance in the 1982 aerial. Historic images and Google Earth ground level photos show a lack of relatively permanent water within W-4 Ditch. Review of the original Wisconsin Public Land Survey Records (1835) show no aquatic resources in the location of this portion of W-4 Ditch. Wetlands associated with Lake Butte des Morts are mapped in the northern ½ of the ¼ section, though not in the location of the reviewed portion of W-4 Ditch. Following review of historic aerial imagery, no persistent wetness signature or any other indication of wetland presence (standing water, repeated

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

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crop/vegetation stress, distinct variation of vegetation) was observed in locations surrounding W-4 Ditch. Additionally, USDA soil map data indicates the review area consists of predominantly non-hydric soils, with no mapped wetlands (WWI and NWI), further supporting the feature was excavated in uplands.

- 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).

Wetlands 6, 7, and 8 (W-6, W-7, and W-8) are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Review of a 2025 GEI Consultants wetland 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-6, W-7, and W-8 are depressional wetlands, surrounded by upland. Review of these resources indicate W-6, W-7, and W-8 do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. W-6, W-7, and W-8 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-6, W-7, and W-8 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-6, W-7, and W-8 are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

Wetlands W-6 and W-7 are located to the southeast of the existing trailer parking lot, on the inside corner where the lot meets the access road in the northeast of the review area. Per county contours, W-6 and W-7 sit in a depressional area where topography slopes up, transitioning to delineated uplands, at the wetland's south and west boundaries. Fill material from the access road confines W-6 and W-7 to the north and east. No outlets are associated with either wetland and they do not physically abut any downstream waters.

Wetland 8 (W-8) is located within the east/west running ditch of the access road, east of the boat ramps. Review of historic atlases and aerial imagery shows W-8 may have been excavated in a wetland area. Elevation data shows the wetland transitioning to delineated upland at the south, east, north, and west, with a culvert discharging to Lake Butte des Morts. The application material indicates the culvert serves as an outlet for the ditch with the lower most elevation above that of the OHWM of the lake. Additionally, fill material from the access road

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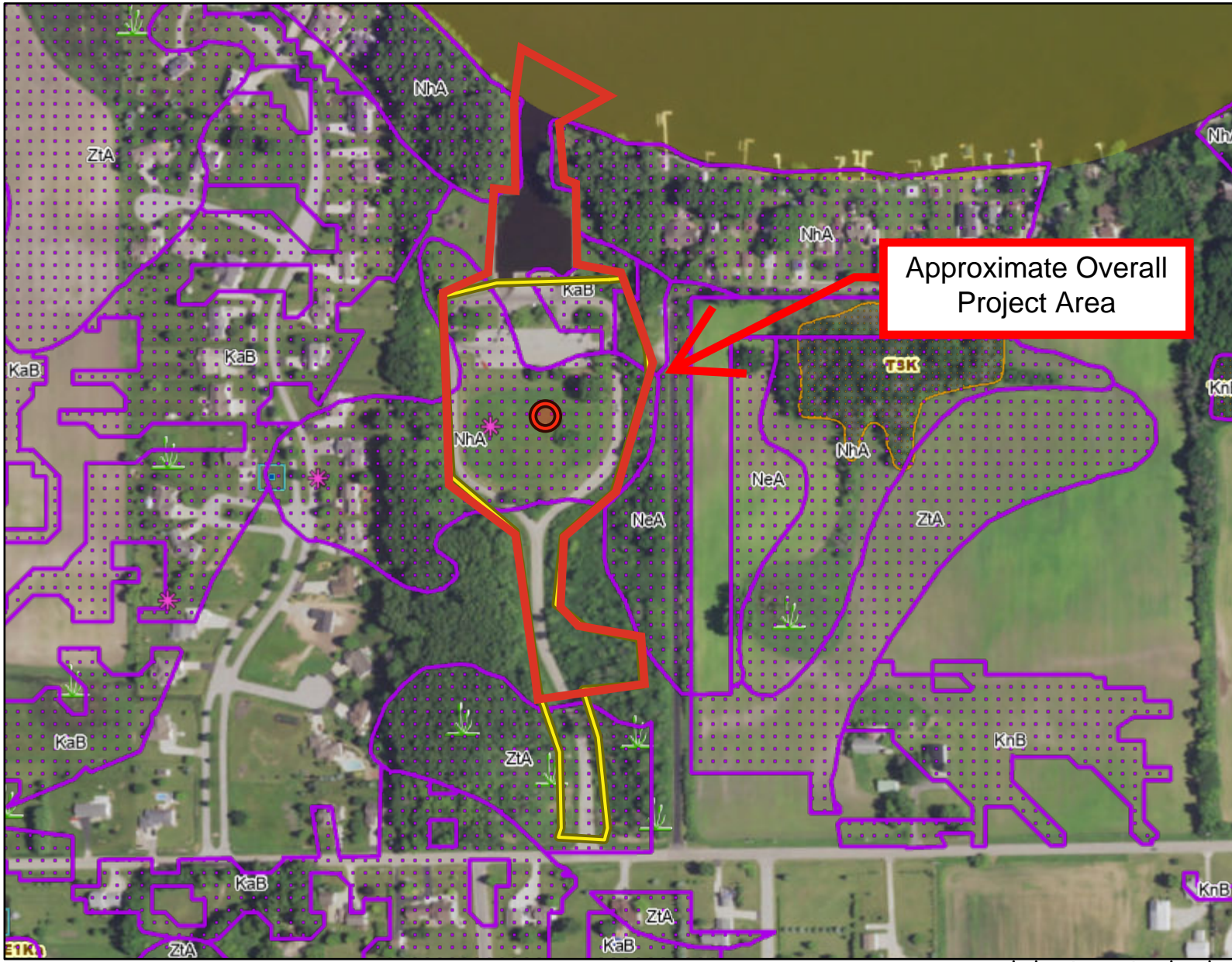
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confines W-8 to the south. No other outlets are associated with the wetland boundaries, and W-8 does not physically abut any downstream waters.

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 07/28/2025.
  - b. AJD Application "2011-05116-TKO 20250625 APP.pdf" in the administrative record.
  - c. Mississippi Valley Division Regulatory Viewer, 07/28/2025.
  - d. Wisconsin DNR Surface Water Data Viewer, 07/28/2025.
  - e. Winnebago County GIS Interactive Mapping, 07/28/2025.
  - f. <https://www.historicaerials.com/viewer>, 07/28/2025.
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.



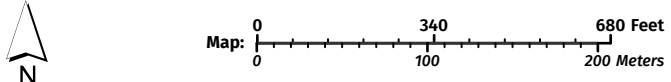
# MVP-2011-05116-TKO Figure 1



**Legend:** (some map layers may not be displayed)

- USDA Wetspots
- Maximum Extent Wetland Indicators
- Wetland Class Points
  - Excavated pond
  - Wetland too small to delineate
  - Wetland Class Areas
- PNW Musky Areas
- Latest Leaf On
  - Red: Band\_1
  - Green: Band\_2
  - Blue: Band\_3
- Municipality
  - Township
  - State Boundaries
  - County Boundaries
- County and Local Roads
  - Local Road
  - Open Water

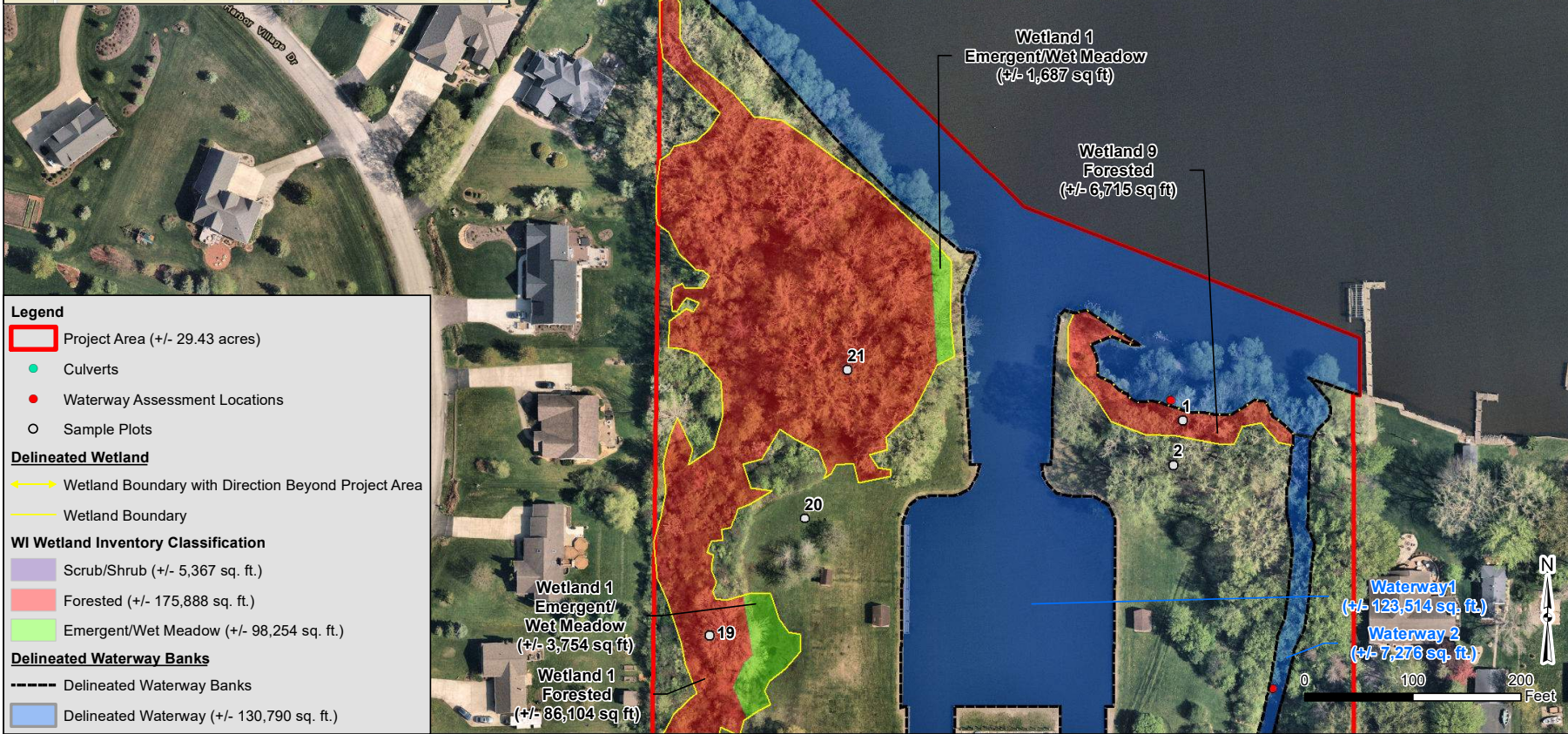
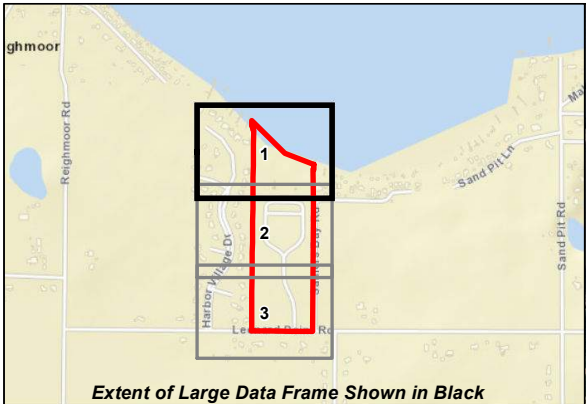
**Notes:**



Service Layer Credits:  
Dams and Floodplains: WI Dept. of Natural Resources, Division of Water, Fisheries Waters: WI Dept. of Natural Resources, Water Division, Latest Leaf On: , Detailed feature basemap: , WI Wetland Inventory (1:7920 and below): Calvin Lawrence, Dennis Weise, Nina Rihn, Designated Waters: Waterway Protection, WDNR, Wisconsin Leaf-Off Digital Orthophotography: , Wetland Indicators: Surface Water Data Viewer Team

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>

# MVP-2011-05116-TKO Figure 2



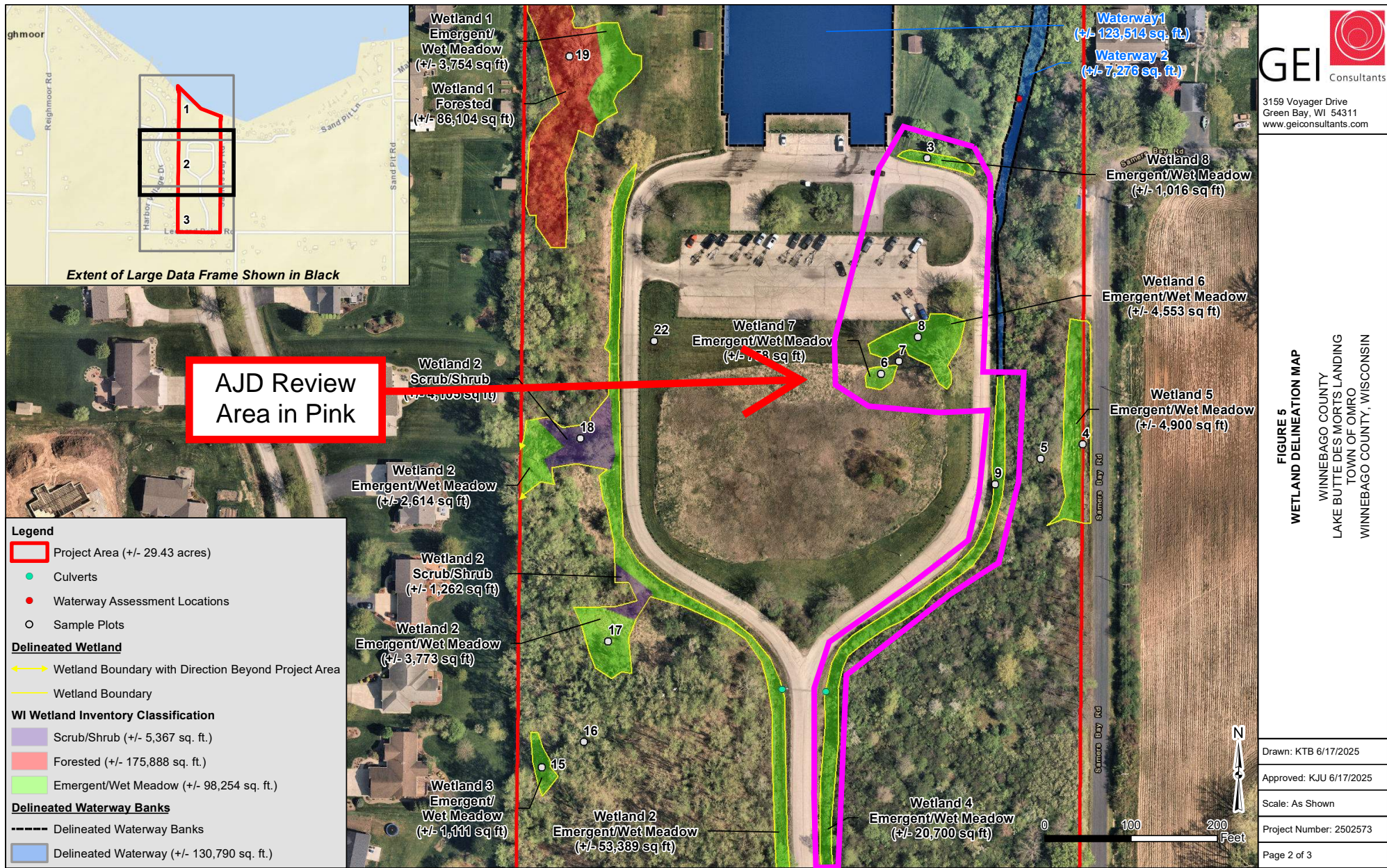
**GEI** Consultants  
 3159 Voyager Drive  
 Green Bay, WI 54311  
 www.geiconsultants.com

**FIGURE 5**  
**WETLAND DELINEATION MAP**  
 WINNEBAGO COUNTY  
 LAKE BUTTE DES MORTS LANDING  
 TOWN OF OMRO  
 WINNEBAGO COUNTY, WISCONSIN

Drawn: KTB 6/17/2025  
 Approved: KJU 6/17/2025  
 Scale: As Shown  
 Project Number: 2502573  
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# MVP-2011-05116-TKO Figure 3



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**FIGURE 5  
 WETLAND DELINEATION MAP**  
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 LAKE BUTTE DES MORTS LANDING  
 TOWN OF OMRO  
 WINNEBAGO COUNTY, WISCONSIN

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# MVP-2011-05116-TKO Figure 4



**FIGURE 5**  
**WETLAND DELINEATION MAP**  
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