

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2012-05355-ALH

MVP

August 26, 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-2012-05355-ALH [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.

MVP

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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-3	Non-Jurisdictional	N/A
W-12	Non-Jurisdictional	N/A
W-13	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)

3. REVIEW AREA.

- a. Project Are Size (in acres): 2 acres
- b. Location Description: The project/review area is located in Section 11, Township 09N, Range 21E, Ozaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 43.253710 Longitude: -87.973050
- d. Nearest City or Town: Mequon
- e. County: Ozaukee
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2012-05355	AJD	Some waters were determined to be non-jurisdictional under the AJD

MVP

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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]

a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

b. The Territorial Seas (a)(1)(ii): 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.

MVP

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- 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).

[Wetland 3 is a depressional wetland that is surrounded by uplands and extends outside of the delineated area according to the wetland delineation report. It is on the south side of Highland Road. The National Wetland Inventory layer on the National Regulatory Viewer indicates a presence of wetlands where Wetland 3 is located. According to the 2-ft Contours, Hillshade, DEM and aerial imagery layers, the wetland extends outside of the delineated area to the southeast however, it is contained by an agricultural field and a residential development. Therefore, the wetland is surrounded by uplands and does not abut any relatively permanent jurisdictional waters. The USA Soils Hydric Class layer shows partially hydric soil in the location of the wetland. Multiple years of aerial imagery do not show many changes in the last decade.

Wetlands 12 and 13 are depressional wetlands on the northside of Highland Road and are completely within the delineated area. They connect to Wetland 3 via culverts under Highland Road. Wetlands 2 and 3 are completely surrounded by uplands. DEM, Hillshade and 2-ft Contours layers confirm the size and shape of the wetlands. The National Wetland Inventory layer indicates a presence of wetlands for Wetland 12 but not

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

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Wetland 13. Multiple years of aerial imagery do not show many changes in the last decade.

The wetlands are not TNWs, territorial seas, or interstate waters and therefore not (a)(1) waters. The wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. The wetlands are nontidal 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; therefore, the wetlands 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 evaluation was conducted on August 26, 2025.]
- b. [Highland Road Site South Professionally Assured Wetland Delineation Report by Evergreen Consultants, LLC dated September 24, 2022.]
- c. [Highland Road Site Professionally Assured Wetland Delineation Report by Evergreen Consultants, LLC dated October 14, 2021.]
- d. [National Regulatory Viewer – USA Soils Hydric Class layer, National Wetland Inventory layer, 2-ft Contours, Hillshade layer, DEM layer and WNDN Imagery 2022, 2020 and 2015 accessed on August 27, 2025.]

10. OTHER SUPPORTING INFORMATION. [N/A]

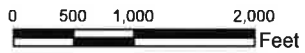
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

# MVP-2012-05355-ALH FIGURE 1 OF 4



Legend  
Site Boundary

## Highland Road Site Site Location Map Highland Road City of Mequon Ozaukee County, WI



Project: OZK21-016-01



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**Legend**

- Wetland Line
- Wetland
- Sample Point
- Picture Location
- Culvert
- Site Boundary

Wetland Delineation was conducted by  
 Chad Fradette, EP, Chem,  
 WDNR Professionally Assured Wetland Delineator  
 with assistance from  
 Shyann Banker, Environmental Specialist

Highland Road Site  
 Wetland Delineation Map  
 Highland Road  
 City of Mequon  
 Ozaukee County, WI  
 - Sheet 3 -

Project: OZK21-016-01



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MVP-2012-05355-ALH FIGURE 3 OF 4



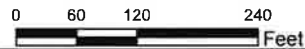
Legend

- Wetland Line
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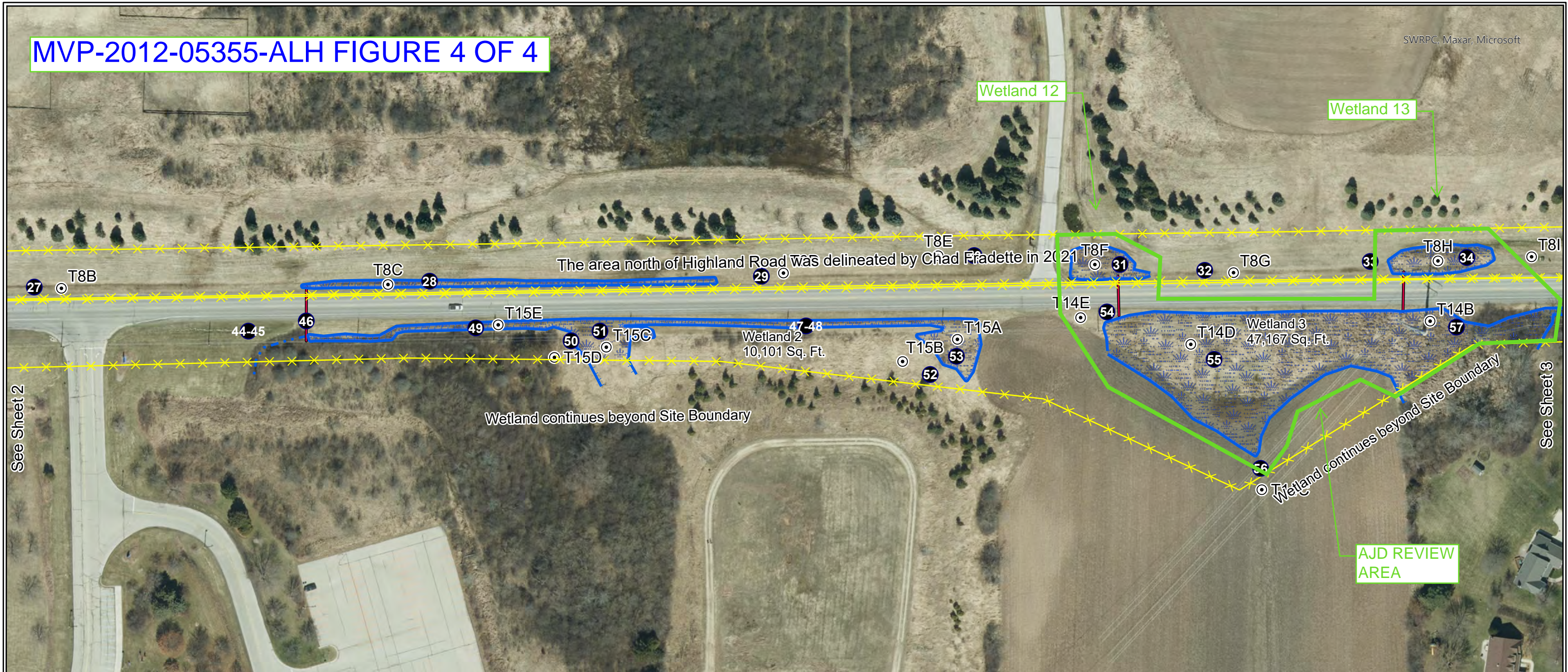
Highland Road Site  
Wetland Delineation Map  
Highland Road  
City of Mequon  
Ozaukee County, WI  
- Sheet 4 -

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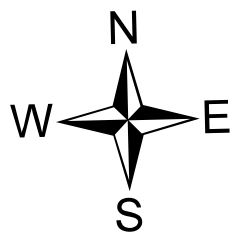
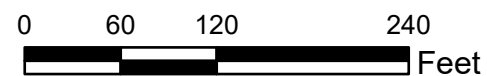
Legend

- Wetland Line
- Wetland
- Sample Point
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 Chad Fradette, EP, Chem,  
 WDNR Professionally Assured Wetland Delineator  
 with assistance from  
 Shyann Banker, Environmental Specialist

Mequon Bike Trail  
 Wetland Delineation Map  
 South Side of Highland Road  
 City of Mequon  
 Ozaukee County, WI  
 -Sheet 2-

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