

CEMVP-RD E

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2013-00145-TKO

CEMVP-RD E

September 18, 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-2013-00145-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	NA
W-2	Non-Jurisdictional	NA
W-3	Non-Jurisdictional	NA
W-4	Non-Jurisdictional	NA
W-5	Non-Jurisdictional	NA

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): ~21.62-acre
- b. Location Description: The project/review area is located in Section 14, Township 05N, Range 21E, Milwaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42.8979 Longitude: -87.9776

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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- d. Nearest City or Town: Franklin
 - e. County: Milwaukee
 - f. State: Wisconsin
 - g. Other associated Jurisdictional Determinations (including outcomes): N/A
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [NA]⁶
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [NA]
 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
[NA]
 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. [NA]

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.

- 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

Wetlands 1 and 2 (W-1, W-2) are linear drainage features which run along the east and west sides of the Franklin School District’s soccer fields. These aquatic features fit under the definition of b(3) waters, from 33 CFR 328.3(b), as they were excavated wholly in and drain only dry land and do not carry a relatively permanent flow of water. This is evident through review of historic aerial imagery, which the earliest available (1937) shows the entire review area to be cropped agricultural field(s) and undeveloped land. No wetlands or waterways are mapped in the areas containing W-1 and W-2, and review of aerial imagery shows no persistent wetness signature or any other indication of wetland presence (standing water, repeated vegetation stress, distinct variation of vegetation) within the areas surrounding Wetlands 1 and 2, indicating the drainage features were constructed in uplands. Review of the original WI Public Land Survey also shows no wetland/waterway history in this portion of the section. A discrete drainage feature can be seen bisecting the review area, running from the southeast to northwest. No relatively permanent water was observed through the years of aerial imagery that were reviewed (1937-2013). This drainage feature is evident until the 2015 aerial shows disturbance for the construction of the soccer fields. Wetlands 1 and 2 are drainage features constructed in and designed to drain uplands. Therefore, Wetland 1 and Wetland 2 are not Waters of the U.S.

⁹ 88 FR 3004 (January 18, 2023)

- 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 2025 Evergreen Consultants, LLC wetland delineation report, historic aerial images, County GIS mapping, WI Surface Water Data Viewer, and LiDAR resources (hillshade and DEM GIS layers from the Mississippi Valley Division Regulatory Viewer) indicate that Wetlands 3, 4, and 5 (W-3, W-4, and W-5) are depressional wetlands, surrounded by upland. Review of these resources indicate W-3, W-4, and W-5 are not, and do not physically abut, a jurisdictional water. W-3, W-4, and W-5 are not TNWs, territorial seas, or interstate waters and therefore is not an (a)(1) waters. W-3, W-4, and W-5 do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. W-3, W-4, and W-5 are non-tidal wetlands that do not abut relatively permanent jurisdictional waters and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands. W-3, W-4, 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-3, W-4, and W-5 are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

W-3 and W-4 sit entirely within the review area and are surrounded by delineated upland in all directions. W-5 is located at the southeast extent of the review area and extends beyond the wetland delineation study area at its east. The delineation report and review of LiDAR indicate W-5 is located within a slight depression. Boundaries of W-5 transition to delineated upland in all other directions. At its eastern most extent, W-5 continues outside the AJD study area. Review of aerial imagery and elevation data shows topography gradually sloping to upland as wetland characteristics are lost moving east from W-5. No discrete features are associated with any of the wetland boundaries which would serve as a continuous surface connection to any downstream water.

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 09/03/2025.
 - b. Application "2013-00145-TKO 20250703 APP.pdf" in the administrative record, 09/03/2025.

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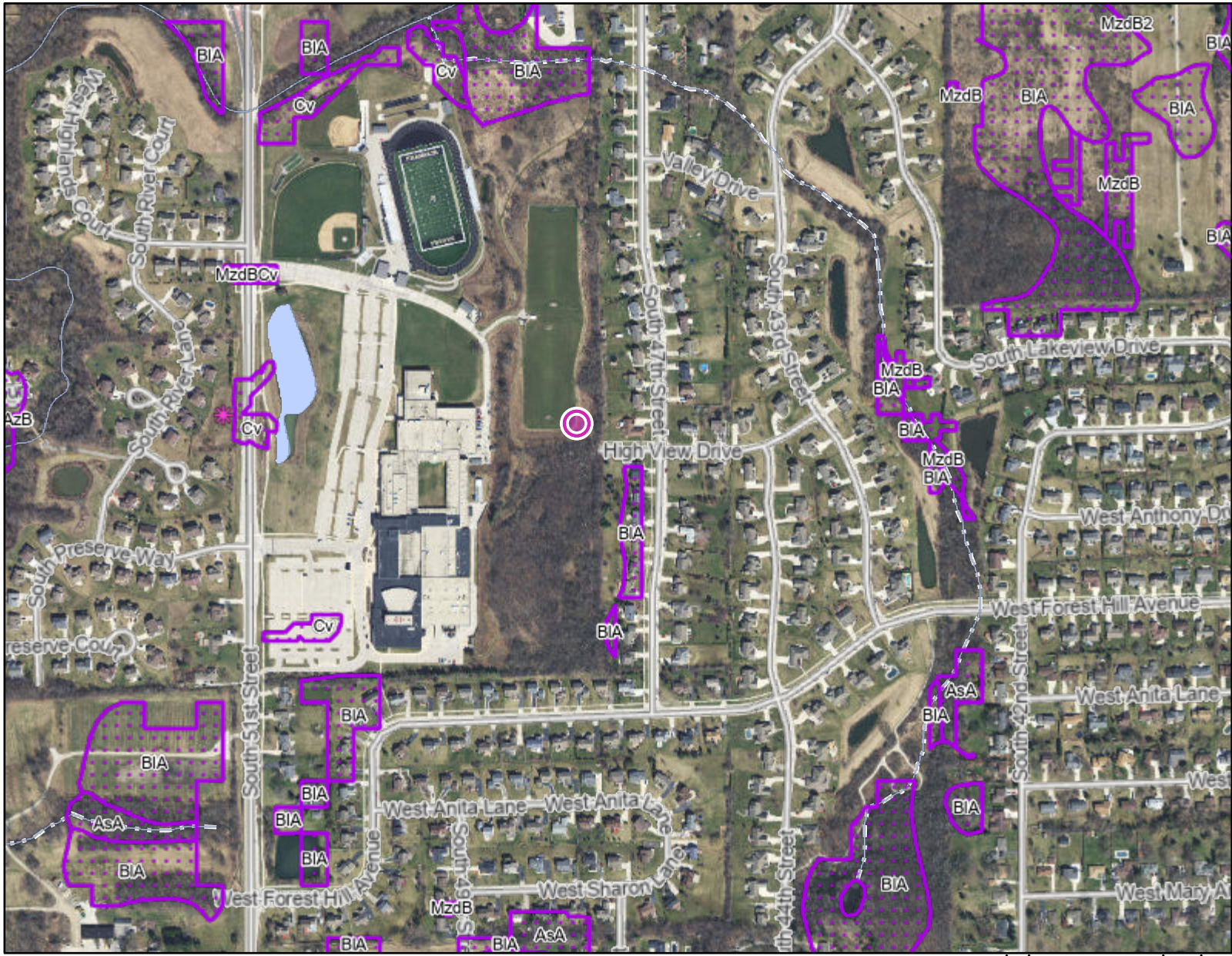
- c. [Mississippi Valley Division Regulatory Viewer, 09/03/2025.](#)
- d. [Wisconsin DNR Surface Water Data Viewer, 09/03/2025.](#)
- e. [Milwaukee County GIS Interactive Mapping, 09/03/2025.](#)
- f. [Google Earth Aerial Imagery, 09/03/2025](#)

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.



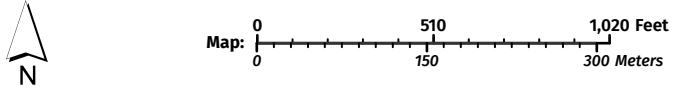
MVP-2013-00145-TKO Figure 1



Legend: (some map layers may not be displayed)

- USDA Wetspots
- 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
- County and Local Roads
- Local Road
- Latest Leaf Off Imagery

Notes:



Service Layer Credits:
Wetland Indicators & Soils: Surface Water Data Viewer Team, Latest Leaf Off: , 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>



Legend

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

Franklin High School
Wetland Delineation Map
 8222 S 51st Street
 City of Franklin
 Milwaukee County, WI



Wetland Delineation was conducted by
 Chad Fradette, EP, Chem,
 WDNR Professionally Assured Wetland Delineator

Project: MIL25-040-01



MVP-2013-00145-TKO Figure 2