



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
ST. PAUL DISTRICT OFFICE
332 MINNESOTA STREET SUITE E1500
ST. PAUL MINNESOTA 55101

MVP

December 2, 2024

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-2022-01301-ALH [[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 Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

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.

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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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
Wetland 3	Non-Jurisdictional	N/A
Wetland 5	Non-Jurisdictional	N/A
Wetland 6	Non-Jurisdictional	N/A
Ditch 1	Non-Jurisdictional	N/A
Ditch 3	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. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

- a. Project Area Size (in acres): 0.80 acres
- b. Location Description: The project/review area is located in Section 18, Township 05N, Range 21E, Milwaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42.900300 Longitude: -88.066030
- d. Nearest City or Town: Franklin
- e. County: Milwaukee
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes): N/A

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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]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 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.
 - 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]

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.

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- 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

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 Ditch 1 is a constructed ditch feature that is not a water of the U.S. According to aerial imagery submitted with the wetland delineation report, the feature was constructed by excavating dry land when the pond for the residential subdivision immediately to the south of the proposed project area was built sometime between 2005 and 2010. There are no wetland signatures in the area in the aerial imagery before 2005, prior to construction, and there are only partially hydric soils at 6%. In multiple years of aerial imagery from Google Earth (2015, 2018, 2020, 2022, and 2024), there are no indications of relatively permanent flow in this ditch. Ditch 1 fits under the definition of a b(3) water, from 33 CFR 328.3(b) as it is a roadside ditch excavated in and draining only dry land and does not carry a relative permanent flow of water.

Ditch 3 is a constructed ditch feature that is not a water of the U.S. According to aerial imagery submitted with the wetland delineation report, the feature was constructed by excavating dry land when West Forest Home Avenue was built sometime between 1951 and 1963. There are no wetland signatures in the area in the aerial imagery before 1951, prior to construction. In multiple years of aerial imagery from Google Earth (2015, 2018, 2020, 2022, and 2024), there are no indications of relative permanent flow in this ditch. Part of it has non-hydric soils. Ditch 3 fits under the definition of a b(3) water, from 33 CFR 328.3(b) as it is a roadside ditch excavated in and draining only dry land and does not carry a relative permanent flow of water.

- a. 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).

⁹ 88 FR 3004 (January 18, 2023)

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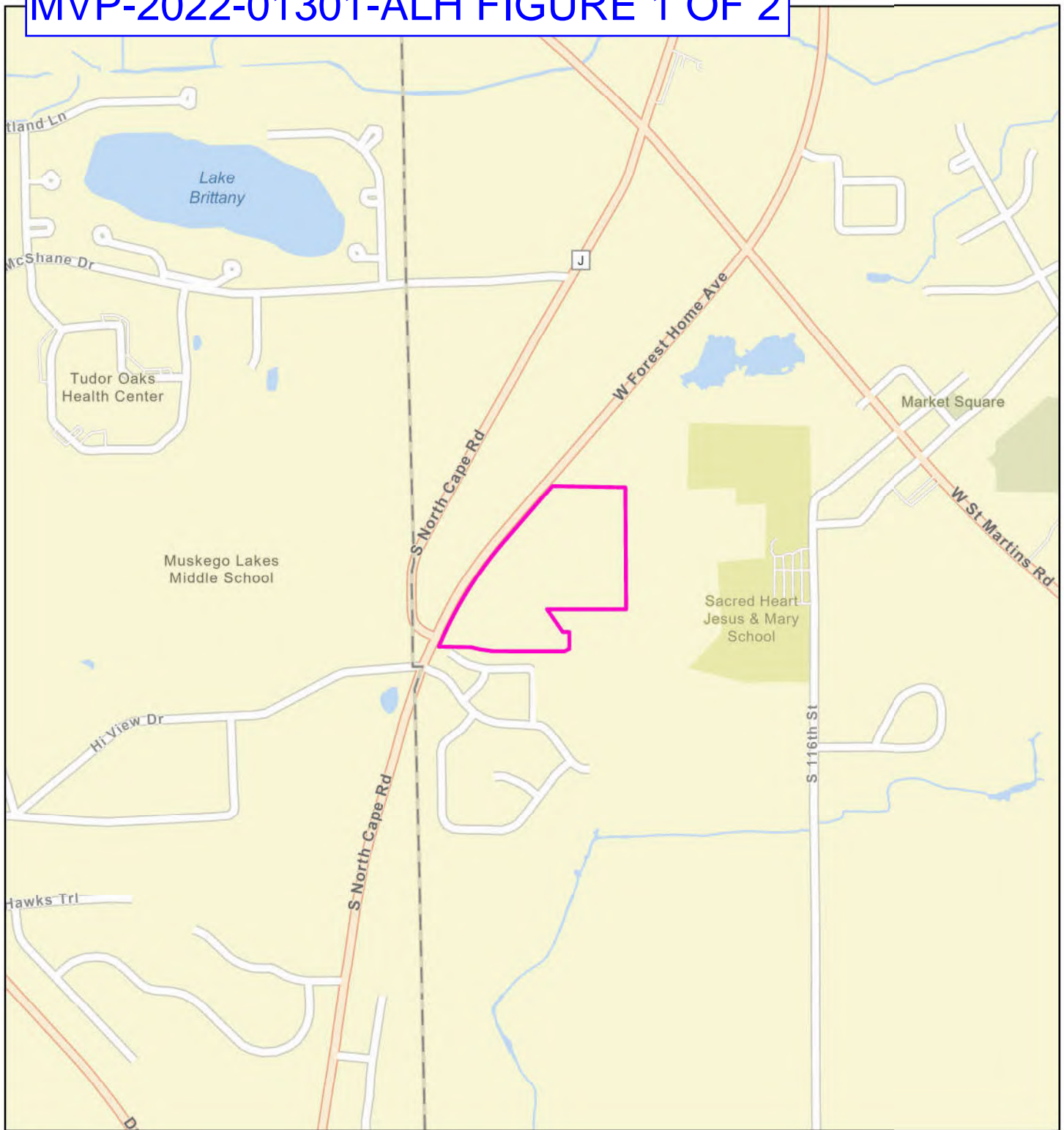
Wetlands 3, 5 and 6 are depressional wetlands that are centrally located in the delineated area surrounded by uplands based on the delineation report. The wetlands are approximately 2,400 linear feet to the southwest of a tributary to Tess Corners Creek. The National Wetland Inventory layer only shows a wetland where Wetland 3 is. The Digital Elevation Model and hillshade layers of the National Regulatory Viewer do not show any discrete or confined features extending beyond these wetlands. Wetland 5 is approximately 40 linear feet away from Ditch 3. The elevation Profile Tool on the National Regulatory Viewer shows a slight rise in elevation between Wetland 5 and Ditch 3. Any connection between the two would be overland flow and not discrete or confined. These wetlands are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. The wetlands do not extend to any tributaries and are not drained by any discrete/confined surface water conveyances. 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. There are no ditches, swales, pipes, or culverts that connect the wetlands to downstream jurisdictional waters. The wetlands are non-tidal wetlands that do not have a continuous surface water connection to 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 described above 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 conducted on December 2, 2024.
- b. Assured Wetland Delineation Report West Forest Home Avenue Property, Prepared by Hey and Associates, Inc., dated July 26, 2022.
- c. USACE National Regulatory Viewer: Hillshade, DEM, National Wetland Inventory, USA Soils Hydric Class. Accessed December 2, 2024.

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.



0 1000 Feet

Project Number: 22-0213

Date: 7/8/2022 10:05 AM



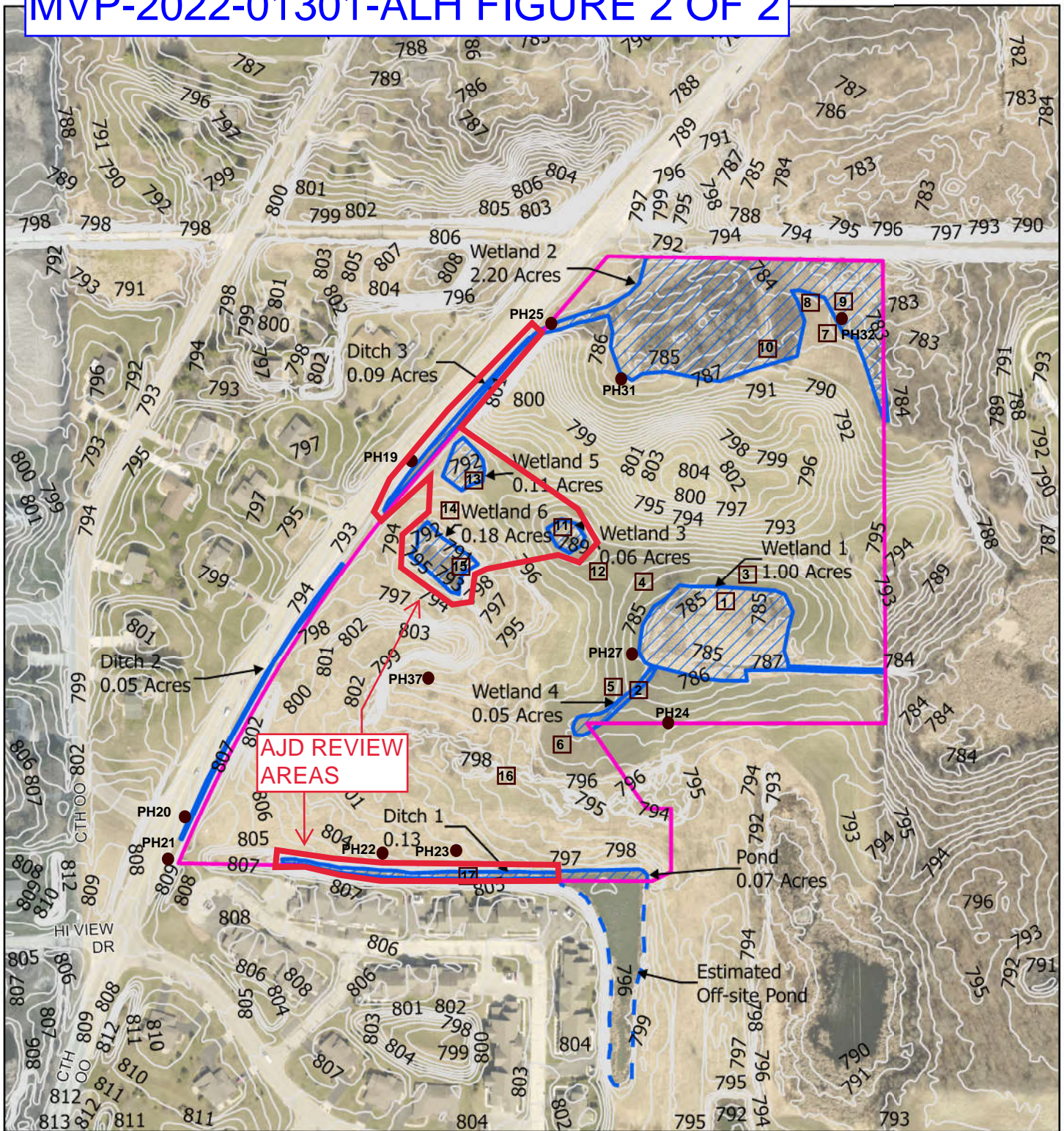
Legend:
Project Boundary

Project Name:
West Forest Home Ave-Franklin

Prepared for:
Continental 695 Fund LLC

Location Information:
T.5N, R.21E, Section 18

MVP-2022-01301-ALH FIGURE 2 OF 2



0 300 Feet

Project Number: 22-0213

Date: 7/8/2022 9:17 AM



Legend:

- Project Boundary
- Surveyed Wetland Boundary
- Estimated Wetland Polyline
- Data Point Location
- Photo Location

Project Name:

West Forest Home Ave-Franklin

Prepared for:

Continental 695 Fund LLC

Aerial Date:

2020

Exhibit Title:

Wetland Boundary

Exhibit:

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