

MVP-R

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00166-RJH MFR 3 of 3

MVP-R

October 8, 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-2025-00166-RJH MFR 3 of 3²

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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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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- 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
W13-3	Non-Jurisdictional	NONE
W13-1	Non-Jurisdictional	NONE
W13-2	Non-Jurisdictional	NONE
W13-4	Non-Jurisdictional	NONE
W13-5	Non-Jurisdictional	NONE
W13-6	Non-Jurisdictional	NONE
W13-7	Non-Jurisdictional	NONE
W16-1	Non-Jurisdictional	NONE
W16-2	Non-Jurisdictional	NONE
W19-1	Non-Jurisdictional	NONE
W19-2	Non-Jurisdictional	NONE
W19-3	Non-Jurisdictional	NONE
W39-1	Non-Jurisdictional	NONE
W39-2	Non-Jurisdictional	NONE
W39-3	Non-Jurisdictional	NONE
W39-4	Non-Jurisdictional	NONE
W39-5	Non-Jurisdictional	NONE
W39-6	Non-Jurisdictional	NONE
W39-7	Non-Jurisdictional	NONE
W39-8	Non-Jurisdictional	NONE
W40-1	Non-Jurisdictional	NONE
W41-1	Non-Jurisdictional	NONE
W41-2	Non-Jurisdictional	NONE
W42-1	Non-Jurisdictional	NONE
W42-2	Non-Jurisdictional	NONE

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W42-3	Non-Jurisdictional	NONE
W42-4	Non-Jurisdictional	NONE
W43-1	Non-Jurisdictional	NONE
W43-2	Non-Jurisdictional	NONE
W43-3	Non-Jurisdictional	NONE
W43-4	Non-Jurisdictional	NONE
W43-5	Non-Jurisdictional	NONE
W44-1	Non-Jurisdictional	NONE
W44-2	Non-Jurisdictional	NONE

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): 103
- b. Location Description: The project/review area is located in Section 10, Township 011N, Range 022E, Ozaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 43.419412 Longitude: -87.861476
- d. Nearest City or Town: Port Washington
- e. County: Ozaukee
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2025-00166-RJH JD ID: 5349443	AJD	All waters were determined to be non-jurisdictional (excluded waters) under the AJD

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MVP-2025-00166-RJH JD ID: 5351859	AJD	All waters were determined to be non-jurisdictional (excluded waters) under the AJD
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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
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

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.

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 [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).

We have reviewed and evaluated the historical photography, Google Earth photography, soil mapping, and the information submitted by the applicant for the following wetlands:

- | | | | |
|---------|---------|---------|---------|
| • W13-1 | • W16-2 | • W39-8 | • W43-2 |
| • W13-2 | • W19-1 | • W41-1 | • W43-3 |
| • W13-3 | • W19-2 | • W41-2 | • W43-4 |
| • W13-4 | • W19-3 | • W42-1 | • W43-5 |
| • W13-6 | • W39-3 | • W42-2 | • W44-1 |
| • W13-7 | • W39-5 | • W42-3 | • W44-2 |
| • W16-1 | • W39-6 | • W42-4 | |

The above wetlands are all depressional wetlands surrounded by uplands within an agricultural field. A review of the Digital Elevation Model (DEM) data, LiDAR imagery, and aerial photography indicate that above wetlands

⁹ 88 FR 3004 (January 18, 2023)

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transitions into uplands and are not adjacent to a relatively permanent water (RPW). W43-4 (closest resource) is located approximately 1,819 linear feet from Sauk Creek, which is classified as a perennial water.

- W13-5 • W39-1 • W39-4 • W40-1
- W43-1 • W39-2 • W39-7

A review of the Digital Elevation Model (DEM) data, LiDAR imagery, and aerial photography indicate that Wetlands W13-5, W43-1, W39-1, W39-2, W39-4, and W39-7 extend beyond the review area and abut the Ozaukee Interurban Trail. Wetlands above W13-5 through W40-1 are depressional wetlands, surrounded by uplands, and are not adjacent to a relatively permanent water (RPW). W39-1 (closest resource) is located approximately 1,607 linear feet from Sauk Creek, which is classified as a perennial water.

W40-1 is split by Highland Drive and is within 164 linear feet of an unnamed mapped tributary. The ROW adjacent to Highland Drive is a manmade feature, lacking bed and bank, and lacking hydrology consistent of a relatively permanent water based on aerial photo observations. In accordance with current WOTUS guidance and the U.S. Supreme Court decision in *Sackett v. EPA* (2023), manmade features such as roadside ditches cannot serve as a continuous surface connection between wetlands and relatively permanent waters. Although W40-1 extends into a ROW ditch, this feature does not create a jurisdictional connection to any relatively permanent water. Based on the change of elevation and the boundaries depicted in the wetland delineation report, we have determined that W40-1 transitions into uplands and is not adjacent to a relatively permanent water (RPW).

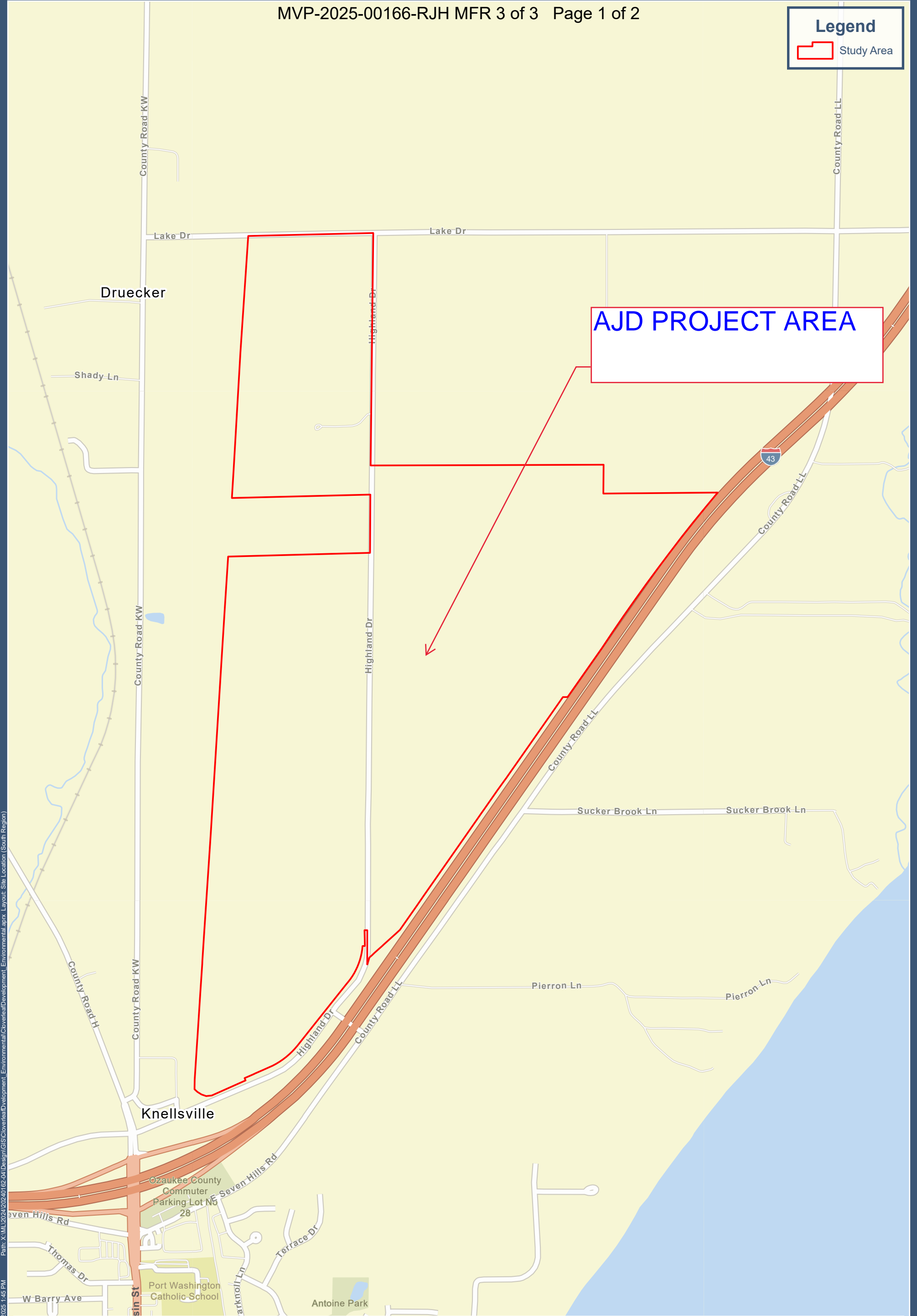
The mapped unnamed tributary offsite to the east has been previously evaluated under the '2025-00166-RJH AJD MFR 2 of 2' as an existing drainage feature lacking the bed and bank, hydrology, and OHWM characteristics and therefore is not considered a tributary.

All the wetlands evaluate above are not traditionally navigable waters (TNWs), territorial seas, or interstate waters, and do not meet the criteria for (a)(1) waters. The listed wetlands do not physically abut Sauk Creek, are not located within a paragraph (a)(2) impoundment, and are not adjacent to a jurisdictional (a)(3) tributary. As non-tidal wetlands that do not meet the definition of "adjacent," the above listed wetlands cannot be evaluated under paragraph (a)(4). Therefore, under the 2023 Revised Definition of "Waters of the United States" (Conforming Rule, 88 FR 61964), all the listed wetlands are not considered jurisdictional.

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 October 07 2025]
 - b. [National Regulatory Viewer – USA Soils Hydric Class layer, National Wetland Inventory layer, Hillshade layer and DEM layer accessed on September 3, 2025.]
 - c. [Wetland Delineation Report, prepared by Graef, dated April 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.

Legend

Study Area



APPENDIX A
FIGURE 1



SITE LOCATION

OZAUKEE COUNTY, WISCONSIN



0 1,000
Feet
1 in = 1,000 ft

Legend

Project 2 Boundary

Wetlands Requested for AJD

Main Project Area

Potential Logistics/Staging Areas

Undisturbed

AJD REVIEW
AREA

User: 1956 Date Saved: 9/29/2025 11:58 AM Path: X:\ML\2024\02\40162-12\Design\GIS\RedGraniteDevelopment_Environmental\RedGraniteDevelopment_Environmental.aprx Layout: Jurisdictional Determinations Project 2

JURISDICTIONAL DETERMINATIONS

OZAUKEE COUNTY, WISCONSIN

Proj. Number: 2024-0162.01 Source: Ozaukee County