

CE-MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00309-CJB

CE-MVP-RD

April 15, 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-2025-00309-CJB, 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.

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 1-E	Non-Jurisdictional	N/A
Wetland 2-E	Non-Jurisdictional	N/A
Wetland 3-E	Non-Jurisdictional	N/A
Wetland 6-E	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)
- “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. Review Area Size (in acres): 10 acres
- b. Location Description: The review area is located in Section 06, Township 21N, Range 18E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.324720 Longitude: -88.356090
- d. Nearest City or Town: Appleton
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
N/A	N/A	N/A

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup>

N/A

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

<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.

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
- 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).

The review areas for this JD include four aquatic resources identified as 1-E, 2-E, 3-E, and 6-E on the attached figure labeled MVP-2025-00309-CJB Figure 2 of 2. According to the wetland delineation reports that were submitted with this JD request (from years 2020 and 2025) and review of topographic maps, the overall site generally slopes from west to east. The closest Relatively Permanent Waters (RPWs) to the review areas include an unnamed tributary to Apple Creek that parallels the northeast property boundary, and Apple Creek located approximately 0.33 to the southwest of the property

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

boundary. Wetlands 1-E, 2-E, 3-E, and 6-E were reviewed individually to determine if they are abutting these RPWs or any other jurisdictional aquatic resources.

Wetland 1-E is located in the southwest corner of the site with upland consisting of an agricultural field to the northeast and southeast, and a forested area to the northwest and southwest. This wetland appears to extend outside of the review area to the southwest so the area outside of the review area southwest of Wetland 1-E was reviewed. Based on review of the National Wetland Inventory layer, Wisconsin Surface Water Data Viewer, LiDAR Hillshade and DEM layers, contour maps, and aerial imagery, Wetland 1 extends into a wooded area that is surrounded by upland consisting of agricultural fields to the north, west and east, and residential development to the south. The closest RPW is located approximately 0.2 miles to the southwest of this area, however, Wetland 1-E is separated from this aquatic resource by a variety of land uses to include approximately 0.1 miles of an upland agricultural field. Therefore, Wetland 1-E does not abut an RPW or any other jurisdictional aquatic resource.

Wetland 2-E is located in the west central area of the site and appears to enter the site from the west and extend through the site to the southern boundary; therefore, review of this wetland includes areas outside of the review area to the west and south of this wetland. At its western limits, wetland 2-E appears to extend into a wooded area. Based on review of the National Wetland Inventory, Wisconsin Surface Water Data Viewer, and LiDAR Hillshade and DEM layers, the western portion of Wetland 2-E do not extend beyond this wooded area. An unnamed tributary is located approximately 0.22 miles to the northwest; however, based on aerial imagery and LiDAR Hillshade and DEM layers, Wetland 2-E is separated from this tributary by upland agricultural land. At its southeastern limits, Wetland 2-E drains into a stormwater inlet located offsite near the southern most limits of Wetland 2-E. Therefore, this wetland does not directly abut an RPW or any other jurisdictional aquatic resource.

Wetland 3-E is located near the southern boundary of the site. Based on the wetland delineation report, topographic maps, and LiDAR images, Wetland 3-E is a depressional wetland surrounded by uplands that include an agricultural field to the north, west, and east, and a residential development to the south. This wetland is contained within the limits of the review area and does not abut an RPW or any other jurisdictional aquatic resource.

Wetland 6-E is located near the northern boundary of the site. This wetland is located within an agricultural field approximately 150 feet to the west of an unnamed tributary to Apple Creek. Based on review of the wetland delineation reports and aerial imagery, this wetland is surrounded by uplands that include the existing agricultural field. Based on review of historic aerial imagery from the 2020 delineation report, there is no indication of a direct connection to the nearby tributary; therefore, Wetland 6-E is located within an

isolated depression and does not abut an RPW or any other jurisdictional aquatic resource.

Wetlands 1-E, 2-E, 3-E, and 6-E are not TNWs, territorial sea, or interstate waters; therefore, these wetlands are not category (a)(1) waters. Based on review of the wetland delineation report, landscape position, aerial photos, and onsite photos, Wetlands 1-E, 2-E, 3-E, and 6-E are not tributaries and have not been created by impounding a water of the U.S.; therefore, these wetlands are not category (a)(2) or (a)(3) waters. These wetlands do not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule, and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar landform. These wetlands are non-tidal wetlands that are not adjacent 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, wetlands 1-E, 2-E, 3-E, and 6-E 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 April 10, 2025
- b. Routine Wetland Delineation (update), completed by Davel Engineering & Environmental, Inc., dated January 23, 2025
- c. Wetland Delineation Report, completed by NES Ecological Services, dated August 27, 2020
- d. USACE Regulatory Viewer, LiDAR Hillshade and DEM layers, accessed April 10, 2025
- e. National Wetland Inventory, accessed from the USACE Regulatory Viewer, April 11, 2025

10. OTHER SUPPORTING INFORMATION.

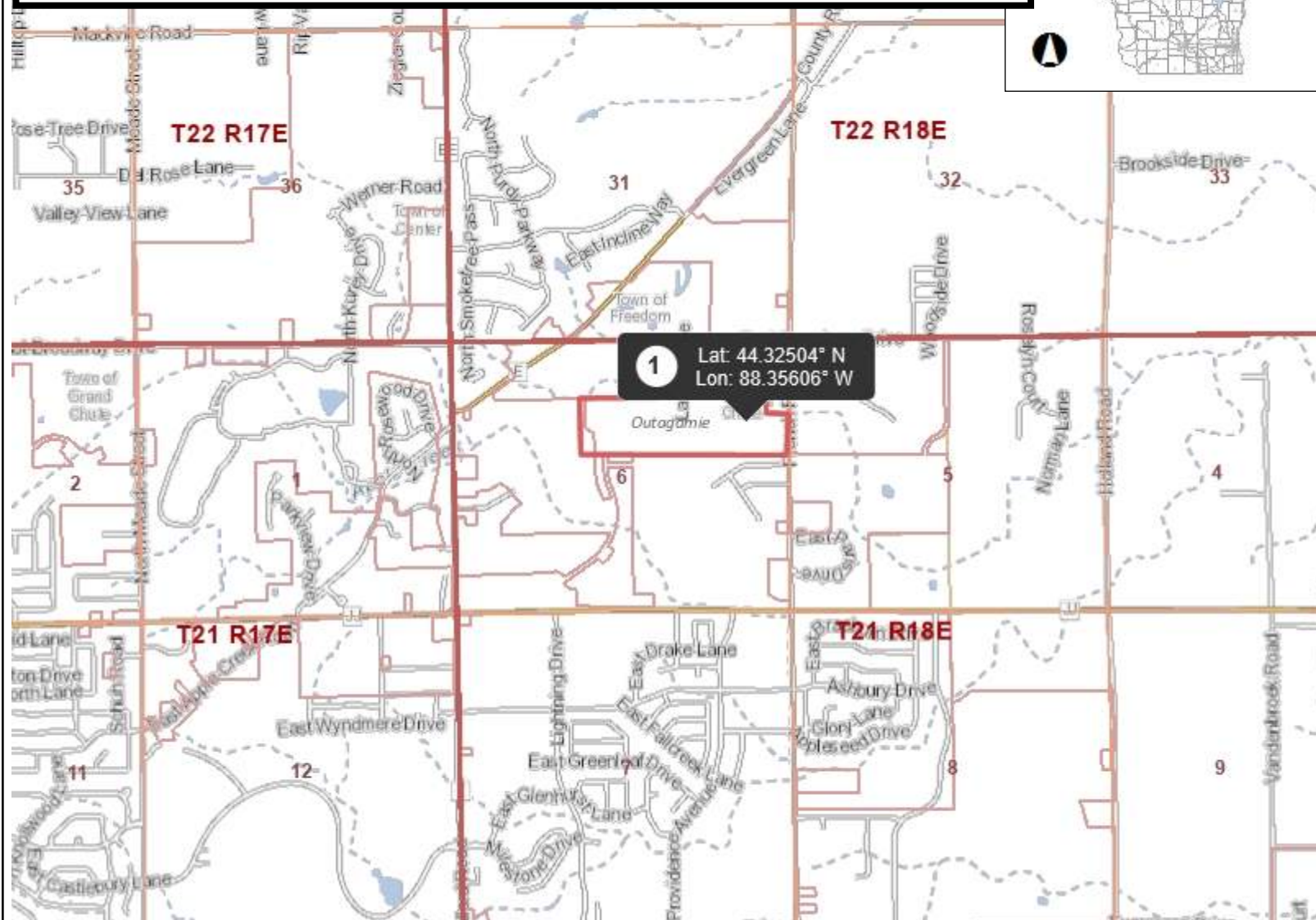
N/A

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.



## Surface Water Data Viewer Map

# MVP-2025-00309-CJB Figure 1 of 2



### Legend

- Township
- Section
- Quarter-Quarter
- County Boundary
- Cities, Towns & Villages
  - City
  - Village
  - Civil Town
- Municipality
- State Boundaries
- County Boundaries
- Major Roads
  - Interstate Highway
  - State Highway
  - US Highway
- County and Local Roads
  - County HWY
  - Local Road
- Railroads
- Tribal Lands
- Rivers and Streams
- Intermittent Streams
- Lakes and Open water

1.0 0 0.50 1.0 Miles

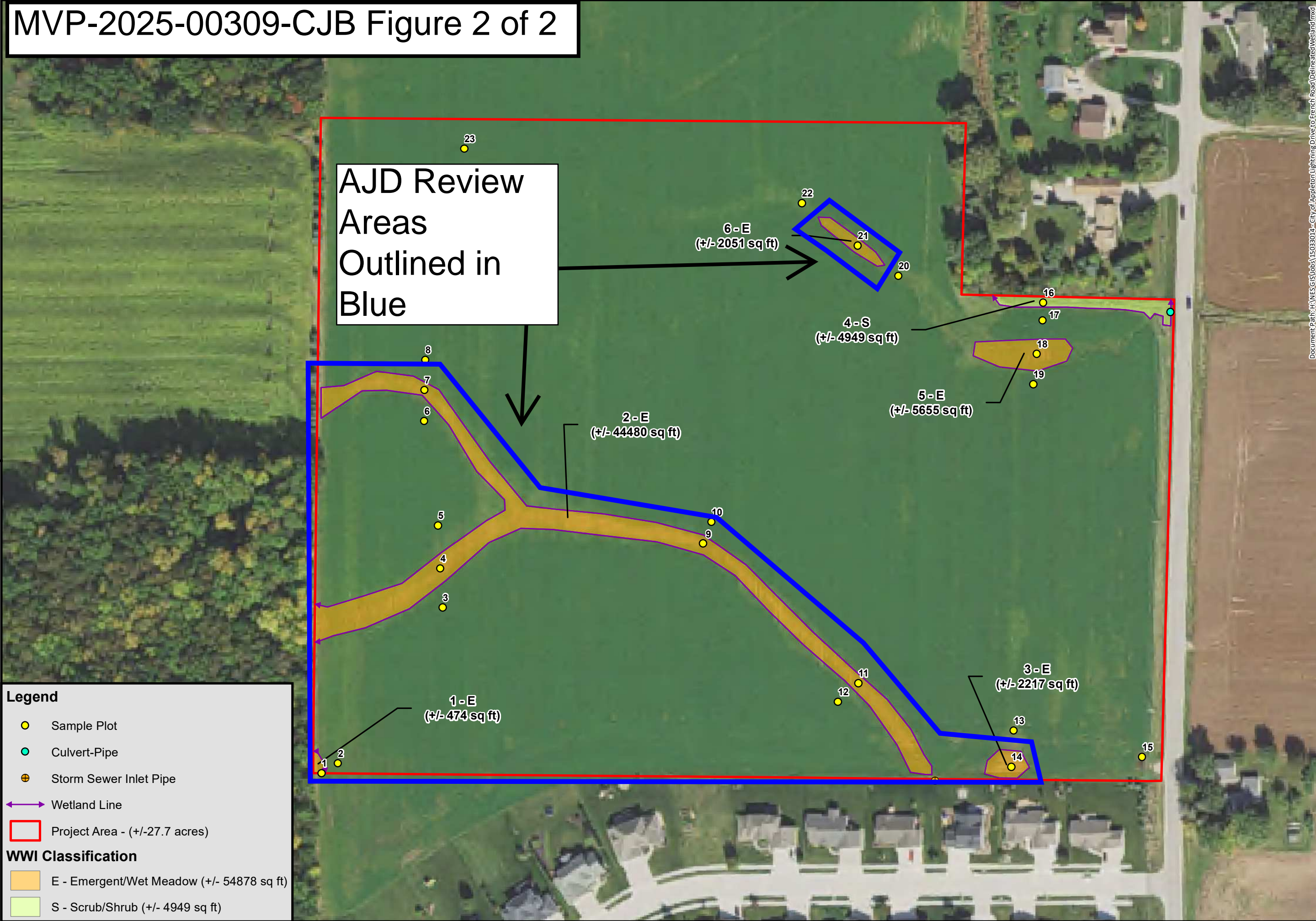
NAD\_1983\_HARN\_Wisconsin\_TM

1: 31,680

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### Notes






**Legend**

- Sample Plot
- Culvert-Pipe
- Storm Sewer Inlet Pipe
- ↔ Wetland Line
- Project Area - (+/-27.7 acres)

**WWI Classification**

- E - Emergent/Wet Meadow (+/- 54878 sq ft)
- S - Scrub/Shrub (+/- 4949 sq ft)



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**Delineated Wetland**

6/22/2020

City of Appleton  
Lightning Drive to French Road Extension  
NES Project No. 15033014  
Town of Grand Chute  
Outagamie County, Wisconsin

Sources: Robert E. Lee & Associates, Inc., Outagamie County

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