

CE MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00459-TKO

CE MVP-RD

May 21, 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-2025-00459-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
Wetland 1 (0.02-acre)	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)
- 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 Area Size (in acres): 1.46-acre
- b. Location Description: The project/review area is located in Section 07, Township 20 N, Range 18 E, Calumet County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.2205 Longitude: -88.4034
- d. Nearest City or Town: Menasha
- e. County: Calumet
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes): [N/A](#)

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.

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. [N/A]
 - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
 - b. The Territorial Seas (a)(1)(ii): 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.

- 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).

[Review of a 2025 Davel Engineering 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 Wetland 1 (W-1) is a depressional wetland, surrounded by uplands. Review of these resources indicate the assessed wetland is not, and does not physically abut, a jurisdictional water. Wetland 1 is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. W-1 does not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. W-1 is a non-tidal wetland that does not abut relatively permanent jurisdictional waters and as such does not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland. W-1 is not an intrastate lake or pond that meets the relatively permanent standard and cannot be evaluated as an (a)(5) water: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, Wetland 1 is not jurisdictional under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule.

⁹ 88 FR 3004 (January 18, 2023)

Wetland 1 (W-1) is a non-tidal depressional wetland, located towards the southwest of a vacant lot, which sits southeast of the intersection of US Highway 10 and Jennie St. W-1 sits in a slight depression with topography that gradually slopes up from the wetland, transitioning to uplands at the northeast, east, and southeast. Topography immediately surrounding W-1 remains level to the north, west, and south. Here, wetland characteristics are lost and gradually transition to upland as you move away from W-1. W-1 does not directly abut any downstream waters. Review of elevation data and historic aerial imagery supports the delineated wetland boundary. Elevation data show W-1 sitting lower than the surrounding uplands while aerial imagery shows a lack of persistent wetness signature or any other indication of wetland presence (standing water, repeated vegetation stress, distinct variation of vegetation) outside the delineated wetland boundary.]

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 05/12/2025.
 - b. AJD Application “2022-00656-TKO 20250402 APP.pdf” in the administrative record.
 - c. Mississippi Valley Division Regulatory Viewer, 05/12/2025.
 - d. Wisconsin DNR Surface Water Data Viewer, 05/12/2025.
 - e. Google Earth Pro, 05/12/2025.
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: (some map layers may not be displayed)

Station Points with Recent Data (10 years)

Waterway and Wetland Alterations

Wetland Identifications and Confirmations

Wetland Class Points

Excavated pond

Wetland Indicators

Rivers and Streams

Intermittent Streams

24K Intermittent Streams

24K Streams and Rivers

Township

Section

Quarter-Quarter

Cities, Towns & Villages

City

Village

Notes:

Docket# IP-NE-2005-8-0735UF



Map: 0 230 460 Feet
0 60 120 Meters

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>.

Service Layer Credits:

Latest Leaf Off: , Wetland Indicators & Soils: Surface Water Data Viewer Team, Monitoring Sites & Data: WI Dept. of Natural Resources, Water Division, Priority Navigable Waterways: Waterway Protection, WDNR, Permits & Determinations: WI DNR Bureau of Watershed Management, Wisconsin Wetland Inventory NWI (Dynamic): Calvin Lawrence, Dennis Weise, Nina Rihn, Cadastral: , Cities, Roads & Boundaries: , Surface Water (Cached): WiDNR, USGS, and other data

Map projection: NAD 1983 HARN Wisconsin TM

Date Printed: 3/12/2025 2:00 PM

Wetland Delineation Map

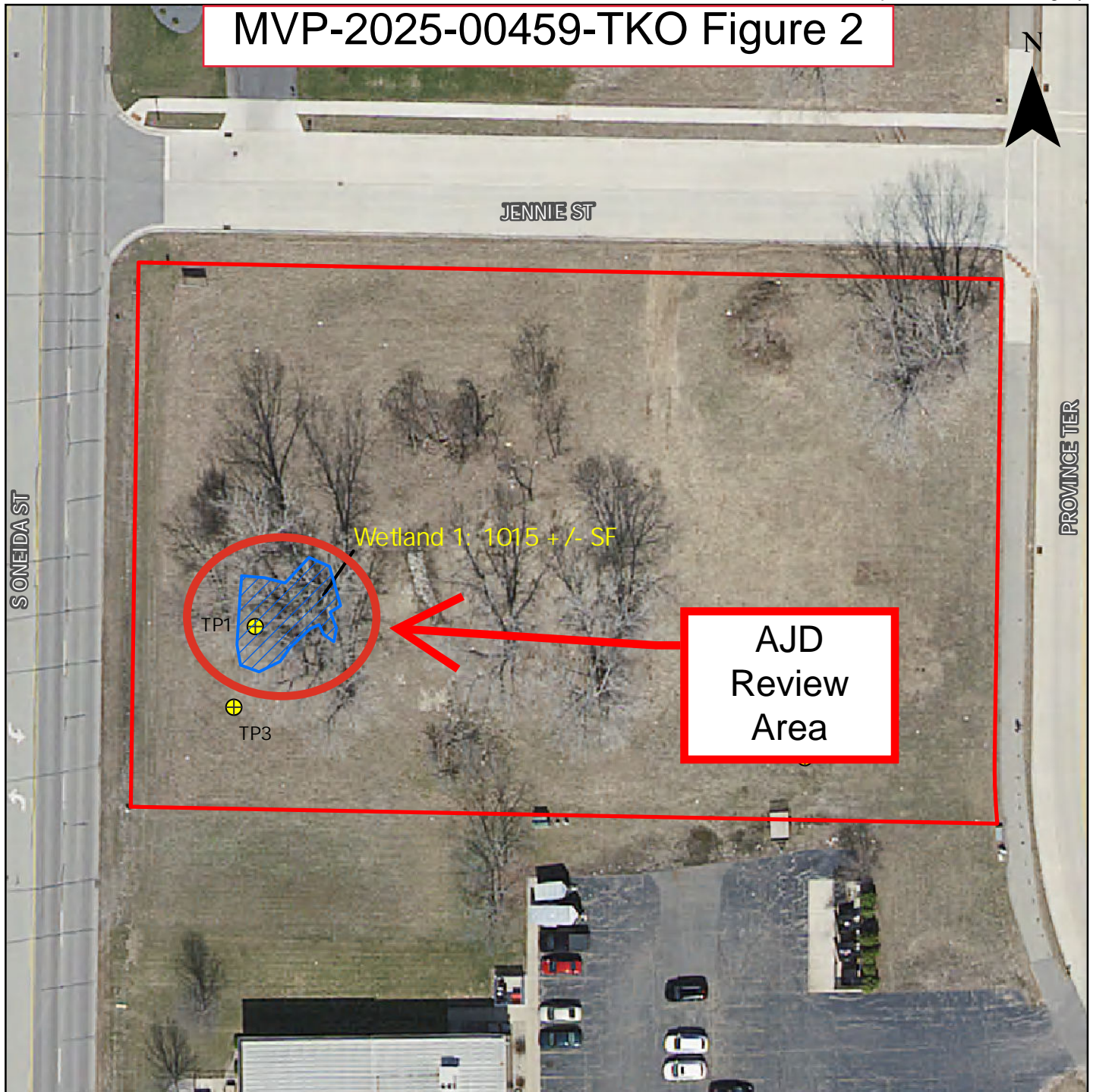
Province Terrace, Lot 11, City of Menasha

Part of Sec. 07, T20N, R18E, City of Menasha, Calumet County, WI

For: Keller, Inc.

April 2021 Aerial Imagery

MVP-2025-00459-TKO Figure 2



The project scope limits shown on this map is not intended to be the parcel boundary

Legend



**DAVEL ENGINEERING &
ENVIRONMENTAL, INC.**
Civil Engineers and Land Surveyors
1164 Province Terrace, Menasha, WI 54952
Ph: 920-991-1866 Fax: 920-441-0804
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0 25 50 75 100 Feet

- Project Scope
- Wetland Delineation
- Test Plots

SHEET INDEX
C1.0 CONCEPTUAL SITE PLAN
A1.0 FLOOR PLAN
A2.0 ELEVATIONS

MVP-2025-00459-TKO Figure 3

BUILDING & FIRE AREA
SQUARE FOOTAGES

Table with 4 columns: FLOOR AREAS, EXISTING, NEW, SUB-TOTAL. Rows include Second Floor, First Floor, Canopies, Basement, Building Area Sub-Totals, Mezzanines, Fire Area Totals, and Remodel Area Totals.

BUILDING CODE ANALYSIS

- APPLICABLE CODES
2015 International Building Code (w/ WI Amendments)
ASHRAE Standard 90.1-2013 or 2015 IECC
2015 IEBC (Level # Alteration)
- OCCUPANCY
Accessory Use
Incidental Use
High-Piled Combustible Storage
Hazardous Materials
Multiple Control Areas
- HEIGHT & AREA
Building Height
Number of Stories
Total Building Area
Total Fire Area
Mixed/Separated Occupancies
Unlimited Area Building
- CONSTRUCTION TYPE
Construction Classification
Fire Separation Distance
- FIRE PROTECTION SYSTEMS
Assumed Sprinkler Type
Fire Alarm System
- MEANS OF EGRESS
Occupant Load
Panic Hardware
- STRUCTURAL DESIGN
Risk Category
Design Loads
Roof Live Load
Walk-on IMP Ceiling Live Load
Steel Framing
Collateral Load
Wood Truss
Top Chord Dead Load
Bottom Chord Load
Mezzanine/Second Floor/Basement Live Load
Point Load (Partition)
Snow Load Criteria
Ground Snow Load (Pg)
Exposure Factor (Ce)
Thermal Factor (Ct)
Wind Loads
Wind Load
Surface Roughness
Exposure Category
Earthquake Load Criteria
Soil Site Class
Ss
S1
- PLUMBING SYSTEMS
Men's WC Required
Women's WC Required
Drinking Fountain Required
Other Source
Ambulatory Stall Required
- MECHANICAL SYSTEMS
NO SINGLE PIECE OF EQUIPMENT OVER 400,000 BTU
NO BOILERS OVER 15PSI AND 10 HORSEPOWER

SITE INFORMATION

- SITE CONTENT
Building Size
Hard Surface
Green Space
Parcel Size (Approx.)
Parking Provided
Area of Disturbance
- ZONING
Property Zoning
Setbacks
Hard Surface Setback
Coverage Limit
Greenspace Requirement
Parking Required
Refuse Enclosure
RTU SCREENING



NORTH
CONCEPTUAL SITE PLAN
1" = 20'-0"



THE LOT DIMENSIONS AND BEARINGS SHOWN ON THIS PLAN ARE INTERPRETED VALUES. BACKGROUND INFORMATION TAKEN FROM LOCAL GIS DATA, AERIAL IMAGERY AND/OR CLIENT PROVIDED INFORMATION. EASEMENTS, STREAMS AND ROADS ARE APPROXIMATE IN NATURE. FOLLOW UP INVESTIGATION WITH STATE AND LOCAL AUTHORITIES AND/OR WITH CERTIFIED SURVEY MAP DATA WHEN AVAILABLE IS REQUIRED.

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Table with 2 columns: Revision number (1-6) and Description.

PROJECT MANAGER: C. MYHRA / D. STUBBS
DESIGNER: S. KLESSIG
INTERIOR DESIGNER:
DRAWN BY: C. TEAFOE
EXPEDITOR:
SUPERVISOR:
PRELIMINARY NO: P24333
CONTRACT NO:
DATE: 12.09.2024
SHEET: C1.0