

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00472-JLK Figure 1 of 3 through 3 of 3

MVP

October 17, 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-2025-00472-JLK [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.

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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 W07	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)

3. REVIEW AREA.

- a. Project Area Size (in acres): 238.8
- b. Location Description: The project/review area is located in Section 24, Township 02N, Range 21E, Kenosha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 42.624250 Longitude: -87.967850
- d. Nearest City or Town: Kenosha
- e. County: Kenosha
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. NA

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. NA

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6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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>7</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 references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed. NA
  - 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

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<sup>6</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>7</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.

## 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>8</sup>
- 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).

Wetland W07 is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. Topographic maps, Google Earth Pro aerial imagery, and site photos provided in the delineation report, indicates Wetland W07 is a linear, swale-shaped wetland extending from the east side of the review area to the west side. Wetland W07 is confined within the review area and mostly surrounded by uplands involving an existing agricultural field to the north and east, an additional agricultural field to the south with a forested area approximately 100 feet further south, and a paved roadway with a roadside ditch extending north to south just west of the review area boundary. The delineation report and the Wisconsin Surface Water Data Viewer shows a mapped tributary extending to the northeast of Wetland W07 with a portion overlapping the wetland. However, site photos and data from the delineation report, a review of Lidar data, and a discussion with Stantec Consulting on June 11, 2025, demonstrates no hydrology, no ordinary high water mark (OHWM), and no bed and bank are present. Based on this information, the mapped tributary immediately northeast of Wetland W07 is no longer present. The western boundary of Wetland W07 extends to a roadside ditch associated with 136<sup>th</sup> Avenue extending north and south. A review of Lidar data and Google Earth imagery indicates this ditch lacks an OHWM and a bed and bank. Additionally, a review of historical aerial photos shows no flowing or standing water present. Based on this information, this ditch is not a relatively permanent water (RPW).

The wetland delineation also shows a portion of Wetland W07 extending southward into a tributary (Stream S02, also labeled as Stream 3 in Figure 3 of 3) that flows from the southwest to northeast. Site level photos provided by Stantec

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

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on August 7, 2025, indicates Wetland W07 reaches a tile inlet at its southernmost boundary. It is at this point where an OHWM is observed that continues approximately 340 feet further southwest before meeting a second tile inlet. A review of historical aerial photos, Lidar data, and the previously mentioned site level photos, indicates once the tributary reaches the second tile inlet, an OHWM and bed and bank are no longer present and the resource transitions back into a wetland. Site level photos provided by the consultant show some standing water within Stream S02, however a review of the Antecedent Precipitation Tool during the same general dates as the site level photos demonstrate correlated rain events and an above normal 30-day rolling rainfall total. There is no standing or running water in the area of stream that exhibit OHWM and bed/banks in the site photos. This indicates the tributary is ephemeral and does not carry a relatively permanent flow and therefore is not a relatively permanent water (RPW). Further review of Lidar data and the delineation report shows the wetland southwest of Stream S02 extends into a culvert, then into a roadside ditch on the southwest side of HWY 142. Additional review of the above-mentioned resources indicates this ditch lacks an OHWM and a bed and bank and historical aerial photos show no flowing or standing water present. Therefore, this ditch is not an RPW.

Based on the above information, Wetland W07 does not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. Therefore, Wetland W07 is 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 June 4, 2025.
  - b. ENW02 Mars Project, Kenosha County Wetland Delineation Report provided by Stantec dated December 13, 2024.
  - c. National Regulatory Viewer-Lidar Data and Google Earth Pro assessed June 4, 2025.
  - d. Site Level Photos Provided by Stantec Consulting on August 7, 2025.
  - e. Antecedent Precipitation Tool assessed October 6, 2025.

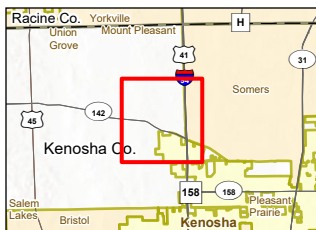
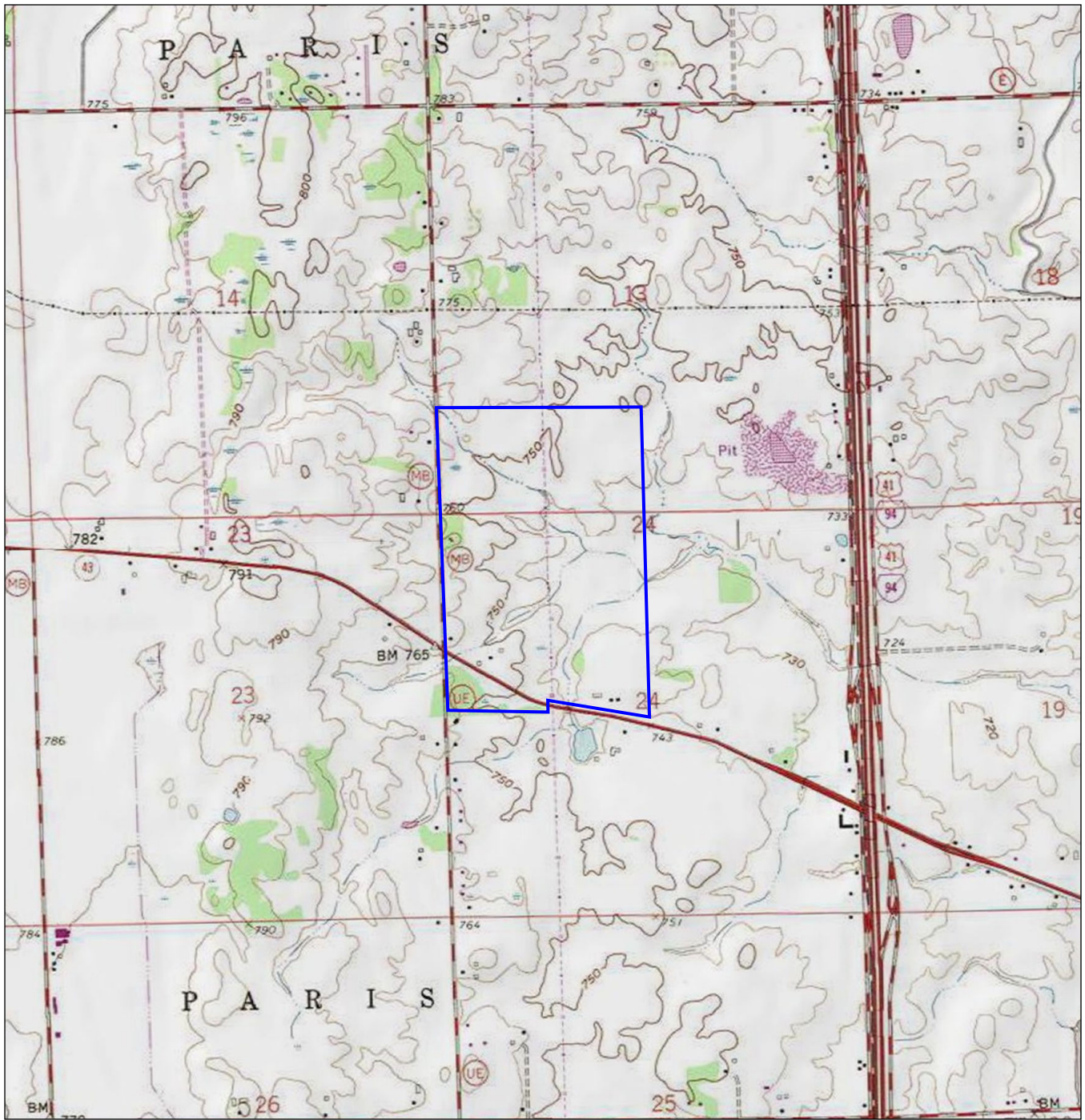
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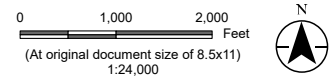
10. OTHER SUPPORTING INFORMATION. NA

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.

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**Legend**  
Project Boundary



**Project Location** Prepared by AJIS on 2024-04-08  
T2N, R21E, S13 & S24 TR by JDP on 2024-04-08  
T. of Paris, Kenosha Co., WI IR by KR on 2024-05-29

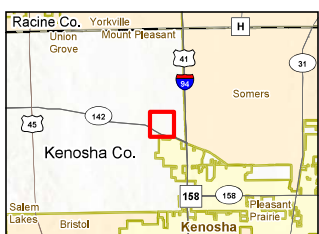
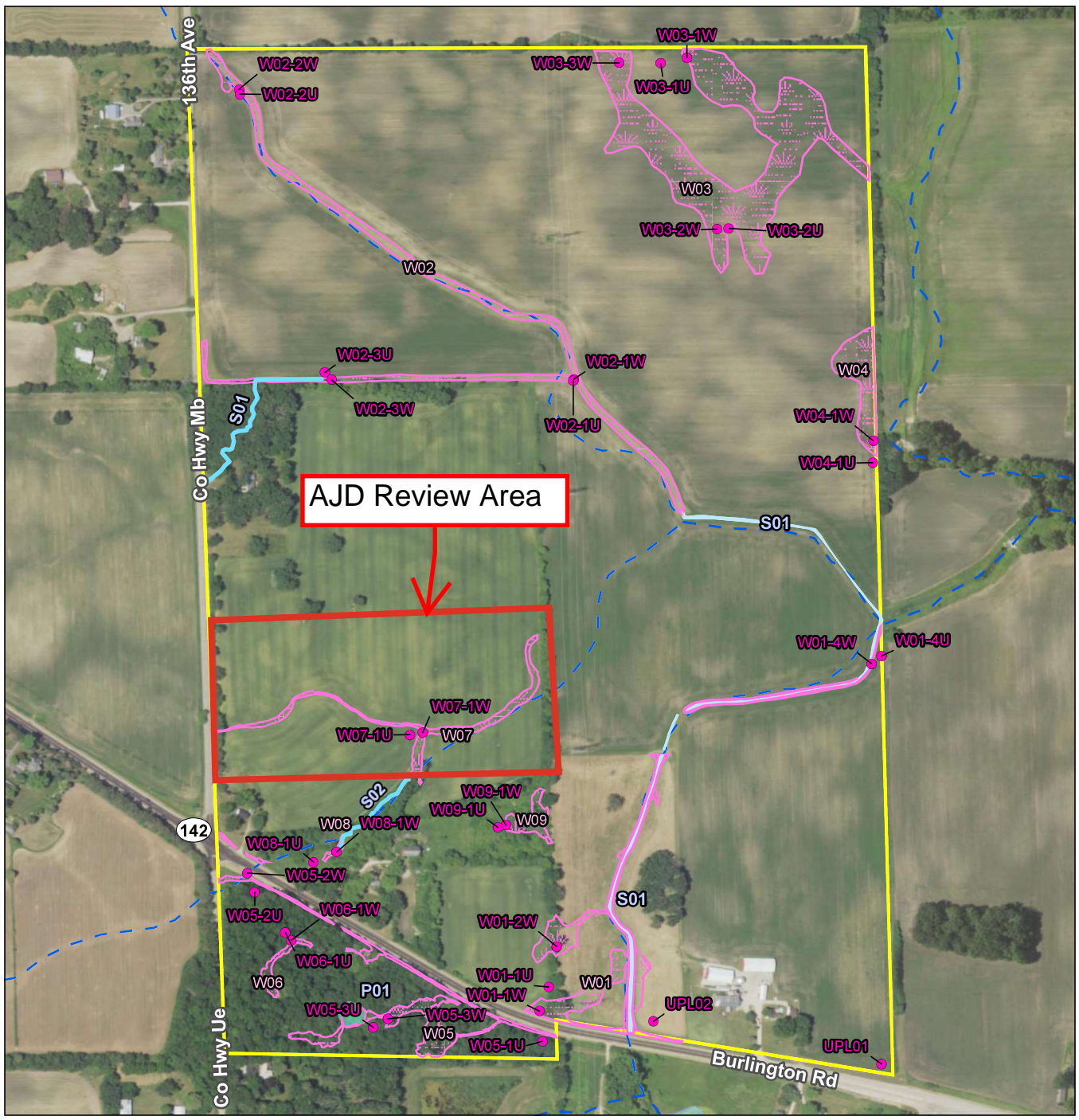
**Client/Project** Confidential Client 193710471  
Mars Kenosha  
Wetland Delineation

**Figure No.**  
1

**Title**  
Project Location and Local Topography

Disclaimer: This document has been prepared based on information provided by others as cited in the Notes section. Stantec has not verified the accuracy and/or completeness of this information and shall not be responsible for any errors or omissions which may be incorporated herein as a result. Stantec assumes no responsibility for data supplied in electronic format, and the recipient accepts full responsibility for verifying the accuracy and completeness of the data.

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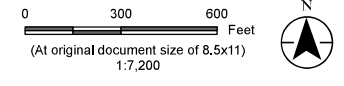


**Legend**

- Project Boundary
- Sample Point
- Field Delineated Waterway Line
- Field Delineated Waterway Area
- Field Delineated Open Water
- Field Delineated Wetland

**DNR 24k Hydrography**

- Perennial Stream\*
- Intermittent Stream
- Waterbody



*Project Location* T2N, R21E, S13 & S24 T. of Paris, Kenosha Co., WI  
*Prepared by* AJJ on 2024-04-08  
 TR by JDP on 2024-04-08  
 IR by KR on 2024-05-29

*Client/Project* Confidential Client  
 ENW02 Mars Project  
 Wetland Delineation  
 193710471

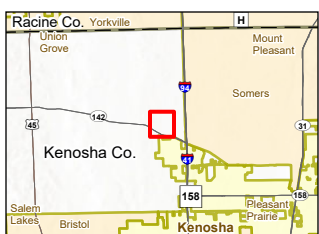
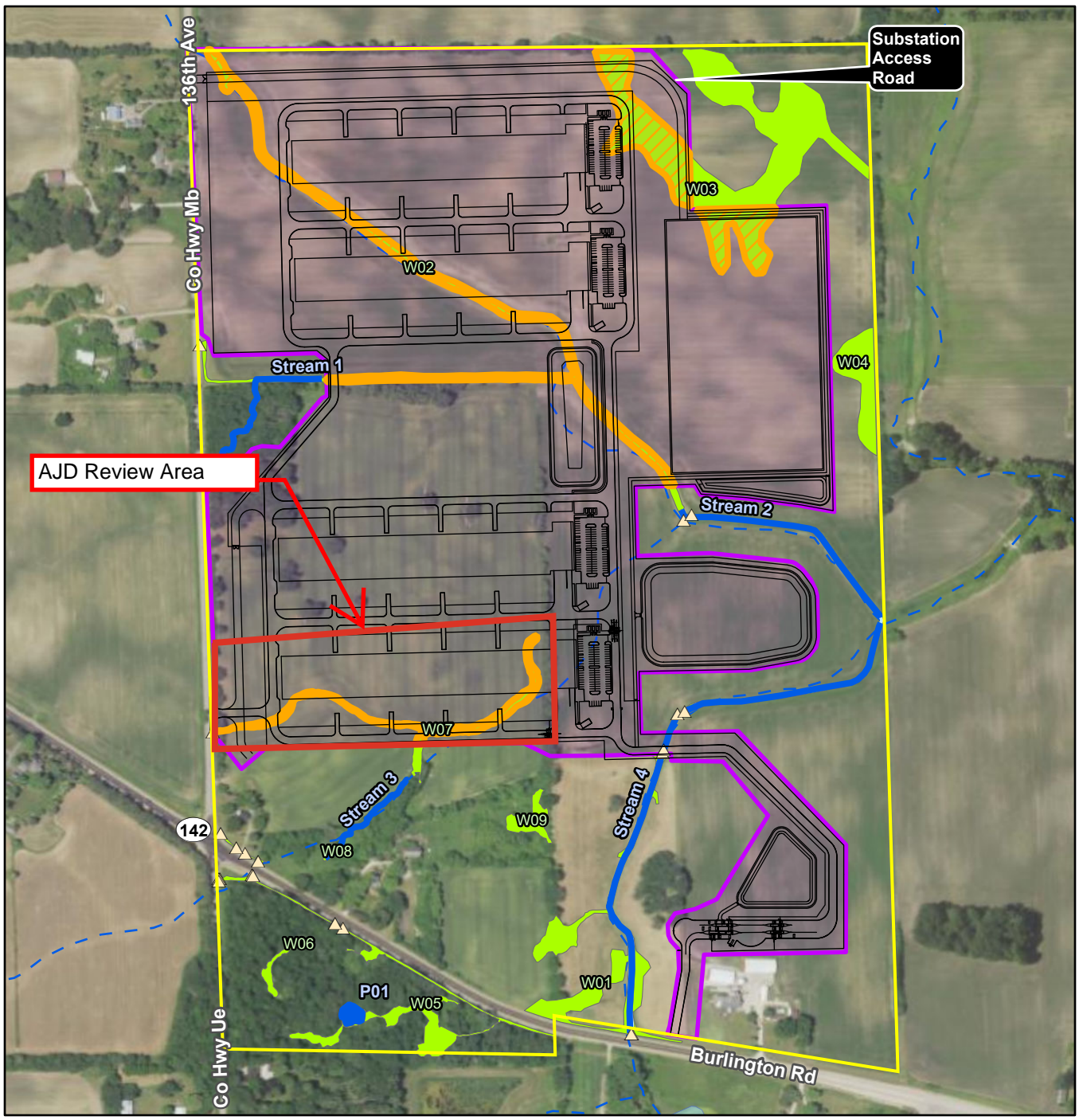
*Figure No.* 4  
*Title* Field Collected Data

**Notes**  
 1. Coordinate System: NAD 1983 StatePlane Wisconsin South FIPS 4803 Feet  
 2. Data Sources: Stantec, Esri, USCB, USGS, WDNR  
 3. Background: NAIP 2022

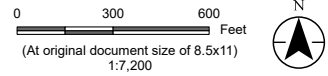
\*No Features Within Data Frame

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- Legend**
- Project Boundary
  - Culvert
  - Field Delineated Waterway Line
  - Field Delineated Waterway Area
  - Field Delineated Open Water
  - Field Delineated Wetland
  - Impact Area
  - Impacted Wetland
- DNR 24k Hydrography**
- ~ Perennial Stream\*
  - - - Intermittent Stream
  - Waterbody



**Project Location**  
T2N, R21E, S13 & S24  
T. of Paris, Kenosha Co., WI

**Prepared by** AJIS on 2025-05-02  
TR by SP on 2025-05-02  
IR by KR on 2025-05-02

**Client/Project**  
Confidential Client  
Mars Kenosha  
Wetland Delineation

193710471

**Figure No.**  
X

**Title**  
Impact Area

**Notes**

1. Coordinate System: NAD 1983 StatePlane Wisconsin South FIPS 4803 Feet
2. Data Sources: Stantec, Esri, USCB, USGS, WDNR
3. Background: NAIP 2022

**Conceptual Plan for Permitting**

\*No Features Within Data Frame

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