

CE MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00942-TKO

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September 29, 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-2025-00942-TKO 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 2	Non-Jurisdictional	N/A
Wetland 3	Non-Jurisdictional	N/A
Wetland 4	Non-Jurisdictional	N/A
Wetland 5	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 Are Size (in acres): ~85 acres
- b. Location Description: The project/review area is located in Section 14, Township 19N, Range 19E, Calumet County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 44.115760 Longitude: -88.187690
- d. Nearest City or Town: Hilbert
- e. County: Calumet
- 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

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

N/A

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.

N/A

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

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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.

- 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>8</sup>

The ditched portions of Wetlands 2 and 5 (W-2 Ditch and W-5 Ditch) are constructed drainage features that are not waters of the U.S. (WOTUS). W-5 Ditch and W-2 Ditch are located within roadside ditches that run along the southern and eastern project area boundary, respectively. These features meet the definition of b(3) waters, from 33 CFR 328.3(b) as they were excavated wholly in, and drain only, dry land, and do not carry a relatively permanent flow of water.

The earliest documented site conditions, from the Original Public Land Survey, show a pair of tributary reaches converging towards the center of the delineation study area, then exiting the project area at the northeast extent. A small wetland is mapped along the easternmost branch of the system. Review of aerial imagery and the delineation report shows the remnant wetland is located south of the delineated wetland (W-2 Ditch) along the eastern site boundary. The Bordner Survey Map shows the associated roadways and nearly the entire project area as cleared crop land, with a small inclusion of upland hardwoods surrounding the location of Wetland 3 (discussed below). Review of historic aerial imagery indicates land use (farming), and ditching had changed local hydrology, at some point between the original survey and the earliest available imagery from 1938, as W-5 Ditch and W-2 Ditch can be seen in their current locations with little evidence of the natural stream reaches apparent in their earlier mapped locations. Historic aerial imagery appears to show a portion of one of the remnant stream channels left in place, apparently draining to the roadway ditch at the south of the project area. This drainage feature remains unchanged through recent imagery and is discussed below (W-5 Channel). The 1938

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

aerial shows the majority of the review area as cropped fields, separated by linear features. Additionally, USDA soils data shows W-5 and W-2 Ditch are located within areas mapped as containing entirely and predominantly not hydric soils, further supporting the ditches were constructed in upland. A small inclusion of hydric soils (Poygan silty clay loam) is mapped along the project areas eastern boundary. However, this area appears to coincide with the wetland area identified in the original survey and is located south of the mapped location of W-2 Ditch. Review of aerial and ground level imagery shows a lack of bed and bank or ordinary high water mark, and shows no evidence of standing water, indicating neither of the ditches possess a relatively permanent flow of water.

- 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 June 2025 Evergreen Consultants wetland 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 Wetlands 3 and 4 (W-3 and W-4) and the remainder of wetlands W-2 (W-2 Basin) and W-5 (W-5 Channel) are depressional wetlands, which lack a continuous surface connection to, therefore do not abut, a jurisdictional water. Wetlands W-3, W-4, W-2 Basin, and W-5 Channel are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. W-3, W-4, W-2 Basin, and W-5 Channel are not and do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. Wetlands W-3, W-4, W-2 Basin, and 5 Channel are non-tidal wetlands that do not abut relatively permanent jurisdictional waters and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands. Wetlands W-3, W-4, W-2 Basin, and W-5 Channel are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as (a)(5) waters: lakes and ponds not identified in (a)(1) -(a)(4). Therefore, Wetlands W-3, W-4, W-2 Basin, and W-5 Channel are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

Wetland 3 is located within a wooded area in the western portion of the review area. W-3 is a non-tidal depressional wetland surrounded by upland. W-3 lacks a continuous surface connection to a jurisdictional water. This was confirmed through review of topographic data, showing the wetlands sitting at lower elevations than nearby uplands, and aerial imagery showing a lack of wetness signature outside the boundaries of the delineated wetland. W-3 transitions to delineated upland along the

east and southwestern borders. Channels are evident along these boundaries where drain tiles are mapped discharging into W-3. W-3 extends outside of the delineation study area to the north and northwest. Elevation data shows a topographic break, generally following the woodland/agriculture transition zone, sloping down into the wooded area containing W-3. Aside from a discrete linear drainage feature (W-1, outside review area) exiting W-3 to the north, this depressional area transitions to upland in all directions. As discussed above, farming practices and drainage improvements had changed local hydrology between the time of the original survey and the first available aerial imagery. By 1992 a single channel is evident flowing through a portion of Wetland 3, continuing north through Wetland 1 (outside the review area). County GIS shows the tributary continuing north through a roadway. Review of LiDAR and aerial imagery shows the channel continuing north through W-1 where it meets an east/west running roadside ditch along Faro Springs Road. Elevation data shows the ditch sloping down to the west approximately 1,200 feet where it discharges to the North Branch of the Manitowoc River. For the purpose of this determination the entire reach of the drainage feature (from W-3 to roadway ditch) was evaluated as a first order tributary. While the channel is mapped as an intermittent tributary on Calumet County GIS (originating in W-3, continuing north), neither the National nor the Wisconsin Wetland Inventories (NWI/WWI) identifies the feature, indicating low volume and frequency of flows. Review of aerial and ground level imagery shows a lack of bed and bank or ordinary high water mark, and shows no evidence of standing water, indicating the lack of a relatively permanent flow of water within the ditch. No other aquatic features abut the area containing W-3.

Wetland W-4 is located completely within the wetland delineation study area, in an actively cropped agricultural field. W-4 is a non-tidal depressional wetland surrounded by delineated upland. This was confirmed through review of topographic data, showing the wetland sitting at lower elevations than nearby uplands, and aerial imagery showing a lack of wetness signature outside the boundaries of the delineated wetlands. W-4 sits in an isolated geographic position with no continuous surface connection to any jurisdictional downstream water.

The main depressional area of W-2 (W-2 Basin) is a non-tidal wetland located at the northeast extent of the review area. W-2 Basin sits at the eastern field edge and is bound by roadway fill material to the east. Fill material from a residential development defines the northern boundary. Topographic data and aerial imagery indicate W-2 Basin transitions to upland at its western boundary. Review of elevation data, shows the wetland sitting at lower elevations than nearby uplands, and aerial imagery shows the wetland transitioning to upland at the west, as a lack of wetness signature outside the boundaries of the delineated wetland is apparent. W-2 Basin is contiguous with an excavated roadside ditch (W-2 Ditch described in Section 8.a above) leading both north and south from the depressional area. Review of aerial and ground level imagery shows a lack of bed and bank or ordinary high water mark, and shows no evidence of standing water, indicating the lack of a relatively permanent flow of water within the ditch. No aquatic resources are mapped in the immediate area surrounding W-2 Basin. No other aquatic features abut W-2 Basin.

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W-5 Channel is a non-tidal depressional wetland located within a drainage swale in the south of the project area. W-5 Channel appears to sit within one of the remnant tributary channels from the Original Public Land Survey. As mentioned earlier, farming practices and improved site drainage changed local hydrology from that noted during the initial survey. The swale is bound by delineated upland to the east and west. Review of aerial imagery and elevation data shows W-5 Channel sloping up to delineated upland at the north, discharging to the non-jurisdictional roadside ditch to the southwest (W-5 Ditch). Review of aerial and ground level imagery shows a lack of bed and bank or ordinary high water mark, and shows no evidence of standing water, indicating the lack of a relatively permanent flow of water.

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 09/30/2025.
  - b. Application "2025-00942-TKO 20250902 APP.pdf" in the administrative record, 09/30/2025.
  - c. Mississippi Valley Division Regulatory Viewer, 09/30/2025.
  - d. Wisconsin DNR Surface Water Data Viewer, 09/30/2025.
  - e. Calumet County GIS Interactive Mapping, 09/30/2025.
  - f. Google Earth Aerial Imagery, 09/30/2025
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.

# MVP-2025-00942-TKO Figure 1

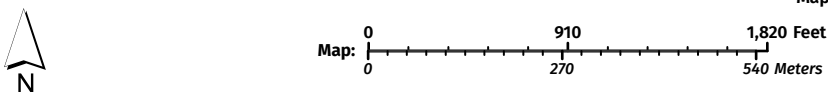


- Legend:** (some map layers may not be displayed)
- Wetland Class Points**
    -  Wetland too small to delineate
  -  Wetland Class Areas
  -  Rivers and Streams
  -  Intermittent Streams
  -  24K Intermittent Streams
  -  Latest Leaf Off Imagery

**Approximate  
AJD Review  
Areas**

**Notes:**

Service Layer Credits:  
 Latest Leaf Off: , DNR Basic Feature Vector Tile  
 Layer WTM: , Surface Water (Cached): WiDNR,  
 USGS, and other data, Wetland Inventory NWI  
 (Dynamic): Calvin Lawrence, Dennis Weise, Nina  
 Rihn



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>

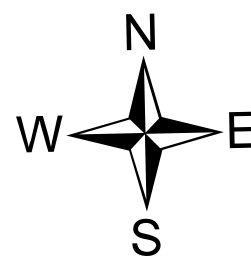
MVP-2025-00942-TKO Figure 2



Legend

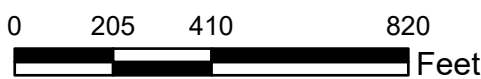
- Site Boundary
- Picture Location
- Wetland Line
- Wetland
- Tile Outlet
- Culvert

New Dairy Site- Holsum Dairies  
 Wetland Delineation Map  
 Mchugh Road  
 Town of Chilton  
 Calumet County, WI  
 - Overall Map -



Wetland Delineation was conducted by  
 Chad Fradette, EP, Chem,  
 WDNR Professionally Assured Wetland Delineator  
 with assistance from  
 Shyann Banker, Environmental Scientist  
 WDNR Professionally Assured Wetland Delineator

Project: CAL25-024-01



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