

CE MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00977-TKO

CE MVP-RD

December 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-2025-00977-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.

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	Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 1	Non-Jurisdictional	N/A	Wetland 10	Non-Jurisdictional	N/A
Wetland 2	Non-Jurisdictional	N/A	Wetland 11	Non-Jurisdictional	N/A
Wetland 3	Non-Jurisdictional	N/A	Wetland 12	Non-Jurisdictional	N/A
Wetland 4	Non-Jurisdictional	N/A	Wetland 13	Non-Jurisdictional	N/A
Wetland 5	Non-Jurisdictional	N/A	Wetland 15	Non-Jurisdictional	N/A
Wetland 6	Non-Jurisdictional	N/A	Wetland 16	Non-Jurisdictional	N/A
Wetland 8	Non-Jurisdictional	N/A	Wetland 17	Non-Jurisdictional	N/A
Wetland 9	Non-Jurisdictional	N/A	Pond 1	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): 127-acre
  - b. Location Description: The project/review area is located in Section 20, Township 02N, Range 22E, Kenosha County, Wisconsin.
  - c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 42.6222      Longitude: -87.9203
  - d. Nearest City or Town: Somers
  - e. County: Kenosha
  - f. State: Wisconsin
  - g. Other associated Jurisdictional Determinations (including outcomes): None
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A]<sup>6</sup>
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]

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<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.

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]
  - 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>

Pond 1 is an excavated stormwater retention pond, located in the southcentral portion of the review area. Review of historic aerial imagery shows Pond-1 was excavated in uplands at some point between 1981-1985. Prior to excavation (1975), the southern branch of an unnamed mapped tributary (discussed in 8.b. below) can be seen as being mapped within the same general area as Pond 1, though southeast of the Pond 1’s delineated boundaries. Aerial imagery shows some evidence of sporadic wetness

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

signature (darkened soil) within this area of excavation, though the location containing Pond-1 exhibited no signs of wetland presence (standing water, repeated crop/vegetation stress, distinct variation of vegetation) within the delineated boundary prior to excavation. The next available imagery (1980) shows the channel rerouted underground, south of Pond 1. By 1985, the channel is seen piped underground from the northeast corner of W-10 to the northwest corner of W-14, while increased wetness signature is evident in the location of W-8 (discussed below) and standing water can be seen within Pond 1. Pond-1 fits under the definition of a b(5) water, from 33 CFR 328.3(b), as it is an artificial basin excavated in dry land to collect and retain water and is used exclusively as a settling basin.

- 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 Hey and Associates wetland delineation report and supplemental supporting data, ground level and 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 W-1, W-2, W-3, W-4, W-5, W-6, W-8, W-9, W-10, W-11, W-12, W-13, W-15, W-16, and W-17 are non-jurisdictional aquatic resources. Review of the above resources indicate Wetlands W-1, W-2, W-3, W-4, W-5, W-6, W-8, W-9, W-10, W-11, W-12, W-13, W-15, W-16, and W-17 are depressional wetlands, surrounded by uplands. These wetlands are not, and do not physically abut, jurisdictional waters. The above wetlands are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. These wetlands are not, and do not physically abut, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. These wetlands do not abut relatively permanent jurisdictional waters and as such do not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent waters. These wetlands are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as an (a)(5) waters: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, Wetlands W-1, W-2, W-3, W-4, W-5, W-6, W-8, W-9, W-10, W-11, W-12, W-13, W-15, W-16, and W-17 are not jurisdictional under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule.

The Wisconsin and National Wetland Inventories (WWI/NWI) show an intermittent tributary mapped as running through the review area. The tributary is shown as originating at the outlet of a pond outside the review area to the northwest, continuing, through W-7A, to Waterway 1 (both outside review area). Ground level imagery from the delineation report (#86) shows a grated outlet, downstream of the pond, discharging to an

underground pipe. The delineation report notes an extensive drain tile system throughout the review area. The mapped channel is located within mapped hydric soils, with wetness signature through various/most years (del rpt 1937, 67, 70, 75, 80, 85, 90, 95, 2000, 2005, 2010, 2020). However, there appears to be no sign of standing or flowing water through review of historic aerials, aside from the single 04/30/2022 aerial. This appears to be a wet period with more pronounced wetness signature and standing water visible in the surrounding areas. Ground level images show the feature as an elongated, low gradient, depression area, with no sign of a bed and bank, OHWM, or relatively permanent flow of water. The channel is delineated as upland. This reach would be non-jurisdictional, as upland, outside of the portion within W-7A.

Wetlands W-1, W-6, W-8, W-9, W-11, W-12, W-13, and W-17 are non-tidal, depression wetlands, located entirely within the wetland delineation study area. Wetlands W-1, W-6, W-8, W-9, W-11, W-12, W-13, and W-17 are surrounded entirely by delineated upland in all directions. Review of elevation data and historic aerial imagery supports the delineated wetland boundary. Elevation data shows W-1, W-6, W-8, W-9, W-11, W-12, W-13, and W-17 sitting at topographic low points within the parcel and immediate surrounding, 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. The WI DNR's SWDV shows that these wetlands do not abut any downstream waters.

Wetlands W-2, W-3, W-4, W-5, W-10, W-15, and W-16 are located throughout the delineation study area with portions of the wetlands extending beyond the study area boundary. Similarly, these aquatic resources are depression wetlands surrounded entirely by upland. These wetlands do not abut any downstream jurisdictional waters.

Wetlands W-2, W-3, and W-5 are located within the northeast portion of the review area and continue outside the delineation study area to roadside ditches. W-2 extends to the south ditch of 18<sup>th</sup> St. while W-3 and W-5 extend to the western ditch of 88<sup>th</sup> Ave. These ditches are non-jurisdictional as they were constructed in, and to drain only, uplands and lack a relatively permanent flow of water. This is evident as they lack a defined bed and bank (LiDAR), OHWM (ground level/aerial imagery), and show no evidence of standing water or prolonged saturation (veg stress/darkened soils). These ditches were constructed in upland as evident by geomorphic position and predominantly non-hydric soil classifications mapped in their locations. Additionally, the original WI public land survey does not indicate the presence of any aquatic features in their locations.

Wetlands W-4, W-15, and W-16 are located along the review area boundary with portions of the wetlands delineated as extending into adjoining agricultural fields, W-4 to the south, and W-15 and W-16 to the west. W-4 is surrounded by delineated upland at the north, east, and west. To the south, contour maps and LiDAR indicate that elevation

slopes up as the wetland boundary transitions to upland. Within the study area, Wetlands W-15 and W-16 are located along a gradual west-east slope and are surrounded by delineated upland to the North, south, and east. W-16 appears to receive hydrologic input from overland drainage of the surrounding uplands as well as overflow from an upstream pond and surrounding wetland outside of the review area. A defined channel connects W-16 to the offsite pond and wetland, based off LiDAR and aerial imagery showing a discrete channel and evidence of repeated wetness signature. The pond and surrounding wetland are located within an upland ag field. W-15 is located approximately 400 feet south of W-16. Elevation data shows the western boundary of W-15 sloping up within the adjacent upland ag field. No aquatic features are mapped surrounding these wetlands, and no evidence of repeated wetness signature or wetland presence was observed surrounding the wetland boundaries. These wetlands do not abut any downstream waters.

Wetland W-10 is an approximately 3.5-acre wetland complex located in the southwest portion of the review area. A portion of this wetland complex is mapped as an intermittent stream. The delineation notes that at the time of the wetland investigation there was limited surface water flow within the area mapped as an intermittent stream due to the various drain tile blows and it appears that this area was excavated as a drainage swale to convey groundwater flow away from the golf course via a network of drain tiles and culverts. Following review of ground level imagery, no stream bed and bank is apparent within the area mapped as stream. Additionally, no standing water is evident throughout the mapped channel in the majority of aerial images reviewed. Ground level images also show nearly 100% vegetative cover within the mapped stream channel, indicating the lack of a relative permanence flow of water. W-10 sits within a depression area which is surrounded almost entirely by upland. Small portions (lobes) of W-10 are mapped as extending outside the study area to the south. Here, elevation slopes up as the wetland boundary transitions to upland. No aquatic features are mapped as surrounding the wetland, and no evidence of repeated wetness signature or wetland presence was observed surrounding the wetland boundary. At its downstream extent of W-10 is a culvert which connects to W-14, outside of the AJD review area. There is no evidence W-10 continues through the culvert to W-14. The profile of the channel bed through W-10 was evaluated using NRV's Digital Elevation Model data and its "Elevation Profile" tool. Results indicate a slight depression within W-10 approximately 240 feet upstream of the culvert outlet. From this low point within W-10 elevation along the channel bed appears to increase slightly moving in the downstream direction through W-10 to the culvert. Aerials (03/10/24, 04/30/22, and 04/30/20) show inconsistent ponding throughout the lower channelized portion of W-10, with little evidence of standing water immediately upstream of the culvert, though saturation is apparent through darkened soils. These observations support the lack of a continuous surface connection between wetlands W-10 and W-14, aside from periods of high flow. W-10 does not abut a jurisdictional downstream water.

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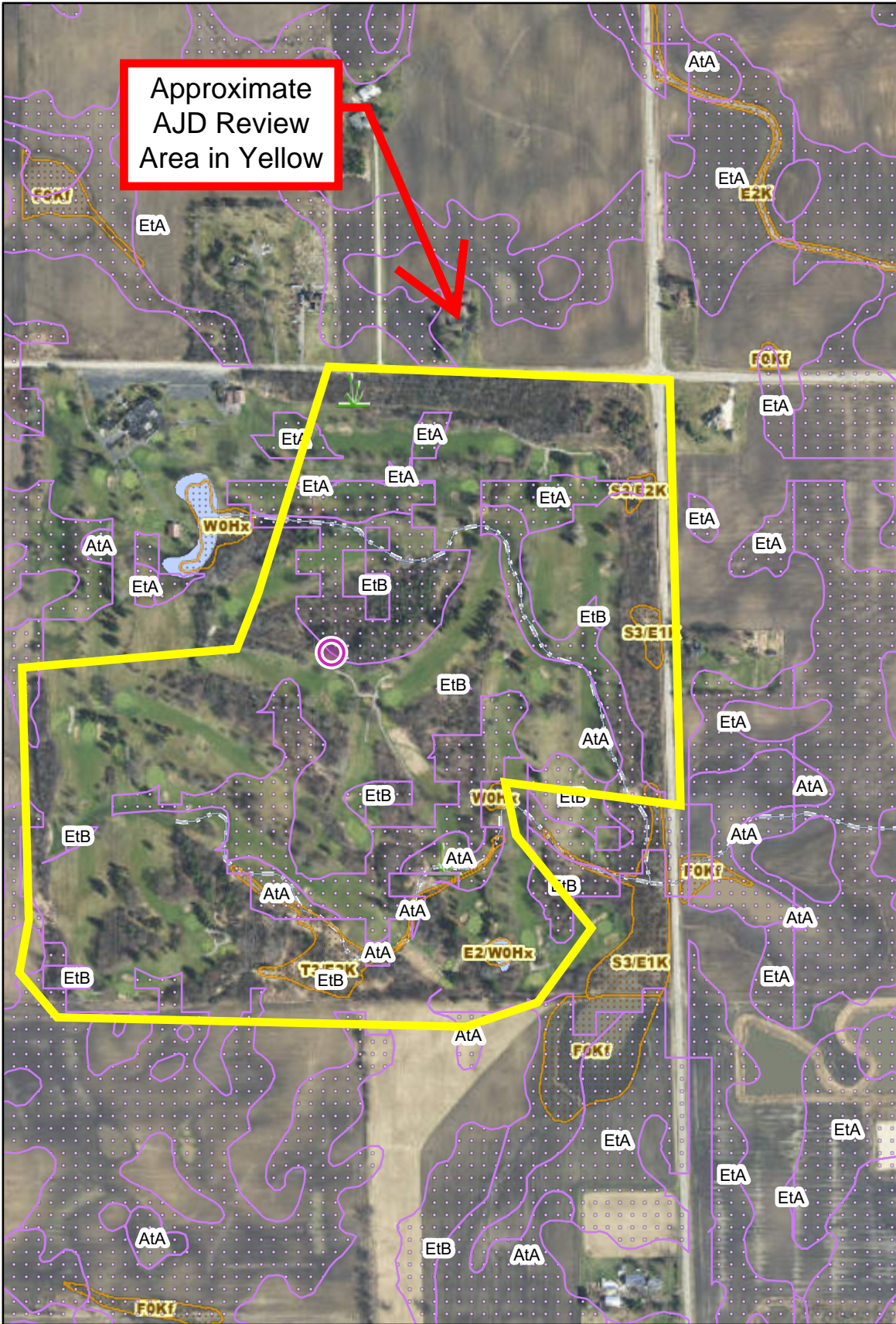
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00977-TKO

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 10/29/2025 thru 12/05/2025.
  - b. Updated AJD Application “2025-00977 20251106 APP.pdf” in the administrative record.
  - c. Supplemental Document “2025-00977 20251103 Waterway 1 Photos.pdf” in the administrative record.
  - d. Phone call with Agent, Documented in “2025-00977 20251205 Phone MFR.pdf” in the administrative record.
  - e. Mississippi Valley Division Regulatory Viewer, 10/30/2025.
  - f. Wisconsin DNR Surface Water Data Viewer, 10/30/2025.
  - g. Kenosha County GIS Interactive Mapping, 10/30/2025.
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-2025-00977-TKO Figure 1

Approximate  
AJD Review  
Area in Yellow

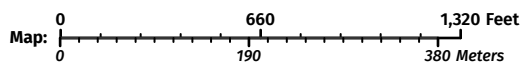


**Legend:** (some map layers may not be displayed)

- Wetland Indicators
- Wetland Class Points**
  - Wetland too small to delineate
  - Wetland Class Areas
- Rivers and Streams
- Intermittent Streams
- Open Water
- 24K Intermittent Streams
- 24K Lakes and Open Water
- 24K Streams and Rivers
- Latest Leaf Off Imagery

**Notes:**

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



Map projection: NAD 1983 HARN Wisconsin TM

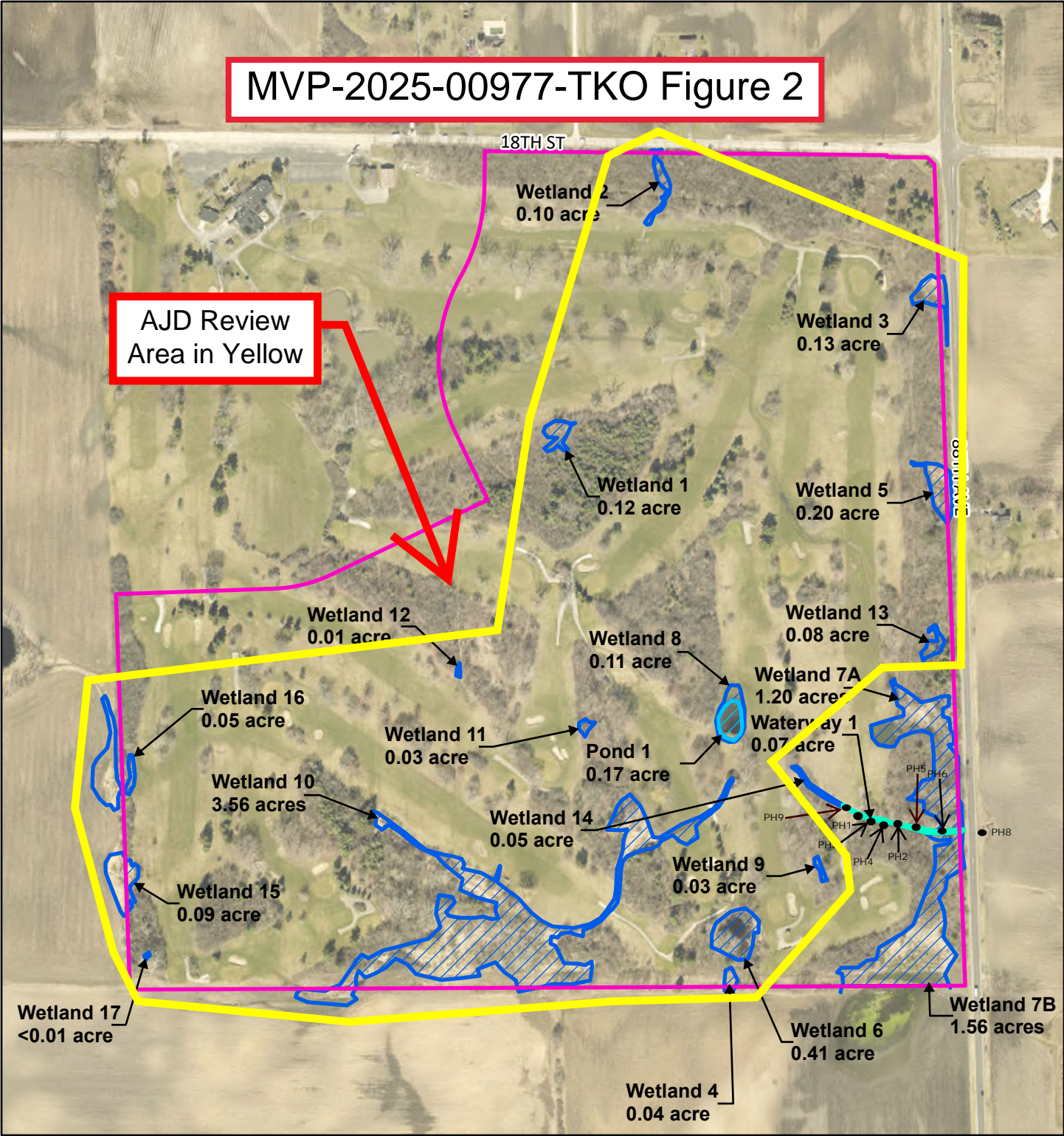
This map is a product generated by a DNR web mapping application.

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# MVP-2025-00977-TKO Figure 2

**AJD Review Area in Yellow**



Scale:  
0 450 Feet



Project Number: 25-0016

Date: 8/29/2025

Prepared by:

- Legend:
- Project Boundary
  - Surveyed Waterway Boundary
  - Off-site Surveyed Waterway Boundary
  - Surveyed Open Water - Pond
  - Surveyed Wetland Boundaries
  - Off-site Surveyed Wetland Boundaries
  - Photograph Locations (PH)

Project Name:  
18th Street - Somers

Prepared for:  
Home Path Financial

Aerial Date:  
2024

Exhibit Title:  
**Surveyed Wetland and Water Feature Boundaries**

Exhibit:  
**7**