



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
332 MINNESOTA STREET, SUITE E1500  
ST. PAUL, MN 55101-1323

CEMVP-RD

06 February 2024

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-2015-01220-JMB MFR 1 of 1.

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>2</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>3</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>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

CEMVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2015-01220-JMB

- 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).
  - i. Wetland 1, non-jurisdictional (0.17 acres)
  - ii. Wetland 2, non-jurisdictional (1.42 acres)
  - iii. Wetland 3, non-jurisdictional (0.92 acres)
  - iv. Wetland 4, non-jurisdictional (535 square feet)

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. \_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 19.5 acres in size and is identified by the polygon on the attached Figure 6. The review area is located at 44.746572608 N, -90.305469892 W near the Village of Spencer, Marathon County, Wisconsin.

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>5</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

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<sup>5</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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>6</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.

- 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

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<sup>6</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.

within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>7</sup>

It was determined that Wetland Area 3 meets the definition of exclusion b(1) for Waste Treatment Systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. Aerial imagery (2016) first shows Wetland Area 3 on the landscape following development/construction to the north. The entire review area was farmland up until construction depicted on the 2016 aerial imagery. The constructed stormwater pond is entirely contained within the project review area.

- 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 Areas 1, 2, and 4 are not a TNW, territorial sea, or interstate water and therefore are not (a)(1) waters. Topographic maps w/Lidar and Google Earth aerial imagery indicate that Wetland Areas 1, 2, and 4 are depressional wetlands, surrounded by upland. These wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. These wetlands are located approximately 0.10 miles from an unnamed tributary, the nearest Relatively Permanent Water (RPW) located east of the review area. However, there are no ditches, swales, pipes, or culverts that connect these wetlands to a downstream jurisdictional water. These wetlands are non-tidal and do not have a continuous surface connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as a (a)(4) adjacent wetland; therefore, Wetland Areas 1, 2, and 4 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. Wetland Delineation Report from Star Environmental, Inc. (dated July 18, 2023).

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

CEMVP-RD

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- b. Offsite Aerial Imagery Review included with project application (dated July 18, 2023).
- c. LiDAR contours (Marathon County); included with Wetland Delineation Report (dated July 18, 2023).

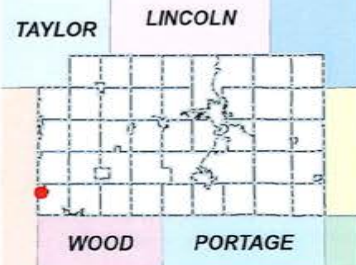
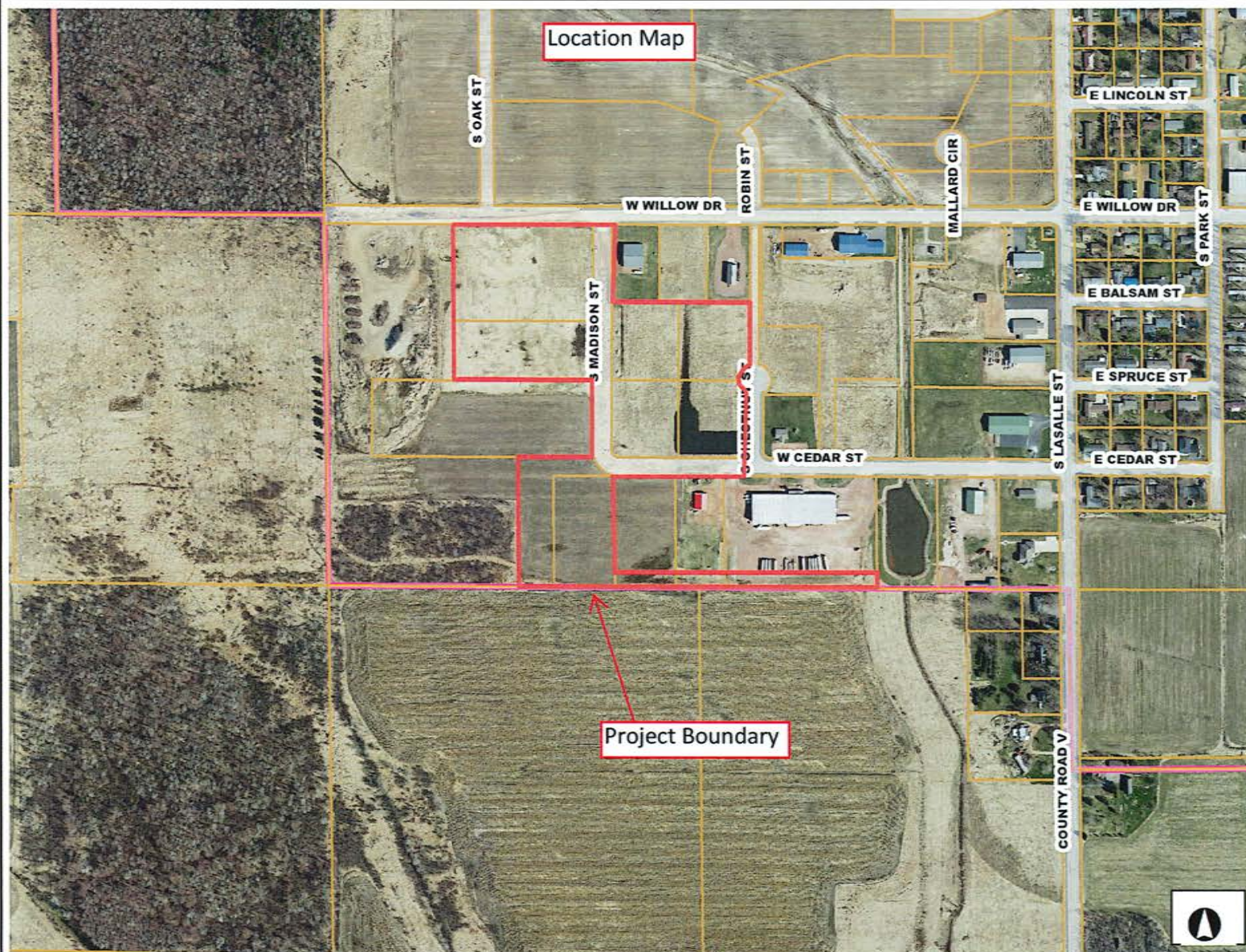
10. OTHER SUPPORTING INFORMATION. N/A

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.





# Land Information Mapping System



## Legend

- Road Names
- Parcels
- Parcel Lot Lines
- Land Hooks
- Right Of Ways
- Named Places
- Municipalities
- 2020 Orthos Countywide
  - Red: Band\_1
  - Green: Band\_2
  - Blue: Band\_3
- 2015 Orthos Countywide
  - Red: Band\_1
  - Green: Band\_2
  - Blue: Band\_3
- 2010 Orthos Countywide
  - Red: Band\_1
  - Green: Band\_2
  - Blue: Band\_3
- 2005 Orthos Countywide
  - High : 255
  - Low : 0
- 2000 Orthos Countywide
  - High : 255
  - Low : 0

266.38 0 266.38 Feet



NAD\_1983\_HARN\_WISCRS\_Marathon\_County\_Feet

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THIS MAP IS NOT TO BE USED FOR NAVIGATION

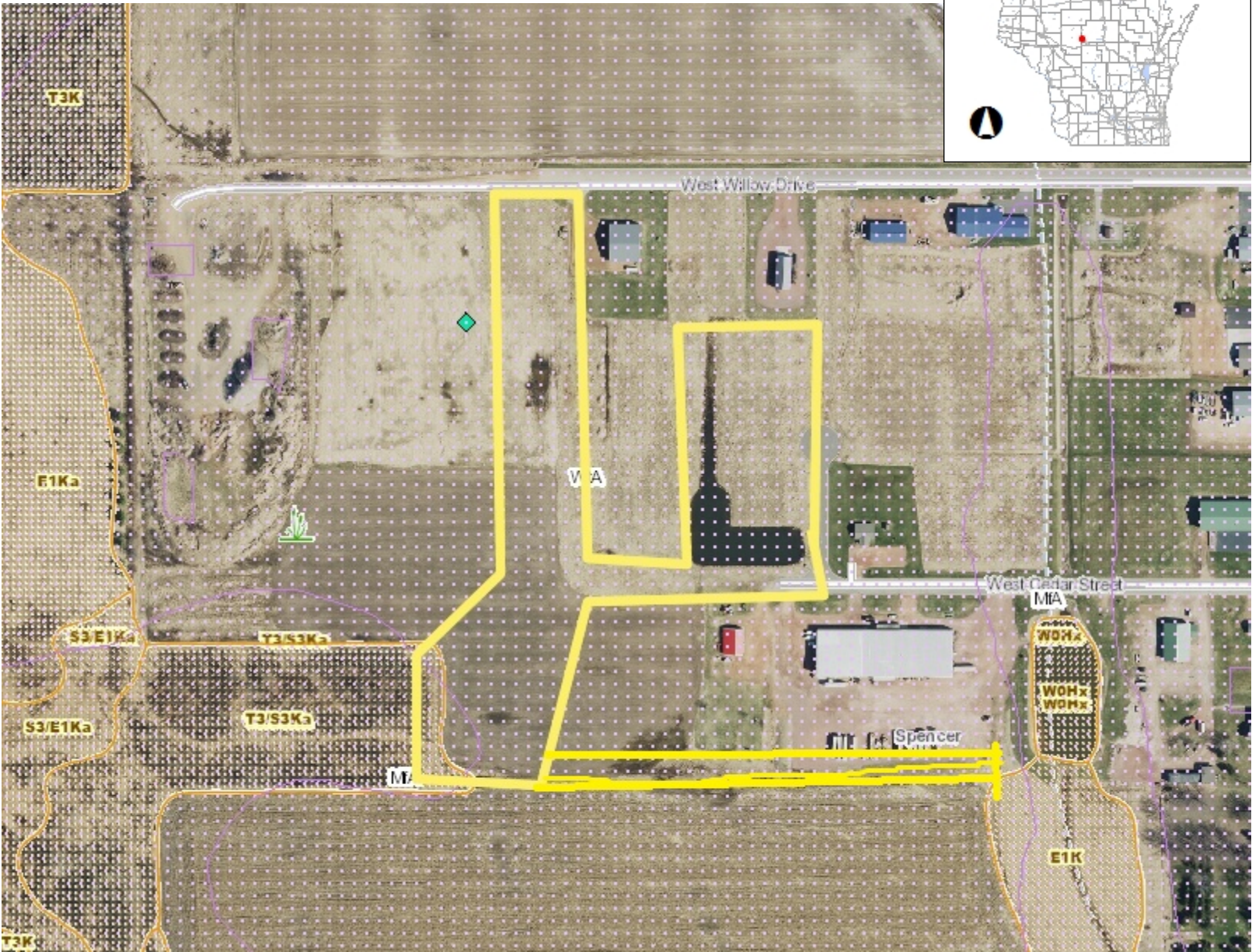
## Notes

Figure 1





# Surface Water Data Viewer Map



## Legend

- Wetland Indicators
- Wetland Class Areas
- Wetland Class Points
- Dammed pond
- Excavated pond
- Filled/draind wetland
- Wetland too small to delineate
- Filled excavated pond
- Filled Points
- Wetland Class Areas
- Filled Areas
- Wetland Class Areas
- Wetland Class Points
- Dammed pond
- Excavated pond
- Filled/draind wetland
- Wetland too small to delineate
- Filled excavated pond
- Filled Points
- Wetland Class Areas
- Filled Areas
- Wild Rice River and Stream Lines
- Wild Rice Lake Polygons
- Record Flood Levels
- Flood Hazard Zones
- 1% Annual Chance Flood Hazard
- Regulatory Floodway
- Special Floodway
- Area of Undetermined Flood Hazard
- 0.2% Annual Chance Flood Hazard
- Future Conditions 1% Annual Chance Flood Hazard
- Area with Reduced Risk Due to Levees

0.1 0 0.06 0.1 Miles

NAD\_1983\_HARN\_Wisconsin\_TM

1: 3,960

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## Notes



# Wetland Delineation Map

Spencer Business Park Project located in the NW1/4, SE1/4, Section 7,  
Township 26 North, Range 2 East, Village of Spencer,  
Marathon County, Wisconsin

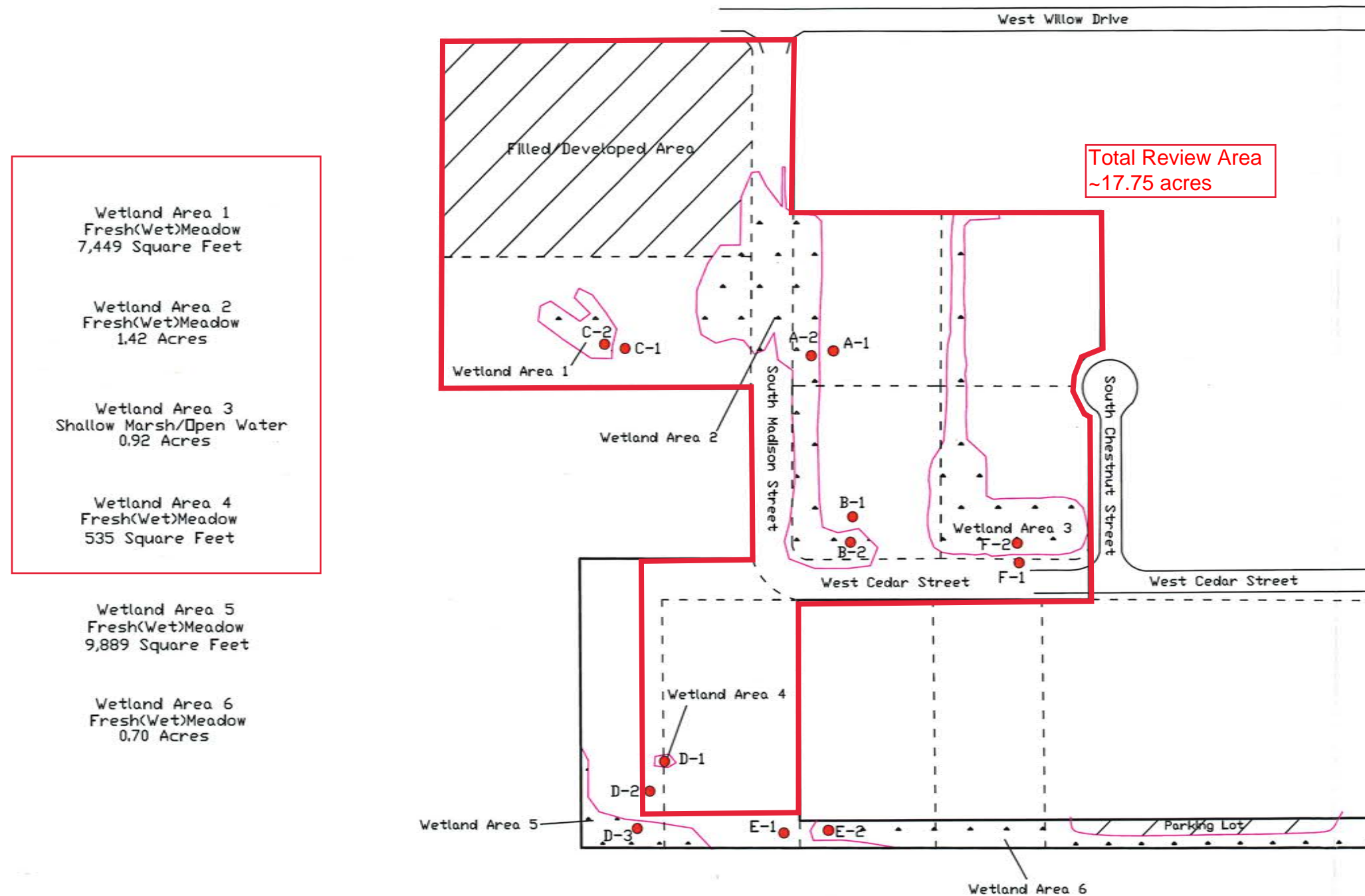


Figure 6

Scale: 1" = 200' Unless Noted  
This is not a certified survey map

Legend:  
— Project Boundary  
--- Property Line  
— Wetland Boundary  
• Sample Point

Star Environmental, Inc.  
PO Box 434 Marathon, WI 54448  
Phone: (715) 443-6115  
Email: Starenvironmental@hotmail.com



# Wetland Delineation Map

Spencer Business Park Project located in the NW1/4, SE1/4, Section 7,  
Township 26 North, Range 2 East, Village of Spencer,  
Marathon County, Wisconsin

Wetland Area 1  
Fresh(Wet)Meadow  
7,449 Square Feet

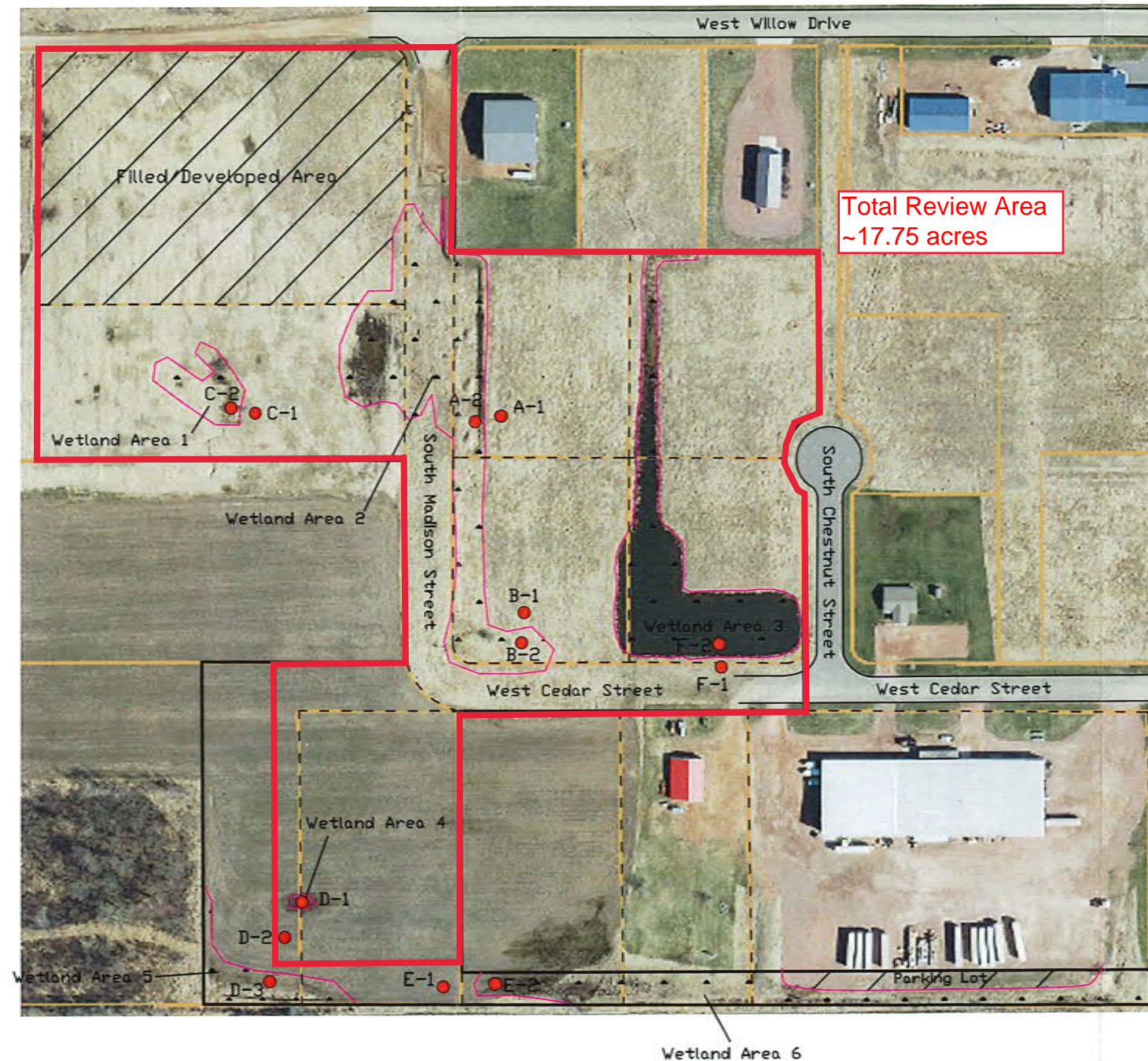
Wetland Area 2  
Fresh(Wet)Meadow  
1.42 Acres

Wetland Area 3  
Shallow Marsh/Open Water  
0.92 Acres

Wetland Area 4  
Fresh(Wet)Meadow  
535 Square Feet

Wetland Area 5  
Fresh(Wet)Meadow  
9,889 Square Feet

Wetland Area 6  
Fresh(Wet)Meadow  
0.70 Acres



## Legend:

- |       |                  |       |               |
|-------|------------------|-------|---------------|
| ————— | Project Boundary | ----- | Property Line |
| ————— | Wetland Boundary | ●     | Sample Point  |

Figure 7

Scale: 1" = 200' Unless Noted



This is not a certified survey map

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