

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00272-JLK

MVP

April 7, 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-2025-00272-JLK [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 Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

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.

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.

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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
Ditch 1	Non-Jurisdictional	None
Wetland W2	Non-Jurisdictional	None
Wetland 3	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): 20
 - b. Location Description: The project/review area is located in Section 31, Township 20N, Range 17E, Winnebago County, Wisconsin.
 - c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.164460 Longitude: -88.513400
 - d. Nearest City or Town: Neenah
 - e. County: Winnebago
 - 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

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. NA
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷
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

⁶ 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.

⁷ 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.

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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).⁸

Ditch 1 is a long, linear feature that runs north to south along the eastern boundary of the existing agricultural field with residential development immediately to the east. Review of historical aerial photos show this ditch was constructed sometime before 1957 to provide agricultural drainage. Further review of historical aerial photos demonstrates a lack of wet signatures and other wetland indicators (standing water, repeated vegetation stress, etc.) in the location of the ditch, suggesting this area was uplands prior to construction. Additionally, the Wisconsin Surface Water Data Viewer shows no mapped wetlands within the footprint of Ditch 1, aerial photos show there is no relatively permanent flow, and the delineation report shows the feature does not drain other waters. Based on this information, Ditch 1 is not jurisdictional under the 2023 Revised Definition of “Waters of the United States”: confirming 88 FR 61964 Final Rule.

Wetland 3 is a long, linear feature that runs west to east along the southern boundary of the existing agricultural field with a forested area immediately to the south. Review of historical aerial photos show this ditch was constructed sometime before 1957 to provide agricultural drainage. Further review of historical aerial photos demonstrates a lack of wet signatures and other wetland indicators (standing water, repeated vegetation stress, etc.) in the location of the ditch, suggesting this area was uplands prior to construction. Additionally, the Wisconsin Surface Water Data Viewer shows no mapped wetlands within the footprint of Wetland 3, aerial and site level photos show there is no relatively permanent flow, and the delineation report shows the feature does not drain other waters. The Surface Water Data Viewer does however show a mapped tributary to the northwest of Wetland 3 and site photos show these features are connected via culvert. However, site photos show Wetland 3 lacks a bed and bank, and ordinary high water mark. Based on this information, Wetland 3 is not

⁸ 88 FR 3004 (January 18, 2023)

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jurisdictional under the 2023 Revised Definition of “Waters of the United States”: confirming 88 FR 61964 Final Rule.

- 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 W2 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, indicate this wetland is a depressional wetland located in the southwestern corner of the review area. Wetland W2 is confined within the review area and surrounded by uplands involving the existing agricultural field to the north, northeast, and east, forested areas to the northwest and south, Wetland 3 (ditch feature evaluated in Section 8.a. above) also to the south, and residential development to the west. The southern boundary of Wetland W2 is near Wetland 3 to the south; however, data provided in the delineation report indicates there is a small berm-like feature hydrologically separating Wetland W2 from Wetland 3. Additional Lidar data and a conversation with the consultant and DNR representative confirmed these two resources are not hydrologically connected. This wetland 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.

Historical aerial photos provided in the delineation report indicates the footprint of the reviewed wetland has been in agricultural production since before 1957. The Wisconsin Surface Water Data Viewer shows the nearest mapped tributary is an unnamed tributary approximately 75 feet to the southwest of Wetland W2. However, based on provided data and site level photos, the area between this wetland and the tributary is uplands involving the previously mentioned agricultural field. Therefore, Wetland W2 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 March 19, 2025.

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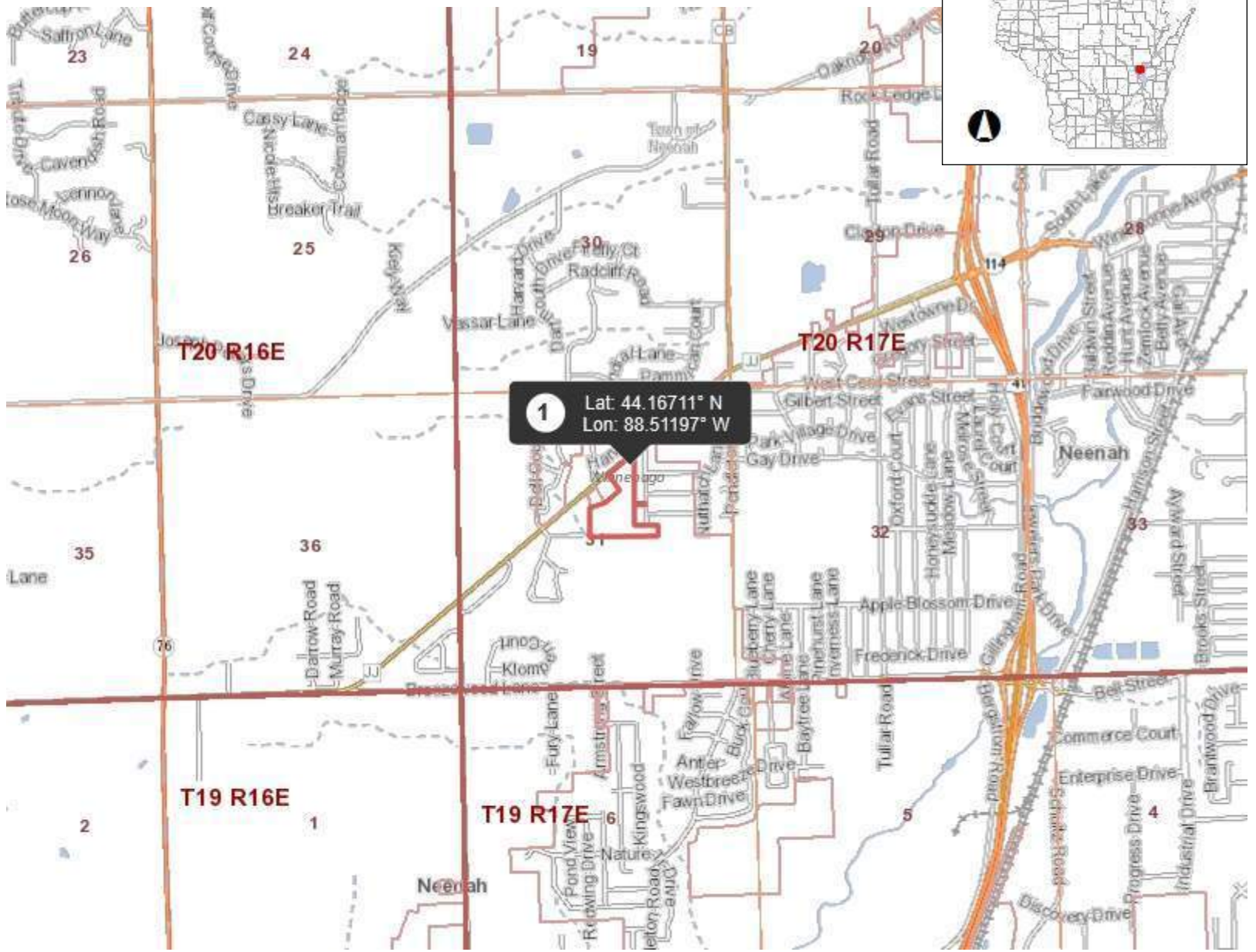
- b. Homestead Acres a Condominium, Town of Neenah Wetland Delineation Report provided by Davel Engineering, LLC dated January 2024.
- c. National Regulatory Viewer-Lidar Data and Google Earth Pro assessed March 19, 2025.
- d. Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army 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).

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.



Surface Water Data Viewer Map



- Legend**
- Township
 - Section
 - Quarter-Quarter
 - County Boundary
 - Cities, Towns & Villages**
 - City
 - Village
 - Civil Town
 - Municipality
 - State Boundaries
 - County Boundaries
 - Major Roads**
 - Interstate Highway
 - State Highway
 - US Highway
 - County and Local Roads**
 - County HWY
 - Local Road
 - Railroads
 - Tribal Lands
 - Rivers and Streams
 - Intermittent Streams
 - Lakes and Open water



NAD_1983_HARN_Wisconsin_TM

1: 31,680

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

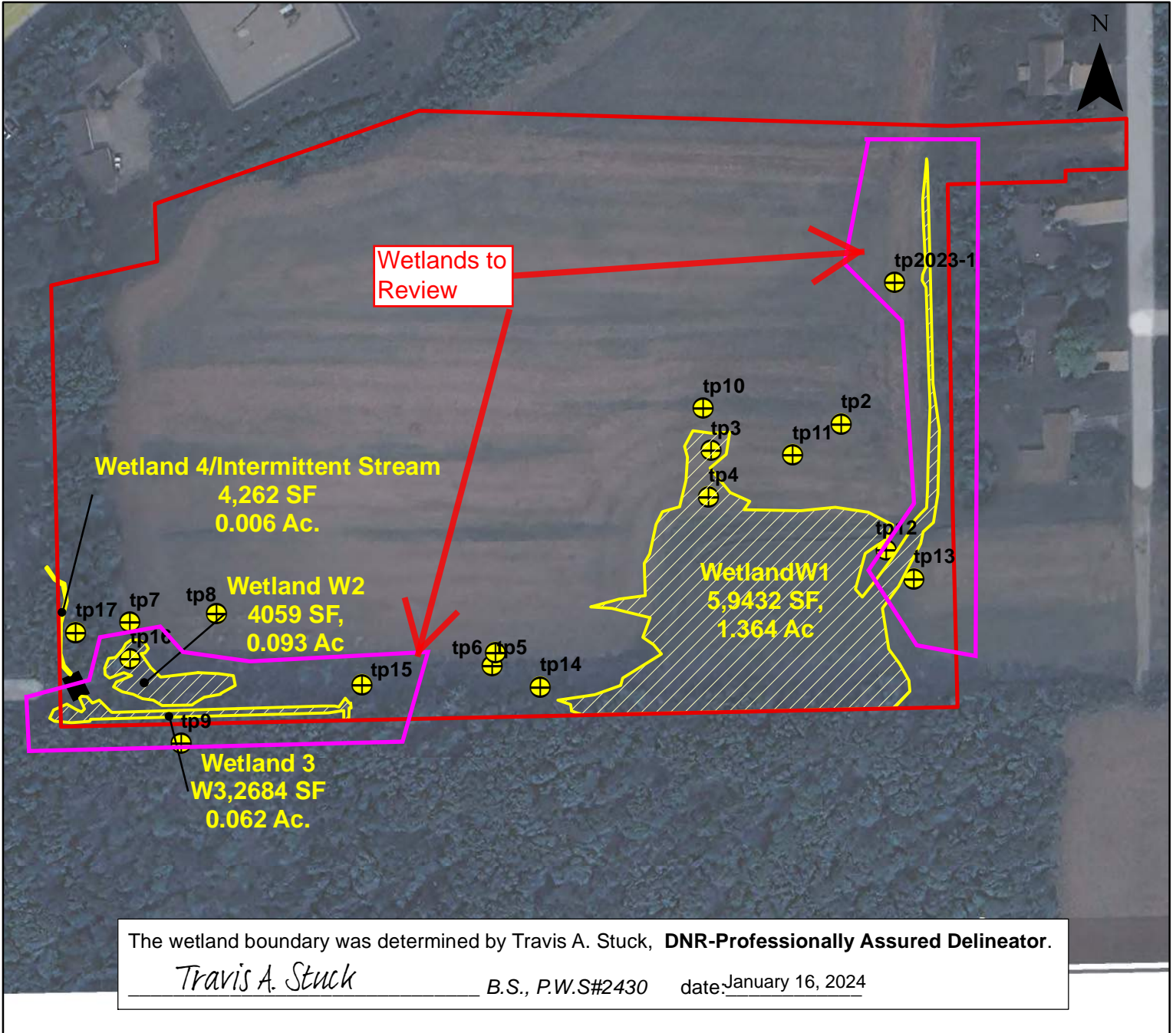
Notes

Wetland Delineation Overview Map

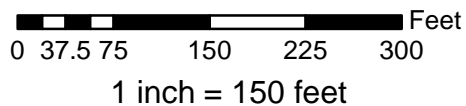
Homestead Acres Condominium

Part of Sec. 31, T20N, R17E, Town of Neenah, Winnebago County, WI
For: LFK Enterprises (Lynne Keller)

June 2023 Aerial



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

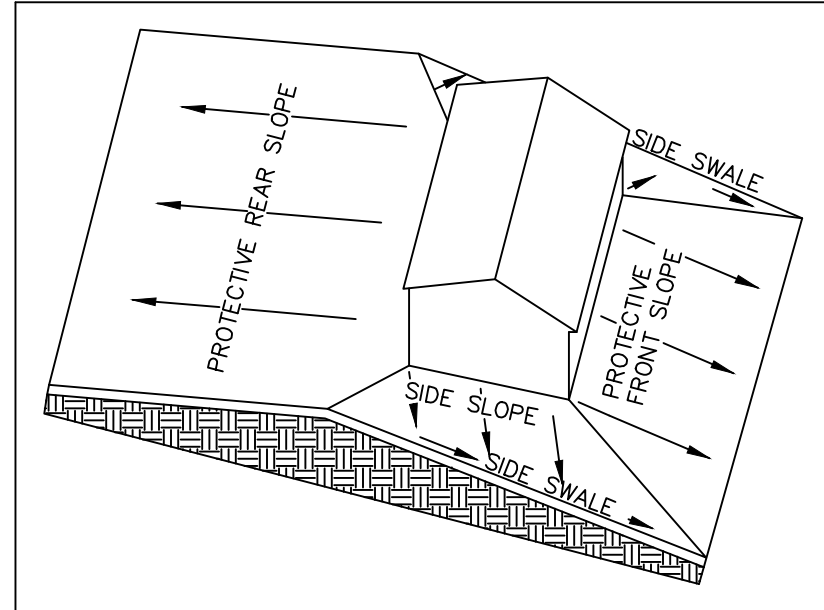
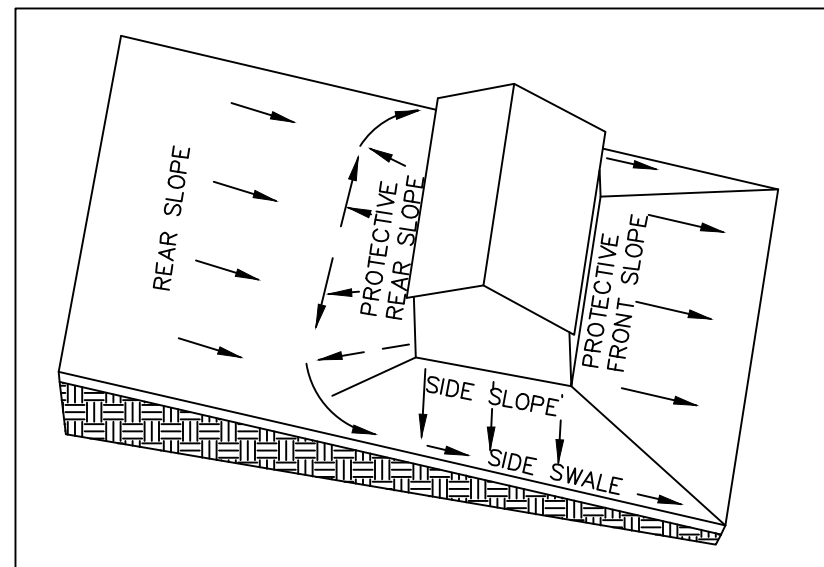


Legend

- Project Scope
- Wetland/Aquatic Resource Boundary
- Plots
- culvert

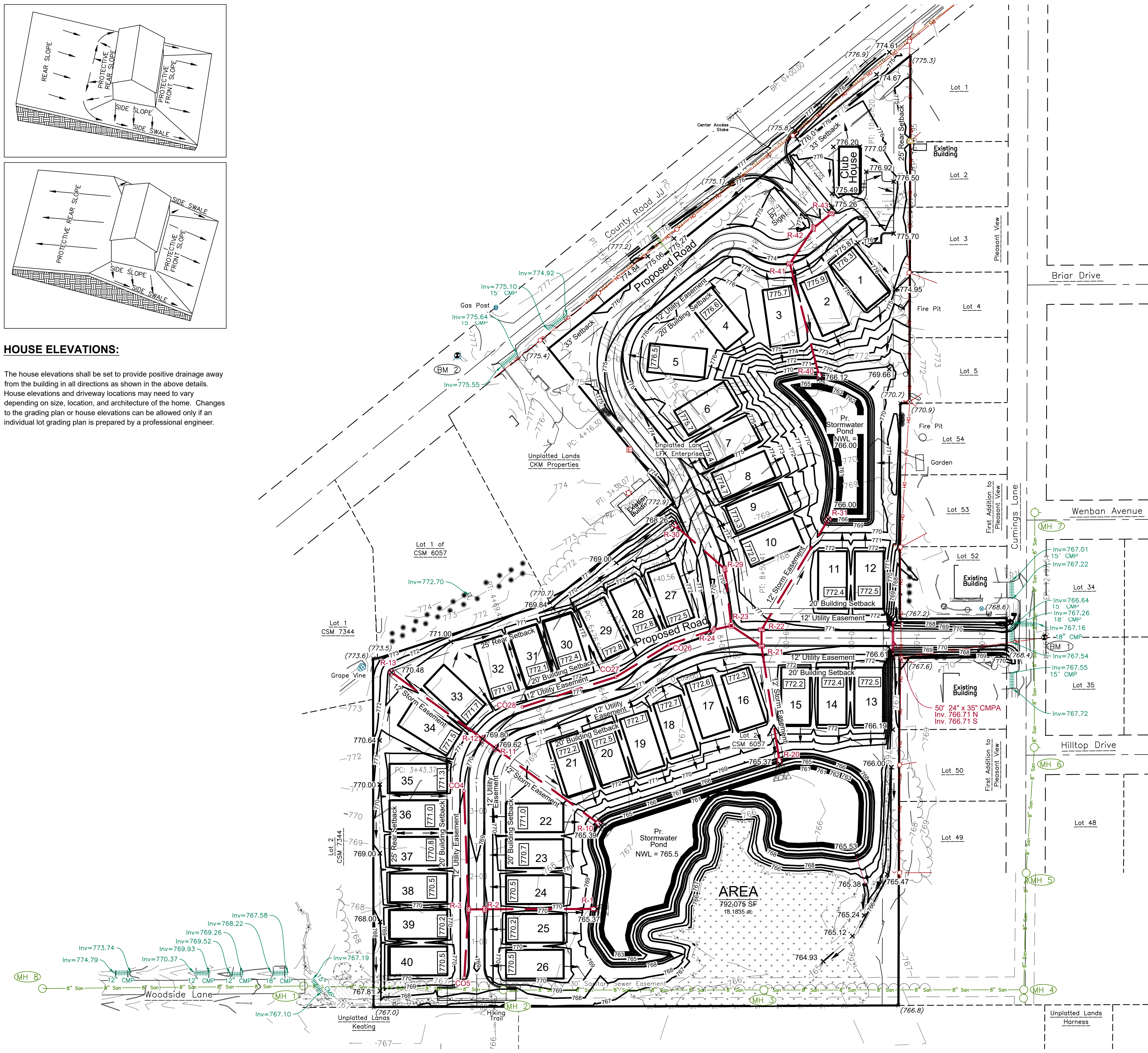


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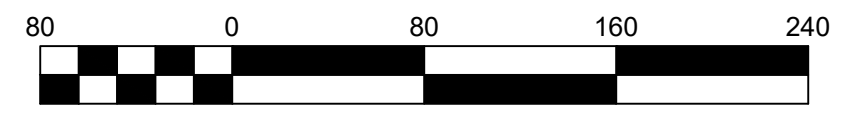
HOUSE ELEVATIONS:

The house elevations shall be set to provide positive drainage away from the building in all directions as shown in the above details. House elevations and driveway locations may need to vary depending on size, location, and architecture of the home. Changes to the grading plan or house elevations can be allowed only if an individual lot grading plan is prepared by a professional engineer.



NOTES:

- Existing utilities shown are indicated in accordance with available records and field measurements. The contractor shall be responsible for obtaining exact locations & elevations of all utilities, including sewer and water from the owners of the respective utilities. All utility owners shall be notified by the contractor 72 hours prior to excavation. Contact Digger's Hotline (1-800-242-8511) for exact utility locations. The Contractor shall verify all staking and field layout against the plan and field conditions prior to constructing the work and immediately notify the Engineer of any discrepancies.
- Vegetation beyond slopes shall remain.
- The contractor shall minimize the area disturbed by construction as the project is constructed. Disturbed areas shall be seeded as soon as final grade is established. Contractor shall replace topsoil and then seed, fertilize and mulch all lawn areas within 1 week of topsoil placement.
- Contractor shall remove all excess materials from the site. Earthwork contractors shall verify topsoil depth.
- All sediment and erosion control devices and methods shall be in accordance with the Wisconsin DNR Technical Standards.
- The contractor shall make weekly inspections and inspections within 1 day of any rainfall exceeding 0.5 inches of the sediment and erosion control devices throughout construction. The contractor shall repair or maintain erosion control devices as necessary. The inspection reports shall be made available to the owner at the end of the construction or upon demand during construction.
- The outside services are shown to stop at a point 8 feet outside the foundation wall. The Contractor shall be responsible for coordination of continuation of the services into the building to properly coincide with the interior plumbing plans, and compliance with all plumbing permits.
- Contractor is responsible for compliance with Department of Safety & Professional Services, Chapter SPS 382, for lateral construction and cleanout locations.



LEGEND

— CATV — CATV	Underground Cable TV	○ Sanitary MH / Tank / Base	□ CATV Pedestal
— FO — FO	Underground Fiber Optic	○ Clean Out / Full Box	□ Gas Regulator
— OH — OH	Overhead Utility Lines	○ Storm Manhole	□ Railroad Signal Sign
— San — San	Sanitary Sewer (Pipe Size)	○ Inlet	□ Tower / Silo
— Sto — Sto	Storm Sewer (Pipe Size)	○ Catch Basin / Yard Drain	□ Post / Guard Post
— E — E	Underground Electric	○ Water MH / Well	□ Satellite Dish
— G — G	Underground Gas Line	○ Curb Stop	□ Large Rock
— T — T	Underground Telephone	○ Hydrant	□ Flag Pole
— W — W	Water Main (Pipe Size)	○ Utility Valve	□ Deciduous Tree
— F — F	Fence - Steel	○ Utility Meter	□ Coniferous Tree
— F — F	Fence - Wood	○ Utility Pole	□ Bush / Hedge
— F — F	Fence - Barbed Wire	○ Light Pole / Signal	□ Stump
— T — T	Treeline	○ Guy Wire	□ Soil Boring
— RR — RR	Railroad Tracks	○ Electric Pedestal	□ Benchmark
— C — C	Culvert	○ Electric Transformer	□ Asphalt Pavement
— I — I	Index Contour - Existing	○ Electric Manhole	□ Concrete Pavement
— M — M	Intermediate Contour - Existing	○ Air Conditioner	□ Gravel
— W — W	Delineated Wetlands	○ Telephone Pedestal	
		○ Telephone Manhole	
		○ Ex Spot Elevation	
— 608 — 608	Proposed Storm Sewer	○ Proposed Storm Manhole	
— 607.86 — 608.73	Proposed Storm Sewer	○ Proposed Curb Inlet	
— 608.73 — 608.73	Proposed Storm Sewer	○ Prop. Catch Basin / Yard Drain	
— 608.73 — 608.73	Proposed Storm Sewer	○ Proposed Endwall	
— 608.73 — 608.73	Proposed Storm Sewer	○ Proposed Rip Rap	
— 608.73 — 608.73	Proposed Storm Sewer	○ Prop. Drainage Direction	
— 608.73 — 608.73	Proposed Storm Sewer	○ Prop. Garage Floor Grade at Door	
— 608.73 — 608.73	Proposed Storm Sewer	○ Emergency Overflow for Runoff	

2025-00272-JLK (Figure 3 of 3)