

CEMVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00481-TKO

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June 9, 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-2025-00481-TKO MFR 1 of 1²

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
Roadside Ditch	Non-Jurisdictional	N/A
Swale 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 Area Size (in acres): 1.67-acre
- b. Location Description: The project/review area is located in Section 33, Township 17N, Range 18E, Fond du Lac County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 43.8935 Longitude: -88.3455
- d. Nearest City or Town: Fond du Lac
- e. County: Fond du Lac
- 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/A⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸
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

⁶ 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.

⁷ 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.

⁸ 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.

- 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).⁹

Both the areas identified as “Roadside Ditch” and “Swale 1”, on the attached figures, are linear drainage and erosion features that are not waters of the U.S. The roadside ditch and swale 1 fit the definitions of b(3) and b(8) waters, from 33 CFR 328.3(b), respectively.

The roadside ditch is a linear drainage ditch which runs east/west through the review area and sits directly south of the private Highland Park Road. The roadside ditch receives water from the approximately 3,400-foot upstream ditched section of the road and a non-RPW grassed waterway, which enters the ditch from the southeast at the eastern extent of the review area. The ditch continues down slope to the west where it discharges to newly replaced culvert where Highland Park Road turns south at the review area’s western extent. This feature fits under the definition of a b(3) water, from 33 CFR 328.3(b), as it was excavated wholly in and drains only dry land and does not carry a relatively permanent flow of water. The roadway and associated ditch were constructed in upland some point prior to the earliest available aerial imagery (1937). Review of available on-line resources indicate the ditch was excavated wholly in and drains only dry land, and it does not carry a relatively permanent flow of water. WI’s initial public land survey shows no aquatic features within the vicinity of the excavated ditch. Review of historic topographical maps also show a lack of wetland or stream history. USDA soil map data indicates the review area consists predominantly of non-hydric soils. Sporadic wetness signatures can be seen in

⁹ 88 FR 3004 (January 18, 2023)

portions of the review area through various years however, no persistent wetness signature or any other indication of wetland presence (standing water, repeated crop/vegetation stress, distinct variation of vegetation) was observed within the ditch. Additionally, the Wisconsin and National Wetland Inventory show no mapped wetlands further supporting the feature was excavated in uplands.

Swale 1 is an erosional feature which runs parallel to the roadside ditch, approximately 40 feet to the south. This feature fits under the definition of a b(8) water, from 33 CFR 328.3(b), as it is a swale characterized by low volume, infrequent, or short duration flow. The discrete feature's definition begins approximately 60 feet southwest of the point where the grassed waterway and ditch meet. The swale and ditch follow the same general profile, sloping to the west. The swale continues approximately 670 linear feet west before losing definition in the upland agricultural field. This feature is likely caused by excess inputs, exceeding capacity of the roadside ditch, being conveyed in and through the field. This swale is an erosional feature which appears to convey infrequent, short duration flows as review of aerial imagery shows a lack of any standing/flowing water. The swale contains no continuous channel or vegetation and shows no sign of an ordinary high water mark, based off a ground level photograph.

- 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).

[N/A]

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 06/10/2025.
- b. AJD Application "2025-00481-TKO 2025007 APP.pdf" in the administrative record.
- c. Mississippi Valley Division Regulatory Viewer, 06/10/2025.
- d. Wisconsin DNR Surface Water Data Viewer, 06/10/2025.
- e. Fond du Lac County GIS Mapping, 06/10/2025.

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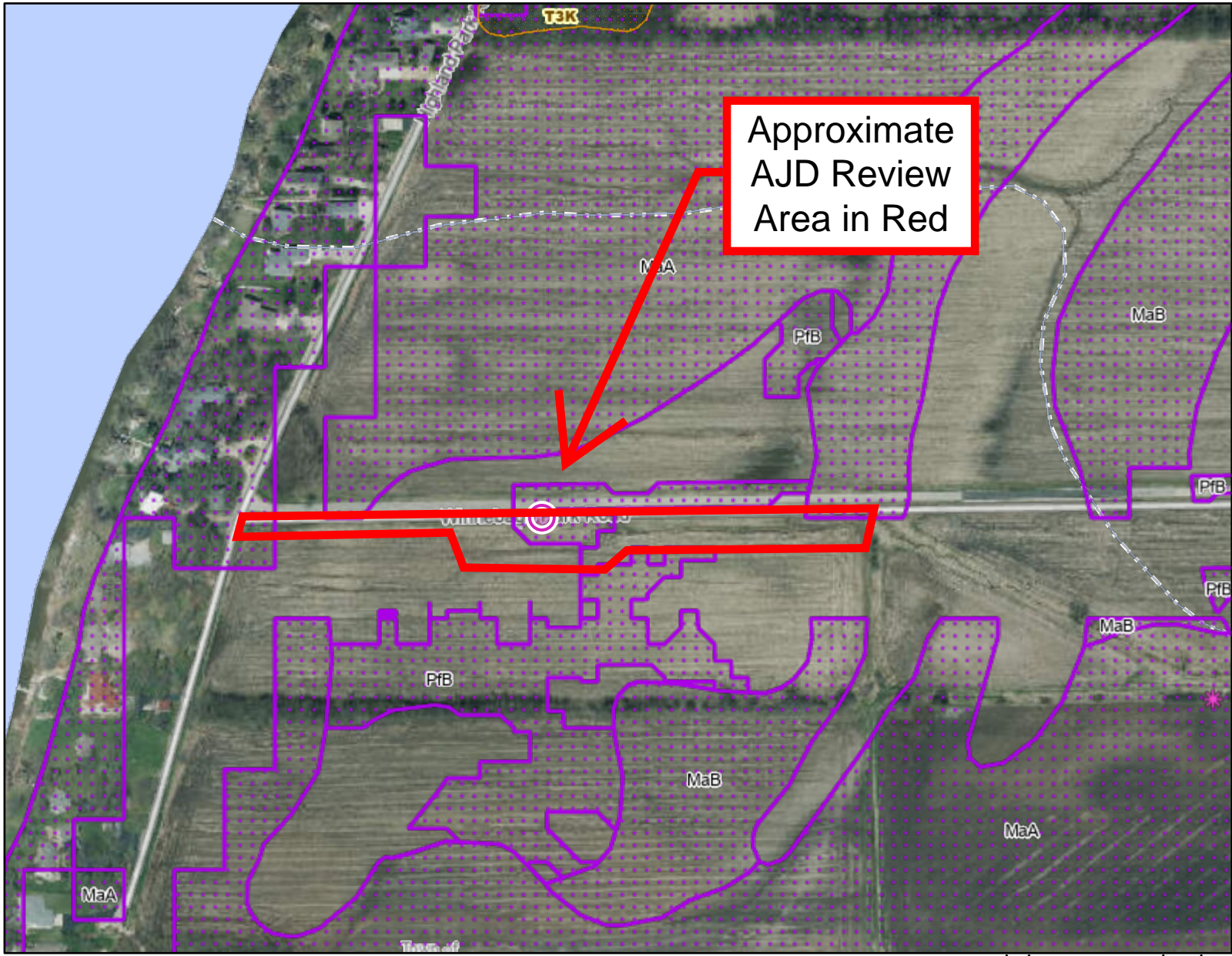
- f. [Google Earth Pro, 06/10/2025.](#)
- g. [ESRI World Imagery Wayback, 06/10/2025](#)
- h. [HistoricAerials.com, 06/10/2025](#)

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-2025-00481-TKO Figure 1 of 2

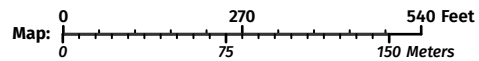


Approximate
AJD Review
Area in Red

Legend: (some map layers may not be displayed)

- Wetland Class Areas
- USDA Wetspots
- Wetland Indicators
- Rivers and Streams
- Intermittent Streams
- Open Water
- 24K Intermittent Streams
- 24K Lakes and Open Water
- 24K Streams and Rivers
- County Boundaries
- County and Local Roads
- Local Road
- Latest Leaf Off Imagery

Notes:



Service Layer Credits:
Latest Leaf Off: , Wetland Indicators & Soils: Surface Water Data Viewer Team, Wisconsin Wetland Inventory NWI (Dynamic): Calvin Lawrence, Dennis Weise, Nina Rihn, Cities, Roads & Boundaries: , Surface Water (Cached): WiDNR, USGS, and other data

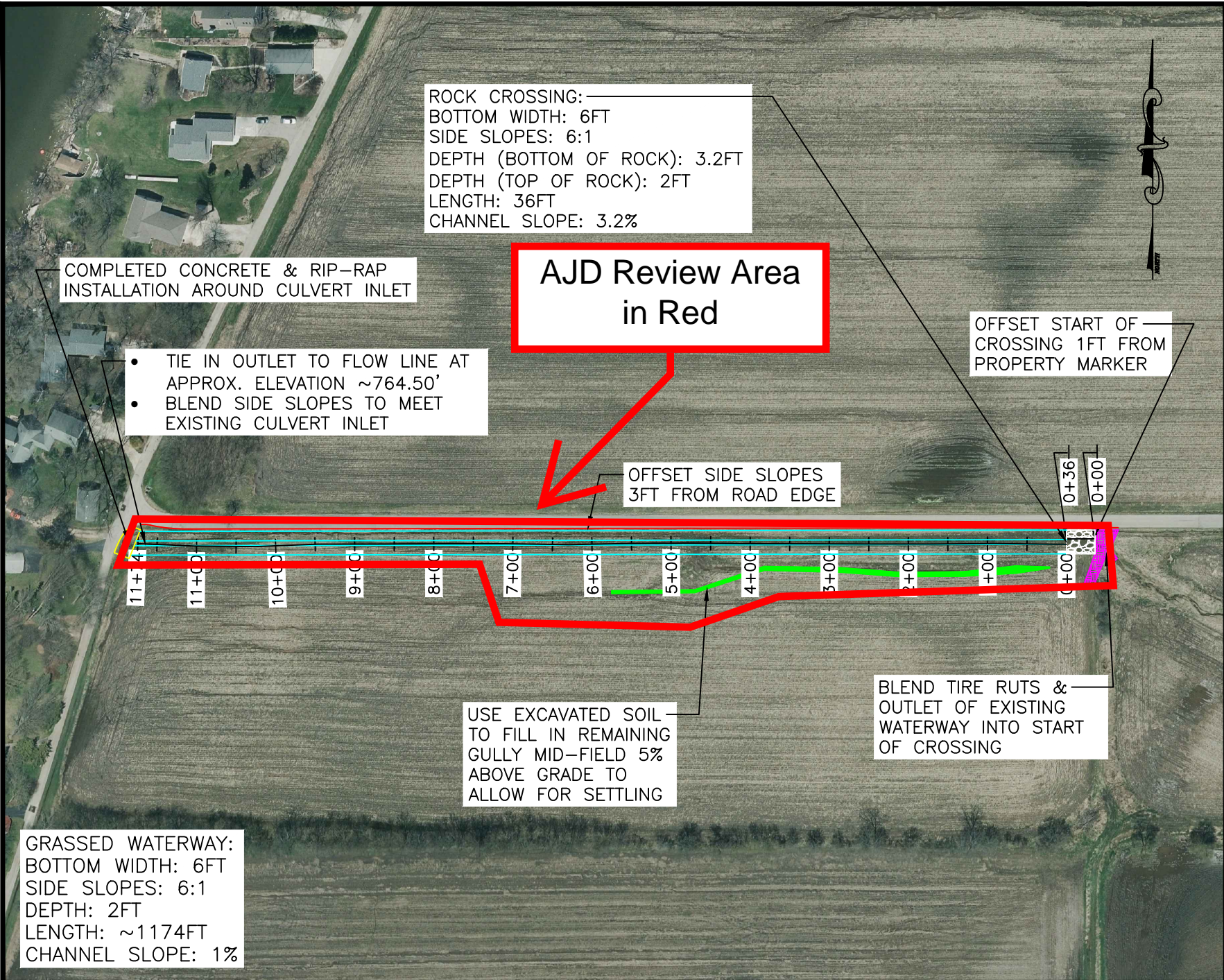
Map projection: NAD 1983 HARN Wisconsin TM

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>

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ROCK CROSSING:
 BOTTOM WIDTH: 6FT
 SIDE SLOPES: 6:1
 DEPTH (BOTTOM OF ROCK): 3.2FT
 DEPTH (TOP OF ROCK): 2FT
 LENGTH: 36FT
 CHANNEL SLOPE: 3.2%

COMPLETED CONCRETE & RIP-RAP
 INSTALLATION AROUND CULVERT INLET

- TIE IN OUTLET TO FLOW LINE AT APPROX. ELEVATION ~764.50'
- BLEND SIDE SLOPES TO MEET EXISTING CULVERT INLET

**AJD Review Area
in Red**

OFFSET SIDE SLOPES
 3FT FROM ROAD EDGE

OFFSET START OF
 CROSSING 1FT FROM
 PROPERTY MARKER

USE EXCAVATED SOIL
 TO FILL IN REMAINING
 GULLY MID-FIELD 5%
 ABOVE GRADE TO
 ALLOW FOR SETTLING

BLEND TIRE RUTS &
 OUTLET OF EXISTING
 WATERWAY INTO START
 OF CROSSING

GRASSED WATERWAY:
 BOTTOM WIDTH: 6FT
 SIDE SLOPES: 6:1
 DEPTH: 2FT
 LENGTH: ~1174FT
 CHANNEL SLOPE: 1%



PLAN VIEW	Designed <u>AKF</u> Drawn <u>AKF</u> Checked <u>AAC</u> Approved <u>TWB</u>	Practice <u>412, 578</u> Date <u>12/04/24</u>	Sheet <u>4</u> of <u>11</u>
CLIENT: <u>WELDON AND SUSAN PETERSON</u> COUNTY: <u>FOND DU LAC</u>			
FOND DU LAC COUNTY LAND & WATER CONSERVATION DEPARTMENT			