



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MVP DISTRICT
GREEN BAY
211 NORTH BROADWAY
GREEN BAY WI 54303

MVP

July 19, 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),¹ MVP-2007-03143-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.

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2007-03143-TKO

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 1 (0.73-acre)	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 16964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

REVIEW AREA. The review area consists of an approximately 1-acre portion of 6-acre parcel proposed for the new Culver’s, Evansville, location. The review area sits within the within the southeast portion of the parcel and is identified by a pink polygon on the attached Figures 1-2 of 2. The parcel containing the review area sits approximately 500 feet to the northeast of the intersection of North Union Road and East Main Street in the City of Evansville. The review area is located in Section 27, Township 04N, Range 010E, in the city of Evansville, Rock County, Wisconsin. There are no other JDs* associated with the review area. See attached figures, labeled 2007-03143-TKO Figures 1-2 of 2. HUC 12: City of Evansville-Allen Creek (070900040301). Lat/Long: 42.7817, -89.2933.

* The ORM database shows actions for both “Unauthorized Activity/Alleged Violation” and “No Permit Required” for the property under the same file number. Review of the electronic files show these actions are associated with a separate aquatic resource, not included in the review area.

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2007-03143-TKO

- a. Project Area Size (in acres): 6 acre
 - b. Location Description: The project/review area is located in Section 27, Township 004N, Range 010E, Rock County, Wisconsin.
 - c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42. 7817 Longitude: -89.2933
 - d. Nearest City or Town: Evansville
 - e. County: Rock
 - f. State: Wisconsin
 - g. Other associated Jurisdictional Determinations (including outcomes):
None
3. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶
4. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
5. 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
6. 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

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.

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2007-03143-TKO

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

7. 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 N/A
- 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 W-1 is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. Review of a May 2024 Merjent delineation report, Google Earth and

⁹ 88 FR 3004 (January 18, 2023)

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2007-03143-TKO

historic aerial images, and hillshade and DEM GIS layers (from the Mississippi Valley Division Regulatory Viewer) indicate that wetland W-1 is a depressional wetland, surrounded by upland. The 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. The assessed wetland sits approximately 900 feet from the closest tributary (Allen Creek (WBIC 883700)). However, there are no ditches, swales, pipes, or culverts that connect the wetland to downstream jurisdictional waters.

Wetland W-1 is a depressional wetland which sits within the southeast portion of a vacant 6-acre property, proposed to be the location of the future Evansville Culver's restaurant. The wetland is surrounded by upland in all directions, with boundaries that transition to delineated upland. Delineated boundaries are supported by several upland sample points and review of LiDAR showing the wetland sitting at a lower elevation than the surrounding upland, along with aerial imagery showing a lack of persistent wetness signature extending outside the wetland's delineated borders. Both the Wisconsin and National Wetland Inventories show a single continuous wetland which includes the areas identified as containing Wetlands W-1 and W-2 (outside of review area). Review of LiDAR shows an elevated, hilled or bermed feature surrounding a majority of Wetland W-1. Ground level photos show these to be uniformly graded berms. The berms surround the northern 2/3 of W-1, and also extend along its southern boundary. Review of historic aerial imagery shows site manipulation in these areas between 2008-14. Review of LiDAR shows a saddle-like feature between two elevated mounds along the ridge of the berm at the southeast corner of W-1. This feature appears to be a designed overflow for Wetland W-1, as the lowest elevation of saddle's trough sits higher than the surrounding wetlands, when viewed in WI DEM layer. Any water exiting Wetland W-1 would be via overland flow. There are no culverts/pipes or discrete features associated with Wetland W-1 that would serve as a continuous surface connection to any downstream waters.

Wetland W-1 is a non-tidal wetland that does not have a continuous surface connection to a relatively permanent jurisdictional water and as such does not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland. The wetland is not an intrastate lake or pond that meets the relatively permanent standard and cannot be evaluated as an (a)(5) water: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, the wetland is not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

8. 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.

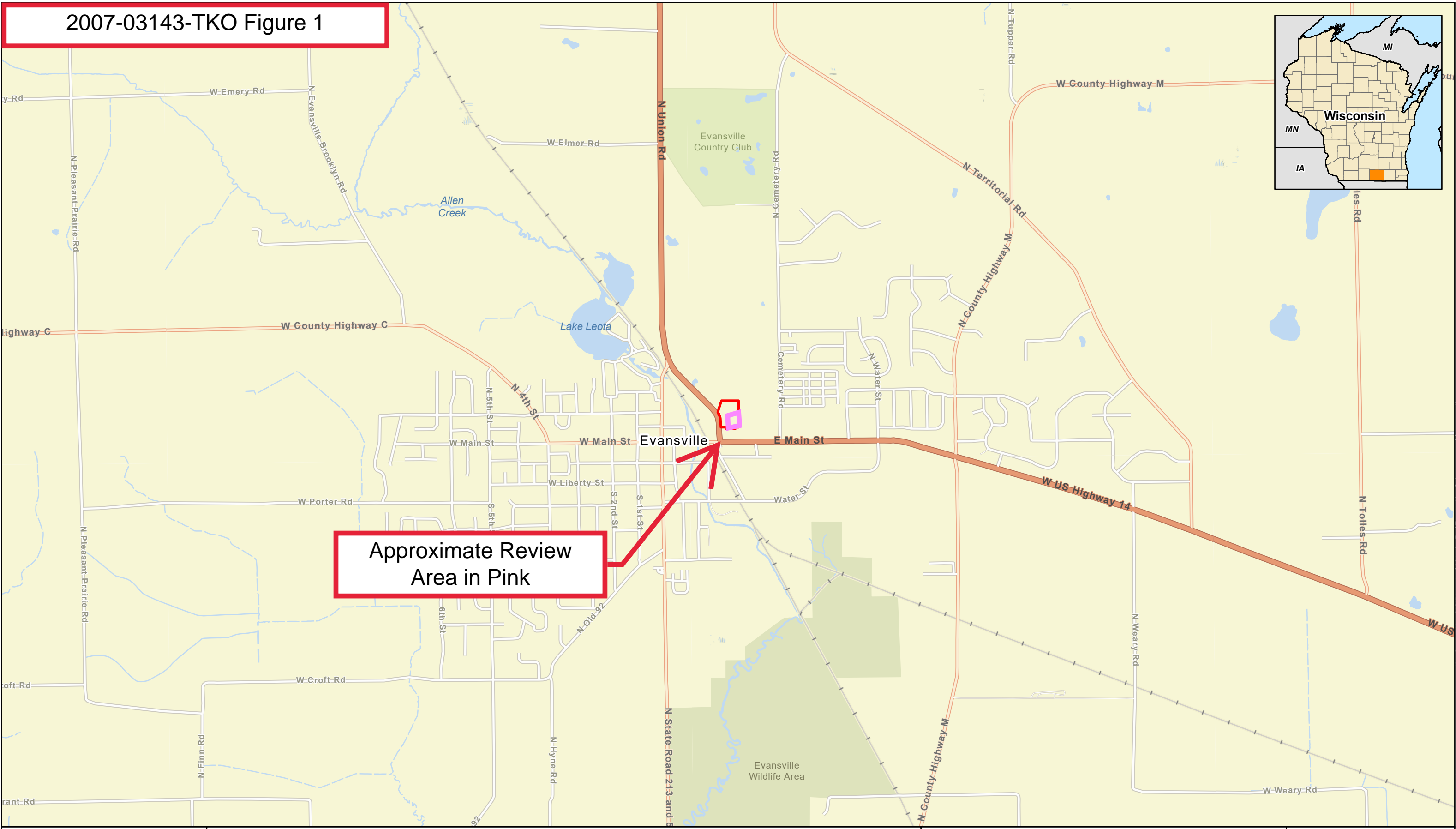
MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2007-03143-TKO

- a. No field visits were conducted. Desktop review evaluation was conducted on 07/03/2024.
- b. AJD Application "2007-03143-TKO 20240523 APP.pdf" in the administrative record, 07/03/2024.
- c. Mississippi Valley Division Regulatory Viewer, 07/03/2024.
- d. Wisconsin DNR Surface Water Data Viewer, 07/03/2024.
- e. Rock County GIS Interactive Mapping, 07/03/2024.
- f. Google Earth, 07/03/2024.

9. OTHER SUPPORTING INFORMATION. N/A

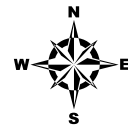
10. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.




Approximate Review
Area in Pink

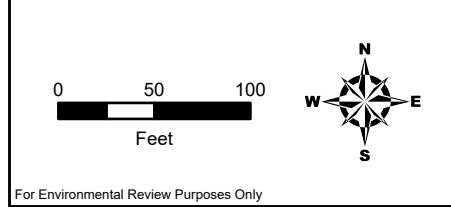
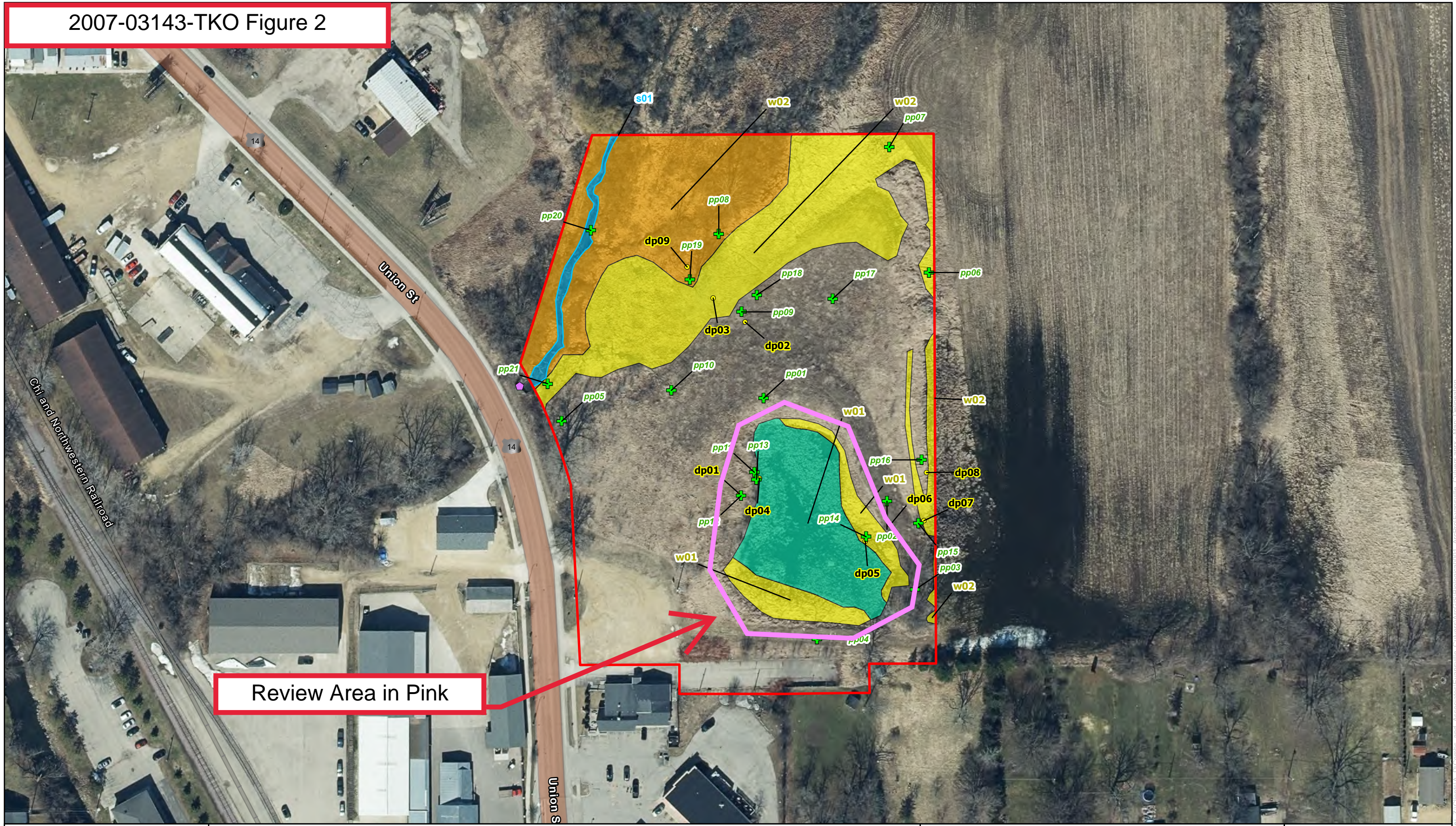
Figure 1: Project Location
Evansville Culver's
Culver's of Janesville
Rock County, WI

0 1,000 2,000
Feet



 Survey Area

merjent.



For Environmental Review Purposes Only

Figure 5: Wetland Delineation
Evansville Culver's
Culver's of Janesville
Rock County, WI

- | | |
|--------------------|---------------------|
| Survey Area | Delineated Waterway |
| Photo Point | Delineated Wetland |
| Culvert | Fresh (Wet) Meadow |
| Wetland Data Point | Shrub-Carr |
| | Shallow Marsh |

