



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

CE-MVP-RD

17 April 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-2009-00051-HSR

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.

---

<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.

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), 2009-00051-HSR

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).
  - i. Wetland 1, non-jurisdictional
  - ii. Wetland 2, non-jurisdictional
  - iii. Wetland 3, non-jurisdictional
  - iv. Wetland 4, non-jurisdictional
  - v. Wetland 5, non-jurisdictional

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 consists of five wetlands—Wetland 1 (4.119 acres/179,409 square feet), Wetland 2 (0.180 acres/7,859 square feet), Wetland 3 (0.160 acres/6,974 square feet), Wetland 4 (0.108 acres/4,703 square feet), and Wetland 5 (0.022 acres/937 square feet)— identified by the labeled blue polygons on the attached *2009-00051-HSR: Figure 2 of 2*. It is located at 44.57872, -87.50533 in the Town of Pierce, Kewaunee County, Wisconsin. There are no other JDs associated with the review area.

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

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), 2009-00051-HSR

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 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

---

<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.

<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.

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), 2009-00051-HSR

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>7</sup>

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).

The review area includes five wetland features within an approximately 35.9-acre property that is currently in agricultural production—both crop and livestock. Based on a review of the wetland delineation report conducted by Evergreen Consultants, LLC, and information and images from the USDA-NRCS Web Soil Survey, National Wetlands Inventory, Wisconsin Department of Natural Resources Surface Water Data Viewer, Google Earth, and the Army Corps of Engineers’ National Regulatory Viewer, Wetlands 1, 2, 3, 4, and 5—as identified by the labeled blue polygons on the attached *2009-00051-HSR: Figure 2 of 2*—are depressional wetlands surrounded by upland.

All five wetlands are classified in the applicant-submitted wetland delineation report as wet meadow wetlands within closed depressions. The dominant vegetation observed in Wetlands 1 (4.119 acres) and 5 (0.022 acres) was reed canary grass (*Phalaris arundinacea*); the remaining wetlands—2 (0.180 acres), 3 (0.160 acres), and 4 (0.108 acres)—did not have any dominant hydrophytic vegetation noted as they were tilled and planted. The wetlands are not traditional navigable waters, territorial seas, or interstate waters and therefore are not (a)(1) waters. In addition, the continuous surface connection requirement is not met, as the wetlands do not physically abut or touch a paragraph (a)(1) or relatively permanent water, nor do they connect to a paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. The wetlands also do not physically abut a relatively permanent

---

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

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), 2009-00051-HSR

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.

The closest aquatic resource is an unnamed tributary (WBIC 5016346) approximately 0.25 miles to the southwest and is separated by a paved road, residential development, and active agricultural production (WDNR SWDV). There does not appear to be any culverts, discrete drainage features, or outlet structures connecting to any surface aquatic resources. Thus, Wetlands 1, 2, 3, 4, and 5 are non-tidal and do not have a continuous surface connection to a relatively permanent jurisdictional water; hence, they do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands.

For the above and referenced reasons, Wetlands 1, 2, 3, 4, and 5 are not jurisdictional under the “2023 Revised Definition of ‘Waters of the United States’”; 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. A wetland delineation conducted by Evergreen Consultants, LLC, in November of 2023 was utilized.
  - b. An office review—utilizing the above and referenced wetland delineation report, as well as USDA-NRCS Web Soil Survey, National Wetlands Inventory, Wisconsin Department of Natural Resources Surface Water Data Viewer, Google Earth, and the Army Corps of Engineers’ National Regulatory Viewer—was conducted on April 3, 2024.
  - c. Google Earth aerial imagery dated 1992, 2004, 2005, 2006, 2007, 2008, 2010, 2013, 2018, 2022, and 2024 and accessed April 3, 2024, were also utilized.

#### 10. OTHER SUPPORTING INFORMATION.

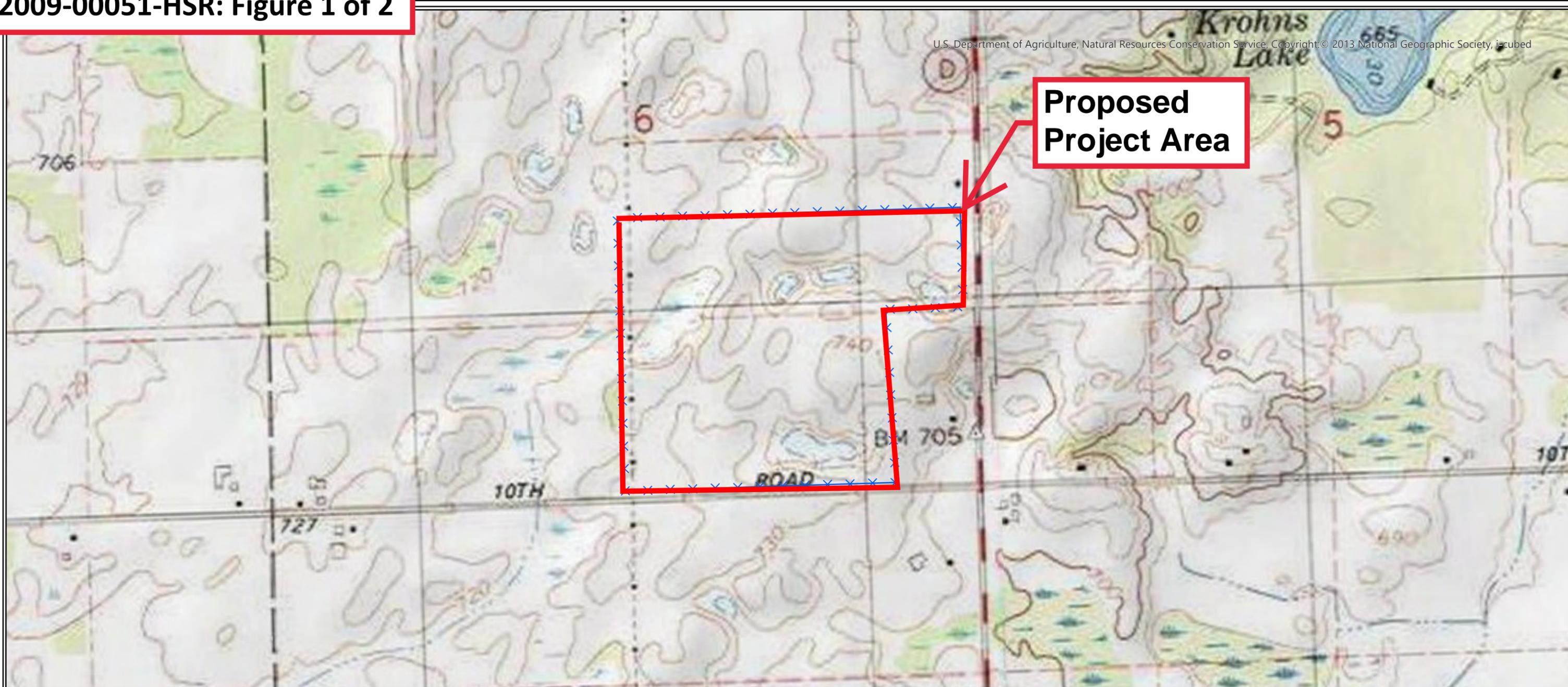
N/A

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-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), 2009-00051-HSR

U.S. Department of Agriculture, Natural Resources Conservation Service, Copyright © 2013 National Geographic Society, i-cubed



Ebert Enterprises  
 USGS Topographic Map  
 N6939 County Road D  
 Town of Pierce  
 Kewaunee County, WI



Legend

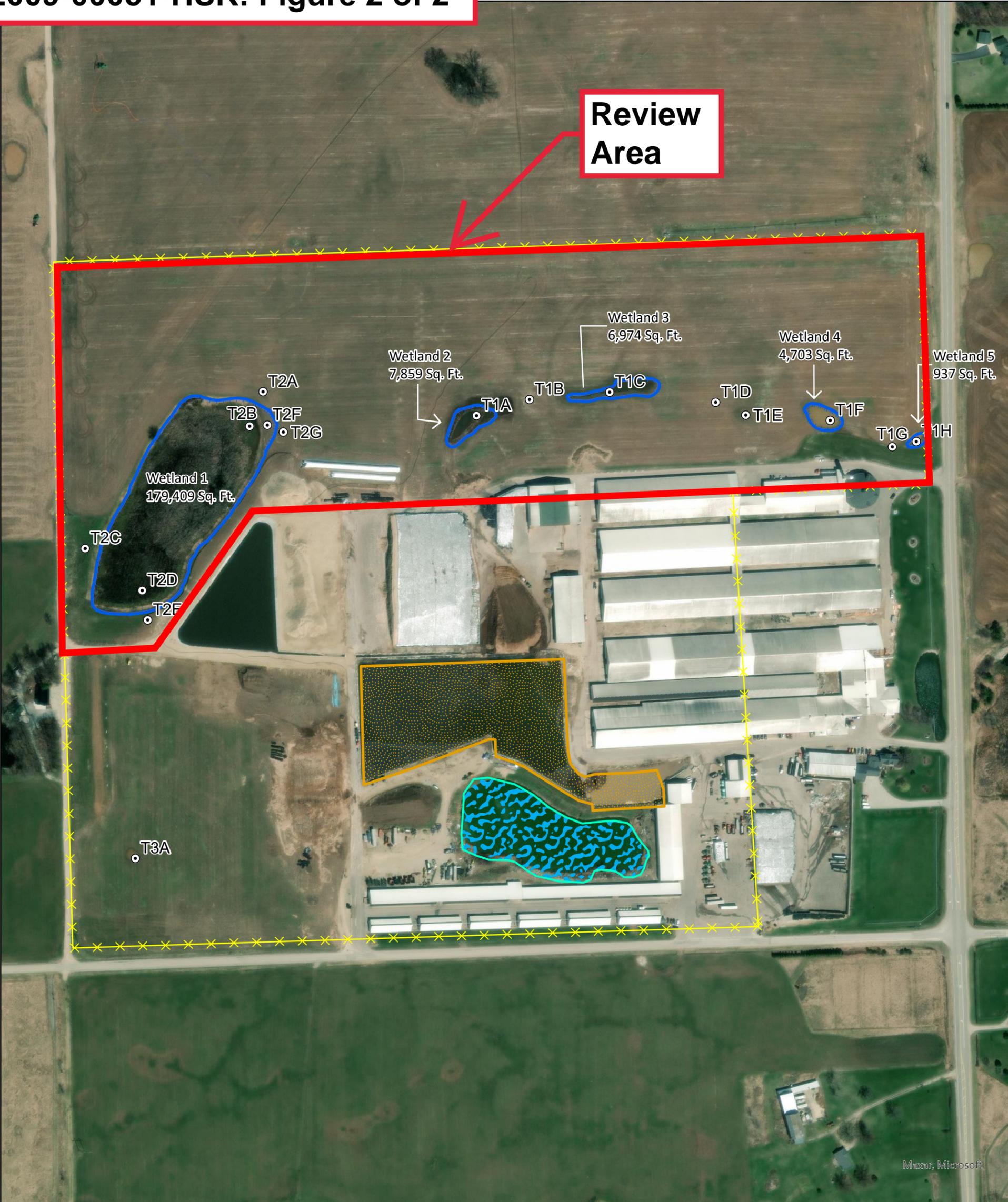
Site Boundary

Project: KEW23-022-01RC

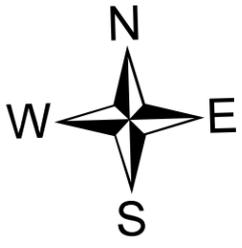


PO Box 680 Pulaski, WI 54162

Phone: 920.615.0019 • Website: [www.evergreenwis.com](http://www.evergreenwis.com)



Ebert Dairy  
 Wetland Delineation Map  
 N6939 County Road D  
 Town of Pierce  
 Kewaunee County, WI



Legend

- Site Boundary
- Sample Point
- Wetland Line
- Wetland
- Manure Storage Pit
- Pond

Wetland Delineation was conducted by  
 Chad Fradette, EP, Chem,  
 WDNR Professionally Assured Wetland Delineator  
 with assistance from  
 Shyann Banker, Environmental Specialist

Project: KEW23-022-01



Phone: 920.615.0019 • Website: www.evergreenwis.com

PO Box 680 Pulaski, WI 54162