

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2011-02953-JLK

MVP

January 26, 2026

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-2011-02953-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
Wetland W3	Non-Jurisdictional	None
Wetland W6/Ditch	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): 16.10
- b. Location Description: The project/review area is located in Section 18, Township 18N, Range 16E, Winnebago County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.03505 Longitude: -88.63033
- d. Nearest City or Town: Algoma
- 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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. NA

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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
 - g. Additional Waters (a)(5): 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.

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 NA
- 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 W6/Ditch is not a TNW, territorial sea, or interstate water and therefore is not an (a)(1) water. The wetland delineation report, topographic maps, and Google Earth Pro aerial imagery, indicates Wetland W6/Ditch is a linear ditch-shaped feature originating from Wetland W3 in the south/central portion of the review area towards the northeast with wetland boundaries contained within the ditch feature. A review of historical aerial photos reveals a lack of flowing/standing water. Uplands involving a previously farmed agricultural field are immediately east, west, and north of Wetland W6/Ditch with residential development further beyond and to the south. The Surface Water Data Viewer shows a mapped tributary entering the northeast portion of the review area and into Wetland W6/Ditch then angling northward outside of the review area where it then heads west and continues to a tree line approximately 0.15 mile further west, then turns south/southwest into a wetland complex expanding north and south. The mapped tributary also continues eastward outside of the review area continuing approximately 0.67 mile further east through a residential development. Further review of aerial photos via Google Earth Pro shows the tributary continuing through a ditch-like feature surrounded by uplands involving the previously mentioned residential development to the east. The Surface Water Data Viewer shows the mapped tributary is a first order stream and approximately 1.06 miles in length and does not intercept any other mapped tributary or TNW along the entire reach. A review of historical aerial photos provided via Google Earth Pro and World Imagery Wayback and a review of site level photos provided in the delineation report and Google Earth-Street View, shows no standing or flowing water present along the entire 1.06 miles. Additionally, a review of street level photos shows the eastern end of the tributary

⁸ 88 FR 3004 (January 18, 2023)

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not only lacks standing/flowing water but also lacks a bed and bank and ordinary high water mark. This indicates Wetland W6/Ditch, and the entire length of first order tributary, is not a relatively permanent water.

The wetland delineation report indicates Wetland W3 is located in the south/central portion of the review area at the southwestern end of the previously evaluated Wetland W6/Ditch. Wetland W3 is surrounded by uplands involving the previously farmed agricultural fields to the north, west, and east, and residential development to the south. The delineation report shows Wetland W3 reaches a another ditch-feature extending offsite to the south. Lidar data suggests this ditch continues southward under HWY 21 and indicates a second ditch is present circling the southern boundary of Wetland W3 and continuing in the same direction as the first ditch. Both ditches continue southward along a paved driveway associated with a nearby commercial development. A review of Google Earth Pro-Street Level photos indicates these ditches are shallow and transitions to uplands just south of the review area. Additionally, data sources show no standing or flowing water, no bed and bank, and no ordinary high water mark present, indicating these ditch features are not relatively permanent waters.

Based on the above information, Wetlands W3 and W6/Ditch 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. Therefore, Wetlands W3 and W6/Ditch 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. Office evaluation conducted on January 15, 2026.
 - b. Olde Apple Acres, Phase 4, Town of Algoma, Winnebago County Wetland Delineation Report provided by Davel Engineering dated June 18, 2022.
 - c. National Regulatory Viewer-Lidar Data and Google Earth Pro assessed January 15, 2026.
 - d. World Imagery Wayback assessed January 21, 2026.

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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

- 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
- Wetland Identifications and Confirmations
- NRCS Wetspots
- Stream Order**
 - 1st Order
 - 2nd Order
 - 3rd Order
 - 4th Order
 - 5th Order
 - 6th Order
 - 7th Order
 - 8th Order
 - 9th Order
- Municipalities



NAD_1983_HARN_Wisconsin_TM

1: 3,960

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

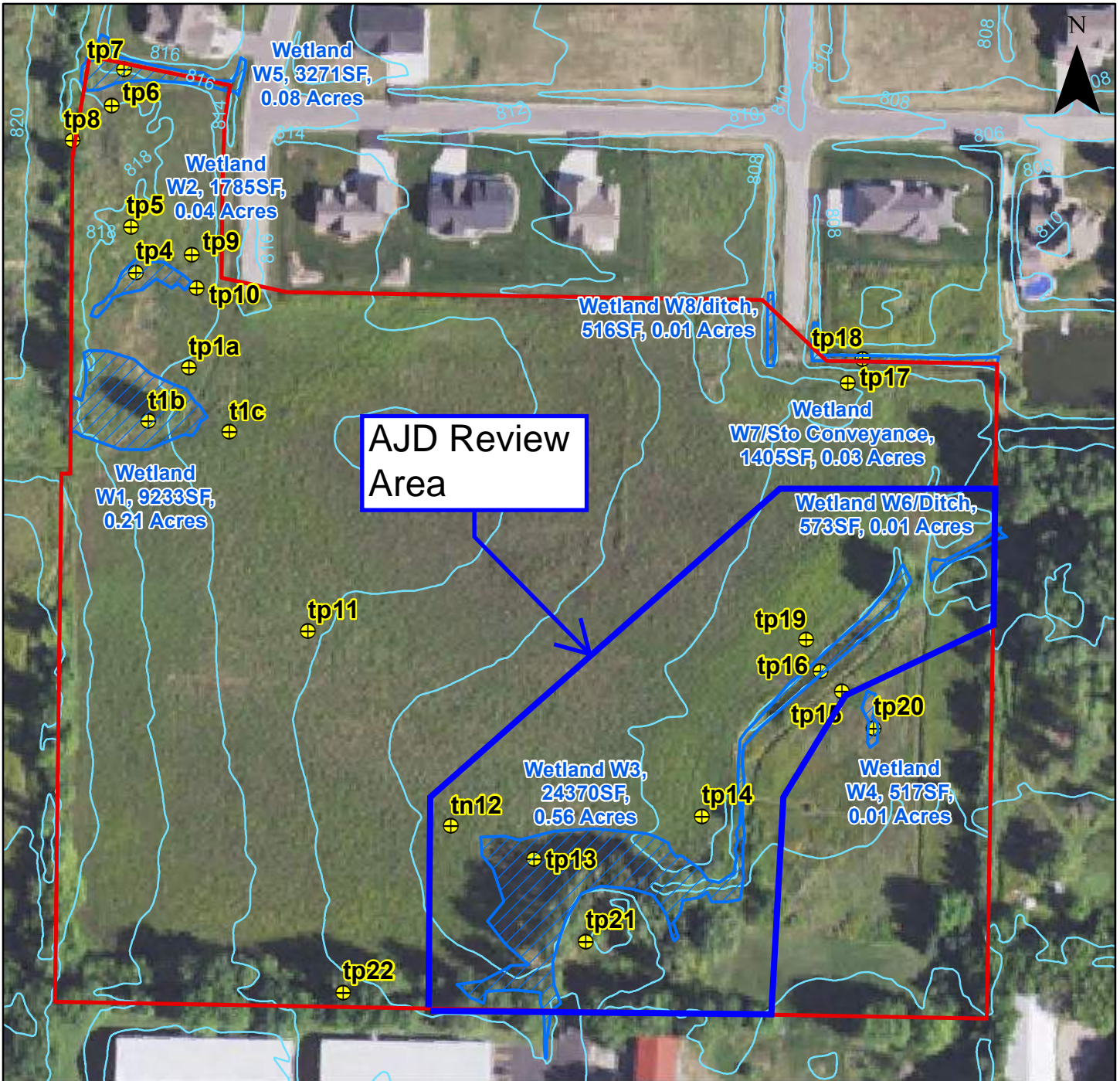
Routine Wetland Delineation Map

Old Apple Acres Phs. 4

Part of Sec. 18, T18N, R15E, Town of Algoma, Winnebago County,

For: John Mark

2020 Aerial



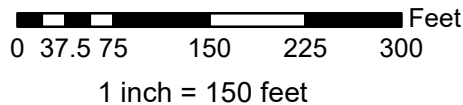
The project scope limits shown on this map is not intended to be the parcel boundary.

The wetland boundary was determined by Travis A. Stuck, **DNR-Professionally Assured Delineator**.

_____ B.S., P.W.S#2430 date: _____

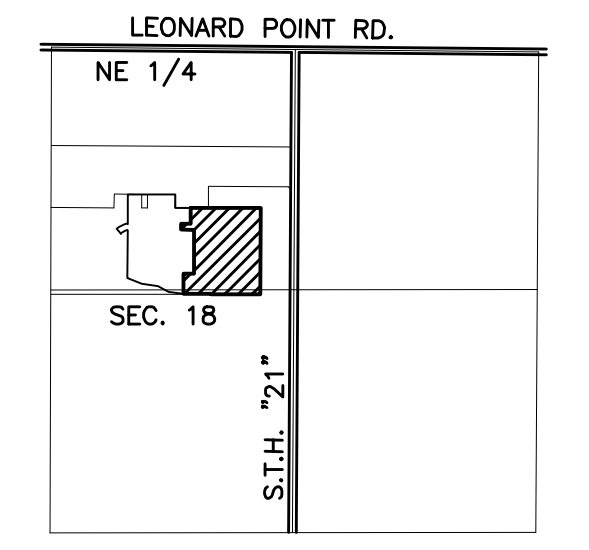
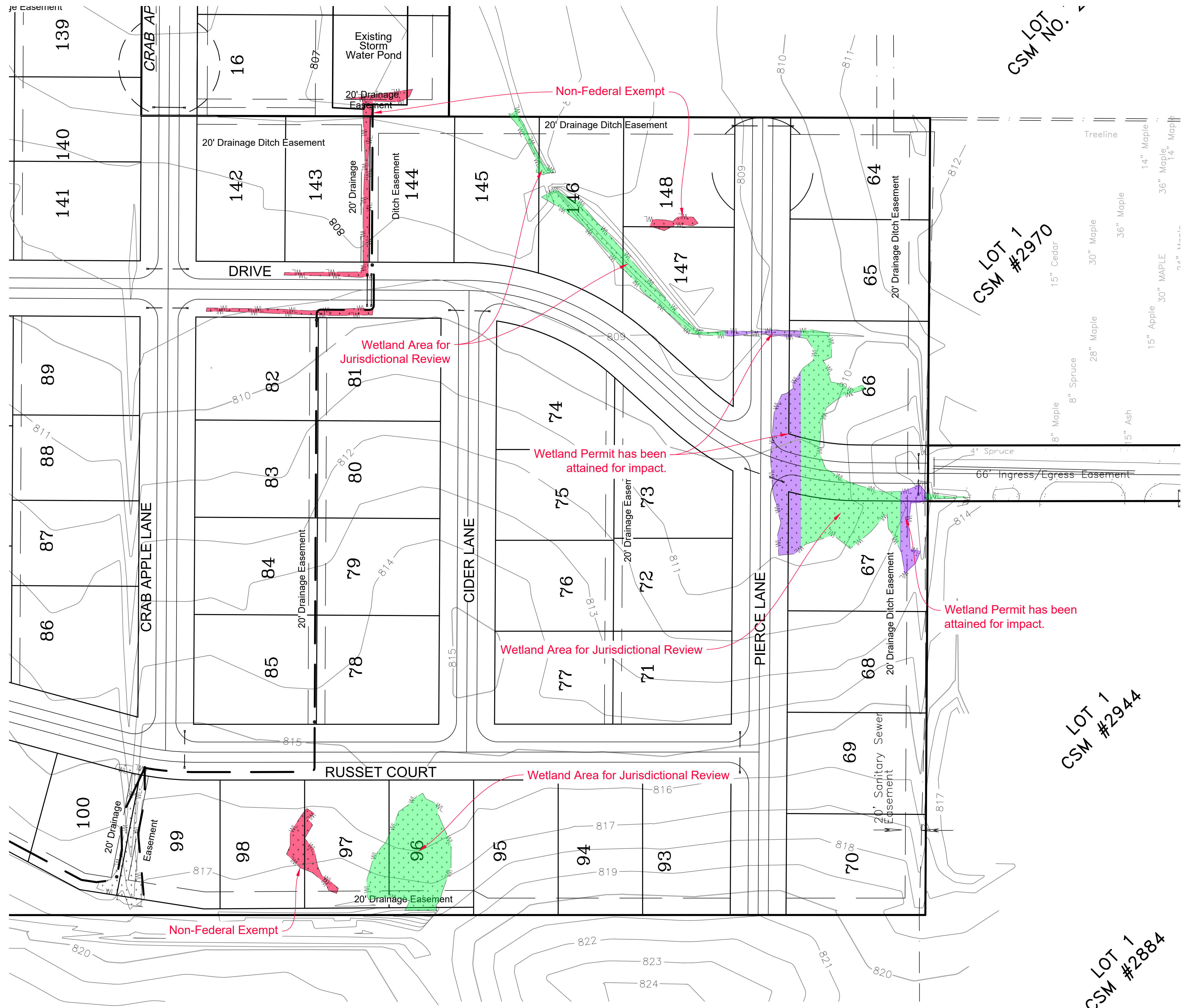


DAVEL ENGINEERING & ENVIRONMENTAL, INC.
Civil Engineers and Land Surveyors
1164 Province Terrace, Menasha, WI 54952
Ph: 920-991-1866 Fax: 920-441-0804
www.davel.pro

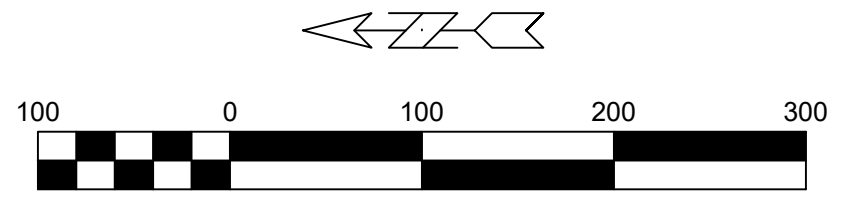


Legend

- ProjectScope
- field_delineation
- ⊕ Soil Boring



SHOWING SECTION 18, TOWNSHIP 18 NORTH, RANGE 16 EAST, TOWN OF ALGOMA, WINNEBAGO COUNTY, WISCONSIN.



LEGEND

- Ditch Check
- Silt Fence
- Inlet Protection (Rock Filter Bags)
- Prop. Drainage Direction
- Index Contour
- Intermediate Contour
- Delineated Wetlands
- Permitted Wetland Impact
- Class 1, Type B Matting

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DAVEL ENGINEERING & ENVIRONMENTAL, INC.
 CIVIL ENGINEERING CONSULTANTS
 1811 Racine Street, Menasha, WI 54952
 Ph: 920-991-1866 Fax: 920-930-9595
 www.davelpro

FINAL PHASE WETLAND IMPACT PLAN

OLDE APPLE ACRES
 TOWN OF ALGOMA, WINNEBAGO COUNTY
 FOR: Midwest Real Estate

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