



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

MVP

May 16, 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-2013-04274-TKO 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).
 - i. [Wetland W-1, non-jurisdictional \(1.38-ac. Lat/Long: 42.8783, -87.8472\)](#)

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 is located in the east central portion of the property at 9100 South 5th Avenue in the City of Oak Creek. The review area is identified by a red polygon on the attached Figures 1 - 2 of 2. There are no other JDs associated with the review areas. The review area is located in Section 24, Township 05 N, Range 22 E, City of Oak Creek, Milwaukee County, WI. See attached figures, labeled 2013-04274-TKO Figures 1-2 of 2. HUC: Oak Creek-Frontal Lake Michigan \(0404000201\). Lat/Long: 42.8783, -87.8472](#)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A](#)⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [\[N/A\]](#)

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.

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.
 - 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): [\[N/A\]](#)

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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.

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- 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 June 2023 Hey and Associates delineation report, Google Earth and historic aerial images, Milwaukee County GIS, 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 2,500 feet northwest of the closest tributary \(Unnamed Tributary \(WBIC 3000340\) to Lake Michigan\) and 380 feet west from Lake Michigan. 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 east central portion of the parcel directly east of a previous industrial facility, between the facility's remnant foundation and Lake Michigan. W-1 has boundaries that transition to delineated upland in all directions. Review of LiDAR and contours show the wetland sitting at a lower elevation than the surrounding upland, while aerial imagery shows a lack of wetness signature outside the wetland's delineated boundaries. Fill material from the industrial facility confines W-1 to the west. Review of LiDAR shows a \(SW-NE running\) linear berm extending into W-1's southwest boundary. To the north, LiDAR and ground level photos show historic fill material from an old rail line, which bounds W-1. Both berms sit at higher elevations, contain no culverts/pipes, and do not separate W-1 from any downstream waters. At the wetlands eastern most point, topography generally levels out leading towards Lake Michigan. At this point a low gradient](#)

⁹ 88 FR 3004 (January 18, 2023)

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depressional area extends towards the lake, which is located between the northern berm and a slight topographic rise to the south/southeast of W-1. Review of LiDAR for this area shows a very slight topographic rise before gradually sloping down towards Lake Michigan through delineated upland. Following review of LiDAR, contours, and ground level photos, no discrete feature is evident which would serve as a continuous surface connection to downstream waters. Along the wetland's southern boundary topography gradually rises to uplands, approximately two (2) feet higher in elevation, before sloping somewhat sharply down to a roadway. LiDAR shows a discrete drainage feature along this boundary, towards the wetland's western end. This feature connects W-1 to a manhole where it enters the municipal stormwater system. In accordance with the Joint Decision Memorandum on NWP-2023-602, where it states "subsurface flow through the city's underground storm sewer system does not qualify as a continuous surface connection", no continuous surface connection is present through the municipal stormwater system. No other identifiable features exist along this southern boundary. There are no other culverts/pipes or discrete features associated with W-1 that would serve as an outlet and constitute 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.

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 2/05/2024.
 - b. AJD Application "2013-04274-TKO 20231226 APP.pdf" in the administrative record, 2/05/2024.
 - c. Mississippi Valley Division Regulatory Viewer, 2/05/2024.
 - d. Wisconsin DNR Surface Water Data Viewer, 2/05/2024.

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e. [Milwaukee County GIS Interactive Mapping](#), 2/05/2024.

10. OTHER SUPPORTING INFORMATION.

[Joint Decision Memorandum on NWP-2023-602](#), 05/01/24

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.

**NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND
REQUEST FOR APPEAL**

Applicant: Hey and Associates, INC. (Bob Kerpec)		File No.: 2013-04274-TKO	Date: 06/05/2024
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL	C	
X	APPROVED JURISDICTIONAL DETERMINATION	D	
	PRELIMINARY JURISDICTIONAL DETERMINATION	E	

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://usace.army.mil/inet/functions/cw/cecwo/reg> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:

Tim Orlowski
U.S. Army Corps of Engineers
Green Bay Field Office
211 N. Broadway St, Suite 221
Green Bay, WI 54303
(651) 290-5010

If you only have questions regarding the appeal process you may also contact the Division Engineer through:

Administrative Appeals Review Officer
Mississippi Valley Division
P.O. Box 80 (1400 Walnut Street)
Vicksburg, MS 39181-0080
601-634-5820 FAX: 601-634-5816

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

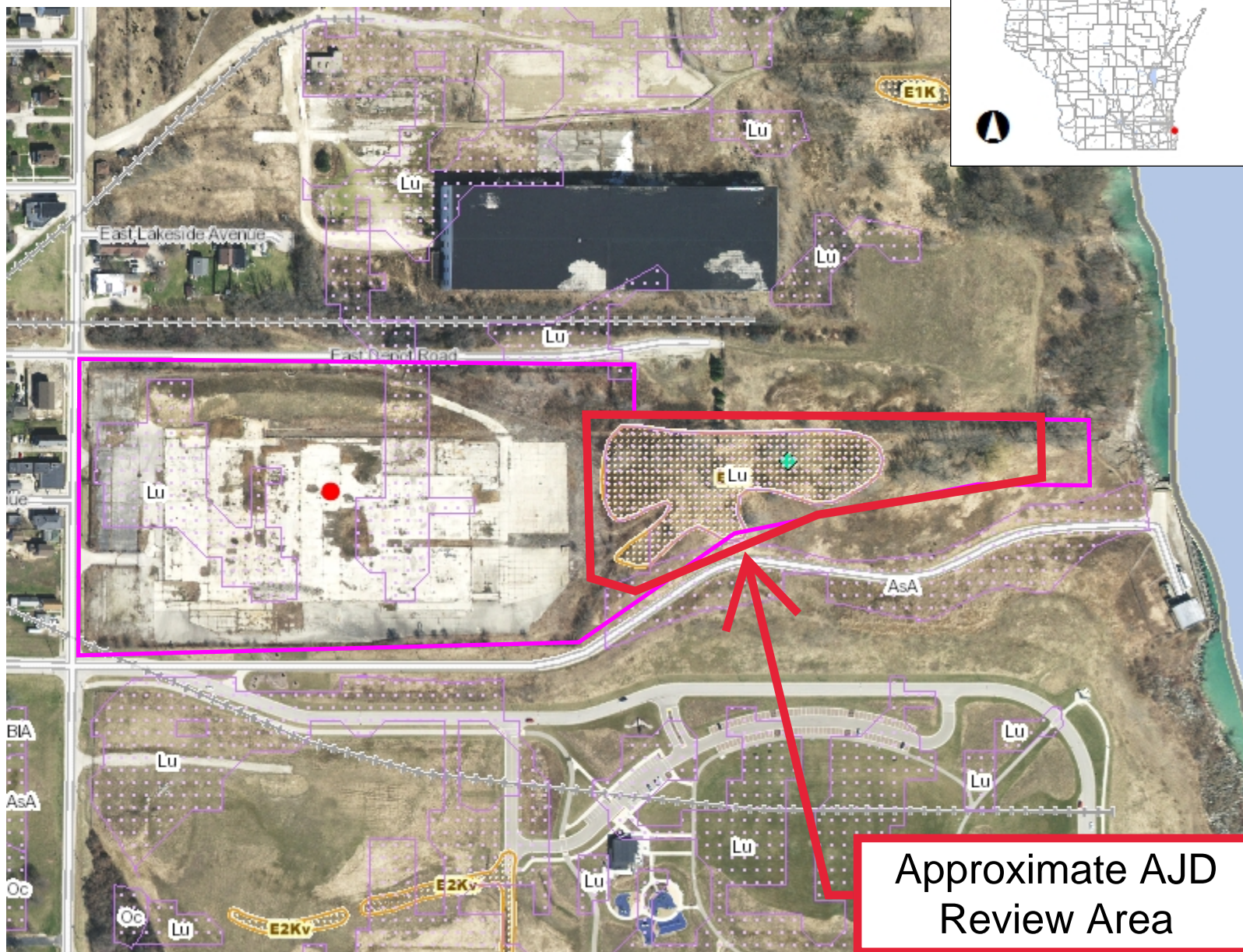
Signature of appellant or agent.

Date:

Telephone number:



2013-04274-TKO Figure 1



- Legend**
- Wetland Indicators
 - Lake Class Areas
 - Riverine/ditch Class 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
 - Lake Class Areas
 - Riverine/ditch Class 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
 - Municipality
 - State Boundaries
 - County Boundaries
 - Major Roads
 - Interstate Highway
 - State Highway
 - US Highway

Approximate AJD
Review Area

0.1 0 0.06 0.1 Miles

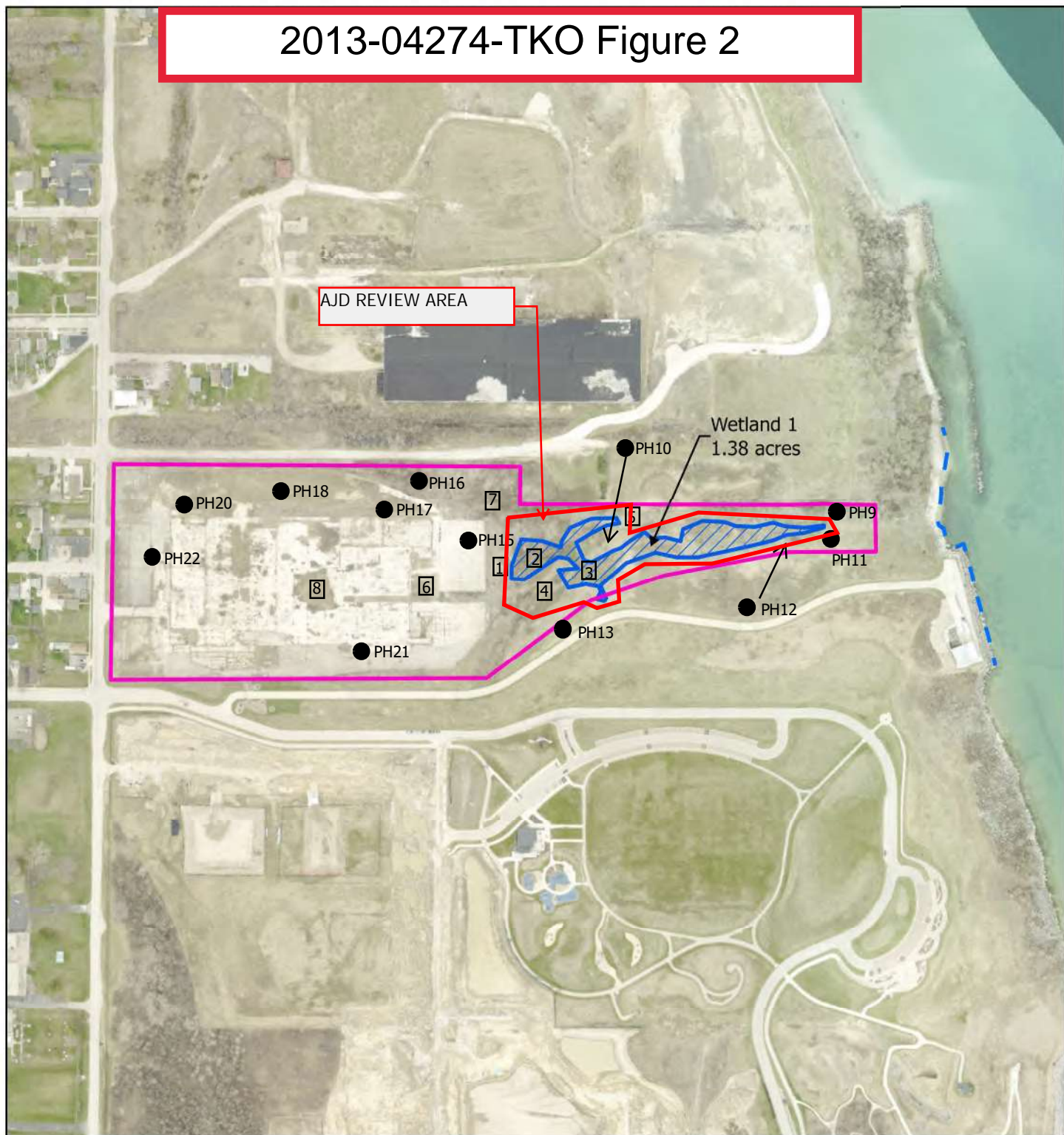
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1: 3,960

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Notes

2013-04274-TKO Figure 2



0 400 Feet

Project Number: 23-0062

Date: 7/26/2023



Legend:

- Project Boundary
- Surveyed Wetland Boundary
- Estimated Off-site Lake Boundary
- Wetland Data Point Location
- Site Photo Location

Project Name:
South 5th Avenue - Oak Creek

Prepared for:
Ramboll

Aerial Date:
2020