



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

CE-MVP-RD

November 25, 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-2015-02266-CJB [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.

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).

1. w01 (0.13 acres), 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.

- a. Review Area Size: 1.83 acres
- b. Location Description: The project/review area is located in Section 08, Township 21N, Range 18E, Outagamie County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.315490 Longitude: -88.336720
- d. Nearest City or Town: Town of Vandebroek
- e. County: Outagamie
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):
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]⁶

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.

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.
 - 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]

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.

- 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 [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 contains one wetland identified as w01 on the figure labeled MVP-2015-02266-CJB Figure 2 of 2. Based on review of aerial photos, this wetland is situated within the landscape with commercial development to the north and west and a restored meadow to the south and east. Based on review of historic aerial photos and the wetland delineation report, this site was undeveloped until the commercial development to the north and west of w01 was constructed sometime between 2014 and 2018. Review of historic images indicates a nearby stream (Apple Creek) south and east of w01 (offsite) was relocated and stormwater ponds and a culverted crossing were constructed sometime between 1992 and 2000. Overall, topography at this site ranges from 727 mean sea level (msl) to 730 msl, with w01 generally located within the 727-foot elevation. Based on review of the wetland delineation report provided by the applicant, this wetland is located within a shallow topographic depression with hydrologic inputs derived from surface water runoff and rooftop drainage from nearby commercial development. No discrete water conveyance features within the commercial development adjacent to w01 were identified in aerial photos, onsite photos, or LIDAR that would provide w01 a continuous surface connection to a downstream water. Apple Creek is located approximately 200 feet to the

⁹ 88 FR 3004 (January 18, 2023)

east of w01 and a stormwater pond is located approximately 185 feet to the south of w01 so desktop resources were reviewed for potential hydrologic connections between w01 and these aquatic resources. Based on review of aerial photos, LiDAR, and 2-foot contour lines, no physical features were observed that would provide discrete conveyance between w01 and another aquatic resource and a continuous surface connection is not present. Lack of a discrete water conveyance feature is further evident in historic aerial photos (1992 to 2023 from the wetland delineation report) and onsite photos, as they do not display any discrete water conveyance from wetland w01 to a downstream water.

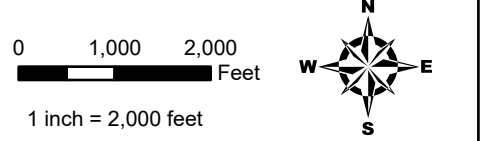
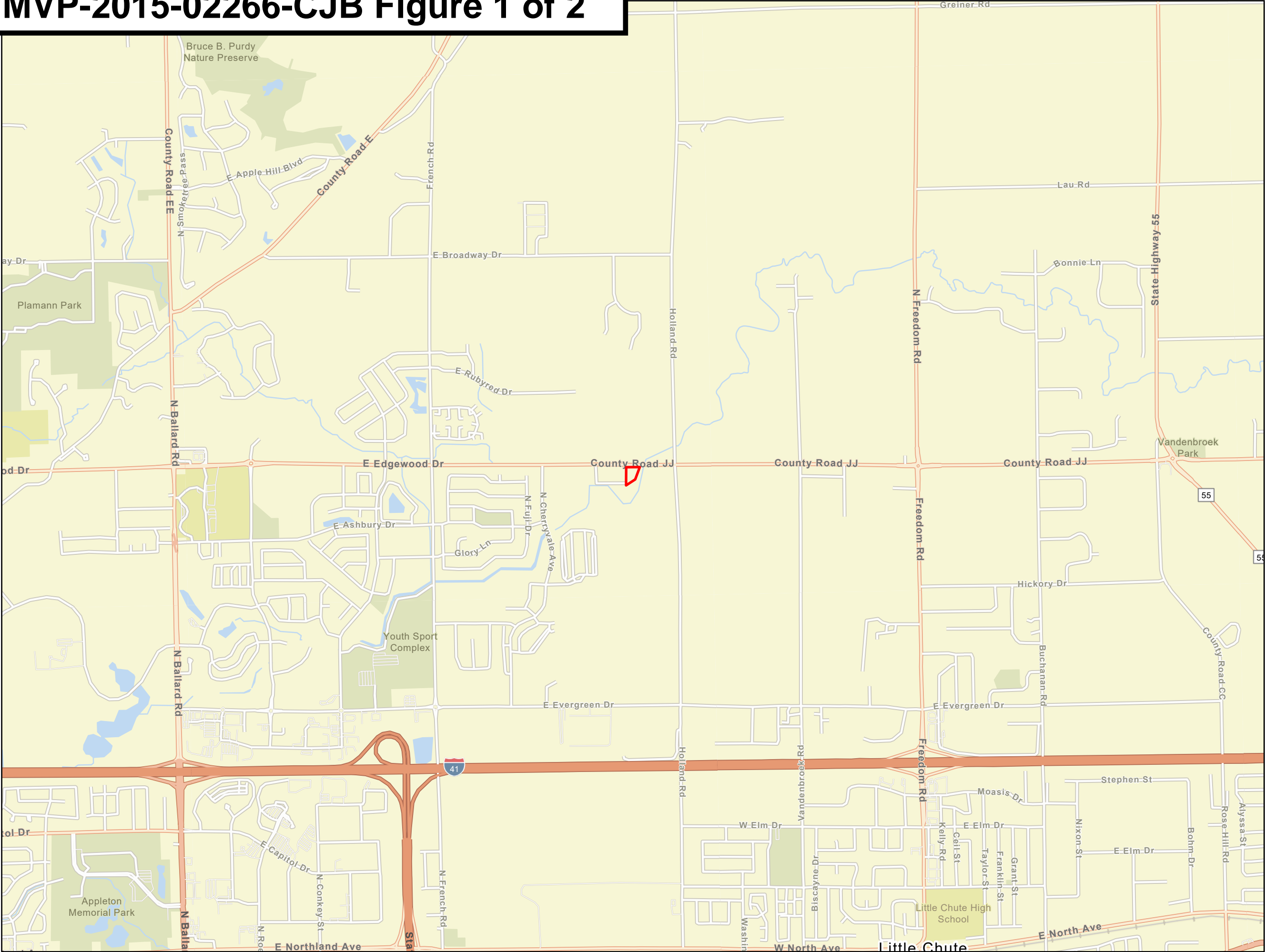
Based on review of the wetland delineation report and landscape position depicted in aerial imagery, wetland w01 is not a TNW, territorial sea, or interstate water; therefore, w01 is not category (a)(1) water. This wetland is not a tributary and has not been created by impounding a water of the U.S.; therefore, this wetland is not a category (a)(2) or (a)(3) water. Wetland w01 does not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule, and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform, and is not connected to a paragraph (a)(1) or relatively permanent water by a discrete feature. Wetland w01 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. Wetland w01 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, wetland w01 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. Office Evaluation Conducted November 18, 2024
 - b. Wetland Delineation Report, prepared by Merjent, dated September 2024
 - c. USACE National Regulatory Viewer, LiDAR (3DEP DEM, 3DEP Hillshade), November 18, 2024
10. OTHER SUPPORTING INFORMATION. [N/A]

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2015-02266-CJB

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.




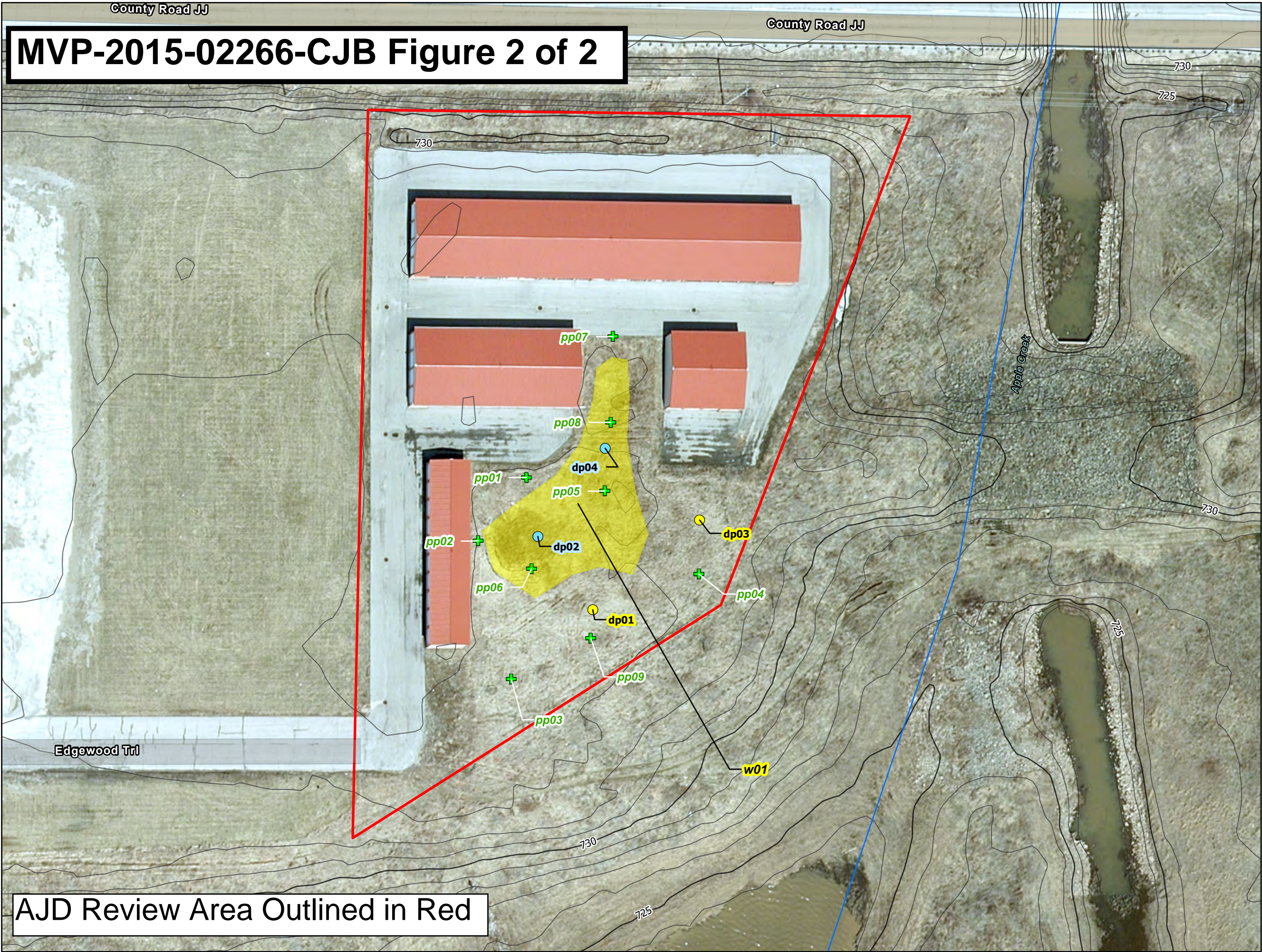
 Project Area (1.83 acres)

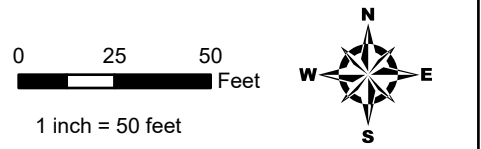
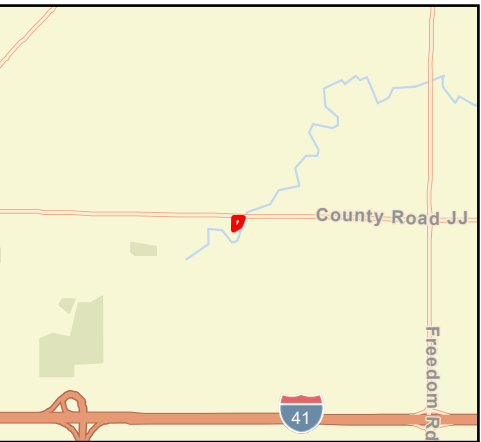
Figure 1
Project Location
Apple Creek Self Storage
Mach IV
Outagamie County, Wisconsin



MVP-2015-02266-CJB Figure 2 of 2



AJD Review Area Outlined in Red



- Project Area (1.83 acres)
- Photo Point
- Upland Data Point
- Wetland Data Point
- Waterway (WDNR 24k)
- Index Contour
- Intermediate Contour
- Delineated Wetland**
- Fresh (Wet) Meadow

Figure 5
Wetland Delineation
Apple Creek Self Storage
Mach IV
Outagamie County, Wisconsin

