



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

30 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-2016-01993-CJB, MFR 1 of 1.<sup>2</sup>

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>3</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>4</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>5</sup> the 2023 Rule as amended,

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<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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

CE-MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2016-01993-CJB

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 1 (0.29 acre), 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 for this JD is approximately 4.5 acres in size and is identified on the figure labeled 2016-01993-CJB Figure 2. The center of the review area is located at 44.21935 N, -88.53139 W, in the Town of Clayton, Winnebago 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.<sup>6</sup> N/A

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

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<sup>6</sup> 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.

CE-MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2016-01993-CJB

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</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
  - g. Additional Waters (a)(5): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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<sup>7</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>8</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.

- 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>9</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).

Wetland 1 is positioned between a roadway and a commercial development. Based on review of the wetland delineation report that was provided with the JD request and historic aerial photos, the review area was cropland until 2015. Modifications since 2015 include the construction of the roadway (American Drive) near the northern limits of the review area and a commercial lot in the southern portion of the review area. The review area is located approximately 0.12 miles to the southeast of the closest tributary (unnamed tributary to Mud Creek) so the area to the northwest of the review area was reviewed to determine if a potential continuous surface connection exists between Wetland 1 and the unnamed tributary. A culvert that was constructed under American Drive and a ditch that was constructed north of American Drive provides Wetland 1 with a discrete connection to a stormwater pond located north of the review area. This stormwater pond was then reviewed for potential outlets that could provide Wetland 1 with a potential connection to a downstream water. Based on review of LiDAR and aerial photos, one potential outlet exists along the northern boundary of the stormwater pond, however, the potential outlet is immediately adjacent to a farm field and no discrete water conveyance feature is present north of the potential outlet. The stormwater ponds western limits are situated approximately 50 feet from an unnamed tributary; however, no discrete features were identified in LiDAR or aerial images that would provide discrete conveyance between the stormwater ponds western limits and the unnamed tributary. Based on review of historic aerial photos, the stormwater pond does not appear to actively direct flow downslope in any of the available historic photos. Any exchange in hydrology between the stormwater pond and the unnamed tributary would likely be through overland sheet flow and not discrete conveyance.

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

CE-MVP-RD

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Therefore, Wetland 1 does not have a continuous surface connection to a paragraph (a)(1) or relatively permanent water.

Based on review of the delineated wetland boundaries and landscape position depicted in aerial imagery, Wetland 1 is not a TNW, territorial sea, or interstate water; therefore, Wetland 1 is not a category (a)(1) water. Historic aerial photos indicate this wetland is not a tributary and was not created by impounding a water of the U.S.; therefore, Wetland 1 is not a category (a)(2) or (a)(3) water. This wetland does not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule, 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 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 pond not identified in (a)(1) – (a)(4). Therefore, Wetland 1 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.

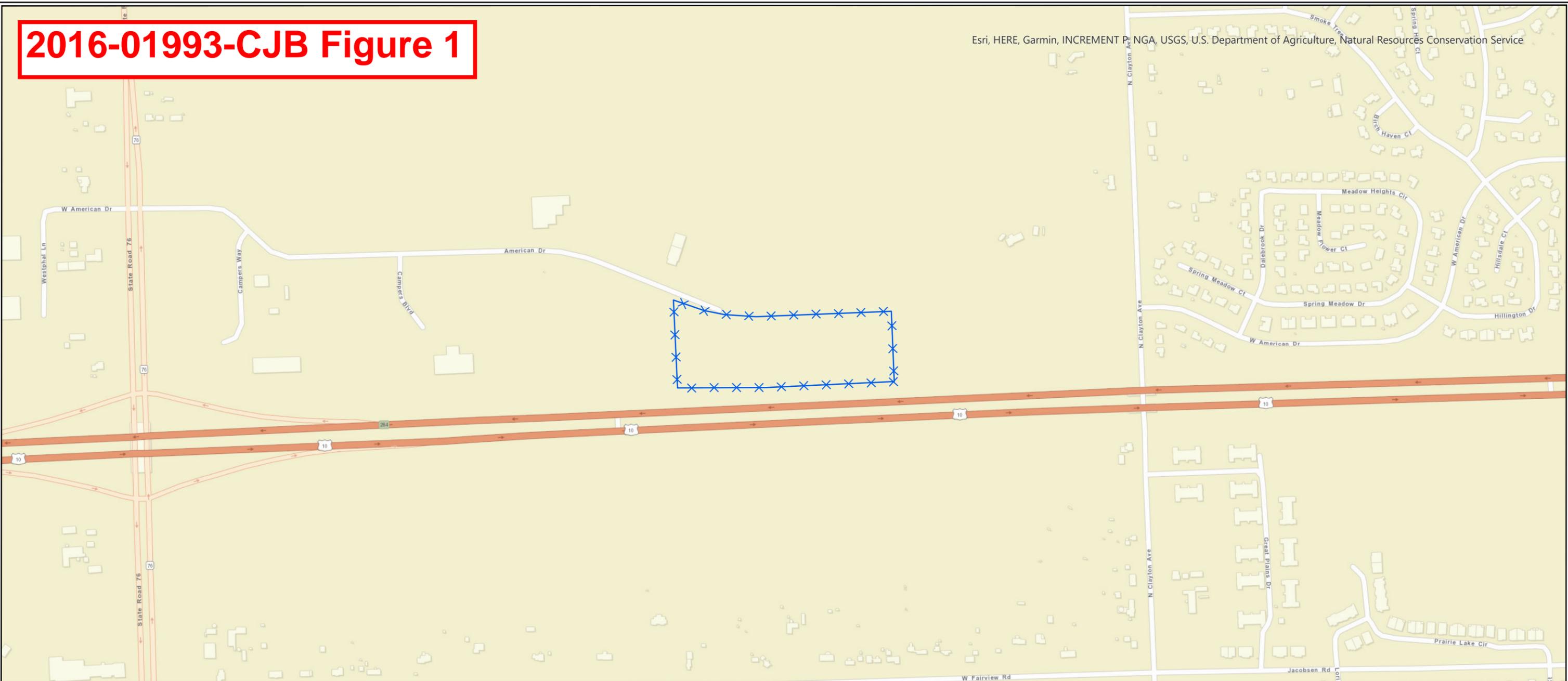
- a. Office Evaluation conducted on April 22, 2024
- b. Wetland Delineation Report provided by Evergreen Consultants, LLC, dated October 7, 2023
- c. U.S. Army Corps of Engineers National Regulatory Viewer, LiDAR and Stream Order layers, April 22, 2024
- d. Google Earth Aerial Photos, select years from 2008-2024

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.

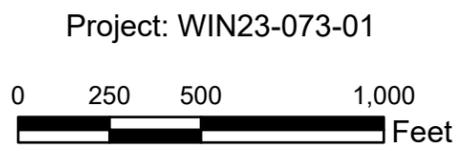
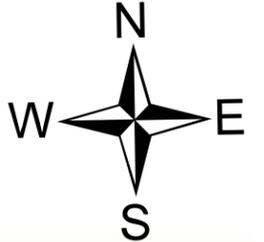
# 2016-01993-CJB Figure 1

Esri, HERE, Garmin, INCREMENT P, NGA, USGS, U.S. Department of Agriculture, Natural Resources Conservation Service

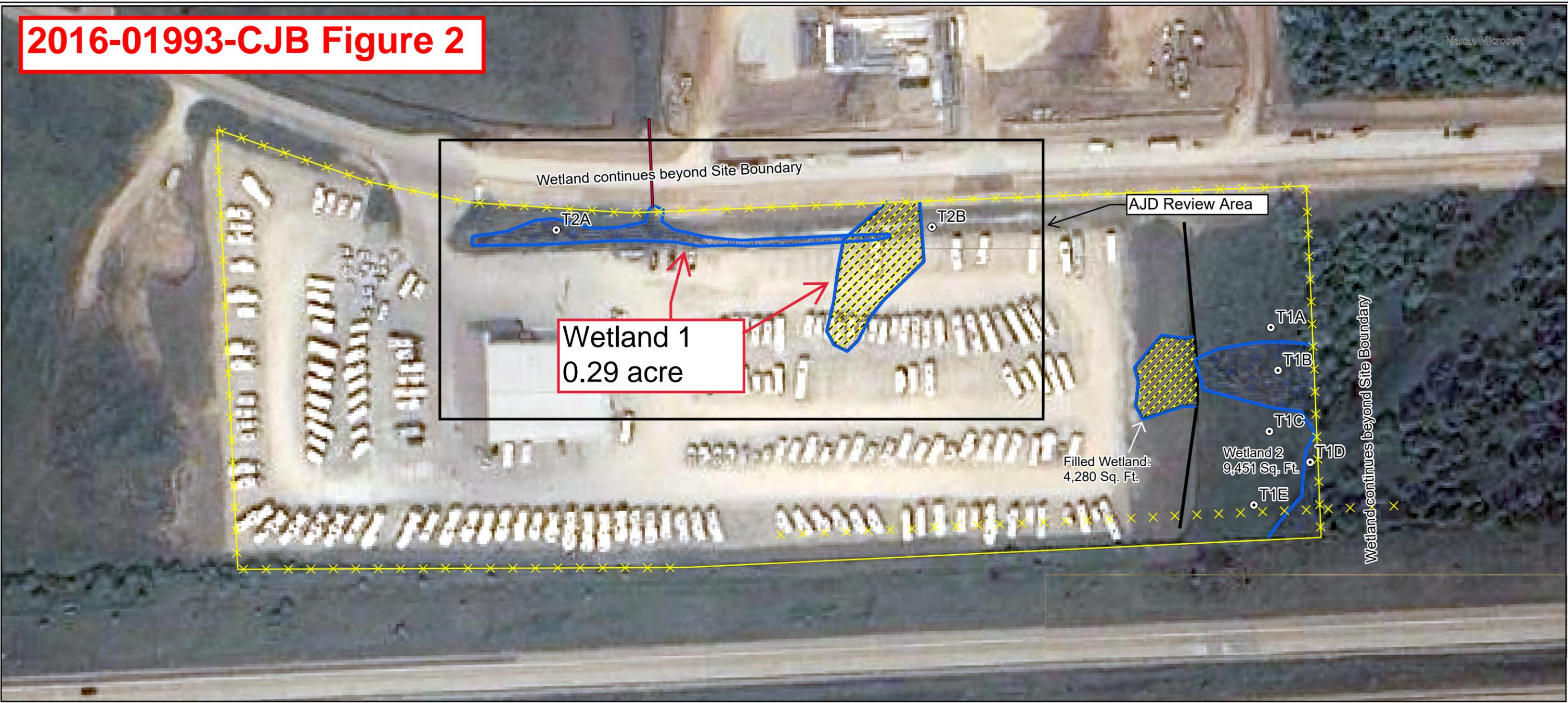


Legend  
✕ Site Boundary

## Kunes Fox Valley RV Site Location Map 2615 West American Drive Town of Clayton Winnebago County, WI



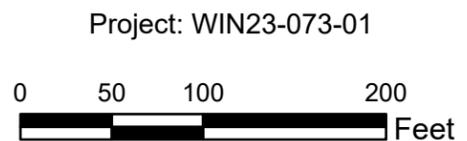
PO Box 680 Pulaski, WI 54162  
Phone: 920.615.0019 • Website: [www.evergreenwis.com](http://www.evergreenwis.com)



- Legend**
- Wetland Line
  - Wetland
  - Filled Wetland
  - Sample Point
  - Culvert
  - Fill Line
  - Site Boundary

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

**Kunes Fox Valley RV  
 Wetland Delineation Map  
 2615 West American Drive  
 Town of Clayton  
 Winnebago County, WI**



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