



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

MVP

01 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) ,¹ MVP-2017-04192-JLK MFR 1 of 1.

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.² 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.³

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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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 (0.09 acre), non-jurisdictional
 - ii. Wetland W-3 (0.12 acre), non-jurisdictional
 - iii. Wetland W-4 (0.05 acre), non-jurisdictional
 - iv. Wetland W-5 (0.10 acre), non-jurisdictional
 - v. Wetland W-8 (0.06 acre), non-jurisdictional
 - vi. Wetland W-10 (0.42 acre), non-jurisdictional
 - vii. Wetland W-11 (0.04 acre), non-jurisdictional
 - viii. Ditch W-7 (0.03 acre), non-jurisdictional
 - ix. Ditch W-9 (0.01 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. There are five review areas identified by the red polygons on the attached figures. The review areas are located in or near 43.68709 N, -87.75436 W in the City of Sheboygan, Sheboygan County, Wisconsin. There are no other JDs associated with these review areas.

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

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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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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).⁷

Based on a review of the wetland delineation report and historical aerial photos provided via Google Earth Pro, Ditches W-7 and W-9 meet the definition of a category (b)(3) exclusion for ditches excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. Aerial photos show Ditch W-7 traverses east to west and is associated with Stahl Road immediately to the north while Ditch W-9 traverses north to south within an agricultural field. Historical aerial photos show Ditch W-9 was constructed along with a storm water pond to the south sometime between 2017 and 2023. Further review of historical aerial photos demonstrates a lack of wet signatures or other wetland indications (standing water, repeated vegetation stress, etc.) in the location of Ditch W-9, suggesting this area was uplands prior to construction. Additionally, the Wisconsin Surface Water Data Viewer indicates no mapped wetlands or hydric soils present within the footprints of both ditches. Therefore, Ditches W-7 and W-9 are not jurisdictional under the 2023 Revised Definition of “Waters of the United States”: confirming 88 FR 61964 Final Rule.

- 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).

Wetlands W-1, W-3, W-4, W-5, W-8, W-10, and W-11 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Topographic maps and Google Earth aerial imagery indicate these wetlands are depressional wetlands, surrounded by uplands. They 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. Wetland W-1, the south westernmost wetland within the

⁷ 88 FR 3004 (January 18, 2023)

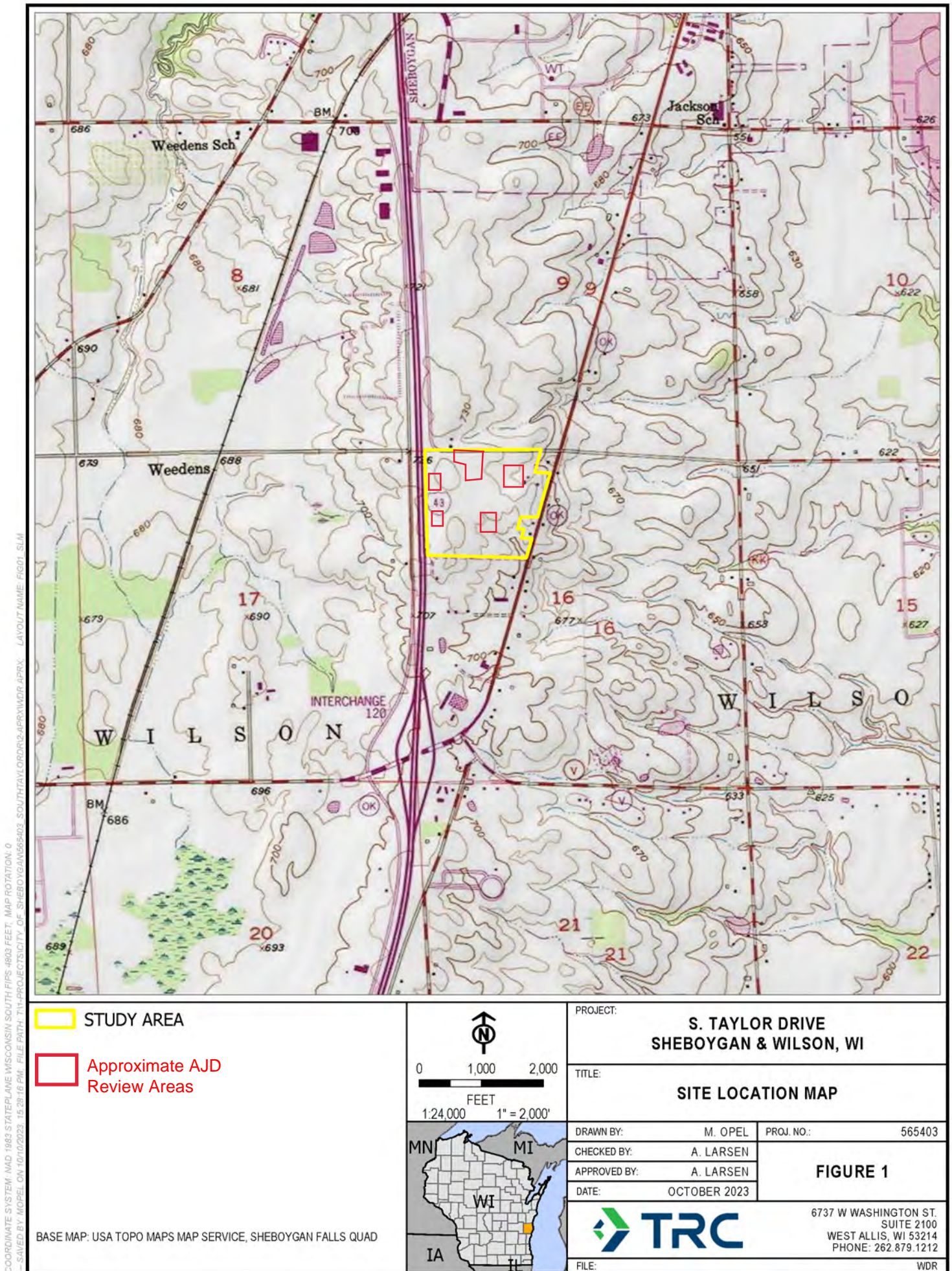
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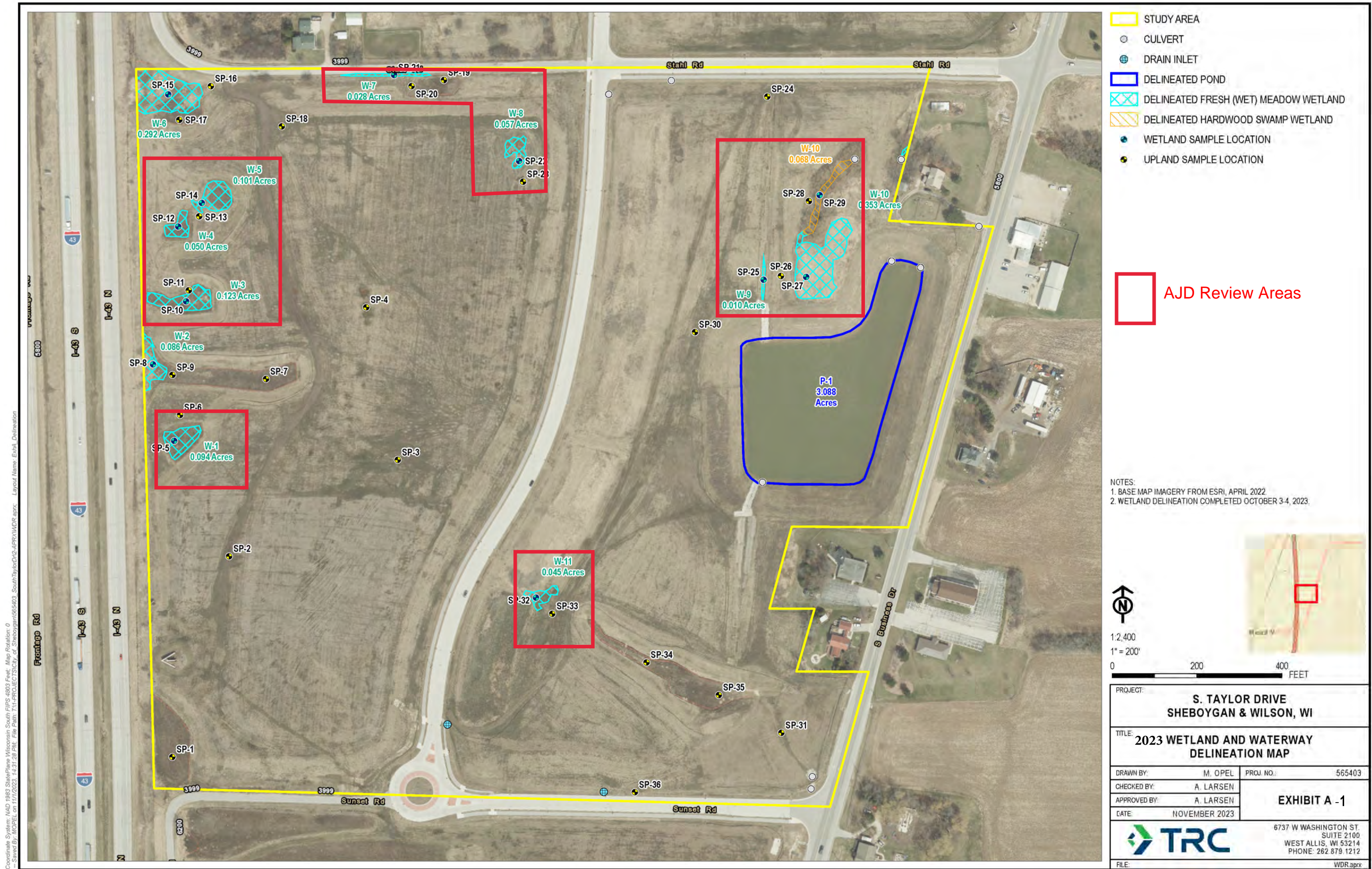
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review areas, is approximately 0.15 miles from an unnamed tributary, further southwest. Lidar data and aerial photos depict a linear-shaped swale feature starting at approximately 52 feet southeast of Wetland W-11 that extends further southeast where it appears to reach the roadside ditches associated with S. Business Drive and Sunset Road. However, the area between Wetland W-11 and the swale feature has been delineated as uplands and aerial photos show no wet signature or other evidence displaying a hydrological surface connection between these two features are present. Furthermore, no culvert or other feature is present that connects Wetland W-11 to this swale.

There are no ditches, swales, pipes, or culverts that connect Wetlands W-1, W-3, W-4, W-5, W-8, W-10, and W-11 to downstream jurisdictional waters. These wetlands are non-tidal wetlands that do not have a continuous surface connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands. Therefore, these wetlands 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 February 27, 2024.
 - b. S. Taylor Drive-Sheboygan & Wilson, WI, Wetland and Waterway Delineation Report prepared by TRC Environmental Corporation, dated November 3, 2023.
 - c. National Regulatory Viewer-Lidar Data assessed on February 27, 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.





2017-04192-JLK (Figure 2 of 2)