



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 10, 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-2018-00755-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.

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2018-00755-TKO](#)

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 \(0.78-ac. Lat/Long: 44.2295, -88.3447\)](#)
 - ii. [Wetland W-2, non-jurisdictional \(0.40-ac. Lat/Long: 44.2312, -88.3442\)](#)
 - iii. [Wetland W-3, non-jurisdictional \(0.07-ac. Lat/Long: 44.2328, -88.3438\)](#)
 - iv. [Wetland W-5, non-jurisdictional \(0.11-ac. Lat/Long: 44.2347, -88.3470\)](#)
 - v. [Wetland W-6, non-jurisdictional \(0.05-ac. Lat/Long: 44.2378, -88.3464\)](#)
 - vi. [Wetland W-7, non-jurisdictional \(0.24-ac. Lat/Long: 44.2334, -88.3459\)](#)
 - vii. [Wetland W-9, non-jurisdictional \(0.05-ac. Lat/Long: 44.2384, -88.3458\)](#)

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 an approximately 24-acre portion of the Southpoint Commerce Park in the City of Appleton, to the southeast of the I-441 corridor. The review area sits within an undeveloped parcel north of Midway Road, between Eisenhower Drive and North Coop Road, and is identified by a red polygon on the attached Figures 1-3 of 3. There are no other JDs associated with the review area. The review area is located in Section 04, Township 20 N, Range 18 E, Village of City of Appleton, Calumet County, WI. See attached figures, labeled 2018-00755-](#)

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2018-00755-TKO](#)

[TKO Figures 1-3 of 3. HUC-12: Garners Creek-Fox River \(040302040205\). Review area center approximate Lat/Long: 44.2320, -88.3446](#)

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

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.

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.

- 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

- 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

Wetland W-9 is a linear drainage ditch which runs primarily north/south and sits in the northern portion of the review area, between an actively cropped and fallow agricultural field. Review of aerial imagery shows the ditch was excavated in uplands at some point between 2008-10 to provide drainage for the site. Review of LiDAR shows the ditch outlets to a wet detention pond constructed during the same timeframe (MVP-2007-05962-NTD, No Permit Required), and is not a water of the U.S. W-9 fits under the definition of a b(3) water, from 33 CFR 328.3(b), as it was excavated wholly in and drains only dry land and does not carry a relatively permanent flow of water. Aerial images (Calumet Co. GIS: 1938, 92, and 2001, 05, and 10,) show the area prior to construction as being actively cropped agricultural fields. Sporadic wetness signatures can be seen throughout portions of the feature’s location, though no persistent wetness signature or any other indication of wetland presence (standing water, repeated crop/vegetation stress, distinct variation of vegetation) was observed. Additionally, USDA soil map data indicates the area consists of entirely non-hydric soils, with no mapped wetlands (WWI and NWI), further supporting the feature was excavated in uplands. WWI shows the presence of an intermittent stream just west (100-150 feet) of the ditch’s location, prior to excavation. The

⁹ 88 FR 3004 (January 18, 2023)

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2018-00755-TKO

wetland delineation which accompanied application 2007-05962-NTD, examined this area mapped as intermittent stream, and found it not to meet wetland characteristics (soils, veg, hydrology).

- 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-2, W-3, W-5, W-6, and W-7 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Review of a November 2021 raSmith delineation report, Google Earth and historic aerial images, Calumet County GIS, and hillshade and DEM GIS layers (from the Mississippi Valley Division Regulatory Viewer) indicate that wetlands W-1, W-2, W-3, W-5, W-6, and W-7 are depressional wetlands, surrounded by upland. These wetlands 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. The assessed wetlands range in distances of approximately 1,250 to 2,200 feet from the closest tributary (Unnamed Tributary (WBIC 5022085) to Garners Creek). However, there are no ditches, swales, pipes, or culverts that provide a continuous surface connection from these wetlands to downstream jurisdictional waters.

Wetland 1 is a depressional wetland whose boundaries transition to delineated uplands in all directions, with no continuous surface connection to any downstream waters. Review of contours and GIS layers show topography sloping from the wetland down to the northeast through a low gradient depressional area. This feature continues to the north, then east though it does not serve as a continuous surface connection based on a review of historic aerial imagery, and flow exiting W-1 would be via overland sheet flow. The majority of W-1 continues outside of the review area to the west. Review of contours and GIS layers show connectivity to a roadside ditch, along Midway Rd. to the south. Topography of the ditch slopes down into W-1 in from both the east and west, and the ditch does serve as continuous surface connection to any downstream waters.

Five wetlands (W-2, 3, 5, 6, and 7) sit to the north of W-1, within the actively cropped agricultural field. Each of these are depressional wetlands whose boundaries transition to delineated uplands in all directions. Wetlands W-2 and W-6 sit in isolated depressions with no defined features adjoining delineated boundaries. A low gradient depressional area can be seen at the northeast of W-

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2018-00755-TKO

3 at a break in topography in the upland surrounding the wetland. This sloping depressional area continues to the northeast, though it does not serve as a continuous surface connection to any downstream waters, as no confined flow path or discrete feature is evident. A similar low gradient depressional area exists at the northern boundary of W-5. This depressional area continues to the north, though it similarly does not serve as a continuous surface connection to any downstream waters. Any flow exiting wetlands W-3 and W-5 would be via overland sheet flow, and not through the confined flow of a discrete feature. At W-7, topography gradually slopes down from the eastern boundary where it continues towards a discrete drainage feature to the north. However, this feature does not appear to take form until approximately 450 linear feet down slope of the eastern boundary of W-7. Flow through this low gradient depressional area would be via overland sheet flow, and no continuous surface connection exists between the wetland and any downstream waters. The above features are evident by review of aerial images, contours, and GIS layers, and aerial imagery shows a lack of persistent wetness signature outside the delineated boundaries.

The above-mentioned wetlands are non-tidal wetlands that do not have continuous surface connections to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetlands. The wetlands are not intrastate lakes or ponds that meet the relatively permanent standard and cannot be evaluated as (a)(5) waters: lakes and ponds not identified in (a)(1) - (a)(4). Therefore, the 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. No field visits were conducted. Desktop review evaluation was conducted on 04/29/2024.
 - b. AJD Application "2018-00755-TKO 20240311 Combined APP.pdf" in the administrative record, 04/29/2024.
 - c. Past Permit Application "2007-05962-NTD.pdf" in the administrative record, 04/29/2024.
 - d. Mississippi Valley Division Regulatory Viewer, 04/29/2024.
 - e. Wisconsin DNR Surface Water Data Viewer, 04/29/2024.

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2018-00755-TKO](#)

f. [Calumet County GIS Interactive Mapping](#), 04/29/2024.

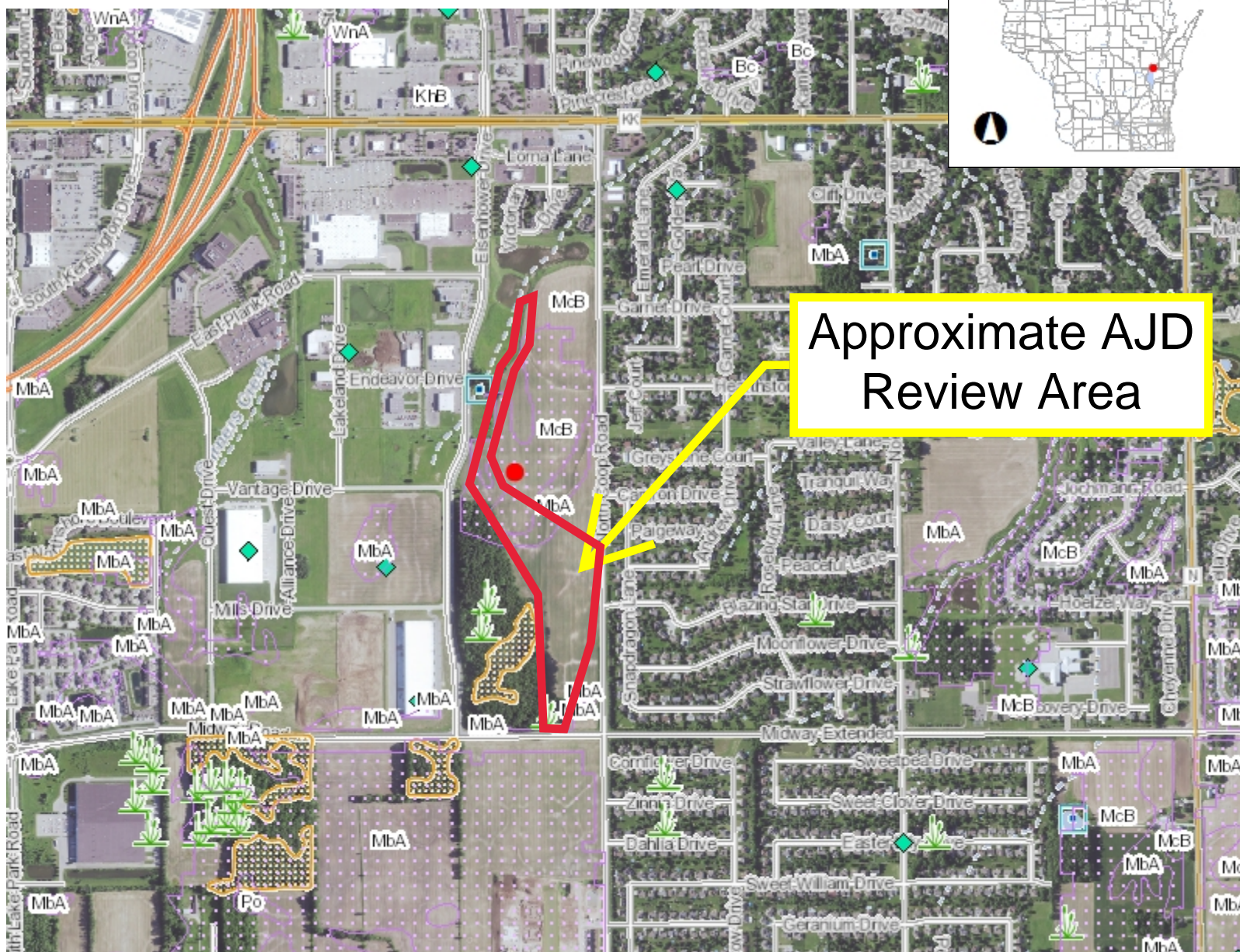
g. [HistoricAerials.com](#), 04/29/2024.

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.



2018-00755-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

0.5 0 0.25 0.5 Miles

NAD_1983_HARN_Wisconsin_TM

1: 15,840

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

AJD Review
Area

319590000

- Map Legend
- No Impact to Wetland (27,985 sqft)
 - Wetland Impact (31,748 sqft)
 - Silt Fence to protect no-impact wetlands

Wetland #	Impact (sqft)
1	27,985
2	1,694
3	3,095
5	4,764
6	2,337
7	10,261


Esri, HERE, Garmin, (c) OpenStreetMap contributors

Parcel 318590000
Wetland Impact Map

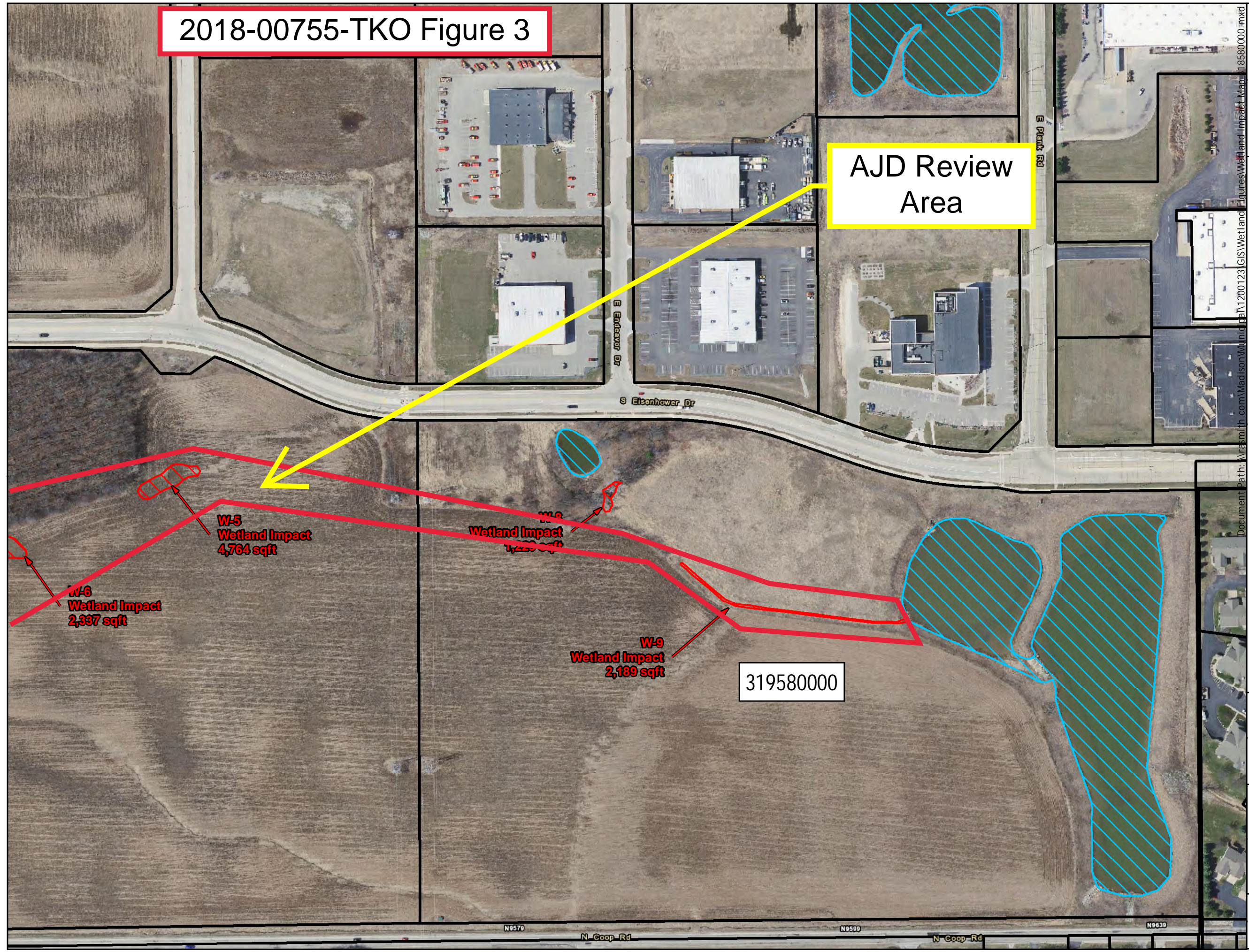


AJD Review
Area

Map Legend

 Wetland Impact (31,748 sqft)

Wetland #	Impact (sqft)
8	1,229
9	2,189



Esri, HERE, Garmin, (c) OpenStreetMap contributors

Parcel 318580000
Wetland Impact Map

