

MVP

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2020-00099-JLK

MVP

November 20, 2025

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-2020-00099-JLK [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).

| Name of Aquatic Resource | JD or Non-JD | Section 404/Section 10 |
|--------------------------|--------------------|------------------------|
| Wetland W-1 | Non-Jurisdictional | None |
| Wetland W-2 | Non-Jurisdictional | None |
| Wetland W-4 | Non-Jurisdictional | None |
| Wetland W-5/Pond 5 | Non-Jurisdictional | None |
| Wetland W-6 | Non-Jurisdictional | None |

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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

- a. Project Area Size (in acres): 27.59
- b. Location Description: The project/review area is located in Section 20, Township 07N, Range 18E, Waukesha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 43.05214 Longitude: -88.40295
- d. Nearest City or Town: Delafield
- e. County: Waukesha
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. NA
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. NA
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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. NA
 - 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

⁶ 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.

⁷ 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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- 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).⁸
- 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-4, W-5/Pond 2, and W-6 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Topographic maps, Google Earth Pro aerial imagery, and site photos provided in the delineation report, indicates Wetlands W-1, W-2, W-4, and W-6 are confined within the north/central portion of the review area. Wetlands W-1 and W-2 are surrounded by uplands involving a paved roadway immediately north and forested areas to the west, east, and south while Wetlands W-4 and W-6 are surrounded by uplands involving the same paved roadway to the south and west, and forested areas to the north and east. The delineation report shows Wetland W-5/Pond 5 is a long, linear-shaped wetland extending from the north/central portion of the review area to the southeast corner with uplands involving forested areas to the east and west. Previously mentioned data sources showed the wetland extends into a roadside ditch associated with Indian Springs Drive to the north. While Lidar data also illustrates a roadside ditch extending east and west along the south side of the roadway, a review of Google Earth historical aerial photos and ground level photos demonstrates the ditch is shallow with no standing/flowing water, indicating this ditch does not have a relatively permanent flow. Lidar data also shows Wetland W-5 extends outside of the review area to the southeast. However, further review of Lidar data, topographic maps, and aerial imagery,

⁸ 88 FR 3004 (January 18, 2023)

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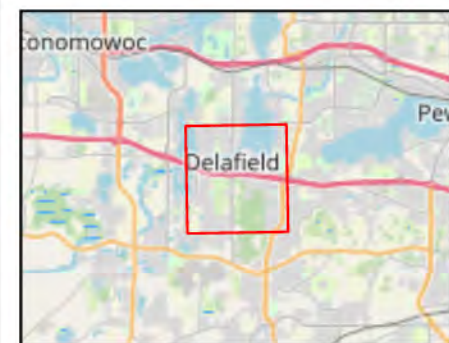
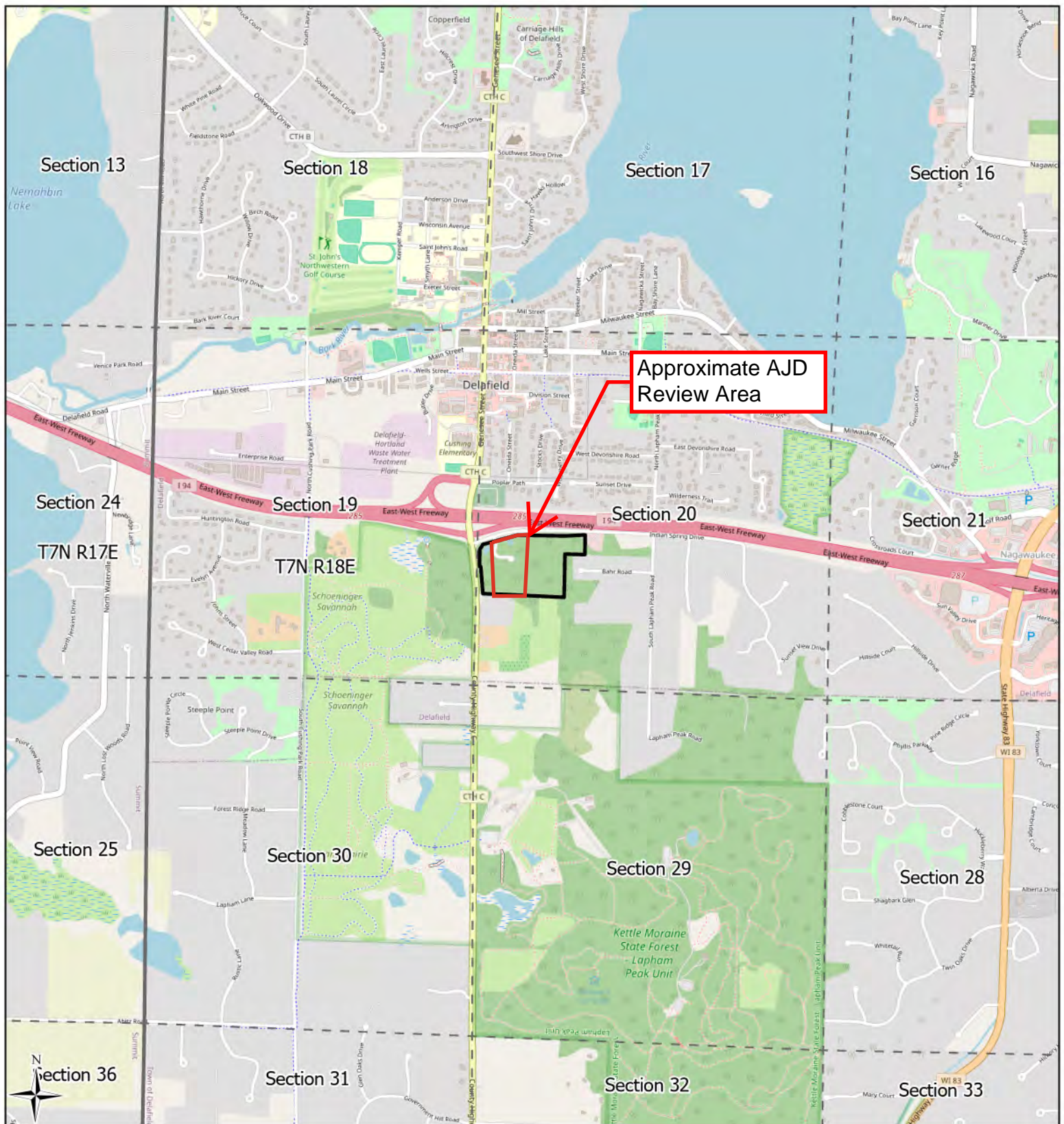
indicates the swale-like feature continues southward approximately 500 feet where it then transitions to uplands involving an agricultural field to the west, east, and south.

Based on the above information, Wetlands W-1, W-2, W-4, W-5/Pond 5, and W-6 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. Therefore, Wetlands W-1, W-2, W-4, W-5/Pond 5, and W-6 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 November 18, 2025.
 - b. CTH C and Indian Springs Drive Parcels, Waukesha County Wetland Delineation Report provided by Heartland Ecological Group dated August 8, 2025.
 - c. National Regulatory Viewer-Lidar Data and Google Earth Pro assessed November 18, 2025.
 - d. Previous COE Approved Jurisdictional Determination dated March 5, 2020.

10. OTHER SUPPORTING INFORMATION. NA

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.



- Study Area (27.59 ac)
- Township
- Section

0 1,000 2,000
Ft

Heartland
ECOLOGICAL GROUP INC

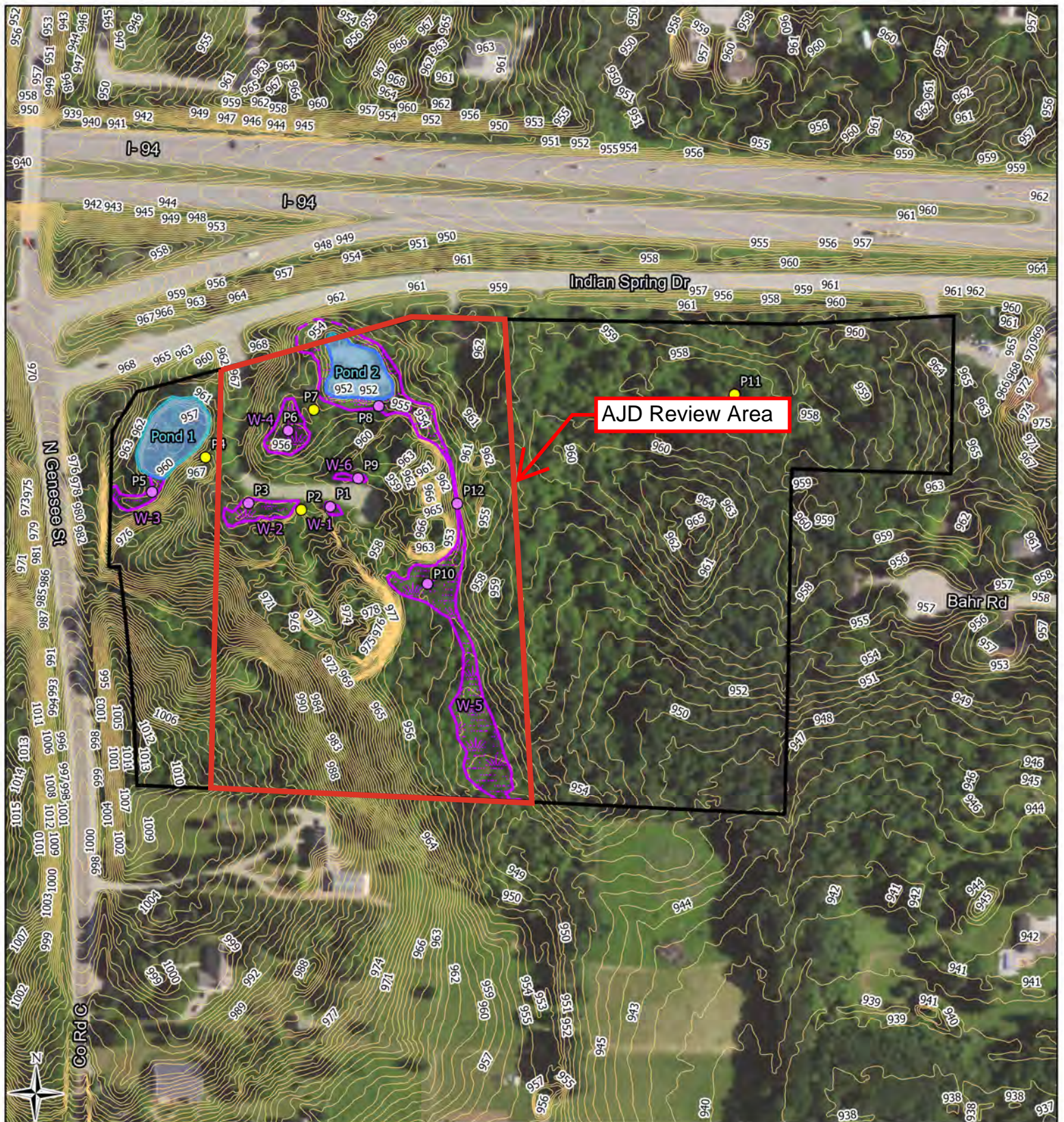
Figure 1. Project Location

CTH & Indian Springs Dr.
Project #20241191
T7N, R18E, S20
C Delafield, Waukesha Co

OpenStreetMap
ESRI

LRR: NCNE

Figure Created: 2/8/2024



- Study Area (27.59 ac)
 - Waukesha Co 1ft Contours
 - Field Delineated Wetlands (1.27 ac)
 - Ponds (0.58 ac)
 - Offsite Wetland Boundaries
- Sample Points**
- Upland
 - Wetland

0 250
Ft

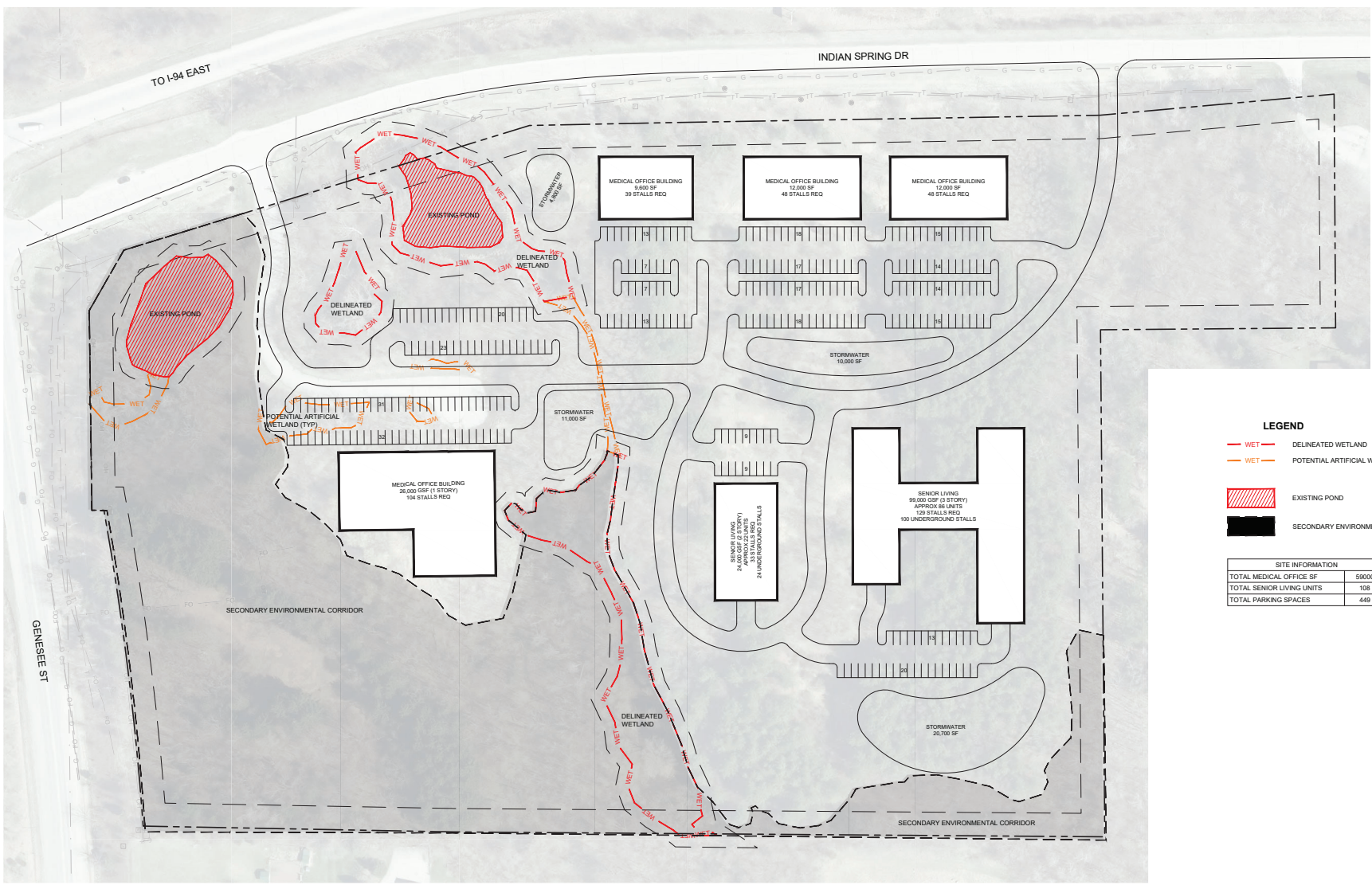
Heartland
ECOLOGICAL GROUP INC

Figure 7. Field Delineated Wetlands

CTH & Indian Springs Dr.
Project #20241191
T7N, R18E, S20
C Delafield, Waukesha Co

2022 NAIP
Waukesha Co, HEG LRR: NCNE

Figure Created: 7/31/2024



LEGEND

- WET (red dashed line) DELINEATED WETLAND
- POTENTIAL ARTIFICIAL WETLAND (orange dashed line)
- EXISTING POND (red hatched area)
- SECONDARY ENVIRONMENTAL CORRIDOR (dashed line)

| SITE INFORMATION | |
|---------------------------|-------|
| TOTAL MEDICAL OFFICE SF | 59000 |
| TOTAL SENIOR LIVING UNITS | 108 |
| TOTAL PARKING SPACES | 449 |

DELAFIELD - CONCEPT TWO LAYOUT

www.thesigmagroup.com
1300 West Canal Street
Milwaukee, WI 53233
Phone: 414-643-4200
Fax: 414-643-4210

TOMAHAWK TRAIL
DELAFIELD, WI

DELAFIELD STEINERGROUP

| NO. | REVISION | DATE | BY | SCALE: | 1" = 60' |
|-----|----------|------|----|--------------|------------|
| | | | | PROJECT NO: | 21610 |
| | | | | DESIGN DATE: | --- |
| | | | | PLOT DATE: | 2025.09.10 |
| | | | | DRAWN BY: | AJR |
| | | | | CHECKED BY: | --- |
| | | | | APPROVED BY: | --- |
| | | | | SHEET NO: | EX 2 |

2020-00099-JLK (Figure 3 of 3)