



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 July 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-2022-01197-HSR

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 2, non-jurisdictional
 - ii. Wetland 2A, non-jurisdictional
 - iii. Wetland 10, 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 consists of three wetlands—Wetland 2 (0.45 acres), Wetland 2A (0.07 acres), and Wetland 10 (0.25)—identified by the red polygon on the attached *2022-01197-HSR: Figure 2 of 4*. It is located at 42.6043, -87.9735 in the City of Kenosha, Kenosha 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.

N/A

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

N/A

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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

g. Additional Waters (a)(5): 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.

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

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 includes three wetlands (Wetland 2, Wetland 2A, and Wetland 10) within a 254.84-acre rural property. All three wetlands are surrounded predominately by active agricultural production and a two-lane County Highway (N). Based on a review of the wetland delineation report conducted by Heartland Ecological Group, Inc. and information and images from the USDA-NRCS Web Soil Survey, National Wetlands Inventory, Google Earth, and the Army Corps of Engineers’ National Regulatory Viewer, Wetlands 2, 2A, and 10—as identified by the labeled purple polygons on the attached *2022-01197-HSR: Figure 1 of 5*—are depressional features surrounded by upland.

None of the wetlands are traditional navigable waters, territorial seas, nor interstate waters and are therefore not (a)(1) waters.

They are also not impoundments nor tributaries of (a)(1) waters and thus are not (a)(2) or (a)(3) waters, respectively.

The three wetlands are located in concave landscape positions bordering a two-lane county highway. The closest aquatic resource is an unnamed tributary (WBIC 737250) approximately 0.64 miles to the west and is separated by active agricultural production, residential development, and elevated topography (Wisconsin Department of Natural Resources’ Surface Water Data Viewer). While there is a culvert connecting Wetland 2 and 2A to each other, and the associated roadway right-of-way ditch initially appears to serve as a discrete

⁷ 88 FR 3004 (January 18, 2023)

connection to the unnamed tributary to the west, the ditch elevation on the north and south sides of the roadway increases and transitions to upland to the west due to a farm access road. For example, the northern ditch (and Wetlands 2A and 10) begin at an elevation of 762. At the farm access road to the west, the elevation is 793. On the other side, it gradually slopes back down to an elevation of 783, and finally 775 at the unnamed tributary. Similarly, the elevation at the southern ditch (and Wetland 2) begins at 760, rises to 792 at the farm access road, slopes back down to 785 on the other side, and ends at 774 at the unnamed tributary. (Please see *2022-01197-HSR: Figures 2 of 5 and 3 of 5.*) Similarly, to the east, the topography begins at the wetlands at approximately 760, but rises to 765 before sloping back down to 755 and then 745 heading east. The topographical feature at 765 extends to the north and south of the road. (Please see *2022-01197-HSR: Figures 4 of 5 and 5 of 5.*) Thus, due to the severed connection via topography in both directions, the ditch is not a distinct feature that maintains a continuous connection. There are no other culverts, discrete drainage features, or outlet structures connecting the wetlands to any other surface aquatic resources. Thus, the continuous surface connection requirement is not met, as the wetlands do not physically abut nor touch a paragraph (a)(1) or relatively permanent water, nor do they connect to a paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. The wetlands also 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. Hence, the wetlands do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands.

The wetlands are also not (a)(5) intrastate lakes and ponds not identified in paragraphs (a)(1) through (4).

For the above and referenced reasons, Wetlands 2, 2A, and 10 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. A wetland delineation conducted by Heartland Ecological Group, Inc., in May of 2024 was utilized.
 - b. An office review—utilizing the above and referenced wetland delineation report, as well as USDA-NRCS Web Soil Survey, National Wetlands Inventory, Google

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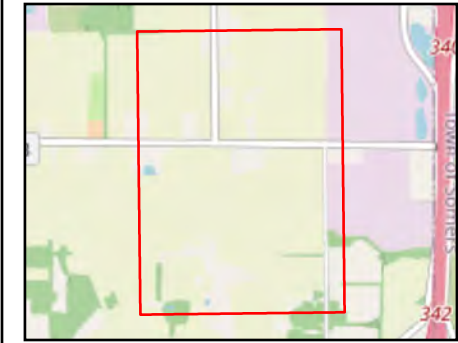
Earth, Kenosha County, Wisconsin GIS, and the Army Corps of Engineers' National Regulatory Viewer—was conducted on July 10, 2024.

- c. Google Earth aerial imagery dated 2000, 2002, 2005, 2006, 2007, 2008, 2010, 2013, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, and 2023, and accessed July 10, 2024, were also utilized.

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.



- Study Area (254.84 ac)
 - Field Delineated Wetland (3.26 ac)
 - Off-site Wetland Boundary
 - Culvert
 - Kenosha Co 1' Contours
 - Waterway
 - Tile Blowout
 - Tile Inlet
 - Tile Outlet w/ Riprap
- Sample Points**
- Upland
 - Wetland



Heartland
ECOLOGICAL GROUP INC

Figure 7. Field Delineated Wetlands - 2024 Addendum
Kolnik Parcel
Project #20220738
T2N, R21E, S25
C Kenosha/T Paris, Kenosha Co

2022 Orthophoto
Kenosha Co, HEG

LRR: MW

<----- West

Orange Color on DEM Layer Illustrating Higher Elevation

Approximate Location of Wetland 10

Approximate Location of Wetland 2A

Farm Access Road

Approximate Location of Wetland 2

Imagery

Lidar

Layers

☐ EPA Ecoregions Level III and IV

☐ WI DNR 2ft Contour from LiDAR

☒ Wisconsin DNR - DEM

High: 1912.395

Low: 496.315

☐ Wisconsin DNR - Hillshade

☐ 3DEP 25-ft Contour

☐ 3DEP Slope

☐ 3DEP Digital Elevation Model (DEM)

☐ 3DEP Hillshade

Satellite and Aerial Imagery

Layers

☐ WIDNR Imagery Index - 1990s Leaf Off

☐ EPA Ecoregions Level III and IV

☐ WIDNR Imagery Index - Latest Leaf Off

☐ WIDNR NAIP Imagery Index - 2015 Leaf On

☐ WIDNR Imagery - Latest Leaf Off

☐ WIDNR CIR Imagery - Leaf On

☐ WIDNR NAIP Imagery - 2022 Leaf On

☐ WIDNR NAIP Imagery - 2020 Leaf On

☐ WIDNR NAIP Imagery - 2015 Leaf On

☐ WIDNR Imagery - 2013 Leaf On

☐ WIDNR Imagery - 2010 Leaf Off

☐ WIDNR Imagery - 2008 Leaf On

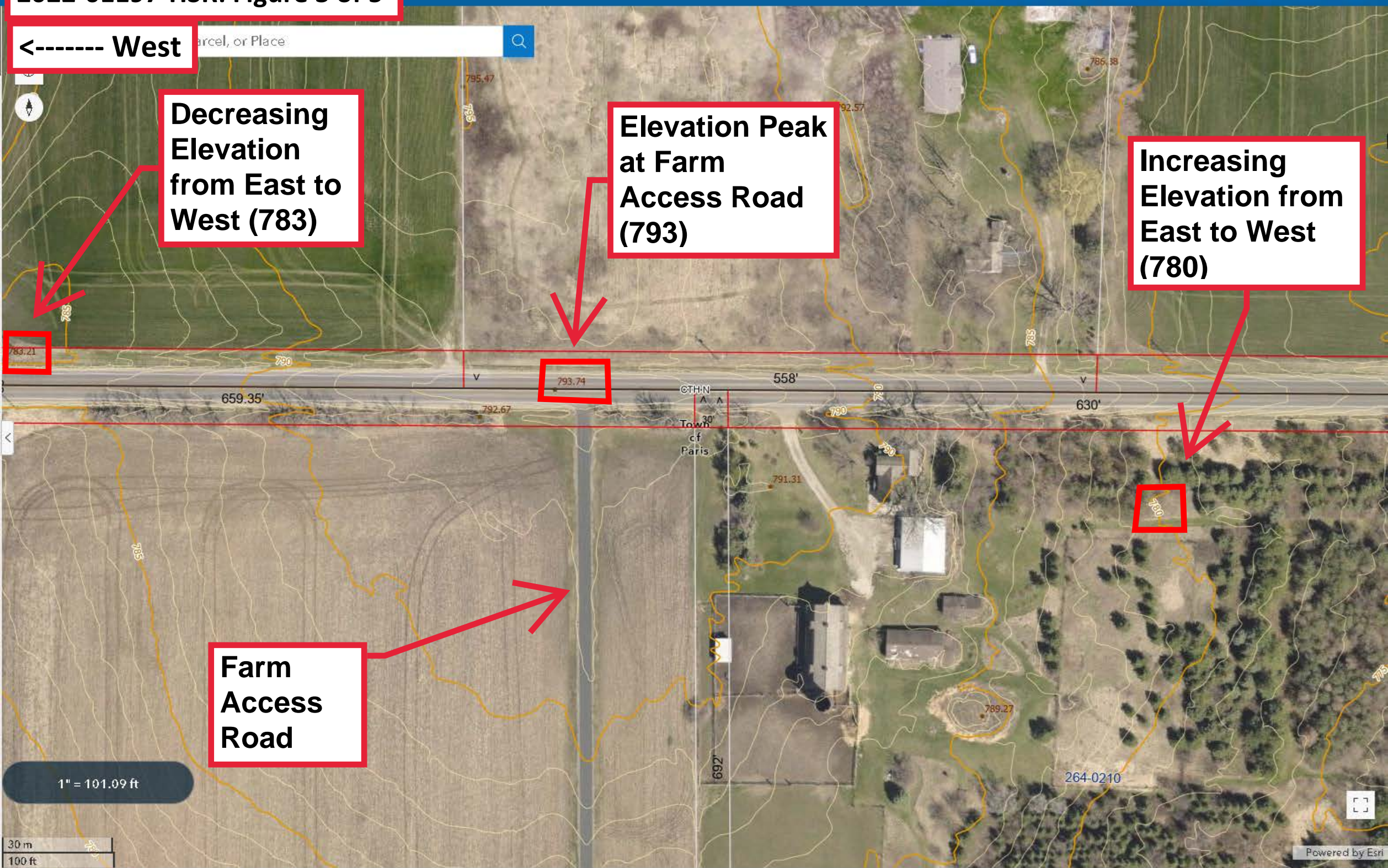
<----- West

Decreasing
Elevation
from East to
West (783)

Elevation Peak
at Farm
Access Road
(793)

Increasing
Elevation from
East to West
(780)

Farm
Access
Road



East ----->

Approximate
Location of
Wetland 2A

Orange Color on
DEM Layer
Illustrating
Higher Elevation

Approximate
Location of
Wetland 2

East ----->

Elevation
Peak (765)

Decreasing
Elevation from
West to East
(755 to 745)

Wetland 2
Elevation (760)

