



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

14 MARCH 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-2022-01570-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-2022-01570-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 1A (2.5 acres), 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 is approximately 3.1 acres in size and is identified in the attached figure labeled 2022-01570-CJB Figure 2. The center of the review area is located at Lat: 44.26968, Lon: -88.44236, in the Town of Grand Chute, Outagamie County, Wisconsin. There are no previous JDs associated with this request.

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.

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

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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.

## 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).<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).

Based on review of the delineated wetland boundaries and landscape position depicted in aerial imagery, Wetland 1A is not a TNW, territorial sea, or interstate water; therefore, Wetland 1A is not a category (a)(1) water. Based on historic aerial photos provided in the wetland delineation report, this wetland appears to have been formed due to commercial development in the surrounding area. Historic aerial photos also indicate this wetland is not a tributary and was not created by impounding a water of the U.S.; therefore, Wetland 1A is not a category (a)(2) or (a)(3) water. The review area is located approximately 0.21 miles to the southeast of the closest tributary (unnamed to Mud Creek). Wetland 1A does not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. The wetland continues beyond the review area to the northwest, west, south, and east so the areas beyond those locations were reviewed for discrete features that would provide potential downstream connections to jurisdictional waters. To the northwest, Wetland 1A appears to extend outside the review area and between commercial developments. Based on LiDAR and aerial photos, there does not appear to be a discrete feature to the northwest of Wetland 1A that would provide a connection to a downstream water. To the west, Wetland 1A appears to extend outside the review area and is potentially bordered by paved parking lots. LiDAR review does not indicate a discrete feature to the west of Wetland 1A that would provide a connection to a downstream water. To the south, potential connections exist to the North Lyndale Drive ditch and the West Packard Street ditch, so those areas were reviewed as potential continuous surface connections. For

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

North Lyndale Drive, Google Earth Street View does not indicate these potential connections would provide discrete conveyance and any movement of water through these areas is likely through overland sheet flow. For West Packard Street, a hydrologic connection potentially exists between Wetland 1A and the West Packard Street ditch, so the ditch was reviewed. Based on LiDAR, this ditch directs water to the west towards North Lyndale Drive. Google Earth Street View indicates water follows the West Packard Street ditch and is then directed into a stormwater inlet prior to reaching North Lyndale Drive. Once entering the stormwater inlet, the potential hydrologic connection becomes untraceable, therefore, the West Packard Street ditch does not appear to provide Wetland 1A with a continuous surface connection with a jurisdictional water. To the east of Wetland 1A, there appears to be a hydrologic connection to the roadside ditch along North Perkins Street. Based on LiDAR, this ditch system directs water to the south towards West Packard Street. Upon reaching West Packard Street, hydrology appears to be directed to the west towards North Lyndale Drive until it reaches the stormwater inlet prior to reaching North Lyndale Drive. As previously stated, once entering the stormwater inlet, the potential hydrologic connection becomes untraceable; therefore, Wetland 1A does not have a continuous surface connection on its east side.

Wetland 1A 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) wetland. Therefore, Wetland 1A 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. Desktop evaluation conducted March 5, 2024
  - b. National Regulatory Viewer, March 5, 2024
  - c. Google Earth Street View, March 5, 2024
  - d. Wetland Delineation Report, Evergreen Consultants, June 17, 2022
  - e. Surface Water Data Viewer, WI DNR, March 5, 2024

10. OTHER SUPPORTING INFORMATION. N/A

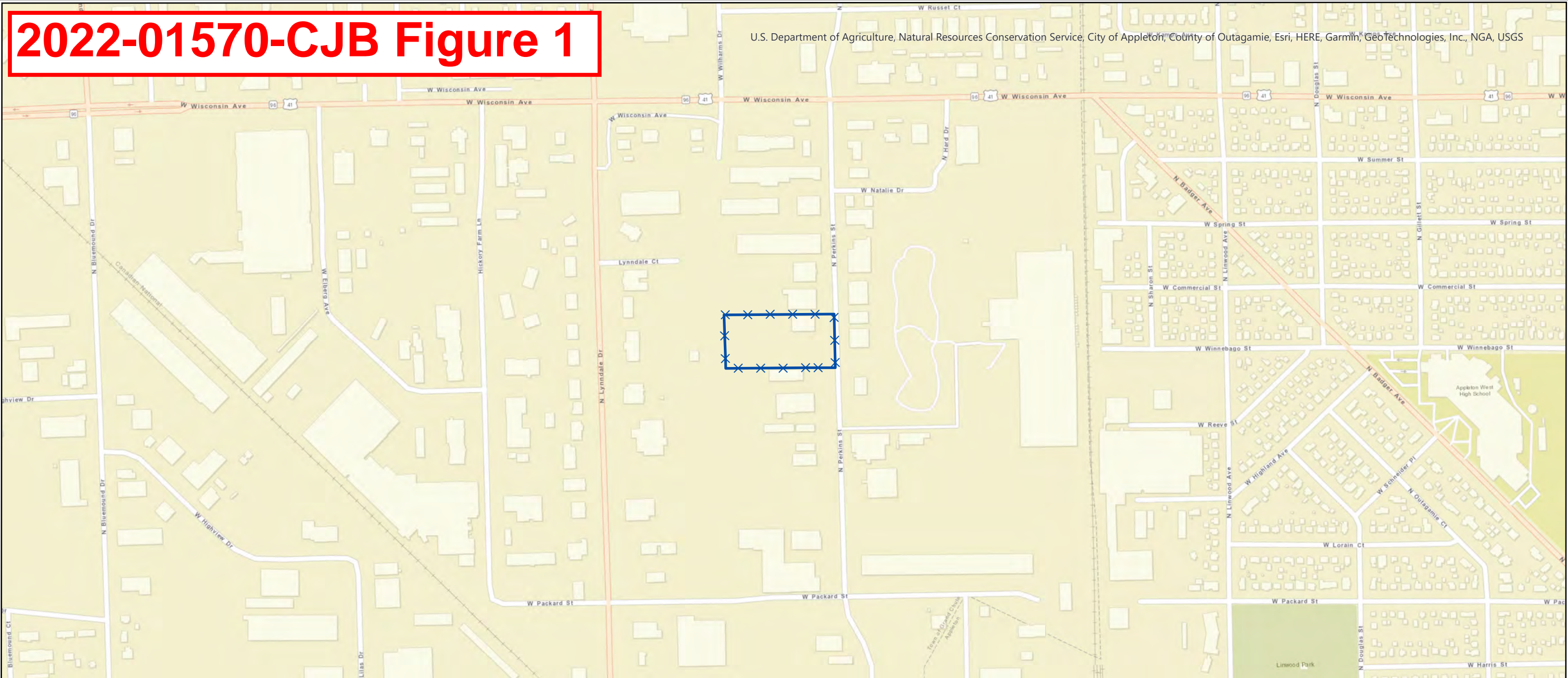
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11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



# 2022-01570-CJB Figure 1

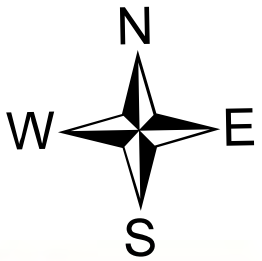
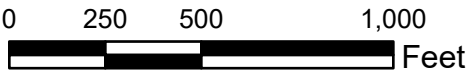


## Legend

 Site Boundary

Linked Living Homes  
Site Location Map  
925 N Perkins Street  
Town of Grand Chute  
Outagamie County, WI

Project: OUT22-045-01

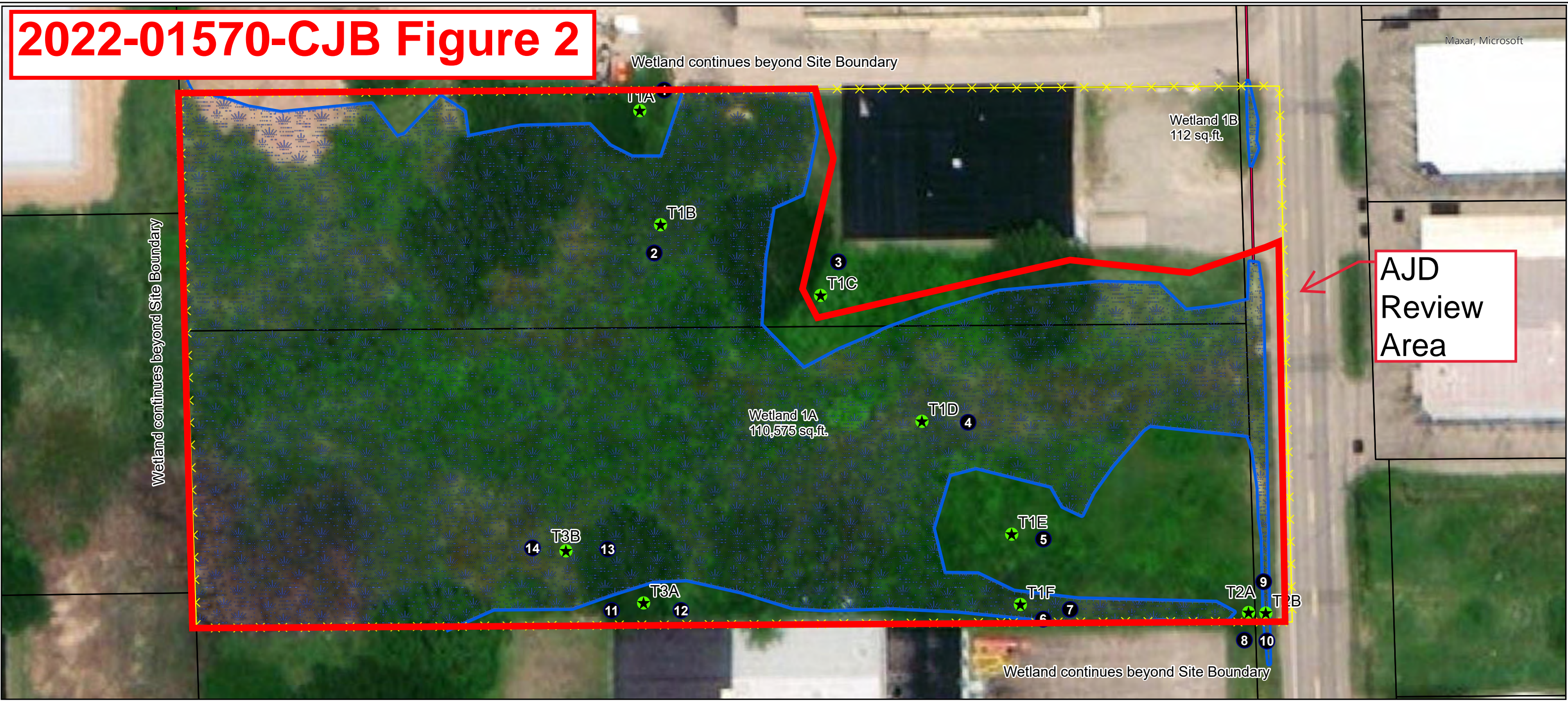


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2022-01570-CJB Figure 2



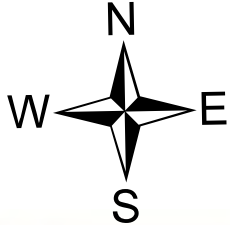
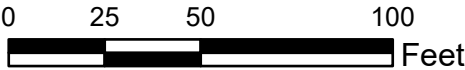
Legend

- Wetland Line
- Wetland
- Parcels
- Sample Point
- Picture Location
- Site Boundary

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

Linked Living Homes  
Wetland Delineation Map  
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