



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

MVP-RD

February 13, 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-2022-02274-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, 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 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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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
W-8 (1.43-acre)	Non-Jurisdictional	NA
W-27 (0.35-acre)	Non-Jurisdictional	NA

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)
- d. "MEMORANDUM ON NWK-2024-00392" (Nov 2024)

3. REVIEW AREA.

- a. Project Area Size (in acres): 160
- b. Location Description: The project/review area is located in Section 31, Township 05N, Range 21E, Milwaukee County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42.8553 Longitude: -88.0690
- d. Nearest City or Town: Franklin
- e. County: Milwaukee
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2022-02274-TKO March 16, 2023	AJD	Wetlands 1, 2, 3, 4, 5, 6, 7, 8A, 9, 11, 12, 16, 17, 18, 19, 20, 22, 22A, 23, 24, 25, 26, 28, 29, 30, 31, 5E, and 10E, and Ponds 1 and 2 were determined to be non-jurisdictional under the AJD
MVP-2022-02274-TKO January 25, 2024	AJD	Wetlands W-10, W-13, W-14, W-21, W-32, W-33, and W-34 were determined to be non-jurisdictional under the AJD

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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
 - b. The Territorial Seas (a)(1)(ii): N/A
 - c. Interstate Waters (a)(1)(iii): 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.

- 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 [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).
[Wetlands W-8 and W-27 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. Review of the November 2022 Heartland Ecological Group delineation report, 2023 Heartland additional field documentation, historic aerial images, and LiDAR (hillshade and DEM GIS layers from the Mississippi Valley Division Regulatory Viewer) indicate that the assessed wetlands 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.

Wetland W-8 sits within a depressional area on the west side of the Metro RDF Landfill site, near South 124th Street. Review of the county contours and the delineation report shows wetland W-8 draining to a roadside ditch identified as wetland W-8A. A prior AJD (03/27/2023; Same ORM number) determined this ditch to be an excluded water and non-jurisdictional. Review of aerial imagery and LiDAR show the ditch draining north, outside the review area, for approximately 80 linear feet (LF) where it connects to an 85 LF culvert crossing (165 LF total length of connection) to the west ditch of S. 124th St. The ditch drains north for approximately 70 LF (235 LF total length of connection) where it

⁹ 88 FR 3004 (January 18, 2023)

enters another culvert. In addition to inputs from the culvert, this ditch collects runoff from S. 124th St., contributing to downstream flows. This ditch, among other aquatic resources, was reviewed under a prior AJD (01/08/2024; ORM# 2009-04421-MWM) and was also determined to be non-jurisdictional. This portion of the connection does not carry relatively permanent flow as both roadside ditches fit the definition of b(3) waters, from 33 CFR 328.3(b). A review of historical aerial photos shows an overall lack of standing and/or flowing water most years in both roadside ditches. Both the east and west ditch of S. 124th St. were determined to have been excavated wholly in, and draining only dry land, and do not carry a relatively permanent flow of water. The Corps has determined that the culvert immediately downstream of the second b(3) water also lacks relatively permanent flow. Per the 2023 Heartland delineation report from 2009-04421-MWM, from its inlet within the ditch, this culvert drains northwest for approximately 350 LF (585 LF total), discharging to an elongated depressional area identified as wetland W-4A. W-4A is described in the report as a wet meadow, adjacent to a mapped intermittent tributary. Review of aerial imagery shows an apparent channel through the center of the wetland where flow would accumulate, though no defined bed and bank is evident following review of aerial and ground level images, as well as LiDAR. The central portion of the wetland can be seen as saturated two, 10/15/2015 and 09/17/2014, instances of aerial imagery reviewed, though there is no continually flowing stream or inundated channel evident which would provide a relatively permanent flow. These aeriels also show standing water in surrounding agricultural fields and ditches which do not normally appear saturated. Use of the Antecedent Precipitation Tool (APT) shows the weeks preceding both aerial images were wetter than normal. 30-Day rolling precipitation totals exceed the 30-Year Normal Ranges for these times. These same timeframes were reviewed from various years to determine if flows are seasonal. Other years of the same months show lack of standing water or wetness signature, supporting flow is in response to discrete precipitation events, and is not seasonally driven. Additionally, ground level photos show dense vegetative growth lining the full width (approximately 15 ft) of W-4A indicating the lack of a channel with relatively permanent flow. The most upstream extent of an intermittent tributary is mapped at the location where W-8 meets the west ditch of S. 124th St. Aerial imagery shows the prior stream channel aligns with this mapped course. Aeriels show the channel was filled sometime between 1963-70, and disturbance was evident in the alignment of the identified culvert. The tributary is mapped as passing through W-4A, approximately 165 LF (750 LF total length of connection), where it discharges through an 80 LF culvert (830 LF total length of connection) to the north. The culvert continues under a landfill roadway where it outlets approximately 65 LF upstream of a well-defined channel which continues north. The Corps has determined that the connection from W-8 to this point downstream is through a system of discrete openair and piped drainage features that experience non-relatively permanent flow (895 LF total

length of connection). The system continues to the west where it abuts a relatively permanent unnamed tributary (WBIC: 5038073) to Big Muskego Lake.

Wetland W-27 sits within a mostly closed depressional area on the east side of the Metro RDF Landfill site, near South 112th Street. Review of aerial imagery shows a discrete outlet at the southeast corner of W-27 which connects to the west ditch of S. 112th St. Review of contours and LiDAR shows the roadside ditch continuing approximately 60 linear feet (LF) to the south where it drains to a 45 LF culvert (105 LF total length of connection), connected to the east ditch of S. 112th St. Both the east and west ditch collect runoff from S. 112th St., contributing to downstream flows. From the culvert outlet, topography slopes down through a discrete drainage feature, continuing approximately 105 feet (210 LF total length of connection) where it discharges to an excavated trapezoidal drainage ditch. Review of historic aerial imagery shows the drainage feature was constructed at some point between 2010-11. This feature collects runoff from the contributing ditches and surrounding upland (scour marks on ditch side slopes). The feature does not appear mapped on either the National or Wisconsin Wetland Inventory (NWI and WWI)¹⁰, though it bisects a mapped wetland, and shows no evidence of relatively permanent flow. It should be noted that site conditions are considerably different from when NWI and WWI was mapped. Since wetland mapping was completed, excavation of the ditch has occurred. Site alterations resulted in changed drainage patterns and land use within the immediate area. With the construction of the drainage feature some farmed areas were converted to ditch, and areas of wetland moved to cultivation. In other locations repeated disturbance from farming operations has stopped and the areas reverted to a more natural state. Review of aerial imagery shows a lack of wetness signature or standing water within the feature. No clearly evident channel or bed and bank is present following review of historic aeriels and ground level images from mapping applications (Bing and Google Earth). Additionally, ground level photos show dense vegetative growth lining the bottom (approximately 15 ft wide) of the feature indicating a lack of relatively permanent flow. This drainage feature continues approximately 1,575 LF (1,785 LF total length of connection) where its dimensions begin to taper into a more defined channel. This channel continues approximately 230 feet (2,015 LF total length of connection) to a wetland area where the channel loses definition. This wetland abuts an unnamed relatively permanent tributary (WBIC: 5038285) of the Root River. In total, the lengths of connections total approximately 2,015 LF from the discharge point of Wetland W-27 and the requisite water.

Wetlands W-8 and W-27 sit approximately 895 and 2,015 feet, respectively, from the closest tributary (RPW) within their watershed (West=unnamed tributary to Big Muskego Lake; East=unnamed tributary to the Root River). As described

¹⁰ NWI mapped 2010, WWI mapped 2006

above, both W-8 and W-27 exhibit traceable physical connections to a relatively permanent jurisdictional tributary. Per the Joint Decision Memorandum on NWK-2024-00392, and after consideration of flow, the number, the types, and the length of connections, the 895 and 2,015-foot lengths of connection here between the reviewed wetlands and the requisite covered waters are not physically close enough to meet the continuous surface connection requirement. The above-mentioned wetlands are non-tidal wetlands with lengths of connections that are so far removed from the requisite waters they do not meet the continuous surface connection requirements 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 completed on 02/05/2025.
- b. Standard Permit Application "2022-02274-TKO 20241210 APP.pdf" in the administrative record.
- c. AJD Application "2009-04421-MWM 20231113 APP.pdf" in the administrative record.
- d. "MEMORANDUM ON NWK-2024-00392" (Nov 2024)
- e. Mississippi Valley Division Regulatory Viewer, 02/05/2025.
- f. Wisconsin DNR Surface Water Data Viewer, 02/05/2025.
- g. Milwaukee and Waukesha County GIS and Land Information Interactive Maps, 02/05/2025.
- h. Antecedent Precipitation Tool, 02/13/2025

10. OTHER SUPPORTING INFORMATION. [N/A]

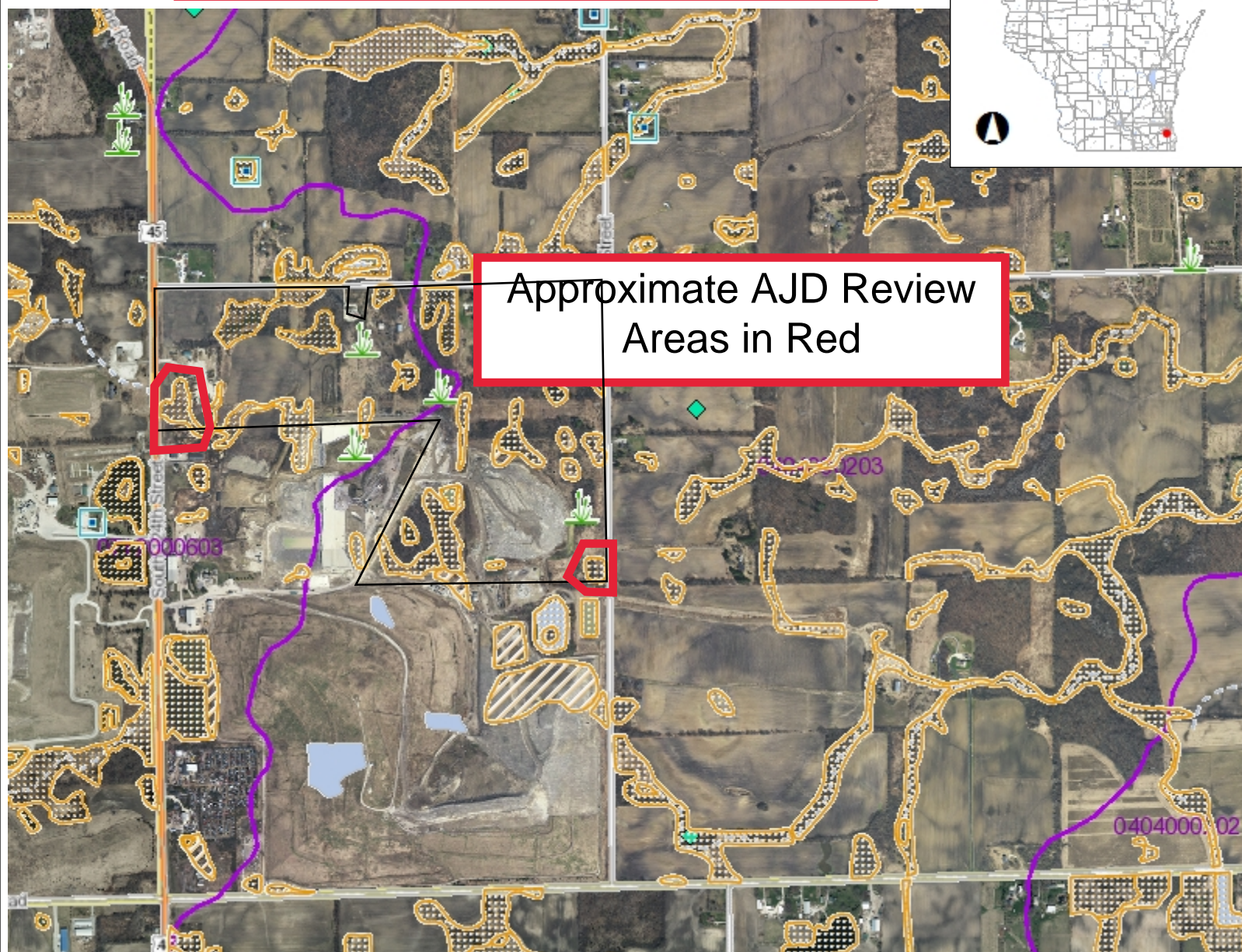
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11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance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



2022-02274-TKO Figure 1



Legend

- 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
- 10-digit HUCs (Watersheds)
- Municipality
- State Boundaries
- County Boundaries
- Major Roads
 - Interstate Highway
 - State Highway
 - US Highway
 - County and Local Roads

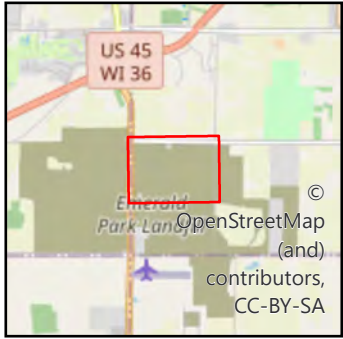
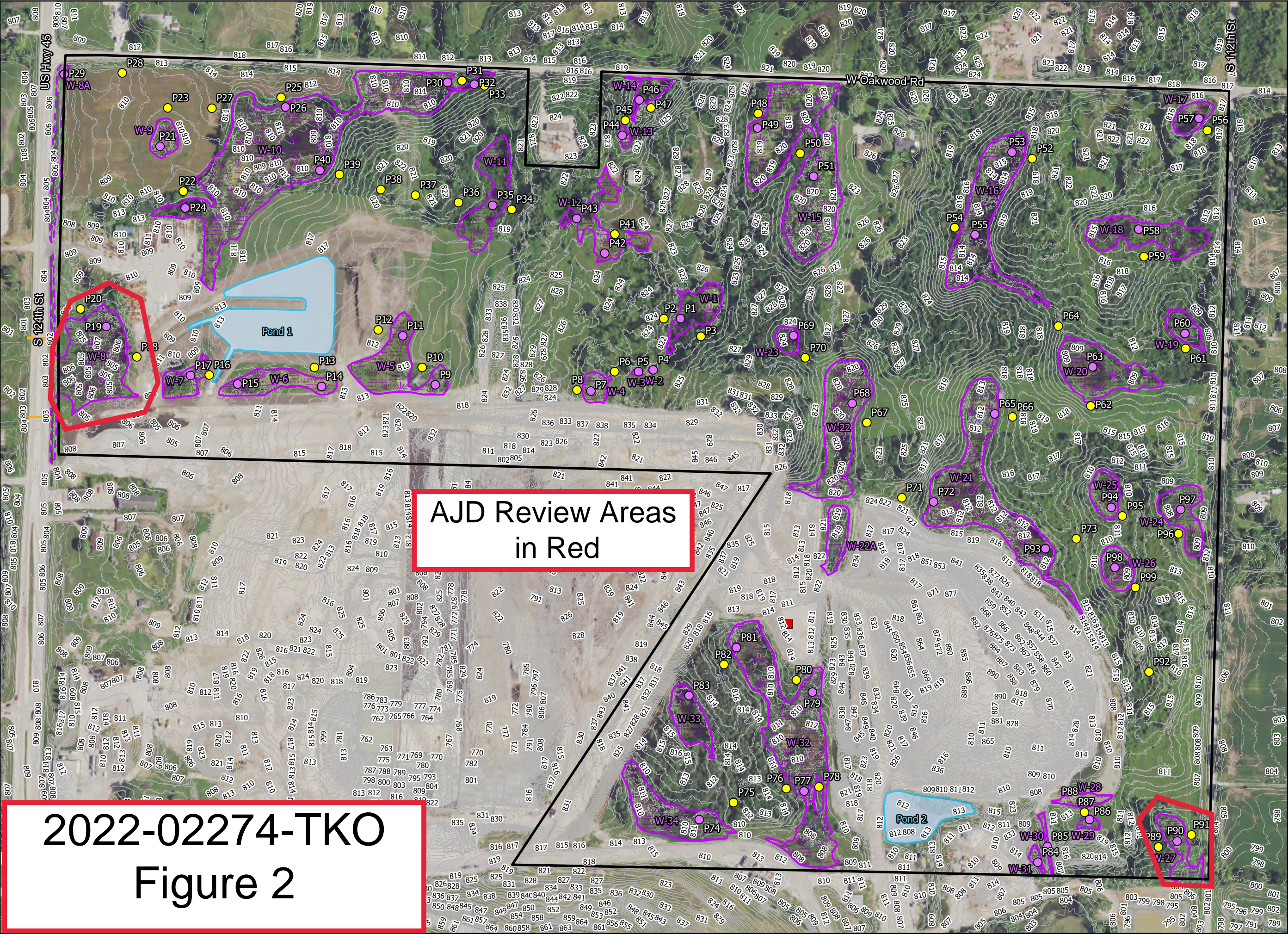
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NAD_1983_HARN_Wisconsin_TM

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



- Study Area (178.55 ac)
 - Field Delineated Wetland (26.22 ac)
 - Waterbody (3.01 ac)
 - Culvert
 - Milwaukee Co. 1' Contours
 - Off-site Wetland Boundary
 - Filled Pond
- Sample Points**
- Upland
 - Wetland

0 150 300
Ft

Heartland
ECOLOGICAL GROUP INC

Figure 6. Field Delineated Wetlands
Metro RFD Oakwood Expansion
Project #20220810
T5N, R21E, S31
C Franklin, Milwaukee Co

2020 NAIP
Milwaukee Co, HEG

LRR: MW