



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
332 MINNESOTA STREET, SUITE E1500
ST. PAUL, MN 55101-1323

MVP

24 April 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-2024-00409-KDZ MFR 1 of 1](#)

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. SUMMARY OF CONCLUSIONS.

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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- 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 1 \(0.38 acre\), 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 150 acres in size and is identified by the red polygon on the attached Figure 1. The review area is located at 43.192528, -89.331808 in the Village of DeForest, Dane 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](#)

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

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.

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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](#)

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

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.

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).

[Based on review of the delineated wetland boundaries and landscape position depicted in aerial imagery, Wetland 1 is situated within an area that has been historically used for row crop agriculture and is not a TNW, territorial sea, or interstate water; therefore, Wetland 1 is not a category \(a\)\(1\) water. Current and historic aerial photos indicate this wetland is not a tributary and was not created by impounding a water of the U.S.; therefore, Wetland1 is not a category \(a\)\(2\) or \(a\)\(3\) water. Based on review of the wetland delineation report, Wetland 2 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. Wetland 1 is located approximately 1,400 feet to the east of the closest tributary \(unnamed to Token Creek\) and Wetland 1 was reviewed for a possible hydrologic connection to this tributary. A review of LiDAR and aerial photos does not indicate a discrete feature that would provide a continuous surface connection to the unnamed tributary to the east or to any other aquatic resource. Wetland 1 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 1 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. [Office evaluation conducted on April 16, 2024.](#)
 - b. [raSmith Wetland Delineation Report dated October 20, 2023.](#)

⁷ 88 FR 3004 (January 18, 2023)

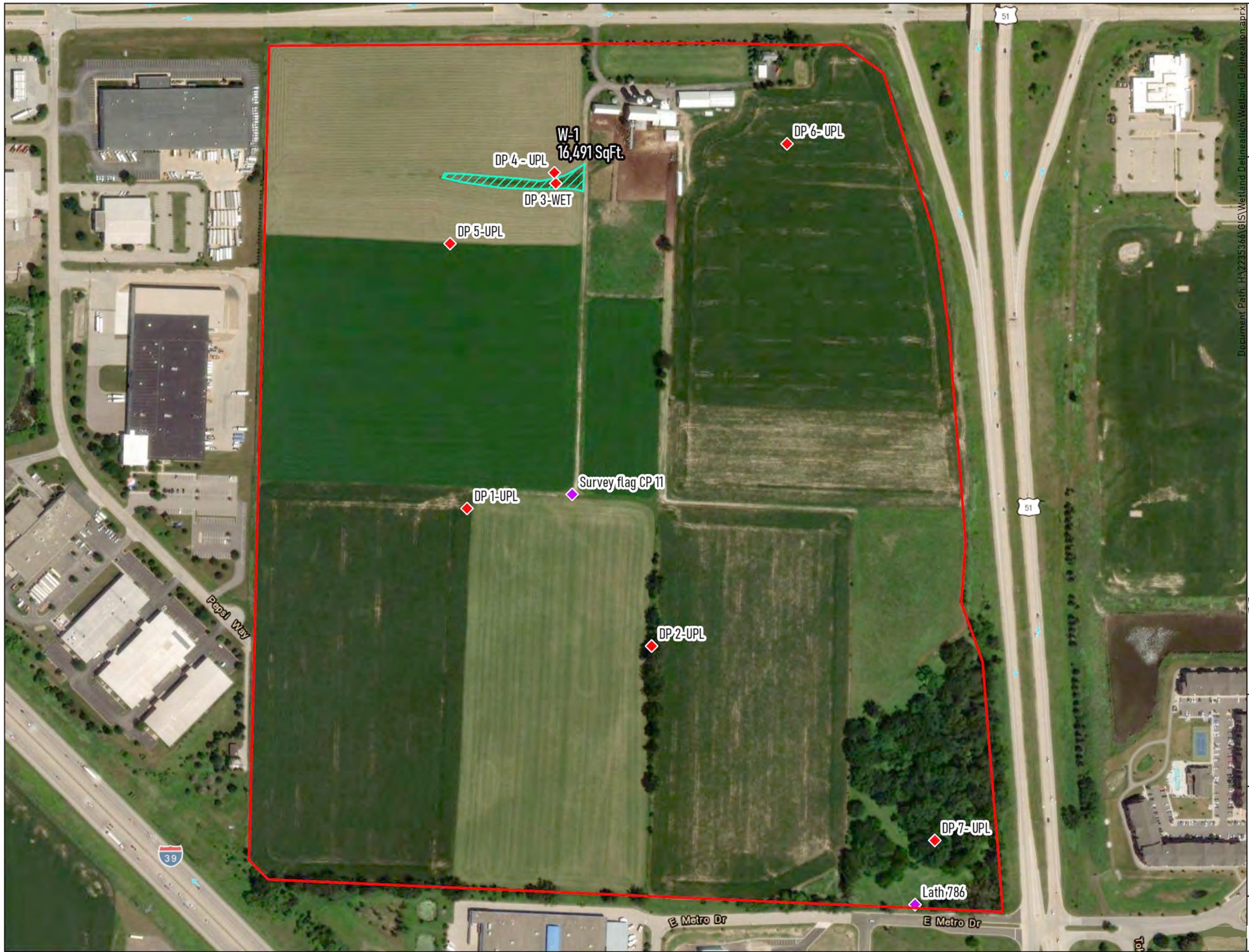
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- c. [Wisconsin Wetland Inventory](#), [USDA Web Soil Survey](#), [USGS NHD](#), [USGS Topographic Maps](#), [WDNR Surface Water Data Viewer](#), [USACE National Regulatory Viewer](#).
- d. [Google Earth imagery](#) dated 1999, 2010, 2011, 2015, 2018, 2019, 2020, 2021, and 2022. Accessed April 16, 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.



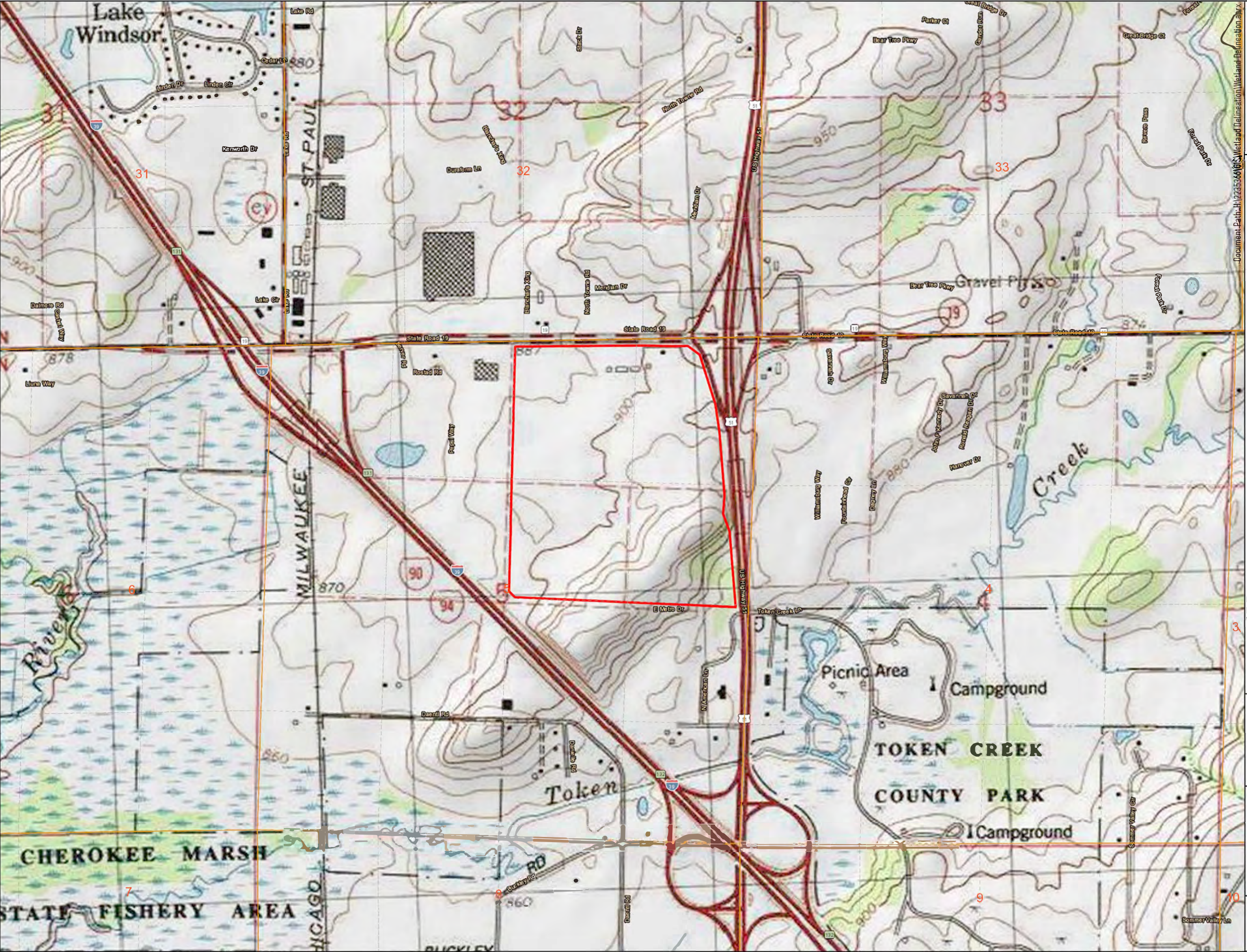
Kwik Trip
Kwik Trip Distribution Center
Town of Burke
Dane County, Wisconsin

- Map Legend
- Study Area (149.75 Acres)
 - Wetland
 - ◆ Sampling Point
 - ◆ Cursors Point

World Transportation: Esri, HERE, iPC
World Imagery: Maxar

Figure 5
Wetland Boundary Map





Kwik Trip
Kwik Trip Distribution Center
Town of Burke
Dane County, Wisconsin




Map Legend
 Study Area (149.75 Acres)

USA_Topo_Maps: Copyright© 2013 National Geographic Society, i-cubed
DW_Map_Dynamic/EN_PLSS_Boundaries_WTM_Ext:
World Transportation: Esri, HERE, IPC

Figure 1A
Topographic/Site Location
Map



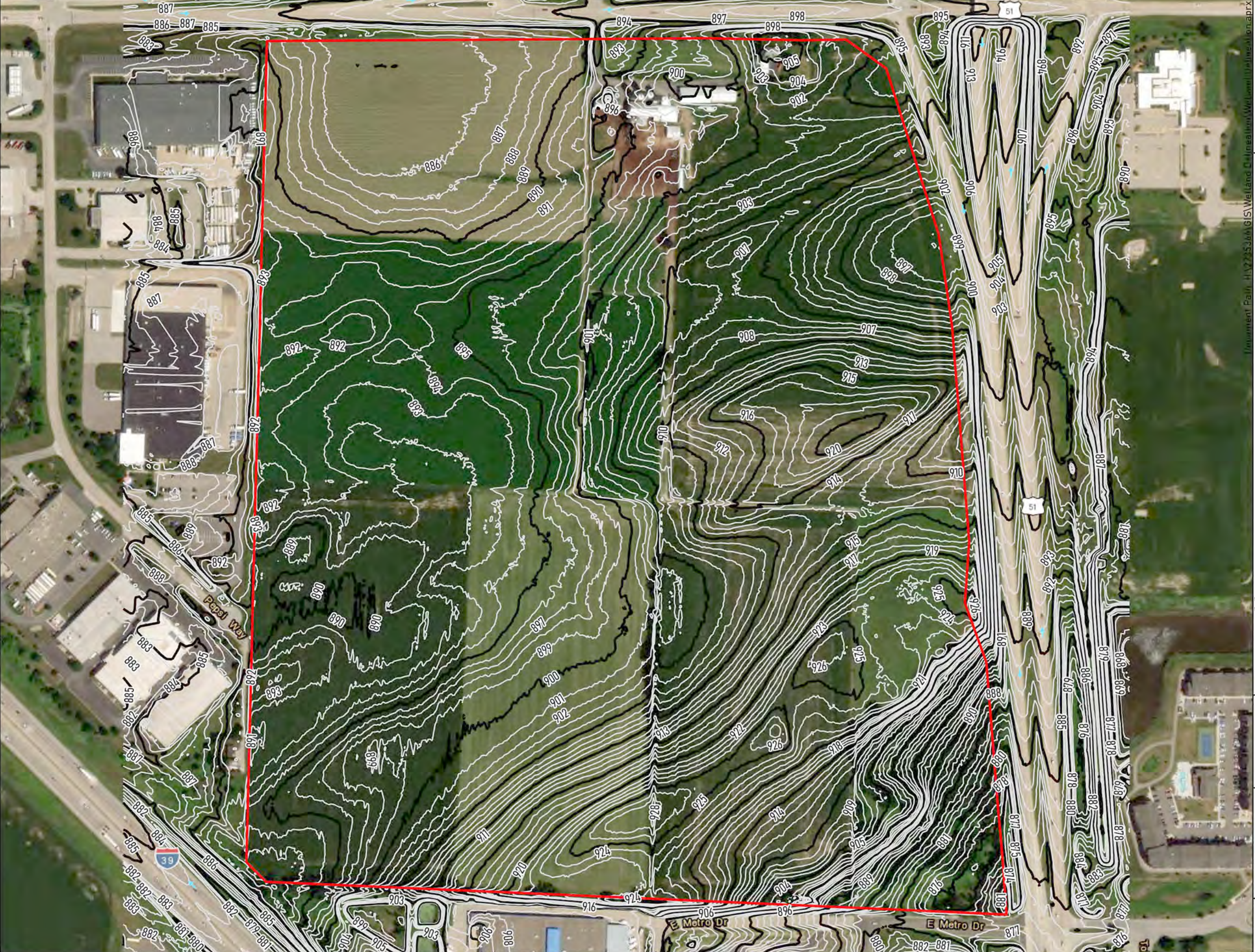
Kwik Trip
Kwik Trip Distribution Center
Town of Burke
Dane County, Wisconsin

- Map Legend
-  Study Area (149.75 Acres)
 -  Intermediate Contour (1-foot)
 -  Index Contour (5-foot)

World Transportation: Esri, HERE, iPC
World Imagery: Maxar

Figure 1B
Contour Map

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Kwik Trip
Kwik Trip Distribution Center
Town of Burke
Dane County, Wisconsin

- Map Legend
- Study Area (149.75 Acres)
 - Wisconsin Wetland Inventory
 - Excavated pond

World Transportation: Esri, HERE, iPC
World Imagery: Maxar

Figure 2A
Wisconsin Wetland Inventory
and Water Resources Map



Kwik Trip
Kwik Trip Distribution Center
Town of Burke
Dane County, Wisconsin

- Map Legend
- Study Area (149.75 Acres)
 - NRCS Wisconsin Soils
 - Somewhat poorly drained
 - Very poorly drained



World Transportation: Esri, HERE, iPC
World Imagery: Maxar

Figure 3
NRCS Soil Map

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September 11, 2023
2235366

0 1 50 300
1-inch equals 300-feet



Photo 7: DP 3-WET facing south.



Photo 8: DP 3-WET facing east.



Photo 9: W-1 facing SE.



Photo 10: W-1 facing SW.