

CEMVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00606-CJB

CEMVP-RD

August 7, 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-2024-00606-CJB, 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.

CEMVP-RD

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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 1	Non-Jurisdictional	N/A

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)
- d. “Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of ‘Waters Of The United States’ Under The Clean Water Act” (March 12, 2025)

3. REVIEW AREA.

- a. Review Area Size (in acres): 3.0
- b. Location Description: The project/review area is located in Section 09, Township 20N, Range 17E, Winnebago County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.222918 Longitude: -88.471932
- d. Nearest City or Town: Neenah
- e. County: Winnebago
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):

Action ID	Type	Outcome
MVP-2024-00606-CJB (dated July 12, 2024)	AJD	Wetland 1 (0.014 acre) was determined to be non-jurisdictional under the AJD

CEMVP-RD

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶

N/A

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.

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.

- 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 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).

The review area contains one wetland identified as Wetland 1 on the figure labeled 2024-00606-CJB Figure 2. A portion of this wetland (0.014 acre) was included within the review area of a previous AJD (2024-00606-CJB) dated July 12, 2024, and was determined non-jurisdictional. The review area for this review has been expanded to include the entire wetland (0.299 acre). Based on review of the wetland delineation report provided by the requestor; this wetland is located within a topographic depression with Copperhead Drive to the north, American Drive to the east, vacant land to the south, and residential development to the west. Historic aerial photos indicate site alterations sometime between 1960 and 1975. Historic aerial images also indicate further site alteration that included excavation at the location

⁹ 88 FR 3004 (January 18, 2023)

of Wetland 1 sometime between 1987 and 1992. Based on potential wetness signatures in the area of Wetland 1 prior to excavation, observed in historic aerial photos dated 1957, 1960, 1975, and 1982, this wetland was reviewed as a potential water of the United States under the 2023 Rule as amended and not as an excluded feature under the 2023 rule as amended.

Based on aerial photos and the wetland delineation report, Wetland 1 is fed by two stormwater culverts, located on the northwest and southwest areas of Wetland 1, that disperse nearby runoff into Wetland 1. Additional areas outside of the review area were also reviewed for potential downstream connections to a relatively permanent water. Review of aerial photos and the WI 24k Hydro Flowlines Stream Order Layer within the National Regulatory Viewer indicates the closest relatively permanent water is Little Butte des Morts located approximately 0.23 miles to the east of Wetland 1. Based on LiDAR images, a depressional area is located adjacent to the northeast area of Wetland 1. Upon further review of LiDAR, Google Street View Images, current and historic aerial photos, and the hydric soil layer, this area immediately to the northeast of Wetland 1 lacks wetness signatures and is located in predominantly non-hydric soil, suggesting this area is upland. Any exchange of hydrology between Wetland 1 and this area would likely be through non relatively permanent overland sheet flow. No other potential downstream connections were observed in aerial or LiDAR images near the exterior boundaries of Wetland 1; therefore, Wetland 1 does not abut a relatively permanent water.

Based on review of the wetland delineation report, landscape position, aerial photos, and onsite photos, Wetland 1 is not a TNW, territorial sea, or interstate water; therefore, Wetland 1 is not a category (a)(1) water. Wetland 1 is not a tributary and has not been created by impounding a water of the U.S.; therefore, this wetland is not a category (a)(2) or (a)(3) water. This wetland does not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule. 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 July 30, 2025
 - b. Wetland Delineation Report, completed by Davel Engineering & Environmental, Inc, dated October 16, 2025

CEMVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00606-CJB

- c. Historic Aerials dated 1957, 1960, 1975, and 1982, generated from HistoricAerials.com on July 2, 2024
- d. USACE National Regulatory Viewer layers to include LiDAR (DEM and Hillshade), WIDNR Imagery – Latest Leaf Off, WI 24k Hydro Flowlines Stream Order, Section 10 – Rivers, Section 10 – Lakes, USA Soils Hydric Class, accessed on July 2, 2024, and July 30, 2025
- e. Google Earth Street View, accessed on July 2, 2024, and July 30, 2025
- f. MVP-2024-00606-CJB AJD, dated July 12, 2024

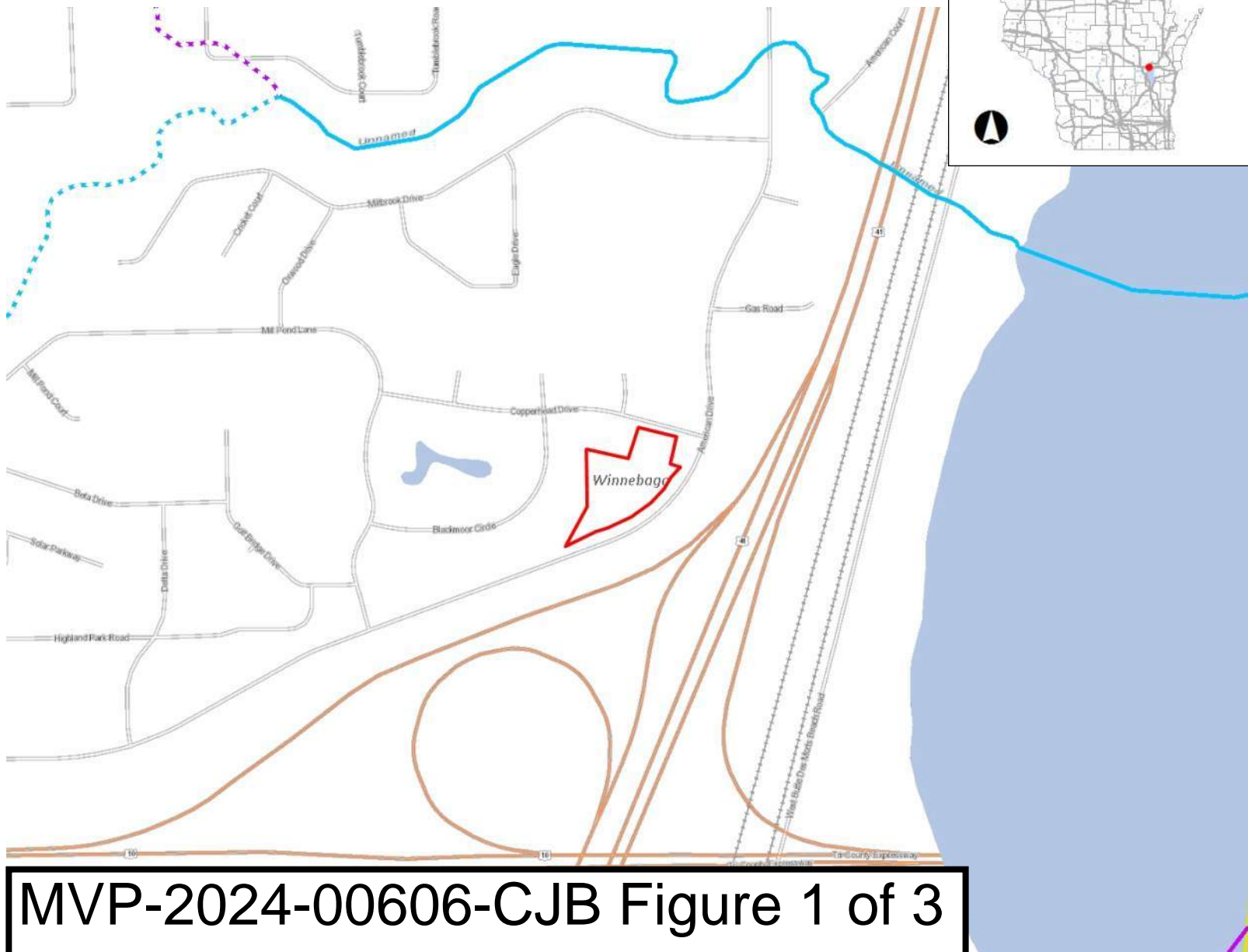
10. OTHER SUPPORTING INFORMATION.

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.

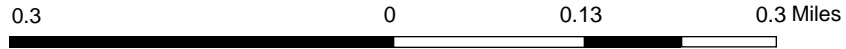


Surface Hydrology Exhibit



- Legend**
- Stream Order**
 - 1st Order
 - 2nd Order
 - 3rd Order
 - 4th Order
 - 5th Order
 - 6th Order
 - 7th Order
 - 8th Order
 - 9th Order
 - County Boundary**
 - Cities, Towns & Villages**
 - City
 - Village
 - Civil Town
 - Municipality**
 - State Boundaries**
 - County Boundaries**
 - Major Roads**
 - Interstate Highway
 - State Highway
 - US Highway
 - County and Local Roads**
 - County HWY
 - Local Road
 - Railroads**
 - Tribal Lands**
 - Rivers and Streams**
 - Intermittent Streams**
 - Lakes and Open water**

MVP-2024-00606-CJB Figure 1 of 3



NAD_1983_HARN_Wisconsin_TM

1: 7,920

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

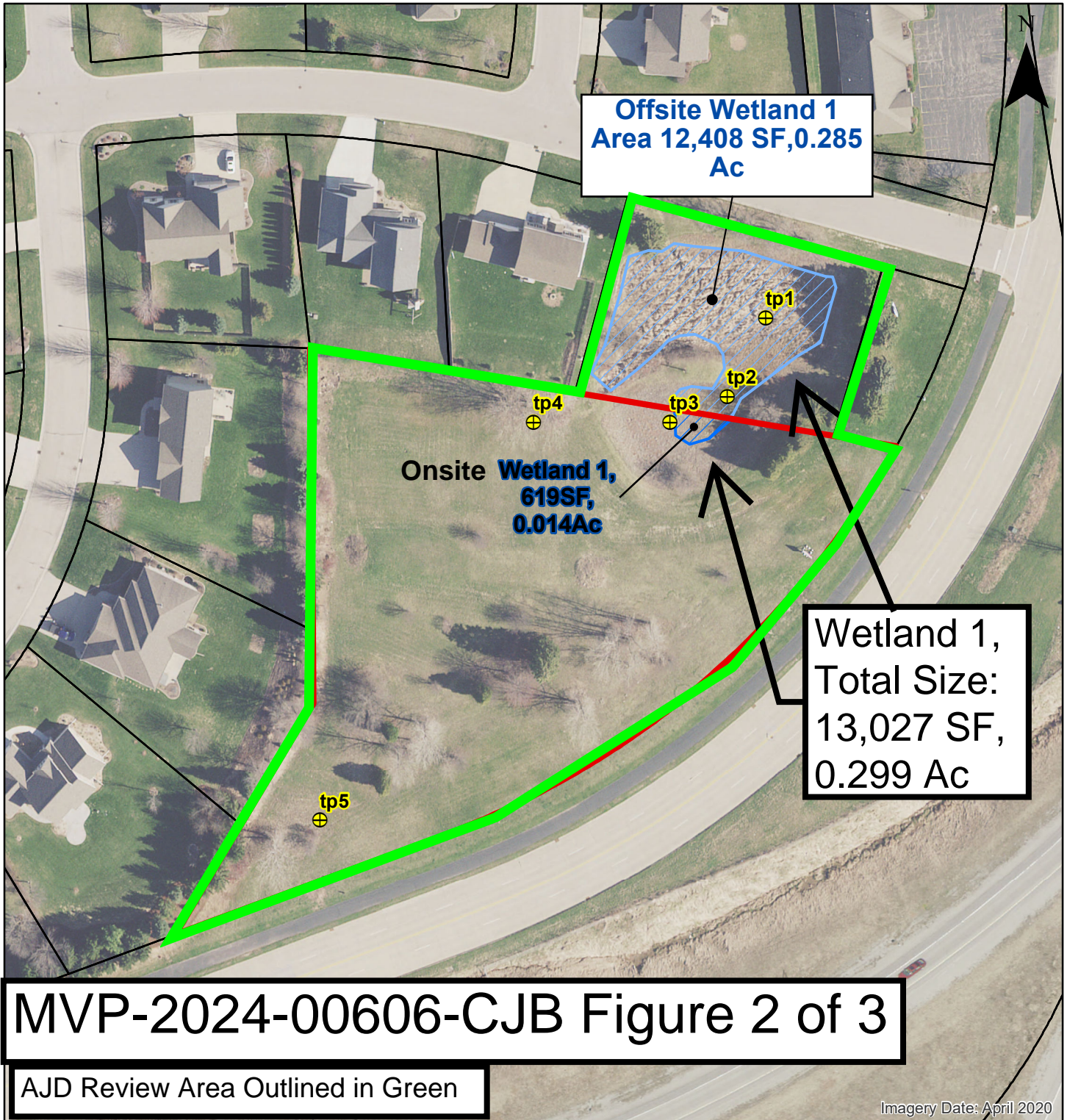
Wetland Delineation Map

2020 Air Photo

American Drive

Part of Sec. 9, T20N, R17E, Village of Fox Crossing, Winnebago County, WI

For: David Gloss



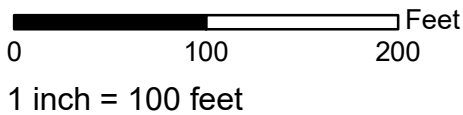
MVP-2024-00606-CJB Figure 2 of 3

AJD Review Area Outlined in Green

Imagery Date: April 2020



DAVEL ENGINEERING & ENVIRONMENTAL, INC.
Civil Engineers and Land Surveyors
1164 Province Terrace, Menasha, WI 54952
Ph: 920-991-1866 Fax: 920-441-0804
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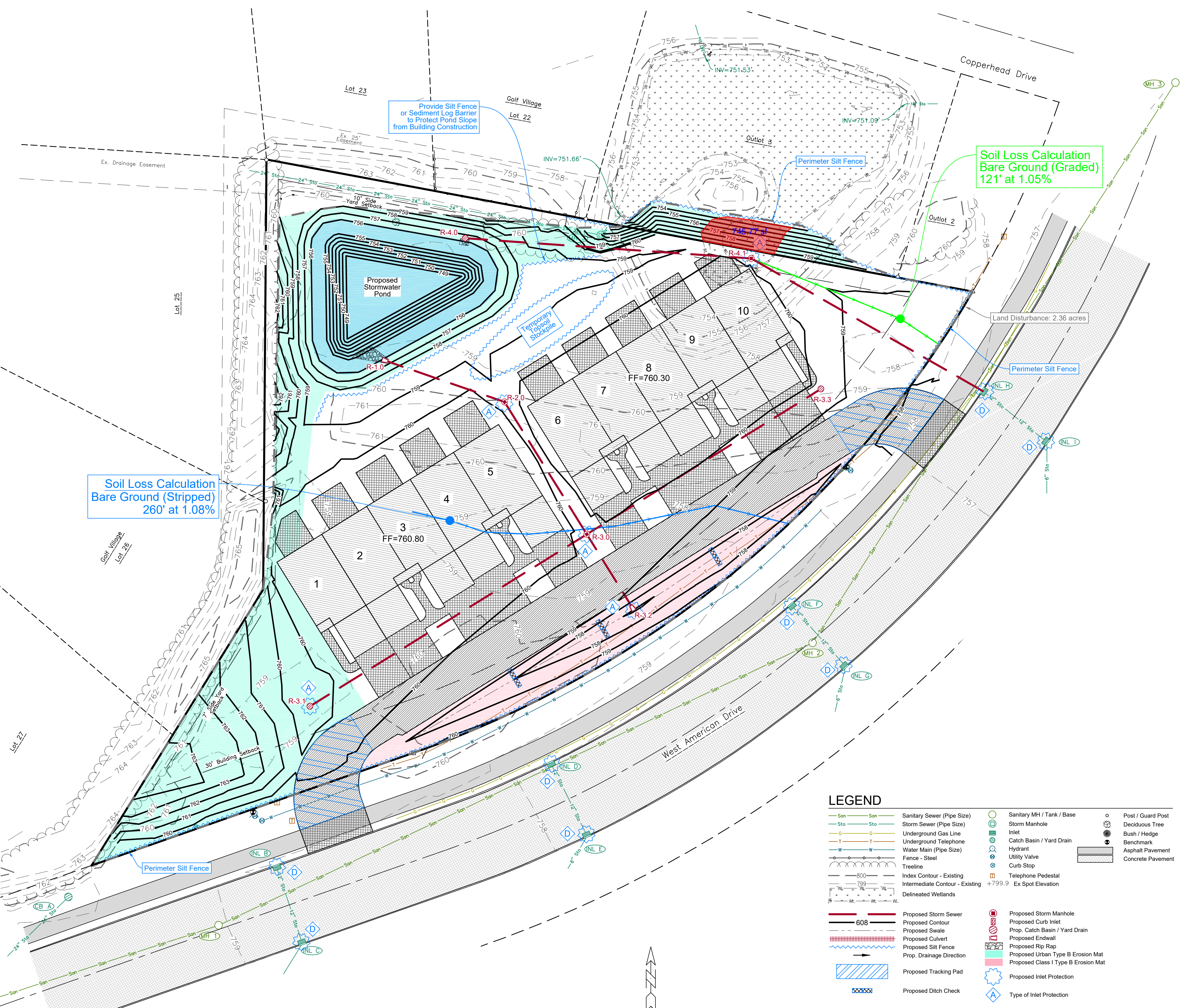
Legend

- Project Scope
- Test Plots
- Wetland Boundary

PN7955 American Drive

The project scope limits shown on this map is not intended to be the parcel boundary.

Drafted by: josh 11-09-2023



LEGEND

Sanitary Sewer (Pipe Size)	Sanitary MH / Tank / Base	Post / Guard Post
Storm Sewer (Pipe Size)	Storm Manhole	Deciduous Tree
Underground Gas Line	Inlet	Bush / Hedge
Underground Telephone	Catch Basin / Yard Drain	Benchmark
Water Main (Pipe Size)	Hydrant	Asphalt Pavement
Fence - Steel	Utility Valve	Concrete Pavement
Treeline	Curb Stop	
Index Contour - Existing	Telephone Pedestal	
Intermediate Contour - Existing	+799.9 Ex Spot Elevation	
Delineated Wetlands		
Proposed Storm Sewer	Proposed Storm Manhole	
Proposed Contour	Proposed Curb Inlet	
Proposed Swale	Prop. Catch Basin / Yard Drain	
Proposed Silt Fence	Proposed Endwall	
Prop. Drainage Direction	Proposed Rip Rap	
	Proposed Urban Type B Erosion Mat	
	Proposed Class I Type B Erosion Mat	
	Proposed Inlet Protection	
	Type of Inlet Protection	
Proposed Building		
Proposed Asphalt		
Proposed Concrete		
Proposed Gravel		

Planned Sediment and Erosion Control Practices

All erosion control practices shall be in place prior to disturbing the site. All sediment and erosion control devices and methods shall be in accordance with DNR Technical Standards and the WisDOT Erosion Control product acceptability lists (PAL). It is the responsibility of the Contractor to minimize the area disturbed and the duration of the disturbance. Erosion & sediment control measures shall be maintained on a continuing basis until the site work is permanently stabilized. All applicable controls must be in place at the end of each work day. All off-site sediment deposits occurring as a result of construction work or a storm event shall be cleaned up at a minimum by the end of each day or as necessary. Flushing shall not be allowed.

- Diverting Flow**
 - Permanent Diversion** - Intended to divert runoff around disturbed areas to a location where the water can be discharged without adversely impacting the receiving area or channel. Permanent diversions will be used to route runoff to the pond.
 - Temporary Diversion** - Intended to divert runoff around disturbed areas to a location where the water can be discharged without adversely impacting the receiving area or channel. Unlike a permanent diversion, the temporary diversion will be removed upon the completion of the project. Temporary diversions will be used upslope of any soil piles to reduce the amount of sediment transported. A diversion is also proposed to temporarily redirect runoff in a non-erosive manner. All diversions shall be installed and maintained in accordance with DNR Technical Standard 1066.
- Overland Flow**
 - Silt Fence** - Intended to provide a temporary barrier to the transportation of sediment offsite. Silt fence also reduces the velocity of sheet flow, thereby reducing the erosion potential of flowing water. Silt fencing is not to be used in areas of channelized flow and sediment deposits shall be removed when a 6-inch depth is reached. The silt fence shall be repaired or replaced as necessary to maintain a barrier. **All Silt Fence shall be installed and maintained in accordance with DNR Technical Standard 1056.** It will be placed at the following locations:
 - along the site boundary where runoff will leave the site.
 - at the toe of soil piles if the pile will remain in place for more than seven (7) days.
 - Sediment Bale Barrier** - Intended to intercept and detain small amounts of sediment from construction operations to prevent sediment from leaving the site. Sediment Bale Barriers are not to be used in areas of channelized flow. **All Sediment Bale Barriers shall be installed and maintained in accordance with DNR Technical Standard 1055.** Sediment Bale Barriers may be used in place of silt fence around soil stockpiles.
 - Mulching areas** - Intended to reduce the amount of erosion caused by rainfall impact, high overland and concentrated flow velocities and assist the establishment of both temporary and permanent vegetation. **All Erosion Mat shall be installed and maintained in accordance with DNR Technical Standards 1052 and 1053 and all Mulching with DNR Technical Standard 1058.** In addition to mulching, Erosion Mat is required per plan with installation per manufacturer specifications. If required due to seasonal interruption of construction activities, all disturbed areas shall be mulched prior to freeze up.
 - Seeding** - Intended to provide a reduction of overland flow velocities and stabilize disturbed areas. Seeding will be used on all disturbed areas within seven days of the completion of the activity that will disturb the area. **All seeding shall be in accordance with DNR Technical Standard 1059.** Seed mixture 40 (per WisDOT Specifications, Section 630) shall be applied at 5 pounds per 1000 square feet for permanent seeding prior to September 15th. Temporary seeding shall consist of Oats, Rye, Winter Wheat, and/or Annual Ryegrass applied at rates and during the season specified by the Technical Standard but no later than November 1st. Sod placement may occur at any time sod is available and the sod and soil are not frozen.
- Trapping Sediment in Channelized Flow**
 - Ditch Checks** - Intended to settle suspended sediment in channelized flow by reducing the flow velocity. **All Ditch Checks shall be installed and maintained in accordance with DNR Technical Standard 1062.** Ditch Checks will be used where indicated on the plan as sediment logs. Additional ditch checks may be required in areas where erosion is occurring.
- Permanent Channel Stabilization**
 - Armored Waterway** - Intended to establish a non-erosive lining in the channel to prevent erosion. This can be accomplished using riprap. Riprap will be used in the following areas:
 - pipe outfalls as indicated on the plans;
 - Vegetated Waterway** - Intended to establish permanent vegetation to reduce the velocity of concentrated runoff thereby protecting the waterway from erosion. The type of erosion mat used will depend upon the velocity of the runoff in the channel and is specified in accordance with DOT Erosion Control Product Acceptability Lists (PAL). Vegetated waterways will be used in the following areas:
 - drainage swales as indicated on the plans;
- Inlet Protection Barriers** - Intended to prevent the sedimentation of storm water conveyance structures. **All Inlet Protection Barriers shall be installed and maintained in accordance with DNR Technical Standard 1060.** As required, inlet protection barriers will be used at all storm sewer inlets as indicated on the plans.
- Stone Tracking Pad** - Intended to reduce the amount of sediment transported onto public roads. **The Tracking Pad shall be installed and maintained in accordance with DNR Technical Standard 1057.** A tracking pad will be constructed at the site entrance as indicated on the plan.
- Dust Control** - Intended to reduce surface to air transport of dust during construction. **Dust control shall be implemented with use of methods provided in DNR Technical Standard 1068.** These methods include the use of polymers, seeding, and mulch.
- Dewatering BMP** - Intended to reduce the amount of sediment transported due to dewatering practices. **Dewatering practices require compliance with DNR Technical Standard 1061.** The use of geotextile bags is required to prevent sedimentation with discharge to the adjacent storm water pond. Upon completion of the dewatering operation, all materials must be disposed of properly in accordance with all state and local requirements.
- Waste Material** - All onsite waste and construction materials shall be handled and disposed of properly. No pavement material, runoff from concrete washout, or other waste material is allowed to enter the storm sewer system or receiving waters.

Sequence of Construction

- Obtain plan approval and other applicable permits. Install erosion control measures. **August 2025**
- Utility construction: **August 2025**
- Stormwater Pond Construction and Site Grading. **August 2025**
- Building Construction: **September 2025**
- Asphalt/Concrete Paving: **June 2026**
- Stabilize terrace areas no later than one week after final grade is established. **No later than July 1, 2026 for seed/mulch application.**
- Remove all temporary measures, topsoil critical areas, and establish vegetation. Water if necessary to establish healthy and well rooted vegetation.

Note: The dates provided are approximate and subject to weather conditions and overall project schedule. Several of the work items listed above may occur simultaneously with others.

Maintenance Plan

The contractor is responsible for inspection and maintenance of sediment and erosion control measures until the project is completed. The inspections shall be made every seven days or within 24-hours of a rainfall event of 0.50-inch or greater. Any control measures that are damaged or not working properly shall be repaired by the end of the day. Accumulated sediment shall be removed when it has reached a height of one-half the height of the structure. In addition, the following measures shall be taken:

- All seeded areas will be re-seeded and mulched as necessary according to the specifications in the planned practices to maintain a vigorous, dense vegetated cover.
- Remove silt fence and temporary structures only after final stabilization and vegetative cover is established.
- Avoid the use of fertilizers and pesticides in or adjacent to channels or ditches.
- Construction and waste materials shall be properly disposed.

Weekly inspection reports shall be maintained by the contractor. These reports shall document inspections and maintenance performed. The date and time of the inspections, the inspector's name, and the status of construction and any maintenance performed. Refer to Appendix C of the Erosion & Sediment Control Plan (report) or the DNR website for a template: <http://dnr.wi.gov/runoff/stormwater/constforms.htm#forms>. Upon request, the inspection reports shall be made available to the owner, the engineer, the Wisconsin Department of Natural Resources, or the Village of Fox Crossing.

Responsible Parties

Best Management Practices (BMPs) Construction and Maintenance:
To be Determined (TBD)

BMP Inspection and Compliance Enforcement
Village of Fox Crossing
Wisconsin Department of Natural Resources