



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

MVP

July 12, 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-2024-00695 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. W3a (0.107 acre), non-jurisdictional
 - ii. W3b (0.004 acre), non-jurisdictional
 - iii. W3c (0.014 acre), non-jurisdictional
 - iv. W4a (0.098 acre), non-jurisdictional
 - v. W4b (0.076 acre), non-jurisdictional
 - vi. W5 (0.033 acre), non-jurisdictional
 - vii. Stormwater Feature 100 (0.256 acre), non-jurisdictional
 - viii. Stormwater Feature 101 (0.129 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 15 acres in size and is identified by the yellow polygon in the attached 2024-00695-LAH Figures 1 of 2 through 2 of 2. The review area is located at 44.20658, -88.34525 in the Village of Harrison, Calumet 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

Wetlands W3a, W3b, W3c, W4a, W4b, Stormwater Feature 100, and Stormwater Feature 101 have been constructed within what was historically an agricultural upland that contained no wetland signatures reviewed through historic aerial imagery. The construction of a commercial building and associated infrastructure that took place in 2009 included the construction of stormwater features and settling basins. These features drain the immediate surrounding area, which is dry, agricultural, and commercial facility uplands. Review of the 2009 Stormwater Features Construction Plan describes these features were constructed to drain water runoff toward a detention basin on the southern end of the review area. This final runoff basin contains no culverts leading outward or mapped wetlands or hydric soil units in these areas. It has been determined that wetlands W3a, W3b, W3c, W4a, W4b, Stormwater Feature 100, and Stormwater Feature 101 are artificial settling basins created by excavation of dry lands for the purpose of collecting and retaining water. Based on this information, these wetlands are considered (b)(5) exclusions of the 2023 Rule, as Amended.

Wetland W5 has been formed within a roadside ditch that drains the roadway and immediate surrounding agricultural field located in upland. W5 has historically held consistent form while Fire Lane 11 (roadway) had been constructed sometime between 1973 and 1981. Prior to this roadway, there were no wetland signatures observable in the area of W5. There are no mapped wetlands or hydric soil units in this area. Therefore, it has been determined that W5 is a water-filled depression situated within a roadside ditch that was created in upland and is non-jurisdictional and considered a (b)(3) exclusion of the 2023 Rule, as Amended.

- 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). N/A

⁷ 88 FR 3004 (January 18, 2023)

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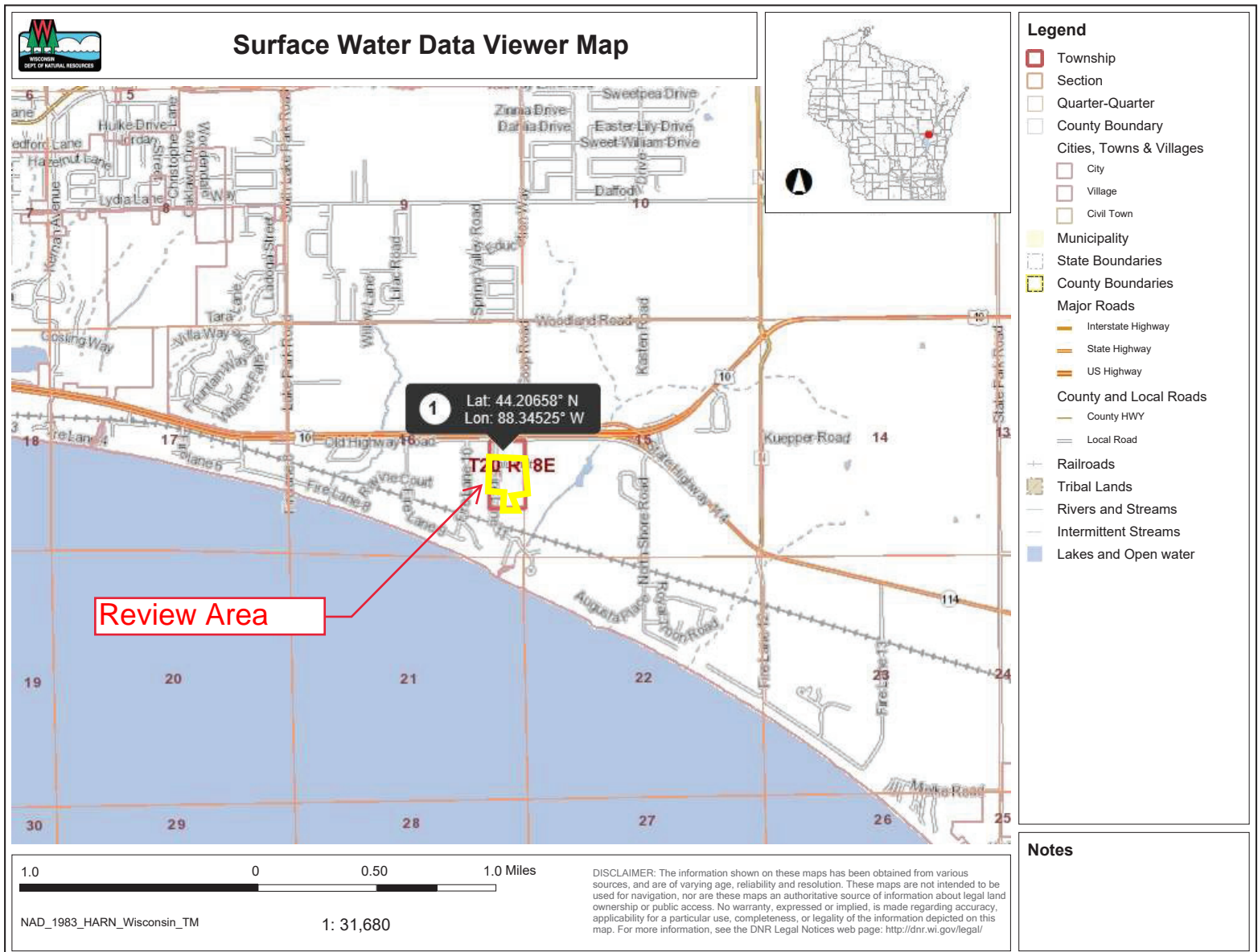
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00695-LAH

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 and completed on July 5, 2024.
 - b. Davel Engineering & Environmental, Inc., Routine Wetland Delineation Report completed for Solum Lang Architects dated May 30, 2024.
 - c. Mississippi Valley Division NRV, WDNR DEM and Hillshade layers accessed July 5, 2024.
 - d. Google Earth imagery dated 1992, 2005, 2006, 2008, 2010, 2011, 2015, 2017, 2018, 2020, 2021, 2023, and 2024. Accessed July 5, 2024.
 - e. Historic Aerials provided by NETRonline, www.HistoricAerials.com dated 1953, 1957, 1973, 1982, 1986, 1992, 2005, 2008, 2010, 2013, 2015, 2017, 2018, and 2020. Accessed July 5, 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.

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Figure 1

USACE 2024 Review Area

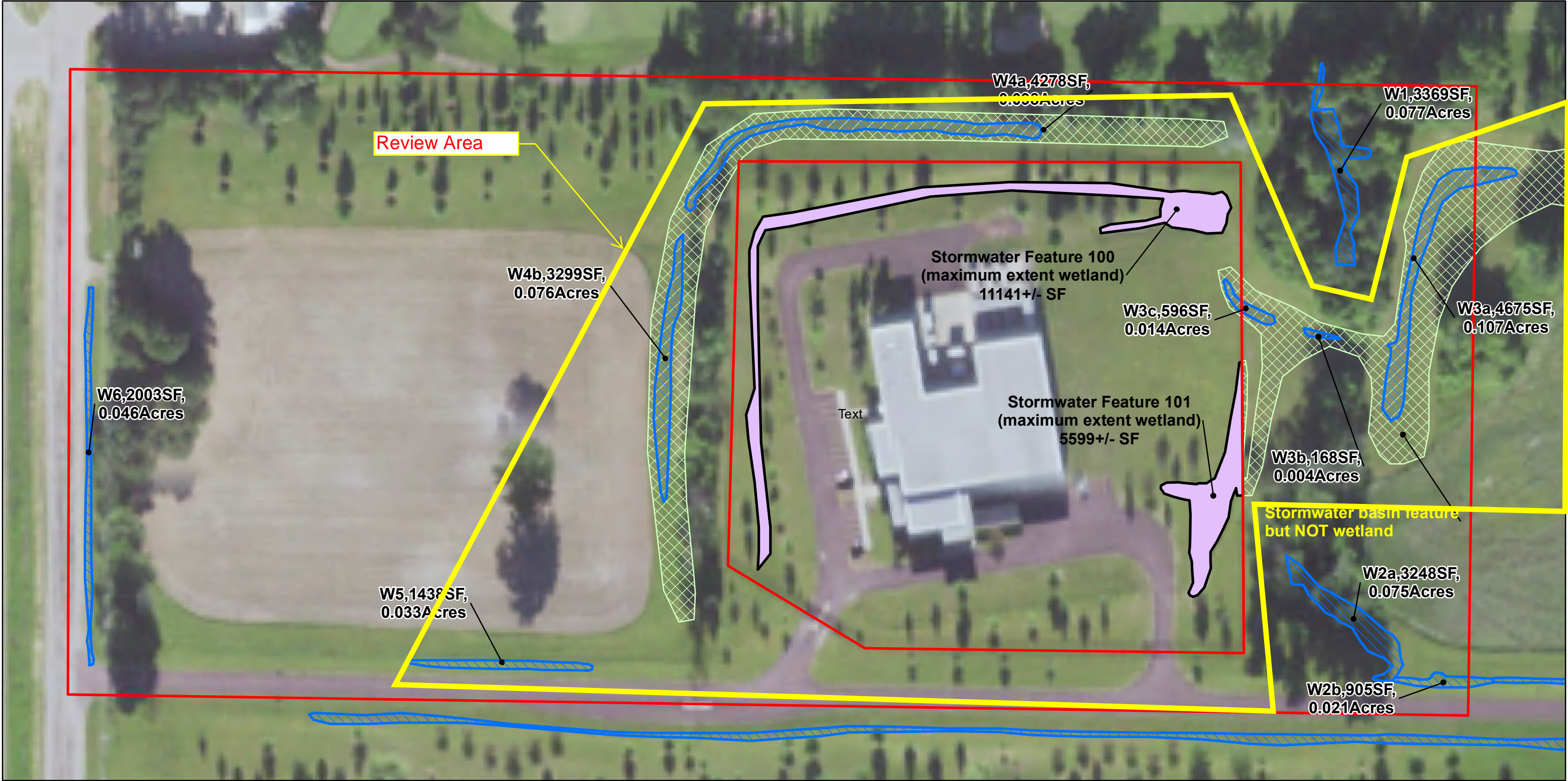




Revised Aquatic Feature Description Map

W6149 Old Highway Road, Village of Harrison
Part of Sec. 15, T20N, R18E, Village of Harrison, Calumet County, WI
For: Soum Lang Architects, LLC (Al Buck)

June 2022
Normal 3-Mo. AP



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



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0 25 50 100 150 200 Feet

Legend

- Scope
- Wetland
- New_Shapefile(2)
- Stormwater Feature