



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

MVP-RD

September 11, 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-2024-00807-TKO [[MVP-2024-00807-TKO 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,

---

<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.

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00807-TKO

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
AW-1 (0.01-acre)	Non-Jurisdictional	None
AW-2 (0.09-acre)	Non-Jurisdictional	None
AW-3 (0.01-acre)	Non-Jurisdictional	None

## 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 an approximately 1.25-acre portion of the 17.8-acre Miller Pipeline site, located at S74W24255 National Ave, in Section 10, Township 05N, Range 19E, Village of Vernon, Waukesha County, WI. The review area is centered at 42.9090, -88.2329, sits within the Eagle Creek-Fox Creek watershed (HUC 10: 0712000607), and is identified by a red polygon on the attached figures labeled: MVP-2024-00807-TKO Figures 1-2 of 3. No other JDs are associated with this review area.]

- a. Project Area Size (in acres): 4.40 Acres
- b. Location Description: The project/review area is located in Section 10, Township 05N, Range 19E, Waukesha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 42.908960 Longitude: -88.231130
- d. Nearest City or Town: Big Bend
- e. County: Waukesha
- f. State: Wisconsin

- g. Other associated Jurisdictional Determinations (including outcomes): N/A
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A]<sup>6</sup>
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [N/A]
  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]

---

<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.

<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.

- 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).<sup>9</sup> [Wetlands AW-1, AW-2, and AW-3 are constructed drainage/stormwater features that are not waters of the U.S. These aquatic features fit under the definition of b(5) waters, from 33 CFR 328.3(b), as they are artificial basins excavated in dry land to collect and retain water and are used exclusively as settling basins. This is evident following review of historic aerial imagery (Waukesha County GIS:1941-2022) showing a lack of wetlands on site prior to site manipulation.]

Prior to its current use as a commercial facility, review of aerial imagery shows the property housed a miniature golf course and driving range from approximately 2000-2020. Before development for recreational use, the site consisted of undeveloped, and row cropped agricultural land. Sporadic wetness signatures can be seen throughout portions of the review area however, no persistent wetness signature or any other indication of wetland presence (standing water, repeated crop/vegetation stress, distinct variation of vegetation) was observed. Additionally, USDA soil map data indicates the review area consists of entirely non-hydric soils, with no mapped wetlands (WWI and NWI), further supporting the features were excavated in uplands. Wetlands AW-1, AW-

---

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

2, and AW-3 were excavated in upland in a series of two separate developments between 2000-2022.

The first signs of substantial site disturbance are evident sometime between 2000-2005, when the golf facilities were constructed. Wetland AW-1 can be seen as a result of these construction activities, confirmed by 2005 contour lines showing AW-1 excavated at the west end of the review area. The site remained unchanged until the 2022 aerial, which shows the site in its current configuration. Prior to being excavated to its current layout, the area containing Wetland AW-2 consisted of the western portion of the miniature golf course. Similarly, the area containing Wetland AW-3 served as the northwest portion of the driving range. As noted above, prior to excavation as stormwater features, the areas containing Wetlands AW-2 and AW-3 showed no evidence of wetland presence. Following this construction (replacement of recreation facility to a commercial development) Wetlands AW-2 and AW-3 can be seen excavated in areas which were previously dry land.]

- 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 or enter rationale/discussion here.]
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 conducted on 09/03/2024.
  - b. Permit Application "2024-00807-TKO 20240716 APP.pdf" in the administrative record.
  - c. Mississippi Valley Division Regulatory Viewer, 09/03/2024.
  - d. Wisconsin DNR Surface Water Data Viewer, 09/03/2024.
  - e. Waukesha County GIS Mapping, 09/03/2024.
  - f. Google Earth, 09/03/2024.

MVP-RD

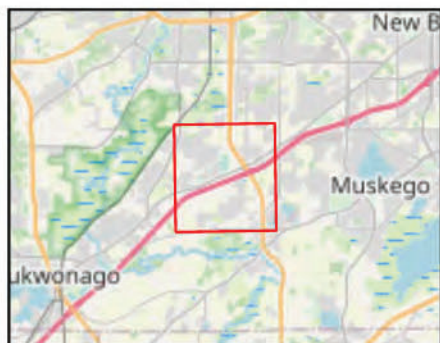
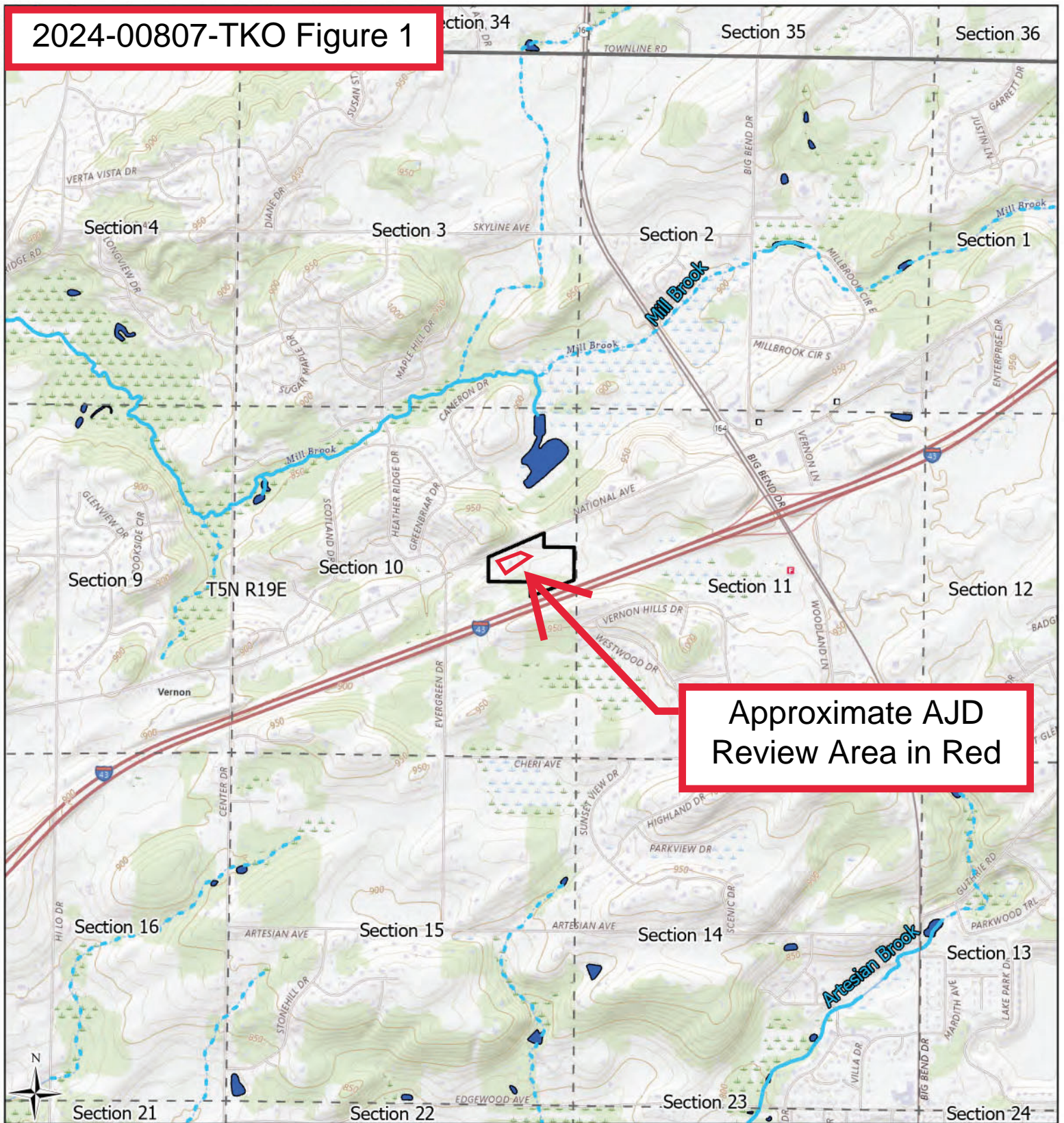
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2024-00807-TKO

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.



# 2024-00807-TKO Figure 1



- Study Area (17.81 ac)
- Township
- Section
- ~ Perennial Streams
- Intermittent Streams
- Waterbodies

0 1,000 2,000  
Ft

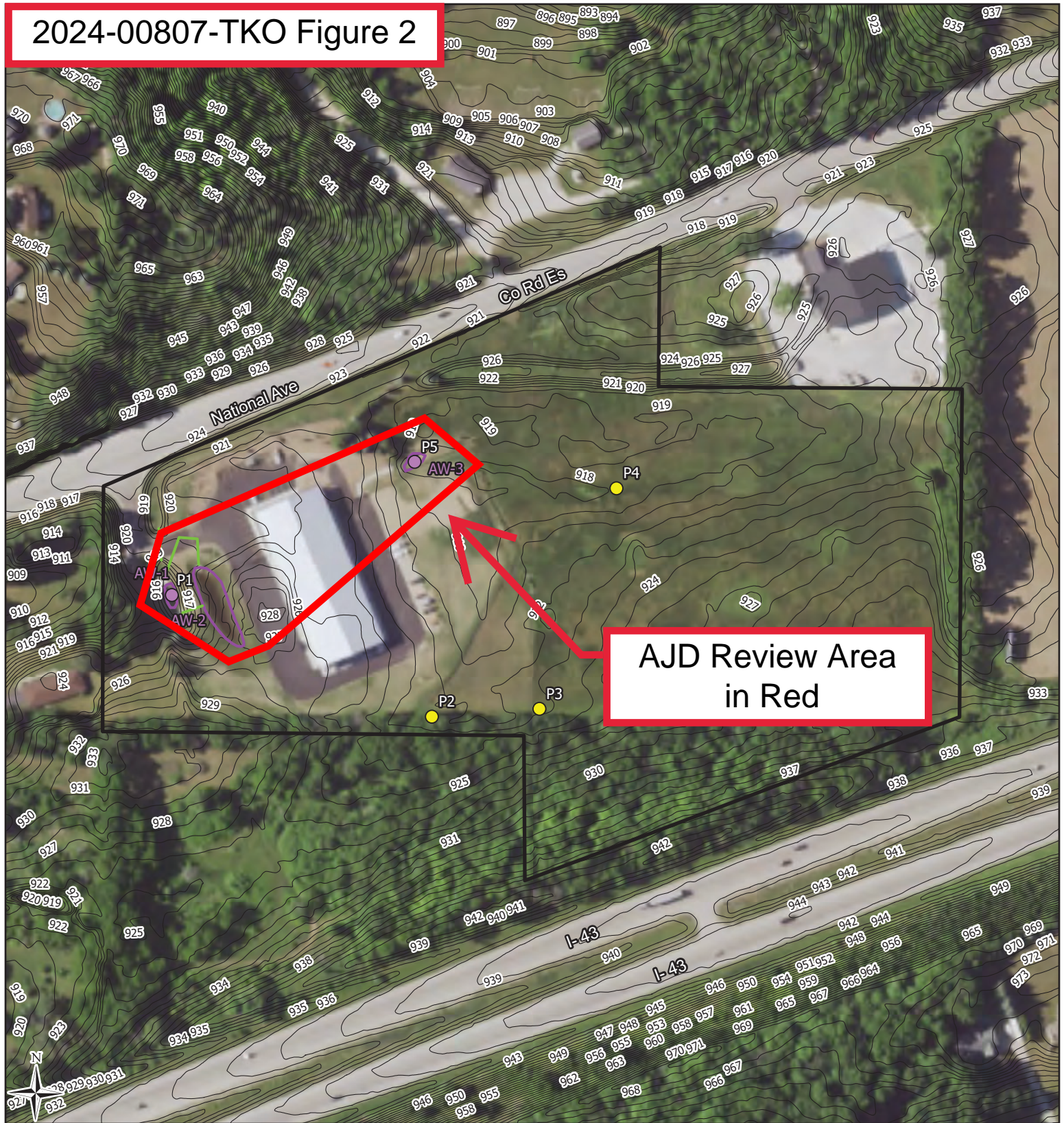
**Heartland**  
ECOLOGICAL GROUP INC

Figure 2. USGS  
Topography  
Miller Pipeline Building  
Project #20241287  
T5N, R19E, S10  
T Vernon, Waukesha Co

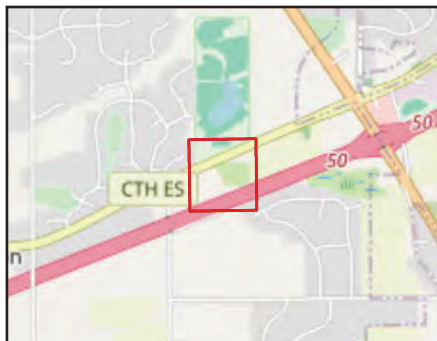
USGSTopo  
USGS, WDNR LRR: NCNE

Figure Created: 6/3/2024





AJD Review Area  
in Red



- Study Area (17.81 ac)
  - Waukesha Co 1ft Contours
  - Field Delineated Wetlands (0.12 ac)
  - Concrete Pipes
- Sample Points**
- Upland
  - Wetland

0 200  
Ft

**Heartland**  
ECOLOGICAL GROUP INC

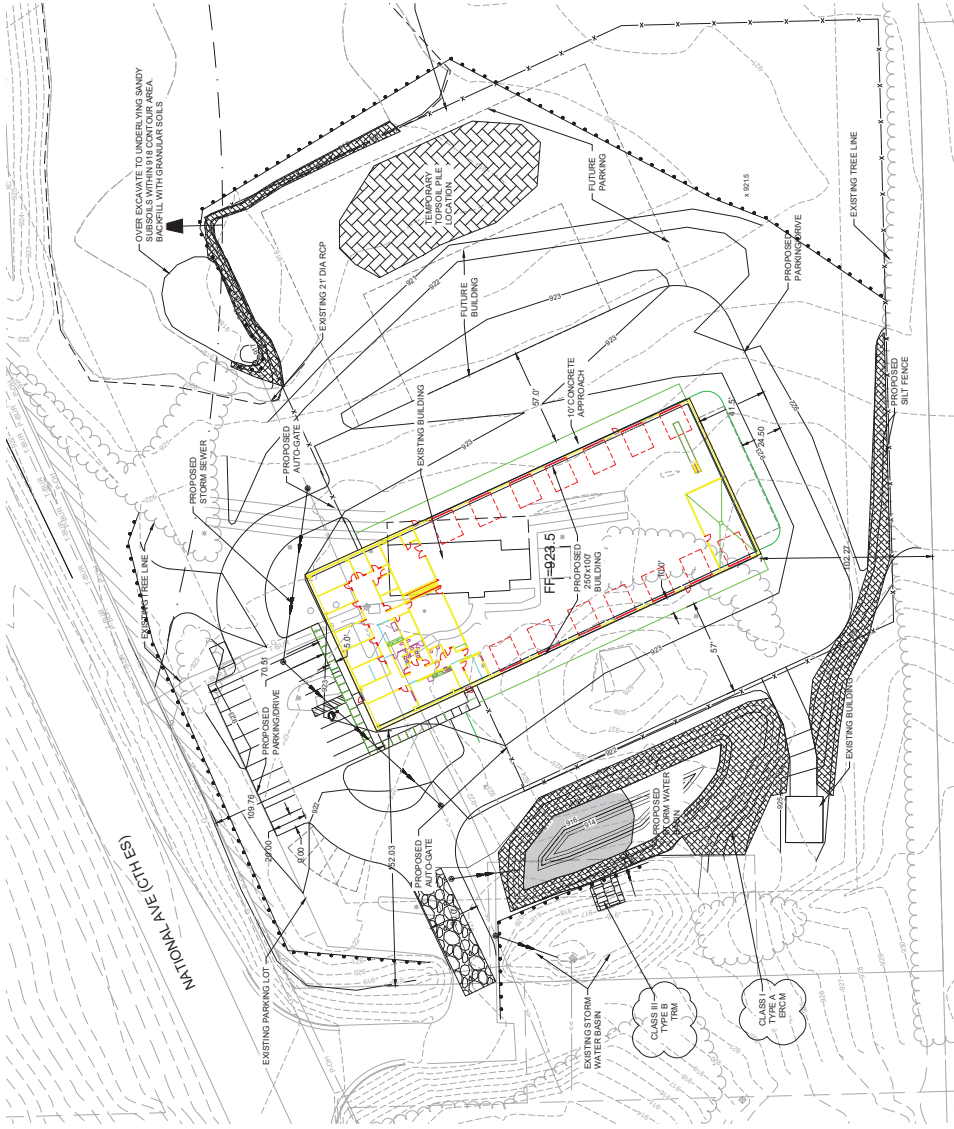
Figure 7. Field  
Delineated Wetlands

Miller Pipeline Building  
Project #20241287  
T5N, R19E, S10  
T Vernon, Waukesha Co

2022 NAIP  
Waukesha Co, HEG LRR: NCNE

Figure Created: 6/15/2024





Hydro X - Combined Construction Sequence and Construction Inspection Schedule		Inspector
Task	Duration Milestone or Task	Rate
08/03/21	Prior to grading activities	Inspection Initials
08/03/21	Hold pre-construction meeting with Village, County, DNR, contractors, utilities, Building & Maintenance, Golf Course Division	EC Insp
08/03/21	Prior to grading activities	EC Insp
08/03/21	Install all trees, under a pipe and from installation any all trees that required staking prior to installation	EC Insp
08/03/21	Construct Basin, Basin Discharge, and other Contingency Basins	EC Insp
08/03/21	Excavate and install basins, install outlet structures, install basins and storm pipes	EC Insp
08/03/21	The following slopes apply to the basins (unless noted otherwise): - Topsoil, surface and vegetation are stripped in basin footprint - Before all basins are re-compact around outlet structures following installation, verify that - The correct pipe diameter and materials are used (poly with sand bags) - Anti-slope devices are installed on specified outlet pipes - The 50% standard Proctor compaction test is met by sampling at five locations along embankment - The basin elevation is 5% above design height to allow for settling - The basin elevation is 5% above design height to allow for settling - The basin elevation is 5% above design height to allow for settling	Engineer
08/03/21	Remove basin side slopes & berms with EC mowing, install riprap in designated basin areas	Engineer
08/03/21	Grading activities	EC Insp
08/03/21	Install all trees around excavation on slope & down slopes, including plans for re-plant	EC Insp
08/03/21	Rough grading & install ditch checks	EC Insp
08/03/21	Begin Building Construction	EC Insp
08/03/21	Install pipe, structure and communication lines (by others)	EC Insp
08/03/21	Install catch and gutter and asphalt paving	Village
08/03/21	Install catch and gutter and asphalt paving	EC Insp
08/03/21	At established areas must be established by Nov. 15th regardless of utility schedule and per Wisconsin Season	EC Insp
08/03/21	Substation Requirements	EC Insp
08/03/21	Project Wrap-up	EC Insp
08/03/21	After grass is well-established at least 75% coverage, all soil, rocks and other temporary BMPs shall be removed. Any accumulated material in the berms/riprap shall be removed and disposed of.	EC Insp
08/03/21	Submit maintenance agreement addendum for approval	Engineer