



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

MVP-RD

2 DECEMBER 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-2024-01249-AJK 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.

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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).
 - i. Wetland 1, 5.44 acres, non-jurisdictional.
 - ii. Wetland 2, 0.02 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 depicted on the attached figures, labeled 2024-01249-AJK Figure 2 of 2.

- a. Project Area Size (in acres): ~ 20 Acres
- b. Location Description: The project/review area is located in Section 36, Township 08N, Range 19E, Waukesha County, Wisconsin.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 42.118305 Longitude: -88.187308
- d. Nearest City or Town: Sussex
- e. County: Waukesha
- f. State: Wisconsin
- g. Other associated Jurisdictional Determinations (including outcomes):
N/A

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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]

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.

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- 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).

Wetlands 1 and 2 are depressional features surrounded by upland that were created incidental to construction of a stormwater pond around 2000; however, all work on the site has been abandoned since the early 2000s. The wetlands are situated in the landscape with agricultural land to the west, a stormwater pond and fallow upland to the north, Town Line Road to the east, and residential development to the south.

Wetland 2 is connected to the stormwater pond directly north of the review area, but this pond does not have an outlet or other surface water connection downstream, as confirmed by aerial photos, DNR hillshade, and DNR digital elevation model (DEM). The nearest tributary is unnamed to the Fox River, located over 1,700 feet west of Wetland 1. WDNR hillshade, DEM, and 1-foot contours show the site sloping slightly to the west (869' on the east side of Wetland 1 and 864' on the western boundary). Based on aerial photos, hillshade, and DEM, there are no discrete features that provide a continuous surface

⁹ 88 FR 3004 (January 18, 2023)

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connection from either wetland towards the unnamed tributary to the west or any other tributary. The field to the west of the wetlands does not show signs of wetness signatures or surface water flow in any aerial photo year. Wetland 1 abuts Town Line Road to the east; however, there are no ditches or discrete features that provide a continuous surface connection anywhere downstream from Wetland 1. A stormwater pond was constructed to the east of Town Line Road in association with residential development. This pond discharges to Wetland 1 under Town Line Road, as confirmed by the delineation report.

Wetlands 1 and 2 are not a TNW, territorial sea, or interstate water and therefore are not an (a)(1) water. The wetlands do not extend to any tributaries and are not drained by any discrete/confined surface water conveyances. The 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. There are no ditches, swales, pipes, or culverts that connect these wetlands to downstream jurisdictional waters. The wetlands are non-tidal wetlands that do not have a continuous surface water 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) adjacent wetland; therefore, Wetlands 1 and 2 are not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule.

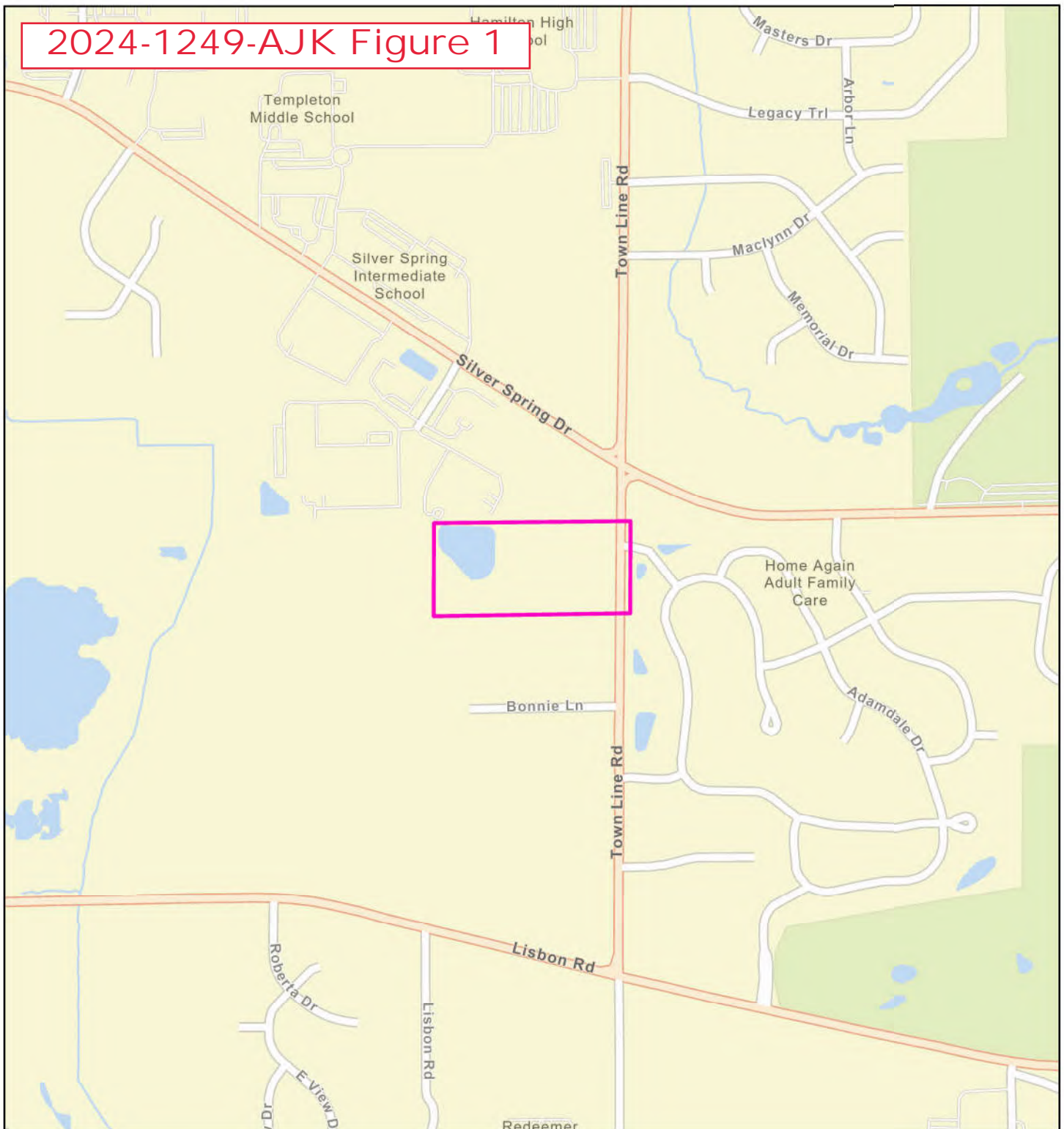
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. No field visit was conducted. Desktop review evaluation was conducted on November 22, 2024.
 - b. Town Line Road Wetland Delineation report prepared by Hey and Associates, dated November 18, 2022.
 - c. Google Earth aerial imagery 1990, 2005-2022, accessed November 22, 2024.
 - d. Mississippi Valley Division National Regulatory Viewer, WDNR Hillshade, Digital Elevation Model, Slope contours, aerial imagery, National Hydrography Dataset, accessed November 22, 2024.
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.

2024-1249-AJK Figure 1



0 1000 Feet

Project Number: 22-0378

Date: 11/3/2022



Legend:
Project Boundary

Project Name:
Townline Road-Sussex

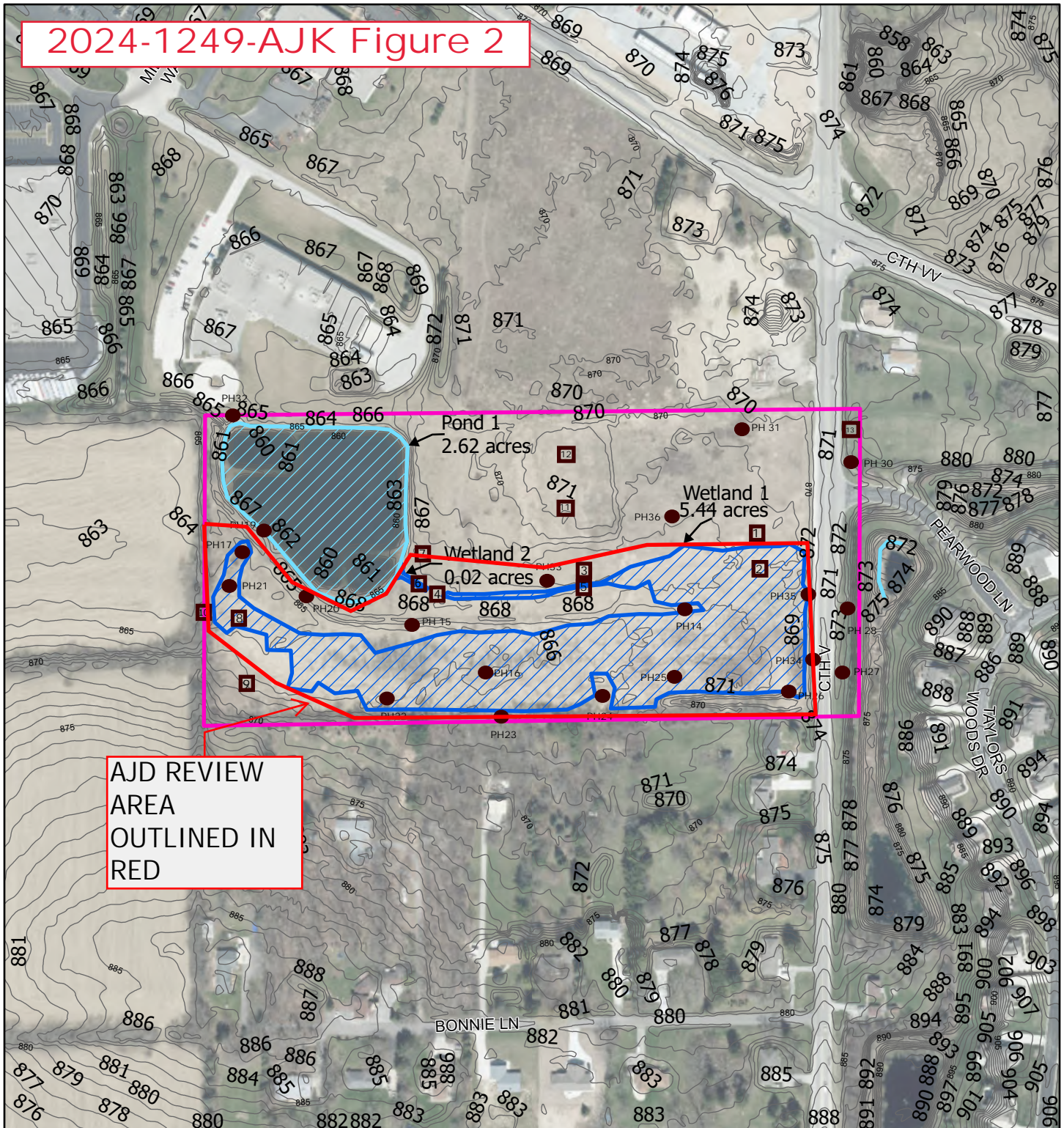
Prepared for:
Pinnacle Engineering Group

Location Information:
T.8N., R.19E., Section 36

Exhibit Title:
Project Location

Exhibit:
1

2024-1249-AJK Figure 2



AJD REVIEW
AREA
OUTLINED IN
RED

0 340 Feet

Project Number: 22-0378

Date: 10/5/2022



Legend:

- Project Boundary
- Surveyed Wetland Boundary
- Pond
- Data Point Location
- Photo Location

Project Name:
Town Line Road-Sussex

Prepared for:
Pinnacle Engineering Group

Aerial Date:
2020