



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

MVP-2025-00047-TRS

8 January 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-2025-00047-TRS 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.

MVP-2025-00047-TRS

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2025-00047-TRS.

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 (654 square feet), non-jurisdictional
 - ii. Wetland 2 (7,640 square feet), non-jurisdictional
 - iii. Wetland 3 (6,498 square feet), non-jurisdictional
 - iv. North Pond (26,535 square feet), non-jurisdictional
 - v. South Pond (5,486 square feet), 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 Corps review area is limited to Wetlands 1, 2, 3, North Pond, and South Pond as shown on the attached AJD Figure 1. The Corps review area (total wetland area) is 46,813 square feet, and the total site area is 4.5 acres. The review is located on the New Berlin School District Elmwood Elementary School Site located in the City of New Berlin, Waukesha County, WI at Latitude: 42.93539 Longitude: -88.08916.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶

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.

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
 - 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

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.

- 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

Wetlands 1 and 2 are identified in the December 2, 2024, Ruekert and Mielke, Inc. – New Berlin School District, Elmwood Elementary School Site Wetland Delineation Report. These wetlands are man-made linear features which formed as a result of grading activities in mapped uplands to convey runoff away from the Elmwood Elementary School parking lot. Wetlands 1 and 2 were constructed between 2000 and 2005 when Elmwood Elementary School was being constructed. Wetlands 1 and 2 are a result of the construction of a ditch system to manage runoff coming from the schools parking lot. Accordingly, the Corps has determined that Wetlands 1 and 2 are excluded from Section 404 jurisdiction under (b)(3) of the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule as ditches excavated wholly in and draining only dry land that do not carry a relatively permanent flow of water.

Wetland 3 is identified in the December 2, 2024, Ruekert and Mielke, Inc. – New Berlin School District, Elmwood Elementary School Site Wetland Delineation Report. Wetland 3 developed as a result of grading activities in mapped uplands between 2000 and 2005 when the North Pond was constructed. Accordingly, the Corps has determined that Wetland 3 is excluded from Section 404 jurisdiction under (b)(7) of the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule as Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

The North and South Ponds are identified in the December 2, 2024, Ruekert and Mielke, Inc. – New Berlin School District, Elmwood Elementary School Site Wetland Delineation Report. The North and South Ponds were constructed in uplands for stormwater retention between 2000 and 2005 when the Elementary

⁹ 88 FR 3004 (January 18, 2023)

school was being built. Accordingly, the Corps has determined that the North and South Ponds are excluded from Section 404 jurisdiction under (b)(1) of the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule as waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

- 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

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. Ruekert and Mielke, Inc. – New Berlin School District, Elmwood Elementary School Site Wetland Delineation Report dated December 2, 2024.
- b. USACE Regulatory Viewer Accessed January 7, 2025.
- c. WDNR - Surface Water Data Viewer Accessed January 7, 2025.
- d. Google Earth Imagery Accessed: January 7, 2025.
- e. Wisconsin Wetland Inventory, USDA Web Soil Survey, and USGS NHD and Topographic Maps Accessed: January 7, 2025.
- f. USGS 1:24K Quad Name: Hales Corners.
- g. Office evaluation conducted on January 7, 2025.

9. OTHER SUPPORTING INFORMATION. N/A

10. 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.

Elmwood Elementary School
New Berlin School District
City of New Berlin

Wetland Boundary Map

Project #: 8204-10001
Drawn By: TPS
Approved By: TPS
Name: 2WetlandBoundary
Date Saved: 9/26/2024

Figure 2



Legend

- Culvert
- Photo Point
- Sample Point
- - - Offsite Waterway
- - - Offsite Wetland
- Area of Investigation (4.5 Acres)
- PEM (14,791.7 SF)
- Storm Water Pond (32,020.2 SF)

Wetland Type:
PEM: Palustrine, emergent



0 50 100
Feet

Path: I:\Projects\8204_NewBerlinSD\10001_ElmwoodElementarySchool\Elmwood 2024.aprx

Elmwood Elementary School
New Berlin School District
City of New Berlin

Site Location Map

Project #:8204-10001
Drawn By: TPS
Approved By: TPS
Name: 1SiteLocation
Date Saved: 9/26/2024

Figure 1

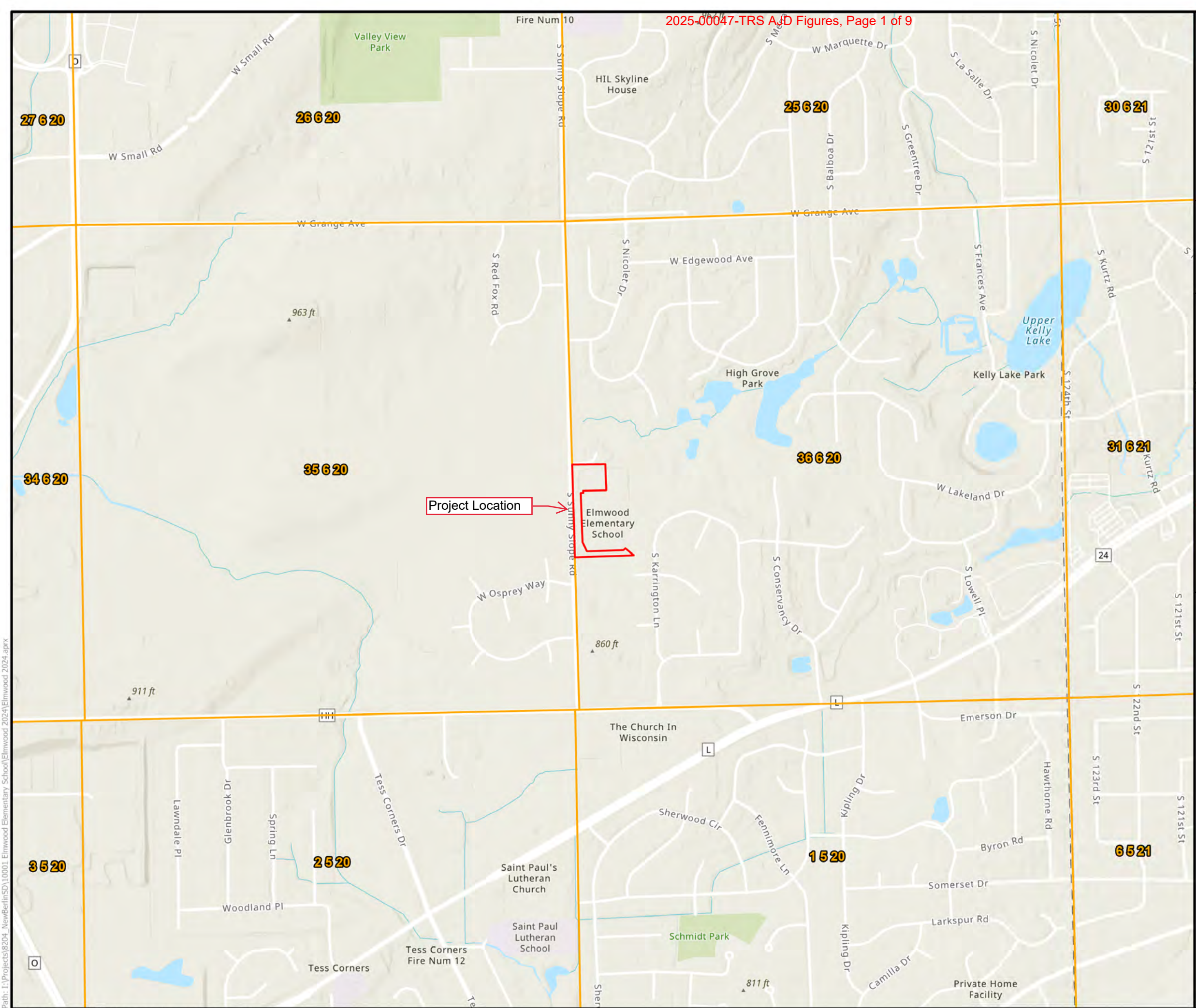


Legend

- Public Land Survey System
- Area of Investigation (4.5 Acres)



0 500 1,000 Feet



Path: I:\Projects\8204_NewBerlinSD\10001_Elmwood Elementary School\Elmwood 2024.aprx

Elmwood Elementary School
New Berlin School District
City of New Berlin

Wetland Boundary Map

Project #: 8204-10001
Drawn By: TPS
Approved By: TPS
Name: 2WetlandBoundary
Date Saved: 9/26/2024

Figure 2



Legend

- Culvert
- Photo Point
- Sample Point
- - - Offsite Waterway
- - - Offsite Wetland
- Area of Investigation (4.5 Acres)
- PEM (14,791.7 SF)
- Storm Water Pond (32,020.2 SF)

Wetland Type:
PEM: Palustrine, emergent



0 50 100
Feet

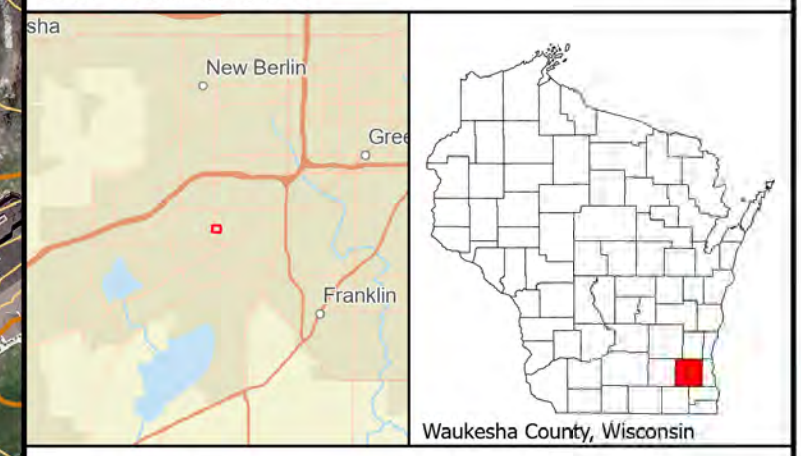
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Elmwood Elementary School
New Berlin School District
City of New Berlin

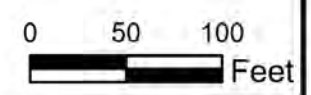
Contour Map

Project #: 8204-10001
Drawn By: TPS
Approved By: TPS
Name: 3Contour
Date Saved: 9/26/2024

Figure 3



- Legend**
- Index Contour
 - Index Depression
 - Intermediate Contour
 - Intermediate Depression
 - Area of Investigation (4.5 Acres)
 - PEM (14,791.7 SF)
 - Storm Water Pond (32,020.2 SF)



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Elmwood Elementary School
New Berlin School District
City of New Berlin

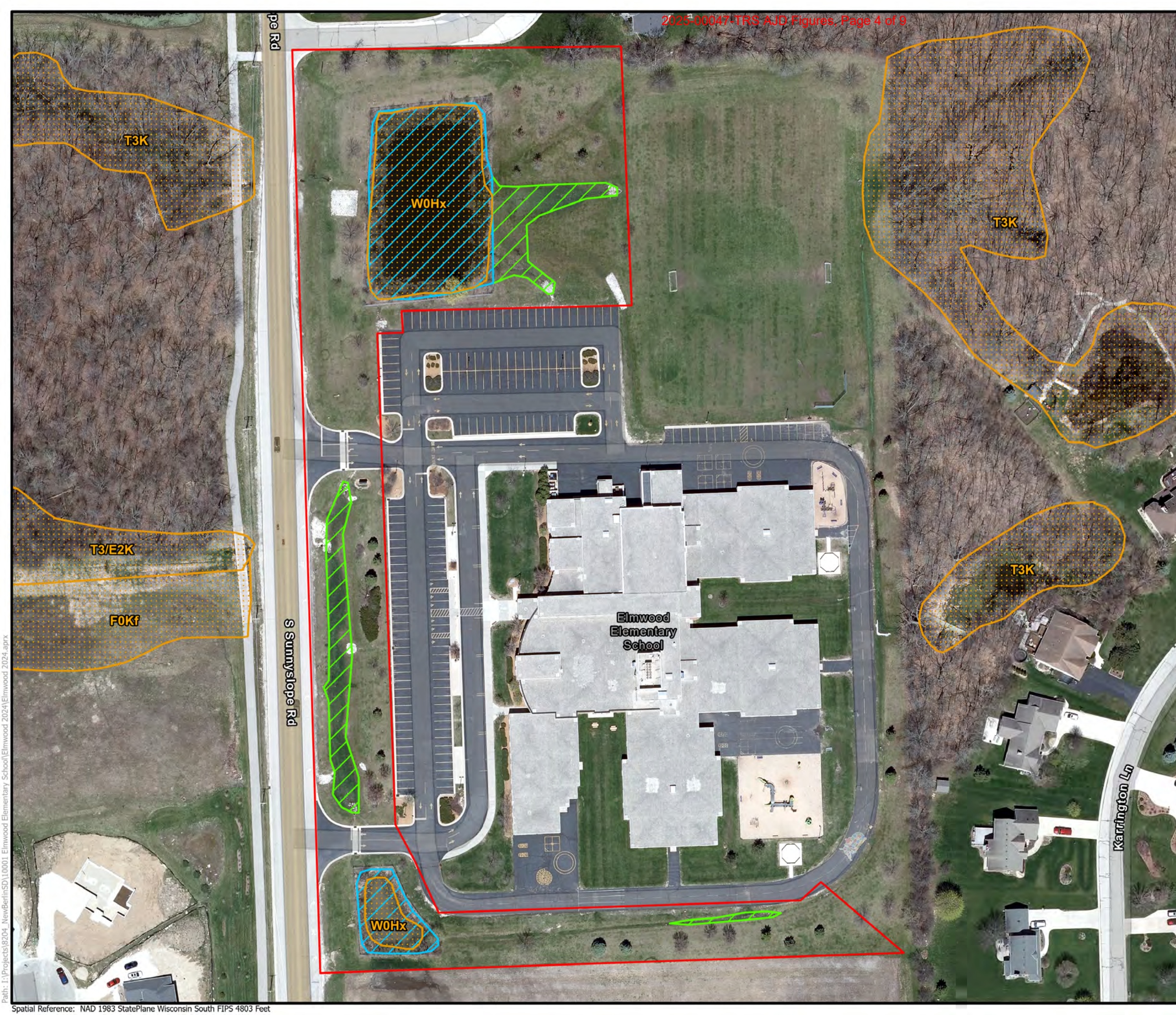
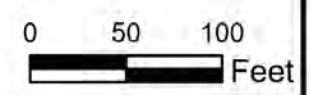
Wisconsin Wetland Inventory and
Waterways/Waterbodies Map

Project #: 8204-10001
Drawn By: TPS
Approved By: TPS
Name: 4Wetland_Waterway
Date Saved: 9/26/2024

Figure 4



- Legend**
-  Area of Investigation (4.5 Acres)
 -  PEM (14,791.7 SF)
 -  Storm Water Pond (32,020.2 SF)
 -  WWI Wetlands
- Wetland Type:
WOHx: Open water, excavated



Elmwood Elementary School
New Berlin School District
City of New Berlin







NRCS Soils and
Wetland Indicator Soils Map

Project #: 8204-10001
Drawn By: TPS
Approved By: TPS
Name: 5Soils
Date Saved: 9/26/2024

Figure 5



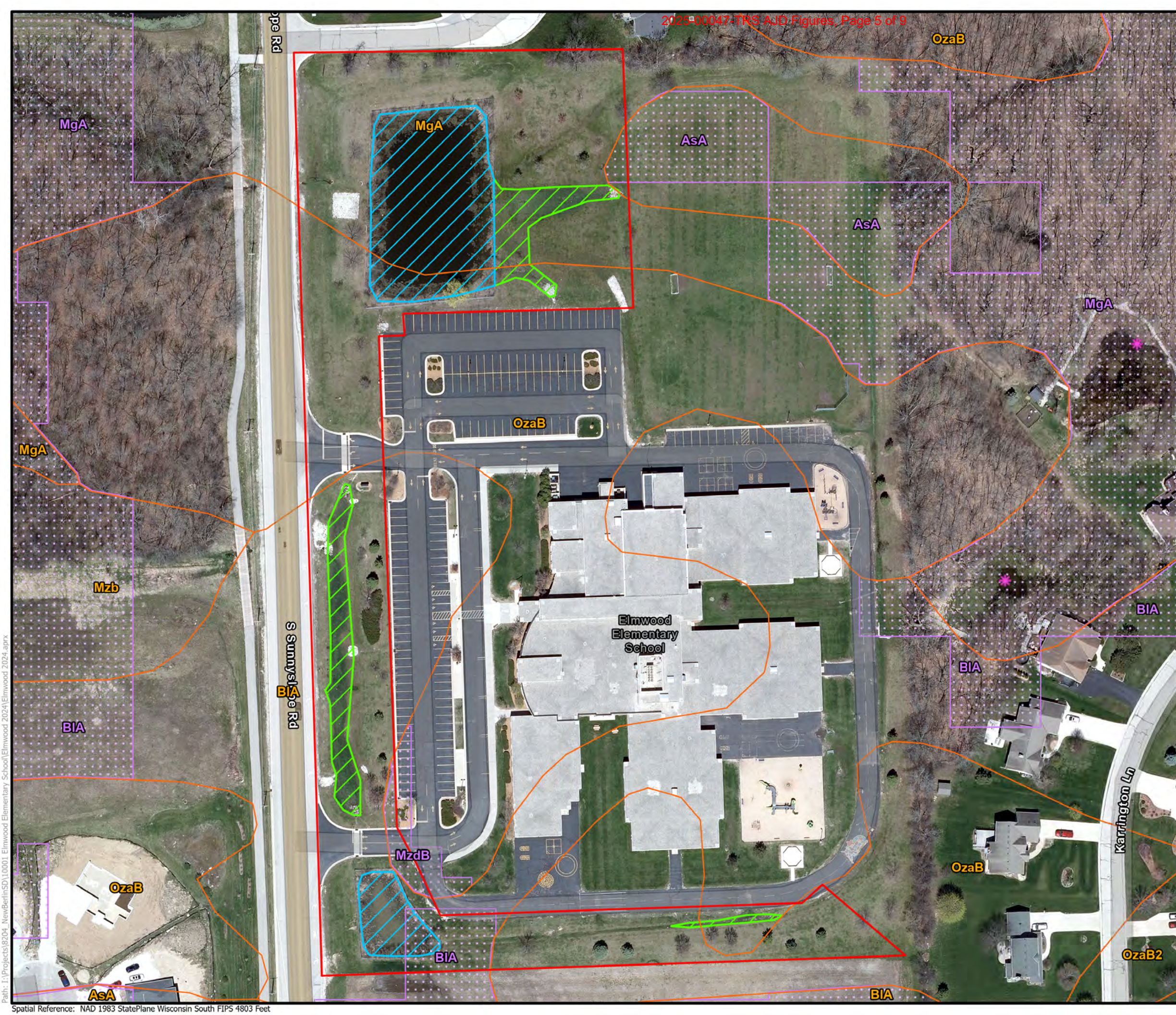
Legend

-  USDA Wetspots
-  Area of Investigation (4.5 Acres)
-  PEM (14,791.7 SF)
-  Storm Water Pond (32,020.2 SF)
-  Maximum Extent Wetland Indicators
-  Soil Mapping Unit

Soil Mapping Unit:
AsA: Ashkum silty clay loam, 0-2% slopes*
BIA: Blount silt loam, 1-3% slopes*
MgA: Martinton silt loam, 1-3% slopes*
OzaB: Ozaukee silt loam, 2-6% slopes (MzdB*)
*Wetland indicator soil



0 50 100
Feet



Path: I:\Projects\8204 New Berlin SD\10001 Elmwood Elementary School\Elmwood 2024\Elmwood 2024.aprx

1941

1963

Elmwood Elementary School
New Berlin School District
City of New Berlin




Historic Aerial Photos Map

Project #: 8024-10001
Drawn By: TPS
Approved By: TPS
Name: 6Aerials
Date Saved: 9/26/2024

Figure 6A



Legend

-  Area of Investigation (4.5 Acres)
-  PEM (14,791.7 SF)
-  Storm Water Pond (32,020.2 SF)



0 75 150
Feet

1970

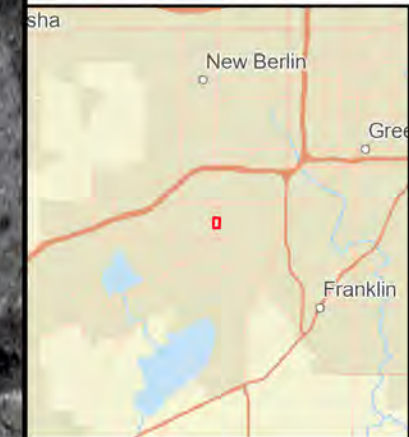
1980

Elmwood Elementary School
New Berlin School District
City of New Berlin




Historic Aerial Photos Map

Project #: 8024-10001
Drawn By: TPS
Approved By: TPS
Name: 6Aerials
Date Saved: 9/26/2024

Figure 6B



Legend

-  Area of Investigation (4.5 Acres)
-  PEM (14,791.7 SF)
-  Storm Water Pond (32,020.2 SF)



0 75 150
Feet

1990

2000

Elmwood Elementary School
New Berlin School District
City of New Berlin




Historic Aerial Photos Map

Project #: 8024-10001
Drawn By: TPS
Approved By: TPS
Name: 6Aerials
Date Saved: 9/26/2024

Figure 6C



Legend

-  Area of Investigation (4.5 Acres)
-  PEM (14,791.7 SF)
-  Storm Water Pond (32,020.2 SF)



0 75 150
Feet

2010

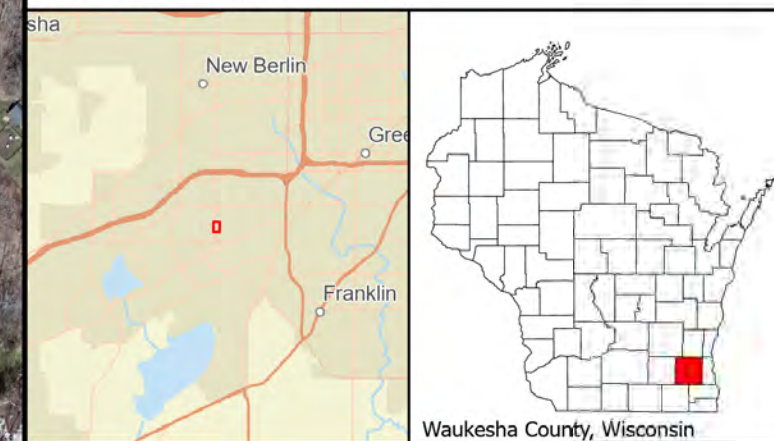
2022

Elmwood Elementary School
New Berlin School District
City of New Berlin

Historic Aerial Photos Map

Project #: 8024-10001
Drawn By: TPS
Approved By: TPS
Name: 6Aerials
Date Saved: 9/26/2024

Figure 6D



Legend

- Area of Investigation (4.5 Acres)
- PEM (14,791.7 SF)
- Storm Water Pond (32,020.2 SF)



0 75 150
Feet

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