



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

MVP-RD

09 APR 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 [2016-03845-EJI 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 (1.55 acres), non-jurisdictional
- ii. Wetland 2 (0.10 acres), non-jurisdictional
- iii. Wetland 3 (0.20 acres), non-jurisdictional
- iv. Wetland 4 (0.63 acres), non-jurisdictional
- v. Wetland 5 (0.93 acres), non-jurisdictional
- vi. Wetland 6 (0.16 acres), non-jurisdictional
- vii. Wetland 7 (0.87 acres), non-jurisdictional
- viii. Wetland 8 (0.09 acres), non-jurisdictional
- ix. Wetland 9 (0.88 acres), non-jurisdictional
- x. Wetland 10 (0.64 acres), non-jurisdictional
- xi. Wetland 11 (0.31 acres), 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)
- d. MEMORANDUM ON NWP-2023-602

3. REVIEW AREA. The review area encompasses approximately 44 acres and is identified by the red polygon on the attached figure labeled MVP-2016-03845-EJI Page 2 of 2. The review area is located at Latitude: 44.866029, Longitude: -93.340812, in the City of Edina, Hennepin County, Minnesota. There are no other JDs associated with this review area.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The wetlands within the review area are connected to the Minnesota River which is listed as a Navigable Water of the United States in Minnesota.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The wetlands in the review area flow into the City of Edina's storm sewer system which is connected to Nine Mile Creek by approximately 0.50 miles of subsurface storm sewer pipes. Nine Mile Creek flows into the Minnesota River approximately 8 river miles south of the review area.
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.

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- 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).

Wetlands 1 through 11 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. A site visit conducted on January 30, 2024, topographic maps, and Google Earth aerial imagery indicate that wetlands 1 through 11 are depressional wetlands, surrounded by upland. These 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. These wetlands are approximately 0.50 miles east of the closest tributary (Nine Mile Creek). Wetlands within the review area flow into the City of Edina’s municipal storm sewer system, which is connected to Nine Mile Creek through approximately

⁹ 88 FR 3004 (January 18, 2023)

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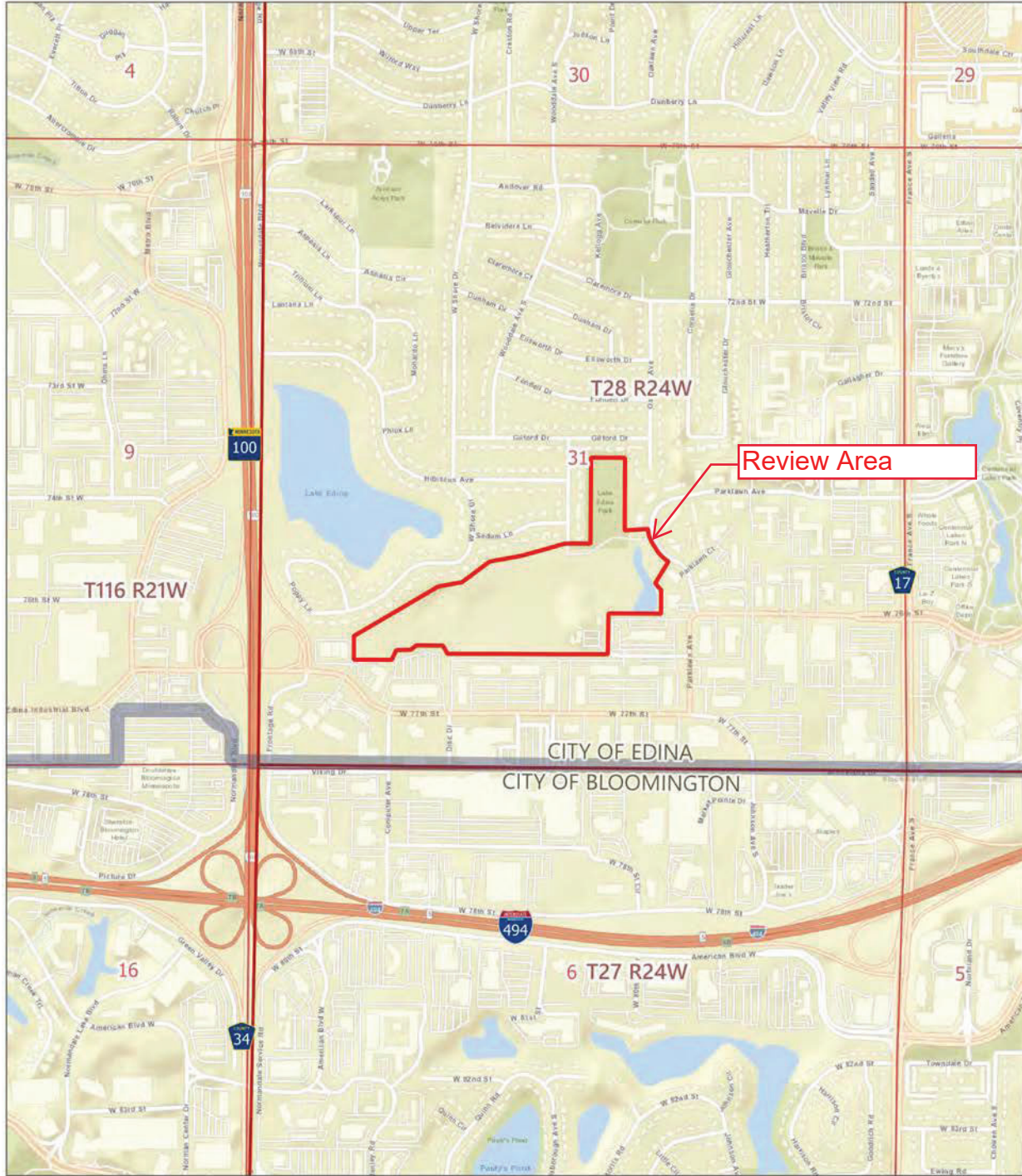
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0.50 miles of subsurface storm sewer pipe. Consistent with the joint policy memo (Memorandum on NWP-2023-602) issued by the Department of the Army and the EPA regarding whether subsurface flow through a municipal storm sewer system qualifies as flow through a discrete feature that can serve as a continuous surface connection, we have determined that subsurface flow through 0.50 miles of the City of Edina's underground storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection. These wetlands are non-tidal wetlands that do not have a continuous surface connection to a relatively permanent jurisdictional water and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands; therefore, these wetlands 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. January 30, 2024 site visit, April 9, 2024 office evaluation.
 - b. Fred Richards Park Wetland Delineation Report dated September 26, 2023
 - c. National Hydrography Dataset (NHD) in Minnesota Regulatory Viewer on April 9, 2024
 - d. MN Public Waters-Public Watercourse layer viewed in Minnesota Regulatory Viewer on April 9, 2024
 - e. City of Edina online water resources map (<https://www.arcgis.com/apps/webappviewer/index.html?id=aeb57968722e476f9b6ef2b86d9326b8>) accessed April 9, 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.



 Review Area



**Fred Richards Park
Location Map**

0 500 1,000 ft


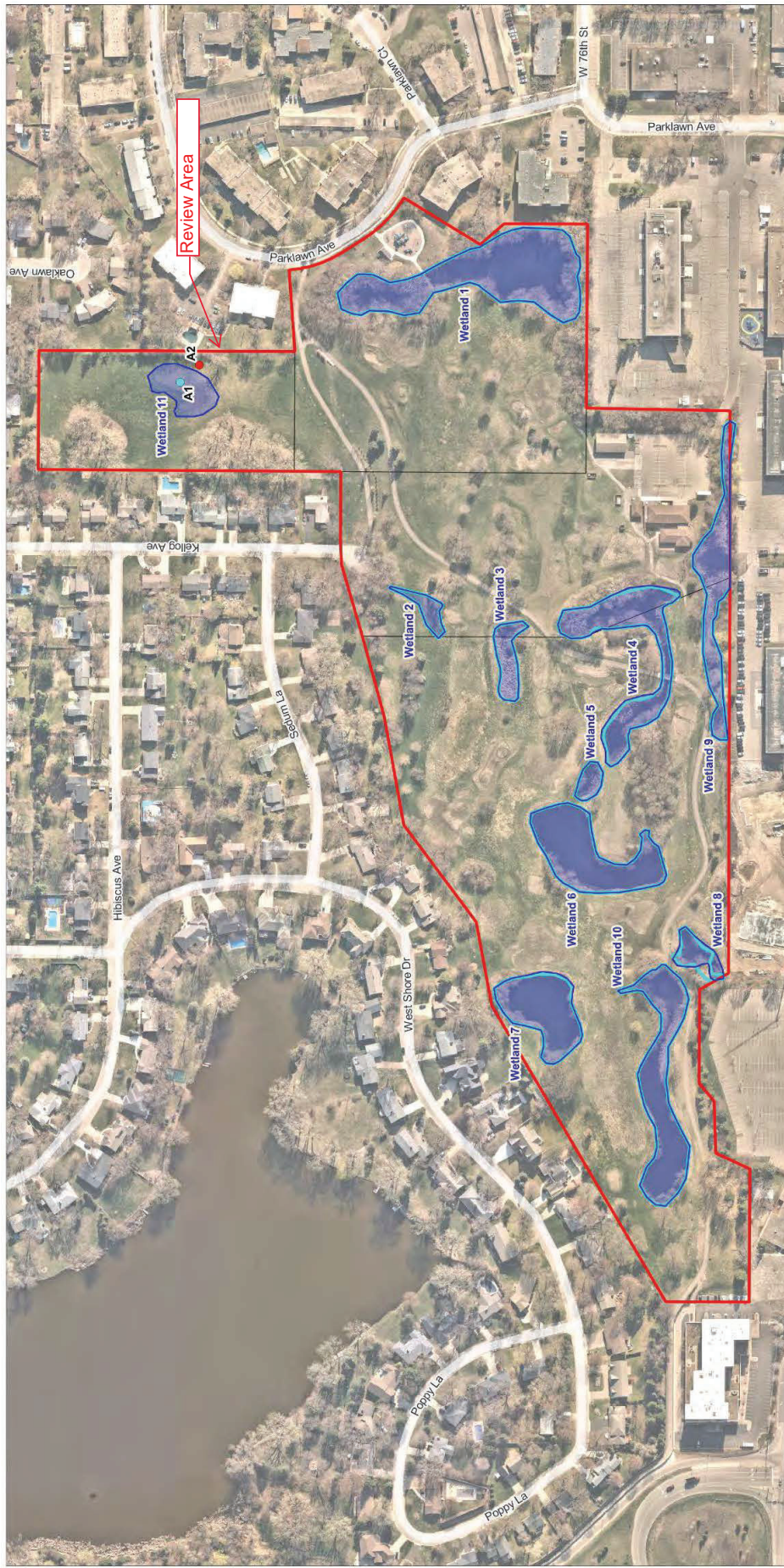


Figure 2. The Study Area is near the southern border of Edina in Hennepin County.



Fred Richards Park
Delineated Wetlands 2023

EOR
water ecology community

- Sample Points
- Upland
- Wetland
- Review Area
- Park Parcels
- Delineated Wetlands (2023)
- Prior Wetland Boundaries (2016)

Figure 6. Updated wetland delineation. The light blue lines indicate where the 2016 delineation differs from the 2023 delineation.