



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

MVP

April 16, 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-2024-00168-DAS MFR 1 of 1²

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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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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 (0.31 acres), non-jurisdictional
 - ii. Wetland 2 (0.12 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. January 2023 Rule preamble at 88 FR 3090

3. REVIEW AREA. The review area is approximately 7.23 acres located in Lime Township (Section 31, Township 109 North, Range 26 West), Blue Earth County, Minnesota and is identified as the Study Area on the attached figures labeled MVP-2024-00168-DAS (AJD) Page 1-2 of 2. Latitude (NAD83) 44.210011, Longitude (NAD83) -93.991945. 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. None.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. A review of the delineated

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.

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wetland boundaries and landscape position depicted in aerial imagery identified there is no flow path from the subject aquatic resources to a TNW, territorial sea, or interstate water.

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.

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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).

Based on review of the delineated wetland boundaries and landscape position depicted in aerial imagery, Wetland 1 and Wetland 2 are not TNWs, territorial seas, or interstate waters; therefore, these waters are not category (a)(1) waters. In addition, they are not tributaries and have not been created by impounding a water of the U.S.; therefore, they are not category (a)(2) or (a)(3) waters.

These wetlands do not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. Wetland 1 and Wetland 2 are located within the review area with no continuous surface or near surface connection to any (a)(1-3) water.

Based upon a review of aerial photographs, topographic maps, National Wetland Inventory (NWI) maps, and the Blue Earth County Soil Survey, the wetlands were determined to be hydrologically isolated with no surface water connection to a water of the United States. The wetlands are within depressional areas surrounded by commercial development. The wetlands are mapped as Tilfer silty clay loam, which is characterized as moderately deep, poorly and very poorly drained soils formed in 50 to 100 centimeters of loamy and silty alluvial sediments overlying limestone bedrock. These soils are on low stream terraces and flood plains in river valleys. Slope ranges from 0 to 2 percent. The wetlands are in the Minnesota River Valley but are more than 2,200 aerial feet from the

⁹ 88 FR 3004 (January 18, 2023)

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current floodplain. The wetlands are approximately 6,200 aerial feet from the Minnesota River.

The wetlands are identified on the NWI map as palustrine, emergent wetlands that are connected to other wetland features that extend to the north; however, the adjacent commercial development prevents the possibility of a continuous surface connection to a jurisdictional water. The wetlands are vegetated, fresh (wet) meadow and seasonally flooded wetlands that are located on a property used for commercial activity to the west and as a quarry site operation to the East. The property is adjacent to agricultural and natural land to the north, and commercial facilities to the south and west. There is no evidence that the wetlands were created as part of the active quarry operation. The vegetative cover, identification on the NWI, and surrounding topography suggest the wetlands are situated in a naturally occurring depression. The closest surface water drainage feature is an intermittent drainage ditch located approximately 2,750 feet north of the subject wetlands. No surface water drainage feature was identified on topographic or hydrologic mapping between the wetlands. The waterbodies do not support a link to interstate or foreign commerce. The wetlands are not known to be used by interstate or foreign travelers for recreation or other purposes; do not produce fish or shellfish that could be taken and sold in interstate or foreign commerce; and are not known to be used for industrial purposes by industries in interstate commerce. The waterbodies were determined to not be jurisdictional under the CWA because the wetlands lacked links to interstate commerce sufficient to serve as a basis for jurisdiction.

Wetland 1 and Wetland 2 do not meet the terms of paragraph (a)(4) because they lack a continuous surface connection to waters identified in paragraph (a)(1) or relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3); and therefore, are not adjacent.

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”

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.

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- a. Jurisdictional Determination Request via the Joint Application submittal for the Westman Investments Building Expansion Project prepared by Bolton & Menk dated February 6, 2024.
- b. USDA NRCS Web Soil Survey viewed in Minnesota Regulatory Viewer on February 6, 2024.
- c. National Hydrography Dataset (NHD) viewed in Minnesota Regulatory Viewer on February 6, 2024.
- d. National Wetland Inventory (NWI) viewed in Minnesota Regulatory Viewer on February 6, 2024.

10. OTHER SUPPORTING INFORMATION. 2011, 2015, 2020, 2021, and 2023 aerial photos viewed in Google Earth Pro.

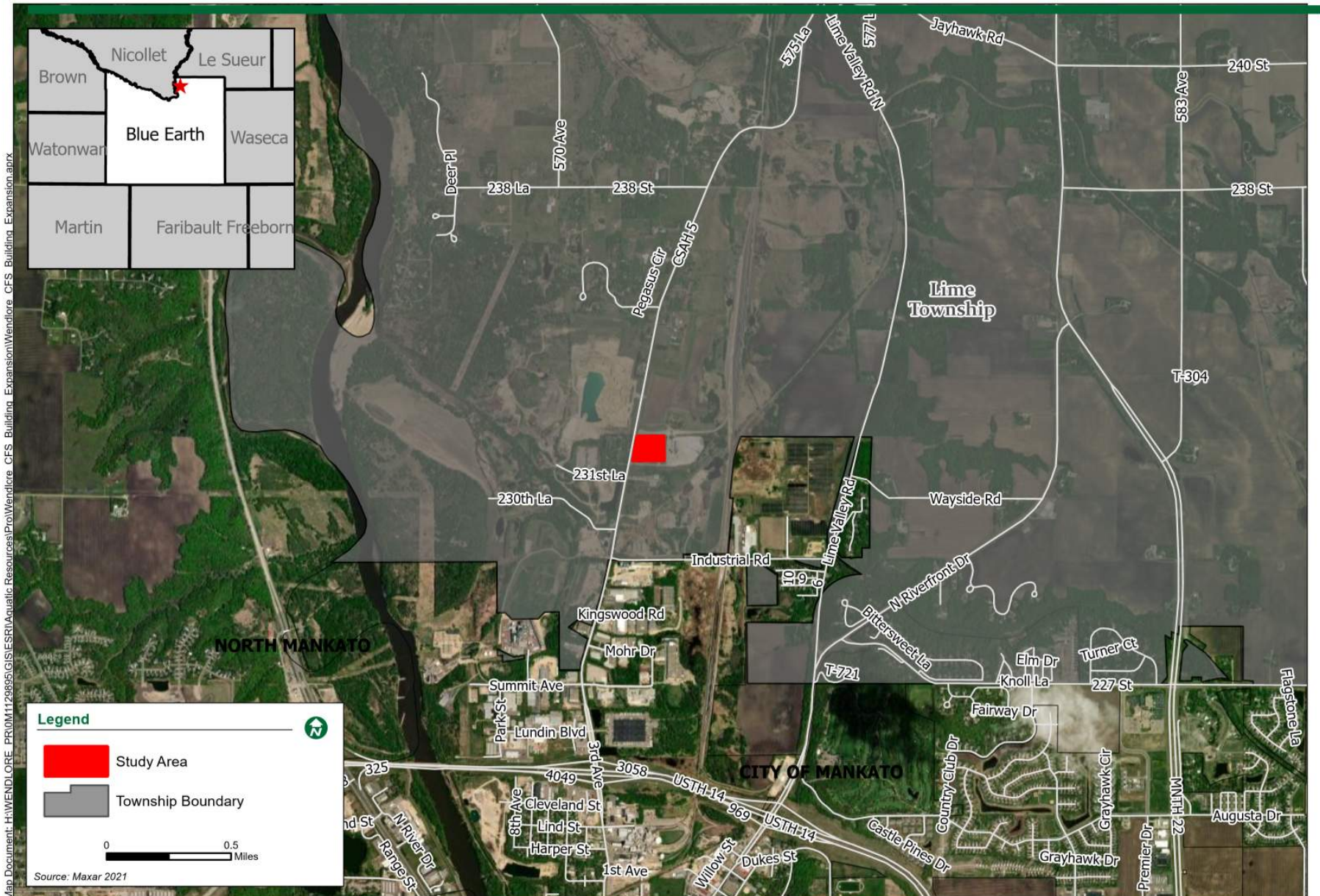
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Westman Investments Building Expansion

Lime Township, Blue Earth County, MN

Exhibit A: Location Map

January 2024

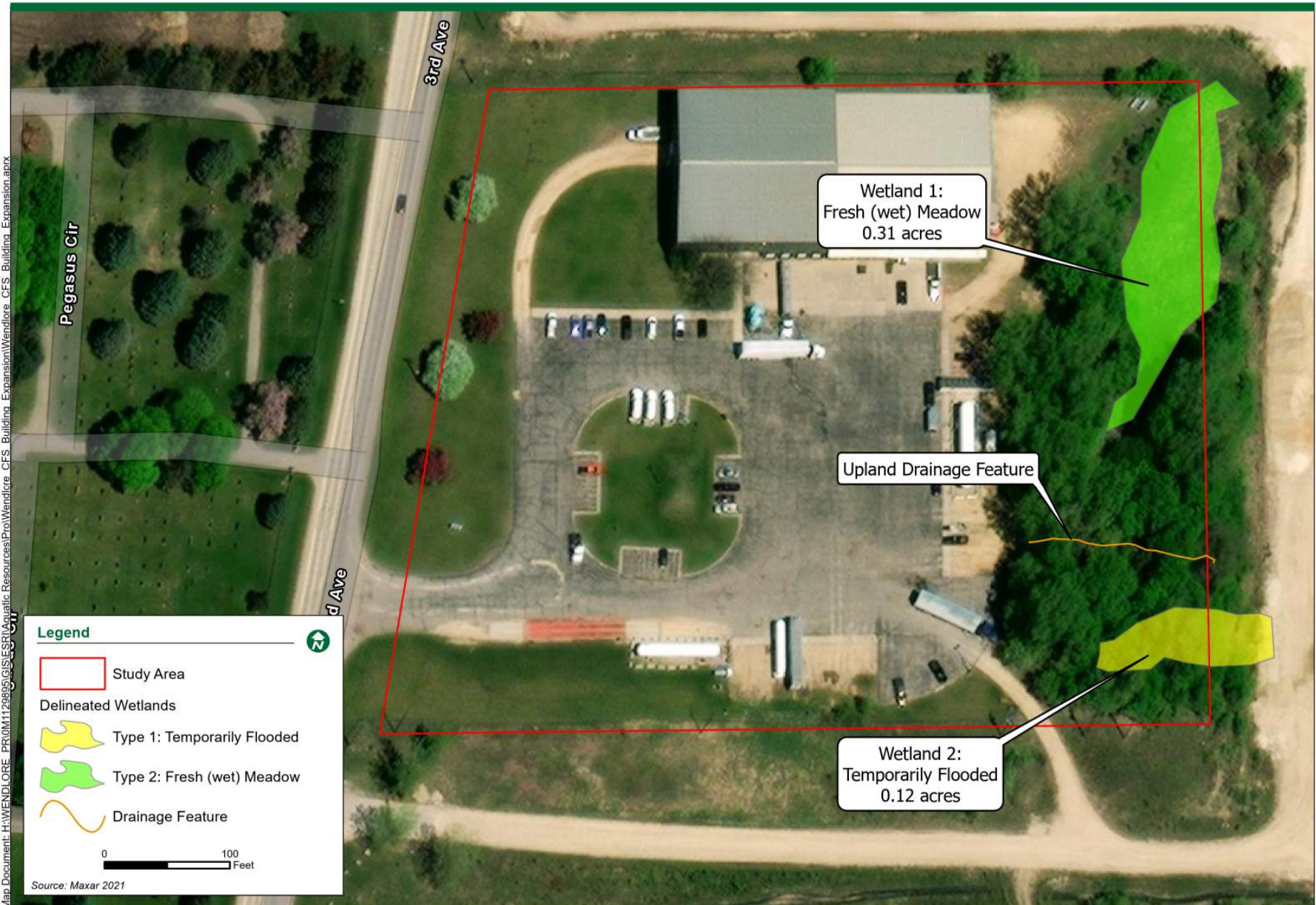


Westman Investments Building Expansion

Lime Township, Blue Earth County, MN

Exhibit 2: Approved Wetland Delineation Map

January 2024



Map Document: H:\WENDLORE PROJ\1129895\GIS\ESRI\Aquatic Resources\Pro\Wetland\Wetland Expansion\Wetland Expansion.aprx