



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

MVP-RD

24 July 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-2020-01175-PJH MFR 1 of 1](#).

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.² 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.³

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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-2020-01175-PJH](#)

- 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 WB-05A consists of a 3.59-acre depressional basin within the review area. Wetland WB-05A extends outside of the review area. Outside of the review area, Wetland WB-05A appears to be a depressional basin with an undefined drainage channel that transitions into overland sheet flow. Wetland WB-05A is 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 subject aquatic resource \(Wetland WB-05A\) is within an approximately 5.00-acre review area identified by the red polygon on the figure labeled MVP-2020-01175-PJH Page 2 of 10. The review area is located in Spring Prairie Township, Clay County, Minnesota. Center coordinates are 46.897168°, -96.429561°. The review area is located in Section 36, Township 140 North, Range 46 West.](#)

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

[N/A](#)

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

[N/A](#)

MVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2020-01175-PJH](#)

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶

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](#)

g. Additional Waters (a)(5): [N/A](#)

⁵ 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.

⁶ 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.

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).⁷

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).

Wetland WB-05A consists of a 3.59-acre depressional basin within the review area. Wetland WB-05A extends outside of the review area. Outside of the review area, Wetland WB-05A appears to be a depressional basin with an undefined drainage channel. The drainage channel has no defined banks or channel bottom and eventually transitions into overland sheet flow. The drainage channel is not a relatively permanent water. The figure labeled MVP-2020-01175-PJH Page 3 of 10 identifies this feature. The closest unnamed tributary is approximately 0.65 miles to the northwest. The closest unnamed tributary is an intermittent stream (according to National Hydrography Dataset) that connects downstream to Clay County Ditch No. 2. Wetland WB-05A is not a Traditional Navigable Water (TNW), territorial sea, or interstate water, therefore is not an (a)(1) water. Wetland WB-05A does not physically abut a relatively permanent (a)(2) impoundment or a jurisdictional (a)(3) tributary and is not separated from jurisdictional waters by a man-made dike, barrier, or natural landform (river berm, beach dune, etc.). Wetland WB-05A is a non-tidal wetland that does not have a continuous surface 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, is 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.

⁷ 88 FR 3004 (January 18, 2023)

MVP-RD

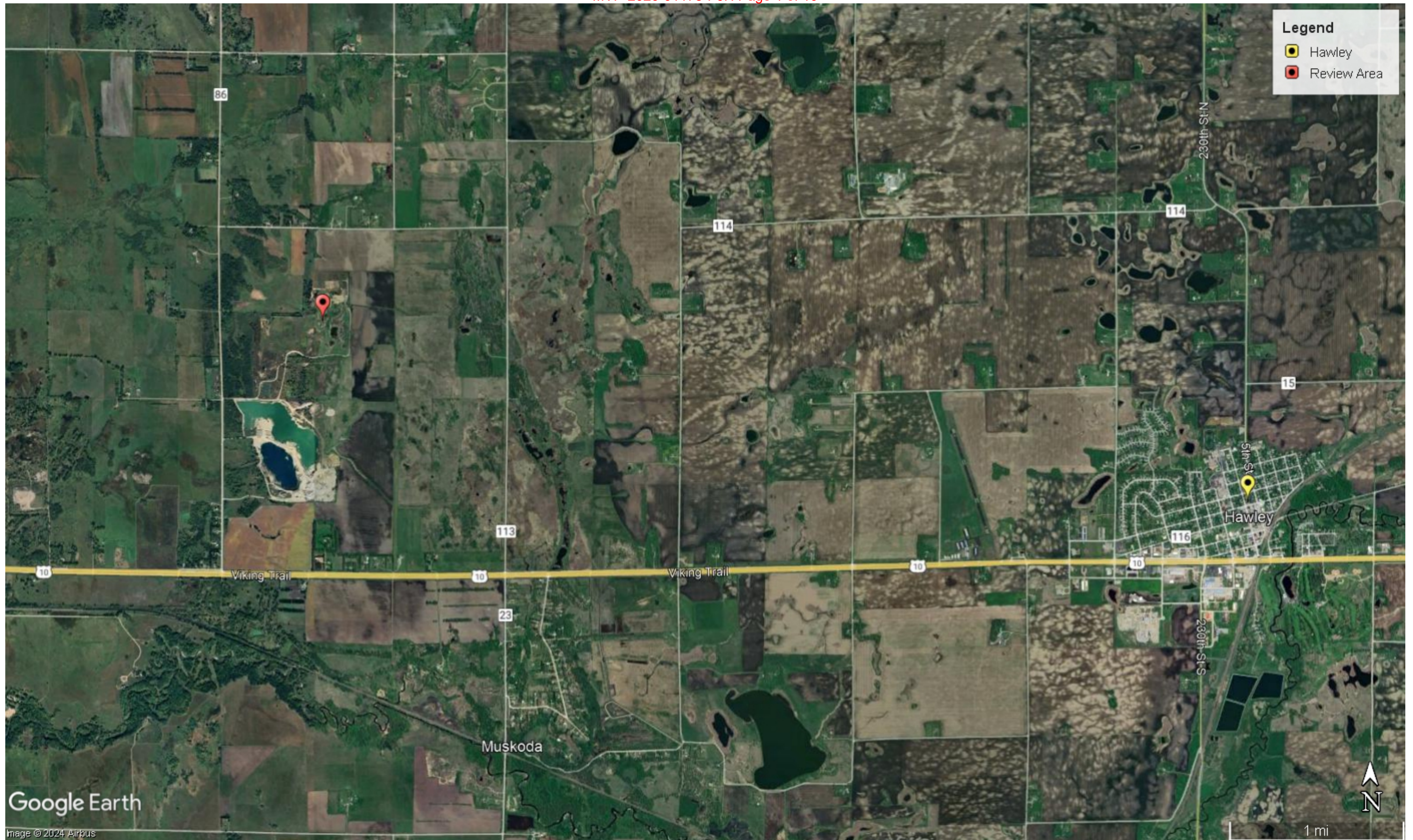
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2020-01175-PJH

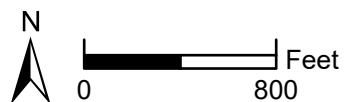
- a. Multiple office evaluations conducted May 21, 2024 – July 18, 2024.
- b. Wetland Delineation Report Kennelly Property dated August 27, 2021.
- c. Aerial Imagery: Google Earth Pro, MN NAIP 2019, MN NAIP 2019-CIR. Clay County GIS: 2023 Imagery
- d. USFWS NWI of MN
- e. LiDAR: MNDNR Hillshade – 2016

10. OTHER SUPPORTING INFORMATION.

A previous jurisdictional determination was completed within a portion of the review area on February 14, 2022. The determination declared that nine wetlands are not to be considered waters of the U.S. and are not jurisdictional under section 404 of the Clean Water Act. Wetland WB-05B was one of the nine wetlands. Wetland WB-05B was historically connected to Wetland WB-05A. It appears Wetland WB-05B has been filled since the issuance of the previous jurisdictional determination. The figures labeled MVP-2020-01175-PJH Pages 7 through 10 show the previous jurisdictional determination and associated figures.

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.





Westwood

Toll Free (888) 937-5150 westwoodps.com
Westwood Professional Services, Inc.

Legend

Review Area
 Property Boundary

Delineated Wetland

Kennelly Property

Clay County, Minnesota

Delineated Wetlands

EXHIBIT 5



Legend

These data are provided on an "AS-IS" basis, without warranty of any type, expressed or implied, including but not limited to any warranty as to their performance, merchantability, or fitness for any particular purpose.

MVP-2020-01175-PJH (2023 Aerial Imagery)

Date: 7/18/2024

Peyton Hamm

<http://claycountymn.gov>

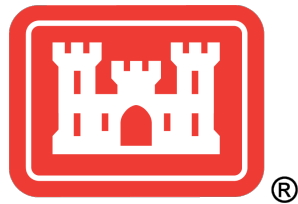
(218)-299-5003

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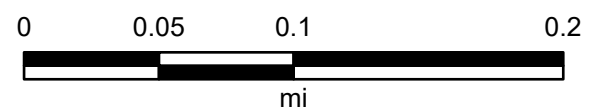
Override 1



MN DNR, USGS, Esri Canada, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA



MVP-2020-01175-PJH (LiDAR: MNDNR Hillshade - 2016)



Map Center: 96.43205°W 46.897662°N

Map Created by: Peyton Hamm

Date: 7/18/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



Data Source(s): Westwood (2024);

Legend

-
-  Review Area
 Project Area
 Mapped DNR Public Waterbody
 Mapped DNR Public Water Basin
 Mapped DNR Public Watercourse
 Mapped NHD Flowline
 Mapped NHD Waterbody
 Mapped NWI Wetland



Kennelly Property

Clay County, MN

Water Resources

EXHIBIT 2




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Map Document: \\westwoodprofs\local\Global Projects\0102371_010236\Amended A.D. Request\0102371_010236\Amended A.D. Request\0102371_010236\Amended A.D. Request_240227.mxd, 2/20/24, 8:11 AM R.C.P.

Data Source(s): Westwood (2024).

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Legend

-  Property Boundary
-  Project Area
-  Predominantly Non-Hydric/Non-Hydric Soil Unit

-  Partially Hydric Soil Unit
-  Predominantly Hydric/All Hydric Soil Unit



Kennelly Property
Clay County, MN

Soils

EXHIBIT 3



DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL, MN 55101-1678

14 February 2022

Regulatory File No. MVP-2020-01175-EJI

[REDACTED]
[REDACTED]
[REDACTED]

Dear [REDACTED]:

This letter regards an approved jurisdictional determination for the Kennelly Property. The project site is in Section 36, Township 140 North, Range 46 West, Clay County, Minnesota. The review area for our jurisdictional determination is identified on the enclosed figure labeled 2020-01175-EJI Page 2 of 2.

The review area contains no waters of the United States subject to Corps of Engineers (Corps) jurisdiction. Therefore, you are not required to obtain Department of the Army authorization to discharge dredged or fill material within this area. The rationale for this determination is provided in the enclosed Approved Jurisdictional Determination form. This determination is only valid for the review area described. You are also cautioned that the area of waters described on the enclosed Jurisdictional Determination form is approximate and is not based on a precise delineation of aquatic resources.

If you object to this approved jurisdictional determination, you may request an administrative appeal under Corps regulations at 33 CFR 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination, you must submit a completed RFA form to the Mississippi Valley Division Office at the address shown on the form.

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR 331.5, and that it has been received by the Division Office within 60 days of the date of the enclosed NAP. It is not necessary to submit an RFA form to the division office if you do not object to the determination in this letter.

This approved jurisdictional determination may be relied upon for five years from the date of this letter. However, the Corps reserves the right to review and revise the determination in response to changing site conditions, information that was not considered during our initial review, or off-site activities that could indirectly alter the extent of wetlands and other resources on-site. This determination may be renewed at the end of the five year period provided you submit a written request and our staff are able to verify that the limits established during the original determination are still accurate.

Regulatory Branch (File No. MVP-2020-01175-EJI)

If you have any questions, please contact me in our Brainerd office at [REDACTED] or [REDACTED]@usace.army.mil. In any correspondence or inquiries, please refer to the Regulatory file number shown above.

Sincerely,

[REDACTED]

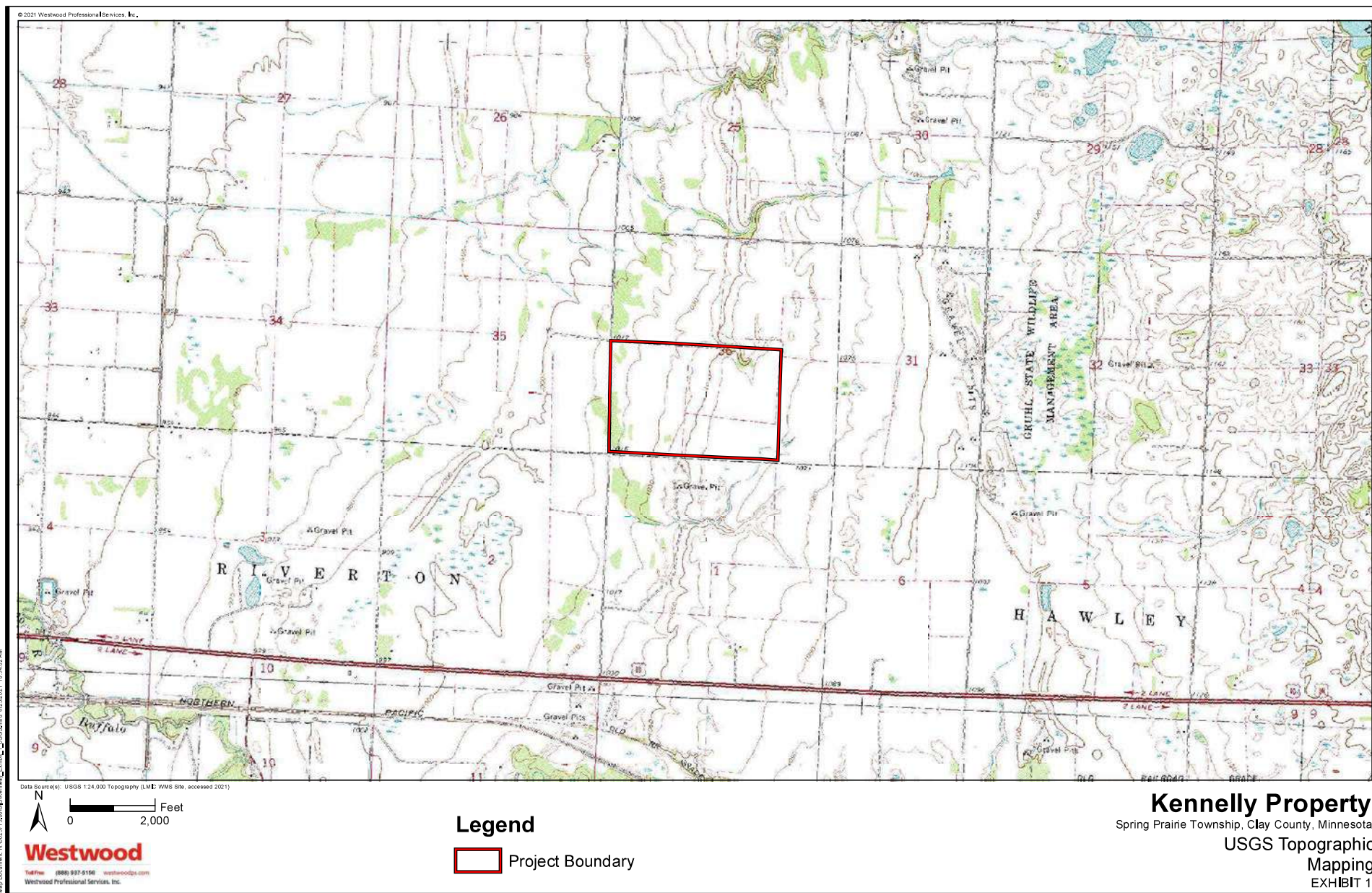
[REDACTED]

Lead Project Manager

Enclosures

cc:

[REDACTED]
[REDACTED]
[REDACTED]



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Table 1: Incidental Wetland Status				
Feature ID	WCA Jurisdictional Status	Aerial Review Note	Field Note	Acres
GP-01	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Non-Hydric Sandy soils observed in area	2.34
GP-02	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Non-Hydric Sandy soils observed in area	10.37
WB-01A	Jurisdictional	No mining noted in aerial review. Area appears to be historically wetland in aerial photos	Hydric mucky soils observed in area	62.79
WB-01B	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	7.49
WB-02	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	0.36
WB-03	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	0.05
WB-04	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	0.67
WB-05A	Jurisdictional	No mining noted in aerial review. Area appears to be historically wetland in aerial photos	Hydric mucky soils observed in area	3.59
WB-05B	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	9.49
WB-06	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	42.26
WB-07	Incidental/Non-Jurisdictional	Mining noted in aerial review. Area appears to be upland prior to mining in aerial photos	Hydric Sandy soils observed in area	0.11

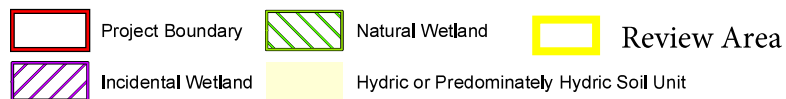


Data Source(s): Field GPS Data (Westwood PS 2021), USDA FSA Aerial (USDA WMS Site, accessed 2021)



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Legend



Kennelly Property

Spring Prairie Township, Clay County, Minnesota

Incidental Wetlands Mapping

November 23, 2021 REVISED EXHIBIT 6