



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

MVP

July 19, 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-2021-02098-RLG MFR 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.

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- 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).
 - a. Wetland WB-01, Non-Jurisdictional
 - b. Wetland WB-02, Non-Jurisdictional
 - c. Wetland WB-07, Non-Jurisdictional
 - d. WetlandWB-09, Non-Jurisdictional
 - e. Wetland WB-10, Non-Jurisdictional
 - f. Wetland WB-11, 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.

- a. Project Are Size (in acres): review area that is solely the extent of the six Wetlands labeled WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 and excludes all other aquatic resources on-site. The larger parcel area that the review area is within is approximately 83.8 acre property
 - b. Location Description: The project/review area is located in Section 07, Township 115N, Range 023W, Carver County, Minnesota.
 - c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 44.781140 Longitude: -93.627150
 - d. Nearest City or Town: Chaska
 - e. County: Carver
 - f. State: Minnesota
 - g. Other associated Jurisdictional Determinations (including outcomes):
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

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N/a

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

N/a

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):

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.

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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).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).

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*

⁷ 88 FR 3004 (January 18, 2023)

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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.

The areas labeled Wetlands WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 were evaluated as potential (a)(4) waters, but they do not have a continuous surface connection to a jurisdictional water.

Wetlands WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 do not have a continuous surface connection to an (a) (1-3) water because all six wetlands do not have a continuous surface or near surface connection to any (a) (1-3) water, a relatively permanent water, nor to the nearby tributaries that connect to the Minnesota river.

Wetlands WB-07 and WB-10 do not connect to any other wetlands or tributaries on or offsite. Wetlands WB-011 and WB-09 connect in times of high precipitation through a gully that became visible in 2019. Wetlands WB-01 and WB-02 connect to offsite waters to the west but are severed by a topographic ridge before reaching nearby wetlands.

Based on the Hillshade, 3DEP Digital Elevation Model, and the topographic relief of Wetlands WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 suggests ground surface would have a small depression at the area of both WB-07 and WB-09 before the surface raises 2 to 10 feet difference surrounding both wetlands. Based on the Hillshade and 3DEP Digital Elevation Model show that the site generally slopes from the higher elevation on the west side of the site and are lower elevation on the east side.

The closest continuous surface water feature within the watershed, to the north and east, is the tributaries that lead to the Minnesota River, which in 1.4 miles to the east. Wetlands WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 show no continuous surface connection to the Minnesota River.

The USDA NRCS' Web Soil Survey and USA Soils Map shows no mapped hydric soils in the project area where Wetland WB-01, WB-02, WB-07, WB-10, and WB-11 are with the main soil types in the area being Le Sueur and Kilkenny. The USDA NRCS' Web Soil Survey shows mapped hydric soils in the project area where Wetland WB-09 is situated in mainly Glencoe soil, a soil common in depressional marshes.

Minnesota Historical Aerial Photographs Online (MHAPO) Imagery from 1937 shows the agriculture field that was on site before residential neighborhood and Highway 212 were built. Wetlands WB-01, WB-07, WB-10, and WB-11 are not seen on the imagery from 1937 but wet signatures are seen on where current day Wetlands WB-02 and WB-09 were in 1937.

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The National Wetland Inventory and National Hydrography Dataset show no waters for Wetlands WB-01, WB-02, WB-07, and WB-10. The National Wetland Inventory shows Wetlands WB-09 and WB-11 connected in a depressional complex that does not connect to any other waters.

Wetlands WB-01, WB-02, WB-07, WB-09, WB-10, and WB-11 do not meet the terms of paragraphs (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 with a continuous surface connection to those waters, and therefore, they are not adjacent.

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. 27575 Highpoint Vistas Mitigation Plan wetland permit application dated May 1, 2024
- b. GoogleEarth 7.3.3.7692. (2024, June 26). Chaska, Minnesota. Latitude: 44.781140 Longitude: -93.627150, Retrieved July 17, 2024, from <http://www.earth.google.com>. For the years: 2023, 2021, 2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2008, 2006, 2005, 2004, 2003, and 1991
- c. MNDNR Hillshade - 2016 accessed July 17, 2024
- d. MHAPO years 1937 and 1951
- e. USDA NRCS Soil Survey USDA-NCSS SSURGO and STATGO
- f. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. <http://www.fws.gov/wetlands/>.
- g. USGS. (2018, September 27). National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1601. Washington, D.C., USA. Retrieved from ftp://rockyftp.cr.usgs.gov/vdelivery/Datasets/Staged/Hydrography/NHDPlus/HU4/HighResolution/GDB/NHDPLUS_H_1601_HU4_GDB.xml
- h. MN 2ft – contours accessed July 17, 2024
- i. 3DEP Digital Elevation Model- DEM accessed July 17, 2024

10. OTHER SUPPORTING INFORMATION.

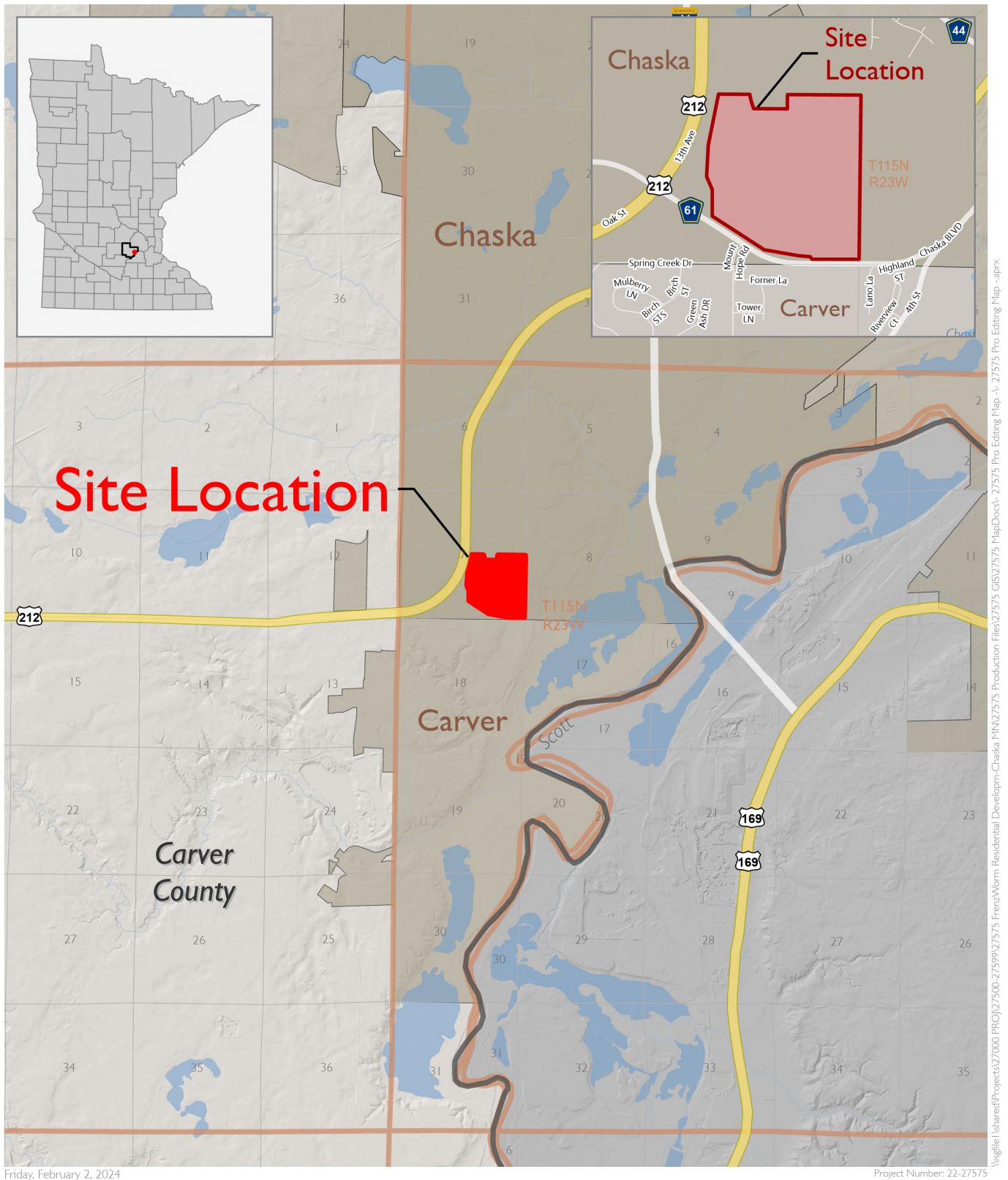
N/a

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

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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.



0 0.5 1 Miles
1 inch = 1 miles



Figure 1
Project Location Map
Highpoint Vistas
Chaska, Carver County, Minnesota

Source(s):
Municipalities (MnDOT, 2016)
Roads (MnDOT, 2020)
Lakes (MN DNR, 2020)
Counties (MN DNR, 2013)
PLSS (USGS)



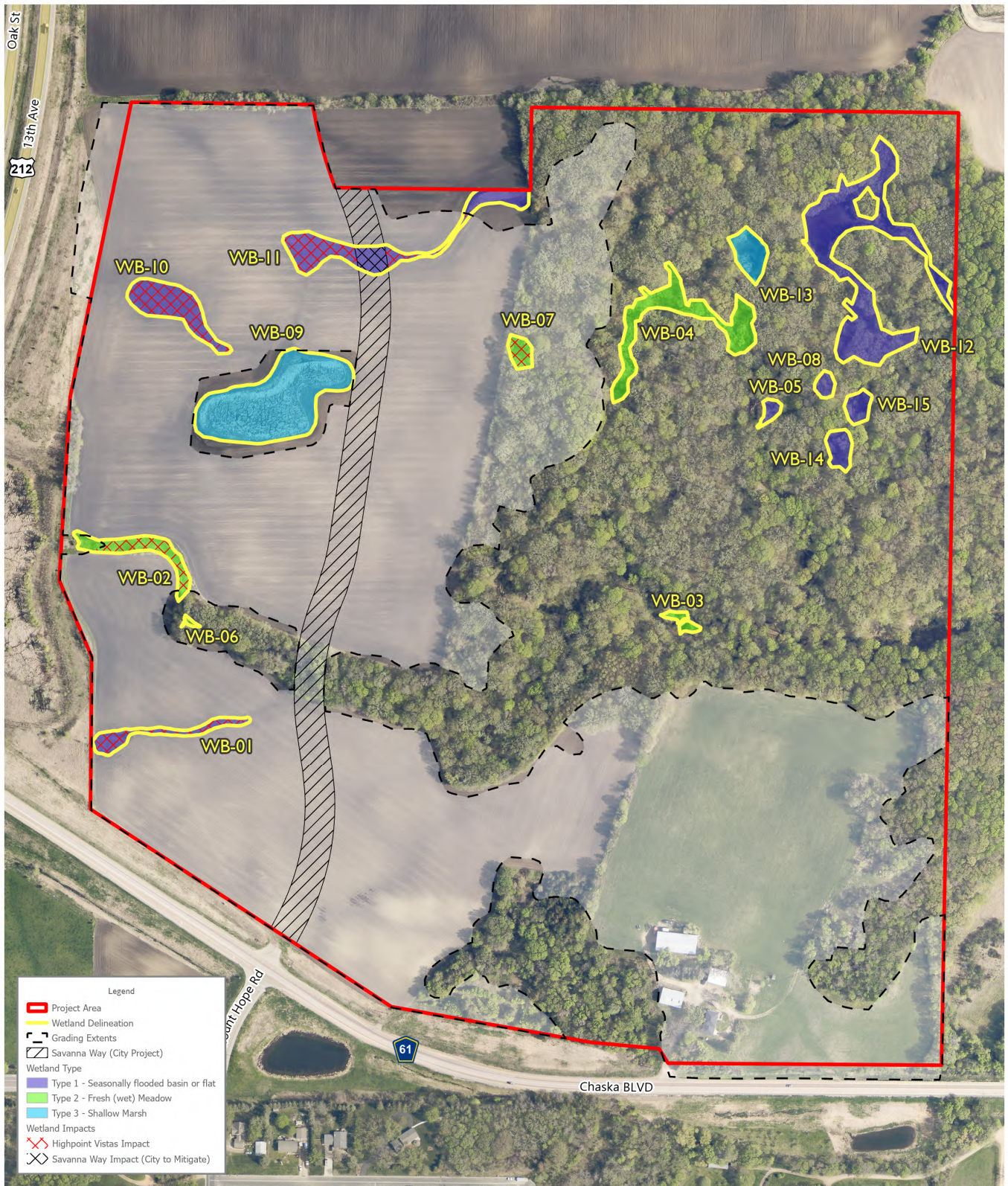
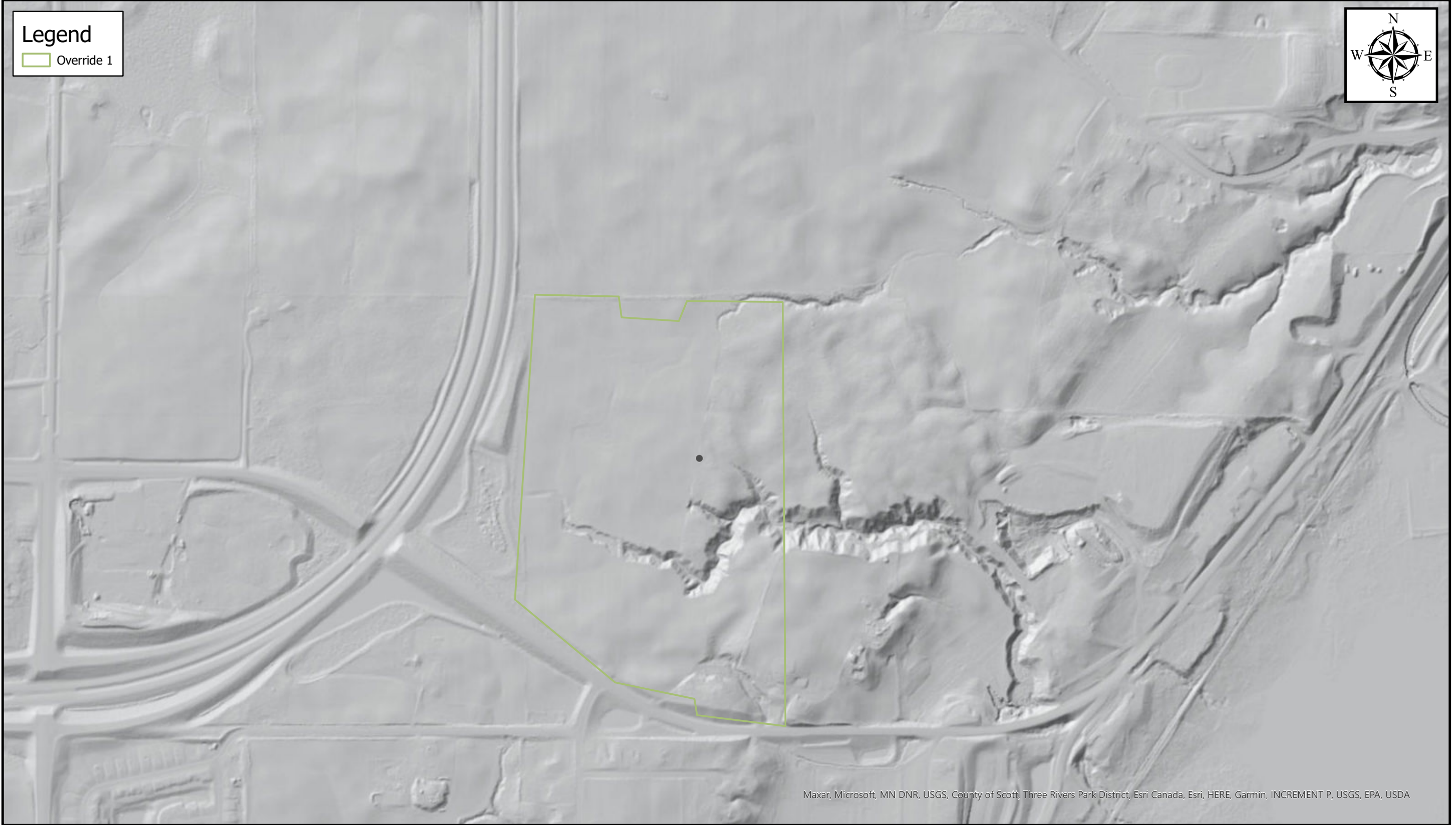


Figure 2
Wetland Impacts Map
Highpoint Vistas
 Chaska, Carver County, Minnesota

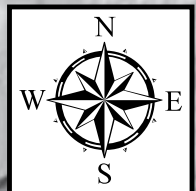
Source(s):
 Orthophoto (Carver Co, 2023)
 Wetland Delineation (Westwood, 2021)



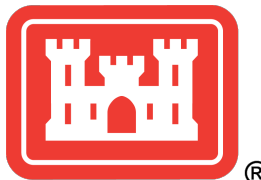


Legend

Override 1



Maxar, Microsoft, MN DNR, USGS, County of Scott, Three Rivers Park District, Esri Canada, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA



2021-02098-RLG Hillshade

0 0.13 0.25 0.5

mi

Map Center: 93.626517°W 44.781906°N

Map Created by: PM NAME
Date: 7/17/2024

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