

CEMVP-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVP-2021-02268-MVW

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June 18, 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) ,<sup>1</sup> MVP-2021-02268-MVW.

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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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).

| Name of Aquatic Resource     | JD or Non-JD       | Section 404/Section 10 |
|------------------------------|--------------------|------------------------|
| Wetland 28 (0.08 acre)       | non-jurisdictional | (b)(3) exclusion       |
| Wetland 36 (203 square feet) | non-jurisdictional | (b)(3) exclusion       |
| Wetland 39 (175 square feet) | non-jurisdictional | (b)(3) exclusion       |
| Wetland 40 (0.06 acre)       | non-jurisdictional | (b)(3) exclusion       |
| Wetland 42 (387 square feet) | non-jurisdictional | (b)(3) exclusion       |
| Wetland 43 (90 square feet)  | non-jurisdictional | (b)(3) exclusion       |
| Wetland 46 (218 square feet) | non-jurisdictional | (b)(3) exclusion       |
| Wetland 48 (0.21 acre)       | non-jurisdictional | (b)(5) exclusion       |
| Wetland 56 (0.22 acre)       | non-jurisdictional | (b)(5) exclusion       |
| Wetland 44 (0.02 acre)       | non-jurisdictional | Does not meet (a)(4)   |
| Wetland 45 (0.10 acre)       | non-jurisdictional | Does not meet (a)(4)   |
| Wetland 47 (175 square feet) | non-jurisdictional | Does not meet (a)(4)   |
| Wetland 52 (0.32 acre)       | non-jurisdictional | Does not meet (a)(4)   |
| Wetland 54 (258 square feet) | non-jurisdictional | Does not meet (a)(4)   |

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. 651, 143 S. Ct. 1322 (2023)

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- d. Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of 'Continuous Surface Connection' Under The Definition Of "Waters Of The United States" Under The Clean Water Act" (March 12, 2025) "
3. REVIEW AREA. The review area consists of Wetland 28 (0.08 acre), Wetland 36 (203 square feet), Wetland 39 (175 square feet), Wetland 40 (0.06 acre), Wetland 42 (387 square feet), Wetland 43 (90 square feet), Wetland 44 (0.02 acre), Wetland 45 (0.10 acre), Wetland 46 (218 square feet), Wetland 47 (175 square feet), Wetland 48 (0.21 acre), Wetland 52 (0.32 acre), Wetland 54 (258 square feet), and Wetland 56 (0.22 acre).
  - a. Location Description: The project/review area is located in Section 3 and 4, Township 118 North, Range 22 West, Hennepin County, Minnesota.
  - b. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 45.061719 Longitude: -93.467378
  - c. Nearest City or Town: Plymouth
  - d. County: Hennepin
  - e. State: Minnesota
  - f. 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. N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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

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<sup>5</sup> 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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>6</sup>

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

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

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<sup>6</sup> 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.

within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>7</sup>

Wetlands 28, 36, 39, 40, 42, 43, and 46, are roadside ditches that were constructed in upland to convey runoff along the road. This was confirmed by reviewing the delineation report submitted by the applicant and desktop resources. The features do not carry relatively permanent flow, are surrounded by upland, were constructed in upland, and are not relocated tributaries. Other resources reviewed to support this determination include Google Earth aerial imagery, US Geological Service 3DEP Hillshade and DEM maps; MNDNR 2-foot contour maps; NWI maps; NHD data; and NRCS hydric soil data. As such, Wetlands 28, 36, 39, 40, 42, 43, 46, and 52 have been determined to be Paragraph (b)(3) excluded ditches and not subject to Section 404 of the Clean Water Act (CWA).

Wetlands 48 and 56 are constructed stormwater ponds that were built in upland between 2006 and 2008 according to available aerial imagery. This was confirmed by reviewing the delineation report submitted by the applicant and desktop resources. Resources reviewed to support this determination include Google Earth aerial imagery, US Geological Service 3DEP Hillshade and DEM maps; MNDNR 2-foot contour maps; NWI maps; NHD data; and NRCS hydric soil data. As such, Wetland 4 has been determined to be a Paragraph (b)(5) excluded artificial lake and not subject to Section 404 of the Clean Water Act (CWA).

- 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 44, 45, 47, 52, and 54 are not traditionally navigable waters (TNW), territorial seas, or interstate waters and therefore are not (a)(1) waters. Topographic maps, LiDAR imagery, and Google Earth aerial imagery indicate that Wetlands 44, 45, 47, 52, and 54 are depressional wetlands surrounded entirely by upland. These wetlands do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary. These wetlands are approximately 0.5 miles from the closest tributary, Eagle Creek, located east of Wetlands 44, 45, 47, 52, and 54. These wetlands are non-tidal wetlands that

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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do not abut 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. Wetland Delineation Report, County Road 47 Preliminary Engineering Project. Prepared for City of Plymouth for Kimley-Horne and Associates, October 2021.
- b. Google Earth Imagery dated 1991, 2004, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016, 2015, 2017, 2018, 2020, 2021, 2022, 2023, and 2024. Accessed March 19, 2025.
- c. USGS 3DEP Elevation. Accessed March 19, 2025.
- d. USDA NRCS Soil Survey SSURGO and STATGO. Accessed March 19, 2025.
- e. USFWS National Wetland Inventory (MapServer). Accessed March 19, 2025.
- f. USGS TNM – National Hydrography Dataset. Accessed March 19, 2025.

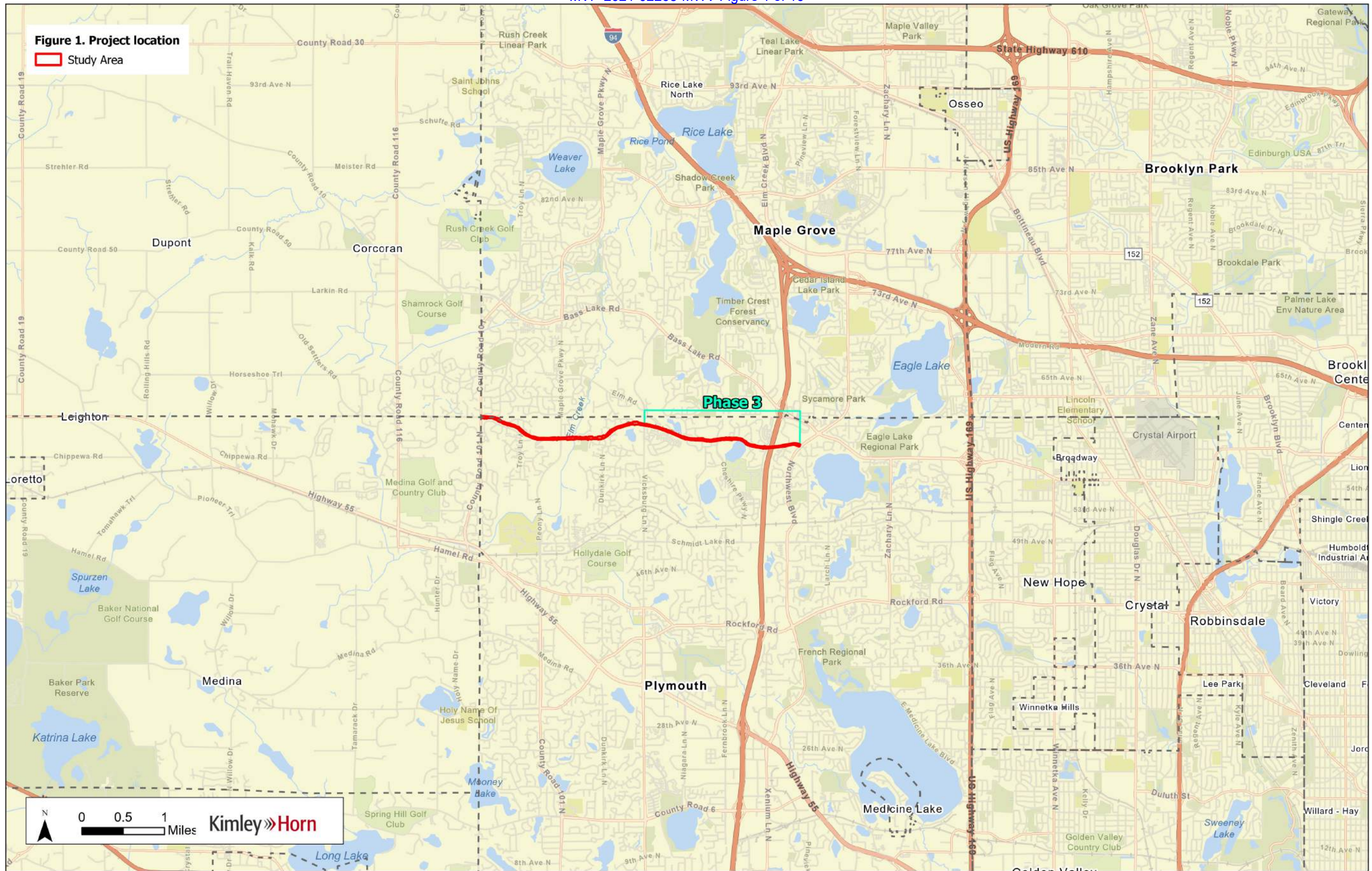
10. OTHER SUPPORTING INFORMATION. N/A

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.



**Figure 1. Project location**

 Study Area



Kimley»Horn



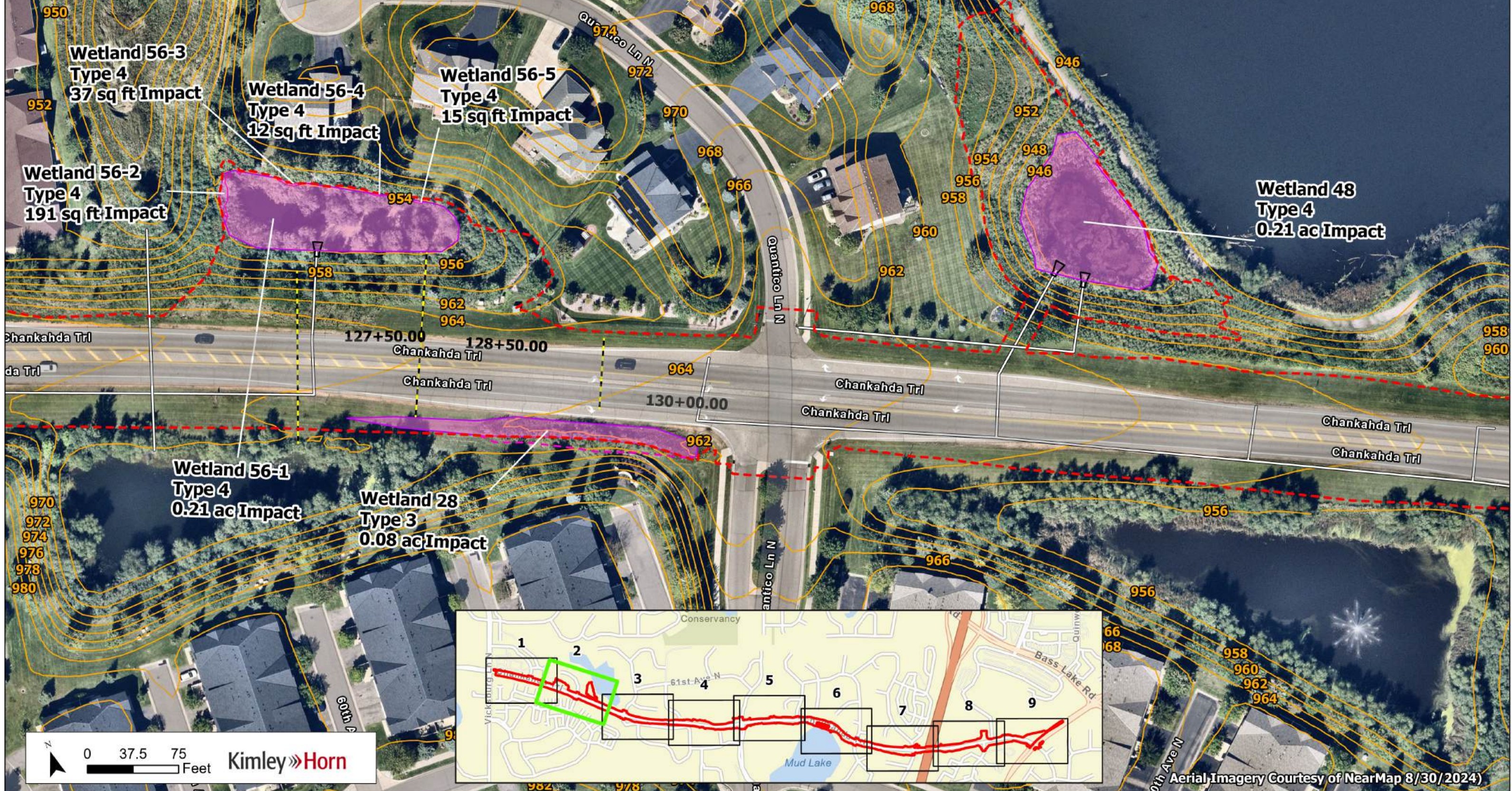
\*Pending LGU/USACE Review

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**Figure 2. Proposed Impacts**



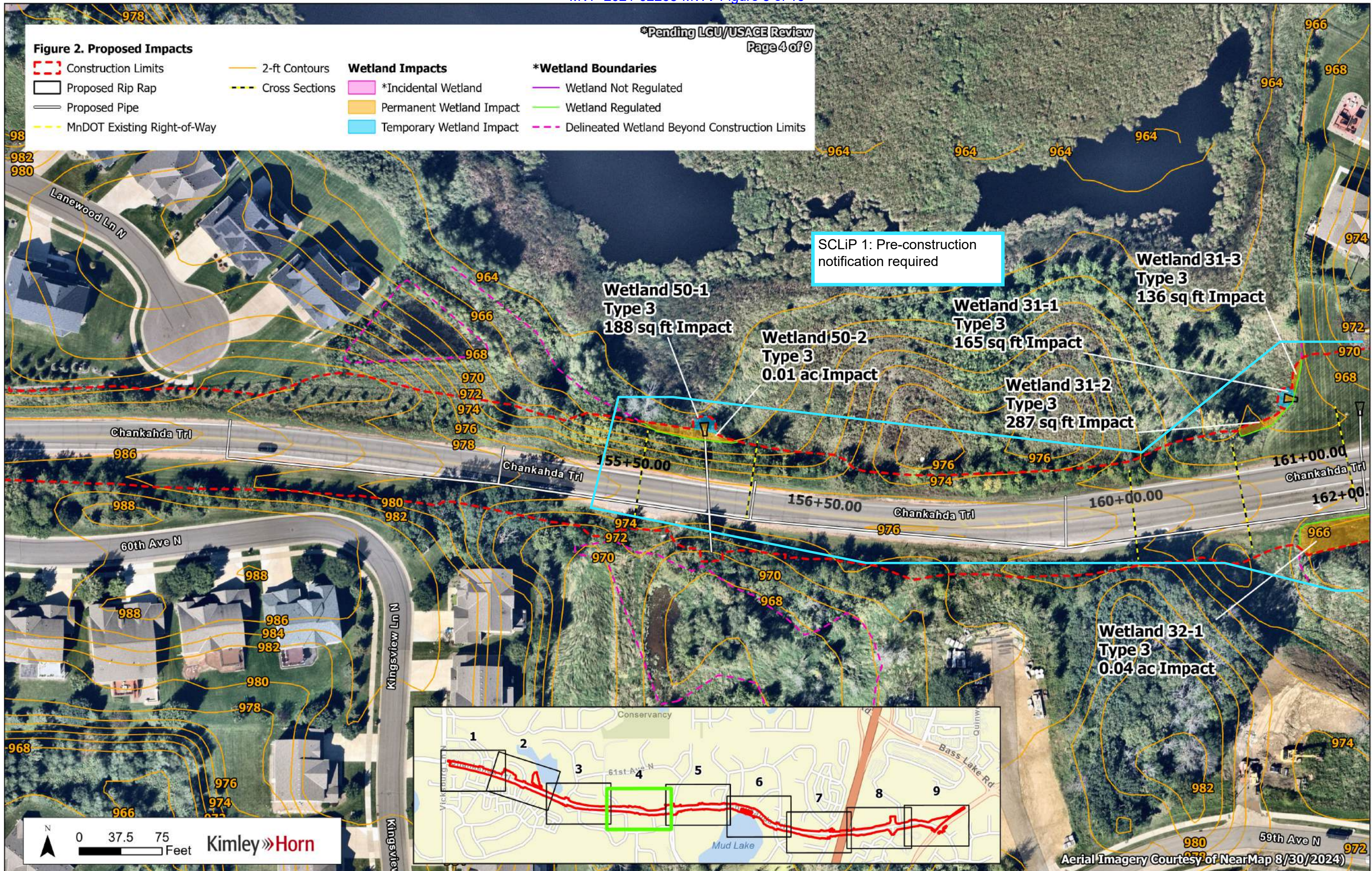
Wetlands 28, 48, and 56 are part of approved jurisdictional determination





\*Pending LGU/USACE Review  
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**Figure 2. Proposed Impacts**





\*Pending LGU/USACE Review

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**Figure 2. Proposed Impacts**

- Construction Limits
- Proposed Rip Rap
- Proposed Pipe
- MnDOT Existing Right-of-Way

- 2-ft Contours
- Cross Sections

**Wetland Impacts**

- \*Incidental Wetland
- Permanent Wetland Impact
- Temporary Wetland Impact

**\*Wetland Boundaries**

- Wetland Not Regulated
- Wetland Regulated
- Delineated Wetland Beyond Construction Limits

SCLiP 1 continued:  
Pre-construction notification  
required

Wetland 36 is part of approved  
jurisdictional determination

**Wetland 53-1**  
Type 3  
384 sq ft Impact

**Wetland 53-2**  
Type 3  
72 sq ft Impact

**Wetland 34-1**  
Type 1  
42 sq ft Impact

**Wetland 34-2**  
Type 1  
61 sq ft Impact

**Wetland 34-3**  
Type 1  
0.02 ac Impact

**Wetland 36**  
Type 3  
203 sq ft Impact

164+50.00

165+50.00

167+50.00

168+50.00

170.50.00

171+50.00

**Wetland 33-1**  
Type 3  
202 sq ft Impact

**Wetland 33-2**  
Type 3  
0.08 ac Impact

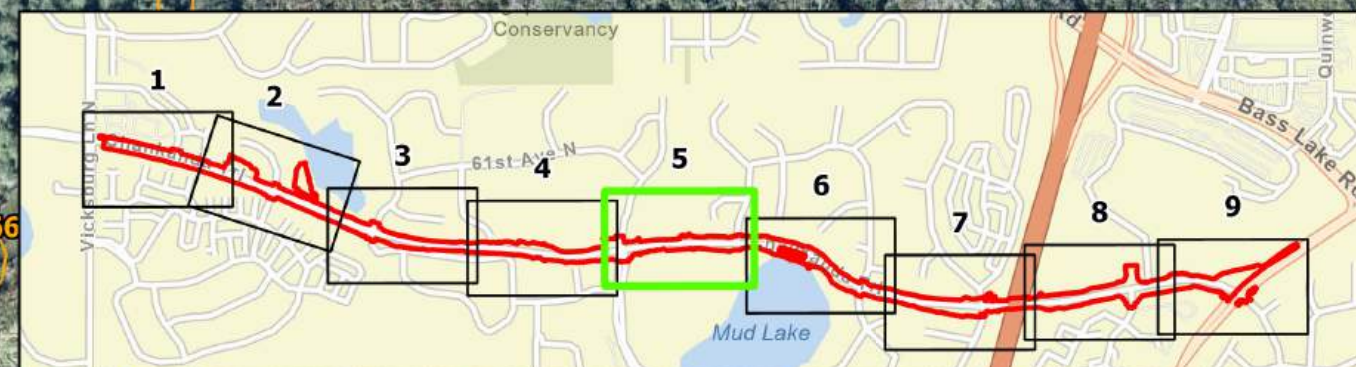
**Wetland 35-1**  
Type 3  
190 sq ft Impact

**Wetland 35-2**  
Type 3  
0.11 ac Impact

**Wetland 35-3**  
Type 1  
152 sq ft Impact

**Wetland 35-4**  
Type 1  
14 sq ft Impact

**Wetland 32-2**  
Type 3  
273 sq ft Impact

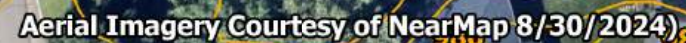


0 37.5 75  
Feet

Kimley **Horn**

Aerial Imagery Courtesy of NearMap 8/30/2024





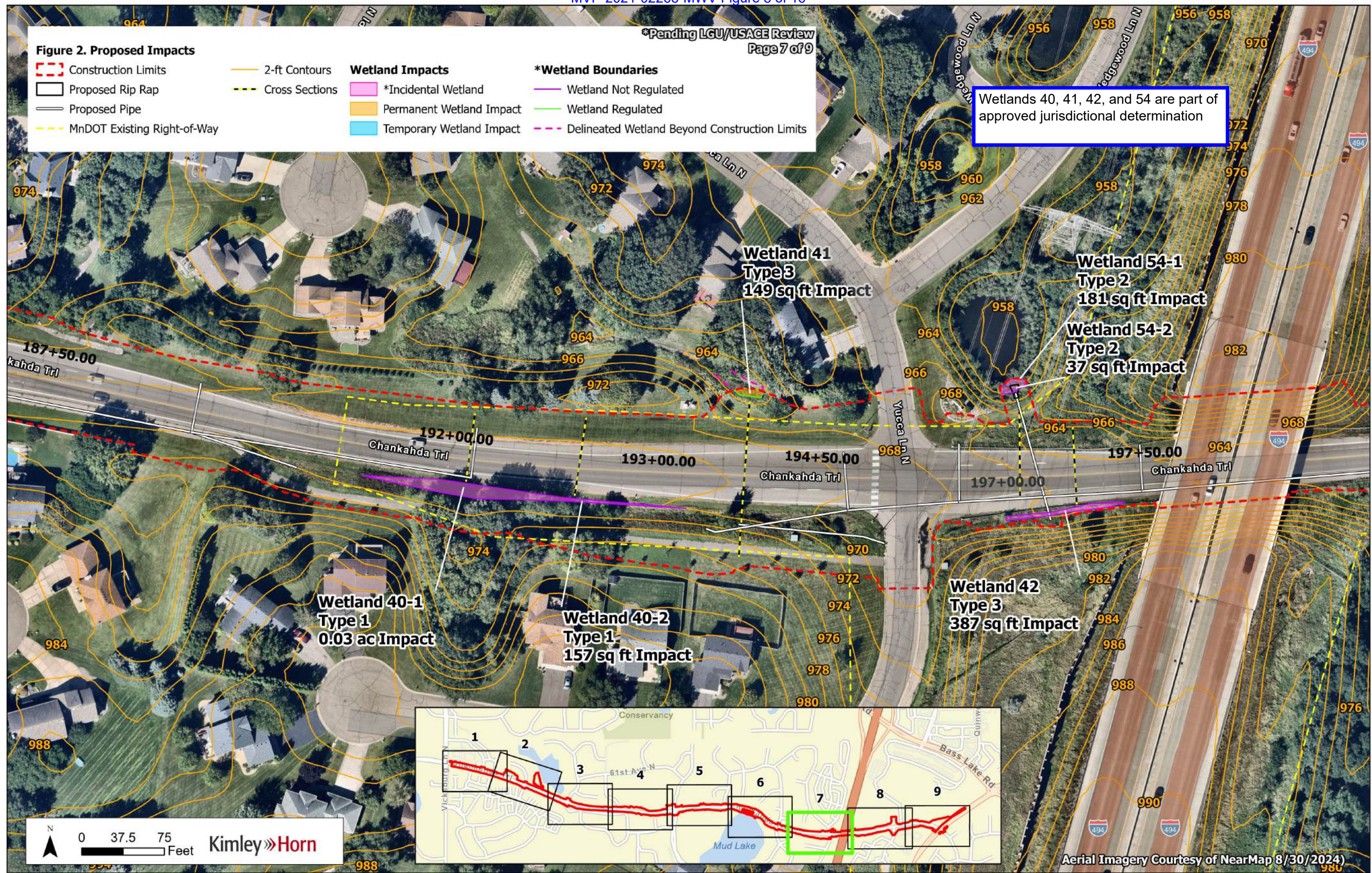


\*Pending LGU/USACE Review  
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**Figure 2. Proposed Impacts**



Wetlands 40, 41, 42, and 54 are part of approved jurisdictional determination



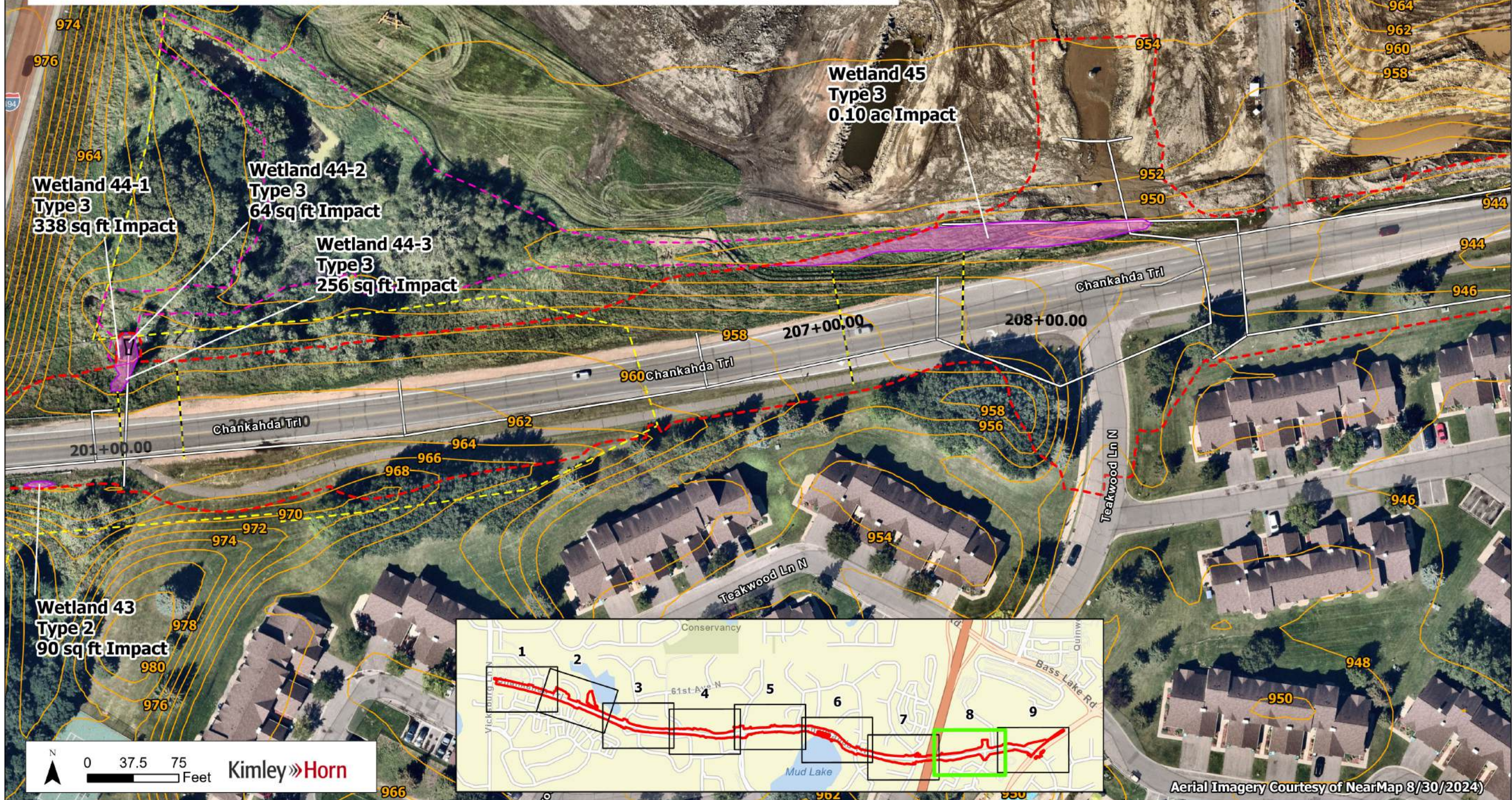


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**Figure 2. Proposed Impacts**

- |                             |                |                          |   |
|-----------------------------|----------------|--------------------------|---|
| Construction Limits         | 2-ft Contours  | <b>Wetland Impacts</b>   | <b>*Wetland Boundaries</b>                    |
| Proposed Rip Rap            | Cross Sections | *Incidental Wetland      | Wetland Not Regulated                         |
| Proposed Pipe               |                | Permanent Wetland Impact | Wetland Regulated                             |
| MnDOT Existing Right-of-Way |                | Temporary Wetland Impact | Delineated Wetland Beyond Construction Limits |

Wetlands 43, 44, and 45 are part of approved jurisdictional determination





\*Pending LGU/USACE Review

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**Figure 2. Proposed Impacts**

Wetlands 46, 47, and 52 are part of approved jurisdictional determination

