



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

MVP-2022-02107-MMP (SP 7106-92)

June 23, 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) ,¹ 2022-02107-MMP. 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.

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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).
 - i. Wetland 2, (0.22 acre). Non-jurisdictional, excluded water.
 - ii. Wetland 3, (0.93 acre). Non-jurisdictional, excluded water.
 - iii. Wetland 4, (0.11 acre). Non-jurisdictional, excluded water.
 - iv. Wetland 5, (0.31 acre). Non-jurisdictional, excluded water.
 - v. Wetland 9, (0.25 acre). Non-jurisdictional.
 - vi. Wetland 10, (0.14 acre). Non-jurisdictional, excluded water.
 - vii. Wetland 12, (0.3 acre). Non-jurisdictional, excluded water.
 - viii. Wetland 15, (0.05 acre). Non-jurisdictional, excluded water.
 - ix. Wetland 16, (0.01 acre). Non-jurisdictional, excluded water.
 - x. Wetland 18, (0.28 acre). Non-jurisdictional.
 - xi. OAR 1, (0.01 acre). Non-jurisdictional, excluded water.
 - xii. OAR 2, (0.01 acre). Non-jurisdictional, excluded water.

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)
- 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 for this determination includes 10 excluded features and 2 non-a(4) waters, as identified on the enclosed figures, labeled 2022-02107-MMP Figures 2-8 of 9. The review area is located along 3.3 miles of US Trunk Highway (TH) 169 between Latitude: 45.4587, Longitude: -93.5856 and Latitude: 45.4312, Longitude: -93.5755. The review area is located in Sections 4 and 9, Township 34 North, Range 26 West, in the City of Zimmerman, Sherburne County, Minnesota.

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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 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

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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- 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

The excluded waters within the review area include Wetlands 2-5, 10, 12, 15 and 16, OAR 1, and OAR 2, as shown on the attached Figures 2-8. Wetlands 2-5, 10, 12, 15, and 16 are being evaluated as excluded ditches because they meet the definition of excluded waters under paragraph b(3) as the ditch features were constructed in upland, drain only upland, do not carry a relatively permanent flow of water, and are not relocated tributaries. OAR 1 and OAR 2 are being evaluated as excluded stormwater ponds because they meet the definition of excluded waters under paragraph b(5) as the stormwater features were constructed by excavating dry land to collect and retain stormwater.

Wetlands 2-5, 10, 12, 15, and 16 are roadside ditches that were constructed in upland to convey runoff along TH 169, based on the wetland delineation completed by Bolton & Menk staff, on behalf of the applicant, and desktop resources, including National Wetland Inventory (NWI) and NRCS’s Hydric Rating, which do not identify wetlands or hydric soils in the entirety of these features. Additionally, a USGS Topographic Map from 1961 identifies the area of these features as upland. Each of these features are surrounded by upland and were constructed in upland. In a review of aerial photos, TH 169 has been constructed since at least 1991. Other resources reviewed to support this determination include 3DEP Hillshade and 3DEP 2-ft, and 5-ft Contour maps and recent aerial imagery which support these features were constructed wholly in and draining only dry land and do not carry a relatively permanent flow of water.

⁷ 88 FR 3004 (January 18, 2023)

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In a review of aerial photos from Google Earth, OAR 1 is associated with commercial development adjacent to TH 169 that occurred between 2004 and 2006. Aerial photos indicate that OAR 2 was constructed between 2015 and 2017. In a review of aerial photos prior to construction of these features, there were no wetness signatures. Additionally, Sherburne County Soil Survey does not identify hydric soils in the location of OAR 1 or OAR 2. Finally, in a review of a USGS topographic maps from 1991, wetlands are not identified in the area of the features, concluding that they were constructed in upland.

Considering the information above, Wetlands 2-5, 9, 10, 12, 15, 16, OAR 1, and OAR2 have been determined to be excluded waters 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 9 and 18 are not traditionally navigable waters (TNW), territorial seas, or interstate waters and therefore are not (a)(1) waters.

Based on the wetland delineation completed by Bolton & Menk, and desktop resources, including LiDAR data, contour maps, recent aerial photos, and the National Wetland Inventory (NWI), Wetland 9 and 18 are depressional basins. The northern portion of Wetland 9 is confined to the roadside ditch, this portion of the wetland is a non-jurisdictional b(3) water that was constructed wholly in and draining only dry land and does not carry relatively permanent flow. The east, west, and north boundaries of Wetland 9 are surrounded by upland and a rise in elevation. Wetland 9 connects to a non-jurisdictional b(3) water, Wetland 10, through a culvert under the frontage road/driveway on the south boundary of the wetland. However, this feature does not carry relatively flow. Therefore Wetland 9 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary. The wetland delineation identifies Wetland 18 continuing to the north offsite, contour maps and LiDAR imagery identify a rise in elevation approximately 4 feet surrounding Wetland 18, aligning with the boundary mapped within the review area. Wetland 18 does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary.

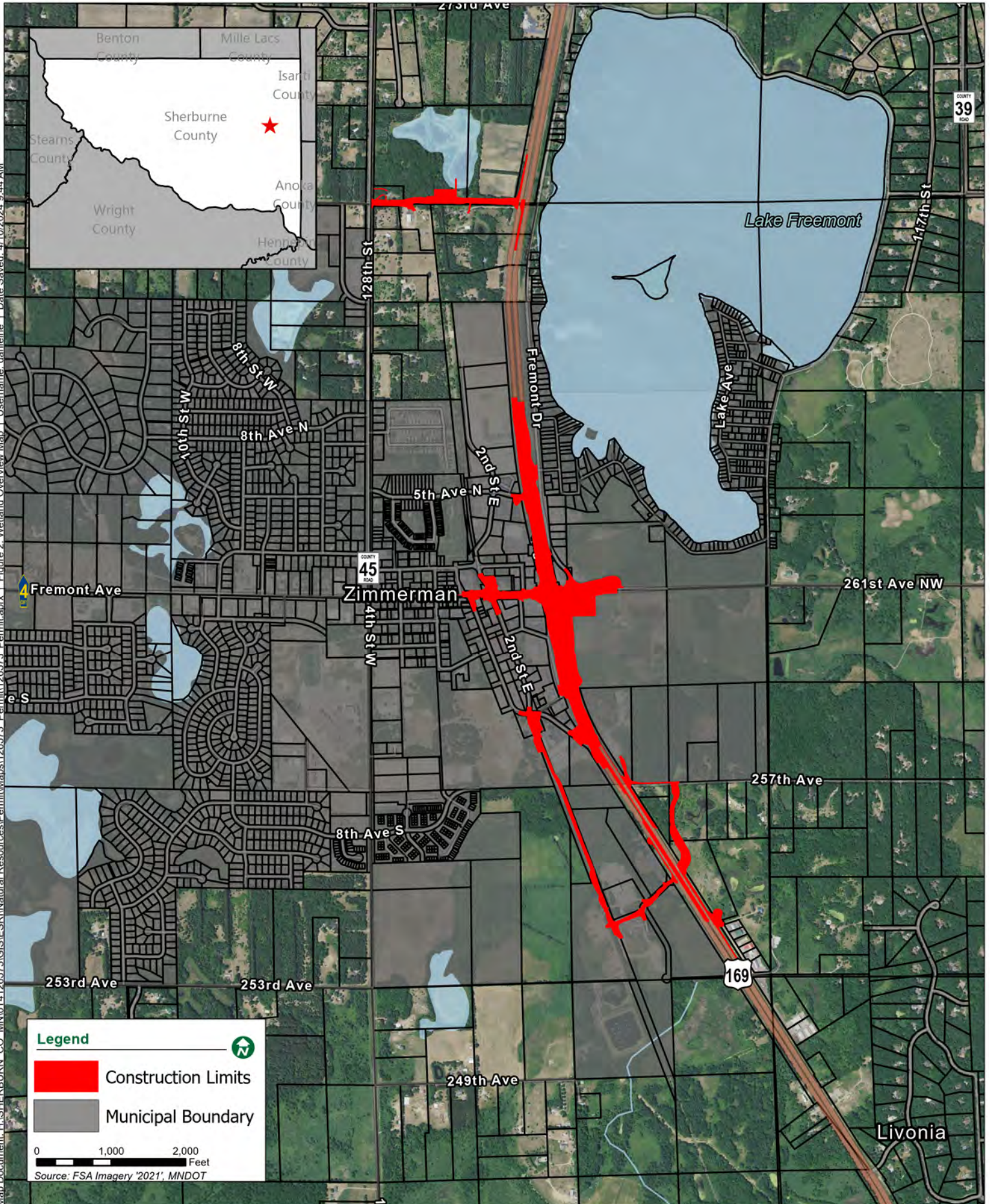
These wetlands are located approximately 0.5-1 mile from the nearest requisite jurisdictional water, Lake Fremont, located northeast of the review area.

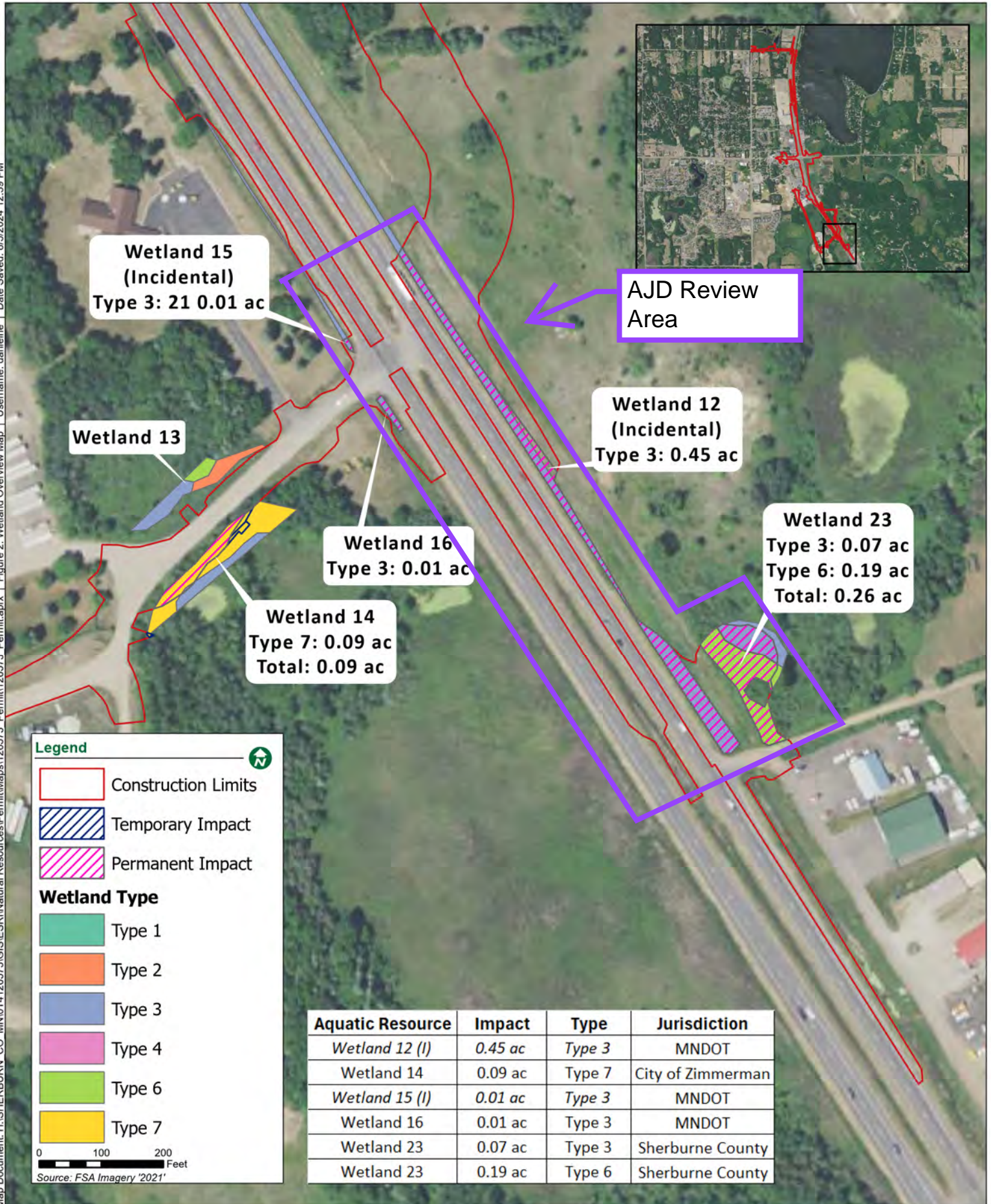
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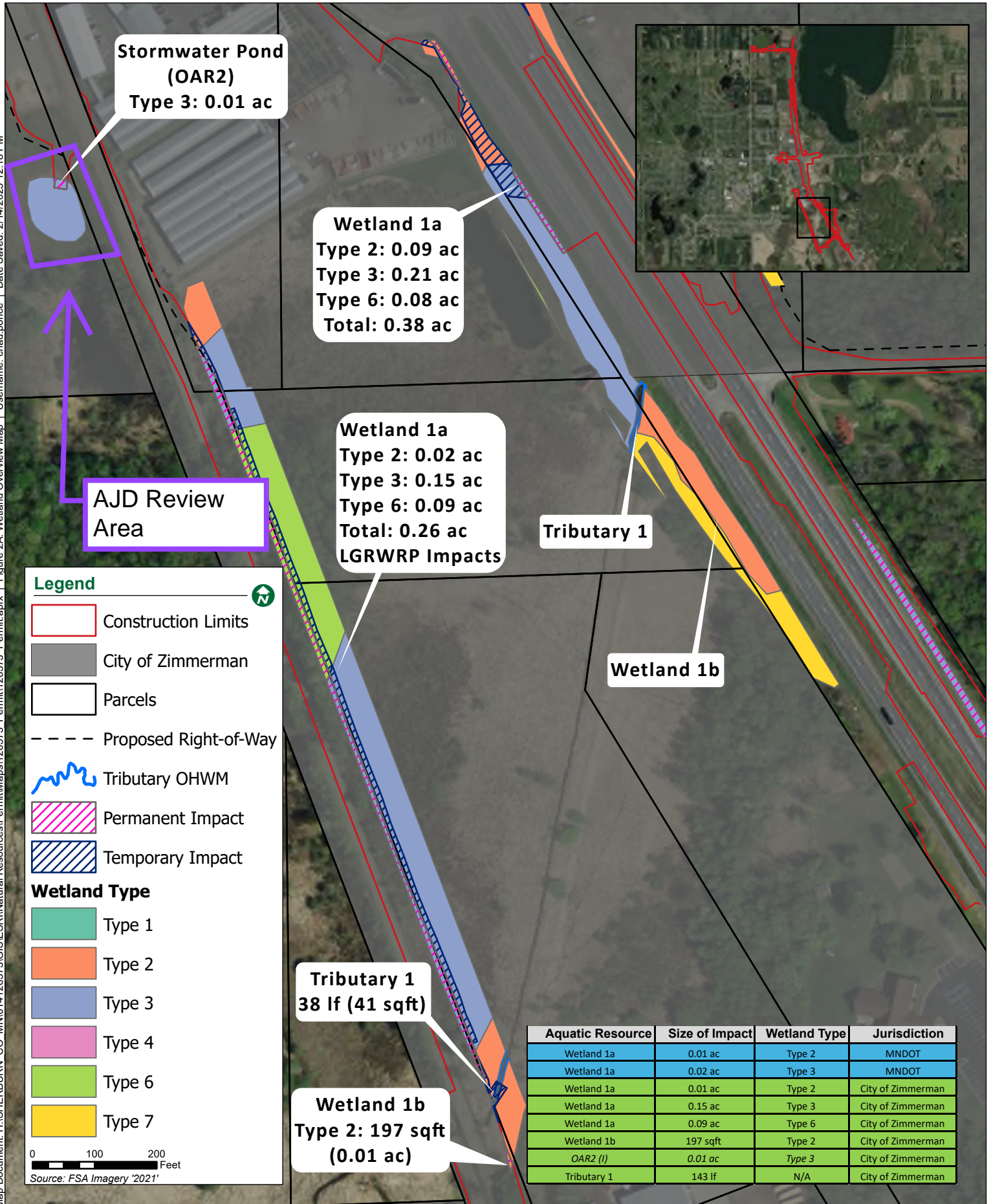
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Wetlands 9 and 18 are non-tidal wetlands that do not abut a relatively permanent jurisdictional water and, as such, do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands; therefore, these wetlands are not jurisdictional 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 completed by Bolton & Menk on November 3, 2022.
 - b. 3DEP 2-ft, 5-ft, 10-ft, and 25-ft Contour maps and 3DEP Hillshade accessed on the National Regulatory Viewer.
 - c. USGS Topographic Maps from 1961 and 1991.
 - d. Google Photo aerial photo from 2004, 2006, 2015, and 2017.
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.







Map Document: H:\SHERBURNE CO MN\074126573\GIS\ESRI\Natural Resources\Permit\Map\126573 Permit.aprx | Figure 2A: Wetland Overview Map | Date Saved: 2/19/2025 2:15 PM | Username: chad.ponce | Permit\126573 Permit\126573

