



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

MVP

08 May 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-2023-00965-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,

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

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 w01 (0.16 acres), non-jurisdictional
 - ii. Wetland w02 (0.20 acres), non-jurisdictional
 - iii. Wetland w03 (0.06 acres), non-jurisdictional
 - iv. Wetland w04 (0.85 acres), non-jurisdictional
 - v. Wetland w05 (0.03 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 3.5 acres located in Weimer Township (Sections 16 and 17, Township 104 North, Range 37 West), Jackson County, Minnesota and is identified as the Survey Area on the attached figures labeled MVP-2023-00965-DAS (AJD) Page 1-2 of 2. The review area is located south of State Highway (Hwy) 60 near the intersection of 390th Avenue. Latitude (NAD83) 43.809069, Longitude (NAD83) -95.297772. There are no other JDs associated with the review area.

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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 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

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.

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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- 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 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 w01, Wetland w02, Wetland w03, Wetland w04, and Wetland w05 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 w01, Wetland w02, Wetland w03, Wetland w04, and Wetland w05 have no continuous surface or near surface connection to any (a)(1-3) water.

⁹ 88 FR 3004 (January 18, 2023)

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Based upon a review of aerial photographs, topographic maps, National Wetland Inventory (NWI) maps, National Hydrography Dataset (NHD), and the Soil Survey, the wetlands were determined to be hydrologically isolated with no surface water connection to a water of the United States.

Wetland w01 is located entirely within a depression created during the construction of State Highway 60 (Hwy 60). Prior to construction of Hwy 60 the area that now contains Wetland w01 was within an agricultural field. Wetland w01 is identified as Palustrine Emergent Persistent Excavated (PEM1Ax) by the National Wetland Inventory (NWI).

Wetland w02 and Wetland w03 are located in a depression to the southwest of the existing Heron Lake Substation. Aerial photos from 1938 and 1954, show the area that now contains Wetland w02 and Wetland w03 was within an agricultural field with no evidence of surface water prior to the construction of the Heron Lake Substation. Wetland w02 and w03 are not identified as wetland by the National Wetland Inventory (NWI).

Wetland w04 is located in an agricultural field to the west of the existing Substation. Wetland w04 slopes down to the west. A review of aerial photos from 1938, 1954, 1991, 2003, 2004, 2006, 2008, 2009, 2011, 2012, 2015, and 2020 showed no instance of surface water in Wetland w04. Wetland w04 is not identified as wetland by the National Wetland Inventory (NWI).

Wetland w05 is located approximately 75 feet south of Wetland w01. Wetland w05 is located in a depression that is surrounded by road corridors to the north and west and agricultural field to the east and south. Wetland w05 is not identified as wetland by the National Wetland Inventory (NWI).

The closest mapped surface water feature is a seasonally flooded, excavated ditch section that extends to the west towards a channelized riverine section between Duck Lake and Heron Lake. The riverine section is approximately 1,500 feet west of Wetland w05. No surface water drainage feature was identified on topographic or hydrologic mapping between w05 and the mapped surface water features.

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

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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 w01, Wetland w02, Wetland w03, Wetland w04, and Wetland w05 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.

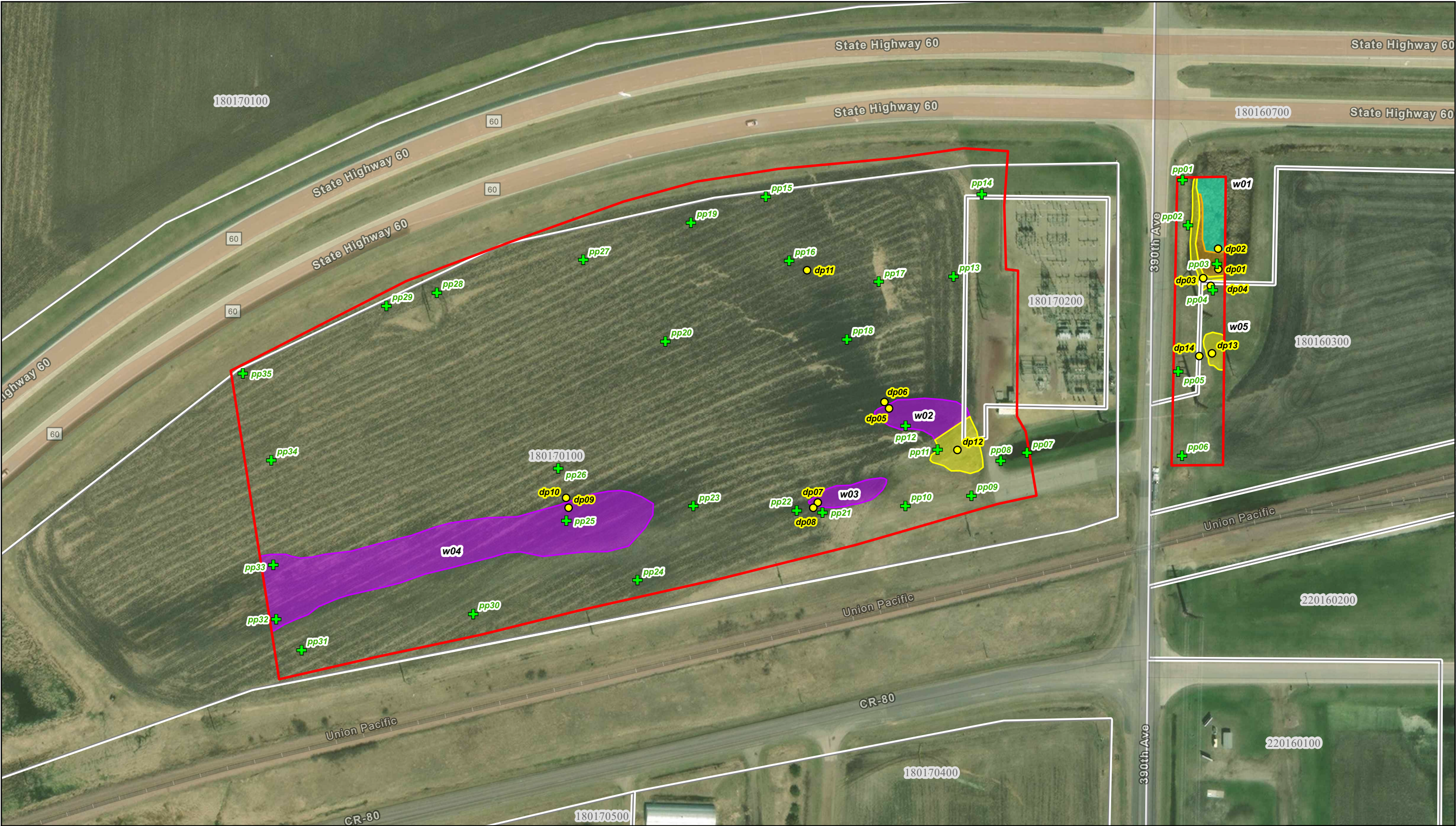
Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including 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.
 - a. Jurisdictional Determination Request via the Joint Application submittal for the Heron Lake Substation Expansion Project prepared by Merjent dated October 2023.
 - b. National Hydrography Dataset (NHD) viewed in Minnesota Regulatory Viewer on May 2, 2024.
 - c. National Wetland Inventory (NWI) viewed in Minnesota Regulatory Viewer on May 2, 2024.
 - d. 2003, 2004, 2006, 2008, 2011, 2012, 2015, and 2020 aerial photos viewed in Google Earth Pro.

10. OTHER SUPPORTING INFORMATION.

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.





075150

Feet

1 inch = 125 feet

Figure 5 Wetland Delineation

Heron Lake Substation Expansion Project

ITC Midwest

Jackson County, Minnesota

Survey Area

Parcel Boundary

Photo Point

Wetland Data Point

Delineated Wetland

Fresh (Wet) Meadow

Seasonally Flooded Basin

Shallow Marsh

Shrub-Carr

Date: 10/17/2023
Source: Z:\Heron_Lake\ArcGIS\1001_ArcPro\10_Heron_Lake_SS_Bio_Survey.aprx Map 10_Heron - Delineation