



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

MVP

25 November 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) ,<sup>1</sup> MVP-2024-00431-MJG MFR 1 of 1<sup>2</sup>

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>3</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>4</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>5</sup> the 2023 Rule as amended,

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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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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 1, 1.39 acre, non-jurisdictional.
  - ii. Wetland 2, 0.15 acre, non-jurisdictional.
  - iii. Wetland 3, 0.88 acre, non-jurisdictional.
  - iv. Stream 1, 72 linear feet (288 sq.ft.), non-jurisdictional.
  - v. Stream 2, 843 linear feet (2529 sq.ft.), 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 54.4 acres in size and is identified by the purple polygon on the attached MVP-2024-00431-MJG AJD Attachments, Page 2 of 2. The review area is located at 45.202235, -93.601325, in the City of Rogers, Hennepin County, Minnesota. There are previous delineation concurrences, MVP-2016-03898-RMM, MVP-2018-01135-MMJ, and MVP-2006-04079-MMJ, are located west and north of the review area which connects to wetland 1 extending offsite. There are no other JDs associated with this 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. 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>6</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 resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>7</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

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<sup>6</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.

<sup>7</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.

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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).<sup>8</sup> 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* 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.

Wetland 1, Wetland 2, Wetland 3, Stream 1, and Stream 2 are not a TNW, territorial sea, or interstate water, and therefore, are not (a)(1) waters. Wetland 1, Wetland 2, Wetland 3, Stream 1, and Stream 2 do not physically abut a paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a berm, bank, dune, or similar natural landform. The National Wetlands Inventory (NWI) and National Hydrography Dataset (NHD) were reviewed. Wetlands 1 and 2 were visible on NWI; however, Wetland 3, Stream 1, and Stream 2 are not shown on NWI or NHD mapping. The USDA/NRCS Hydric Soils survey displays a majority of Partially Hydric (26-50%) soils throughout Stream 1 location and a portion of Wetland 3. The rest of

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

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Wetland 3 and Stream 2 are shown as having Not Hydric (0%) soils. Wetlands 1 and 2 are shown as having all hydric soils.

Stream 1 extends from east to west before it drains into Wetland 3 from the southeast. Based on Google Earth aerial imagery and MHAPO imagery, Stream 1 does not appear to have flowing water within the channel. Stream 1 appears to receive water from precipitation events and/or the drain tile outlet pipe from the adjacent agricultural field. The City of Rogers drainage easement can be seen within attached figures MVP-2024-00431-MJG AJD Attachments, Page 2 of 3. Due to the vegetated channel and source of hydrology, Stream 1 appears to have non-relatively permanent flow. The APT tool was not functional during this review.

Wetland 3 is a 0.88-acre historic depressional wetland, surrounded by an upland forest, Stream 1, and Stream 2. The wetland receives water from runoff from surrounding areas, precipitation events, and also from Stream 1.

Stream 2 is approximately 843 linear feet long, which includes an approximately 17-foot-long culvert. Stream 2 receives water from wetland 3 and precipitation, and discharges into Wetland 1. Based off of topographic maps, Google Earth and MHAPO imagery, and DEMs, a channel is present; however, based on the source of hydrology, Stream 2 appears to have non-relatively permanent flow. Water from Stream 2 flows into Wetland 1. The APT tool was not functional during this review.

An offsite review was also conducted utilizing the data resources listed below to determine the extents of Wetland 1 and Wetland 2 and to determine if any continuous surface connections (csc) exist for Wetland 1, Wetland 2, Wetland 3, Stream 1, and Stream 2 to any potential relatively permanent waters (RPWs). Wetland 1 and 2 extends offsite to the west and north across 141<sup>st</sup> Ave North via culvert. Based off of aerial data, topographic maps, NWI, and DEMs, the offsite portions of Wetland 1 and Wetland 2 appear to converge to the west of the project site and appear to be depressional wetlands that are not separated from a jurisdictional water by a swale, ditch, culvert, natural berm, bank, dune, or similar natural landform, as documented in the MVP-2016-03898-RMM Delineation Report, MVP-2018-01135-MMJ Delineation Report, and MVP-2006-04079-MMJ Delineation Report. Wetlands 1 and 2 are non-tidal wetlands located approximately 0.26 miles south from the nearest potential relatively permanent waterway, the Crow River.

Wetland 1, Wetland 3, and Wetland 3 do not have a continuous surface connection to a relatively permanent jurisdictional water, and as such does not

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meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetland. Stream 1 and Stream 2 do not have a downstream connection to any downstream (a)(1) or (a)(2) waters. As such Stream 1 and Stream 2 cannot be evaluated as (a)(3) tributary; therefore, Wetland 1, Wetland 2, Wetland 3, Stream 1, and Stream 2 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. Field Wetland Delineation Report for Veit and Company, including a delineation of aquatic resources, dated June 26, 2023.
  - b. Proposed Mining Footprint, Figure 2 reviewed May 14, 2024.
  - c. Wetland Delineation Report for Parcels 1712023120001 and 114800171200, including a delineation of aquatic resources, dated October 7, 2016 (located under file number MVP-2016-03898-RMM).
  - d. Wetland Delineation Report for Parcel 1612023230001, including a delineation of aquatic resources, dated October 16, 2018 (located under file number MVP-2006-04079-EJW).
  - e. Wetland Determination Report for Parcel 1712023240002, dated March 21, 2017.
  - f. National Regulatory Viewer, accessed November 21, 2024.
  - g. United States Fish and Wildlife Service, National Wetland Inventory, accessed November 21, 2024.
  - h. USDA NRCS Soil Survey USDA-NCSS SSURGO and STATGO accessed October 30, 2024.
  - i. United States Geological Survey (USGS), National Hydrography Dataset, accessed November 21, 2024.
  - j. Minnesota Department of Natural Resources, 2-meter contour data, accessed November 21, 2024.

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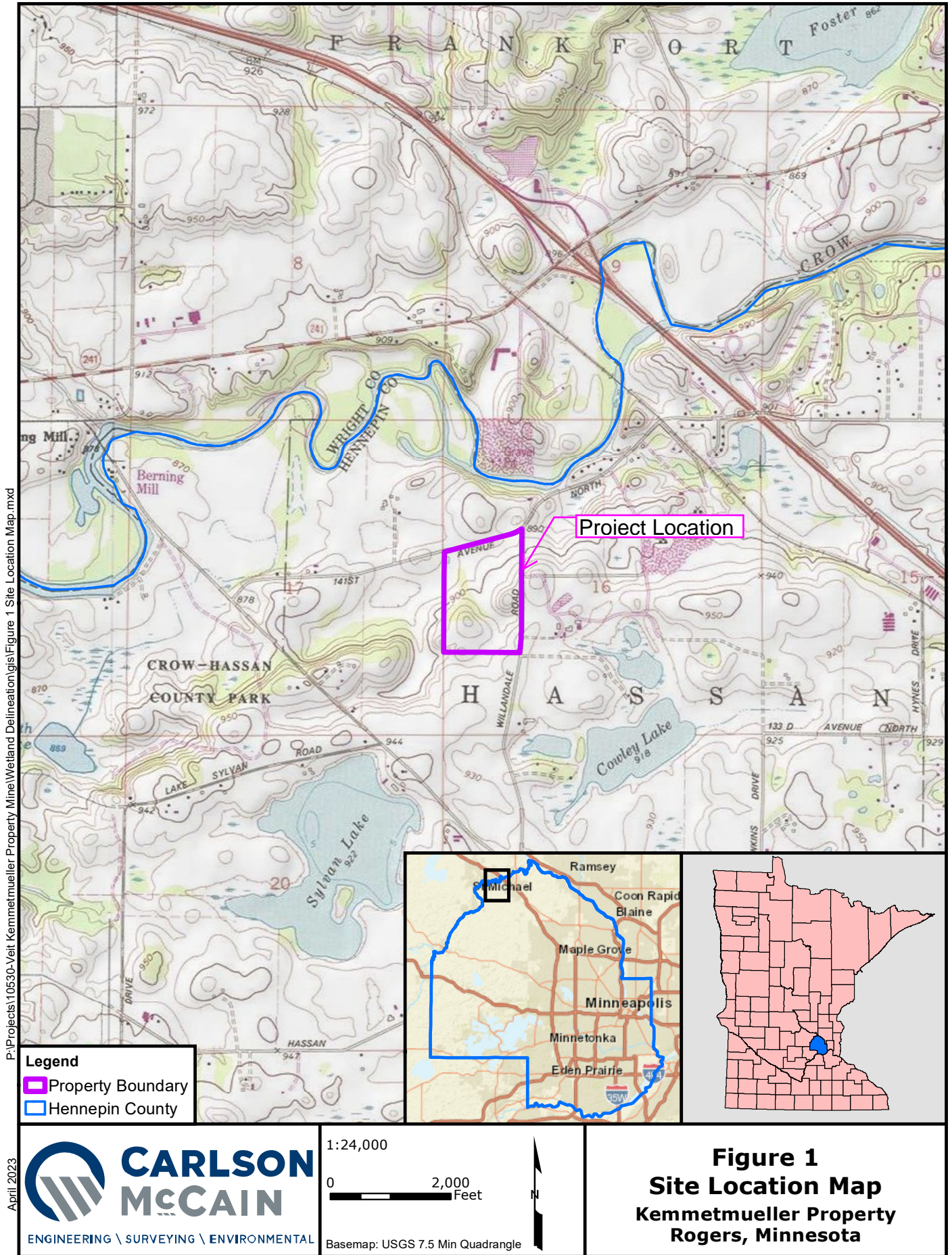
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- k. Minnesota Department of Natural Resources, hillshade data, accessed November 21, 2024.
- l. USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic service, accessed November 21, 2024.
- m. Minnesota Historic Aerial Photographs Online, years 1937, 1945, 1963, accessed November 21, 2024.
- n. Google Earth Aerial Imagery, years 2004, 2006, 2008, 2011-2024, accessed November 21, 2024.
- o. Hennepin County ArcGIS Natural Resources Map, Hennepin County GIS, accessed November 26, 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 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.

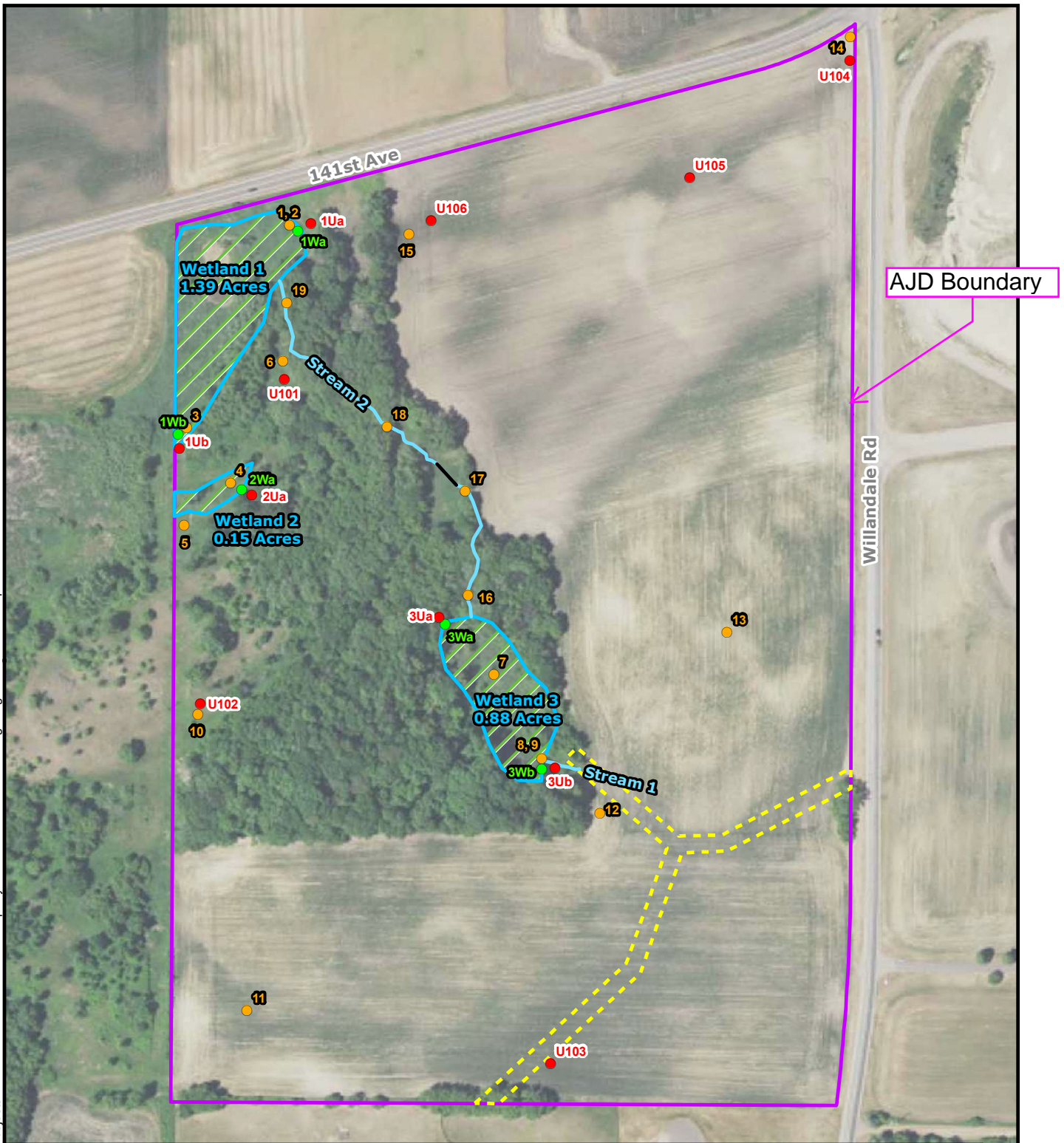






P:\Projects\10530-Veit Kemmetmueller Property Mine\Wetland Delineation\gis\Figure 5 Wetland Map.mxd

June 2023



#### Legend

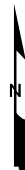
- Wetland Test Hole Location    — Ephemeral Stream    ● Photograph Location    — Culvert
- Upland Test Hole Location    ■ Delineated Wetland    ■ Property Boundary    - - - City of Rogers Drainage Easement



1:3,000

0 250 Feet

Basemap: MnGeo color 7-county, 2020.



**Figure 5**  
**Wetland Map**  
**Kemmetmueller Property**  
**Rogers, Minnesota**