



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

November 26, 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-2024-01135-RLG MFR 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 2 (0.09 Acres), Non-Jurisdictional
 - ii. Ditch 2 (118 Linear Feet), Non-Jurisdictional
 - iii. Ditch 3 (69 Linear Feet), 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 Area Size (in acres): 2.64 Acres
- b. Location Description: The project/review area is located in Section 36, Township 119N, Range 023W, Hennepin County, Minnesota.
- c. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 45.076040 Longitude: -93.525090
- d. Nearest City or Town: Hamel
- e. County: Hennepin
- f. State: Minnesota
- g. Other associated Jurisdictional Determinations (including outcomes):
None

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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 WATERS⁶: 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 10.⁷ 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

⁶ 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.

⁷ 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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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).⁸

This AJD is limited to the boundary of Wetland 2, Ditch 2 and Ditch 3, as shown on the attached figure. The hillshade and topographic maps indicate Ditch 2 and Ditch 3 are excavated channels that are likely not natural features. The surrounding upland supports that this area was likely excavated previously. Historic aerials found on MHAPO show that the ditch was constructed in uplands sometime between 1971 to 1991. Review of historic USGS topographic maps and imagery shows no wet signature Ditch 2 and Ditch 3 are currently situated.

According to the preamble to the 1986 Corps Regulations (33 CFR 320-330) the Corps generally does not consider non-tidal ditches excavated on dry land to be Waters of the U.S. (WOUS). In accordance with Rapanos guidance, ditches excavated wholly in and draining only uplands and have less than relatively permanent flow of water are generally not considered WotUS. Therefore, as a feature excavated in upland with less

⁸ 88 FR 3004 (January 18, 2023)

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than relatively permanent flow of water, Ditch 2 is not a jurisdictional WoUS under the Clean Water Act.

According to the preamble to the 1986 Corps Regulations (33 CFR 320-330) the Corps generally does not consider swales and erosional features to be Waters of the U.S. (WOUS). In accordance with Rapanos guidance, a swale is a discrete topographic feature, it does not have a defined channel, nor an ordinary high water mark, and have less than relatively permanent flow of water are generally not considered WoUS. Therefore, Ditch 3 is not a jurisdictional WoUS under the Clean Water Act.

The individual feature labeled Ditch2 on Page 2 of 3 and Page 3 of 3 of the enclosed figures meets the terms of paragraphs (b)(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. The individual feature labeled Ditch 3 on Page 2 of 3 and Page 3 of 3 of the enclosed figures meets the terms of paragraphs (b)(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow. Ditch 2 and Ditch 3 carries non-relatively permanent flow during storm events, and does not contain a bed and bank or an ordinary high water mark.

- 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).

The area labeled Wetland 2 was evaluated as potential (a)(4) waters but it does not have a continuous surface connection to a jurisdictional water.

Wetland 2 does not have a continuous surface connection to an (a)(1-3) water because Wetland 2 does not have a continuous surface or near surface connection to any (a)(1-3) water, a relatively permanent water. Wetland 2 connects to Ditch 2 and Ditch 3 which were dug out in upland. Wetland 2 does not connect to any other wetlands or tributaries on or offsite.

The closest tributary, unnamed Country Ditch, is located north of the review area but 0.33 miles away from Wetland 2. The USDA NRCS' Web Soil Survey shows no mapped hydric soils in the project area where Wetland 2 is and Hennepin County NPR GIS site listed the soil type being Tadkee-Tadkee where Wetland 2 is.

The closest surface water feature is a wetland complex to the north within site boundaries and continues offsite. Wetland 1 is 55 feet to the north. No surface water

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drainage feature was identified on Hilshade, topographic or hydrologic mapping between Wetland 2 and Wetland 1.

Minnesota Historical Aerial Photographs Online (MHAPO) Imagery from 1971 shows the historical agriculture field on the project site and the area around it. The National Wetland Inventory and National Hydrography Dataset do not show Wetland 2. Wetland 2 does not meet the terms of paragraphs (a)(4) because it lacks 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.

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 determined to not be jurisdictional under the CWA because the wetlands lacked links to interstate commerce sufficient to serve as a basis for jurisdiction.

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. 6699 Briddle Path De Minimis Exemption Application Oct, 2024
 - b. GoogleEarth 7.3.3.7692. (April 19, 2024). Retrieved Nov 26, 2024 from <http://www.earth.google.com>. For the years: 2023, 2022, 2021, 2020, 2017, 2015, 2012, 2012, 2011, 2009, 2008, 2006, 2004, 2003, and 1991
 - c. MNDNR Hilshade - 2016 accessed April 19, 2024
 - d. USDA NRCS Soil Survey USDA-NCSS SSURGO and STATGO
 - e. 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/>.

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- f. USGS. (Nov 26, 2024). National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1601. Washington, D.C., USA.
- g. Hennepin County GIS. (Nov 26, 2024). Minneapolis, MN USA. Retrieved from <https://gis.hennepin.us/naturalresources/>

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.

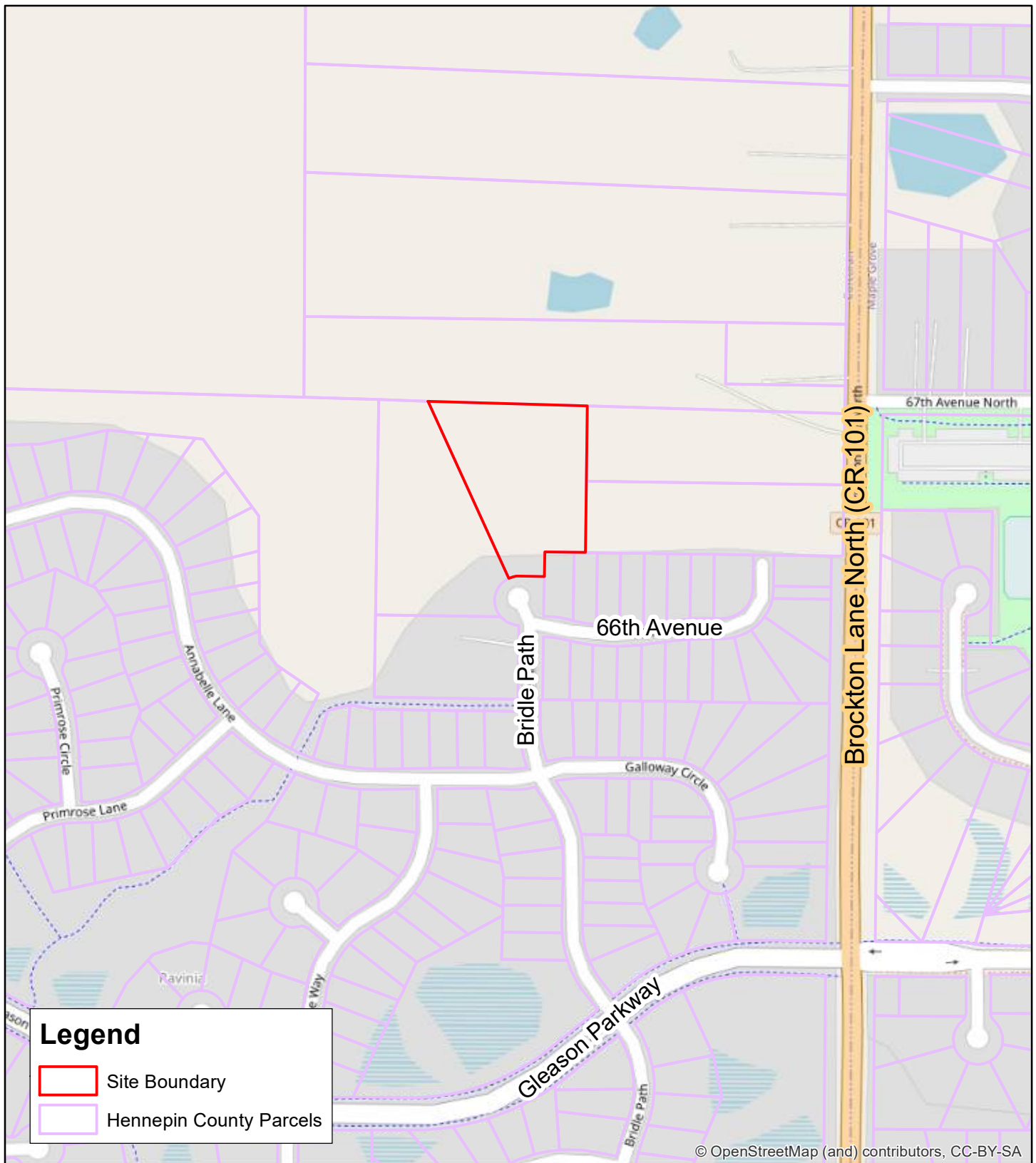





Figure 1 - Site Location



N



0 500



Feet

6699 Bridle Path (KES 2024-026)
Corcoran, Minnesota

Note: Boundaries indicated on this figure are approximate and do not constitute an official survey product.

KJOLHAUG ENVIRONMENTAL SERVICES COMPANY

Source: ESRI Streets Basemap

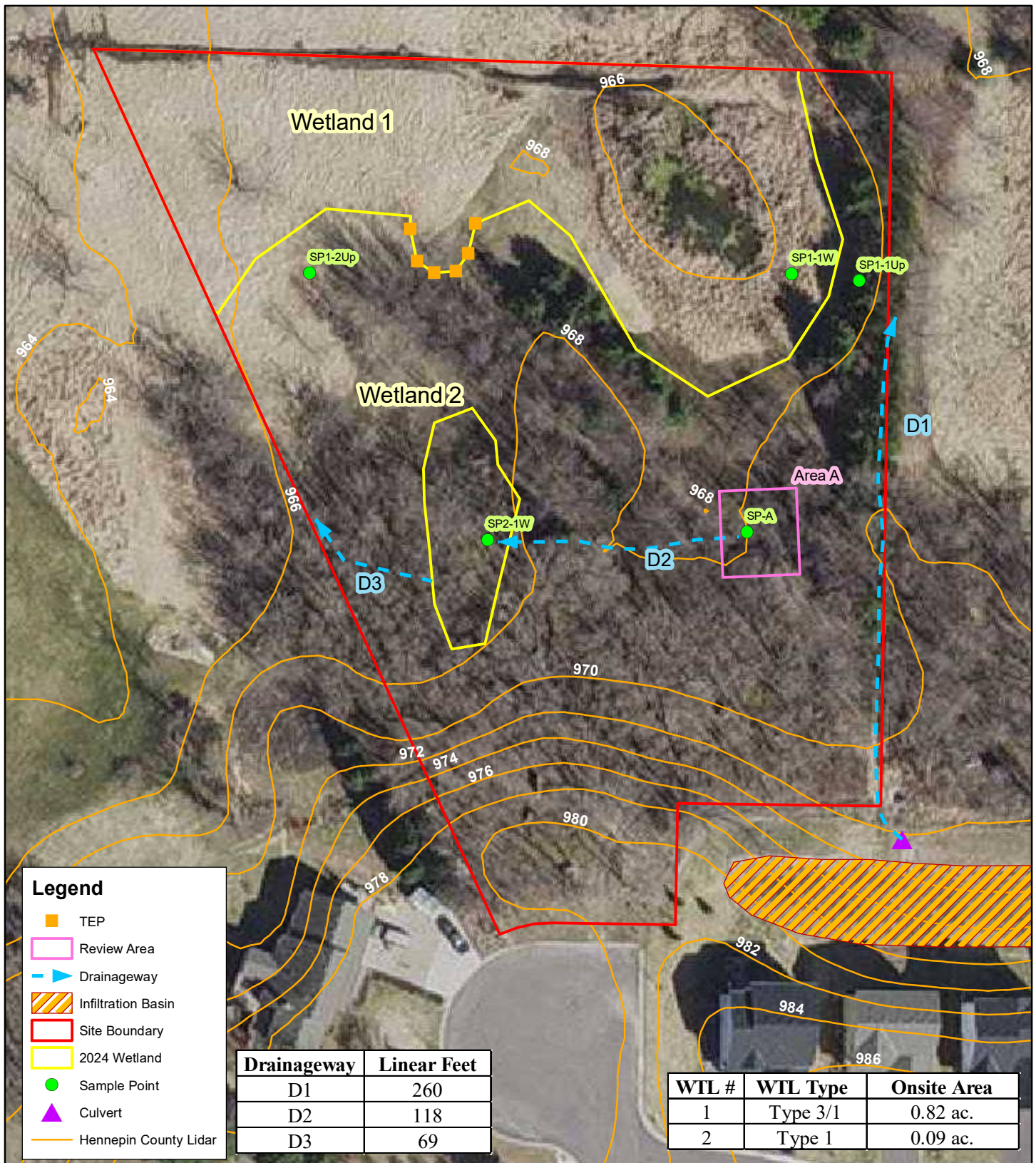


Figure 2 - Existing Conditions TEP Revised 6/24/2024 (2020 Twin Cities Metro Photo)

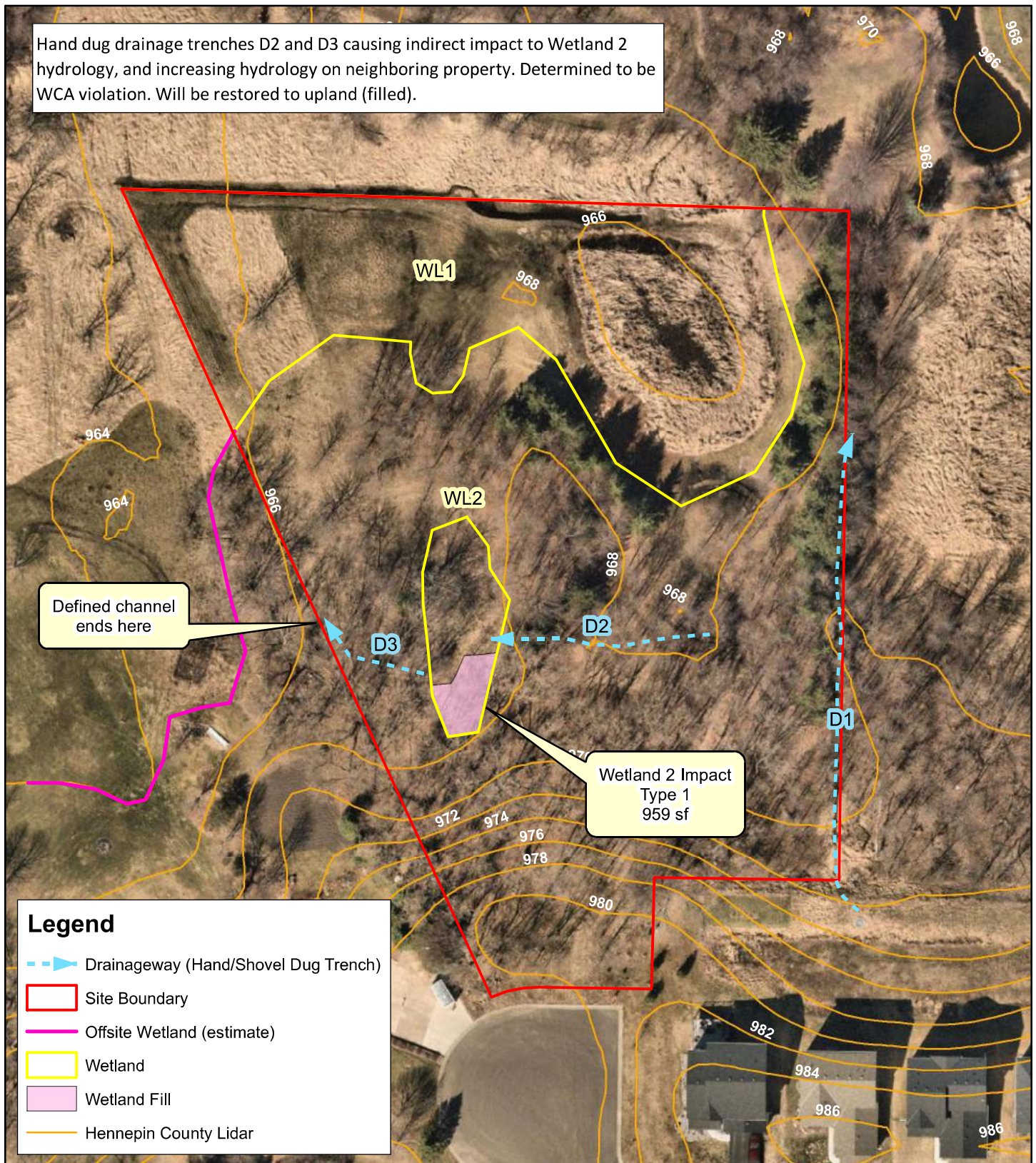


Figure 3 - Proposed Wetland Impacts & Hydrology Restoration (2021 Henn Co Photo)