



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

MVP

26 August 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-2024-00773-JST 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. Upland Ditch 1 (296 linear feet), non-jurisdictional
- ii. Upland Ditch 2 (694 linear feet), non-jurisdictional
- iii. Upland Ditch 3 (587 linear feet), non-jurisdictional
- iv. Drainageway 1 (598 linear feet), non-jurisdictional
- v. Wetland 1 (144 square 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)

3. REVIEW AREA. [The review area is located in Section 36, Township 114 North, Range 21 West, Lakeville, Dakota County, Minnesota. The center coordinates of the site are Latitude: 44.640618, Longitude: -93.279737. The review area is solely limited to Upland Ditches 1, 2, 3, Drainageway 1, and Wetland 1 as identified in the enclosed project figures. The review area is located off County Road 70, south of 210th St W, east of Kenrick Ave, west of Jacquard Ave, and north of 215th St W. The nearest waterway is the West Branch South Creek located approximately 0.2 miles southeast of the review area.](#)

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](#)
 - 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

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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- 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 [This AJD is limited to the boundaries of Upland Ditches 1, 2, and 3. Based on the wetland delineation report submitted on behalf of the requestor, the subject features were created incidental to the development of County Road 70. This created a series of roadside ditches located along County Road 70 that were dug in uplands, drain only uplands, and do not support relatively permanent water. This is evidenced by historic imagery from the 1950’s which indicates that the land use was predominantly agricultural prior to the development of the existing road infrastructure. After the development of County Road 70 adjacent to the site, these roadside ditches formed and are mapped within non-hydric soils as indicated on the NRCS Web Soil Survey dataset. This supports the rationale that these upland ditches were excavated in dry land, drain only dry land, and do not support relatively permanent water. This non-jurisdictional determination is in accordance with the Revised Definition of ‘Waters of the United States’; Conforming which states that the Corps generally does not consider the following waters to be Waters of the United States; “Ditches \(including roadside ditches\) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.”, including any wetlands that have developed within the boundaries of the excluded feature. Based on this review, Upland Ditches 1, 2, and 3 meet the \(b\)\(3\) exclusion and are not jurisdictional under Section 404 of the Clean Water Act.](#)
- 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 aquatic resources within the review area identified as Wetland 1, and Drainageway 1 are not TNWs, territorial seas, or interstate waters and are therefore not \(a\)\(1\) waters. This determination is supported by the national wetland and hydrography datasets which do not identify any aquatic resources or other potential connections between these aquatic resources and any other waters. The review area consists of cultivated fields, a swale feature, and a](#)

⁷ 88 FR 3004 (January 18, 2023)

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wooded portion. Wetland 1 is in the northeastern portion of the site and is a small depressional feature that is wholly surrounded by uplands. Wetland 1 does not physically abut a relatively permanent (a)(2) impoundment or (a)(3) tributary and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. After reviewing historic aerial imagery, Drainageway 1 does not appear to extend offsite and is contained entirely within the site and does not carry relatively permanent flow. Due to the lack of relatively permanent water in Drainageway 1, it would not meet the relatively permanent standard. Drainageway 1 does not carry a relatively permanent flow and does not flow directly or indirectly into any (a)(1) waters or (a)(2) impoundments, therefore it cannot be evaluated as an (a)(3) tributary. There is no swale, erosional feature, stream, ditch nor pipe connecting Wetland 1 or Drainageway 1 to any stream or river downstream. Wetland 1 is a non-tidal wetland that does not have a continuous surface connection to a relatively permanent jurisdictional water and as such does not meet the definition of adjacent and cannot be evaluated as an (a)(4) adjacent wetland; therefore, this aquatic resource is not jurisdictional under the 2023 Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 Final Rule. 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. County Road 70 Wetland Delineation Report prepared by Kjolhaug Environmental Services dated July 29th, 2024.
 - b. USFWS NWI Map Service. Accessed August 14, 2024.
 - c. USGS NHD Map Service. Accessed August 13, 2024.
 - d. Google Earth Imagery dated 1991, 2006, 2010, 2015.
 - e. MNHAPO Imagery dated 1951, 1957, 1964.
 - f. NRCS Web Soil Survey. Accessed August 13, 2024.
 - g. USGS 3DEP DEM. Accessed August 13, 2024.

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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.

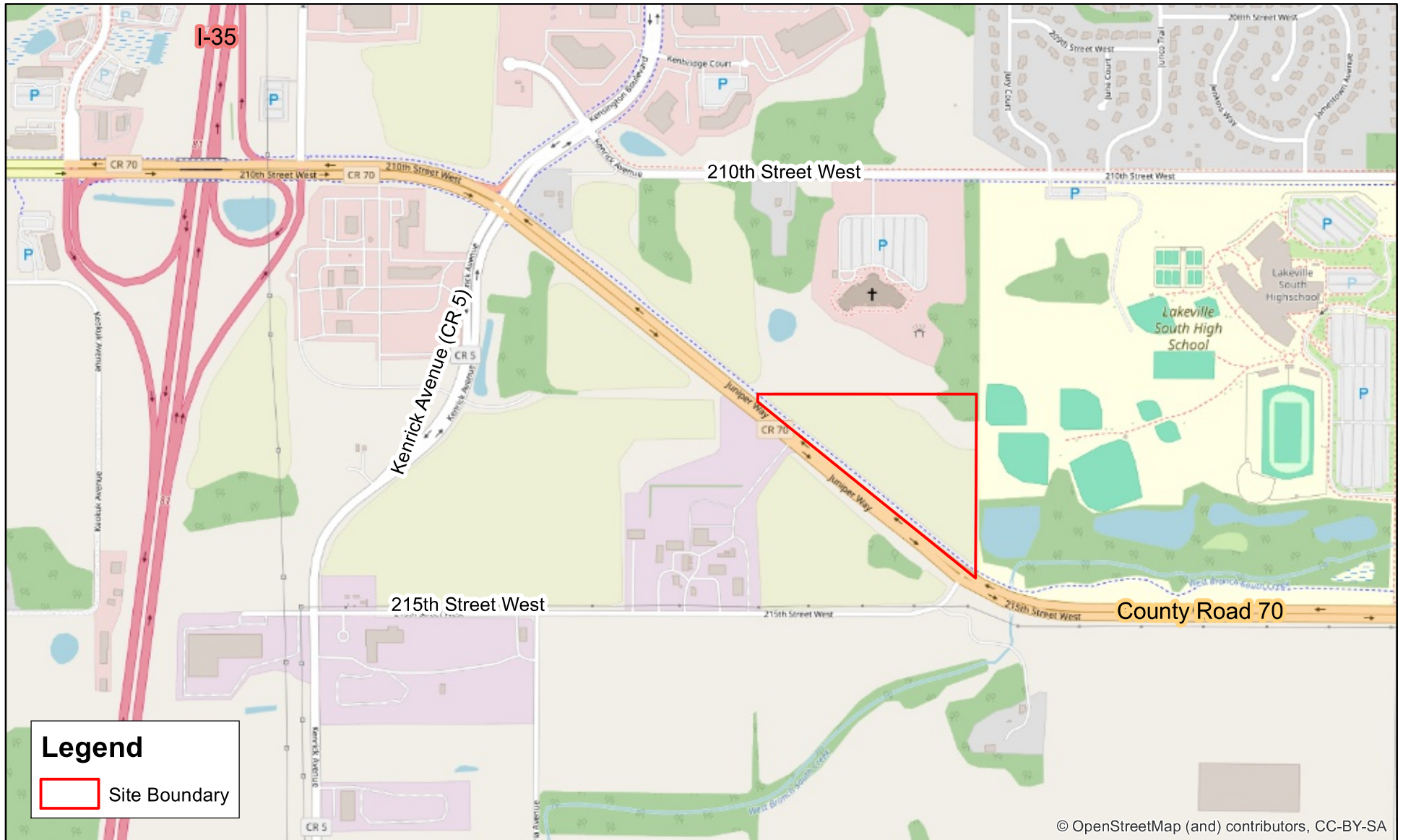


Figure 1 - Site Location



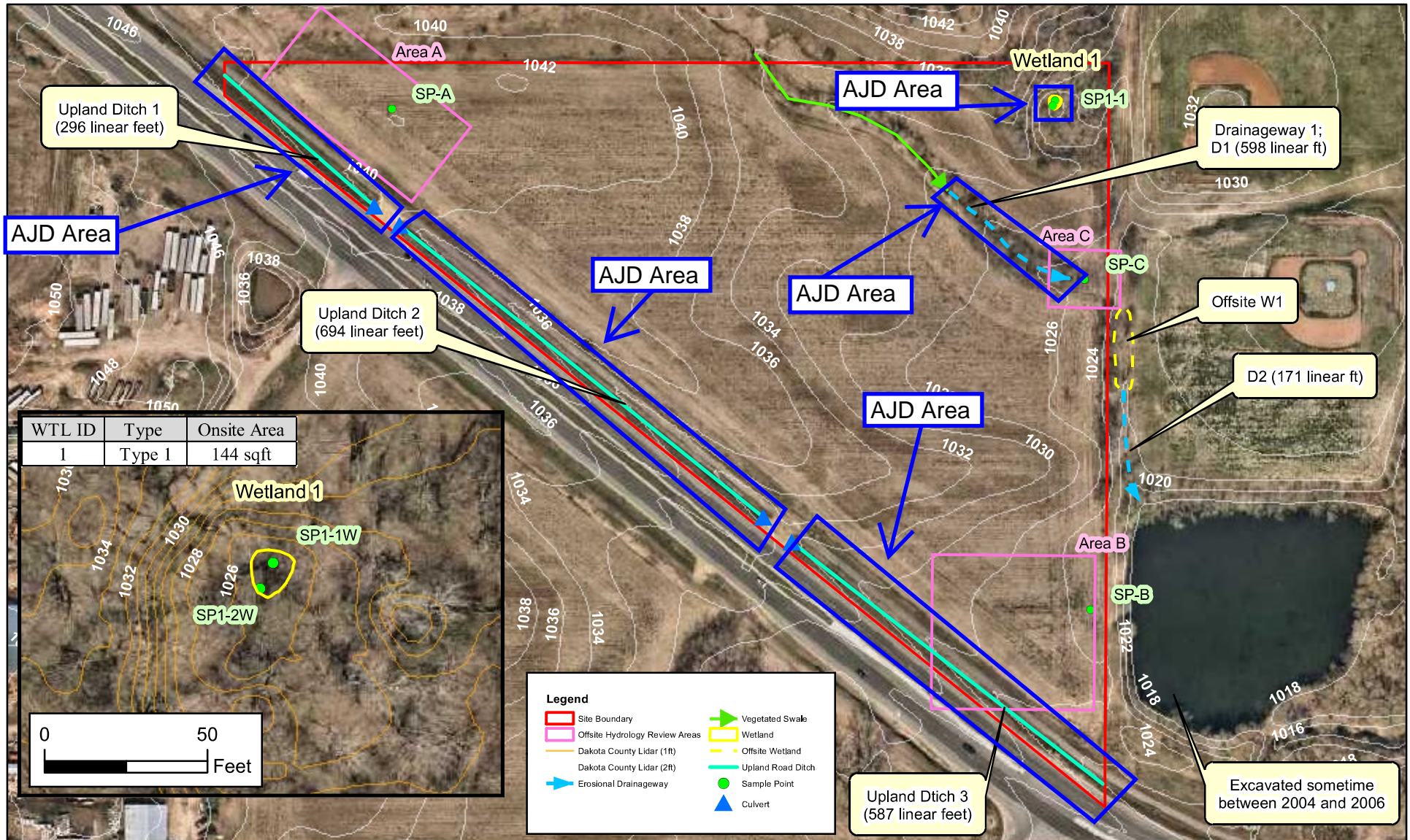


Figure 2 - Existing Conditions (2023 Dakota County Aerial Photo)

