



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

MVP-2024-01233-DDP

December 10, 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-2024-01233-DDP MFR 1 of 1.²

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).

- Wetland 2 (0.335 acres) - non-jurisdictional
- Wetland 3 (0.155 acres) - non-jurisdictional
- Wetland 4 (0.702 acres) - non-jurisdictional
- Wetland 5 (0.406 acres) - non-jurisdictional
- Wetland 7 (0.047 acres) - non-jurisdictional
- Wetland 8 (0.236 acres) - non-jurisdictional
- Wetland 9 (1.144 acres) - non-jurisdictional
- Wetland 10 (0.201 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 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 limited to Wetlands 2, 3, 4, 5, 7, 8, 9 & 10 and is identified by the blue polygon on the attached figures labeled MVP-2024-01233-DDP Figures - Page 2 of 2. The review area is located at 44.05514251, -90.37929589 in the Town of Byron, Monroe County, Wisconsin. There are no other JDs associated with the review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A.⁶

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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A.
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.
 - 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.

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.

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
- Wetlands 2, 3, 7, 8, 9 and 10: Wetlands 2 and 3 are excavated shallow scrapes that appear on the landscape as distinct circular depressions with abrupt edges dropping approximately 2 to 3 feet from the adjacent uplands. According to the landowner, these areas were excavated sand borrow pits for the nearby cranberry marsh to the southeast. Reviewing aerial photography, neither wetland area shows any distinct signs of being present on or before 1939. Wetlands 7, 8 and 9 are all located in an area where there has been previous earthwork. Stockpiles of soil can be seen on aerial photography as early as 1980 and continuing through 1999. Sand excavation can be seen on aerial imagery in 2003. Wetland 10 is an artificially constructed wetland located at the entrance to the property as a result of improper grading and compaction. According to the applicant, during the evaluation of the adjacent parcel, approximately 2 feet of muck was spread throughout this area overlying natural upland sand profiles. Sampling points 10-1 Up and 10-1 Wet in the wetland delineation support this conclusion. Accordingly, The Corps has determined that Wetlands 2, 3, 7, 8, 9 and 10 are excluded from Section 404 jurisdiction under (b)(7) of the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule. Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel are not “waters of the United States.”
- 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).

⁹ 88 FR 3004 (January 18, 2023)

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- Wetlands 4 & 5: Wetlands 4 and 5 are located within the south central and north central portions of the property respectively. Both are entirely contained within the Corps review area and are classified primarily as Wooded Swamp communities. Wetlands 4 and 5 were observed on high points of the property within perched depressional areas. Wetlands 4 and 5 are not TNWs, territorial seas, or interstate waters; therefore, Wetlands 4 and 5 are not category (a)(1) waters. Current and historic aerial photos indicate Wetlands 4 and 5 are not tributaries and were not created by impounding a water of the U.S.; therefore, Wetlands 4 and 5 are not category (a)(2) or (a)(3) waters. Based on review of the wetland delineation report, Wetlands 4 and 5 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. The closest waterway is an unnamed tributary to the East Fork Lemonweir River approximately 0.32 miles east of Wetlands 4 and 5. Wetlands 4 and 5 are surrounded by uplands and there are no ditches, swales, pipes, or culverts that provide a surface connection from Wetlands 4 or 5 to the unnamed tributary to the East Fork Lemonweir River. Wetlands 4 and 5 are non-tidal wetland that do not have a continuous surface connection to a relatively permanent water and as such do not meet the definition of adjacent and cannot be evaluated as (a)(4) adjacent wetlands; therefore, Wetlands 4 and 5 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.

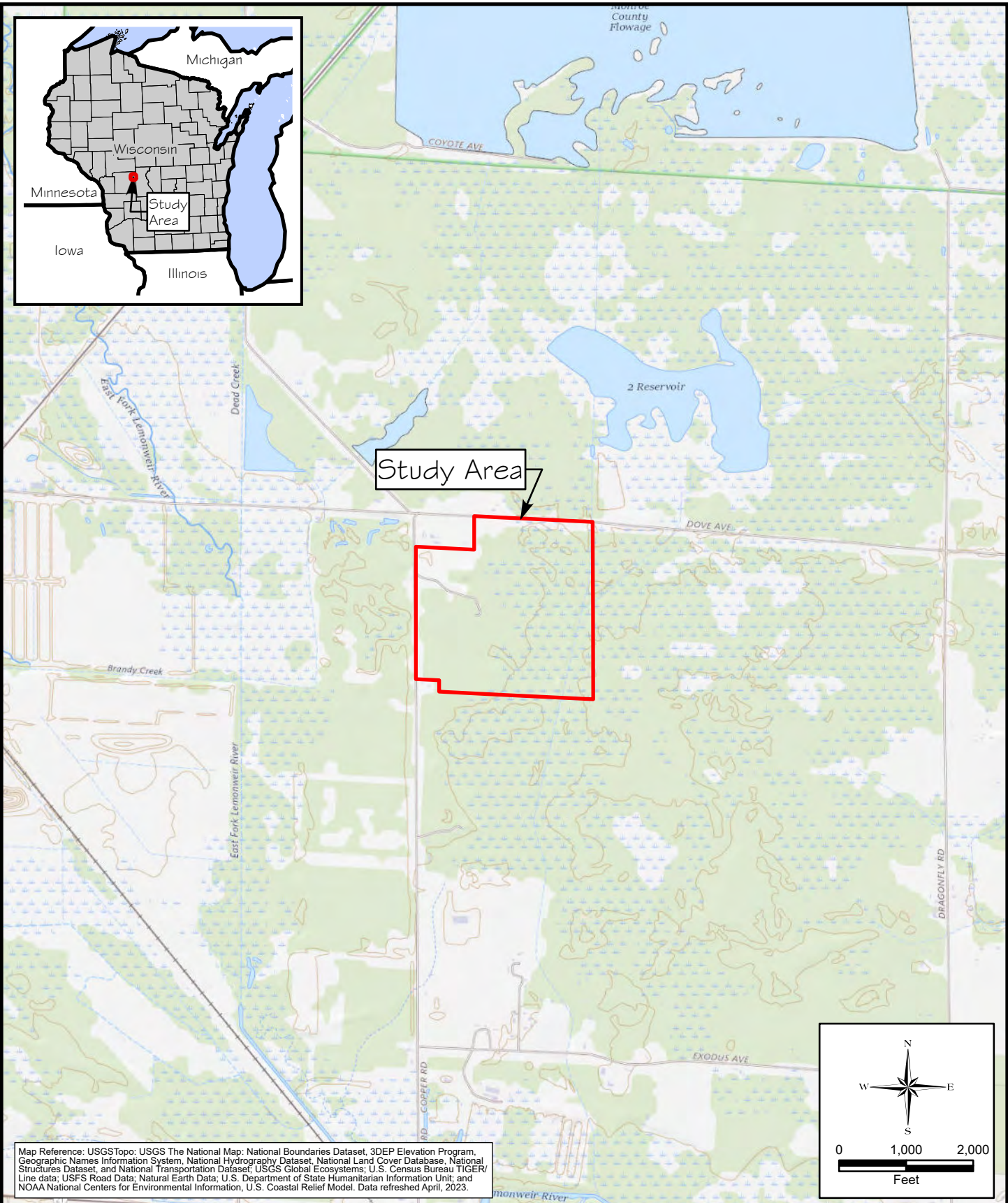
- a. Wetlands & Waterways LLC Wetland Delineation Report for the Hi-Crush Operation, LLC – Valley Corporation Property Dated September 15, 2023
- b. Google Earth Accessed: November 22, 2024
- c. USACE Regulatory Viewer Accessed: November 18, 2024
- d. NRCS Web Soil Survey Accessed: November 22, 2024
- e. WDNR - Surface Water Data Viewer Accessed: November 18, 2024

10. OTHER SUPPORTING INFORMATION. N/A

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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.



**Site Location
and Local Topography**

Valley Corporation
Sec. 09, T18N, R01E, Town of Byron
Monroe County, Wisconsin

Approved By:
AMK

Drawn By:
PM

Date:
04/19/2023

Scale:
1:2,000'

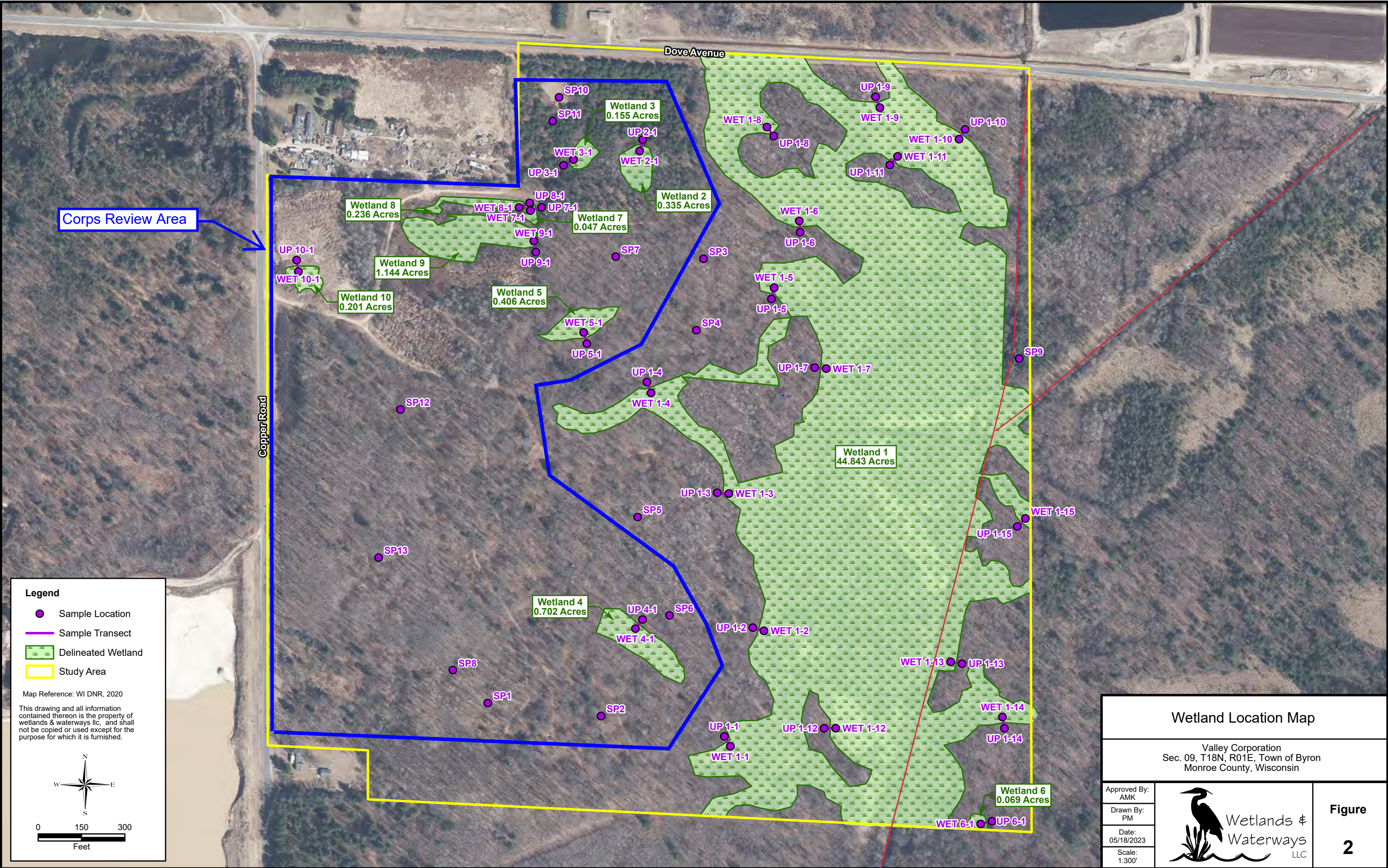
This drawing and all information
contained thereon is the property of
wetlands & waterways llc, and shall
not be copied or used except for the
purpose for which it is furnished.



Wetlands &
Waterways
LLC

Figure

1A



Wetland Location Map

Valley Corporation
Sec. 09, T18N, R01E, Town of Byron
Monroe County, Wisconsin

Approved By:
AMK
Drawn By:
PM
Date:
05/18/2023
Scale:
1:300'



Figure
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