



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

MVP-2024-00090-MWM (SAP 034-607-026)

27 FEB 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-2024-00090-MWM, 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. Wetland 2, 0.01 acres. Non-jurisdictional
 - ii. Wetland 1, 0.03 acres. Excluded water, not a Water of the US.
 - iii. Wet Ditch 1, 0.069 acres. Excluded water, not a Water of the US.
 - iv. Wet Ditch 2, 0.077 acres. Excluded water, not a Water of the US.
 - v. Wet Ditch 3, 0.117 acres. Excluded water, not a Water of the US.
 - vi. Wet Ditch 4, 0.043 acres. Excluded water, not a Water of the US.
 - vii. Wet Ditch 5, 0.027 acres. Excluded water, not a Water of the US.
 - viii. Wet Ditch 6, 0.018 acres. Excluded water, not a Water of the US.
 - ix. Wet Ditch 7, 0.008 acres. Excluded water, not a Water of the US.
 - x. Wet Ditch 8, 0.01 acres. Excluded water, not a Water of the US.
 - xi. Wet Ditch 9, 0.163 acres. Excluded water, not a Water of the US.
 - xii. Wet Ditch 10, 0.035 acres. Excluded water, not a Water of the US.
 - xiii. Wet Ditch 11, 0.017 acres. Excluded water, not a Water of the US.
 - xiv. Wet Ditch 12, 0.007 acres. Excluded water, not a Water of the US.
 - xv. Wet Ditch 13, 0.004 acres. Excluded water, not a Water of the US.

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 limited to the wetlands and wet ditches as identified in Section 1.a and on the attached figures, labeled MVP-2024-00090-MWM on figure 1 of 3 through 3 of 3. The review area is located in Sections 5-8, 17 and 18, Township 119 North, Range 26 West and in Sections 31 and 32, Township 120 North, Range 36 West in Kandiyohi County, Minnesota. The AJD review area is between Latitude: 45.1093, Longitude: -95.2217 and Latitude: 45.16009, Longitude: 95-2266. The 10-digit HUC code that the review area is within is the Upper Hawk Creek, HUC: 0702000407.

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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 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

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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- 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).⁷

The features within the review area include Wetland 1 and Wet Ditch 1-13, as shown on the attached figures labeled MVP-2024-00090-MWM: Figure 2 of 2, which are excluded waters. The features fit under the definition of a b(3) water as they were created by excavating dry land and the features drain only dry land and they don't carry relatively permanent flow, nor are they relocated tributaries.

Wetland 1 is a linear ditch located on fill placed for construction of County State Aid Highway (CSAH) 7. Wet Ditch 1-13 are linear drainage features also constructed in association with CSAH 7. In a review of a 1992 aerial photo, the alignment and location of the ditches appear to be the same location as the existing ditches documented by the applicant. Other resources reviewed to support this determination include Digital Elevation Model (DEM), MNDNR Hillshade from 2016, and 2-foot contours from MN accessed on the National Regulatory Viewer (NRV) and USFWS National Wetland Inventory.

Considering the information above, these features have been determined to each be a Paragraph (b)(3) excluded ditch and not subject to Section 404 of the Clean Water Act (CWA).

- 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).

⁷ 88 FR 3004 (January 18, 2023)

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The feature within the review area, Wetland 2 is not a TNW, territorial sea, nor interstate water and therefore are not (a)(1) waters. This wetland does not physically abut a relatively permanent paragraph (a)(2) impoundment or jurisdictional (a)(3) tributary and is not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. There is no inlet or outlet structure within the wetland. The nearest tributary is an unnamed tributary to Hawk Creek (DNR Hydro ID 107778) located approximately 1.2 miles directly south.

Wetland 2 is located southeast of the CSAH 7(135th Street) and Highway 12 intersection. The wetland boundary is identified on the figures submitted by the applicant and is completely confined to the review area. A culvert is present approximately 40 feet northwest and approximately 4 feet higher in elevation than the wetland. This culvert is located under CSAH 7 and has an east/west alignment. In a review of Digital Elevation Model (DEM), MNDNR Hillshade from 2016, and 2-foot contours from MN accessed on the National Regulatory Viewer (NRV), the wetland is within a topographic depression and there are no confined topographic features that could serve as a continuous surface connection to a downstream TNW.

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. Wetland Delineation figures submitted January 18, 2024.
 - b. USFWS National Wetland Inventory.
 - c. Digital Elevation Model (DEM), MNDNR Hillshade from 2016, and 2-foot contours from MN accessed on the National Regulatory Viewer (NRV).

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.