



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

[MVP]

[09 February 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-2004-03077-ACM 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.<sup>2</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>3</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>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

- 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, non-jurisdictional (0.17 acres)
  - ii. Stormwater Impoundment 1, non-jurisdictional (approximately 2.5 acres)
  - iii. Stormwater Impoundment 2, non-jurisdictional (approximately 0.4 acres)
  - iv. Ephemeral Stormwater Conveyance 1, non-jurisdictional (1,929.7 linear feet)
  - v. Ephemeral Stormwater Conveyance 2, non-jurisdictional (140.0 linear feet)
  - vi. Ephemeral Stormwater Conveyance 3, non-jurisdictional (155.9 linear feet)

## 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 128 acres in size and is identified by the red polygon on the attached MVP-2004-03077-ACM Figures, Page 2 of 2. The review area is located at 44.86965 N, -93.21464 W in the Fort Snelling Unorganized Territory, Hennepin County, Minnesota. There is a previous AJD (MVP-2004-03077-JJY) completed on March 5, 2004, which identified that Site 3 (Stormwater Impoundment 1 on the current AJD) was non-jurisdictional as it was isolated, and Site 1 (Stormwater Impoundment 2 on the current AJD) was non-jurisdictional as it was constructed in uplands. No other aquatic resources were identified on the prior AJD.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED N/A

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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
  - e. Tributaries (a)(3): N/A
  - f. Adjacent Wetlands (a)(4): N/A

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<sup>5</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>6</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.

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

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>7</sup> During the site visit, it was determined that Ephemeral Stormwater Conveyances 1b, 2 and 3 do not have an Ordinary High Water Mark (OHWM). Ephemeral Stormwater Conveyance 1b’s channel is absent at its upper reach. The channel reappears periodically through its reach, but often disappears and becomes overland sheet flow without a defined channel or presumably disappears underground. Ephemeral Stormwater Conveyances 1b, 2, and 3 did not have water in them at the time of the site visit. Ephemeral Stormwater Conveyances 1b, 2, and 3 receive flow only from stormwater runoff. The historic aerials reference for this Approved Jurisdictional Determination shows no evidence of surface water in Ephemeral Stormwater Conveyances 1b, 2, and 3. As Ephemeral Stormwater Conveyances 1b, 2, and 3 do not contain an OHWM, they are swales and meet the (b)(8) exclusion. Stormwater Impoundment 2 is a pond that was excavated in uplands for the purpose of retaining water and settling sediments; therefore, it meets the (b)(5) exclusion. Stormwater Impoundment 1 is an intrastate pond not identified in paragraphs (a)(1-4) that does not have a continuous surface connection to an (a)(1) or (a)(3) water, and, therefore, it does not qualify as an (a)(5) water.
- 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

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

(a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”

Wetland 1, Stormwater Impoundments 1 and 2, and Ephemeral Stormwater Conveyances 1a, 1b, 2, and 3 are not TNWs, territorial seas, or interstate waters and therefore are not (a)(1) waters. A site visit was conducted on September 14, 2023, as the requestor’s submitted delineation listed Ephemeral Stormwater Conveyances 1a, 1b, 2, and 3 as ephemeral streams. A review of historic topographic maps indicates that there are no aquatic resources in this site. Google Earth aerial photos and the University of Minnesota Historical Aerials Photos indicate that Stormwater Impoundments 1 and 2 were created in areas that previously had no aquatic resources. Stormwater Impoundment 1 was constructed in hydric soils while Stormwater Impoundment 2 appears to have been constructed in uplands. Stormwater Impoundments 1 and 2, Wetland 1, and Ephemeral Stormwater Conveyance 1a do not physically abut a relatively permanent paragraph (a)(2) impoundment or a jurisdictional (a)(3) tributary and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. The Minnesota River is located 0.35 miles southeast of Stormwater Impoundment 2. Ephemeral Stormwater Conveyance 1a has an Ordinary High Water Mark, evidenced by its bed and bank, natural line impressed on the bank, sediment sorting, and absent vegetation, among others, for approximately 50 feet in length as it exits the culvert underneath LaBelle Drive. Ephemeral Stormwater Conveyance 1a transitions into Ephemeral Stormwater Conveyance 1b as it flows into the woods. Ephemeral Stormwater Conveyance 1b eventually flows down through a culvert and into Stormwater Impoundment 2. Due to several breaks in the discrete nature of this feature, we conclude that Ephemeral Stormwater Conveyance 1a does not maintain a continuous surface connection between Ephemeral Stormwater Conveyance 1b, Wetland 1 and Stormwater Impoundment 2. Ephemeral Conveyance 3, and the section of Ephemeral Stormwater Conveyance 1 between the southernmost culvert and Stormwater Impoundment 2, are concrete lined channels. Ephemeral Stormwater Conveyance 2 flows out of a culvert under LaBelle Drive and then disappears presumably underground. It is unknown where Stormwater Conveyance 2 outlets to. Ephemeral Stormwater Conveyance 1a did not have water in it at the time of the site visit. There are no other aquatic resources or conveyances that flow into Ephemeral Stormwater Conveyance 1a. Ephemeral Stormwater Conveyance 1a receives flow only from stormwater runoff. The historic aerials reference for this Approved Jurisdictional Determination shows no evidence of surface water in Ephemeral Stormwater Conveyance 1a and no evidence of an aquatic resource in this area. Wetland 1 is a non-tidal wetland and does not have a continuous surface connection to a relatively permanent jurisdictional water and as such it is not an (a)(4) adjacent wetland. A review of

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

Google Earth Aerials from 1991 to 2023 was completed to identify any years with evidence of water in Ephemeral Stormwater Conveyance 1a. Flow was not present in years with normal conditions. Of the aerials reviewed, the 1991 aerial was wetter than normal and did contain evidence of flow. No other aerials documented evidence of flow. Ephemeral Stormwater Conveyance 1a lacks relatively permanent flow and does not qualify as an (a)(3) water.

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. Site visit conducted September 14, 2023, and office evaluation completed on October 31, 2023.
  - b. Waters of the U.S. Technical Report, including a delineation of aquatic resources, dated July 2022.
  - c. National Regulatory Viewer, accessed October 31, 2023.
  - d. United States Fish and Wildlife Service, National Wetland Inventory, accessed October 31, 2023.
  - e. United States Geological Survey (USGS), National Hydrography Dataset, accessed October 31, 2023.
  - f. Minnesota Department of Natural Resources, 2-meter contour data, accessed October 31, 2023.
  - g. Minnesota Department of Natural Resources, hillshade data, accessed October 31, 2023.
  - h. USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic service, accessed October 31, 2023.
  - i. United States Department of Agriculture, Natural Resources Conservation Service, Web Soil Survey, accessed October 31, 2023.
  - j. University of Minnesota Historical Aerial Photographs Online, imagery dated 1937, 1945, 1957, 1968. Accessed October 31, 2023.
  - k. Google Earth Photos, imagery dated 1991, 2003, 2005, 2006, 2009, 2013, 2016, 2020, 2023. Accessed October 31, 2023.

[MVP]

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2004-03077-ACM]

- l. USGS Topographic Maps, maps dated 1896, 1951, 1967, 2010. Accessed October 31, 2023.
- m. Antecedent Precipitation Tool, for the Google Earth Imagery dated 1991, 2003, 2005, 2006, 2009, 2013, 2016, 2020, 2023. Accessed October 31, 2023, Accessed January 31, 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.