



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

MVP

24 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-2017-04044-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.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. [Stream 1, \(739 linear feet, 0.33 acres\), 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 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 0.33 acres in size and is located in Sections 33 and 34, Township 117 North, Range 23 West, Hennepin County, Minnesota. The review area is centrally located at Latitude 44.90148, Longitude -93.58531. The surrounding area consist of forests, wetlands, ponds/lakes, residential and commercial development, and roadways. There are no other JDs associated with the review area. A delineation concurrence was issued on January 26, 2018, in the review area.](#)

4.

5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A](#)

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [N/A](#)

7. 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

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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A

8. 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

9. 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

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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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷ N/A

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

Stream 1 is not a TWN, territorial sea, or interstate water and therefore is not an (a)(1) water. The National Wetland Inventory and National Hydrography Dataset do not show any tributary or linear aquatic resources. Web Soil Survey shows that Stream 1 is not located in any hydric soils. Historic topographic maps do not show a stream feature. Based on the Minnesota contour and hillshade data, it appeared there was a linear feature in the review area. The Antecedent Precipitation Tool was unable to gather data in this review area. Due to the forested riparian corridor of Stream 1, the stream flow regime was unable to be determined via Google Earth imagery. A site visit was conducted on June 26, 2024, to assess the stream flow regime of Stream 1. Stream 1 flowed entered the review area through a stormwater culvert. Stream 1 is located in the bottom of a steep ravine. Multiple rain gutters, sump pump pipes, and other concentrated flow points discharged water into the top of the ravine and into Stream 1. Stream 1 had an Ordinary High Water Mark, for the majority of its reach. Indications of the OHWM included a weak bed and bank, a natural line impressed on the bank, and sediment sorting, among others. The OHWM and bed and bank disappeared in several sections of Stream 1 and was not well defined in the remainder of the stream. Water was not present in the channel during the site visits from the delineation and the AJD request. Portions of Stream 1 had one to two inches of water in the channel. Based on the lack of evidence continuous OHWM, the weak evidence bed and bank, the multiple concentrated flow points and stormwater culvert, Stream 1 lacks relatively permanent flow and does not qualify as an (a)(3) water.

⁷ 88 FR 3004 (January 18, 2023)

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10. 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 on June 26, 2024.](#)
- b. [Office evaluations, completed on August 24, 2024.](#)
- c. [Shorewood Lane Ravine Restoration, AJD request, dated April 8, 2024.](#)
- d. [Delineation Report, including a delineation of aquatic resources, dated November 1, 2017.](#)
- e. [National Regulatory Viewer, accessed between May 22, 2023; and August 24, 2024.](#)
- f. [United States Fish and Wildlife Service, National Wetland Inventory, accessed August 24, 2024.](#)
- g. [United States Geological Survey \(USGS\), National Hydrography Dataset, accessed August 24, 2024.](#)
- h. [Minnesota Department of Natural Resources, 2 meter contour data, accessed August 24, 2024.](#)
- i. [Minnesota Department of Natural Resources, hillshade data, accessed August 24, 2024.](#)
- j. [USGS 3D Elevation Program \(3DEP\) Bare Earth DEM Dynamic service, Accessed August 24, 2024.](#)
- k. [Google Earth Photos, imagery dated 1991 – 2023.](#)
- l. [United States Drought Monitor, data from June 25, 2024, accessed on August 24, 2024.](#)
- m. [Natural Resources Conservation Service, Web Soil Survey, accessed on August 24, 2024.](#)
- n. [United States Geological Service, historic topographic maps dated 1958 – 2023, accessed August 24, 2024.](#)

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11. OTHER SUPPORTING INFORMATION. [N/A](#)

12. 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.