



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

[MVP-RD]

[28 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),¹ [MVP-2024-00106-TMS] [MFR 1 of 3].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).
 - i. [Wetland 1 (3.38 acres), non-jurisdictional]
 - ii. [Wetland 35 (0.27 acre), 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 approximately 3.65 acres in size and is located at Lat. 46.840755 N, -92.201078 W in Duluth, St. Louis County, Minnesota. Relevant figures, including one depicting the boundaries of the review area are attached. The review area is located in the Duluth International Airport, and has been affected by filling, grading, and excavation activities to construct the infrastructure associated with the airport including the runway, taxiways, a perimeter road, and drainage ditches. In email correspondence dated February 21, 2024, the applicant's agent requested that the review of wetlands listed in this MFR be expedited to assist the applicant in the NEPA compliance process as part of an upcoming grant deadline for the project. Additional wetlands that were identified at the Duluth International Airport site will be evaluated for their jurisdictional status and listed in a separate AJD document.]

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Lake Superior.]⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Wetlands 1 and 35 drain to wetlands to the south of the airport via culverts and drainage ditches, which drain to Miller Creek, which drains into Lake Superior.]
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]

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.

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.

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- 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

- 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 1 and 35 are located in man-made ditches excavated wholly in and draining only dry land and that do not carry relatively permanent flow of water, therefore meeting the (b)(3) exclusion under the 2023 Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 Final Rule. A review of topographical maps, digital elevation model, and photographs of the wetlands indicates they are located in grass-bottomed ditches which were graded during construction of the airport to direct runoff away from the runway and taxiway. The ditches containing grass bottoms indicates that these ditches do not appear to experience relatively permanent flow.]
- 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).
[N/A]

⁹ 88 FR 3004 (January 18, 2023)

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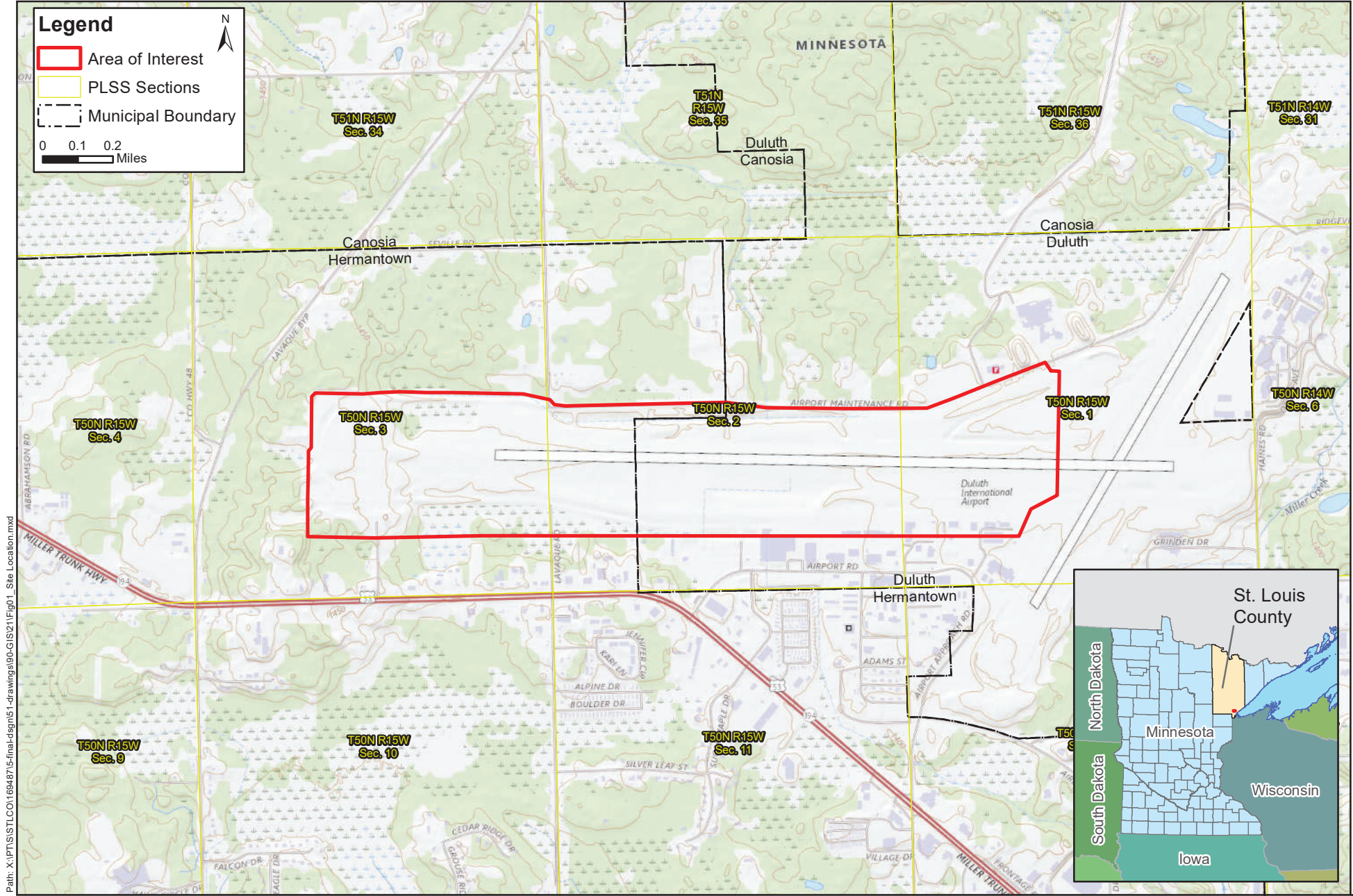
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVP-2024-00106-TMS]

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. [AJD Request, SEH Inc., January 23, 2024]
- b. [Wetland Delineation Report, SEH Inc. January 5, 2024]
- c. [National Regulatory Viewer, 2023 data sources]
- d. [Desktop Evaluation, February 23, 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.



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	418 West Superior Street, Suite 200 Duluth, MN 55802-1512 PHONE: (218) 279-3000 FAX: (651) 490-2150 WATTS: 800-325-2055 www.sehinc.com	Project: DULAI 174212 Print Date: 1/3/2024	Site Location & USGS Topography 2023 Duluth International Airport Wetland Delineation City of Duluth, St. Louis County, Minnesota	Figure 1
	Map by: amack Projection: NAD 83 UTM Zone 15N Source: SEH, ESRI, MnGEO MNDNR Background: USGS Topo.			

This map is neither a legally recorded map nor a survey map and is not intended to be used as one. This map is a compilation of records, information, and data gathered from various sources listed on this map and is to be used for reference purposes only. SEH does not warrant that the Geographic Information System (GIS) Data used to prepare this map are error free, and SEH does not represent that the GIS data can be used for navigational, tracking, or any other purpose requiring exacting measurement of distance or direction or precision in the depiction of geographic features. The user of this map acknowledges that SEH shall not be liable for any damages which arise out of the user's access or use of data provided.



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	418 West Superior Street, Suite 200 Duluth, MN 55802-1512 PHONE: (218) 279-3000 FAX: (651) 490-2150 WATTS: 800-325-2055 www.sehinc.com	Project: DULAI 174212 Print Date: 1/8/2024	Wetland Delineation Results Duluth International Airport Wetland Delineation City of Duluth, St. Louis County, Minnesota	Figure 6-4
	Map by: J. Thayer Projection: NAD 83 UTM Zone 15N Source: MnGEO, SEH, ESRI, MnTOPO Background: 2023 St. Louis County			

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