



**U.S. ARMY CORPS OF ENGINEERS
REGULATORY PROGRAM
APPROVED JURISDICTIONAL DETERMINATION FORM (INTERIM)
NAVIGABLE WATERS PROTECTION RULE**

I. ADMINISTRATIVE INFORMATION

Completion Date of Approved Jurisdictional Determination (AJD): 6/22/2020

ORM Number: MVP-2015-02528-RMM

Associated JDs: MVP-2015-02528-RMM AJD issued January 17, 2017. This AJD supersedes that AJD.

Review Area Location¹: State/Territory: MN City: Beaver Bay Township County/Parish/Borough: Lake

Center Coordinates of Review Area: Latitude 47.303566 Longitude -91.381938

II. FINDINGS

A. Summary: Check all that apply. At least one box from the following list MUST be selected. Complete the corresponding sections/tables and summarize data sources.

- ☐ The review area is comprised entirely of dry land (i.e., there are no waters or water features, including wetlands, of any kind in the entire review area). Rationale: N/A or describe rationale.
- ☐ There are "navigable waters of the United States" within Rivers and Harbors Act jurisdiction within the review area (complete table in Section II.B).
- ☐ There are "waters of the United States" within Clean Water Act jurisdiction within the review area (complete appropriate tables in Section II.C).
- ☒ There are waters or water features excluded from Clean Water Act jurisdiction within the review area (complete table in Section II.D).

B. Rivers and Harbors Act of 1899 Section 10 (§ 10)²

§ 10 Name	§ 10 Size	§ 10 Criteria	Rationale for § 10 Determination
N/A.	N/A.	N/A.	N/A.

C. Clean Water Act Section 404

Territorial Seas and Traditional Navigable Waters ((a)(1) waters): ³				
(a)(1) Name	(a)(1) Size	(a)(1) Criteria	Rationale for (a)(1) Determination	
N/A.	N/A.	N/A.	N/A.	

Tributaries ((a)(2) waters):				
(a)(2) Name	(a)(2) Size	(a)(2) Criteria	Rationale for (a)(2) Determination	
N/A.	N/A.	N/A.	N/A.	

Lakes and ponds, and impoundments of jurisdictional waters ((a)(3) waters):				
(a)(3) Name	(a)(3) Size	(a)(3) Criteria	Rationale for (a)(3) Determination	
N/A.	N/A.	N/A.	N/A.	

Adjacent wetlands ((a)(4) waters):				
(a)(4) Name	(a)(4) Size	(a)(4) Criteria	Rationale for (a)(4) Determination	
N/A.	N/A.	N/A.	N/A.	

¹ Map(s)/figure(s) are attached to the AJD provided to the requestor.

² If the navigable water is not subject to the ebb and flow of the tide or included on the District's list of Rivers and Harbors Act Section 10 navigable waters list, do NOT use this document to make the determination. The District must continue to follow the procedure outlined in 33 CFR part 329.14 to make a Rivers and Harbors Act Section 10 navigability determination.

³ A stand-alone TNW determination 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. A stand-alone TNW determination should be completed following applicable guidance and should NOT be documented on the AJD Form.



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D. Excluded Waters or Features

Excluded waters ((b)(1) – (b)(12)): ⁴				
Exclusion Name	Exclusion Size		Exclusion ⁵	Rationale for Exclusion Determination
Ditch (identified as 17a and 17b on attached figures)	5,875	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	See attached form for detailed rationale for the ditch feature.
Wetlands identified as: 01a, 01b, 02/20 (one wetland with a watershed divide), 03a, 03b, 03c, 04/21, 05, 06, 08, 09, 10, 11a, 11b, 11c, 12, 13, 32, 33, 34 (north and south because of watershed divide), 35, 36, 37	See attached form for sizes of wetlands	acre(s)	(b)(1) Non-adjacent wetland.	See attached form for detailed rationale for wetlands.
Wetlands identified as: 07a, 07b, 07c, 07d, 07e, 07f, 07g, 07h, 30a, 30b, 30c, 30d, 31	See attached form for sizes of wetlands		(b)(9) Water-filled depression constructed/excavated in upland/non-jurisdictional water incidental to mining/construction or pit excavated in upland/non-jurisdictional water to obtain fill/sand/gravel.	See attached form for detailed rationale for wetlands.

⁴ Some excluded waters, such as (b)(2) and (b)(4), may not be specifically identified on the AJD form unless a requestor specifically asks a Corps district to do so. Corps districts may, in case-by-case instances, choose to identify some or all of these waters within the review area.

⁵ Because of the broad nature of the (b)(1) exclusion and in an effort to collect data on specific types of waters that would be covered by the (b)(1) exclusion, four sub-categories of (b)(1) exclusions were administratively created for the purposes of the AJD Form. These four sub-categories are not new exclusions, but are simply administrative distinctions and remain (b)(1) exclusions as defined by the NWPR.



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Excluded waters ((b)(1) – (b)(12)): ⁴				
Exclusion Name	Exclusion Size		Exclusion ⁵	Rationale for Exclusion Determination
Wetlands identified as: 38a, 38b, 38c, 38d	See attached form for sizes of wetlands		(b)(10) Stormwater control feature constructed or excavated in upland or in a non-jurisdictional water to convey, treat, infiltrate, or store stormwater runoff.	See attached form for detailed rationale for wetlands.
Ditch (identified as 2b on attached figures)	1,900	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	See attached form for detailed rationale for the ditch feature.
Ditch 14a	725	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	See attached form for detailed rationale for the ditch feature.
Ditch 14b	130	linear feet		
Ditch 27a	1,330	linear feet	(b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).	See attached form for detailed rationale for the ditch feature.

III. SUPPORTING INFORMATION

A. Select/enter all resources that were used to aid in this determination and attach data/maps to this document and/or references/citations in the administrative record, as appropriate.

☒ Information submitted by, or on behalf of, the applicant/consultant: [Technical Memorandum, Diversion Ditch/Wetland 17b Characterization, dated May 6, 2020](#)



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This information is sufficient for purposes of this AJD.

Rationale: I have reviewed the memorandum and have found that information within the report can be used for this JD. The report provides relevant information on the construction of the diversion ditch. The report documents the ditch was constructed in 0.57 acre of wetland; however, those wetlands were not adjacent to an (a)(1)-(a)(3) water. The figures show the wetlands but that they are not directly abutting any other water.

- ☐ Data sheets prepared by the Corps: Title(s) and/or date(s).
- ☐ Photographs: Select. Title(s) and/or date(s).
- ☒ Corps site visit(s) conducted on: August 2016, April 2017
- ☒ Previous Jurisdictional Determinations (AJDs or PJDs): Several of the resources above were found to be non-jurisdictional in a January 17, 2017 AJD. However, this AJD supersedes that AJD.
- ☐ Antecedent Precipitation Tool: provide detailed discussion in Section III.B.
- ☐ USDA NRCS Soil Survey: Title(s) and/or date(s).
- ☒ USFWS NWI maps: NWI
- ☒ USGS topographic maps: 24k

Other data sources used to aid in this determination:

Data Source (select)	Name and/or date and other relevant information
USGS Sources	N/A.
USDA Sources	N/A.
NOAA Sources	N/A.
USACE Sources	N/A.
State/Local/Tribal Sources	N/A.
Other Sources	N/A.

B. Typical year assessment(s): Typical year assessment is not required in this case because the features are excluded regardless of the results of a typical year assessment.

C. Additional comments to support AJD: N/A

NSM NWPR AJD Attachment Form

Excluded Waters or Features Rationale:

Exclusion Name: Ditch 17a, Ditch 17b

Exclusion Size: 5,875 total linear feet

Exclusion: (b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).

Rationale: In order to document this ditch appropriately, there will be a discussion on the history of this site since the landscape has been altered over the course of several decades.

When the tailings basin was originally constructed in the late 1970s and early 1980s a large diversion ditch (unnamed ditch) was constructed on the northwest side of the tailings basin (that ditch is not Ditch 17a or 17b which exclusion (b)(5) applies to on this AJD Form). The unnamed diversion ditch was constructed to divert water from Big Thirtynine and Little Thirtynine Creeks and take the water to the west to the Beaver River. Over the course of the next 25-30 years after the diversion ditch was constructed water continued to find its way into the remnant streams of Big and Little Thirtynine Creeks after the diversion was constructed (overland flow and water percolating through the diversion). As a result of the two streams having flow after the diversion was constructed, Murphy's Pond was formed downstream at the place the two streams meet, which also happened to be at the northern most embankment of the tailings basin. The water was impounded up against the embankment and confined by topography with nowhere to go. Big and Little Thirtynine feed directly into Murphy's Pond. The history on this site is important because one could think that this ditch is relocating both Big and Little Thirtynine Creeks which could make the ditch jurisdictional. However, that is not the case and the large unnamed ditch constructed north of the tailings basin is the one that relocated both Big and Little Thirtynine Creeks. Big and Little Thirtynine Creeks feed into an impounded location and resulted in the creation of Murphy's Pond. After several decades NSM decided it was time to outlet the water in Murphy's pond to alleviate pressure on their railroad and dam embankment and Ditch 17a and 17b were constructed.

In 2005 NSM made a request to the Corps to create a new ditch (Ditch 17a and 17b) to provide an outlet for Murphy's Pond and Big and Little Thirtynine Creeks. The new ditch (Ditch 17a and 17b) was to be constructed to provide an outlet for the confined water. In order to construct the new ditch a permit was needed from the Corps for 0.57 acre of wetland impact associated with the construction of the ditch, those were the only aquatic resource impacts associated with constructing the ditch. At the time NSM was proposing approximately 20 acres of wetland impact for several activities at their tailings basin and the ditch construction was one small part of that permit request. At the time the Corps did not complete an AJD as one was not requested by the applicant. At this time it is necessary to look at the original wetlands the ditch was constructed through to determine if they are considered adjacent under the NWPR.

The Applicant submitted a Technical Memorandum, dated 06MAY2020, documenting the wetland impacts associated with the ditch construction. After reviewing that report I have concluded the four wetlands that were impacted as a result of the construction of the ditch would not be considered adjacent under the NWPR. Each of the four wetlands are located on the north side of the railroad embankment, confined by topography, and not connected to, or touching, any other (a)(1)-(a)(3) water. Therefore, the four wetlands the ditch was constructed in are not adjacent under the NWPR (They are (b)(1) non-adjacent wetlands).

The feature in question (Ditch 17a and 17b) is a ditch that was constructed sometime after 2006. The Corps authorized the construction of the ditch along with several other impacts at the

tailings basin in 2006 (Refer to Permit 2005-02628-TWP). The ditch is 5,875 linear feet in length and 3.56 acres in area. Of the 3.56 acres of constructed ditch area, 2.99 was upland and 0.57 acre was constructed in wetland that are not considered adjacent.

Based on the information provided above the feature is a constructed ditch, which is known because a permit was issued to construct it and approximately 2.99 acres of the total 3.56 were constructed in uplands. The remaining 0.57 acre of wetland impact occurred in wetlands that have been determined to not be adjacent to any (a)(1)-(a)(3) water. This is sufficient information to demonstrate this feature meets the definition of a ditch. The information above also documents how the ditch was not constructed in a tributary and does not relocate a tributary as well as it was not constructed in adjacent wetlands.

Exclusion Name: Wetlands 01a, 01b, 02/20 (one wetland with a watershed divide), 03a, 03b, 03c, 04/21, 05, 06, 08, 09, 10, 11a, 11b, 11c, 12, 13, 32, 33, 34 (north and south because of watershed divide), 35, 36, 37

Exclusion Size: Wetlands 01a (0.44 acre), 01b (0.89 acre), 02/20 (one wetland with a watershed divide – 8.80 acres), 03a (0.20 acre), 03b (0.06 acre), 03c (0.13 acre), 04/21 (12.18 acres), 05 (10.32 acres), 06 (1.25 acres), 08 (2.66 acres), 09 (3.54 acres), 10 (3.62 acres), 11a (0.04 acre), 11b (0.06 acre), 11c (0.13 acre), 12 (9.46 acres), 13 (11.93 acres), 32 (0.26 acre), 33 (1.38 acres), 34 (north and south because of watershed divide, 18.24 acres), 35 (4.27 acres), 36 (0.10 acre), 37 (5.48 acres)

Exclusion: (b)(1) non-adjacent wetlands

Rationale: The wetlands listed above have been grouped together because they are all non-adjacent wetlands. The applicant has provided a robust delineation of aquatic resources for their site. The Corps has confirmed the boundaries and all the wetlands listed above are not adjacent to an (a)(1)-(a)(3) water. The wetlands are all surrounded by upland and are not abutting any (a)(1)-(a)(3) water. None of the wetlands are inundated by flooding from an (a)(1)-(a)(3) water. These wetlands are also not separated from an (a)(1)-(a)(3) water by any natural feature and they are also not physically separated from an (a)(1)-(a)(3) water by a manmade structure that allows for a direct hydrologic surface connection between the wetlands and an (a)(1)-(a)(3) water. These wetlands have been determined to be non-adjacent wetlands and are not regulated under Section 404 of the Clean Water Act.

Exclusion Name: Wetlands 07a, 07b, 07c, 07d, 07e, 07f, 07g, 07h, 30a, 30b, 30c, 30d, 31

Exclusion Size: Wetland 07a (0.02 acre), Wetland 07b (0.02 acre), Wetland 07c (0.6 acre), Wetland 07d (0.1 acre), Wetland 07e (0.1 acre), Wetland 07f (0.04 acre), Wetland 07g (0.01 acre), Wetland 07h (0.04 acre), Wetland 30a (0.8 acre), Wetland 30b (0.2 acre), Wetland 30c (1.1 acres), Wetland 30d (0.4 acre), Wetland 31 (5.3 acres)

Exclusion: (b)(9) Water-filled depression constructed/excavated in upland/non-jurisdictional water incidental to mining/construction or pit excavated in upland/non-jurisdictional water to obtain fill/sand/gravel.

Rationale: Wetlands 07a, 07b, 07c, 07d, 07e, 07f, 07g and 07h are located in the northeast part of the review area and Wetlands 30a, 30b, 30c, 30d, and 31 are located in the north central part of the review area. The wetlands were excavated in upland for the purpose of obtaining fill for other uses on the mine site. These basins were excavated in uplands. Active mining is occurring on the mine site near these waters and has not been abandoned. Therefore, 07a, 07b, 07c, 07d, 07e, 07f, and 07h, 30a, 30b, 30c, 30d, and 31 are not considered to be waters of the U.S. and are not jurisdictional under Section 404 of the Clean Water Act.

Exclusion Name: Wetlands 38a, 38b, 38c, 38d

Exclusion Size: Wetland 38a (0.3 acre), Wetland 38b (0.1 acre), Wetland 38c (0.5 acre), and Wetland 38d (0.1 acre)

Exclusion: (b)(10) Stormwater control feature constructed or excavated in upland or in a non-jurisdictional water to convey, treat, infiltrate, or store stormwater runoff.

Rationale: Wetlands 38a, 38b, 38c, and 38d are located in the southeast corner of the review area. These wetlands were excavated in upland (as confirmed by the delineation of aquatic resources and historical photos) for the purpose of capturing storm water based on information provided by the applicant. Therefore, Wetlands 38a, 38b, 38c, and 38d are not considered to be waters of the U.S. and are not jurisdictional under Section 404 of the Clean Water Act.

Exclusion Name: Ditch 02b

Exclusion Size: 1,900 linear feet

Exclusion: (b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).

Rationale: Ditch 02b is located in the northeast part of the site. It is a straight linear ditch feature constructed in a northwest to southeast direction. It is approximately 1,900 feet long, 17 feet wide, and approximately 3 feet deep. The ditch was constructed in upland as confirmed in the field on August 10, 2016. The ditch does not meet the requirements for an (a)(1) or (a)(2) water. Based on information from the applicant and confirmed by aerial imagery the ditch was not constructed in a tributary and is not a relocated tributary. Therefore Ditch 02b is not jurisdictional under Section 404 of the Clean Water Act.

Exclusion Name: Ditch 14a and 14b

Exclusion Size: Ditch 14a: 725 linear feet, Ditch 14b: 130 linear feet

Exclusion: (b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).

Rationale: Ditches 14a and 14b are located in the southern extent of the project area. The ditches were constructed in uplands next to berms surrounding the tailings basin. The ditches do not meet the requirements for an (a)(1) or (a)(2) water. Based on information from the applicant and confirmed by aerial imagery the ditch was not constructed in a tributary and is not a relocated tributary. Therefore Ditches 14a and 14b are not jurisdictional under Section 404 of the Clean Water Act.

Exclusion Name: Ditch 27a

Exclusion Size: 1,330 linear feet

Exclusion: (b)(5) Ditch that is not an (a)(1) or (a)(2) water, and those portions of a ditch constructed in an (a)(4) water that do not satisfy the conditions of (c)(1).

Rationale: Ditch 27a is located in the western part of the project area, extending west of the project area. Ditch 27a makes up the western lobe of the larger wetland 27 aquatic resource. The ditch was constructed in uplands and was created when they installed the berms in that area. The ditch appears to have been constructed to route drainage away from the base of the berms. The ditch does not meet the requirements for an (a)(1) or (a)(2) water. Based on information from the applicant and confirmed by aerial imagery the ditch was not constructed in a tributary and is not a relocated tributary. Therefore Ditch 27a is not jurisdictional under Section 404 of the Clean Water Act.