



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
332 MINNESOTA STREET, SUITE E1500  
ST. PAUL, MN 55101-1678

MVP

30 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) ,<sup>1</sup> MVP-2022-02103-SSC, MFR 1 of 1<sup>2</sup>.

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>3</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>4</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>5</sup> the 2023 Rule as amended,

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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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. Tributary 1, 6630 linear feet, 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
- e. US EPA's Memorandum on MVS-2023-00288

3. REVIEW AREA. The review area is 6,630 linear feet and is identified by the yellow polygon on the attached figure labeled MVP-2022-02103-SSC, Page 2 of 5. The review area is located at 44.147336 N, -91.984172 W in Whitewater and Mount Vernon Township, Winona County, Minnesota. No previous JDs are associated with the project site.

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. Tributary 1 is located along the southern side of County State Aid Highway (CSAH) 30. Tributary 1, within the review area, is approximately 6,630 linear feet and flows offsite to the west into a wetland complex that is adjacent to the Whitewater River. The Whitewater River flows into the Mississippi River, a TNW.

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6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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>7</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
  - g. Additional Waters (a)(5): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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<sup>6</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>7</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.

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- 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>8</sup> 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.

The aquatic resource within the review area labeled Tributary 1, is not a TNW, territorial sea, or interstate water and is therefore not an (a)(1) water. Tributary 1 was also evaluated as an (a)(3) water and was found to not meet this category because it is not a relatively permanent, standing or continuously flowing body of water.

Tributary 1 is approximately 6,630 linear feet in length within the review area and is located along the southern side of CSAH 30. The tributary continues offsite to the west where it enters a wetland complex that is adjacent to the Whitewater River. The tributary meanders directly up against CSAH 30 at points and also meanders further away in a more sinuous pattern away from the roadway. The bed of the tributary is located mostly within a ravine position being contained by CSAH 30 on the north side of the tributary and on the south side of the tributary by a steep ridge (2-foot contours map the top of the ridge at 1174 ft elevation down to approximately 800 ft elevation at the downstream portion of Tributary 1 in the review area). The National Wetland Inventory (NWI), National Hydrography Dataset (NHD), hillshade (MnDNR), historic USGS topographic maps (1934, 1937, 1972, 1985, 2011, 2022), and Strahler Stream Order mapping were

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<sup>8</sup> 88 FR 3004 (January 18, 2023)

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reviewed for the project and indicated that a 1<sup>st</sup> order tributary is present for portions of Tributary 1. The delineated tributary continues further upstream than is mapped by desktop resources. A USGS StreamStats report was generated for the site. The drainage area was less than 1 square mile in size (reported as 0.69 square miles), which can be an indicator of systems that flow only in response to precipitation events. The applicant provided a report and site photos from May 12, 2023 that described and showed that there was no standing or flowing water within Tributary 1. The Antecedent Precipitation Tool (APT) indicated that the climatic condition for this day was wetter than normal. Minnesota climate data from the nearest weather station denoted that 0.11-inch of rain fell on May 12, 2023 and 0.13-inch of rain fell on May 9, 2023 (3 days prior). A site visit was also completed by the Corps on July 25, 2024. The length of the review area was walked by Corps staff and no standing or flowing water was noted. The APT indicated wetter than normal conditions for the day of the site visit. Minnesota climate data from the nearest weather station denoted 0.5-inch of rain fell on July 22, 2024 (3 days prior). Aerial imagery was reviewed but due to heavy tree canopy and the tributary being within a steep ravine, the channel could not be reviewed for relative permanence from these images. The site photos and information supplied by the applicant and site visit completed by the Corps were both in wetter than normal climatic conditions. Precipitation had occurred within 3 days of both of those site visits and no water was identified as continuously flowing or standing at that time. The tributary reach reviewed likely only flows in response to very recent precipitation events and is therefore a non-relatively permanent water.

The EPA Memorandum on MVS-2023-00288 and January 2023 rule preamble state that: “[t]o determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler stream order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream; see Technical Support Document section IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream they connect to. Consistent with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). Rapanos Guidance at 6 n.24. Where data indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used.” While the downstream reach (offsite) of Tributary 1 was not reviewed for relative permanence, the review area contains a majority of the tributary reach (based on Strahler Stream Order). Tributary 1

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within the review area is approximately 1.26 miles in length while desktop mapping of the remainder of the downstream tributary is approximately 0.72 miles in length. The flow characteristic that best characterizes the entire reach is non-relatively permanent flow.

Based on the information discussed above, Tributary 1 is a tributary evaluated under (a)(3) and determined to not be a relatively permanent water with a continuous surface connection to a paragraph (a)(1) or (a)(3) water; therefore, this non-relatively permanent feature is not jurisdictional under the 2023 “Revised Definition of ‘Water of the United States’; Conforming” 88 FR 61964 Final Rule.

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. Field visit conducted on July 29, 2024.
- b. Office evaluation conducted August 29, 2024.
- c. United States Fish and Wildlife Service, National Wetland Inventory, accessed August 29, 2024
- d. United States Geological Survey (USGS), National Hydrography Dataset, accessed August 29, 2024
- e. United States Geological Survey, Topographic Maps (Cochrane 1934, 1937; Winona 1985; Weaver 1972, 2011, 2022), accessed August 29, 2024
- f. Minnesota Department of Natural Resources – Hillshade, 2-foot LiDAR contours, Strahler Stream Order, accessed on August 29, 2024
- g. United States Geological Survey, StreamStats accessed May 30, 2024
- h. Engineer Research and Development Center (ERDC), Antecedent Precipitation Tool (version 2.0.0), accessed August 29, 2024

10. OTHER SUPPORTING INFORMATION. N/A

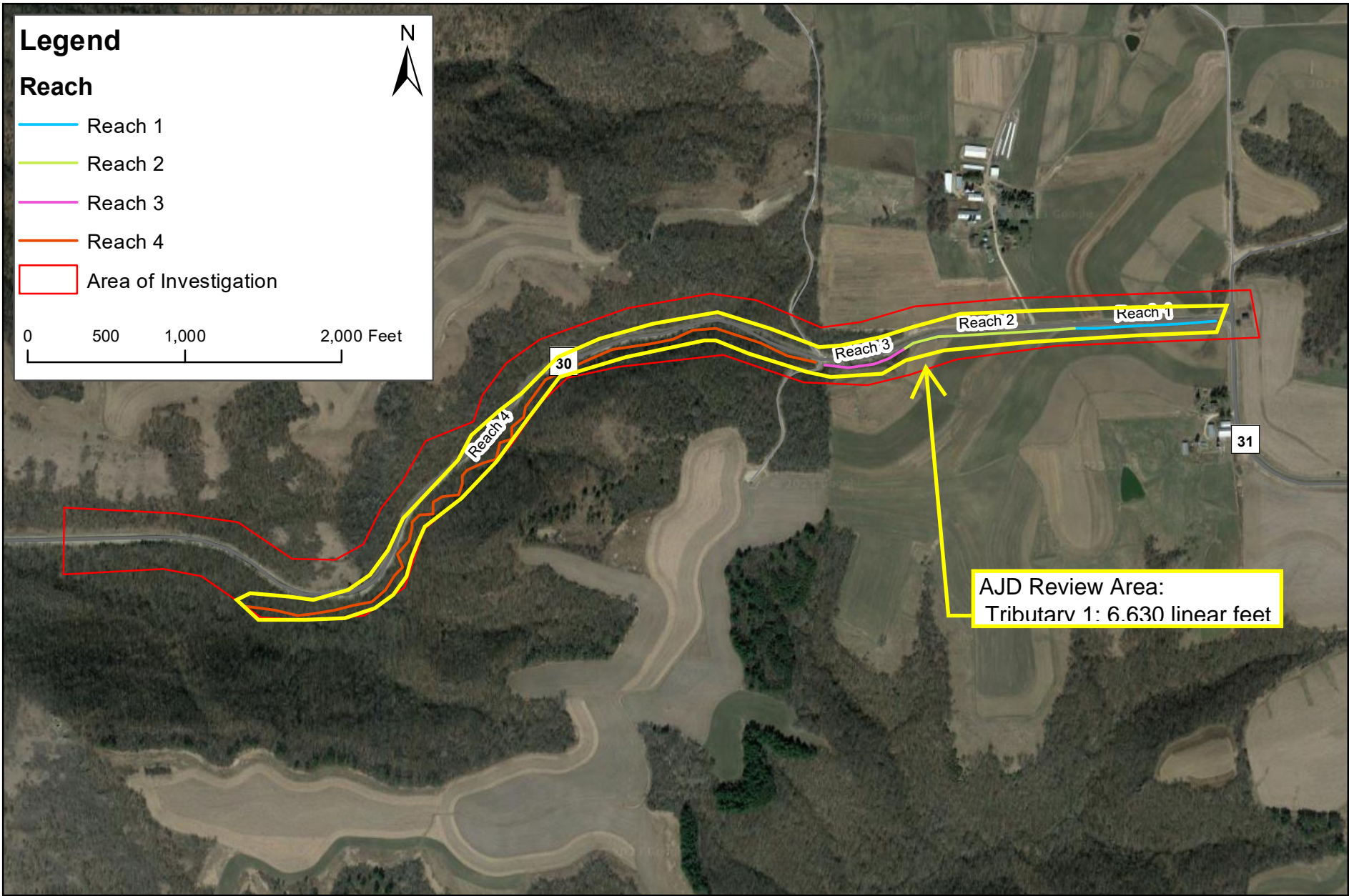
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Path: X:\UZ\W\WINOC\164296\Streams\GIS\FIGURE 8 RESULTS.mxd



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Project: WINOC 164296  
Print Date: 5/26/2023

Map by: amack  
Projection: NAD 83 UTM Zone 15N  
Source: Google, SEH, ESRI, USDA,  
NRCS, USGS, MnDNR, MnGeo

## **WATERWAY INVESTIGATION RESULTS**

### **CSAH 30 RECONSTRUCTION**

### **WINONA COUNTY, MINNESOTA**

Figure  
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