



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

MVP

November 29, 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-2023-01649-RMH 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.

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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).

Name of Aquatic Resource	Jurisdictional or Non-jurisdictional
Ditch 1 (1,350 linear feet)	Non-Jurisdictional
Ditch 2 (1.81 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)

3. REVIEW AREA. The review area is limited to Ditch 1 and 2 as identified in the enclosed project figures. The review area is an approximate 40-acre property located northeast of County Road 38 and County Road 40 in Lake Andrew Township in Kandiyohi County, MN. The nearest tributary is Shakopee Creek located approximately 1.4 miles southeast of the review area. There are no other JDs associated with this review area.

- a. Project Area Size (in acres): 40
  - b. Location Description: The project/review area is located in Section 10, Township 121 North, Range 35 West.
  - c. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 45.296394 Longitude: - 95.06263
  - d. Nearest City or Town: New London
  - e. County: Kandiyohi
  - f. State: Minnesota
  - g. Other associated Jurisdictional Determinations (including outcomes) NA
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Minnesota River](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Ditch 2 flows north into Ditch 1](#)

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which flows in a southwesterly direction to Shakopee Creek. Shakopee Creek eventually outlets into the Minnesota River, a TNW, which is located approximately 42 miles to the southwest.

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

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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.

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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).<sup>7</sup>

[Ditch 2 is positioned within an area identified as a PEM1Af type wetland on the National Wetland Inventory Map \(NWI\) map. A review of aerial imagery does not indicate a defined bed and bank or channel. There appears to be an excavated channel in the center portion of the wetland as far back as 1991 but in 2003, 2004, 2006, 2008, 2009, 2010, 2011, 2012 and 2019, there is no evidence of a channel, and the area appears to have been cropped. Ditch 2 meets the \(b\)\(2\) exclusion as Prior Converted Cropland \(PPC\) designated by USDA. A review of historic imagery supports the PCC determination made by USDA as there is evidence of cropping prior to December 23, 1985. A USDA Certified Wetland Determination map was submitted by the farm operator. Based on the desktop resources reviewed, Ditch 2 according to exclusion \(b\)\(2\) of the 2023 Rule, is not a water of the United States This exclusion does not apply to Ditch 1 as the prior converted cropland exclusion only covers wetlands.](#)

- 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](#)

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

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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 Ditch 1 is not a TNW, territorial sea, or interstate water and is therefore not an (a)(1) water. Ditch 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.

Ditch 1 is approximately 1,350 linear feet in length within the review area. It continues offsite to the west flowing under County Road 38 (Andrew Road West). The USGS National Hydrography Dataset (NHD) identifies the Ditch as intermittent. It is a non-relatively permanent tributary with a channel that appears to have been straightened. Historic imagery was reviewed as far back as 1938 and the ditch with the straightened channel was visible so excavation was prior to 1938. The National Wetland Inventory (NWI), National Hydrography Dataset (NHD), hillshade (MnDNR), historic imagery, and Strahler Stream Order mapping were reviewed for the project and indicated that Ditch 1 is a first order stream with a 1,450 linear foot evaluated reach. It flows in a westerly direction within the review area and then shifts to a southerly flow direction where it joins another first order stream and becomes a second order stream. To determine if Ditch 1 meets the relatively permanent standard, the flow characteristics of the entire reach of the tributary that is a first order stream were evaluated. The point at which the tributary enters a higher order stream extends outside to the review area to the west so 1,450 linear foot reach was evaluated. The USGS Stream Stats program delineated a watershed of 0.79 square miles or approximately 505 acres. Drainage areas of less than 1 square mile in size can be an indicator of systems that flow only in response to precipitation events.

A review of recent aerial imagery appears to indicate standing water in a minority of years and in addition, water is not seen within the entire extent of the reach. An aerial photo review found intermittent surface water present in the review area on May 21, 2008, April 28, 2015, May 9, 2019, and April 20, 2024, but no surface water was evident on May 31, 2003, August 2, 2004, May 31, 2006, June 2, 2009, June 23, 2010, September 13, 2012.

The Antecedent Precipitation Tool (APT) was used to determine whether observations of surface water or lack of were representative of normal climatic conditions.

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On May 9, 2019, surface water was visible, the APT indicated that the climatic conditions for that day, were wetter than normal. Minnesota climate data from surrounding weather stations denoted that 5.0 inches of rain fell on the previous 30 days which would indicate that the water observed was likely a result of previous rainfall events. Imagery from April 20, 2024, also indicated surface water. The APT indicated normal conditions; however, Minnesota climate data from the nearest weather station denoted 1.98-inches of rain fell on April 17, 2024 (3 days prior).

The APT tool indicated wetter than normal conditions on June 23, 2010, with 7.12 inches of rainfall reported in the previous 30 days. A review of aerial imagery did not indicate surface water. On September 13, 2012, the APT indicated normal conditions but there was no evidence of surface water. The results from the APT further support the lack of relatively permanent water/flow and that the visible surface water likely resulted from precipitation.

In addition, the Ditch was predominately vegetated and established trees were growing in the channel from 2003-2012 which further supports the lack of relatively permanent flowing water. Based on a review of the imagery after 2012, it appears that the trees were cut, and the channel was narrowed. Imagery from 2024, indicates trees were again growing in the channel. The non-relatively permanent flow characteristics observed at the reach's downstream limit remain representative of the entire reach of the feature.

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 Ditch 1 was not reviewed for relative permanence, the review area contains a majority of the tributary reach (based on Strahler Stream Order). Ditch 1 within the review

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area is approximately 1,350' in length while desktop mapping of the remainder of the downstream tributary is approximately 100' in length. The flow characteristic that best characterizes the entire reach is non-relatively permanent flow.

Based on the desktop resources reviewed and the information discussed above, Ditch 1 was 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, these non-relatively permanent features are 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. Notice of Decision for Hjelle Tiling Project prepared by Kandiyohi County LGU dated December 20, 2023.
  - b. USFWS NWI Map Service. Accessed October 23, 2024.
  - c. USGS 3D Elevation Program DEM. Accessed October 23, 2024.
  - d. USGS NHD Map Service. Accessed October 23, 2024.
  - e. Google Earth imagery dated 1985, 1991, 2003, 2004, 2006, 2008-2011, 2015, 2019, 2022, and 2024.
  - f. Minnesota Historical Aerial Photographs Online 1938, 1955, 1963 imagery accessed October 8, 2024
  - g. U.S. Geological Survey, 2019, The StreamStats program, online at <https://streamstats.usgs.gov/ss/>, accessed on November 13, 2024.
10. OTHER SUPPORTING INFORMATION. Historically this property was farmed and has undergone various disturbances over the years. Three fields are identified within the property. Two of these are identified as FW – farmed wetlands and the third field where the ditches are located is identified as PC/NW – prior converted/non-wetland. Ditch 2 is situated within an area mapped as a PEM1Af type wetland. A USDA Certified Wetland Determination map was submitted by the farm operator.

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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.





**MVP-2023-01649-RMH**

Kandiyohi County, MN  
Sec 15 T 121 N R 35 W

0 0.05 0.1 0.2



mi

Map Center: 95.063419°W 45.299345°N

Map Created by: R Hegge

Date: 10/29/2024

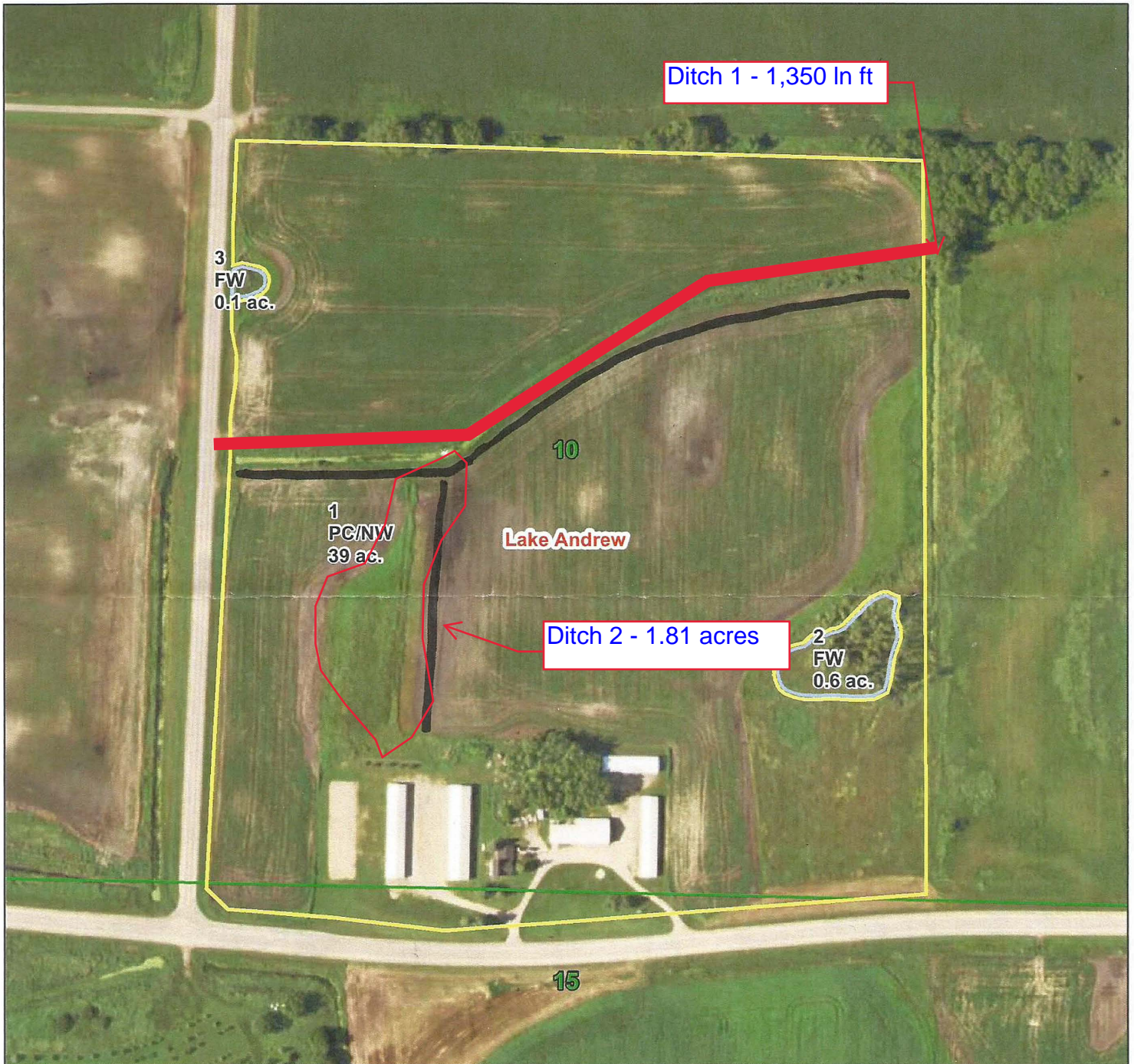
Coordinate System: WGS 1984 Web Mercator Auxiliary  
Sphere





# Certified Wetland Determination

12/18/2023



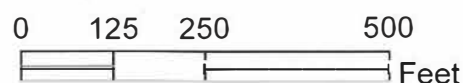
## Legend

- PC/NW
- FW
- Civil Townships
- Sections

Kandiyohi County - Lake Andrew Twp - Sec 10

T121 R35 S10

1:3,000 1 inch = 250 feet



This certified wetland determination/delineation has been conducted for the purpose of implementing the wetland conservation provisions of the Food Security Act of 1985. This determination/delineation may not be valid for identifying the extent of the COE's Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or other waters, you should request a jurisdictional determination from the local office of the COE prior to starting the work.