



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

2024-00741-LRK

July 30, 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 2024-00607-MWM. 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 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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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, 417.423 linear feet. Excluded water (ditch), not a Water of the US.
 - ii. Wetland 2, 0.146 acre. Excluded water (stormwater feature), not a Water of the US.
 - iii. Wetland 3, 0.028 acre. Excluded water (stormwater feature), not a Water of the US.
 - iv. Wetland 4, 463.778 linear feet. Excluded water (ditch), not a Water of the US.
 - v. Wetland 5, 205.746 linear feet. Excluded water (ditch), not a Water of the US.
 - vi. Wetland 6, 0.011 acre. Excluded water (stormwater feature), not a Water of the US.
 - vii. Wetland 7, 241.575 linear feet. Excluded water (ditch), not a Water of the US.
 - viii. Wetland 8, 89.553 linear feet. Excluded water (ditch), not a Water of the US.
 - ix. Wetland 9, 0.318 acre. Excluded water (stormwater feature), not a Water of the US.
 - x. Wetland 10, 205.563 linear feet. Excluded water (ditch), not a Water of the US.
 - xi. Wetland 11, 187.490 linear feet. Excluded water (ditch), not a Water of the US.
 - xii. Wetland 12, 0.403 acre. Excluded water (stormwater feature), not a Water of the US.
 - xiii. Wetland 13, 590.777 linear feet. Excluded water (ditch), not a Water of the US.
 - xiv. Wetland 14, 210.138 linear feet. Excluded water (ditch), not a Water of the US.
 - xv. Wetland 15, 102.242 linear feet. Excluded water (ditch), not a Water of the US.
 - xvi. Wetland 16, 211.225 linear feet. Excluded water (ditch), not a Water of the US.
 - xvii. Wetland 17, 850.500 linear feet. Excluded water (ditch), not a Water of the US.
 - xviii. Wetland 18, 981.974 linear feet. Excluded water (ditch), not a Water of the US.
 - xix. Wetland 19, 0.009 acre. Excluded water (stormwater feature), not a Water of the US.

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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 6194 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The features within the review area include 6 non-jurisdictional stormwater features and 13 non-jurisdictional ditches identified in Section 1(a) of this MFR and as shown on the attached figure labeled MVP 2024-00741-LRK, Page 1 of 1 within the yellow polygon. The identified features are within the Sofidel America-Duluth industrial facility and adjacent to Interstate 35. The review area is between Latitude: 46.734181, Longitude: -92.161483 and is located in Sections 17, Township 49 North, Range 14 West in the City of Duluth, St. Louis County, Minnesota.
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. N/A
6. 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 resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A

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.

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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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

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).⁷

The features identified within the review area include Wetlands 1-19. Wetlands 2, 3, 6, 9, 12, and 19 are stormwater features constructed in upland to collect and retain water as settling basins. Wetlands 1, 4, 5, 7, 8, 10, 11, 13, 14, 15, 16, 17, and 18 are ditches constructed in upland, drain only upland, do not carry relatively permanent flow, and are not relocated tributaries. These determinations are based on the following:

⁷ 88 FR 3004 (January 18, 2023)

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- US Geological Service 3DEP Hillshade and DEM and MNDNR 2-foot contour maps shows the ponds are located in areas of the project that are higher in elevation and supportive of uplands.
- Recent and historic aerial photos show that ponds are located in close proximity to industrial developments and consist of geometry indicative of being manmade to store stormwater from these developments.

In conclusion, Wetlands 1, 4, 5, 7, 8, 10, 11, 13, 14, 15, 16, 17, and 18 each meet the definition of a (b)(3) excluded ditch as they were created by excavating dry land, drain only dry land, and the features don't carry relatively permanent flow, nor are they relocated tributaries. Wetlands 2, 3, 6, 9, 12, and 19 each meet the definition of a (b)(5) excluded artificial lakes and ponds as they were created by excavating dry land to collect and retain water as settling basins. Thus, these features are not waters of the United States and are not subject to Section 404 of the Clean Water Act (CWA).

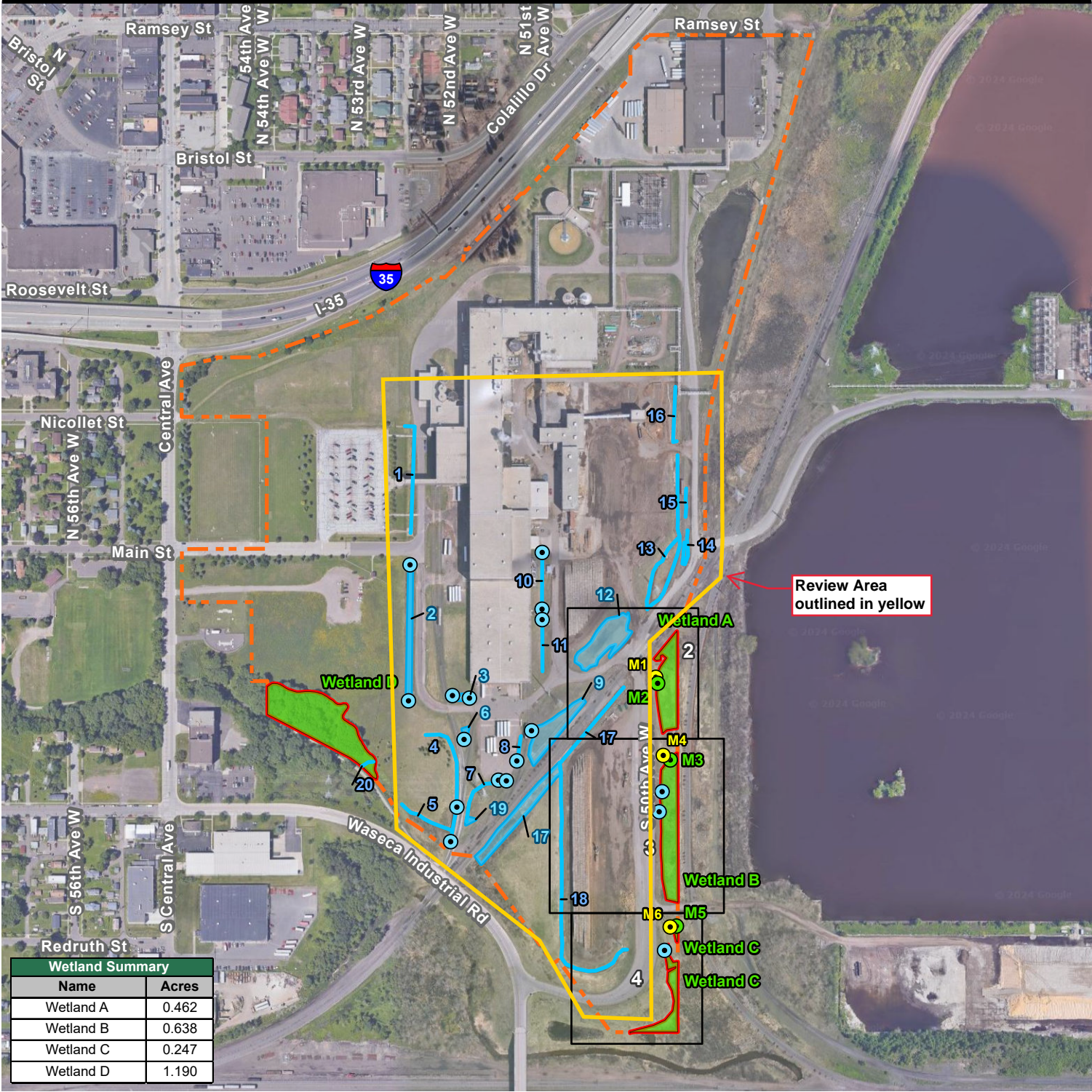
- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

9. 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. Wetland Delineation Report prepared by Braun Intertec Corporation. (Travis Fristed) on June 6, 2024.
- b. USA Soils Map Units, USA Soils Hydric Class, and MNDNR Hillshade – 2016 accessed from the NRV.

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.



- Approximate Site Boundary
- Delineated Wetland Boundary
- Delineated Wetland Area
- Wetlands Delineated by Aerial Photos
- Upland Sample
- Wetland Sample
- Culvert Sample

NOTE: Wetland boundaries and types are approximate for illustrative purposes only and do not reflect actual survey data.

