

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 31 December 2012

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

Omaha District – Upper Maple River Dam - NWO-2010-1490-BIS Form 1

C. PROJECT LOCATION AND BACKGROUND INFORMATION: RPWs (Maple River), Abutting & Adjacent Wetlands

Legal Descriptions: S15, 22, 26, 27, 34, 35 & 36, T144N, R56W

State: **North Dakota** County/parish/borough: **Steele** City: **3 miles southwest of Hope**

Center coordinates of site (lat/long in degree decimal format): Lat. **47.26167° N**, Long. **-97.74587° W**.

Universal Transverse Mercator: **14**

Name of nearest waterbody: **Maple River**

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: **Sheyenne River**

Name of watershed or Hydrologic Unit Code (HUC): **Maple (9020205)**

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date: **12 December 2012**

Field Determination. Date(s): **10 September 2011**

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain: _____.

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: **17,132 linear** feet: **10 (avg)** width (ft) and/or **0.4** acres.

Wetlands: **281.5** acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known): _____.

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

2. **Non-regulated waters/wetlands (check if applicable):**³

- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
Explain: **Non-regulated waters are identified and described on Form 2. SECTION III(F) of this form is purposely left blank and will also be completed on Form 2.**

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**

Identify TNW: _____.

Summarize rationale supporting determination: _____.

2. **Wetland adjacent to TNW**

Summarize rationale supporting conclusion that wetland is "adjacent": _____.

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

(i) **General Area Conditions:**

Watershed size: **1620** square miles

Drainage area: **59.6** square miles

Average annual rainfall: **21** inches

Average annual snowfall: **41** inches

(ii) **Physical Characteristics:**

(a) **Relationship with TNW:**

Tributary flows directly into TNW.

Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **30 (or more)** river miles from TNW.

³ Supporting documentation is presented in Section III.F.

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

Project waters are **1 (or less)** river miles from RPW.
Project waters are **30 (or more)** aerial (straight) miles from TNW.
Project waters are **1 (or less)** aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain: **N/A: Intrastate waters.**

Identify flow route to TNW⁵: **The Maple River flows directly into the Sheyenne River (receiving TNW).**
Tributary stream order, if known: **Third Order + (Beyond Headwaters).**

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain: _____.
 Manipulated (man-altered). Explain: **The upper reaches of the Maple River, within its seasonal reach, contain both, natural and manipulated conditions at various locations. There are lengths of stream that have been channelized, straightened and impounded. This immediate reach within the project area, has been manipulated via the construction of the Sussex Dam and a smaller farm pond embankment.**

Tributary properties with respect to top of bank (estimate):

Average width: **10** feet
Average depth: **3-6** feet
Average side slopes: **3:1** .

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover: **Mixed species, primarily hydrophytic herbaceous**
 Other. Explain: _____.

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: **Impaired due to past manipulations, mostly stable banks.**

Presence of run/riffle/pool complexes. Explain: **None present.**

Tributary geometry: **Meandering**

Tributary gradient (approximate average slope): **<1** %

(c) Flow:

Tributary provides for: **Seasonal flow**

Estimate average number of flow events in review area/year: **20 (or greater)**

Describe flow regime: **Seasonal flows during spring following snow melt and precipitation runoff. Groundwater likely to contribute to flows during spring season. Flows may be substantially reduced during summer months when precipitation declines and the peak of the growing season.**

Other information on duration and volume: **Capacity to provide year round flows in wet years and no flow in dry years. Typically seasonal flows anticipated. Peak record flow at Hope Gage Station is near 1,400 cfs in summer of 2011.**

Surface flow is: **Discrete.** Characteristics: **Bed and Bank Stream Channel, with OWHM present.**

Subsurface flow: **Unknown.** Explain findings: **No testing of groundwater flows; however, subsurface influence is likely during periods of high water table and aquifer activity.**

Dye (or other) test performed: _____.

Tributary has (check all that apply):

Bed and banks
 OWHM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

⁶ A natural or man-made discontinuity in the OWHM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OWHM has been removed by development or agricultural practices). Where there is a break in the OWHM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

- other (list): _____
 Discontinuous OHWM.⁷ Explain: _____.

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

- | | |
|--|--|
| <input checked="" type="checkbox"/> High Tide Line indicated by: | <input checked="" type="checkbox"/> Mean High Water Mark indicated by: |
| <input type="checkbox"/> oil or scum line along shore objects | <input type="checkbox"/> survey to available datum; |
| <input type="checkbox"/> fine shell or debris deposits (foreshore) | <input type="checkbox"/> physical markings; |
| <input type="checkbox"/> physical markings/characteristics | <input type="checkbox"/> vegetation lines/changes in vegetation types. |
| <input type="checkbox"/> tidal gauges | |
| <input type="checkbox"/> other (list): | |

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: _____.

Identify specific pollutants, if known: _____.

(iv) Biological Characteristics. Channel supports (check all that apply):

- Riparian corridor. Characteristics (type, average width): **Combination of prairie grass (native & tame spp) & cultivated lands.**
- Wetland fringe. Characteristics: **Herbaceous riverine wetlands are present throughout the reach.**
- Habitat for:
 - Federally Listed species. Explain findings: _____.
 - Fish/spawn areas. Explain findings: **The upper Maple River reaches do provide spawning and reproduction habitat for fishes within the system.**
 - Other environmentally-sensitive species. Explain findings: _____.
 - Aquatic/wildlife diversity. Explain findings: **Seasonal river and wetlands provide habitat for both aquatic and terrestrial species, as well as micro and macro-organisms.**

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties: **See the attached table for Adjacent Wetlands, Sizes & Types.**

Wetland size: _____ acres

Wetland type. Explain: _____.

Wetland quality. Explain: **Ten (10) wetlands were determined to be “adjacent” to the Maple River.**

These wetlands generally consist of moderate quality palustrine herbaceous wetlands, with shallow – abbreviated surface inundation. The wetlands provide suitable habitat for a variety of wildlife including aquatic life and terrestrial species that utilize these wetlands for food, cover and reproductive habitat. In addition, all of these wetland provide some function water quality and biochemical processes by trapping pollutants and other materials.

Project wetlands cross or serve as state boundaries. Explain: **N/A.**

(b) General Flow Relationship with Non-TNW:

Flow is: **Intermittent flow.** Explain: **An intermittent to seasonal flow pattern is expected to correlate with the hydrograph of the Maple River.**

Surface flow is: **Discrete**

Characteristics: **These 10 adjacent wetlands flow into the Maple River and may be subject to receiving floodwaters from the river.**

Subsurface flow: **Unknown.** Explain findings: **No testing of groundwater flows; however, subsurface influence is likely during periods of high water table and aquifer activity.**

Dye (or other) test performed: _____.

(c) Wetland Adjacency Determination with Non-TNW:

Directly abutting

Not directly abutting

Discrete wetland hydrologic connection. Explain: **Seventy-seven (77) wetlands exhibit a contiguous “abutting” connection to the Maple River, the remaining 10 adjacent wetlands exhibit a floodplain-floodway proximity to the Maple River. These adjacent wetlands are affected by flows to & from the Maple River.**

Ecological connection. Explain: _____.

Separated by berm/barrier. Explain: _____.

⁷Ibid.

- (d) Proximity (Relationship) to TNW
 Project wetlands are **30 (or more)** river miles from TNW.
 Project waters are **10-15** aerial (straight) miles from TNW.
 Flow is from: **Wetland to navigable waters.**
 Estimate approximate location of wetland as within the **500-year or greater** floodplain.

(ii) Chemical Characteristics:

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: **No abnormal water attributes have been observed.**

Identify specific pollutants, if known: **No specific pollutants have been documented onsite, however, agricultural runoff, sediment and other pollutants within the Maple River watershed are expected to be present within the project waters.**

(iii) Biological Characteristics. Wetland supports (check all that apply):

Riparian buffer. Characteristics (type, average width): **Both, prairie grass (native and non-native spp.) and cultivated lands with highly variable widths.**

Vegetation type/percent cover. Explain: **Herbaceous upland and wetlands species, as well as, commodity crops.**

Habitat for:

Federally Listed species. Explain findings: _____.

Fish/spawn areas. Explain findings: _____.

Other environmentally-sensitive species. Explain findings: _____.

Aquatic/wildlife diversity. Explain findings: **These adjacent wetlands increase biodiversity within the watershed and ecoregion. Both aquatic and terrestrial life utilize these riparian corridors and wetlands.**

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: **30 (or more)**

Approximately (**281.5**) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
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Please refer to the attached table for the adjacency relationship & size of each wetland. There are eighty-seven (87) total wetlands that are determined to be either “abutting” or “adjacent”, the remaining waters are determined to be the actual river channel bed (Maple River waters).

Summarize overall biological, chemical and physical functions being performed: **These wetlands have the capacity to store/absorb water, transform nutrients, grow biotic matter and diversify the plant communities and wildlife of the ecotype. Broadly characterized, the functions provided by these wetlands can be grouped by habitat, hydrologic and water quality. In terms of habitat, these wetlands provide food, water and refuge for fish, invertebrates, birds and mammals. Hydrologically, these wetlands reduce flow velocity, aid in ground water recharge and/or discharge, and influence the hydrologic cycle’s atmospheric processes. The wetlands improve water quality by trapping sediment and pollutants, and by the biochemical processes within the wetlands and their soils.**

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: ____.
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: ____.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: **The delineated wetlands identified on the attached table, consisting of abutting and adjacent wetlands that do not directly abut, cover a geographic area of approximately 281.5 total acres. All of these wetlands are part of a cumulative analysis for significant nexus to the Sheyenne River, which is the nearest TNW. Given the fact that the Maple River is a direct, seasonally flowing tributary to the Sheyenne River, with multiple 303(d) list of impairments, it is determined that these wetlands have the capacity to store ag-waste byproduct, nutrients, sediments, bacteria, pathogens, floodwaters, and other materials that can be harmful to downstream TNWs. Based upon the principle considerations outlined in the EPA/USACE joint guidance and instruction on jurisdiction under the Clean Water Act, it is determined that these adjacent wetlands, have more than an insubstantial and speculative effect on the ecological, chemical and physical integrity of the downstream TNWs. This functional & physical capacity to affect the Sheyenne River constitutes a significant nexus. As such, these adjacent and abutting wetlands are waters of the US .**

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 - TNWs: ____ linear feet ____ width (ft), Or, ____ acres.
 - Wetlands adjacent to TNWs: ____ acres.
2. **RPWs that flow directly or indirectly into TNWs.**
 - Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: ____.
 - Tributaries of TNW where tributaries have continuous flow “seasonally” (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: **The upper Maple River subwatershed drains approximately 60 square miles of land. This basin receives sufficient snowfall and annual precipitation to provide seasonal flows in accordance with a typical North Dakota year. The seasonal flows occur during the spring, following snow melt and precipitation runoff. Groundwater is likely to also contribute to flows during spring season. Flows may be substantially reduced during summer months when precipitation declines and the peak of the growing season. At lower reaches within the Maple River basin, the river exhibits perennial, year-round flow.**

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: **17,132** linear feet **10** width (ft).
- Other non-wetland waters: **112.37** acres.

Identify type(s) of waters: **Sussex Dam impoundment of Maple River (Meets Wetland Parameters).**

3. **Non-RPWs⁸ that flow directly or indirectly into TNWs.**

- Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).
 Other non-wetland waters: _____ acres.

Identify type(s) of waters: _____.

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: _____.
- Wetlands directly abutting an RPW where tributaries typically flow “seasonally.” Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: **The project area contains 77 wetlands that were field delineated in October 2012, demonstrating that these wetlands exhibit a contiguous/continuous surface connection to the banks of the Maple River. This direct physical relationship to the seasonally flowing upper reach of the Maple River, constitutes an “abutting” relationship (Wetlands abutting RPWs).**

Provide acreage estimates for jurisdictional wetlands in the review area: **278.17** acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: **3.33** acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: _____ acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from “waters of the U.S.,” or
 Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
 Demonstrate that water is isolated with a nexus to commerce (see E below).

E. **ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰**

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
 from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
 which are or could be used for industrial purposes by industries in interstate commerce.
 Interstate isolated waters. Explain: _____.
 Other factors. Explain: _____.

Identify water body and summarize rationale supporting determination: _____.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- Other non-wetland waters: ____ acres.
Identify type(s) of waters: _____.
- Wetlands: ____ acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: _____.
- Other: (explain, if not covered above): _____.

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): ____ linear feet ____ width (ft).
- Lakes/ponds: ____ acres.
- Other non-wetland waters: ____ acres. List type of aquatic resource: _____.
- Wetlands: ____ acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): ____ linear feet, ____ width (ft).
- Lakes/ponds: ____ acres.
- Other non-wetland waters: ____ acres. List type of aquatic resource: _____.
- Wetlands: ____ acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: **Submitted as part of the application package and subsequent submittal of the wetland delineation report and JD request received in December 2012.**
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: _____.
- Corps navigable waters' study: _____.
- U.S. Geological Survey Hydrologic Atlas: _____.
- USGS NHD data.
- USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: **1 : 24,000 – HOPE & LUVERNE, NORTH DAKOTA.**
- USDA Natural Resources Conservation Service Soil Survey. Citation: **NRCS Soils Map Provided As Part of the Delineation Report.**
- National wetlands inventory map(s). Cite name: **US Fish and Wildlife Service NWI Map provided on behalf of the applicant.**
- State/Local wetland inventory map(s): _____.
- FEMA/FIRM maps: _____.
- 100-year Floodplain Elevation is: _____ (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): **NAIP & Google Earth Pro (Numerous Years & Dates).**
or Other (Name & Date): **Onsite photographs provided in the delineation report (October 2012).**
- Previous determination(s). File no. and date of response letter: **Preliminary JD issued on 17 May 2012 (NWO-2010-1490-BIS).**
- Applicable/supporting case law: _____.
- Applicable/supporting scientific literature: _____.
- Other information (please specify): **USACE Project Manager Onsite Visit 10 September 2011.**

B. ADDITIONAL COMMENTS TO SUPPORT JD: Reference is made to the USACE & EPA Joint Guidance and Instruction on CWA 404 Jurisdiction and December 2008 Revised Guidance which indicate that all RPWs that flow directly or indirectly into TNW are WOUS. Further, wetlands abutting these RPWs are also WOUS. Wetlands adjacent to, but not directly abutting, are WOUS if they have the cumulative capacity to have more than a speculative effect on TNWs.

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U.S. Army Corps of Engineers

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SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 31 December 2012

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

Omaha District – Upper Maple River Dam - NWO-2010-1490-BIS Form 2

C. PROJECT LOCATION AND BACKGROUND INFORMATION: Isolated Wetlands - Nonjurisdictional

Legal Descriptions: S15, 22, 26, 27, 34, 35 & 36, T144N, R56W

State: **North Dakota** County/parish/borough: **Steele** City: **3 miles southwest of Hope**

Center coordinates of site (lat/long in degree decimal format): Lat. **47.26167° N**, Long. **-97.74587° W**.

Universal Transverse Mercator: **14**

Name of nearest waterbody: **Maple River**

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: **Sheyenne River**

Name of watershed or Hydrologic Unit Code (HUC): **Maple (9020205)**

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date: **12 December 2012**

Field Determination. Date(s): **10 September 2011**

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain: _____.

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

The review area does contain waters of the US. The detailed information on these jurisdictional waters is provided on Form 1. All remaining sections on this Form 2, pertaining to jurisdictional waters of the US have been left blank. Please refer to Form 1 for these determinations and analysis.

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: **17,132 linear** feet: **10 (avg)** width (ft) and/or **0.4** acres.

Wetlands: **281.5** acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known): _____.

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

2. **Non-regulated waters/wetlands (check if applicable):**³

- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: **The JD Review area contains thirty-five (35) isolated wetlands, totaling approximately 37.5 acres. These wetlands, sizes and types are provided on the attached table. The isolated, nonjurisdictional wetlands consist of excavated pits that have been abandoned and meet wetland criteria and shallow depressional wetland basins. The wetlands were field delineated and mapped and do not exhibit any discernible surface connection, or outlets to the Maple River. These sites are 100% surrounded by uplands and are perched or otherwise located outside the flood zone of the river, where there is insufficient frequency and duration of hydrologic exchange to constitute adjacency. Because of this topographic and geographic separation, these waters do not exhibit sufficient proximity to waters of the US to be considered “adjacent” for hydrologic and ecological purposes. ORM2 mapped elevation profiles indicate that these wetlands are closed and may spill infrequently overland during extreme runoff events. Overland sheetflow and runoff in these cases, does not substantiate a claim of adjacency under current guidance and instruction on CWA 404 jurisdiction. Lastly, these wetlands do not appear to exhibit any past, present or future nexus to interstate or foreign commerce. As such, the 35 wetlands identified on the attached table, are determined to be isolated, intrastate and nonjurisdictional under the auspices of Section 404 of the Clean Water Act.**

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**

Identify TNW: _____.

Summarize rationale supporting determination: _____.

2. **Wetland adjacent to TNW**

Summarize rationale supporting conclusion that wetland is “adjacent”: _____.

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are “relatively permanent waters” (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for

³ Supporting documentation is presented in Section III.F.

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: _____ **Pick List**
 Drainage area: _____ **Pick List**
 Average annual rainfall: _____ inches
 Average annual snowfall: _____ inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

- Tributary flows directly into TNW.
- Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.
 Project waters are **Pick List** river miles from RPW.
 Project waters are **Pick List** aerial (straight) miles from TNW.
 Project waters are **Pick List** aerial (straight) miles from RPW.
 Project waters cross or serve as state boundaries. Explain: _____.

Identify flow route to TNW⁵: _____.
 Tributary stream order, if known: _____.

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain: _____.
 Manipulated (man-altered). Explain: _____.

Tributary properties with respect to top of bank (estimate):

Average width: _____ feet
 Average depth: _____ feet
 Average side slopes: **Pick List**.

Primary tributary substrate composition (check all that apply):

- Silts
- Sands
- Concrete
- Cobbles
- Gravel
- Muck
- Bedrock
- Vegetation. Type/% cover: _____
- Other. Explain: _____.

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: _____.

Presence of run/riffle/pool complexes. Explain: _____.

Tributary geometry: **Pick List**

Tributary gradient (approximate average slope): _____ %

(c) Flow:

Tributary provides for: **Pick List**
 Estimate average number of flow events in review area/year: **Pick List**
 Describe flow regime: _____.
 Other information on duration and volume: _____.

Surface flow is: **Pick List**. Characteristics: _____.

Subsurface flow: **Pick List**. Explain findings: _____.
 Dye (or other) test performed: _____.

Tributary has (check all that apply):

- Bed and banks
- OHWM⁶ (check all indicators that apply):
 - clear, natural line impressed on the bank
 - the presence of litter and debris
 - changes in the character of soil
 - destruction of terrestrial vegetation

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

⁶ A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

- | | |
|--|---|
| <input type="checkbox"/> shelving | <input type="checkbox"/> the presence of wrack line |
| <input type="checkbox"/> vegetation matted down, bent, or absent | <input type="checkbox"/> sediment sorting |
| <input type="checkbox"/> leaf litter disturbed or washed away | <input type="checkbox"/> scour |
| <input type="checkbox"/> sediment deposition | <input type="checkbox"/> multiple observed or predicted flow events |
| <input type="checkbox"/> water staining | <input type="checkbox"/> abrupt change in plant community _____ |
| <input type="checkbox"/> other (list): _____ | |
- Discontinuous OHWM.⁷ Explain: _____.

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

- | | |
|--|--|
| <input type="checkbox"/> High Tide Line indicated by: | <input type="checkbox"/> Mean High Water Mark indicated by: |
| <input type="checkbox"/> oil or scum line along shore objects | <input type="checkbox"/> survey to available datum; |
| <input type="checkbox"/> fine shell or debris deposits (foreshore) | <input type="checkbox"/> physical markings; |
| <input type="checkbox"/> physical markings/characteristics | <input type="checkbox"/> vegetation lines/changes in vegetation types. |
| <input type="checkbox"/> tidal gauges | |
| <input type="checkbox"/> other (list): _____ | |

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: _____.

Identify specific pollutants, if known: _____.

(iv) Biological Characteristics. Channel supports (check all that apply):

- Riparian corridor. Characteristics (type, average width): _____.
- Wetland fringe. Characteristics: _____.
- Habitat for:
 - Federally Listed species. Explain findings: _____.
 - Fish/spawn areas. Explain findings: _____.
 - Other environmentally-sensitive species. Explain findings: _____.
 - Aquatic/wildlife diversity. Explain findings: _____.

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland size: _____ acres

Wetland type. Explain: _____.

Wetland quality. Explain: _____.

Project wetlands cross or serve as state boundaries. Explain: _____.

(b) General Flow Relationship with Non-TNW:

Flow is: **Pick List**. Explain: _____.

Surface flow is: **Pick List**

Characteristics: _____.

Subsurface flow: **Pick List**. Explain findings: _____.

Dye (or other) test performed: _____.

(c) Wetland Adjacency Determination with Non-TNW:

- Directly abutting
- Not directly abutting
 - Discrete wetland hydrologic connection. Explain: _____.
 - Ecological connection. Explain: _____.
 - Separated by berm/barrier. Explain: _____.

(d) Proximity (Relationship) to TNW

Project wetlands are **Pick List** river miles from TNW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Flow is from: **Pick List**.

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) Chemical Characteristics:

⁷Ibid.

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: _____.
 Identify specific pollutants, if known: _____.

(iii) Biological Characteristics. Wetland supports (check all that apply):

- Riparian buffer. Characteristics (type, average width): _____.
- Vegetation type/percent cover. Explain: _____.
- Habitat for:
 - Federally Listed species. Explain findings: _____.
 - Fish/spawn areas. Explain findings: _____.
 - Other environmentally-sensitive species. Explain findings: _____.
 - Aquatic/wildlife diversity. Explain findings: _____.

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: **Pick List**
 Approximately (_____) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
_____	_____	_____	_____

Summarize overall biological, chemical and physical functions being performed: _____.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: _____.
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: _____.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: _____.
4. **Relatively Permanent Waters with seasonal flows:** _____

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. TNWs and Adjacent Wetlands. Check all that apply and provide size estimates in review area:

- TNWs: _____ linear feet _____ width (ft), Or, _____ acres.
 Wetlands adjacent to TNWs: _____ acres.

2. RPWs that flow directly or indirectly into TNWs.

- Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: _____.
 Tributaries of TNW where tributaries have continuous flow “seasonally” (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: _____.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).
 Other non-wetland waters: _____ acres.

Identify type(s) of waters: _____.

3. Non-RPWs⁸ that flow directly or indirectly into TNWs.

- Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).
 Other non-wetland waters: _____ acres.

Identify type(s) of waters: _____.

4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.

- Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: _____.
 Wetlands directly abutting an RPW where tributaries typically flow “seasonally.” Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: _____.

Provide acreage estimates for jurisdictional wetlands in the review area: _____ acres.

5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.

- Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: _____ acres.

6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: _____ acres.

7. Impoundments of jurisdictional waters.⁹

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from “waters of the U.S.,” or
 Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
 Demonstrate that water is isolated with a nexus to commerce (see E below).

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- which are or could be used for industrial purposes by industries in interstate commerce.
- Interstate isolated waters. Explain: _____.
- Other factors. Explain: _____.

Identify water body and summarize rationale supporting determination: _____.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).
- Other non-wetland waters: _____ acres.
Identify type(s) of waters: _____.
- Wetlands: _____ acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: _____.
- Other: (explain, if not covered above): _____.

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: **37.5 acres.**

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet, _____ width (ft).
- Lakes/ponds: _____ acres.
- Other non-wetland waters: _____ acres. List type of aquatic resource: _____.
- Wetlands: _____ acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: **Submitted as part of the application package and subsequent submittal of the wetland delineation report and JD request received in December 2012.**
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: _____.
- Corps navigable waters' study: _____.
- U.S. Geological Survey Hydrologic Atlas: _____.
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: **1 : 24,000 – HOPE & LUVERNE, NORTH DAKOTA.**
- USDA Natural Resources Conservation Service Soil Survey. Citation: **NRCS Soils Map Provided As Part of the Delineation Report.**

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- National wetlands inventory map(s). Cite name: **US Fish and Wildlife Service NWI Map provided on behalf of the applicant.**
- State/Local wetland inventory map(s): _____.
- FEMA/FIRM maps: _____.
- 100-year Floodplain Elevation is: _____(National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): **NAIP & Google Earth Pro (Numerous Years & Dates).**
or Other (Name & Date): **Onsite photographs provided in the delineation report (October 2012).**
- Previous determination(s). File no. and date of response letter:
Preliminary JD issued on 17 May 2012 (NWO-2010-1490-BIS).
- Applicable/supporting case law: _____.
- Applicable/supporting scientific literature: _____.
- Other information (please specify): **USACE Project Manager Onsite Visit 10 September 2011.**

B. ADDITIONAL COMMENTS TO SUPPORT JD: Given the lack of discernible surface and ecological connectivity, the 35 wetlands are determined isolated. Due to lack of commerce nexus, the wetlands are determined non-jurisdictional.