



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. LOUIS DISTRICT  
1222 SPRUCE STREET  
ST. LOUIS, MISSOURI 63103

CEMVS-OD-F

June 5, 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> [MVS-2023-160](#)<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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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.

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).

- 1) S-1 (Crooked Run) (3,352 feet), jurisdictional (Section 404)
- 2) S-2 (509 feet), non-jurisdictional
- 3) S-3 (873 feet), non-jurisdictional
- 4) W1 (0.40-acre), non-jurisdictional (excluded)

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) (2023 Rule, as amended)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- d. Citing to the 27 September coordination memo, specifically to the language which reads, "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."

3. REVIEW AREA. The Review Area consists of approximately 345-acres proposed for the development of a ground-mounted solar system located north of Hilltop Road, near White Hall, Greene County, Illinois. Approximate coordinates for the center of the Review Area are Latitude 39.4290° and Longitude -90.3845°.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Illinois River](#)

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Crooked Run is the receiving water for all the surface drainage within the Review Area. Crooked Run flows into Apple Creek eventually intersecting the Illinois River, a TNW.](#)

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):**

[S-1 \(Crooked Run\)](#) (3,352 feet) is a second-order tributary with a 1,105-acre watershed at its location within the Review Area. The tributary was observed flowing during the wet season (March 4, 2024) and dry with isolated pools during the dry season (August 23, 2022). The flow characteristics at the downstream limit are representative of the entire reach of the tributary. Physical characteristics combined with the systems watershed conditions provide weight-of-evidence that the tributary has flowing water continuously during certain times of the year (i.e., wet season), which is necessary to meet the relatively permanent standard.

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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.

- 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>8</sup>

[W1 \(0.40-acre\)](#) meets the (b)(3) exclusion for Certain Ditches; Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water. Wetlands that develop entirely within the confines of an excluded ditch are not jurisdictional.

- 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).

[S-2 \(509 feet\)](#) and [S-3 \(873 feet\)](#) are first-order tributaries to S-1 with less than 90-acre watersheds. The onset of streamflow coincides with precipitation events and cease shortly after the termination of overland run-off. Even with presumed back-to-back or multiple storm events throughout their watersheds, these systems would not sustain baseflows for extended periods of time, but rather maintain a repeated sequence of streamflow, flow cessation, and channel drying throughout the year. Based on their location within their respective watersheds and the lack of standing or flowing water for more than a short duration in direct response to precipitation, S-2 and S-3 would not meet the Relatively Permanent Standard.

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

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.
- Wetland Delineation Report dated March 19, 2024
  - USGS Topographic Maps, 1:24,000 Scale, Roodhouse East and West, IL Quads
  - USGS NHDPlus
  - USGS Stream Stats
  - Antecedent Precipitation Tool
  - USDA-NRCS Soil Survey for Greene County, Illinois
  - USGS Illinois Geologic Maps
  - USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
  - Illinois Height Modernization (ILHMP) LiDAR Data
  - Google Earth Pro Aerial Imagery, Various Aerial Images

10. OTHER SUPPORTING INFORMATION.

Table 1. Water Resources Identified within the Review Area

Feature ID	Latitude	Longitude	Length / Area	Stream Order	Watershed Size (acres)	Flow Characteristics	Wetland Type	WOTUS
S-1 (Crooked Run)	39.4311	-90.3916	3,352 ft	2nd	1,105	RPW	-----	Yes
S-2	39.4294	-90.3934	509 ft	1 <sup>st</sup>	60	NRPW	-----	No
S-3	39.4329	-90.3900	873 ft	1 <sup>st</sup>	85	NRPW	-----	No
W1	39.4263	-90.3814	0.40 ac	-----	-----	-----	PEM	No

**Antecedent Precipitation Tool Results**

Delineation Field Evaluation Dates:

Aug 31, 2022: Dry Season / Normal Conditions / Drought Index: Moderate Wetness

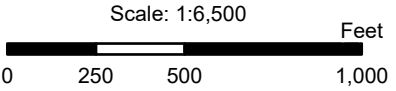
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.





- ▭ Project Site
- ▭ Wetlands
- Impacted Stream
- ▬ Streams
- ▣ Culverts
- Photo Points
- Wetland Data Points
- Upland Data Points

DATA SOURCES:  
ESRI WMS - Aerial



Project No.:  
N1247071  
Date:  
May 2024  
Drawn By:  
AKW  
Reviewed By:  
SEW



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**Wetland Delineation Map**

Emerald Solar  
Hilltop Road  
White Hall, Greene County, Illinois

**Exhibit**

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