



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

CEMVS-RD

October 2, 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-2024-81](#)<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).

### **Tributaries**

- 1) Ephemeral Stream 1 (573 feet), non-jurisdictional
- 2) Ephemeral Stream 2 (1,455 feet), non-jurisdictional
- 3) Intermittent Stream 1 (1,766 feet), jurisdictional (Section 404)
- 4) Intermittent Stream 2 (6,078 feet), jurisdictional (Section 404)
- 5) Ephemeral Stream 3 (126 feet), non-jurisdictional
- 6) Ephemeral Stream 4 (37 feet), non-jurisdictional
- 7) Ephemeral Stream 5 (81 feet), non-jurisdictional
- 8) Ephemeral Stream 6 (76 feet), non-jurisdictional

### **Wetlands**

- 9) Wetland 1 (0.6-acre), jurisdictional (Section 404)
- 10) Wetland 2 (0.15-acre), jurisdictional (Section 404)
- 11) Wetland 4 (0.03-acre), non-jurisdictional
- 12) Wetland 5 (0.38-acre), non-jurisdictional
- 13) Wetland 6 (0.05-acre), jurisdictional (Section 404)
- 14) Wetland 7 (0.01-acre), non-jurisdictional
- 15) Wetland 8 (0.01-acre), non-jurisdictional
- 16) Wetland 10 (0.11-acre), non-jurisdictional
- 17) Wetland 12 (0.15-acre), jurisdictional (Section 404)

See Tables 1 and 2 in Section 10 for more detailed information relating to each aquatic resource presented above.

Note: Wetland 3, Wetland 9, and Wetland 11 were removed from the AJD to avoid review delays.

## 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.”
  - e. Citing to the “Technical Support Document for the Final “Revised Definition of “Waters of the United States”” Rule dated December 2022.
3. REVIEW AREA. The Review Area consists of approximately 317-acres proposed for the development of a 28-megawatt alternating current (AC) ground-mounted solar system located south of State Route 13 in Swanwick Precinct, Perry County, Illinois. Approximate coordinates for the center of the Review Area are Latitude 38.1709° and Longitude -89.5619°.
  4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Big Muddy River \(TNW\)](#)
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Galum Creek is the receiving water for all the surface drainage within the Review Area. Galum Creek flows south to Beaucoup Creek eventually intersecting the Big Muddy River, a TNW. The Big Muddy River is a Section 10 water from mile 0 to mile 51.9, near DeSoto, Illinois.](#)
  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](#)

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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.

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):**

**Intermittent Stream 1** (1,766 feet) is a first and second-order tributary within the Review Area that has a 209+ acre watershed at its downstream most extent within the Review Area. At the time of the delineation, the stream reach was observed with both flowing and pooled water because of 1-inch precipitation event within the preceding 8-days and 4-inches of rain in the preceding 30-days. The flow characteristics at the downstream limit are representative of the entire reach of the tributary, as most of the hydrology is received from ditches along the railroad to the north. Physical characteristics combined with the systems watershed conditions provide weight-of-evidence that the tributary has continuous flow at least seasonally or flowing water continuously during certain times of the year (i.e., wet season), which is necessary to meet the relatively permanent standard.

**Intermittent Stream 2** (6,078 feet) is a second-order tributary with a 371-acre watershed at its downstream most extent within the Review Area, draining much of the village of Swanwick. At the time of the delineation, the stream reach was observed with both flowing and pooled water because of 1-inch precipitation event within the preceding 8-days. The second order reach also appears to maintain a groundwater connection through a portion of the year. Although the upper limits (10%) of the second-order reach appear to exhibit non-RPW flow characteristics, the majority of the 2<sup>nd</sup> order reach extending from limits of the Review Area down to Galum Creek meet the relatively permanent standard. The stream's physical characteristics, watershed conditions, and presence of flowing reaches during the dry season, provide weight-of-evidence that the tributary has continuous flow at least

seasonally or flowing water continuously during certain times of the year (i.e., wet season), which is necessary to meet the relatively permanent standard.

**f. Adjacent Wetlands (a)(4):**

- **Wetland 1** is a 0.60-acre emergent wetland that abuts Intermittent Stream 1, an (a)(3) water (requisite water).
- **Wetland 2** abuts Ephemeral Stream 1 (non-RPW CSC) for approximately 150-feet before intersecting Intermittent Stream 1 (requisite water).
- **Wetland 6** abuts Ephemeral Stream 3 (non-RPW CSC) for approximately 100-feet before intersecting Intermittent Stream 2 (requisite water).
- **Wetland 12** is a 0.11-acre emergent wetland that abuts Intermittent Stream 3, an (a)(3) water (requisite water).

**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>
- 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).

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

**Ephemeral Stream 1 / Ephemeral Stream 2 / Ephemeral Stream 3  
Ephemeral Stream 4 / Ephemeral Stream 5 / Ephemeral Stream 6**

Each of these six (6) tributaries are first-order tributaries, that lie within the upper extents of small watersheds draining agricultural fields. Many of these features lie within agricultural waterways that have not been properly maintained or in disturbed settings where the lack of perennial vegetation has allowed for channel development. 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. Their watershed sizes do not provide enough overland flow to maintain continuous seasonal flow without the presence of an elevated groundwater connection during the wet season for extended periods. Based on their location within their respective local watershed and lack of physical characteristics indicating the presence of a groundwater connection, these features would not meet the Relatively Permanent Standard.

**Wetlands 4, 7, 8, and 10** are depressional wetlands within the Review Area. No discrete features or non-RPW tributaries were identified exiting the wetland features downslope.

**Wetland 5 (Pond)** was not constructed on a tributary and does not have a CSC with a requisite water.

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 dated December 2023
  - b. USGS TopoView Topographic Maps, 1:24,000 Scale, Coulterville, IL Quad
  - c. USGS NHDPlus, Accessed March 28, 2024
  - d. USGS Stream Stats
  - e. Antecedent Precipitation Tool
  - f. USDA-NRCS Soil Survey for Perry County, Illinois
  - g. USGS Illinois Geologic Maps
  - h. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
  - i. Illinois Height Modernization (ILHMP) LiDAR Data
  - j. Google Earth Pro Aerial Imagery, Various Aerial Images

## 10. OTHER SUPPORTING INFORMATION.

Table 1. Wetlands Identified within the Review Area

Wetland ID	Latitude	Longitude	Area (Acres)	Wetland Type	CSC	WOTUS
Wetland 1	38.1749	-89.5605	0.60	PEM	Yes	Yes
Wetland 2	38.1743	-89.5599	0.15	PEM	Yes	Yes
Wetland 4	38.1662	-89.5566	0.03	PEM	No	No
Wetland 5 (Pond)	38.1649	-89.5564	0.38	PUB	No	No
Wetland 6	38.1658	-89.5540	0.05	PEM	Yes	Yes
Wetland 7	38.1647	-89.5533	0.01	PEM	No	No
Wetland 8	38.1664	-89.5517	0.01	PEM	No	No
Wetland 10	38.1653	-89.5491	0.11	PEM	No	No
Wetland 12	38.1668	-89.5462	0.15	PEM	Yes	Yes

Table 2. Tributaries Identified within the Review Area

Feature ID	Latitude	Longitude	Length (feet)	Stream Order	Watershed Size (acres)	Flow Characteristics	WOTUS
Ephemeral Stream 1	38.1744	-89.5604	573	1 <sup>st</sup>	92	NRPW	No
Ephemeral Stream 2	38.1713	-89.5643	1,455	1 <sup>st</sup>	<15	NRPW	No
Intermittent Stream 1	38.1743	-89.5616	1,766	1 <sup>st</sup> / 2 <sup>nd</sup>	209*	RPW	Yes
Intermittent Stream 2	38.1653	-89.5586	6,078	2 <sup>nd</sup>	371	RPW	Yes
Ephemeral Stream 3	38.1660	-89.5542	126	1 <sup>st</sup>	<15	NRPW	No
Ephemeral Stream 4	38.1661	-89.5528	37	1 <sup>st</sup>	<15	NRPW	No
Ephemeral Stream 5	38.1664	-89.5527	81	1 <sup>st</sup>	<15	NRPW	No
Ephemeral Stream 6	38.1670	-89.5497	76	1 <sup>st</sup>	<15	NRPW	No

\*Watershed size may not reflect total drainage area to the routing of railroad drainages into the feature.



CEMVS-OD-F

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-81](#)

**Joint Policy Memorandums:** [NWK-2022-00809](#), [NAP-2023-01223](#), & [SWG-2023-00284](#)

### **Antecedent Precipitation Tool Results**

Delineation Field Evaluation Dates:

Aug 9, 2022: Dry Season / Drier than Normal / Drought Index: Normal

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.



