



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. LOUIS DISTRICT
1222 SPRUCE STREET
ST. LOUIS, MISSOURI 63103-2833

CEMVS-R

7 June 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 MVS-2023-328, MFR 1 of 1.²

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.³ 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.⁴

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),⁵ the 2023 Rule as amended,

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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, Non-Jurisdictional, [0.54 Acres]
 - ii. Wetland 2, Non-Jurisdictional, [0.01 Acres]
 - iii. Wetland 3, Non-Jurisdictional [0.30 Acres]
 - iv. Stream 1, Non-Jurisdictional, [894 Linear Feet]
 - v. Stream 2, Non-Jurisdictional, [68 Linear Feet]

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The JD review area is 43.2 acres, geographic coordinates 39.318038, -89.304589, located west of Nokomis, Montgomery County, Illinois.

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. All features on site leave the review area via an excavated drainage ditch travelling approximately .75 miles before connecting to East Fork Shoal Creek.

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6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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): N/A
 - f. Adjacent Wetlands (a)(4): N/A
 - g. Additional Waters (a)(5): N/A

⁶ 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.

⁷ 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.

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).⁸

Wetland 1 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. Aerials from 1939 show the feature as a constructed ditch draining only uplands. No evidence which illustrates the presence of a natural tributary prior to the excavation of the ditch is available.

Wetland 2 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. Aerials from 1939 show the feature as a constructed ditch draining only uplands. No evidence which illustrates the presence of a natural tributary prior to the excavation of the ditch is available.

Wetland 3 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. Aerials from 1939 show the feature as constructed ditch draining only uplands. No evidence which illustrates the presence of a natural tributary prior to the excavation of the ditch is available.

- 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).

⁸ 88 FR 3004 (January 18, 2023)

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Stream 1 is a non-relatively permanent tributary. The antecedent precipitation tool (APT) indicates that the minimal water observed in the channel during the site visit on January 23, 2023, was during the Wet Season and a period of Mild Wetness. Stream 1 originates from Wetland 1, gains stream characteristics due to its confluence with Stream 2 and the degradation of drain tiles nearby and flows south out of the review area. The non-relatively permanent flow characteristics observed at the reach's downstream limit remain representative of the entire reach of the feature. The flow path outside of the review area, before meeting East Fork Shoal Creek, is also an excavated channel constructed in uplands that lacks stream characteristics.

Stream 2 is a non-relatively permanent tributary. ATP indicates that water observed in the channel during the site visit on January 23, 2023, was during the Wet Season and a period of Mild Wetness. Stream 2 flows into Stream 1. 1939 aerials show no stream at the current location of Stream 2, however, due to land use changes, Stream 2 is far more prominent in 1956 aerials. The non-relatively permanent flow characteristics observed at the reach's downstream limit remain representative of the entire reach of the feature. After Stream 2's confluence with Stream 1, the feature's flow path leaves the review area to the south.

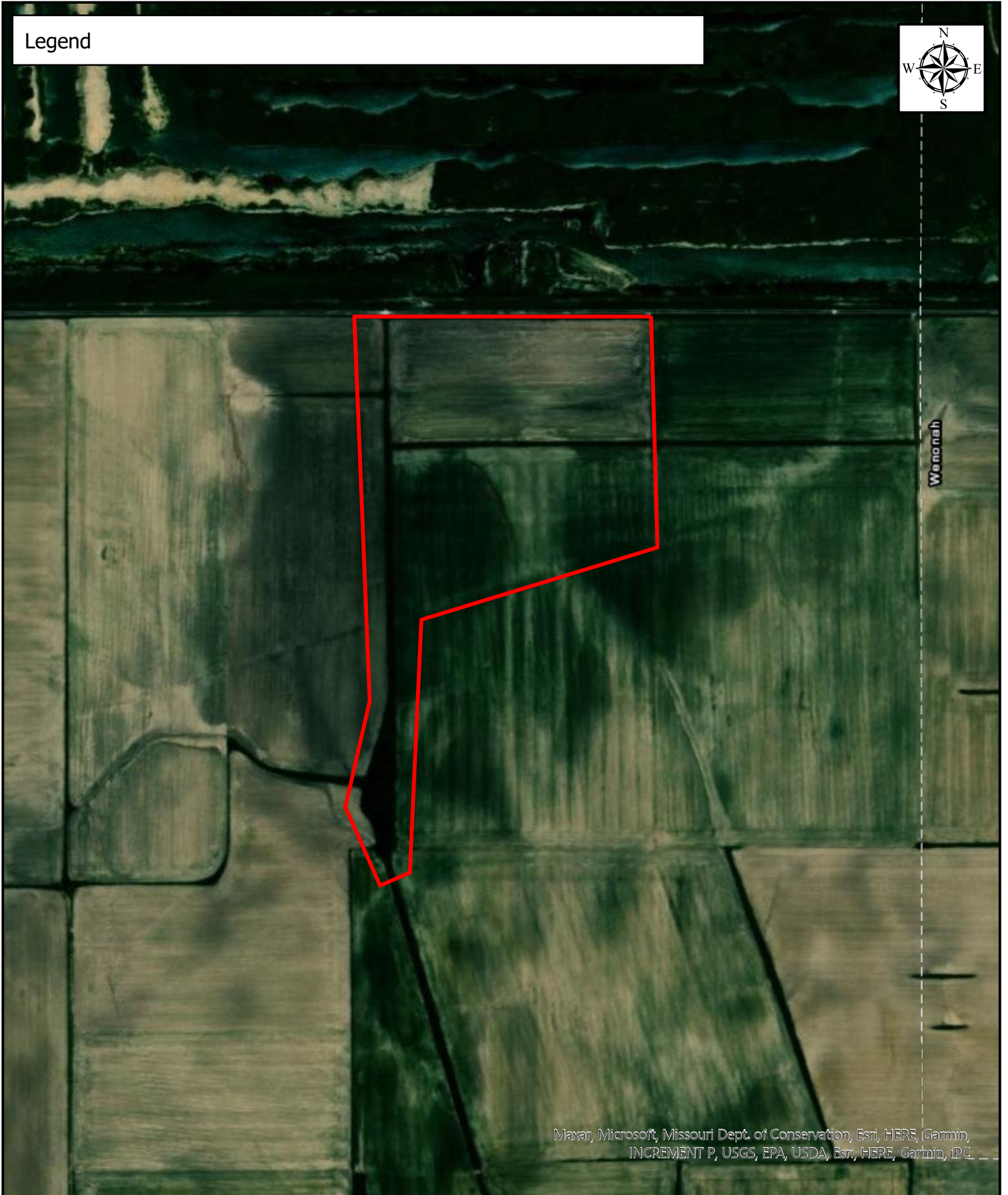
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Delineation Report submitted by CEC, dated May 17, 2023.
- b. Google Earth Aerial Imagery (Various Years)
- c. IL Statewide LiDAR DEM WGS Hillshade, accessed 4 June 2024
- d. Nokomis, IL 2021 (US Topo) Scale 1:24000, accessed 4 June 2024
- e. National Wetlands Inventory, accessed 4 June 2024
- f. 29 April 1939 Aerial, accessed 3 June 2024
- g. APT for 23 January 2023, accessed 3 June 2024

10. OTHER SUPPORTING INFORMATION. N/A

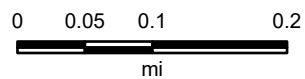
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

Legend



Maxar, Microsoft, Missouri Dept. of Conservation, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Esri, HERE, Garmin, IPC

MVS-2024-308



Map Center: 89.305021°W 39.316067°N

Map Created by: Heyer
Date: 6/10/2024

Coordinate System: WGS 1984 Web
Mercator Auxiliary Sphere



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