



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

CEMVS-RD

October 21, 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-2024-113](#)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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 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.

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) Intermittent Stream 1 (2nd Order) (1,708 feet), jurisdictional (Section 404)
- 2) Intermittent Stream 2 (3,661 feet), jurisdictional (Section 404)
- 3) Ephemeral Stream 1 (403 feet), non-jurisdictional
- 4) Ephemeral Stream 2 (64 feet), non-jurisdictional
- 5) Ephemeral Stream 3 (733 feet), non-jurisdictional
- 6) Ephemeral Stream 4 (181 feet), non-jurisdictional
- 7) Ephemeral Stream 5 (70 feet), non-jurisdictional
- 8) Ephemeral Stream 6 (70 feet), non-jurisdictional
- 9) Perennial Stream 1 (247 feet), jurisdictional (Section 404)
- 10) Wetland 2 (0.06-acre), jurisdictional (Section 404)
- 11) Wetland 3 (0.16-acre), non-jurisdictional
- 12) Wetland 5 (0.37-acre), non-jurisdictional
- 13) Wetland 6 (0.21-acre), non-jurisdictional
- 14) Pond 1 (2.42-acre), non-jurisdictional

Note: Wetlands 1 and 4 were removed from this 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 370-acres proposed for the development of an alternating current \(AC\) ground-mounted solar system located 4904 Bowls Bottom Road, Pinckneyville, Perry County, Illinois. Approximate coordinates for the center of the Review Area are Latitude 38.1619° and Longitude - 89.3707°.](#)
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. [Swanwick Creek and Beaucoup Creek are the receiving waters for all the surface drainage within the Review Area. Swanwick Creek flows into 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 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,

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.

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 (2nd Order Reach) (1,708 feet) and **Intermittent Stream 2** (3,661 feet) have approximately 200-acre watersheds at their downstream most extent within the Review Area. Second order **Intermittent Stream 1** and **Intermittent Stream 2** continue for approximately 3,927 feet and 4,826 feet, respectively before intersecting one another west of the Review Area. At the time of the delineation, during the dry season, neither stream reach was observed without flowing or pooled water. Both tributaries have been channelized and heavily manipulated throughout their respective reaches. Physical characteristics combined with the systems watershed conditions provide weight-of-evidence that the tributaries have continuous flow at least seasonally or flowing water continuously during certain times of the year, which is necessary to meet the relatively permanent standard.

Perennial Stream 1 / Beaucoup Creek (125 feet) is a third-order or greater tributary along the eastern limits of the Review Area that has a 70,137-acre watershed at its location within the Review Area. 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.

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

Wetland 2 abuts Ephemeral Stream 1 (165-feet) before intersecting Intermittent Stream 1 (RPW- section 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).⁸

- 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).

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

Each of these five (5) tributaries are first-order tributaries, that lie within the upper extents of small agricultural watershed. 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 its location within the local watershed and the lack of standing or flowing water for more than a short duration in direct response to precipitation, these features would not meet the Relatively Permanent Standard.

*Note: Ephemeral Stream 1, Ephemeral Stream 4, and Pond 1 combined are a single 1st-order reach per the Strahler Methodology. The combined reach is classified as a non-RPW.

Ephemeral Stream 6 (70 feet) (previously labeled Intermittent Stream (1st order)) is a first-order tributary with a 60-acre watershed. 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 its location within the local watershed and the lack of standing or flowing water for more than a short duration in direct response to precipitation, Ephemeral Stream 6 would not meet the Relatively Permanent Standard.

Pond 1 bisects Ephemeral Stream 1 and 4, which are part of an overall 1st order system. As such, the feature, in combination with Ephemeral Stream 1 and 4,

⁸ 88 FR 3004 (January 18, 2023)

were evaluated as an (a)(3) water. Although Pond 1 is a relatively permanent water due to the presence of a constructed embankment, the non-relatively permanent flow characteristics observed at the reach's downstream limit remain representative of the entire reach of the feature. Furthermore, using the Strahler methodology for the evaluation of (a)(3) waters, the pond (577 feet) in combination with the two ephemeral tributaries (584 feet) was determined to be a non-relatively permanent water.

Wetland 3 is a depressional wetland within the Review Area. No discrete features or non-RPW tributaries were identified exiting the wetland feature downslope.

Wetland 5/6 is an emergent wetland that lies within the limits of a constructed agricultural ditch, that does not replace a previously existing aquatic resource within the respective agricultural setting. As such, the wetland is excluded as a paragraph (b)(3) water as it lies within a constructed ditch that was excavated wholly in and draining only dry land and does not carry a relatively permanent flow of 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. USACE Site Visit
 - c. USGS Topographic Maps, 1:24,000 Scale, Todds Mill and Winkle, IL Quads
 - d. USGS NHDPlus, Accessed April 1, 2024
 - e. USGS Stream Stats
 - f. Antecedent Precipitation Tool
 - g. USDA-NRCS Soil Survey for Perry County, Illinois
 - h. USGS Illinois Geologic Maps
 - i. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
 - j. Illinois Height Modernization (ILHMP) LiDAR Data
 - k. Google Earth Pro Aerial Imagery, Various Aerial Images

10. OTHER SUPPORTING INFORMATION.

Table 1. Tributaries Identified within the Review Area

Feature ID	Latitude	Longitude	Length (feet)	Stream Order	Watershed Size (acres)	Flow Characteristics	WOTUS
Ephemeral Stream 1	38.1645	-89.3770	403	1 st	31	NRPW	No
Ephemeral Stream 2	38.1605	-89.3624	64	1 st	28	NRPW	No
Ephemeral Stream 3	38.1536	-89.3689	733	1 st	<25	NRPW	No
Ephemeral Stream 4	38.1664	-89.3778	181	1 st	<25	NRPW	No
Ephemeral Stream 5	38.1709	-89.3764	70	1 st	<25	NRPW	No
Ephemeral Stream 6*	38.1709	-89.3738	70	1 st	61	NRPW	No
Intermittent Stream 1*	38.1679	-89.3754	1,708	2 nd	206	RPW	Yes
Intermittent Stream 2	38.1609	-89.3729	3,661	2 nd	185	RPW	Yes
Perennial Stream 1	38.1638	-89.3618	247	3 rd or greater	70,137	RPW	Yes

*Stream was divided up by stream order to satisfy flow regime methodology. Ephemeral Stream 6 was previously Intermittent Stream 1

Table 2. Wetlands Identified within the Review Area

Wetland ID	Latitude	Longitude	Area (Acres)	Wetland Type	CSC	WOTUS
Wetland 2	38.1646	-89.3767	0.06	PEM	Yes	Yes
Wetland 3	38.1605	-89.3606	0.16	PEM	No	No
Wetland 5	38.1687	-89.3681	0.37	PEM	No	No
Wetland 6 ¹	38.1686	-89.3680	0.21	PEM	No	No

¹Wetland 6 is an offsite continuation of Wetland 5, that was only evaluated via desktop.

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

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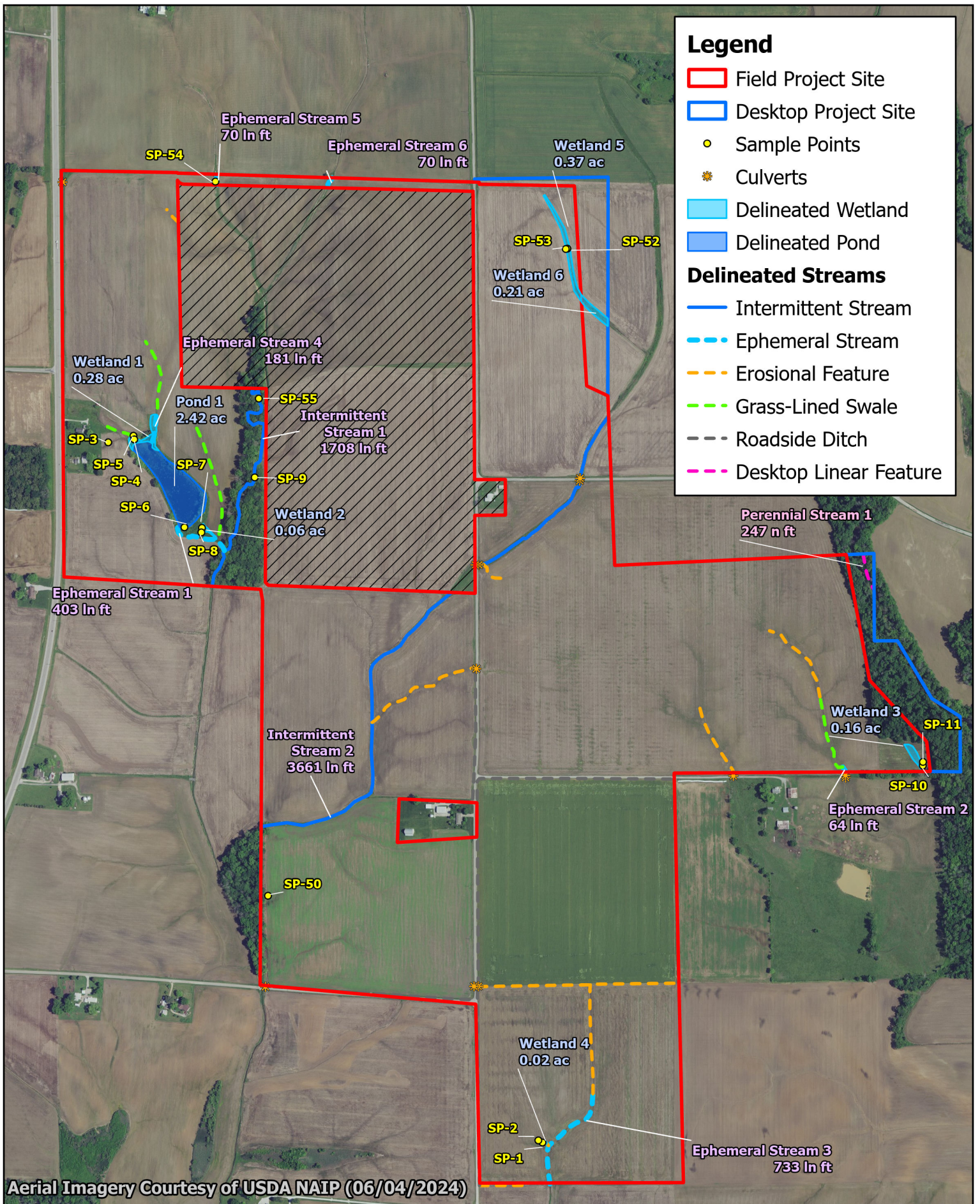
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-113](#)

Antecedent Precipitation Tool Results

Delineation Field Evaluation Dates:

Aug 9, 2022: Dry Season / Normal Conditions / 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.



Aerial Imagery Courtesy of USDA NAIP (06/04/2024)