



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

CEMVS-RD

28 October 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-2024-363.

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.² 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.³

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),⁴ 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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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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. W-1 (1.3-acres), jurisdictional – Section 404

ii. W-2 (0.2-acres), jurisdictional – Section 404

iii. S-1 (1,294.8 LF), jurisdictional – Section 404

iv. S-2 (99.3 LF), jurisdictional – Section 404

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)

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. Review area is a 33.85-acre study area within a larger 113-acre parcel. Study area is located at 218 County Road 1200 E within the City of Hillsboro, Montgomery County, Illinois. 39.1620, -89.4771. Site was formerly known as “Eagle Zinc”, portions of which recently underwent hazard remediation supervised by the USEPA.

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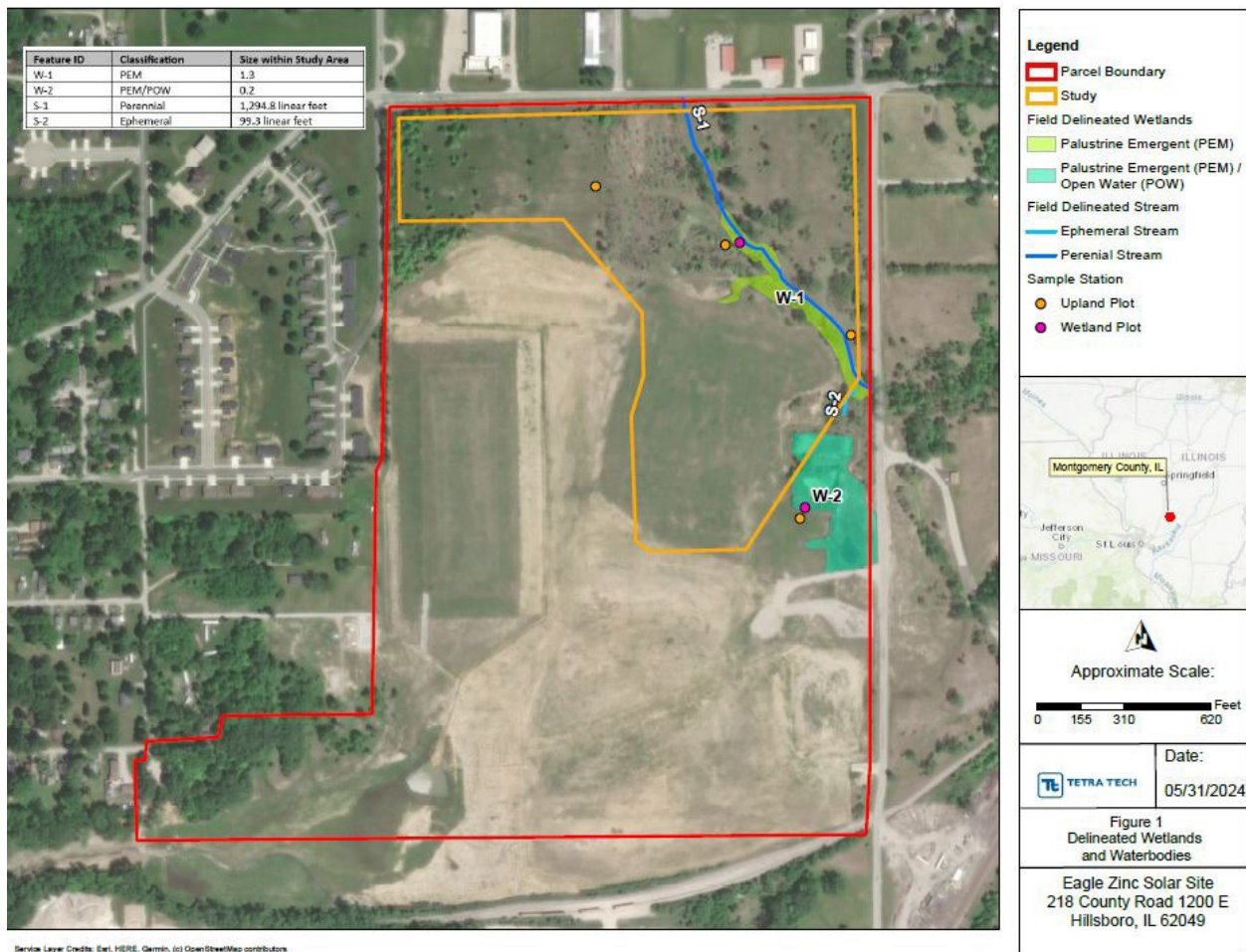


Figure 1 - Review Area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Mississippi River, which is navigable in fact.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Unnamed tributaries to Lake Hillsboro are the receiving waters for all the surface drainage that leaves the review area. Lake Hillsboro eventually drains into Shoal Creek, which eventually intersects the Kaskaskia River, which flows into the Mississippi River.

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6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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: The delineation report classified S-1 (1,294.8') as having perennial flow, with standing water present at the site visit. S-1 is a first order tributary that becomes a second order tributary at the junction of S-1 & S-2. S-1 contains flowing or standing water year-round or continuously during certain times of the year for more than a short duration in direct response to precipitation. Flow

⁵ 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.

⁶ 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.

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characteristics were categorized at the lowest downstream portion of the first order reach and were similar throughout. The district has determined S-1 to be an RPW.

S-2: A feature described by the delineation report as having ephemeral flow located in the southeastern portion of the study area that drains the retention ponds into S-1/W-1. Delineator described flowing water in the feature during site visit, which was conducted during normal rainfall conditions and there were no recorded rainfall events in the preceding days, which indicates flow may be present for more than a short duration in direct response to precipitation. Flow regime was assessed at the furthest downstream reach of the feature, and it remained consistent throughout the length. The district has determined S-2 to be a relatively permanent water.

f. Adjacent Wetlands (a)(4):

W-1: An emergent wetland located in the eastern portion of the study area, located along the toe slope of the fill area and surrounding S-1. Wetland 1 receives water from S-1, then drains into S-1. W-1 is directly abutting S-1 a relatively permanent tributary.

W-2: An emergent wetland located in the southeastern portion of the study area, consisting of several abandoned, man-made retention ponds whose overall shallow depth (<6.6') is sufficient to categorize them as wetlands. The northernmost pond has a culvert to direct overflow into W-1 via S-2. There are discrete features providing a physical connection to an RPW, there appears to be sufficient flow, the connection appears to be unimpaired and continuous, and the length of the connection (70') is a relatively short distance, therefore W-2 has a continuous surface connection to a downstream RPW S-2.

o Flow Path: W-2 (0.2-acres) -> Culvert (~70') -> First Order Requisite RPW (S-2).

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

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within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷ N/A

- 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). N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “SWANCC,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with SWANCC. N/A
- f. 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 pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

⁷ 88 FR 3004 (January 18, 2023)

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Figure 2 - Watershed Map

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.

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- a. Wetland Delineation Report dated 5 June 2024
- b. USGS Topographic Maps
- c. USGS NHDPlus
- d. USGS Stream Stats
- e. Antecedent Precipitation Tool
- f. USDA Soil Survey
- g. USFWS National Wetland Inventory
- h. Illinois LiDAR
- i. Google Earth Pro Aerial Photography

10. OTHER SUPPORTING INFORMATION.

Antecedent Precipitation Tool Results:

27 October 2023: Wet Season, Mild Drought, Normal Conditions

15 ay 2024: Wet Season, Incipient Drought, Normal Conditions

Joint Policy Memorandums on NWK-2022-00809, NAP-2023-01223, SWG-2023-00284 & LRB-2023-00451

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.