



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

CEMVS-R

July 24, 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-2024-381](#)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) [STRM01 \(1,340 feet\), 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 41-acres proposed for solar development near West Frankfort, Franklin County, Illinois. The Review Area generally lies in Section 35, Township 7 South, and Range 3 East. Approximate coordinates for the Review Area are Latitude 37.8765° and Longitude -88.8522°.](#)

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. [Pond Creek is the receiving waters for all the surface drainage that leaves the Review Area. Pond Creek eventually intersects the Big Muddy River, a TNW. The Big Muddy River is considered a Section 10 water downstream of 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, 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**

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

Please note: Aquatic resource naming conventions were assigned by the Agent during field delineation efforts. The Corps has adopted the naming conventions for documentation consistency, although they may not directly coincide with the feature being described or its jurisdictional status.

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.

- 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
 - **STRM01** (1,340 feet) is a channelized drainage ditch that begins at a culvert outfall under Dorris Road along the northern limits of the Review Area. The drainage ditch flows from north to south paralleling the eastern limits of the Review Area. Review of historic aerial photography dating back to 1938 illustrates the presence of surface drainage and the lack of a previously defined tributary or other natural drainage feature, including wetlands, prior to the presence of the linear ditch. Additionally, a wetland data form was completed adjacent to the ditch and did not indicate the presence of a wetland. This is further supported by the 16-feet of elevation change (decrease) between Dorris Road and Neilson Road to the south, which would reduce the potential for development of wetlands. Drainage conveyed through the ditch south of the Review Area enters an actively cultivated swale prior to the roadside ditch network along Neilson Road. No OHWM or bed and banks can be observed south of the Review Area. STRM01 is excluded as a paragraph (b)(3) water as it is a linear constructed ditch that was excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water.
 - 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).
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 January 23, 2023
 - b. USGS Topographic Maps, 1:24,000 Scale, Thompsonville, IL Quad
 - c. Antecedent Precipitation Tool
 - d. USGS NHDPlus
 - e. USGS Stream Stats
 - f. USGS Illinois Geologic Maps

⁸ 88 FR 3004 (January 18, 2023)

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- g. USDA-NRCS Soil Survey for Franklin County, Illinois
- h. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
- i. Illinois Height Modernization (ILHMP) LiDAR Data
- j. Illinois Historic Aerial Photography – ISGS Geospatial Data Clearinghouse
- k. Google Earth Pro Aerial Imagery, Various Aerial Images

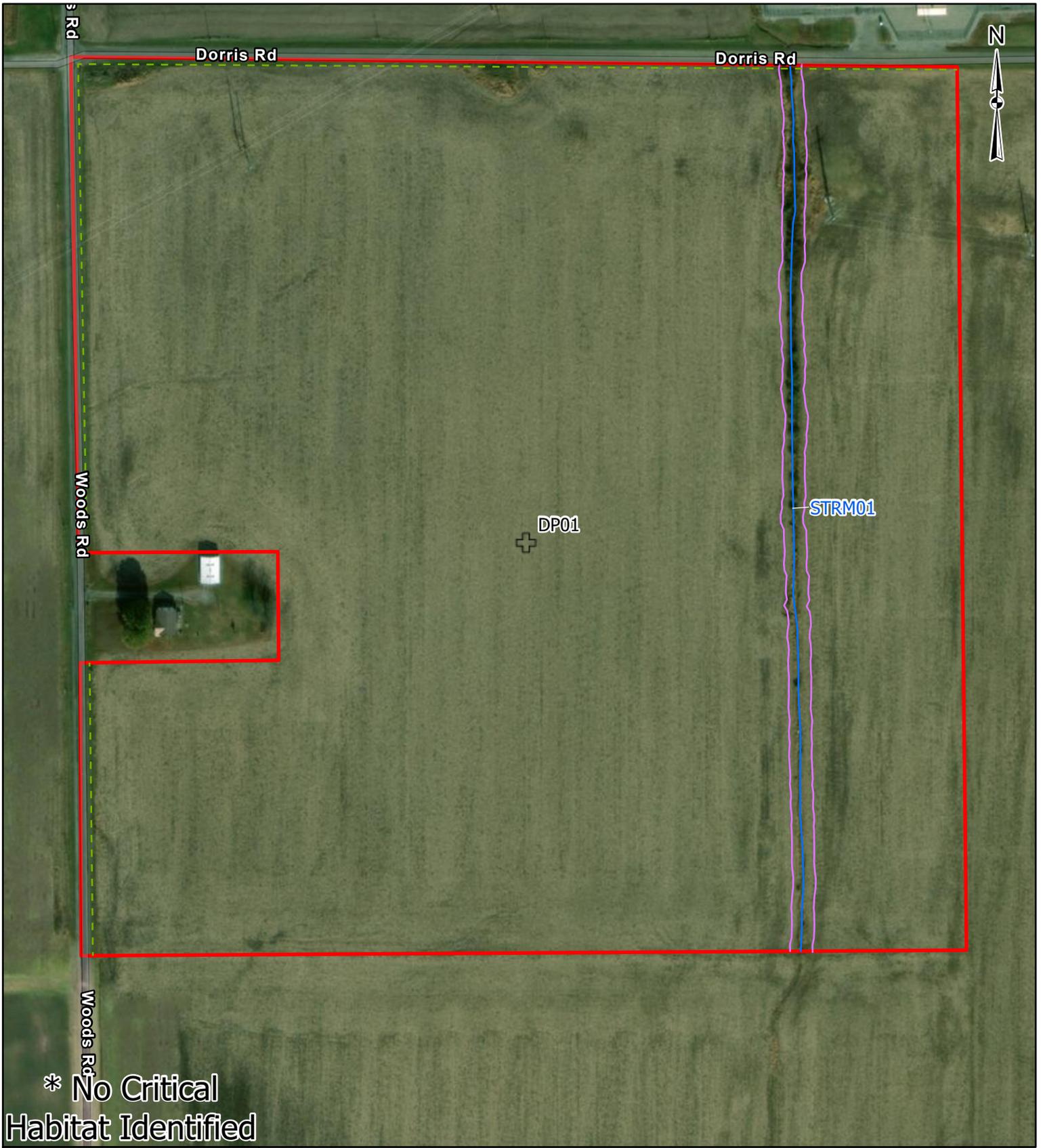
10. OTHER SUPPORTING INFORMATION.

Antecedent Precipitation Tool Results

Delineation Field Evaluation Dates:

January 11, 2023: Wet Season / Normal Conditions / Mild Drought

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

- Project Boundary
- + Data Point
- Stream
- Ordinary High Water Mark
- - - Drainage Ditch

0 250 500
US Feet

BLACK MOUNTAIN
ENERGY

UTILITY
INFRASTRUCTURE
SOLUTIONS

hbk
ENGINEERING

A QUANTA SERVICES COMPANY

Exhibit 2

WOTUS and Critical Habitat Map

Man O' War BESS

Black Mountain Energy

Franklin County, IL