



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

CEMVS-RD

December 12, 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-2024-593](#)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) Ephemeral Stream 1 (2,251 feet), non-jurisdictional
- 2) Ephemeral Stream 2 (1,467 feet), non-jurisdictional
- 3) Ephemeral Stream 3 (427 feet), non-jurisdictional
- 4) Ephemeral Stream 4 (97 feet), non-jurisdictional
- 5) Ephemeral Stream 5 (985 feet), non-jurisdictional
- 6) Ephemeral Stream 6 (717 feet), non-jurisdictional
- 7) Ephemeral Stream 7 (3,613 feet), non-jurisdictional
- 8) Ephemeral Stream 8 (377 feet), non-jurisdictional
- 9) Ephemeral Stream 9 (215 feet), non-jurisdictional
- 10) Ephemeral Stream 10 (229 feet), non-jurisdictional
- 11) Ephemeral Stream 11 (1,023 feet), non-jurisdictional
- 12) Intermittent Stream 1 (1,650 feet), jurisdictional (Section 404)
- 13) Wetland 1 (0.25-acre), non-jurisdictional
- 14) Wetland 2 (0.18-acre), non-jurisdictional
- 15) Wetland 3 (0.27-acre), non-jurisdictional
- 16) Wetland 4 (0.11-acre), non-jurisdictional
- 17) Wetland 5 (0.15-acre), non-jurisdictional
- 18) Wetland 6 (0.39-acre), jurisdictional (Section 404)
- 19) Wetland 7 (0.24-acre), jurisdictional (Section 404)
- 20) Wetland 8 (0.58-acre), jurisdictional (Section 404)
- 21) Wetland 9 (0.04-acre), jurisdictional (Section 404)
- 22) Wetland 10 (0.23-acre), 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) (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 531-acres proposed for solar development in Six Mile and Tyrone Townships, Franklin County, Illinois. The Review Area generally lies in Sections 5 and 6, Township 7 South, and Range 1 East. Approximate coordinates for the center of the Review Area are Latitude 37.9426° and Longitude -89.1307°.
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. [Surface drainage exits the Review Area through unnamed tributaries to the Little Muddy River, from east to west. The Little Muddy River eventually intersects 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

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.

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 (3rd Order Reach) (1,708 feet) has an approximately 1,795-acre watershed at its downstream most extent within the Review Area. At the time of the delineation, during the wet season (drought conditions), the stream reach was observed with flowing water. The flow regime is consistent throughout the tributary's extent within the Review Area and is representative of the entire evaluated stream reach. Physical characteristics combined with the systems watershed conditions provide weight of-evidence that the tributary contains continuous flow at least seasonally or flowing water continuously during certain times of the year, which is necessary to meet the relatively permanent standard.

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

Wetland 6 is part of a larger forested wetland complex extending north outside the Review Area, which *abuts* Intermittent Stream 1 (RPW-requisite water).

Wetland 7 *abuts* Ephemeral Stream 10 (229-feet) before intersecting Intermittent Stream 1 (RPW-requisite water).

Wetland 8 is part of a larger forested wetland complex extending east outside the Review Area, which *abuts* Intermittent Stream 1 (RPW-requisite water).

Wetland 9 is separated from Ephemeral Stream 10 and Intermittent Stream 1 (RPW-requisite water) by the tributary's natural berm. Out of bank events result in Intermittent Stream 1 providing hydrology to Wetland 9. At capacity the wetland drains back into the tributary via surface flow, over the natural berm. As such, Wetland 9 is adjacent to Intermittent Stream 1.

Wetland 10 *abuts* a secondary braided channel of Intermittent Stream 1 (RPW-requisite water) outside the Review Area.

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).

Wetland 1 and **Wetland 2** are depressional wetlands abutting Ephemeral Stream 7 and an erosional feature to Ephemeral Stream 5, respectively. Ephemeral Stream 5 and 7 are part of a braided complex of a first-order non-RPW tributary. Hydrology from the wetlands enters Ephemeral Stream 7, which flows west out of the Review Area before entering the forested floodplain of the Little Muddy River. Based on lidar, the channel intersects a large wetland complex comprised of numerous braided channels and other aquatic features (i.e. forested wetlands) immediately west of Big Pond Road, which likely meet the Relatively Permanent Standard.

- Flow Path: **Wetland 1** ->Ephemeral Stream 7 (2,344 feet) -> culvert (40 feet) -> tributary/wetland complex (RPW-Requisite Water)
- Flow Path: **Wetland 2** -> Erosional Feature (213 feet) -> Ephemeral Stream 5 (1,595 feet) -> Ephemeral Stream 7 (964 feet) -> culvert (40 feet) -> tributary/wetland complex (RPW-Requisite Water)

Based on the length of the flow paths (2,384 feet and 2,812 feet, respectively), the Corps has determined that the approximately 0.45-mile and 0.53-mile physical connections between the wetlands and the likely relatively permanent water are long, and the connection is via non-RPW tributaries, a culvert, and erosional feature. After consideration of flow, the number, the types, and the length of connections between the wetlands and the requisite covered water are not physically close enough to meet the continuous surface connection

⁸ 88 FR 3004 (January 18, 2023)

requirement. Thus, Wetland 1 and Wetland 2 do not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, are not “adjacent.”

Wetlands 3 and Wetland 4 are depressional wetlands within an active agricultural field that collect surface run-off. No discrete features or non-RPW tributaries were identified exiting the wetland features downslope.

- Flow Path(s): None

Wetland 5 abuts a non-RPW tributary outside of the Review Area. The first-order non-RPW tributary (478 feet) extends north through the forested community, before transitioning into an agricultural waterway (1,628 feet) and back to a non-RPW tributary (543 feet) north of Yellow Banks Road before entering an RPW at Latitude 37.9516° and Longitude -89.1267°.

- Flow Path: Wetland 5 -> non-RPW tributary (478 feet) -> waterway (1,628 feet) -> culvert (40 feet) -> non-RPW tributary (543 feet) -> Intermittent Stream 1 (RPW - Requisite Water).

Based on the length of the flow path (2,689 feet) through four (4) features, the Corps has determined that the approximately 0.50-mile physical connection between the wetland and the relatively permanent water is long, and the connection is via non-RPW tributaries, culverts, and other non-relatively permanent waters that have varying physical indicators of flow frequency, and duration. After consideration of flow, the number, the types, and the length of connection, the 2,689-foot length of connection between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland 5 does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not “adjacent.”

**Ephemeral Stream 1 / Ephemeral Stream 2 / Ephemeral Stream 3 /
Ephemeral Stream 4 / Ephemeral Stream 5 / Ephemeral Stream 6 /
Ephemeral Stream 7 / Ephemeral Stream 8 / Ephemeral Stream 9 /
Ephemeral Stream 10 / Ephemeral Stream 11**

Each of these five (11) tributaries are first-order tributaries, that lie within the upper extents of agricultural watersheds. 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 their location within the local watersheds and the lack of standing or flowing water for more than a short duration in direct response to precipitation, these features are best characterized as non-relatively permanent waters.

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 Topographic Maps, 1:24,000 Scale, Elkhville, IL Quad
 - c. USGS NHDPlus
 - d. USGS Stream Stats
 - e. Antecedent Precipitation Tool
 - f. USDA-NRCS Soil Survey for Franklin County, Illinois
 - g. USFWS National Wetland Inventory, Color Infrared, 1980's, 1:58,000 Scale
 - h. Illinois Height Modernization (ILHMP) LiDAR Data
 - i. Illinois Historic Aerial Photography – ISGS Geospatial Data Clearinghouse
 - 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	37.9427°	-89.1298°	0.25	PFO	No	No
Wetland 2	37.9424°	-89.1305°	0.18	PEM	No	No
Wetland 3	37.9365°	-89.1253°	0.27	PEM	No	No
Wetland 4	37.9451°	-89.1191°	0.11	PEM	No	No
Wetland 5	37.9446°	-89.1234°	0.15	PEM	No	No
Wetland 6	37.9536°	-89.1322°	0.39	PEM	Yes	Yes
Wetland 7	37.9522°	-89.1295°	0.24	PEM	Yes	Yes
Wetland 8	37.9503°	-89.1279°	0.58	PEM	Yes	Yes
Wetland 9	37.9532°	-89.1289°	0.04	PFO	Yes	Yes
Wetland 10	37.9536°	-89.1280°	0.23	PFO	Yes	Yes

Table 1. Tributaries Identified within the Review Area

Feature ID	Latitude	Longitude	Length (feet)	Stream Order	Flow Characteristics	WOTUS
Intermittent Stream 1	37.9532°	-89.1283°	1,650	3 rd	RPW	Yes
Ephemeral Stream 1*	37.9367°	-89.1343°	2,251	1 st	NRPW	No
Ephemeral Stream 2*	37.9373°	-89.1335°	1,467	1 st	NRPW	No
Ephemeral Stream 3*	37.9375°	-89.1369°	427	1 st	NRPW	No
Ephemeral Stream 4	37.9423°	-89.1304°	97	1 st	NRPW	No
Ephemeral Stream 5	37.9435°	-89.1315°	985	1 st	NRPW	No
Ephemeral Stream 6*	37.9415°	-89.1279°	717	1 st	NRPW	No
Ephemeral Stream 7*	37.9418°	-89.1280°	3,613	1 st	NRPW	No
Ephemeral Stream 8*	37.9493°	-89.1227°	377	1 st	NRPW	No
Ephemeral Stream 9	37.9498°	-89.1199°	215	1 st	NRPW	No
Ephemeral Stream 10	37.9530°	-89.1291°	229	1 st	NRPW	No
Ephemeral Stream 11	37.9517°	-89.1328°	1,023	1 st	NRPW	No

*Tributary part of a larger 1st order braided stream complex

Joint Policy Memorandums: [NWK-2024-00392](#), [POH-2023-187](#), [NWK-2022-00809](#), [NAP-2023-01223](#), & [SWG-2023-00284](#)

Antecedent Precipitation Tool Results

Delineation Field Evaluation Dates:

October 25, 2022: Wet Season / Drier than Normal / Mild Drought

April 4, 2023: Wet Season / Wetter than Normal / Incipient Drought

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.

