



## MEMORANDUM ON MVS-2023-00288

### Summary

For MVS-2023-00288, the U.S. Environmental Protection Agency and the Office of the Assistant Secretary of the Army for Civil Works (OASACW) at the U.S. Department of the Army have determined that the draft approved jurisdictional determination (JD) adequately supports the non-jurisdictional status of Stream 1.

On May 25, 2023, the Supreme Court decided *Sackett v. EPA* and concluded that the *Rapanos* plurality established the proper jurisdictional standard under the Clean Water Act for relatively permanent waters and adjacent wetlands. 598 U.S. 651 (2023). The concept of how to identify tributary reaches for purposes of assessing tributaries was not affected by the decision in *Sackett*.<sup>1</sup> The direction in this memorandum is consistent with the Clean Water Act (CWA) and the amended 2023 rule<sup>2</sup> at 33 CFR 328.3 and 40 CFR 120.2. In providing this direction, we have also utilized relevant case law and existing guidance included within the January 2023 rule preamble, consistent with *Sackett*.

### I. The Draft Approved JD Adequately Supports the Non-Jurisdictional Status of Stream 1

The draft approved JD covers an approximately 30-acre site located west of Griggsville, Pike County, Illinois at 39.7239 North latitude and -90.7894 West longitude. The St. Louis District voluntarily coordinated with EPA Region 5 regarding the jurisdictional

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<sup>1</sup> The concept of how to identify tributary reaches for purposes of assessing tributaries was not affected by the decision in *Sackett* for either of the regulatory regimes that are currently operative across the country due to ongoing litigation (i.e., the amended 2023 rule and the pre-2015 regulatory regime being implemented consistent with *Sackett*).

<sup>2</sup> The amended 2023 rule refers to the "Revised Definition of 'Waters of the United States,'" (88 FR 3004, January 18, 2023; "January 2023 rule") as amended by the final rule "Revised Definition of 'Waters of the United States'; Conforming" (88 FR 61964, September 8, 2023; "conforming rule") (33 CFR 328.3; 40 CFR 120.2). It is the rule that is currently operative in the State of Illinois.

status of Stream 1 in this draft approved JD, and Region 5 subsequently elevated the draft approved JD to the agencies' Headquarters offices for review.

In the draft approved JD, the District determined that Stream 1 is a third order tributary reach that is 15,491 total linear feet, with a segment of 5,729 linear feet located within the review area. Stream 1 extends both north and south of the review area. The draft approved JD states that the flow characteristics observed at the farthest downstream limit of the stream were determined to meet the relatively permanent standard. However, these characteristics were not representative throughout the evaluated tributary reach, particularly outside the review area where the streambed slopes differ. In its entirety, the majority of the tributary reach had characteristics of non-relatively permanent flow and the minority of the tributary reach, largely within the review area, had characteristics of relatively permanent flow. Therefore, Stream 1 was classified in the draft approved JD as a non-relatively permanent tributary, as the District determined that the non-relatively permanent characteristics best characterize the tributary reach.

As part of the joint coordination process under the 2023 rule, as amended, EPA Region 5 elevated this voluntarily coordinated draft approved JD, specifically for Stream 1, with questions regarding the appropriate approach in determining jurisdictional status when a tributary reach consists of multiple flow regimes. Region 5 questioned whether the underlying differences in site conditions would be sufficient to consider Stream 1 as two separate reaches – one with relatively permanent flow, and one with non-relatively permanent flow.

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the January 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the January 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 amended 2023 rule, generally remain relevant to implementing the amended 2023 rule. The January 2023 rule preamble states that<sup>3</sup>:

“[t]o determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler<sup>4</sup> stream order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream; *see* Technical Support Document section IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream they connect to. Consistent

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<sup>3</sup> 88 FR 3086 (January 18, 2023).

<sup>4</sup> Strahler, A. N. 1957. “Quantitative analysis of watershed geomorphology.” American Geophysical Union Transactions 38: 913-920.

with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (*i.e.*, the point the tributary enters a higher order stream). *Rapanos* Guidance at 6 n.24. Where data indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used.”

## II. Conclusion

Based upon the evaluation approach described in the January 2023 rule preamble, the agencies have determined that the District used the appropriate approach to identifying and characterizing the flow characteristics of Stream 1, and the non-jurisdictional status of Stream 1. Stream order is a common, longstanding scientific concept of assigning whole numbers to indicate the branches of a stream network. Using stream order to identify stream reaches is transparent, well-understood, predictable, and easy to implement. The agencies have determined that the site-specific conditions do not warrant using an alternative approach. Therefore, no further action is needed by the St. Louis District, and the District may proceed to finalize draft approved JD MVS-2023-00288.

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