



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

CEMVSOD-F

26 June 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ [MVS-2024-125](#)

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 For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable [[in this state, Missouri](#)] due to litigation.

¹ While the Supreme Court’s decision in *Sackett* 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. [Louiselle Creek, jurisdictional, Section 404](#)
 - ii. [Pond, non-jurisdictional](#)
 - iii. [Drainage A, non-jurisdictional](#)
 - iv. [Drainage B, non-jurisdictional](#)
 - v. [Drainage C, non-jurisdictional](#)
 - vi. [Drainage D, non-jurisdictional](#)

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

REVIEW AREA. [The review area includes a 15.56 acres residential parcel at 2212 Rule Avenue Maryland Heights, St. Louis County, Missouri. Central coordinates: 38.720172°, -90.467427°](#)

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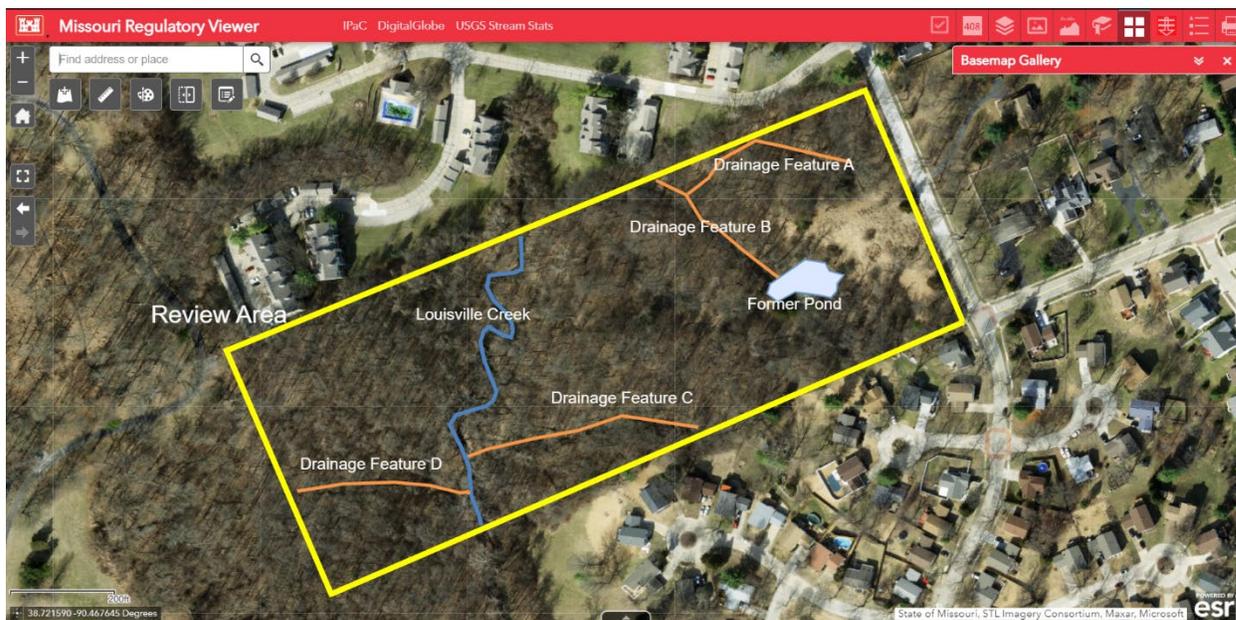


Figure 1. Review Area of property at 2212 Rule Avenue.

3. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A](#)
4. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [The subject waters flow through Louisville Creek, which flows through several culvert features and then flows into Fee Fee Creek, which then after 0.54 miles flows into Creve Coeur Creek which then after 0.85 miles flows into the navigable Missouri River.](#)
5. 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](#)

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.

6. 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 pre-2015 regulatory regime and 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 pre-2015 regulatory regime. 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. TNWs (a)(1): [N/A](#)
- b. Interstate Waters (a)(2): [N/A](#)
- c. Other Waters (a)(3): [N/A](#)
- d. Impoundments (a)(4): [N/A](#)
- e. Tributaries (a)(5):

[Louisville Creek \(also known as Louiselle Creek\) – 758 Linear Feet](#)

[*The stream segment is mapped in different resources by one of these two names with the most commonly used naming of “Louisville Creek” in mapping resources. USFWS National Wetlands Inventory map erroneously identifies Louisville Creek as a linear Freshwater Forested/Shrub Wetland feature. Louisville Creek has an elevation change of approximately 6 feet across its 758 linear foot length, with an average slope of less than 1% \(0.8%\).](#)

[Within the review area Louisville Creek is a Stream Order 1. There has been extensive development in the watershed just off of the mainstream stem and with 19.2% impervious surface in the upstream watershed of site the stream segment receives significant piped stormwater runoff from developments as hydrological inputs. According to the USGS Stream Stats Map, Louiselle Creek remains a stream order 1 until just upstream of the Bryce Canyon Drive crossing. A review of available aerial imagery shows flow present in the stream channel for the majority of the length across numerous years during leaf-off periods. The flow conditions within the review area appear to reflect the conditions in the overall stream length. USGS Topographic Maps identify the stream reach as an intermittent tributary and the on-site delineator identified the tributary as a](#)

perennial system. The tributary typically supports continuous flow year-round and meets the definition of a relatively permanent water meeting the definition of an (a)(5) Tributary, a jurisdictional waters of the U.S.

- f. The territorial seas (a)(6): *N/A*
- g. Adjacent wetlands (a)(7): *N/A*

7. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Pond – 0.137 acres

USFWS mapped freshwater pond but not mapped in USGS Topographic maps even at 1:24,000 scale which is likely due to the small size of the feature. The pond is located at the uppermost portions of the catchment with less than 3 acre watershed area draining into the pond feature and was constructed in uplands sometime between 1958 and 1968 according to images on [HistoricAerials.com](#). At the time the pond was constructed at the rear of a single residence on the large acre parcel and is believed to have been constructed for aesthetic purposes in uplands.

Recently intentionally breached, we believe sometime between April 2023 and the completion of the on-site delineation in November 2023. Recent March 2024 aerials do show some evidence of pooling of water in lower elevations of the basin. The basin drains to Drainage Feature B, an erosional swale which does not meet the definition of a waters of the U.S. For these reasons the USACE has determined that the feature is an artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons that the preamble considers generally non-jurisdictional.

- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.

⁷ 51 FR 41217, November 13, 1986.

Drainage Features (Drainage A-D)

No mapped in USFWS's National Wetlands Inventory, USGS Stream Stats Application, nor National Hydrography Dataset (NHD).

USGS Topographic Maps capture the landscape contours which do show relatively sharp topographic relief at the drainage features location but does not identify them as stream features. The drainage features and topographic relief are visible in USGS National Map 3D Elevation Maps (dated February 29, 2024 at this location).

The USDA soils maps the majority of the review area as Menfro silt loam, 9-15% slopes. The site is generally located on the well-drained, highly erodible, loess slopes of the hillslopes outside the Missouri River right descending bank floodplain. The Ecological site is Deep Loess Exposed Backslope Woodland and Forests. The highly erodible nature of the soils contributes to overly incised features along the historic high bank of the Missouri River have very small scale drainages that contribute to erosional features formations that do not rise to the level of an ephemeral stream. They have high slopes for the region and do not support defined bed and bank features. Delineator noted that the features lack an established bed and bank and ordinary high-water mark. These small features appear to only support stormwater flow for a short duration, during and immediately following, a rainfall event and do not support relatively permanent flow.

Drainage A – 283 linear feet

Exhibits a 40 foot elevation drop across it's short 283 length, with an average slope of 14%. It has a limited drainage area of less than 2 acres.

Drainage B – 300 linear feet

A 30 foot elevation drop occurs across it's 300 length, with an average slope of 10%. It has a limited drainage area of less than 3 acres.

Drainage C – 360 linear feet

Exhibits a 37 foot elevation change across it's 360 length, with an average slope of 10%. It has a limited drainage area of less than 4 acres.

Drainage D – 268 linear feet

This feature has a 35 foot elevation change across it's 268 length, with an average slope of 13%. It has a limited drainage area of less than 8 acres

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- 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](#)
8. 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 Investigation – 2212 Rule Avenue – Revised 3.6.24, On-Site Soils, November 10, 2023](#)
 - b. [U.S.G.S Topographic Maps, accessed 3/21/2024](#)
 - c. [U.S.G.S. Streams Stats, accessed 3/21/2024](#)
 - d. [U.S.D.A. Soil Web Map, accessed 3/21/2024](#)
 - e. [USACE Regulatory National Viewer, accessed 3/21/2024](#)
 - f. [FEMA Flood Map, accessed 3/7/2024](#)

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g. [St. Louis County Parcel Viewer](#), accessed 2/26/2024

h. [Google Earth Pro](#), accessed 3/25/2024

i. [Antecedent Precipitation Tool](#), accessed 3/25/2024

9. OTHER SUPPORTING INFORMATION. [N/A](#)

10. 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.