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

CEMVSOD-F [16 May 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) , MVS-2024-185

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.[1] 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.[2] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[3] 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 Missouri] due to litigation.

1. SUMMARY OF CONCLUSIONS.

[1] 33 CFR 331.2.
[2] Regulatory Guidance Letter 05-02.
[3] 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.

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. Stream A - 2nd Order, (598 linear feet), non-jurisdictional
ii. Stream A - 3rd Order, (755 linear feet), non-jurisdictional
iii. Stream B - 1st Order, (190 linear feet), non-jurisdictional
iv. Stream B – 2nd Order, (136 linear feet), non-jurisdictional
v. Stream C – 1st Order, (223 linear feet), non-jurisdictional

2. REFERENCES.

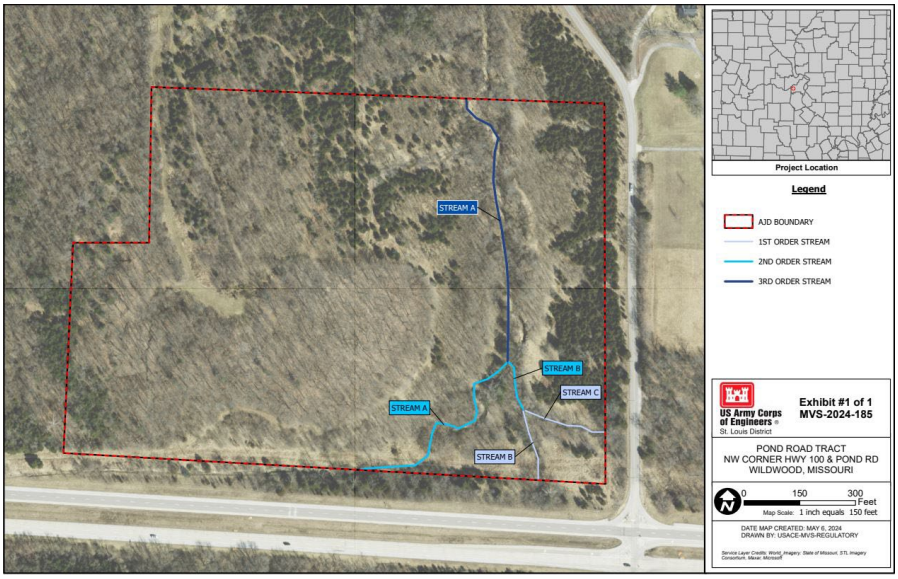
a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

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)

3. REVIEW AREA. The Review Area is the approximately 30.76-acre area located at the northwest corner of HWY 100 and Pond Rd intersection in Wildwood, MO with approximate geographic coordinates 38.587904°, -90.656918°.



4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Missouri River

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Stream C flows to Stream B which flows into Stream A. Stream A flows to Bonhomme Creek which flows to the Missouri River, a TNW.

6. SECTION 10 JURISDICTIONAL WATERS[4]: 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.[5] 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 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

[4] 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.
[5] 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.

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5): N/A

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): N/A

8. 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").[6] 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. N/A

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.

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

[6] 51 FR 41217, November 13, 1986.

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).

Stream A – 2nd Order (~598 linear feet) is a non-relatively permanent reach that would flow to Stream A – 3rd Order during times when the channel has surface discharge. Stream A – 2nd Order enters the Review Area running parallel to HWY 100 via a concrete lined channel before it turns to the N/NE across the utility ROW and becomes a natural channel bed. This reach had an undulating bedload and channel characteristics typical of a losing stream. No flow was observed during the USACE site visit on 4/23/2024 within this reach. The streambed did not contain a consistent low-flow channel or thalweg, and channel characteristics appeared to have developed by the repeated sequence of flashy streamflow, flow cessation, and channel drying throughout the year. Much of the channel had leaf wracking on the upstream side of rocks/debris indicative of the lack of consistent flows. Therefore, Stream A – 2nd Order was classified as a non-relatively permanent water.

Stream A – 3rd Order (~755 linear feet) is a non-relatively permanent reach that would flow to Bonhomme Creek during times when the channel has surface discharge. Stream A – 3rd Order originates at the confluence of Stream A – 2nd Order and Stream B – 2nd Order. Stream A – 3rd Order drains an approximately 313-acre watershed (Including 1st and 2nd Orders of Streams A, B, & C) to its' confluence with Bonhomme Creek. The evaluated 3rd order reach begins at the confluence of Stream A – 2nd Order and Stream B – 2nd Order (38.587004°, -90.656614°) and continues off-site to the confluence of Stream A – 3rd Order and Bonhomme Creek (38.596065°, -90.654597°). No flow was observed during the USACE site visit on 4/23/2024 within the portion of the reach located within the Review Area, however several discontinuous and isolated pools were observed. The streambed did not contain a consistent low-flow channel or thalweg, and channel characteristics appeared to have developed by the repeated sequence of flashy streamflow, flow cessation, and channel drying throughout the year. Much of the channel had leaf wracking on the upstream side of rocks/debris indicative of the lack of consistent flows. Stream A – 3rd Order had an undulating bedload and channel characteristics were typical of a losing stream. A 1st order stream fed by a hillside spring/seep was observed contributing flow to Stream A – 3rd order in a downstream, off-site portion of the reach just south of Portland Crest Ct. This portion of the reach beginning at this confluence (38.594456°, -

90.655595°) to the confluence of Stream A – 3rd Order with Bonhomme Creek was classified as a relatively permanent water. This portion of the reach was flowing at the time of the site visit and fish were present in the pools. The evaluated reach includes approximately 3,755' of stream length. 3,067' was classified as non-relatively permanent (82%) and 688' was classified as relatively permanent (18%). Therefore, Stream A – 3rd Order was classified as a non-relatively permanent water.

Stream B – 1st Order (~190 linear feet) is an ephemeral channel that would flow to Stream B – 2nd Order, likely only in direct response to a precipitation event. No flow was observed during the USACE site visit on 4/23/2024. Stream B – 1st Order was determined to be a non-relatively permanent water.

Stream B – 2nd Order (~136 linear feet) is an ephemeral channel that originates at the confluence of Stream B – 1st Order and Stream C – 1st Order and would flow to its' confluence with Stream A – 2nd Order during times when the channel has surface discharge. No flow was observed during the USACE site visit on 4/23/2024. Stream B – 2nd Order was determined to be a non-relatively permanent water.

Stream C – 1st Order (~223 linear feet) is an ephemeral channel that would flow to Stream B – 2nd Order, likely only in direct response to a precipitation event. No flow was observed during the USACE site visit on 4/23/2024. Stream C – 1st Order was determined to be a non-relatively permanent 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. USACE Site Visit, April 23, 2024

b. USGS Topographic Maps, Accessed April 30, 2024

c. USGS Stream Stats, Accessed April 5, 2024

d. Antecedent Precipitation Tool, Accessed April 25, 2024

e. USDA-NRCS Soil Survey, Accessed April 30, 2024

f. USFWS National Wetland Inventory, Accessed April 30, 2024

g. LiDAR, Accessed April 30, 2024

h. Google Earth Pro Aerial Imagery, Accessed April 30, 2024

10. OTHER SUPPORTING INFORMATION. A review of USGS topographic maps from 1940-2021 identifies a tributary in the location of Stream A. From 1940-1993, the feature is indicated as a "dashed blue line," while from 2012-2021 the feature is indicated as a "solid blue-line." The USGS Stream Stats identifies Stream A and shows a drainage area of ~313 acres (including Streams B & C) to its' confluence with Bonhomme Creek. The U.S. Fish & Wildlife Service's (USFWS) National Wetland Inventory (NWI) mapper generally matches the USGS topographic maps depicting the linear riverine feature. The MO Gaining and Losing Streams Segments 2018 data layer indicated the portion of the Stream A reaches within the Review Area were indicated as losing stream segments. The mapped losing stream segment continued north outside of the Review Area until the spring-fed/seep 1st order stream entered Stream A. These mapped stream segments generally matched conditions observed in the field.

The Corps visited the site on April 23, 2024, during normal conditions during the wet season, with the drought index indicating a severe drought. During the site visit, Stream A was primarily a dry channel with some isolated pools of standing water. Streams B & C were dry channels. In addition, the Corps visited the downstream, off-site portion of Stream A near its' confluence with Bonhomme Creek. A hillside spring/seep was identified feeding Stream A via a 1st order stream. Downstream of the spring/seep, flow was observed, and fish were present in some of the pools.

Below is the consultant submittal of delineated features.

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.