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

CEMVS-RD 18 MARCH 2025

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-2024-553 Reconsideration 3/18/2025

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.

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[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.

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. Tributary A – 250 linear feet, jurisidictional, Section 404

      ii. Drainage Swale – 1,020 linear feet, non-jurisidictional

      iii. Pond – 0.29 acres, non-jurisidictional

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)

   e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

   f. 2008 Rapanos Guidance

3. REVIEW AREA.
   The review area is within a 96.83-acre agricultural parcel located just to the west of the city limits of Cuba, Missouri within Crawford County. Located within Section 36, Township 39 North, Range 5 West with central coordinates of the site 38.060584°, -91.42261°

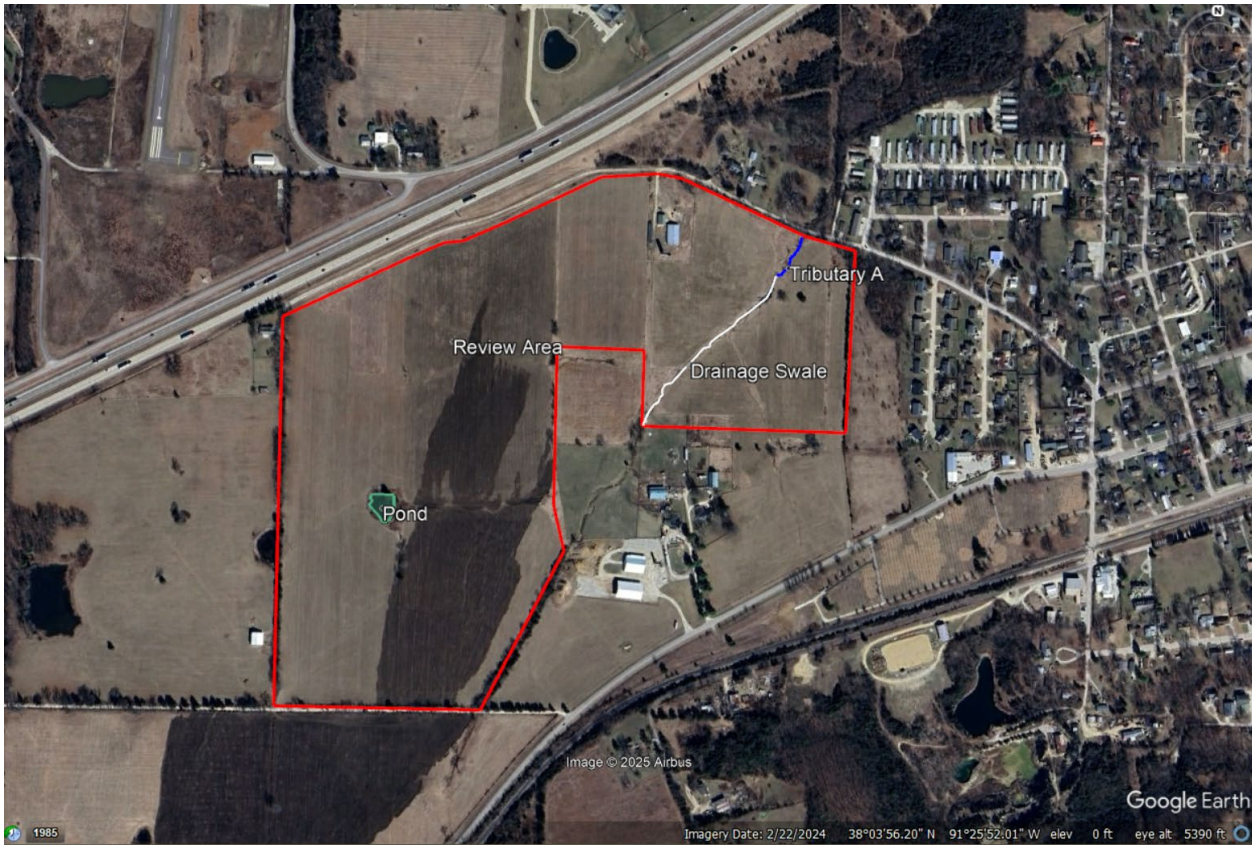

Figure 1. Review area map overlaid Google Earth Aerial dated 2/22/2024.

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.
   The flow path from the aquatic resources on site all flow to an upper reach of the Pleasant Valley Creek, which flows into Brush Creek, then the Bourbeuse River which is a primary tributary to the Meramec River that is a navigable water in its lower length. Meramec River is a primary tributary to the navigable Mississippi River.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

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

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

   e. Tributaries (a)(5):

      Tributary A – 250 linear feet
      The channel flows through the northeastern portion of the site and is generally located at 38.062824068°, -91.4185603103°. The tributary flows through an agricultural parcel that appears to have been used for many years for agricultural

[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.

purposes with historic aerials showing the area used extensively for pastureland. Due to this land use entailing the removal of any forested riparian and cattle not being fenced outside of the channel have created modified stream conditions on site. Upgradient portions of the watershed are transported through a drainage swale with no riparian and over widened into pools from cows utilizing these areas for drinking and cooling. This area is further discussed as “Drainage Swale” in Section 8.b as a preamble generally not jurisdictional aquatic resource.

A review of desktop resources all identified the stream length within the review area. The stream reach is mapped as an intermittent length in all of the USGS Topographic, 1:24,000 scale maps reviewed (1948, 2012, 2015, 2017, 2021, 2023). USFWS NWI maps the stream as a riverine stream system, USGS Stream Stats maps the stream through the parcel and extend the mapped length further upgradient and outside of the review area. MDNR Water Quality Standards Map identifies this under Reach Code 07140103000976 with Waterbody Identification Number 5028 and the set identifies presumed uses for the stream: warm water habitat, irrigation, livestock and wildlife protection, secondary contact recreation, whole body contact recreation category B, and human health protection. The upper reaches of a FEMA mapped Flood Zone A starts at the downstream most segment within the review area and continues along the Stream Order 1 length. The NRCS Soils web map was reviewed and predominant soil series in this upper portion of the watershed was the Plato series which documents the presence of a fragipan and this high clay content appears to stopping flow from moving down through soil profile and forcing laterally, slowly.

On site evaluation by the delineator shows no flow at the time of the site visit and inconsistent Ordinary High Water Mark features observed, however the visit occurred during an Incipient Drought within the wet season with drier than normal conditions present. In the 30 days preceding the site visit only 0.01” rainfall had been recorded. A follow up site visit was completed by the delineator and USACE staff on January 28, 2025 to better define the uppermost extent of the stream length. Consistent bed and bank, sediment sorting, compression of cobble in the stream bed, bank shelving was consistently observed in the stream length extending 250 linear feet immediately upstream of the McLeod Street crossing.

In accordance with the Assessing Relatively Permanent Flow from the 2008 *Rapanos* Guidance the entire Stream Order 1 length was evaluated. The downstream most point of the Stream Order 1 length is located at 38.066562°, -91.412911°. As the site is in the upper most reach and the channel in various

states of modification along its length it was determined that an evaluation of the entire length was the most appropriate way to evaluate the flow within the reach.

Google Earth aerial imagery with adequate resolution, clarity, and visibility were utilized to evaluate flow through the entire Stream Order 1 reach. Aerials with capture dates 2/22/2024, 11/5/2022, 4/15/2020, 2/3/2017, 10/28/2014, 4/1/2012. Five of the six aerial years showed evidence of flow consistently along the visible stream lengths along the Stream Order 1 length. The stream order length was also evaluated in the field by USACE on 12/12/2024 and 1/28/2025 and flow was the predominant condition in the majority of the stream order 1 length. StreamStats low flow figures for "60 Day 10 Year Low Flow" are 0.00286 CFS (1.3 GPM) indicating that flow is present in low flow situations.

Overall, the desktop resources and field investigations appear to support that flow being present within the Stream Order 1 length is the dominant condition and that the tributary supports relatively permanent flow. The Corps has determined that Tributary A would meet the definition of a jurisidictional (a)(5) Waters of the U.S.

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").[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 – 0.29 acres
The small freshwater pond is located in the uppermost elevations of the catchment, being generally located at coordinates: 38.0595050709°, -91.4254413679°. The pond is not mapped within all of the USGS Topographic, 1:24,000 scale maps reviewed (1948, 2012, 2015, 2017, 2021, 2023), nor is it mapped by FEMA Flood Maps, MDNR Water Quality Standards Map or USGS Stream Stats map. USFWS NWI maps the pond as a freshwater pond with no mapped connection to the nearby riverine system. The feature is visible on aerial

[7] 51 FR 41217, November 13, 1986.

images as well as in lidar imagery but there is no evidence of a tributary being present immediately upstream or downstream of the pond embankment.

The field delineators report confirmed that the pond appears to collect limited surface flows from the 10-acre watershed that drains towards the feature. Limited open water was noted in aerial imagery as well as during the site investigation which demonstrate the limited flow captured by the pond embankment.

A review of desktop resources, including recent and historical aerial images, all identified the pond as constructed in uplands and utilized as a farm stock pond. For these reasons the Corps has determined that the pond would be considered a generally not jurisidictional feature, as described in the preamble to the 1986 regulations.

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.

Drainage Swale – 1,020 linear feet
This feature is the erosional, upper portions of Tributary A, with Central coordinates are 38.06149215°, -91.420217°. This feature is within the mapped length of the desktop resources discussed in Tributary A but field observations and desktop resources show that this area is an area of much lower slope in the uppermost portion of the catchment. Further upgradient it appears that some of these areas were cut or ditched to drain uplands and the presence of the Plato soil series which has an impermeable clay layer may have resulted in more saturated conditions in the soils and agricultural uses may have attempted to aid drainage through ditching. During USACE field investigation there was flow present but a lack of ordinary high water mark features in the Drainage Swale area with upland vegetation present throughout the inundated areas. The lack of change of vegetation type and the lack of destruction of terrestrial, upland, vegetation support defining this area as an upland drainage swale area that the *Rapanos guidance* identified as generally, not a jurisdictional waters of the U.S.

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

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 Investigation – Village at Silo Ridge, Cuba, MO* report by On-Site Soils dated 11/4/2024

b. *Stream Order and Jurisdictional Assessment,* report by On-Site Soils dated 11/27/2024

c. USACE Field Investigations, 12/12/2024 & 1/28/2025

d. USDA Soil Survey, accessed 10/16/2024

e. NETRonline historic aerial imagery, capture years: 1955, 1978, 1984 & 1995

f. Google Earth Pro aerial imagery, capture dates: 2/22/2024, 11/5/2022, 4/15/2020, 2/3/2017, 10/28/2014, 4/1/2012

g. Antecedent Precipitation Tool, accessed 11/20/2024

h. USFWS National Wetland Inventory, accessed 11/20/2024

i. MDNR Water Quality Standards Map Viewer, accessed 11/20/2024

j. USGS Stream Stats application, accessed 11/20/2024

10. OTHER SUPPORTING INFORMATION. N/A

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.