



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

CEMVSOD-F

30 October 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-2024-408](#)

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

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<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</sup> 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).

### **Tributaries**

- 1) Ephemeral Stream 1 (1,308 feet), non-jurisdictional
- 2) Ephemeral Stream 2 (909 feet), non-jurisdictional
- 3) Ephemeral Stream 3 (672 feet), non-jurisdictional
- 4) Ephemeral Stream 4 (279 feet), non-jurisdictional
- 5) Ephemeral Stream 5 (2,530 feet), non-jurisdictional
- 6) Ephemeral Stream 6 (265 feet), non-jurisdictional
- 7) Ephemeral Stream 7 (1,407 feet), non-jurisdictional
- 8) Ephemeral Stream 8 (244 feet), non-jurisdictional

### **Wetlands**

- 1) Wetland 1 (.31 acre), non-jurisdictional
- 2) Wetland 3 (.03 acre), 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)

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### 3. REVIEW AREA.

The Review Area consists of approximately 102-acres proposed for the development of an alternating current (AC) ground-mounted solar system located approximately two miles south of Louisiana, Pike County, Missouri. The 102-acre Review Area is part of a larger approximate 200-acre parcel. Approximate coordinates for the center of the Review Area are Latitude 39.4073° and Longitude -91.0686°.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Mississippi River](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [Buffalo Creek is the receiving water for all the surface drainage within the Review Area. Buffalo Creek flows into the Mississippi River.](#)
6. SECTION 10 JURISDICTIONAL WATERS<sup>4</sup>: 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. [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.

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<sup>4</sup> 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.

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- 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): [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”).<sup>5</sup> 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.

[Erosional Features labeled on the attached AJD Figure do not exhibit characteristics of streamflow nor do they have a defined bed, bank or ordinary high-water mark. As such, these erosional features do not satisfy the definition of an \(a\)\(5\) tributary. Therefore, these features are determined to be non-jurisdictional.](#)

- 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](#)

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<sup>5</sup> 51 FR 41217, November 13, 1986.

- 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).

- [Non-RPW Tributaries:](#)

[\*\*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 Streams 1 through 8 are first-order tributaries characterized by ephemeral flow regimes located within the upper extent of an agricultural watershed. 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 their respective local watershed and lack of physical characteristics indicating the presence of a groundwater connection, these features would not meet the Relatively Permanent Standard. The area located above Ephemeral Stream 4 consists of a hardwood forest cover type and serves as a filter strip prior to surface waters accumulating within Ephemeral Stream 4.](#)

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- **Non-jurisdictional Wetlands:**

**Wetlands 1 and 3** are depressional areas located within historically and actively farmed agricultural field. The wetlands serve as minor and temporary collection basins within an agricultural field setting. The features do not meet the definition of an (a)(1)-(7) water, and specifically are not considered (a)(7) Adjacent Wetlands; due to lack of a continuous surface connection to a relatively permanent (a)(4) Impoundment or (a)(5) Tributary water. No discrete features or non-RPW tributaries were identified exiting the wetland features.

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.

- Wetland Delineation Report dated July 2024
- USGS Topographic Maps, 1:24,000 Scale, Louisiana Quad
- USGS NHDPlus, Accessed September 13, 2024
- USGS Stream Stats
- Antecedent Precipitation Tool
- USDA-NRCS Soil Survey for Pike County
- USFWS National Wetlands Inventory
- LiDAR Data- Regulatory Viewer
- Various Aerial Images

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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

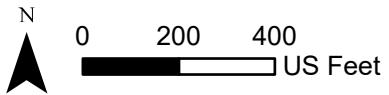
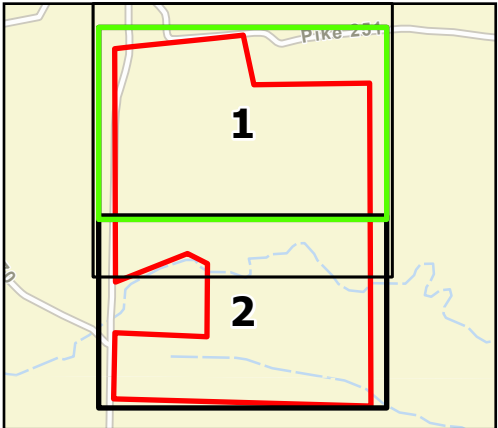


### Legend

- Delineated Area
- Limits of Disturbance
- Delineated Wetlands\***
- Non-Jurisdictional
- USACE-Jurisdictional

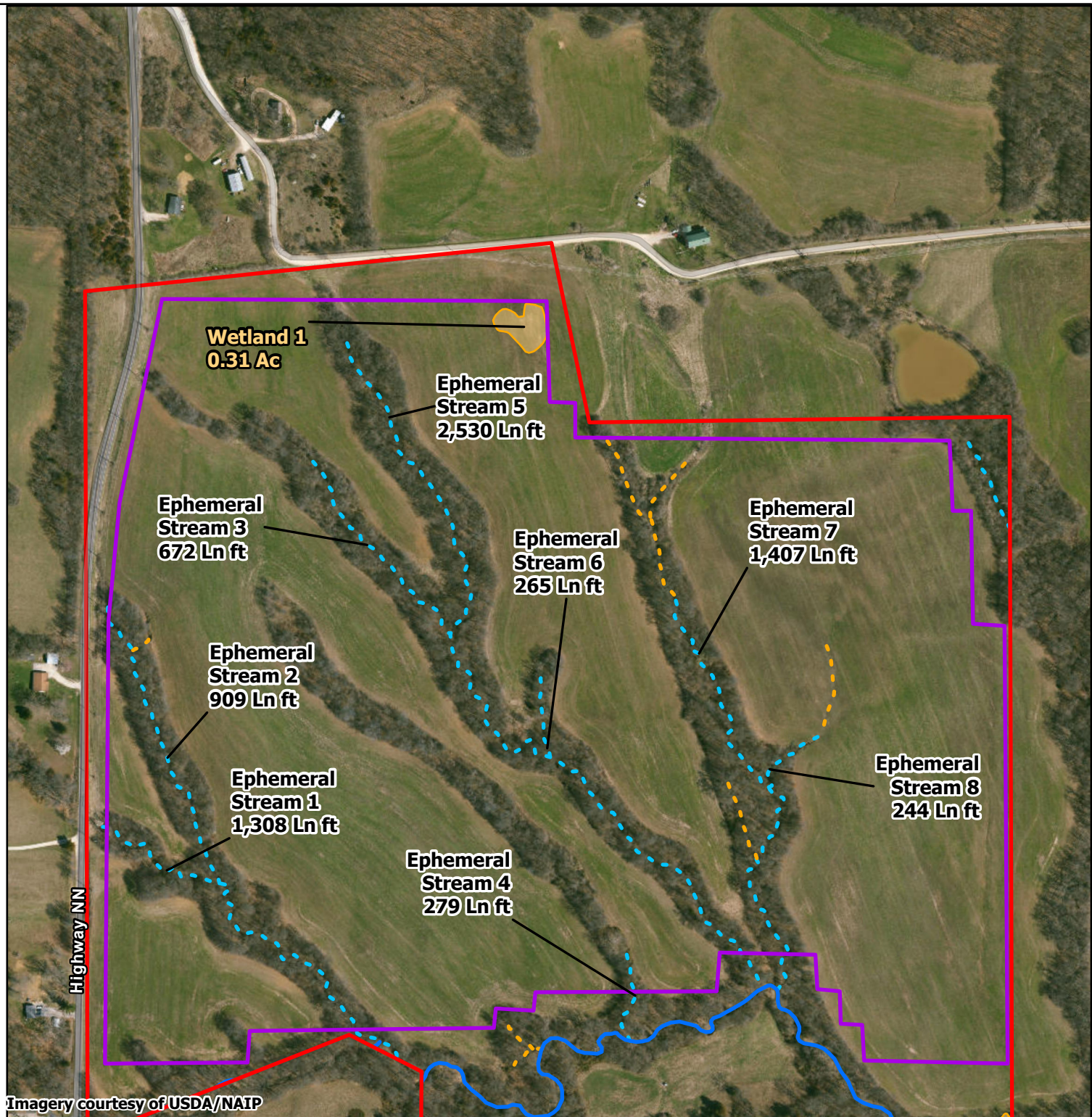
- Delineated Linear Features\***
- Non-Jurisdictional Ephemeral Stream
- Non-Jurisdictional Erosional Feature
- USACE Jurisdictional Intermittent Stream

\*Anticipated regulatory status has not been verified by the USACE



### Features Included in AJD





Ozark Overlook  
Solis Renewables LLC






Imagery courtesy of USDA/NAIP

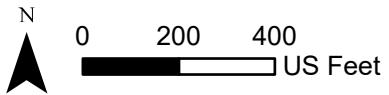
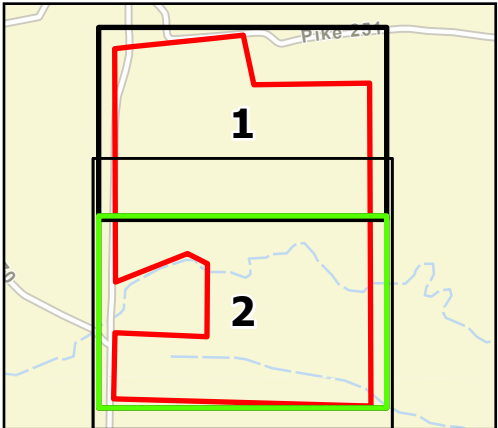


**Legend**

-  Delineated Area
-  Limits of Disturbance
- Delineated Wetlands\***
-  Non-Jurisdictional
-  USACE-Jurisdictional

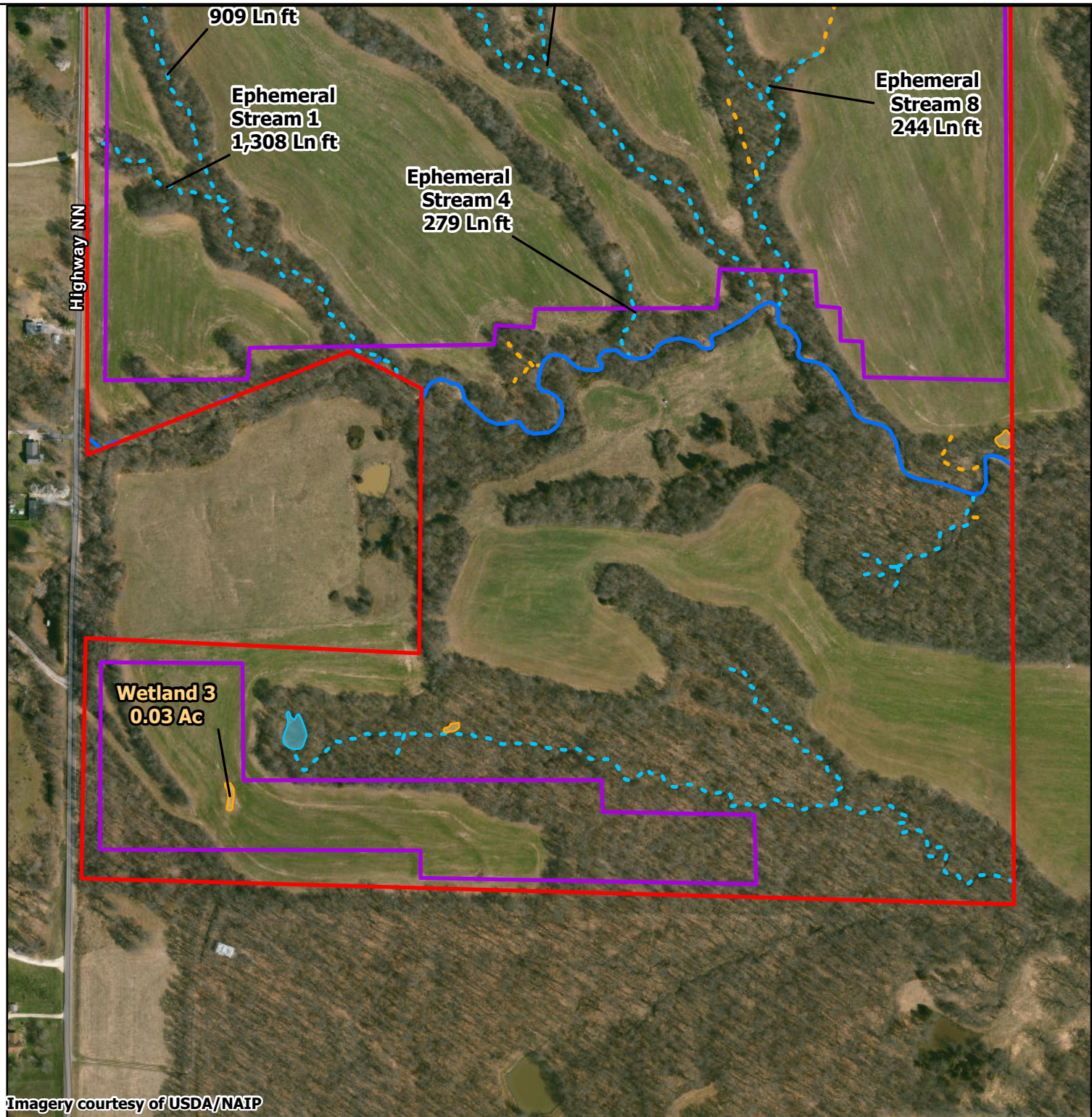
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