



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

CEMVSOD-F

20 September 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-2024-417](#)

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 [Missouri](#) due to litigation.

1. SUMMARY OF CONCLUSIONS.

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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- 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. [Unnamed Tributary, Section 404](#)

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 project review area is approximately a 50.84 acres size land parcel which includes an unnamed tributary on the west side of the property that flows into Brush Creek, which in turn flows into the Meramec River. The location of the project is Section 9, Township 43 North, Range 2 East, Latitude 38.4898 °N Longitude -90.8047 °W.](#)

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Figure 1: Review Area including NHD and NWI data

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Meramec River, as listed on www.mvr.usace.army.mil list navigable waters.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The Unnamed Tributary is a first order stream which flows into Brush Creek, which flows into the Meramec River.
- 6.
7. 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.

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8. 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): *N/A*
 - f. The territorial seas (a)(6): *N/A*
 - g. Adjacent wetlands (a)(7): *N/A*
9. 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. *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

⁷ 51 FR 41217, November 13, 1986.

be non-jurisdictional under the CWA based on the criteria listed in the guidance.
N/A

- 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).

Unnamed Tributary: The tributary is a first order stream that flows into Brush Creek, which flows into the Meramec River. The drainage area is approximately 0.12 square miles, or 76.8 acres. The National Hydrology Database (NHD) does show a blue line along the tributary and categorized this waterbody as intermittent. USGS 3D Elevation Hill Shade data also displayed shading along the tributary, indicating evidence of drainage. National Wetlands Inventory data also displayed evidence of potential open water to the east the tributary. Google Earth Pro Aerial Imagery did not show evidence of relatively permanent water flow through the tributary through years 1995-2023, though it did reveal evidence of ponding to the east of the tributary dating from 1995 until 2018. After years 2018, this pond seems to disappear and appears to have become taken over by woody vegetation. A site visit to the review area was conducted on September 13, 2024. The tributary was dry and had no water flow, as seen in historical aerial imagery. There was also no evidence of ponding the east of the tributary, and

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appeared heavily wooded, also seen in aerial imagery since 2018. There was a pipe structure observed that was plugged with rock debris, that may have severed any connection to the previously ponded area. The Antecedent Precipitation Tool was run for the day of the site visit, September 13, 2024, and revealed that though precipitation was slightly below the average normal precipitation range, the area was still considered to be in normal precipitation conditions. It was determined that this unnamed tributary to Brush Creek has non-relatively permanent water flow.

10. 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. Field visit, September 13, 2024
- b. Antecedent Precipitation Tool, September 13, 2024
- c. Google Earth Pro, Aerial Imagery
- d. 3DEP Hillshade Data
- e. 3DEP Digital Elevation Model (DEM)
- f. NHD/NWI data layers, National Regulatory Viewer
- g. StreamStats, USGS

11. OTHER SUPPORTING INFORMATION. *N/A*

12. 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.

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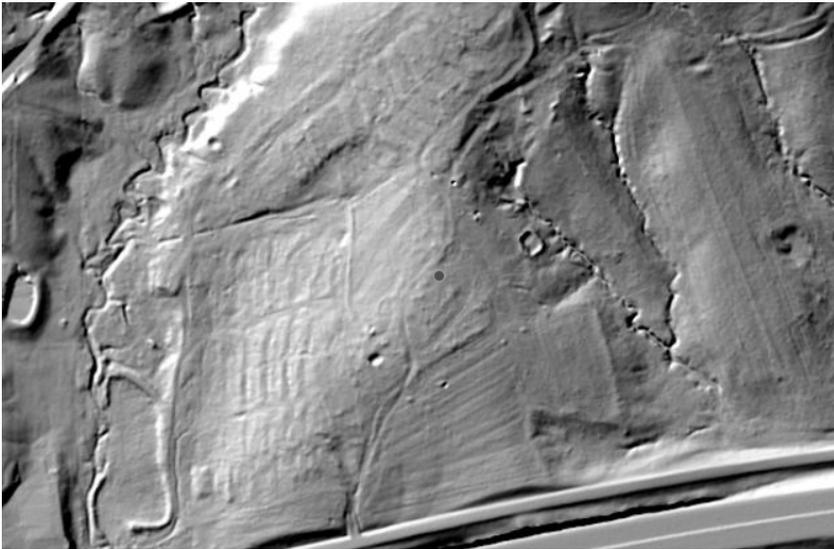


Figure 2 3 DEP Hillshade Imagery

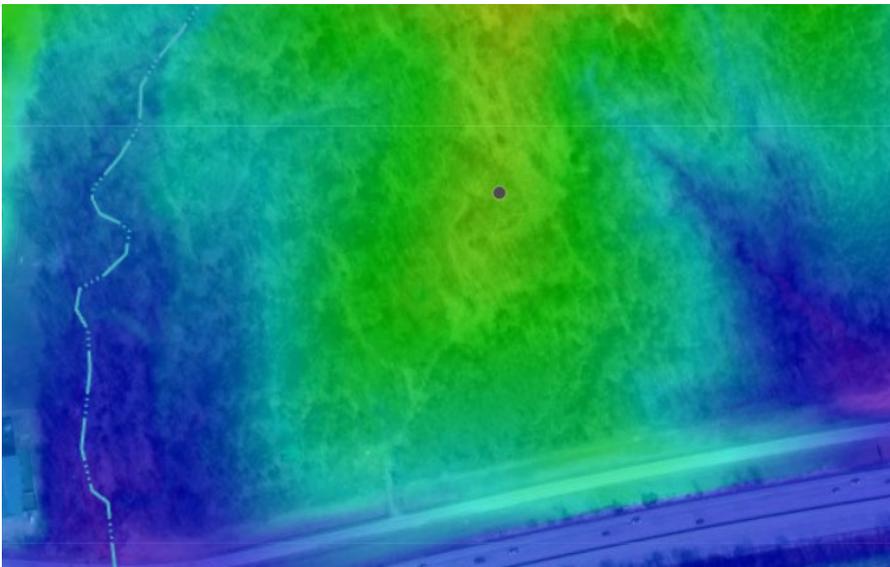


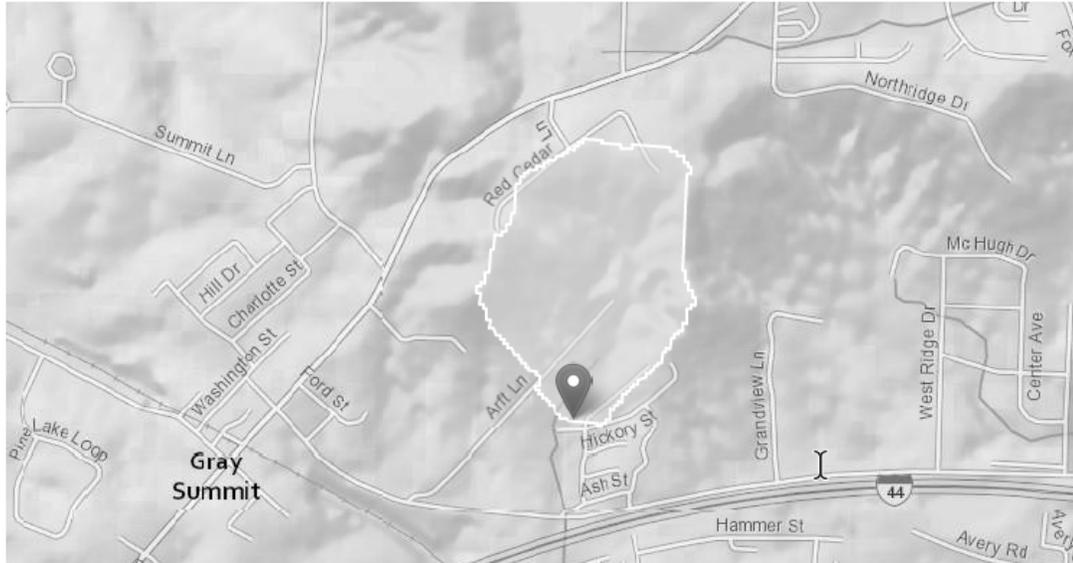
Figure 3 3DEP Digital Elevation Model

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StreamStats Report Brush Creek to Meramec River

Region ID: MO
Workspace ID: MO20240826214920564000
Clicked Point (Latitude, Longitude): 38.49019, -90.80709
Time: 2024-08-26 16:49:47 -0500



Collapse All

> Basin Characteristics

Parameter Code	Parameter Description	Value	Unit
BSHAPE	Basin Shape Factor for Area	1.88	dimensionless
CSL10_85	Change in elevation divided by length between points 10 and 85 percent of distance along main channel to basin divide - main channel method not known	378	feet per mi
DRNAREA	Area that drains to a point on a stream	0.12	square miles

Figure 4 Stream Stats Data

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Figure 5 Review area including NHD and NWI data.



Photo 1 Photo of tributary, North side of crossing, facing north

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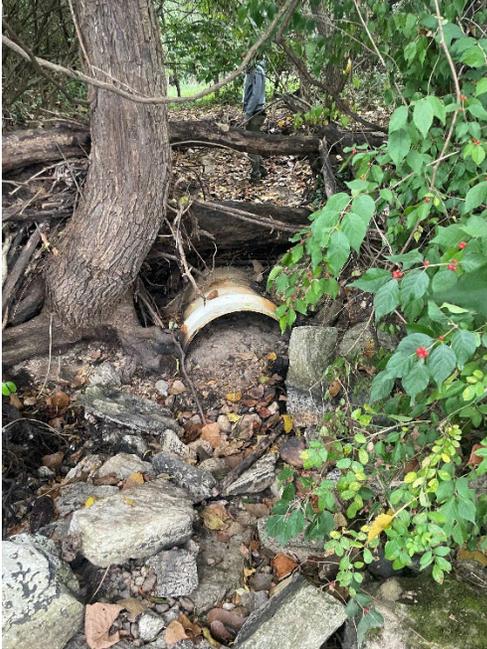


Photo 2 North side of crossing, facing north, close to road. Plugged pipe structure.



Photo 3 Culvert facing south towards road

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