



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

CEMVSOD-F

14 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),¹ MVS-2006-475

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. Drainage Feature A, non-jurisdictional, 745 linear feet
 - ii. Drainage Feature B, non-jurisdictional, 675 linear feet
 - iii. Pond, non-jurisdictional, 0.41 acres

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 consists of a 45.74 acre, currently composed of two parcels (Parcel ID: 02101102001009 & 02101101001071), bordered on the south of Corisande Hills Road, south of the Fox Creek at Corisande subdivision. Central coordinates of the site are 38.481612° latitude and 90.432928° longitude, within Jefferson County, Missouri.

Under the ORM number, this review area has been previously reviewed by the Corps under several different regulatory regimes. The first was completed on August 10, 2006 under the 1986 regulations and applicable guidance at the time. The AJD found ephemeral stream, (identified here as Drainage Feature B), to be a jurisdictional tributary and its impoundment, (identified here as Pond). In 2020 an updated AJD was requested under the Navigable Waters Protection Rule. The ephemeral stream (Drainage B) and it's impoundment (Pond) were found to be aquatic resources expressly excluded from the definition of WOTUS under exclusion (b)(3) and (b)(8).

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Navigable length of Meramec River, which flows to the Mississippi River.](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [These aquatic resources flow downgradient to an unnamed tributary to the Meramec River which flows 0.82 miles before flowing in the navigable length of the Meramec River.](#)
6. 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](#)
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

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.

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](#)

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, non-jurisdictional, 0.41 acres](#)

[The small pond appears to have been constructed sometime between 1968 and 1972 according to a review of HistoricAerials.com. A review of historic USGS topographic maps from 1916 to the most recent 2021 maps only show topography that suggests a drainage feature, but no mapped tributaries are ever shown in this location. The pond feature, being so minor, is also not shown as a pond on USGS topographic maps but is shown as a small freshwater pond in USFWS National Wetland Inventory maps. No tributary is mapped inflowing or](#)

⁷ 51 FR 41217, November 13, 1986.

outflowing of the pond. On site delineations have found the pond to be located in an ephemeral stream, a non-relatively permanent waters, and therefore in non-waters. The pond appears to trap the limited flows of the small (21 acre) but steep watershed and primary lose that water from evaporation from the pond with no evidence of regular outflow from the pond observed during both USACE and delineators investigation of the site. Overall the pond appears to have been constructed in dry land and can be assumed to have been constructed for a settling basin to trap debris and sediments that might have been deposited on the downgradient agricultural land, used primarily for pastureland. Therefore, the USACE has determined that the pond was most appropriately characterized as the “generally non-jurisdictional” “artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.”

- 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 Feature A, non-jurisdictional, 745 linear feet

The drainage feature has a limited 9 acre watershed that drains flow from the immediately adjacent slopes. The steep slopes appear to contribute to the formation of an erosional feature that dissipates and then becomes more of a swale feature that flows downgradient to a stormwater inlet structure in the Fox Creek at Corisande subdivision. A review of map resources found no streams mapped by the USGS Topographic Maps, USFWS NWI Mapper, Jefferson County Parcel Mapper. Delineators noted lack of consistent definition, highly dependent upon slope conditions present supporting the features definition of erosional feature. The feature appears to be a small wash characterized by low flow volume immediately following rainfall events that would be considered a “generally not jurisdictional” feature that does not meet the definition of a 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

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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).

[Drainage Feature B, non-jurisdictional, 675 linear feet](#)

[This feature has been previously delineated as an ephemeral stream that supports flow immediately after rainfall events. The feature has a small, approximately 22 acre watershed that has steep topographic relief which creates definition in the sloped areas. The stream does not consistently support flow in the channel which is then impounded at lower elevations by the on-site Pond. Immediately downstream of the pond there was no defined channel discharging from the pond, only a broad swale, which appears to indicate that flows are low in volume and usually evaporate from the pond rather than regularly discharge downstream. No stream feature was mapped by USGS Topographic Maps, USFWS National Wetlands Inventory nor the Jefferson County Parcel Viewer. The ephemeral stream feature was found not to support at least seasonally continuous flow and does not meet support relatively permanent flow, therefore the stream was found not to meet the definition of a tributary, Waters of the U.S.](#)

- 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. [On-Site Soils WOTUS Investigation – Corisande Woods – Fenton, MO, dated May 7, 2024](#)
- b. [USGS Topo Viewer, map years 1916-2015, Accessed May 8, 2024](#)
- c. [HistoricAerials.com, imagery years 1958, 1971, & 1992, accessed May 8, 2024](#)

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- d. [National Regulatory Viewer](#), accessed May 8, 2024
- e. [U.S. Fish & Wildlife Service's Wetland Mapper \(interactive National Wetland Inventory map\)](#), accessed May 8, 2024
- f. [USDA Web Soils Map](#), accessed May 8, 2024
- g. [Jefferson County – Missouri Parcel Viewer map](#), accessed May 8, 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.