



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

CEMVSOD-F

December 6, 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-2023-681](#), [MFR 1 of 1](#)

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. Wetland 1 (WL-1), jurisdictional, 0.16 acres, Section 404
 - ii. Wetland 2 (WL-2), jurisdictional, 0.02 acres, Section 404
 - iii. Wetland 3 (WL-3), jurisdictional, 0.02 acres, Section 404
 - iv. Deepwater Habitat (DWH-1), 0.74 acres, non-jurisdictional
 - v. Deepwater Habitat (DWH-2), 1.69 acres, jurisdictional, Section 404
 - vi. Stream PS-1, jurisdictional, 3,410 linear feet, Relatively Permanent Water (RPW), Section 404
 - vii. Stream IS-1, jurisdictional, 1,547 linear feet, RPW, Section 404
 - viii. Stream IS-2, jurisdictional, 910 linear feet, RPW, Section 404
 - ix. Stream ES-1, non-jurisdictional, 277 linear feet, non-RPW
 - x. Stream ES-2, non-jurisdictional, 387 linear feet, non-RPW
 - xi. Stream ES-3, non-jurisdictional, 298 linear feet, non-RPW
 - xii. EF-1, non-jurisdictional, 80 linear feet, erosional feature
 - xiii. EF-2, non-jurisdictional, 46 linear feet, erosional feature
 - xiv. EF-3, non-jurisdictional, 40 linear feet, erosional feature
 - xv. EF-4, non-jurisdictional, 25 linear feet, erosional feature
 - xvi. EF-5, non-jurisdictional, 47 linear feet, non-RPW
 - xvii. EF-6, non-jurisdictional, 47 linear feet, erosional feature
 - xviii. EF-7, non-jurisdictional, 352 linear feet, erosional feature

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- xix. EF-8, non-jurisdictional, 82 linear feet, erosional feature
- xx. EF-9, non-jurisdictional, 46 linear feet, non-RPW
- xxi. D-1, non-jurisdictional, 185 linear feet, constructed roadside ditch
- xxii. D-2, non-jurisdictional, 410 linear feet, constructed roadside ditch
- xxiii. GW-1, non-jurisdictional, 90 linear feet, grass waterway-upland swale
- xxiv. GW- 2, non-jurisdictional, 250 linear feet, grass waterway-upland swale

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 JD review area consists of approximately 200 acres and is situated in Section 20, 28, and 29 of Township 47 North, Range 2 East, Wentzville, St. Charles County, Missouri, Latitude: 38.8084, Longitude: -90.8231 (center of review area). The project area is composed of a range of uses, including an existing educational campus, an agricultural property with active commodity crop production, multiple forested complexes, and an abandoned farmstead. The project area is bordered by East Pitman Avenue to the north, Interstate 70 to the south, Freymuth Road to the east, and commercial properties to the west. The wetland delineation of the project area was performed on October 24-25, 2023.

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

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CONNECTED. Watershed within project area flows into Peruque Creek, a tributary stream to the Mississippi River (TNW)⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS All aquatic resources within the project area flow into Stream PS-1 (a)(5) water (RPW). Stream PS-1 continues to flow **outside** the limits of the project area and into Lake St. Louis (a)(4) water. Leaving the impoundment, the stream flow continues into Peruque creek, traveling approximately 14 miles, where the stream flow meets the Mississippi River (a)(1) water.
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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.

⁵ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁶ 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.

⁷ 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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- 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):

Stream PS-1 meets the Relatively Permanent Standard (RPS).

The stream flow regime as determined during the USACE site visit, in addition to the consultant site visit was relatively permanent flow based on visual observation of flow, OHWM, and bed and channel bank stream morphology. This stream is characterized by typical year-round flows. The APT was used to determine normal site conditions. APT results for site visit conducted January 11, 2024 indicated drier than normal site conditions, however, the site had received normal precipitation patterns within the 30-year normal range for this time of year. APT results for wetland consultant site visit on October 25, 2023 showed moderate drought conditions, however, stream flows were observed.

Stream IS-1 meets the RPS. This stream reach begins its flow regime from the beginning point immediately adjacent to and east of Benard Drive and flows to the confluence with Stream PS-1. The stream flow regime as determined during the USACE site visit conducted in addition to the wetland consultant site visit was relatively permanent flow based on visual observation of flow, OHWM, and bed and channel bank stream morphology. This stream is characterized by seasonal continuous flows. The APT was used to determine normal site conditions. APT results for site visit conducted January 11, 2024 indicated drier than normal site conditions, however, the site had received normal precipitation patterns within the 30-year normal range for this time of year. APT results for wetland consultant site visit on October 25, 2023 showed moderate drought conditions, however, stream pools were observed.

Deepwater Habitat (DWH-2) and Stream IS-2 are perennial water resources that meet the Relatively Permanent Standard (RPS) by capturing water from an approximate 70-acre watershed. This stream reach begins flow from within the DWH-2 location to the downstream confluence with PS-1. The stream flow regime as determined during the USACE site visit, was relatively permanent flow based on visual observation of flow, OHWM, and bed and channel bank stream morphology. This tributary reach is characterized by seasonal continuous flows

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and includes the ponded area which is connected via a pipe to IS-2. The APT was used to determine normal site conditions. APT results for site visit conducted January 11, 2024, indicated drier than normal site conditions, however, the site had received normal precipitation patterns within the 30-year normal range for this time of year.

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

g. Adjacent wetlands (a)(7):

Wetland 1 (W-1) is an emergent wetland directly connected to PS-1 by a non-RPW (EF-5).

- Flow Path: Wetland 1 -> EF-5, non-RPW (47 feet) -> -> PS-1, unnamed RPW tributary. Within this flow path from Wetland 1 to the unnamed RPW (within EF-5), OHWM indicators included the following: scour, sediment sorting, water staining, deposition, shelving, as well as changes in character of soil, bed and bank, and plant community changes with leaf litter disturbance.

Wetland 2 (W-2) is an emergent wetland that has formed within a low-lying area directly abutting DWH-2.

Wetland 3 (W-3) is an emergent wetland connected to IS-2 by non-RPW (EF-9).

- Flow Path: Wetland 3 -> EF-9, non-RPW (46 feet) -> IS-2 unnamed RPW tributary. Within this flow path from Wetland 1 to the unnamed RPW (within EF-9), OHWM indicators included the following: scour, sediment sorting, water staining, deposition, shelving, as well as changes in character of soil, bed and bank, and plant community changes with leaf litter disturbance.

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”).⁸ Include size of the aquatic resource or feature within

⁸ 51 FR 41217, November 13, 1986.

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the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Deepwater Habitat (DWH-1), 0.74 acres, non-jurisdictional, preamble water. Other small ornamental body of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

- 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.

D-1, 185 linear feet, constructed roadside ditch. Excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. Historic aerial imagery and wetland delineation support the findings.

D-2, 410 linear feet, constructed roadside ditch. Excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. Historic aerial imagery and wetland delineation support the findings.

- 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

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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 ES-1, 277 linear feet, non-RPW

Stream ES-2, 387 linear feet, non-RPW

Stream ES-3, 298 linear feet, non-RPW

Stream EF-5, 47 linear feet, non-RPW

Stream EF-9, 46 linear feet, non- RPW

Streams ES-1, ES-2, ES-3, EF-5 and EF-9 are characterized by the presence of OHWM indicators and ephemeral flow regimes located within the upper extent of the watershed. OHWM indicators included, scour, sediment sorting, water staining, deposition, shelving, as well as changes in character of soil, bed and bank, and plant community changes with leaf litter disturbance. These streams exhibited no flowing water at the time of the Shive-Hattery wetland delineation (October 2023) nor Corps site visit (January 2024). Therefore, Streams ES-1, ES-2, ES-3, EF-5, and EF-9 do not have continuous flow at least seasonally and are non-relatively permanent waters.

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. Corps field visit, January 11, 2024
 - b. USGS.gov/streamstats, December 7, 2023
 - c. Shive-Hattery Wetland Delineation Report, February 20, 2024
 - d. MVD/Missouri Regulatory Viewer (multiple data sources), February 20, 2024
 - e. Antecedent Precipitation Tool, February 20, 2024
 - f. Historic aerial imagery and USGS topographic maps, March 11, 2024.

10. OTHER SUPPORTING INFORMATION.

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Other Citations:

Joint Policy Memorandums: [NWK-2024-00392](#), [POH-2023-187](#), [NWK-2022-00809](#), [NAP-2023-01223](#), & [SWG-2023-00284](#)

Based on Corps field observation the following features do not exhibit any OHWM indicators: EF-1, EF-2, EF-3, EF-4, EF-6, EF-7, EF-8, GW-1, and GW-2, therefore, these resources are not regulated.

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.



Figure 7: Wetland Delineation

UPCI Campus Development | Wentzville, Missouri | Project #2112307670

0 350 700
US Feet



Data Sources:

