



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

CEMVS-R

16 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),¹ MVS-2024-169

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. Stream 1, jurisdictional – Section 404 – 3,000 linear feet
 - ii. Stream 2, non-jurisdictional – 97 linear feet
 - iii. Stream 3, non-jurisdictional – 238 linear feet
 - iv. Stream 4, non-jurisdictional – 367 linear feet
 - v. Stream 5, non-jurisdictional – 481 linear feet
 - vi. Stream 8, non-jurisdictional – 811 linear feet

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. An approximately 45-acre area west of the current commercial buildings at 2200 Master Card Blvd, O'Fallon, MO 63368 bounded on the north and east by an unnamed tributary. Geographic coordinates are 38.748199°, -90.743298° at the center of the review area, within Section 13, Township 46 North, Range 2 East, within St. Charles County, Missouri.

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Figure 1. Review area map.

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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. All of the aquatic resources within the review area flow into Stream 1. Stream 1 flows into Dardenne Creek, a primary tributary to the navigable Mississippi 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 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):

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.

e. Tributaries (a)(5):

Stream 1, jurisdictional – Section 404 - 3,000 linear feet

A review of desktop resources shows a well-documented, Stream Order 3, tributary that first appeared in earliest USGS topographic maps and was documented as perennial or intermittent in all following maps. Central coordinates for the tributary within the review area are 38.747845°, -90.741625°. The unnamed tributary flows into Dardenne Creek, a primary tributary to the navigable Mississippi River. The stream is mapped in the USFWS NWI Mapper, USGS Stream Stats, and is a designated floodway in FEMA National Flood Hazard Layer map. The state through the MDNR identifies the tributary as Waterbody Identification Number 5025, Reach Code 07110009000273 and sets water quality standards for the following presumed uses for the streams: Warm Water Habitat, Irrigation, Livestock and Wildlife Protection, Secondary Contact Recreation, Whole Body Contact Recreation - Category B, & Human Health Protection. At the downstream most portion of the Stream Order 3 reach (outside of the review area) the stream drains a 2.61 square mile watershed and at the review area drains 1,520 acres. From a review of aerial imagery, it appears that the downstream segment of the Stream Order 3 length is representative of the stream conditions within the review area. Desktop and onsite evaluations found flow present in the stream channel year-round consistently. Flow was present at the time of delineation investigations in August 2024 and during USACE site visit on October 8, 2024. The desktop and field observations support the USACE's determination that Stream 1 has relatively permanent flow and is a jurisdictional (a)(5) tributary 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. 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

⁷ 51 FR 41217, November 13, 1986.

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.

Stream 2, non-jurisdictional – 97 linear feet

A review of desktop resources shows little evidence of this feature being present; central geographic coordinates: 38.749847°, -90.745573°. It is not mapped by USGS Stream Stats, USFWS NWI Mapper, MDNR Water Quality Standards, FEMA National Flood Hazard Layer map, nor in USGS Topographic Maps. A review of Lidar data does show a small erosional cut with greater than 25% slope and a limited watershed of less than 1 acre. A review of aerial imagery shows that the drainage feature flows off of a roadway and previous development that was along the ridge top. It is suspected that an old pipe or drainage infrastructure may have directed stormwater flows at this location because there is no topographic relief to direct flow to this area. The feature does not support consistent flow and drains a limited area in flashy stormwater flows down the hillside that is characteristic of an erosional drainage feature generally not jurisdictional under the Clean Water Act.

Stream 5, non-jurisdictional – 481 linear feet

A review of desktop resources shows little evidence of this feature being present; central geographic coordinates: 38.748414°, -90.743985°. It is not mapped by USGS Stream Stats, USFWS NWI Mapper, MDNR Water Quality Standards, FEMA National Flood Hazard Layer map, nor in USGS Topographic Maps. A review of Lidar data of the area does not show any evidence of a defined bed and bank. As discussed in Stream 8 the upper reaches of this drainage area have been graded and filled by commercial and roadway development. The drainage swale appears to be an incidental drainage feature from the lake construction in the upper portions of Stream 8 that occurred sometime between 1995 and 2002.

Observations on-site in the delineator's report and Corps site visit found that the natural hillslope to the north meets the constructed berm to the south along the lakes edge. Honeysuckle bounds both slopes and the center is the drainage swale that is characterized by debris accumulation but no consistent bed and bank features. The drainage feature loses any definition downstream of the lake, where the slope increases, and downgradient the drainage area loses all definition and has no connection to Stream 8. For these reasons the Corps determined that Stream 5 is most appropriately characterized as a drainage swale that is generally not jurisdictional under the CWA.

- 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).

Stream 3, non-jurisdictional – 238 linear feet

A review of desktop resources shows limited data on the stream system with central geographic coordinates at 38.750033°, -90.745345°. The review area encompasses the full length of the Stream Order 1 length of Stream 3. The stream is not mapped by USGS Stream Stats, USGS Topographic Maps, USFWS NWI Mapper, nor MDNR Water Quality Standards Map, however, the stream system is visible in lidar imagery and FEMA Flood Hazard Layer map identify backwater flood zone in this area off of the larger Stream 1. The watershed area for this stream is approximately 5 acres and appears to be characterized by ephemeral flow that only flows immediately following rainfall events.

On-site observations by delineators documented ephemeral, non-relatively permanent, stream flow through the stream. The Corps has determined that Stream 3 is primarily ephemeral flow driven by stormwater runoff and does not support relatively permanent flow. Therefore Stream 3, as a non-relatively permanent water, does not meet the definition of an (a)(5) Tributary and is not a jurisdictional Water of the U.S.

Stream 4, non-jurisdictional – 367 linear feet

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A review of desktop resources was similar to that of Stream 3 with limited mapping and identified features primarily secondary conditions of Stream 1 for Stream 4 with central geographic coordinates at 38.749520°, -90.741726°. The review area encompasses the full length of the Stream Order 1 length of Stream 4. The stream is not mapped by USGS Stream Stats, USGS Topographic Maps, USFWS NWI Mapper, nor MDNR Water Quality Standards Map, however, the stream system is visible in lidar imagery and FEMA National Flood Hazard Layer map identify backwater flood zone in this area off of the larger Stream 1. The watershed area for this stream is approximately 7 acres and appears to be characterized by ephemeral flow that only flows immediately following rainfall events.

On-site observations by delineators documented ephemeral, non-relatively permanent, flow within the stream. The Corps has determined that Stream 4 is primarily ephemeral flow driven by stormwater runoff and does not support relatively permanent flow. Therefore Stream 4, as a non-relatively permanent water, does not meet the definition of an (a)(5) Tributary and is not a jurisdictional Water of the U.S.

Stream 8, jurisdictional – 811 linear feet

A review of desktop resources provided mixed findings of the stream, with its central geographic coordinates at 38.7471466°, -90.742127°. A review of historic 1:24,000 scale USGS topographic maps showed a mapped intermittent tributary in older years 1937 & 1940, a mapped drainage area in 1954 & 1994 maps, and no mapped drainage feature in later 2015, 2017 and 2021 map. The stream is not mapped in USFWS NWI mapper nor MDNR Water Quality Standards map. The stream channel is excluded from the mapped flood zone by FEMA National Flood Hazard Layer map, with flood zones located in the adjacent uplands but not in the stream itself. USGS Stream Stats identify a stream channel in this location and up through the upstream impoundment and into two small upper branches that no longer exist. The stream at its downstream most extent (and within the review area) shows that the stream has a 58-acre watershed with extensive modification to the hydrology and landscape.

In reviewing historical aerial imagery on Google Earth, the upstream portion of Stream 8 has been extensively modified. Upstream of the 811 linear feet within the review area the stream channel has been filled by roadway and commercial developments and by the impoundment of the upper reach at the Mastercard property. Therefore, it was clear that the downstream most extent of Stream 8 was not representative of the entire reach. The stream channel is visible in 1979, 1990 & 1995 aerials but the upper reaches are filled and/or impounded by 2002. A review of Corps records has not found any files for a permit or alleged violation for the construction in the upper reaches; it is unclear if that was because

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resources were determined to be non-jurisdictional (pre-Rapanos) or if the activities were regulated, but unidentified. The aerial imagery is not to the resolution needed to determinate the presence or absence of flow within this narrow of a channel, but it can be noted that these stream channels and narrow riparian were avoided by agricultural operations. More recent aerial imagery was also consulted the narrow stream channel presented other issues the cut bank is often casting a shadow into the stream channel which makes it difficult to determine if flow is present. Overall, the Corps does not believe that adequate documentation exists to determine that the impoundment was constructed in a relatively permanent water and therefore was excluded from the stream's evaluation.

In evaluation the stream reach on-site observations were heavily relied upon to support the Corps decision due to the conflicting desktop resources. Site delineators evaluated the stream and noted intermittent flow in the stream with a pool at the scour hole at the lake outlet with a dry stream bed. The delineators were uncertain about the determination of relatively permanent waters status and requested Corps review. The Corps visited the site with the delineators on October 8, 2024. No flow was observed in the stream channel and the single pool present was in the scour hole at the lake outlet with no flow from the upgradient lake. The landscape also is graded and sloped so that most of the adjacent uplands does not shed towards Stream 8 but rather towards Stream 1 to the northeast or to the southwest to Stream 6. It seems that the FEMA Flood Hazard Layer map may have perceived the lower elevations of the adjacent uplands (mapped flood zones) compared with the higher setting of the stream and banks (excluded from flood zones). In areas it almost appears that the channel had been previously manipulated by channelization and leveeing along the banks, however the age of the modifications is to such an extent that it cannot be definitively stated with this level of investigation. The lack of pools within the channel and the inability to document consistent flow from aerial imagery nor other office resources the Corps determined that the stream did not provide continuous surface flow and that the stream supported non-relatively permanent flow that does not meet the definition of 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. Farnsworth Group FTI Mastercard Solar Array Wetland Delineation Report, September 18, 2024
 - b. Corps Site Visit, October 8, 2024

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- c. USGS Topographic Maps, captures 1903 to 2021, accessed September 27, 2024
- d. USFWS National Wetland Inventory Mapper, accessed September 27, 2024
- e. FEMA National Flood Hazard Layer map, accessed October 7, 2024
- f. USGS Stream Stats, accessed October 7, 2024
- g. Google Earth aerial imagery, captures 1990-2023, accessed October 7, 2024
- h. Regulatory Viewer, accessed September 27, 2024
- i. MDNR Water Quality Standards Map, accessed October 3, 2024
- j. USDA NCRS Soil Survey, web survey accessed October 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.