



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

CEMVS-R

[20 June 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-2024-218](#)

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.¹ 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.² For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),³ 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 33 CFR 331.2.

² Regulatory Guidance Letter 05-02.

³ 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.

CEMVS-R

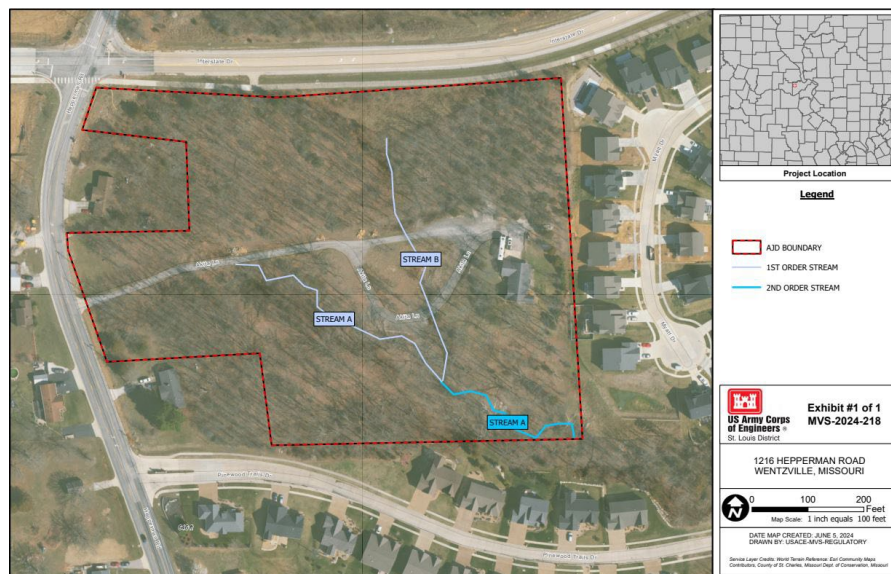
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-218](#)

- 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 A – 1st Order, (479 linear feet), non-jurisdictional
 - ii. Stream A – 2nd Order, (322 linear feet), non-jurisdictional
 - iii. Stream B – 1st Order, (459 linear feet), 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)

3. REVIEW AREA. The Review Area is the approximately 11-acre area located at 1216 Hepperman Road in Wentzville, St. Charles County, Missouri with approximate geographic coordinates 38.801240°, -90.884410°.



CEMVS-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-218](#)

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 [Stream A -1st Order and Stream B – 1st Order converge and become Stream A – 2nd Order which converges with an off-site unnamed tributary just north of Pinewood Trails Dr. where it continues off-site to the south flowing into Peruque Creek. Peruque Creek flows into Cuivre Slough and ultimately into the Mississippi River, a TNW.](#)
6. SECTION 10 JURISDICTIONAL WATERS⁴: 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 10.⁵ [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](#)

⁴ 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.

⁵ 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.

CEMVS-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-218](#)

- 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”).⁶ 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.

- 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](#)

⁶ 51 FR 41217, November 13, 1986.

- 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 A – 1st Order (~479 linear feet) is an ephemeral channel that would flow to its' confluence with Stream B – 1st Order, likely only in direct response to a precipitation event. Stream A – 1st Order originates from an upland drainage feature to the north of Akita Lane and is conveyed through a culvert where it begins to develop channel definition south of Akita Lane. No flow was observed during the USACE site visit; and the stream channel primarily only contained a few isolated pockets of water, except for a portion that was backed up due to concrete slabs that had been placed in the channel. Stream A – 1st Order was determined to be a non-relatively permanent water.

Stream A – 2nd Order (~322 linear feet) is an ephemeral channel that would flow to its' confluence with an off-site unnamed tributary to the east just north of Pinewood Trails Dr., likely only in direct response to a precipitation event. Stream A – 2nd Order originates from the confluence of Stream A – 1st Order and Stream B – 1st Order within a forested area. The channel contained some discontinuous stretches of standing water and isolated pools following recent rain events. The channel was primarily characterized by leaf/debris wracking and no consistent thalweg or low flow channel, indicative of short duration, flashy flow events. The channel had some vegetation growing within the OHWM and was backed up due to the placement of concrete slaps further indicating the water observed is likely related to recent rain events and does not sustain a baseflow. Stream A – 2nd Order was determined to be a non-relatively permanent water.

Stream B – 1st Order (~459 linear feet) is an ephemeral channel that would flow to its' confluence with Stream A – 1st Order, likely only in direct response to a precipitation event. Stream B – 1st Order appears to originate where flow concentrates to the south of Interstate Dr. within a forested area and drains to the south through a culvert at Akita Lane. The channel contained some standing water at the time of the site visit; however, the channel was getting backed up at the culvert opening due to leaf debris. The channel definition appeared to be somewhat inconsistent, and the presence of water can likely be attributed to recent rain events and the partial blockage of the culvert opening. The channel contained leaf/debris wracking and no consistent thalweg or low flow channel,

CEMVS-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-218](#)

indicative of short duration, flashy flow events. Stream B – 1st Order was determined to be a non-relatively permanent water.

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. [USACE Site Visit, May 13, 2024](#)
- b. [USGS Topographic Maps, Accessed May 23, 2024](#)
- c. [USGS Stream Stats, Accessed May 13 & May 23, 2024](#)
- d. [Antecedent Precipitation Tool, Accessed May 16, 2024](#)
- e. [USDA-NRCS Soil Survey, Accessed May 23, 2024](#)
- f. [USFWS National Wetland Inventory, Accessed May 23, 2024](#)
- g. [LiDAR, Accessed May 23, 2024](#)
- h. [Google Earth Pro Aerial Imagery, Accessed May 23, 2024](#)

10. OTHER SUPPORTING INFORMATION. A review of USGS topographic maps from 1973-2021 did not indicate any blue-line features within the review area. The U.S. Fish & Wildlife Service's (USFWS) National Wetland Inventory (NWI) mapper and the National Hydrography Dataset (NHD) did not indicate any water features within the review area.

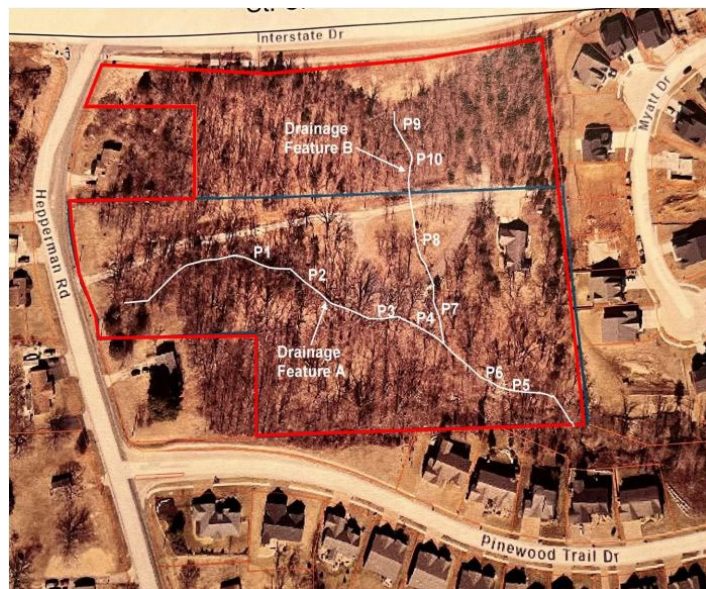
The Corps visited the site on May 13, 2024, during wetter than normal conditions during the wet season, with the drought index indicating a mild drought.

Stream order designation assumed an order change at approximately 38.800303° , - 90.882189° at the confluence of Stream A – 2nd Order and an off-site, unnamed tributary just north of Pinewood Trails Dr. This was supported by a Corps project file associated with the development to the east of the review area that listed two intermittent streams and one ephemeral stream that were impounded/impacted.

Below is the consultant submittal of delineated features.

CEMVS-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2024-218](#)



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.