



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

CEMVSOD-F

18 July 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-2024-231

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 A-B (12.76-acres), non-jurisdictional
 - ii. Wetland C (1.61-acres), 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)
 - e. Citing to the 27 September coordination memo, specifically to the language which reads, "Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended."
 - f. Citing to the "Technical Support Document for the Final "Revised Definition of "Waters of the United States"" Rule dated December 2022.
3. REVIEW AREA. Review area is an approximately 40-acre tract located along Ferguson Lane in St. Louis County, Missouri. Approximate coordinates: 38.7862, -90.4382).

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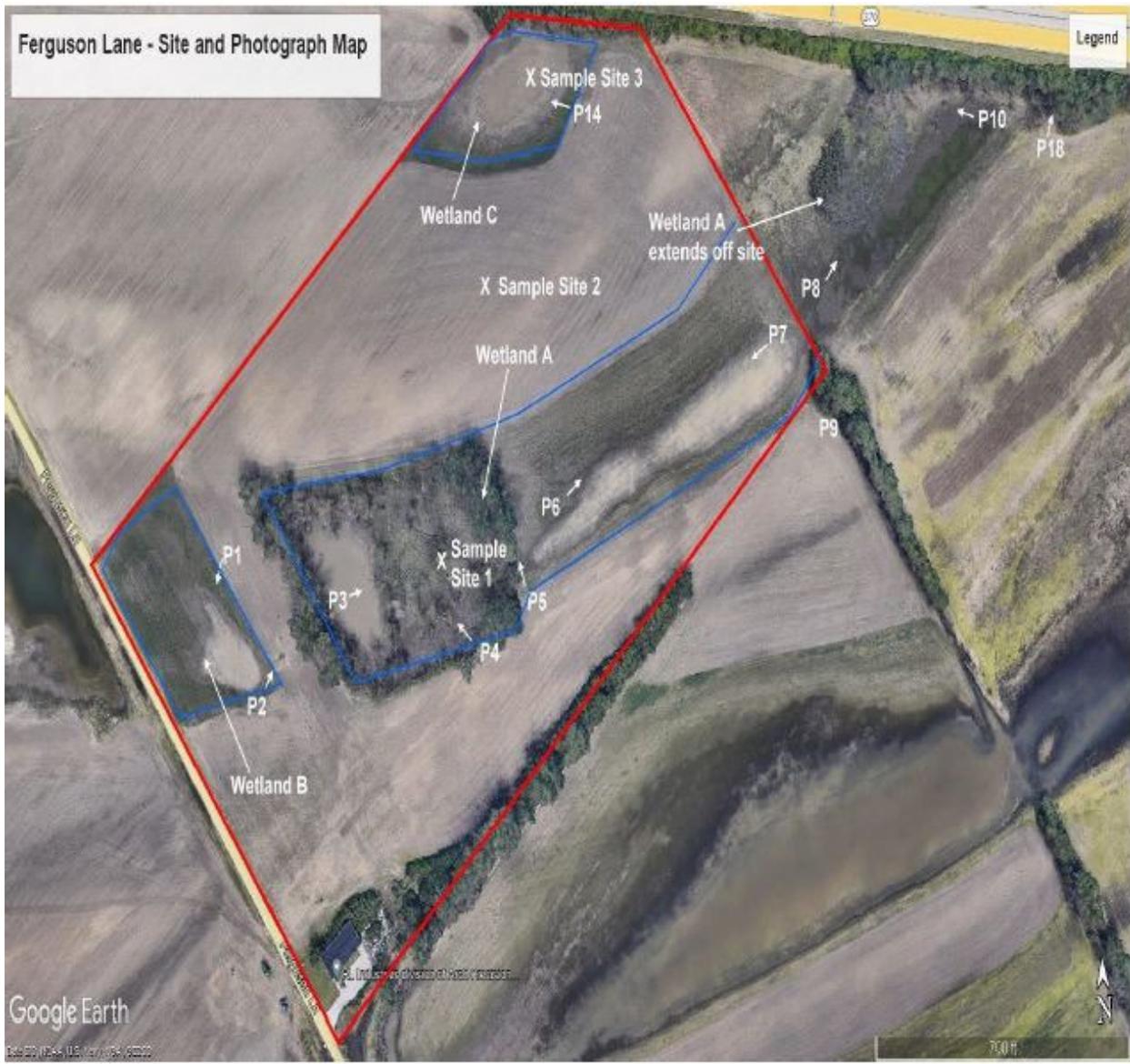


Figure 1 – Review Area Photograph

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Figure 2 – Regional LiDAR DEM

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Missouri River
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Depressional Wetland A (10.39-acres) and Depressional Wetland B (2.37-acres) are counted as a single Depressional Wetland A-B (12.76-acres) due to a potential shallow subsurface connection. Wetland A-B receives offsite flow from the west, south, and east and serves as a regional watershed sink for surface flows. Flow from the west begins at approximately 38.7887, -90.4518, and flows approximately 3,300' thru an agricultural swale to a 30' culvert under Ferguson Lane, where it dumps into Wetland A-B. Flow from the south begins approximately around 38.7809, -90.4336, and flows approximately 1700' thru a wetland, then approximately 2000' thru a ditch, into Wetland A-B. Flow from the east begins at approximately 38.7948, -90.4224, and flows approximately 600' thru a ditch, then it is conveyed via sheet flow approximately 1500', then flows into another ditch for approximately 350', thru a 70' culvert under Missouri Bottom Road, then flows via sheet flow for approximately 600' before reaching a 250' culvert under Route 370. This route shows weak evidence of flow, however, there is a non-functioning PTO-style pump that an agricultural producer used to pump water from south to north, even though LiDAR elevation data indicates flow would travel from north to south. The pump setup that remains would inhibit flow, in either direction, but there is no evidence of debris or other material being washed up against it. There are a few roadside or agricultural ditches that flow into Wetland A-B, but none of them connect to the nearest RPW (Cowmire Creek to the east). Wetland A-B has an approximate elevation of 432'. The elevations of the

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estimated in flows are approximately 438', giving the depressional Wetland A-B approximately 6' of elevation difference between it and the source of its' hydrology.

Wetland C was formed incidental to the construction of Route 370 and is fully isolated. It does not possess a continuous surface connection to any other waters. Wetland C receives hydrology from precipitation and overland flow from its minimal watershed. It is frequently planted to commodity crops. There were no indicators of flow present during the site visit.

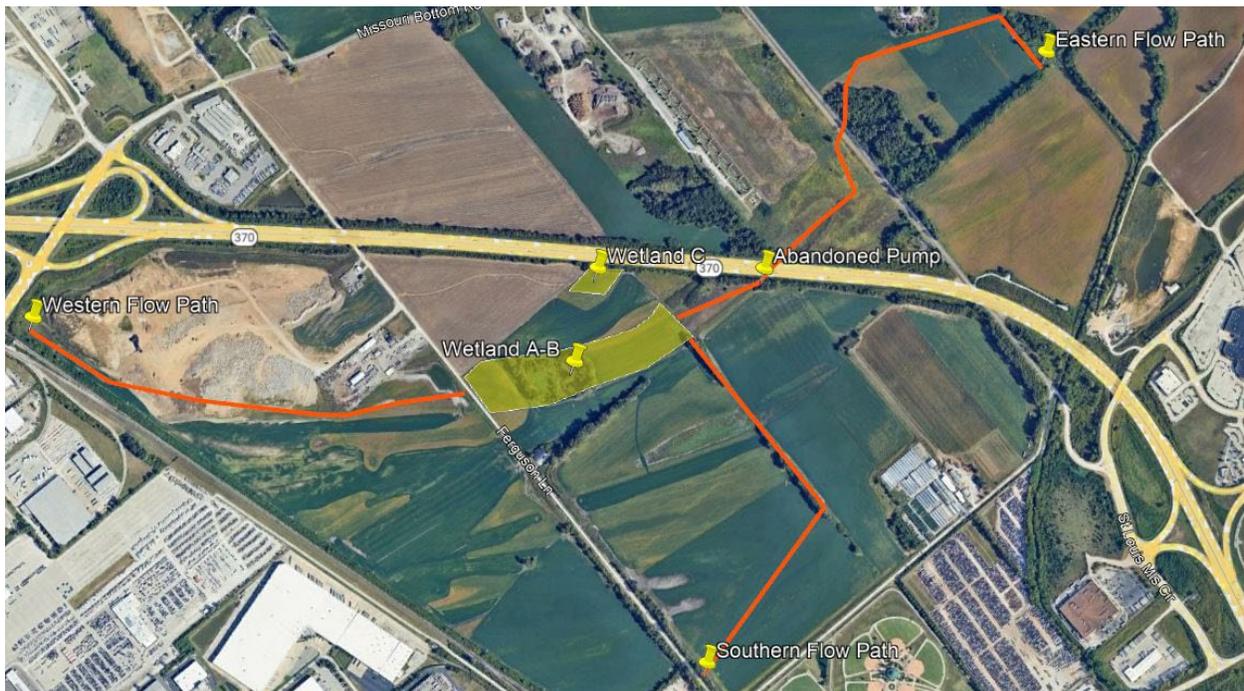


Figure 3 Orientation of Wetlands A-B & C along with the drainages flowing into them.

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Figure 4 Elevation profile of Wetland A-B and its' relationship to the surrounding terrain.

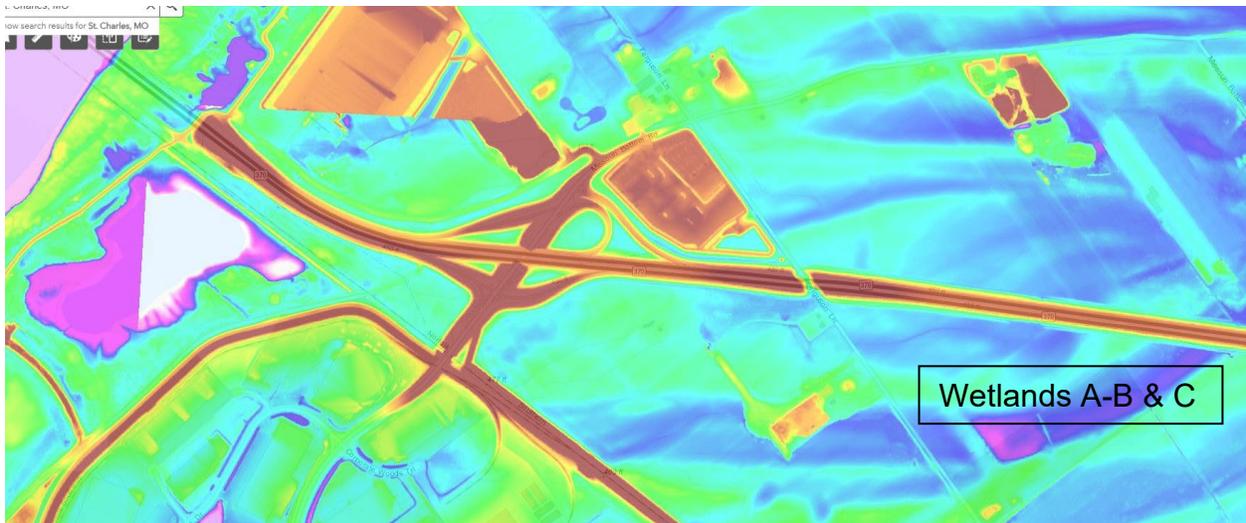


Figure 5 – LiDAR DEM image of area to the west of Wetlands A-B & C.

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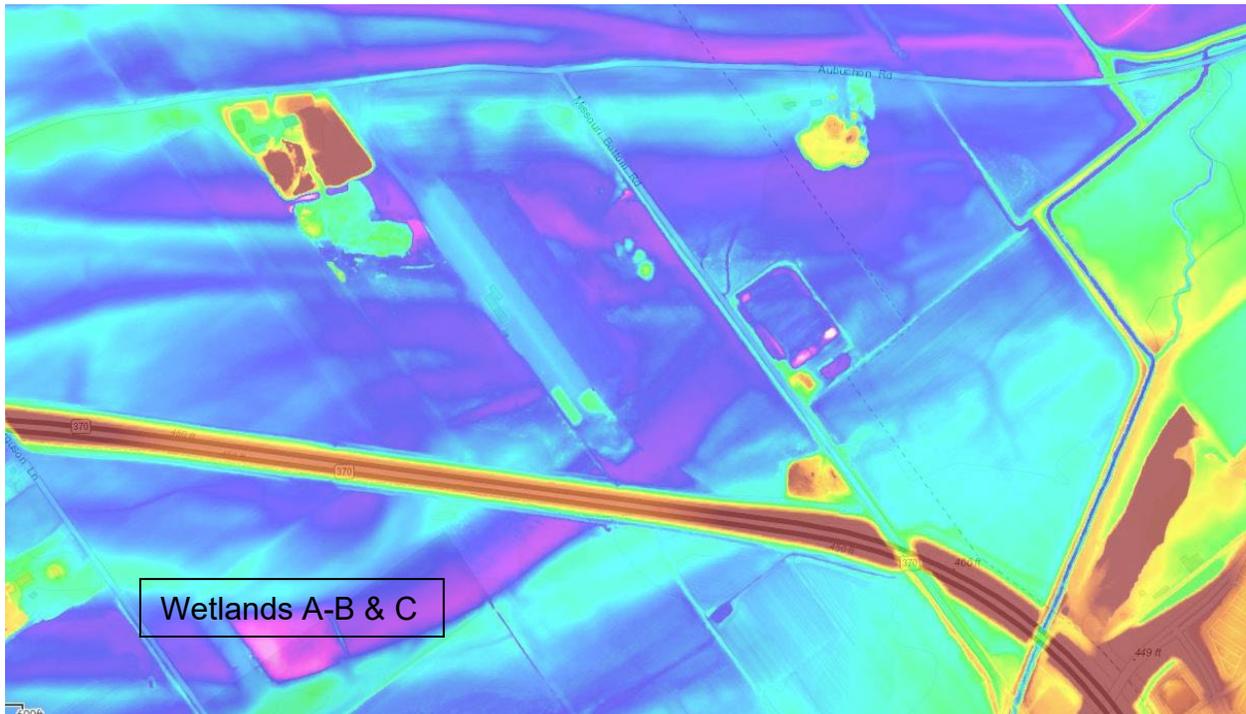


Figure 6 – LiDAR DEM image of area to the east of wetlands A-B & C.

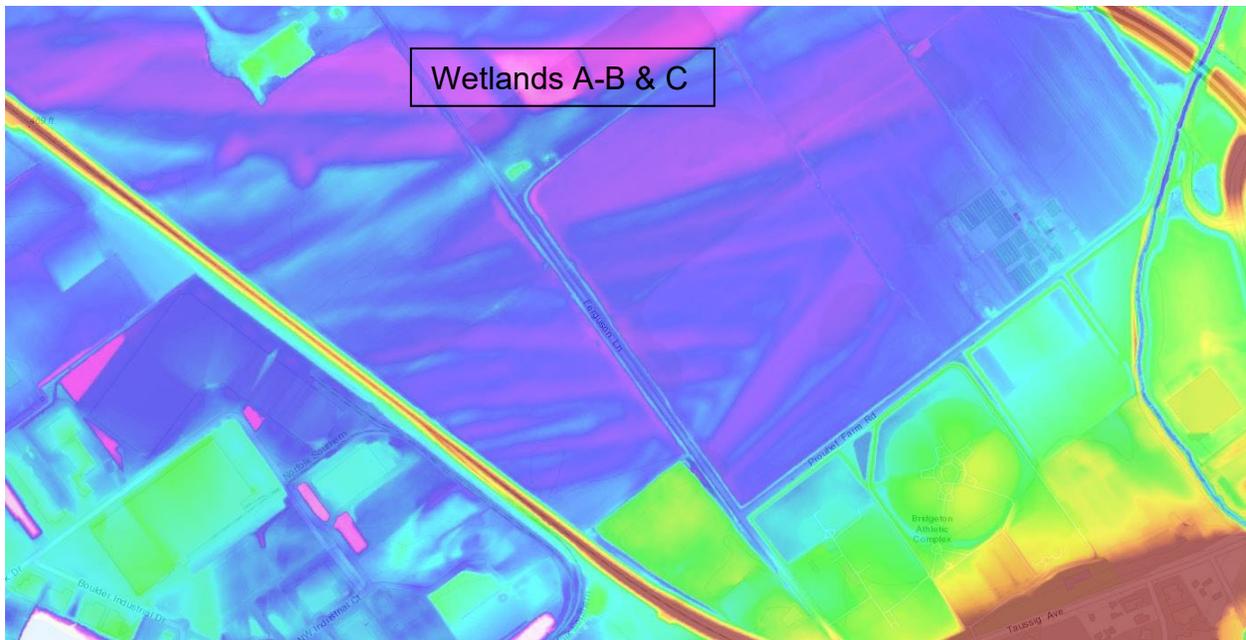


Figure 7 – LiDAR DEM image of area south of Wetlands A-B & C.

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Figure 8 – Project Area in 1990 photograph. Route 370 is under construction. Image taken from www.historicaerials.com, accessed on 18 July 2024.

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Figure 9 – Project Area in 1974 photograph. Prior to Route 370. Image taken from www.historicaerials.com, accessed on 18 July 2024.

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

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.

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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): 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. N/A

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.

⁷ 51 FR 41217, November 13, 1986.

- 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. 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).

According to recent joint policy memos, not all physical connections provide a CSC. For a CSC to be present, a physical connection must exist, flow must be conveyed between the wetland and RPW, and that flow must be of a sufficient level – weak indicators do not indicate a CSC. LiDAR imagery does not show channels throughout the potential flow path from the identified resources to the Missouri River or Cowmire Creek. This indicates that a physical connection may not exist past the estimated origin points indicated above. It also indicates uncertainty that flow is conveyed at all, let alone at a sufficient level. There is an approximate 6’ elevation difference between the identified resources and the

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estimated origins of flow. This is a significant difference in relative heights when considered in context of the Missouri River floodplain.

Because of the uncertainty of an unbroken physical connection, that is too extended and tenuous, that provides sufficient flow between Wetland A-B and the Missouri River, the district finds that Wetlands A-B & C lack a continuous surface connection to a relatively permanent water. See description of flow paths above.

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. Site visit conducted 17 June, 2024.
- b. Office review conducted 17 June and 5 July, 2024.
- c. Wetland Investigation Report, dated 19 April, 2024.
- d. Regulatory GIS Viewer, accessed 5 July 2025.

10. OTHER SUPPORTING INFORMATION:

Joint Policy Memos for NWK-2022-00809, NAP-2023-01223, & SWG-2023-00284.

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.