



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

CEMVS-RD

[1 November 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-2024-276](#)

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.<sup>1</sup> 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.<sup>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</sup> 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.

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<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</sup> 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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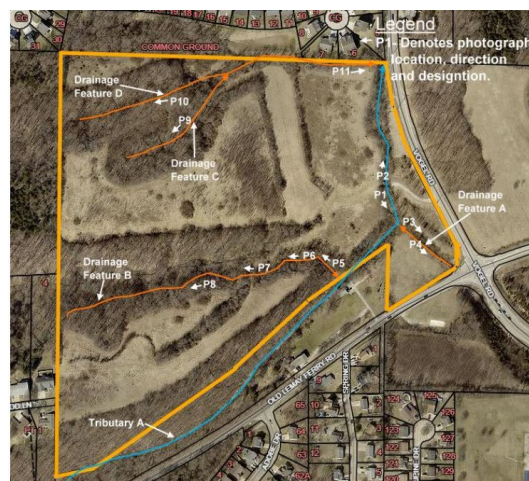
1. SUMMARY OF CONCLUSIONS.

- 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, \(266 linear feet\), non-jurisdictional](#)
  - ii. [Drainage Feature B, \(1,219 linear feet\), non-jurisdictional](#)
  - iii. [Drainage Feature C, \(465 linear feet\), non-jurisdictional](#)
  - iv. [Drainage Feature D, \(1,397 linear feet\), 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 42-acre area in the northwest corner of the intersection at Old Lemay Ferry Road and Vogel Road in Arnold, MO with approximate geographic coordinates 38.418160°, -90.415995°. This AJD evaluates only Drainages A-D in support of a permit action for impacts to Tributary A.](#)



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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 [Drainage Features A-D all flow to Pomme Creek, a tributary to the Meramec River, which ultimately flows to the Mississippi River. The Mississippi River is considered a TNW.](#)
6. SECTION 10 JURISDICTIONAL WATERS<sup>4</sup>: 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.<sup>5</sup> [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](#)

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<sup>4</sup> 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.

<sup>5</sup> 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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- 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”).<sup>6</sup> 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. [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](#)

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<sup>6</sup> 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).

*\*This AJD is to evaluate only Drainages A-D within the Review Area associated with a permitting action for impacts to Tributary A.*

**Drainage Feature A** (~266 linear feet) is an ephemeral channel that would flow to Tributary A, likely only in direct response to a precipitation event. Drainage Feature A originates in a brushy, wooded area and no flow or pools were observed during the USACE site visit on 6/10/2024. Drainage Feature A generally exhibited characteristics typical of a non-relatively permanent drainage feature, had a relatively steep grade, and likely does not flow seasonally. Drainage Feature A was determined to be a non-relatively permanent water.

**Drainage Feature B** (~1,219 linear feet) is an ephemeral channel that would flow to Tributary A during times when the channel has surface discharge. Drainage Feature B originates in a forested corridor and drains an approximately 33-acre watershed. Drainage Feature B was determined to be a first order stream and appears to be fed by several upland drainage features. No flow or pools were observed during the USACE site visit on 6/10/2024 at the downstream end near the confluence with Tributary A. The drainage feature did not appear to contain a consistent low-flow channel or thalweg, and channel characteristics appeared to have developed by the repeated sequence of streamflow, flow cessation, and channel drying throughout the year. It does not appear the channel has groundwater influence as a source of baseflow, and channel characteristics seem to be conducive of a channel where cessation of flow is often associated with termination of overland flow, hillslope runoff recession, and depletion of water in saturated soils. Drainage Feature B likely does not flow seasonally and was determined to be a non-relatively permanent water.

**Drainage Feature C** (~465 linear feet) is an ephemeral channel that would flow to Drainage Feature D, likely only in direct response to a precipitation event. Drainage Feature C originates in a brushy, wooded area and no flow or pools were observed during the On-Site Soils site visit on 4/12/2024. Drainage Feature C generally exhibited characteristics typical of a non-relatively permanent drainage feature, had a relatively steep grade, and likely does not flow

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seasonally. Drainage Feature C was determined to be a non-relatively permanent water.

**Drainage Feature D** (~1,397 linear feet) is an ephemeral channel that would flow to Tributary A, likely only in direct response to a precipitation event. Drainage Feature D originates in a brushy, wooded area and no flow or pools were observed during the USACE site visit on 6/10/2024 at the downstream end near the confluence with Tributary A. Drainage Feature D generally exhibited characteristics typical of an ephemeral drainage feature, had a relatively steep grade, and likely does not flow seasonally. Down-gradient of its' confluence with Drainage Feature C, the feature began to exhibit more defined channel characteristics. However, at its' confluence with Tributary A the channel was overgrown and not well defined and appeared to lack consistent flows. Drainage Feature D 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. On-Site Soils Site Visit, April 12, 2024 & USACE Site Visit, June 10, 2024
  - b. USGS Topographic Maps, Accessed July 19, 2024
  - c. USGS Stream Stats, Accessed July 26, 2024
  - d. Antecedent Precipitation Tool, Accessed July 19, 2024
  - e. USDA-NRCS Soil Survey, Accessed July 19, 2024
  - f. USFWS National Wetland Inventory, Accessed July 19, 2024
  - g. National Hydrography Dataset, Accessed July 19, 2024
  - h. LiDAR, Accessed June 3, 2024
  - i. Google Earth Pro Aerial Imagery, Accessed July 19, 2024
10. OTHER SUPPORTING INFORMATION. A review of USGS topographic maps from 1975-2021 does not identify Drainages A-D in the Review Area as "blue-line" features. The only "blue-line" feature indicated is Tributary A as a dashed "blue-

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line.” The Missouri Water Quality Standards (WQS) Stream Classification 2019 dataset generally matches the USGS topographic maps and indicates only Tributary A with no other stream features identified within the Review Area. The U.S. Fish & Wildlife Service’s (USFWS) National Wetland Inventory (NWI) mapper also indicates a linear feature in the location of Tributary A as the only feature within the Review Area.

The Antecedent Precipitation Tool (APT) for 6/10/2024 (USACE Site Visit) indicated normal conditions in the dry season during a mild drought.

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.