



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

CEMVSOD-F

3 September 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),<sup>1</sup> MVS-2024-310

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 Missouri due to litigation.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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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- 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 (45.8-acres), non-jurisdictional
  - ii. Wetland B (1.36-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)

3. REVIEW AREA. Review area is an approximately 90-acre tract, along the eastern side of State Route 94, in St. Charles County, Missouri. Approximate coordinates: 38.8355, -90.4657.

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Figure 1 – Review Area Map

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 Wetland A is a large, isolated depression, with inlets on the north and south ends. The southern inlet flows generally north towards Wetland A, approximately 4,700' thru a series of culverts and ditches, from about 38.8134, -90.4666. The start of the southern inlet was offsite, with no access – so location was estimated via LiDAR. Wetland A continues offsite to the north for approximately 3,600' until it reaches a series of excavated ponds. The northern inlet flows generally west thru approximately 4.6

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miles of excavated agricultural surface drainage features. It then flows approximately 3000' thru a presumptive forested wetland, originating at approximately 38.8314, -90.4015. The start of the northern inlet was offsite, with no access – so location was estimated via LiDAR. Wetland A has an approximate elevation of 428'. The feature that drains into it from the south has an elevation of approximately 440' at its' start. The feature that drains into it from the north has an elevation of approximately 437' at its' start. This leaves Wetland A between 9-12' below the origins of the drainage features that feed it, resulting in Wetland A being isolated from the Missouri River, a TNW. Wetland B is an isolated depression with no connection to a TNW.

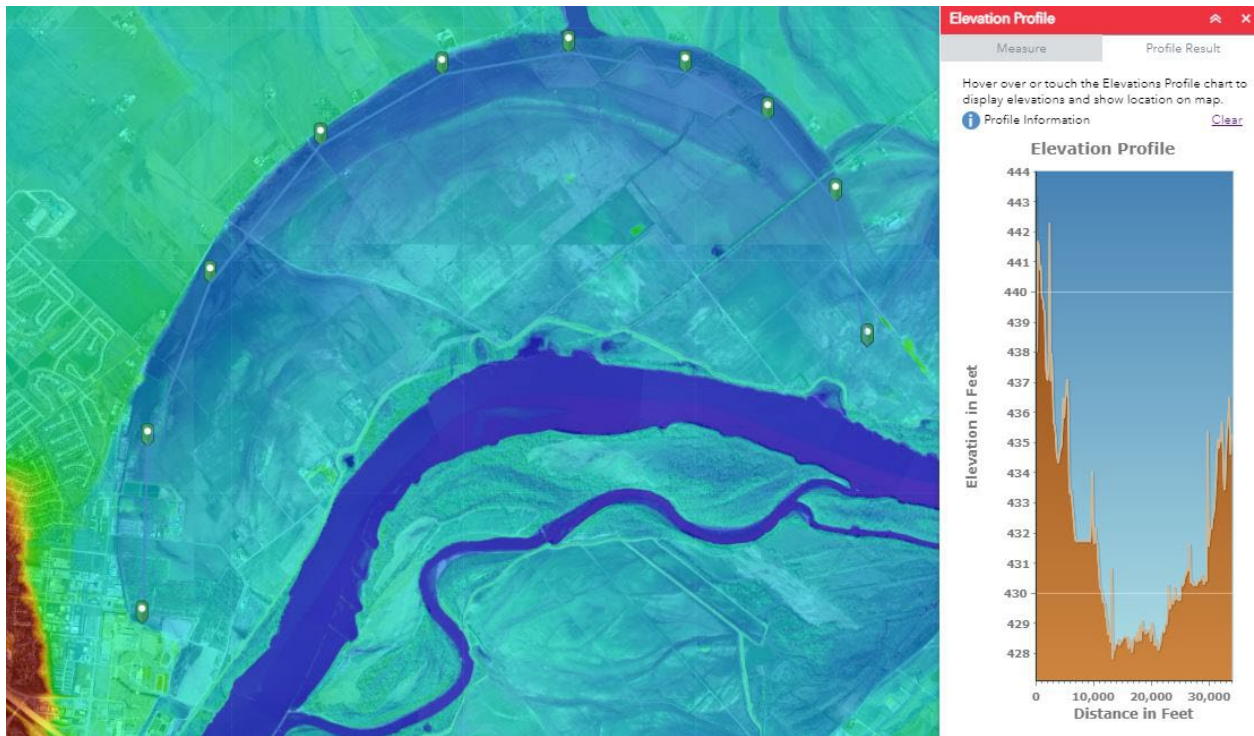


Figure 2. Profile elevations showing Wetland A 9-12' below origin of inlets.



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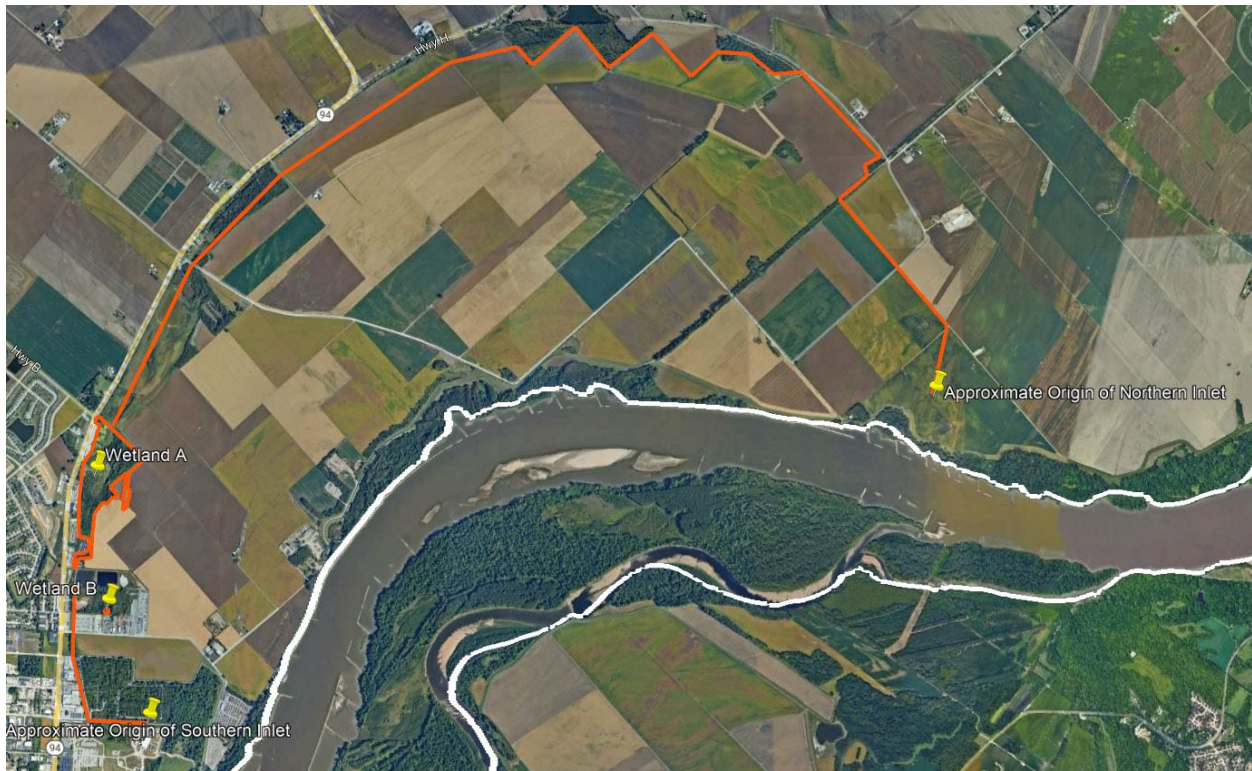


Figure 3 Estimated flow paths of the northern/southern inlets of wetland A.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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

<sup>5</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>6</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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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”).<sup>7</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

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<sup>7</sup> 51 FR 41217, November 13, 1986.

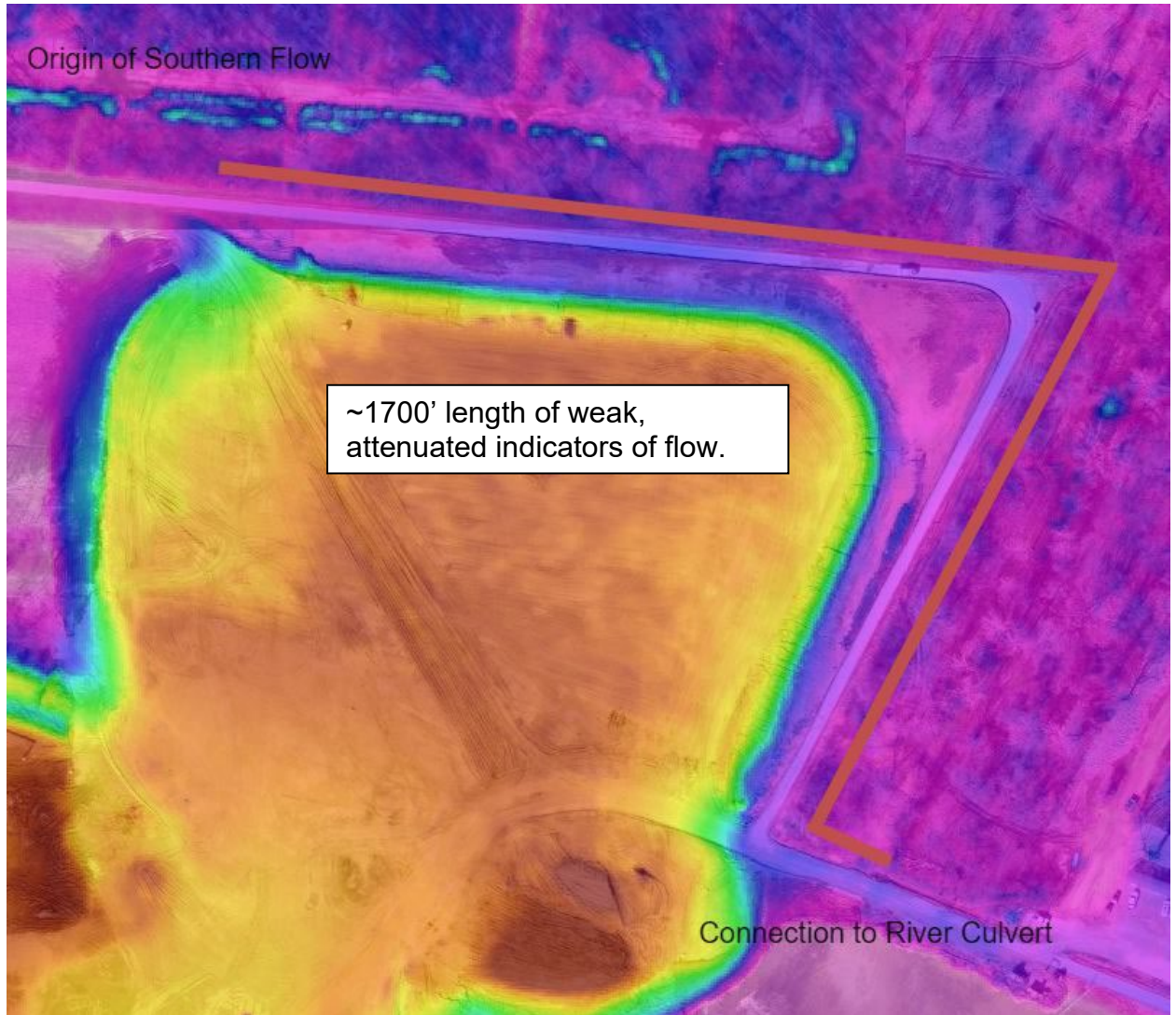
the review area and describe how it was determined to be a waste treatment system. N/A

- 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).

Wetland A is an approximately 45.8-acre wetland that lacks a continuous surface connection to an RPW. Two inlets flow into Wetland A from offsite, but they do not provide a continuous surface connection between Wetland A and the Missouri River, a TNW (see discussion on flow path above in section 5). While it can be inferred that a physical connection may exist for the southern flow path, it occurs in and around a Boeing facility used to manufacture sensitive munitions and is therefore unavailable for on-site visits. 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 Wetland A to the Missouri River. This indicates that a physical connection may not exist past the estimated origin point indicated above. It also indicates uncertainty that flow is conveyed at all, let alone at a sufficient level. This speculative connection occurs over a length of 1700’, further weakening the prospect of a CSC. There is an approximate 12’ elevation difference between Wetland A and the estimated origin of flow from the south. This is an *extreme* difference in relative heights when considered in context of the Missouri River floodplain.

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There is an outfall into the Missouri River located at 38.8065, -90.4642. Some data sources show a tributary that connects Wetland A to this culvert. This is not reflected in LiDAR data. In fact, this culvert primarily handles discharge from a water treatment facility to the south, with only a small contribution from an undeveloped area south of Boeing Service Road. It cannot be ascertained if any of the flow from the outfall is ever conveyed to or from Wetland A.

Because of the uncertainty of an unbroken physical connection, that is too extended and tenuous, that provides sufficient flow between Wetland A and the Missouri River, the district finds that Wetland A lacks a continuous surface connection to a relatively permanent water.

Wetland B is an approximately 1.36-acre isolated wetland with no continuous surface connection to any other 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. Site visit conducted on June 17, 2024. Office review on June 17 and July 5, 2024.
  - b. Wetland Investigation Report dated June 7, 2024.
  - c. Online Regulatory GIS viewer, accessed July 5, 2024.

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.