



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

CEMVS-R

21 AUGUST 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-2024-416](#)

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).

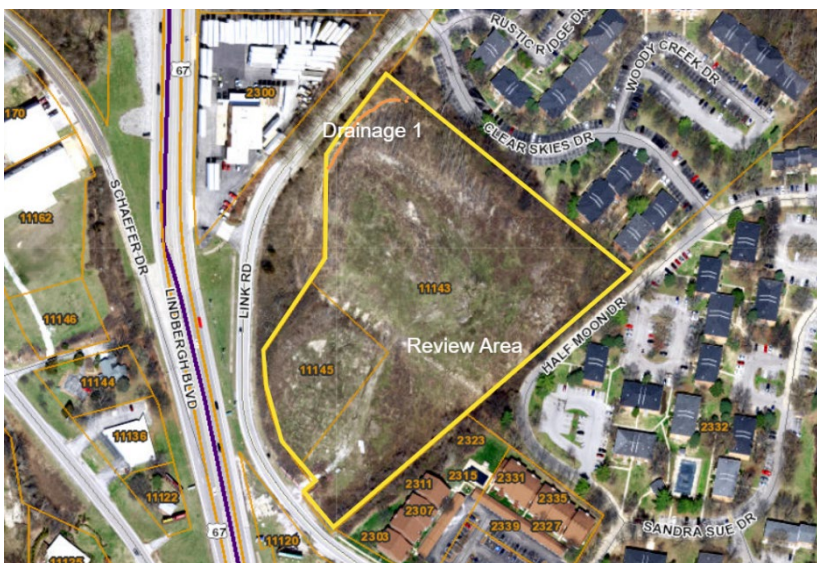
- i. [Drainage 1 - 252 linear feet, non-jurisdictional](#)

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 7.9 acres located at current mailing address parcels at 11145 & 11143 N Warson Road, St. Louis, Missouri 63114. The review area is located within Section 45, Township 46 North, Range 5 East within St. Louis County. Approximate



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coordinates of the review area are 38.7019°, -90.4072°. There were no records of any previous jurisdictional determinations in the ORM database.

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.

The undefined drainage feature within the review area flows into an unnamed branch of Fee Fee Creek. Fee Fee Creek then flows into Creve Coeur Creek before then shortly flowing into the navigable, Missouri 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

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.

references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

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 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.

USGS maps from 1933 show roadways in similar alignment immediately adjacent to the site on the west and south as they are currently. The review area is part of the upper most portions of an undefined drainage feature that flows into an unnamed branch of Fee Fee Creek. Fee Fee Creek then flows into Creve Coeur Creek before then shortly flowing into the navigable, Missouri River. The review area's topography suggests the upper most extent of an undefined drainage feature might be present but no mapped stream is shown in 1:24,000 scale USGS maps reviewed (1933, 1954, 2012, 2021).

This topography is supported by the Regulatory Viewer's hillshade lidar and slope layers which illustrate the topographic relief in the area. In reviewing these different maps and considering the roadway and development modifications to the landscape, which creates complexity in the upper watershed drainage, the watershed was calculated to be limited to approximately 5 acres.

A review of higher resolution aerial photography available in the Regulatory Viewer and Google Earth, does suggest a drainage feature present in the western portion of the site where the topographic relief is mapped. A review of Google Earth aerials from 2002-2010 shows extensive grading and filling across the majority of the review area including the area of the drainage feature. 2011 Google Earth aerial shows grading and rock lining placed in the drainage area.

⁷ 51 FR 41217, November 13, 1986.

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The drainage feature continues to be present in aerial imagery after that point with varying clarity depending on tree cover.

The following resources were reviewed and none of these resources document a stream channel is the review area: USGS Topographic Maps, USGS National Hydrological Dataset, USFWS NWI map, MDNR's Water Quality Standards Map Viewer, and St. Louis County Parcel Viewer.

A review of the resources has found that there are no historic waters present within the drainage feature area. It appears to drain the upper most portions of the watershed and support irregular and low flow volumes of stormwater following rainfall events. It appears that grading and fill of the drainage feature following the extensive grading and filling operations of the site made the drainage feature more visible due to the clearing and placement of riprap. Overall, the Corps has determined that this is an upland erosion drainage feature that could be characterized as a ditch or swale that does not support relatively permanent flow and does not meet the definition of a waters of the U.S.

- 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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- 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).

N/A

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. Submittals: Warson Grove NPR Application, 7/19/2024 & Warson Grove St. Louis AJD Form Signed, 7/19/2024
- b. USFWS National Wetland Inventory, accessed 8/19/2024
- c. USGS's TopoViewer, 1-24,000 Creve Coeur Quadrangle, years: 1933, 1954, 2012, 2021
- d. USACE Regulatory Viewer Map, accessed 8/19/2024
- e. USGS National Hydrological Dataset, accessed 8/19/2024
- f. St. Louis County Parcel Mapper, accessed 8/20/2024
- g. MDNR's Water Quality Standards Map Viewer, accessed 8/19/2024
- h. Google Earth Pro, capture years: 1993, 2002, 2006, 2008, 2010, 2021, 2022

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.