



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

CEMVSOD-F

[11 March 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-2024-075](#)

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.

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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. [Tributary A, \(296 linear feet\), non-jurisdictional](#)
 - ii. [Tributary B, \(720 linear feet\), 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 59-acre area located at the northwest corner of Interstate-70 and Interstate-64 intersection in Wentzville, MO with approximate geographic coordinates 38.808344, -90.845673.](#)



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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 [Tributary B flows to Tributary A which flows south to Peruque Creek and ultimately to the Mississippi River.](#)
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](#)
 - c. Other Waters (a)(3): [N/A](#)
 - d. Impoundments (a)(4): [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.

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- 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](#)
- 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

⁶ 51 FR 41217, November 13, 1986.

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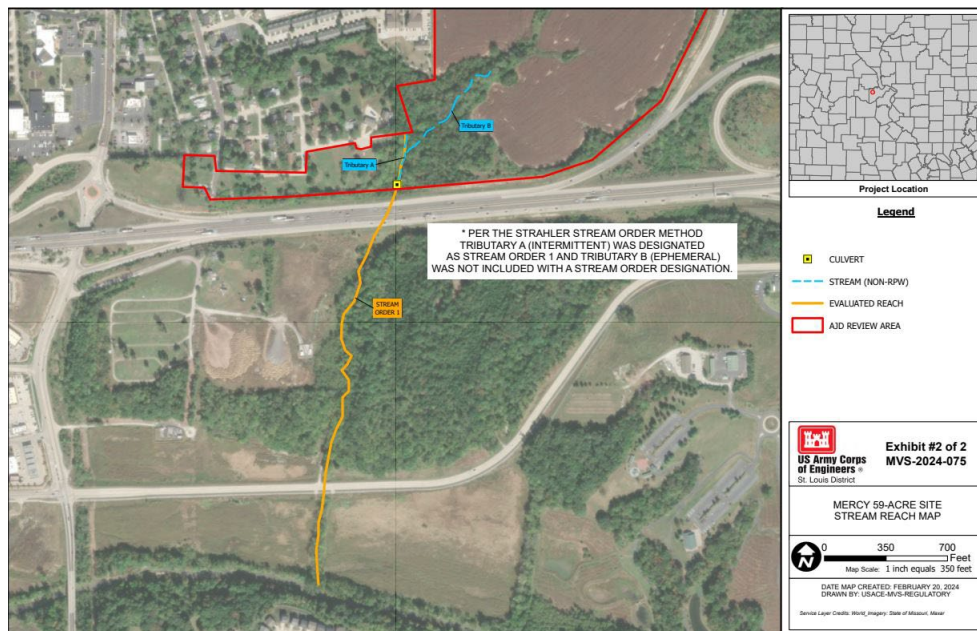
categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Tributary A (~296 linear feet) is a non-relatively permanent water that would flow to Peruque Creek during times when the channel has surface discharge. Tributary A originates in a forested area adjacent to residential developments and drains an approximately 166-acre watershed (Tributary B included) to its' confluence with Peruque Creek. Tributary A was determined to be a first order stream and the evaluated reach extends outside of the Review Area to its' confluence with Peruque Creek (38.800146°, -90.850181°). Tributary A has approximately 62' of fall in 3,200' of distance. Flow was observed during the USACE site visit on 2/5/2024 within the portion of the reach located within the Review Area. A spring was observed adjacent to Tributary A providing a consistent baseflow. In addition, it appears some of the input for Tributary A comes from a drainage basin off-site to the north. The portion of Tributary A located within the Review Area (north of I-70) would be considered a relatively permanent water (RPW). However, the remainder of the reach (south of I-70) did not match the characteristics of the northern portion and would not be considered an RPW. This southern portion of the stream channel was primarily dry with no flow observed during the site visit. The streambed within the southern portion of Tributary A did not contain a consistent low-flow channel or thalweg, and channel characteristics appeared to have developed by the repeated sequence of flashy streamflow, flow cessation, and channel drying throughout the year. Much of the stream channel in the southern portion had leaf wracking on the upstream side of rocks/debris indicative of the lack of consistent flows. The culvert that conveys Tributary A beneath I-70 was almost completely dry during the USACE site visit. Tributary A has characteristics typical of a losing stream. The evaluated reach includes approximately 3,200' of stream length. 2500' was classified as non-RPW (78%) and 700' was classified as RPW (22%). Therefore, Tributary A was classified as a non-RPW tributary.

Tributary B (~720 linear feet) is an ephemeral channel that would flow to Tributary A, likely only in direct response to a precipitation event. Tributary B originates within a vegetated agricultural swale where it begins to develop channel definition within a brushy, wooded corridor. No flow was observed during the USACE site visit, and the stream channel only contained a few isolated pockets of water. Tributary B was determined to be a non-relatively permanent water.

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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, February 5, 2024](#)
 - b. [USGS Topographic Maps, Accessed February 20, 2024](#)
 - c. [USGS Stream Stats, Accessed February 1, 2024](#)
 - d. [Antecedent Precipitation Tool, Accessed February 20, 2024](#)
 - e. [USDA-NRCS Soil Survey, Accessed February 20, 2024](#)
 - f. [USFWS National Wetland Inventory, Accessed February 20, 2024](#)
 - g. [LiDAR, Accessed February 1, 2024 & February 20, 2024](#)
 - h. [Google Earth Pro Aerial Imagery, Accessed February 1, 2024 & February 20, 2024](#)

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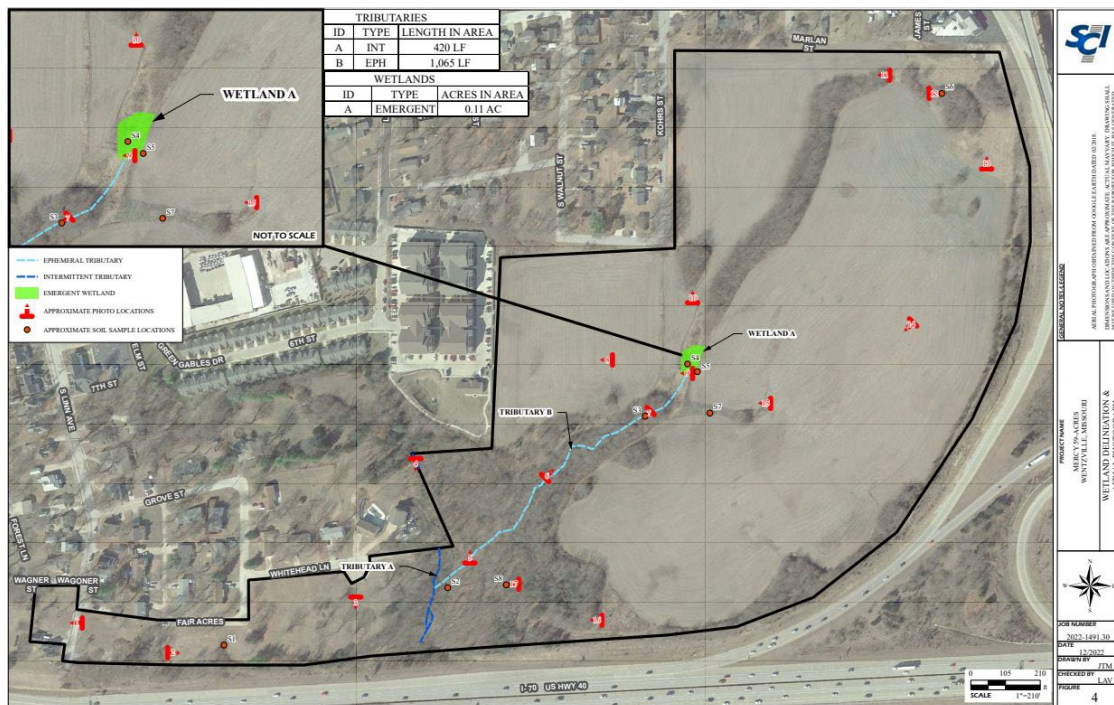
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10. OTHER SUPPORTING INFORMATION. A review of USGS topographic maps from 1973-2021 identifies a tributary as a “dashed blue-line” in the Review Area. The USGS Stream Stats identifies Tributary A and shows a drainage area of ~166 acres (including Tributary B) to its’ confluence with Peruque Creek. The U.S. Fish & Wildlife Service’s (USFWS) National Wetland Inventory (NWI) mapper generally matches the USGS topographic maps depicting the linear riverine feature.

The Corps visited the site on February 5, 2024, during normal conditions during the wet season, with the drought index indicating a moderate drought. During the site visit, Tributary A was flowing and was being fed by a spring. Tributary B was mostly dry, with some isolated pockets of water. Recent snowmelt was likely contributing to some of the water observed in Tributary B.

In addition, the Corps visited the downstream, off-site portion of Tributary A in July of 2023 for a separate request and conditions observed were consistent with the non-RPW nature of the channel that was observed on the most recent site visit.

*Wetland A as identified in the SCI delineation did not meet all three parameters to be considered a wetland. The area was determined to be upland and not included as an aquatic resource. The area was dominated by upland species like tall fescue and teasel, and the area did not have indicators of hydrology to support its’ classification as a wetland.



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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.