



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

CEMVS-R

30 April 2025

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-2025-78](#)

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 [in 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. McCoy Creek: Jurisdictional, Section 404
- ii. Drainage Feature A: Non-jurisdictional
- iii. Drainage Feature B: Non-jurisdictional
- iv. Drainage Feature C: Non-Jurisdictional
- v. Drainage Feature D: Jurisdictional, Section 404
- vi. Pond A: Non-Jurisdictional
- vii. Pond B: Non-Jurisdictional
- viii. Pond C: Jurisdictional, Section 404
- ix. Pond D: Jurisdictional, Section 404

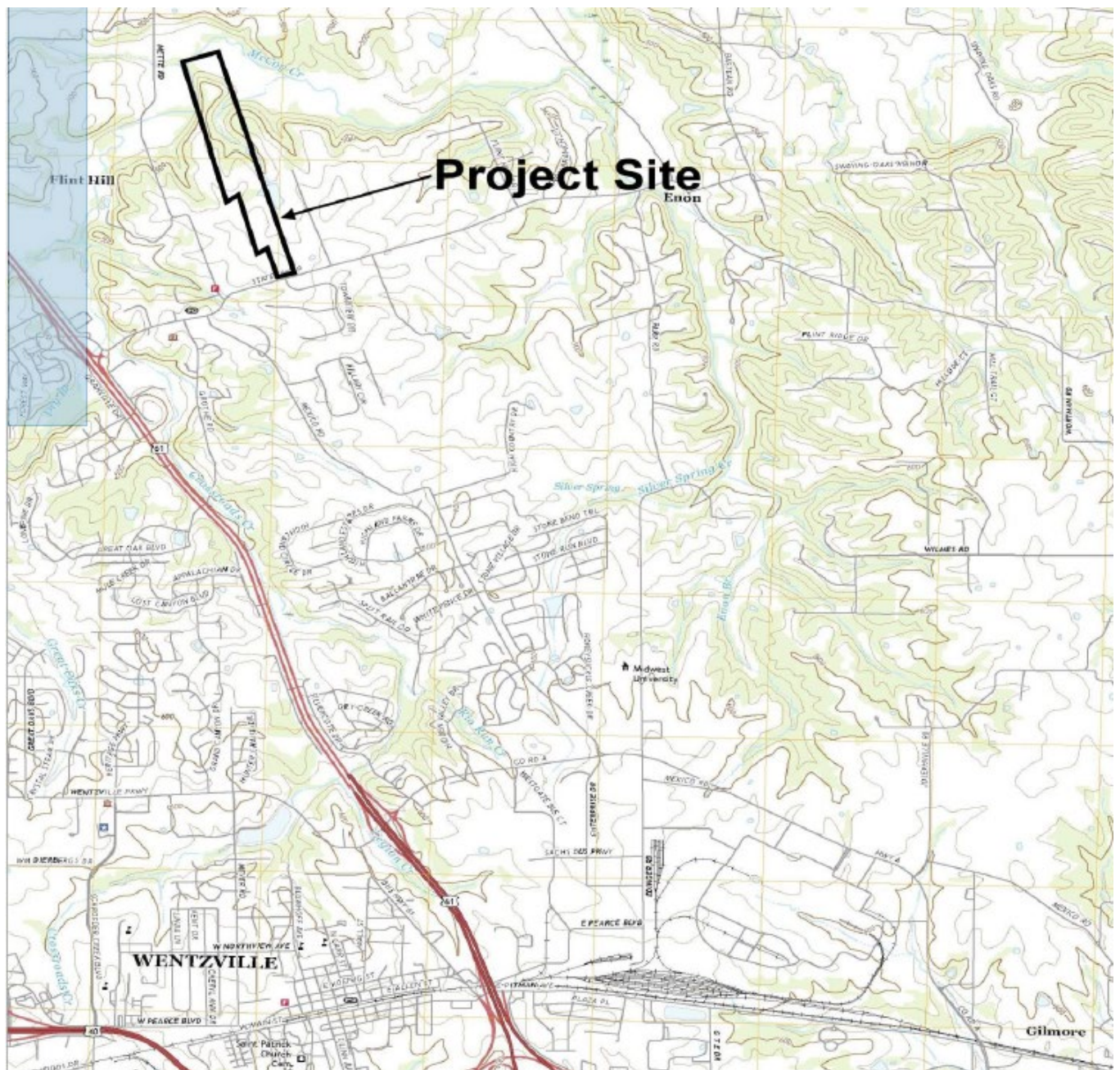
## 2. REFERENCES.

- 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 entire project site is 68.07-acres and is comprised of an undeveloped property which borders McCoy Creek and contains four ponds and five drainage features. The majority of the site is upland woodlands as well as some fields within the floodplain of McCoy Creek. The site is located at Latitude 38.8638, and Longitude -90.8575, City of Flint Hill, St. Charles County, Missouri.

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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 \(TNW\)](#)



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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [McCoy creek flows into the Cuivre River, which flows into the Cuivre Slough, a primary tributary to the Mississippi River. The Mississippi River is a Section 10 water within the St. Louis District from mile 0, Cairo Illinois to mile 300, Saverton, Missouri.](#)
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> [NA](#)
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): [NA](#)
  - b. Interstate Waters (a)(2): [NA](#)
  - c. Other Waters (a)(3): [NA](#)
  - d. Impoundments (a)(4): [NA](#)

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<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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e. Tributaries (a)(5):

i. **McCoy Creek.** This stream channel flows along the northwestern property boundary and is 30-50 feet wide and exists within the site for approximately 876 linear feet. McCoy Creek is mapped on the NWI maps as a riverine feature and is identified on the NHD as a perennial feature. Downstream of this site, McCoy Creek flows directly into Cuivre River, a perennial stream source. McCoy Creek is a 3rd order stream and contained waterflow during the consultant site visits conducted on January 24, 2025 and February 17, 2025. McCoy Creek is considered a Relatively Permanent Waterbody, has a 15,040-acre watershed at this location and would be considered Jurisdictional.

ii. **Drainage Feature D.** The drainage exists within the site for approximately 3,100 linear feet and is 3-4 feet wide. The drainage feature has a 134.4-acre watershed at this location and is a 2nd order stream channel. The drainage is identified as riverine on the NWI maps, and it is mapped on the NHD layer as an intermittent stream. The drainage does have flowing water within the majority of the stream channel but does have an area within its central section that does not appear to have flow present. The feature is considered a Relatively Permanent Waterbody and is jurisdictional. The bed and bank are defined in the steeper section of the channel, but when the slope diminishes within the floodplain of McCoy creek, the bed and bank features deteriorate or appear disturbed before becoming defined again before its confluence with McCoy Creek.

Drainage Features D Flowpath: Drainage Feature D → Pond D →  
Drainage Feature D → Pond C → Drainage Feature D

iii. **Pond C.** The pond is approximately 0.38-acres and is located within the northern section of the site. The pond is located within Drainage Feature D, which flows into and out of it. Due to its connection to a waters of the U.S., this feature is considered jurisdictional.

ii. **Pond D.** The pond is approximately 0.15-acres and is located within the eastern section of the site. The pond is located within Drainage Feature D, which flows into and out of it. Due to its connection to a waters of the U.S., this feature is considered jurisdictional.

j. The territorial seas (a)(6): NA

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k. Adjacent wetlands (a)(7): [NA](#)

## 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. [NA](#)
- 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. [NA](#)
- 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. [NA](#)
- 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. [NA](#)
- 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*. [NA](#)
- 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

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

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

- i. **Drainage Feature A.** In its upper reaches, the drainage feature exists within the site for approximately 680 linear feet and is 1-3 feet wide. In the lower reach before its confluence with Drainage Feature B, the drainage exists as an open water habitat (Pond A) for an additional 640 linear feet. The drainage feature has a 42.37-acre watershed and is a 1st order stream channel. The drainage is not identified on the NWI maps, nor is it mapped on the NHD layer. The drainage did not have flowing water within the majority of its length during the consultant site visits and is considered a non-relatively permanent waterbody.
- ii. **Drainage Feature B.** In its upper reaches, the drainage exists within the site for approximately 427 linear feet and is 1-3 feet wide. In the lower reach before its confluence with Drainage Feature A, the drainage features exists as an open water habitat (Pond A) for an additional 260 linear feet. The drainage feature is a 1st order stream channel. The drainage is not identified on the NWI maps, nor is it mapped on the NHD layer. The drainage did not have flowing water within the majority of its length during the consultant site visits and is considered a non-relatively permanent waterbody.
- iii. **Drainage Feature C.** The drainage exists within the site for approximately 829 linear feet and is 3-5 feet wide. Within the reach, the channel also flows for approximately 108 linear feet through an open water habitat (Pond B). The drainage feature is a 1st order stream channel. The drainage did not have flowing water within the majority of its length during the consultant site visits and is considered a Non-Relatively Permanent Waterbody. The bed and bank are defined in the steeper section of the channel but when the slope diminishes, the bed and bank features deteriorate or are non-existent
- iv. **Pond A.** The pond is approximately 0.44-acres and is located within the southeastern portion of the site. Pond A is located at the confluence of Drainage Feature A and Drainage Feature B. Since the open-water habitat accounts for less than 50% of each of the overall drainage features, Pond A is considered non-relatively permanent.
- v. **Pond B.** The pond is approximately 0.11-acres and is located within the western section of the site. Pond B is located within Drainage Feature C.

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Since the open-water habitat accounts for less than 50% of the drainage feature, Pond B is considered non-relatively permanent.

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. Consultant Site Visit: 1/24/24 and 2/17/25
- b. National Hydrography Dataset (NHD)
- c. StreamStats for watershed data
- d. Digital Elevation Model (LIDAR)
- e. FEMA Maps
- f. National Wetland Inventory Map (NWI)

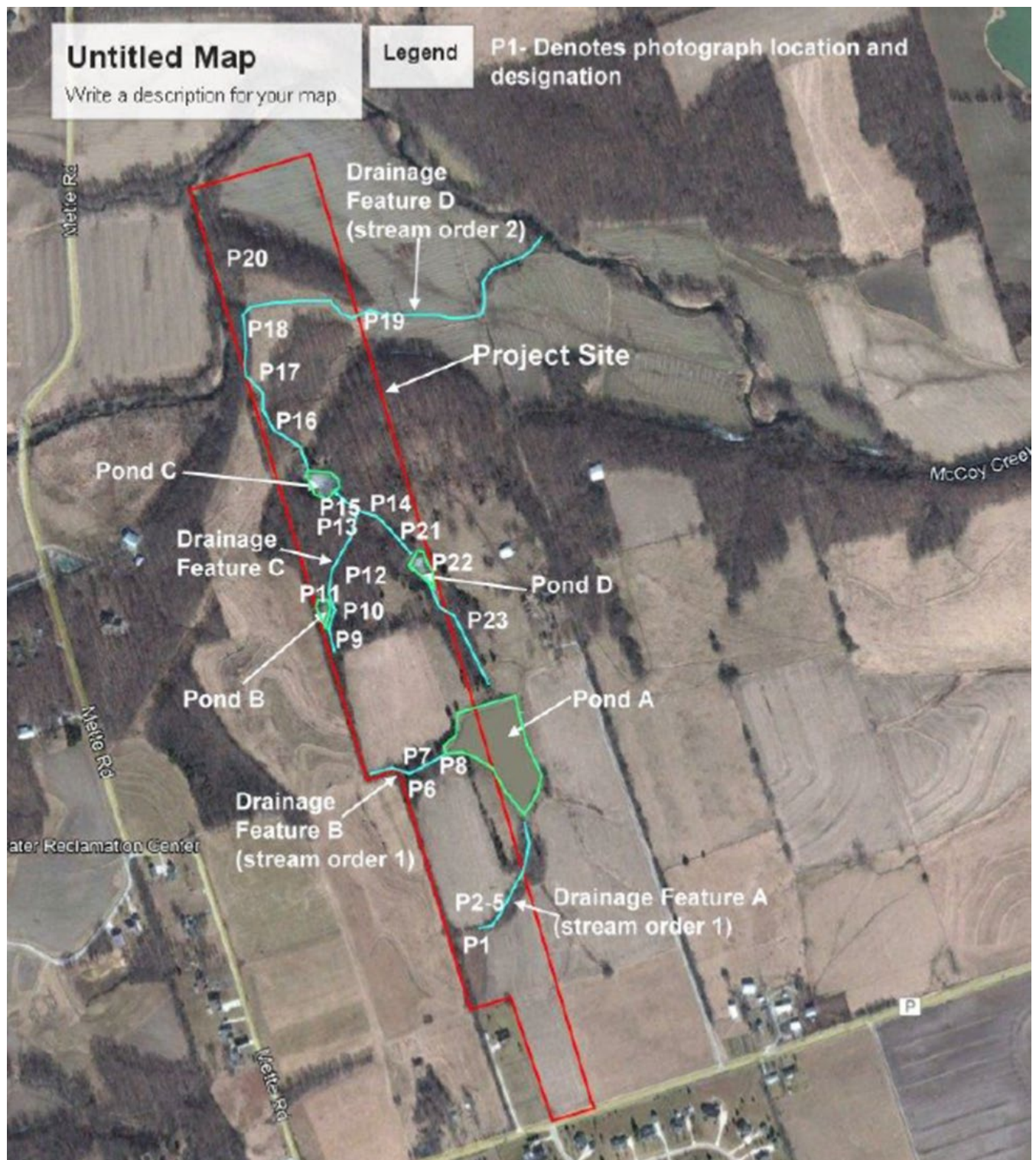
10. OTHER SUPPORTING INFORMATION. NA

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.



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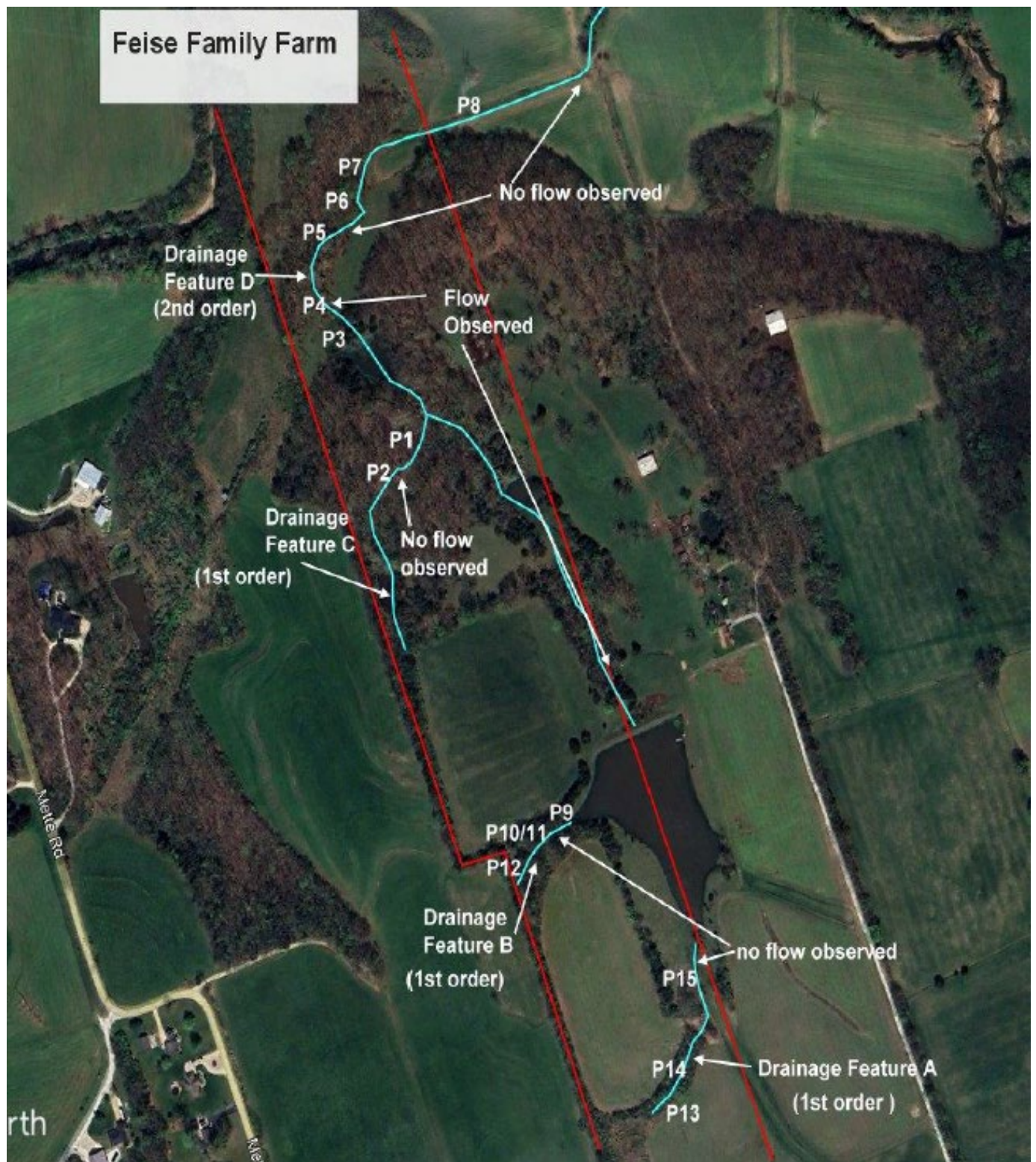
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