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

CEMVS-RD 12 MARCH 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) ,[1] MVS-2024-678

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.

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[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.

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. Stream 1, non-jurisdictional, Section 404 – 5,340 linear feet

        ii. Stream 2, non-jurisdictional, Section 404 – 136 linear feet

        iii. Stream 3, non-jurisdictional Section 404 – 131 linear feet

        iv. Open Water 1, non-jurisidictional Section 404 – 0.19 acres

2. REFERENCES.

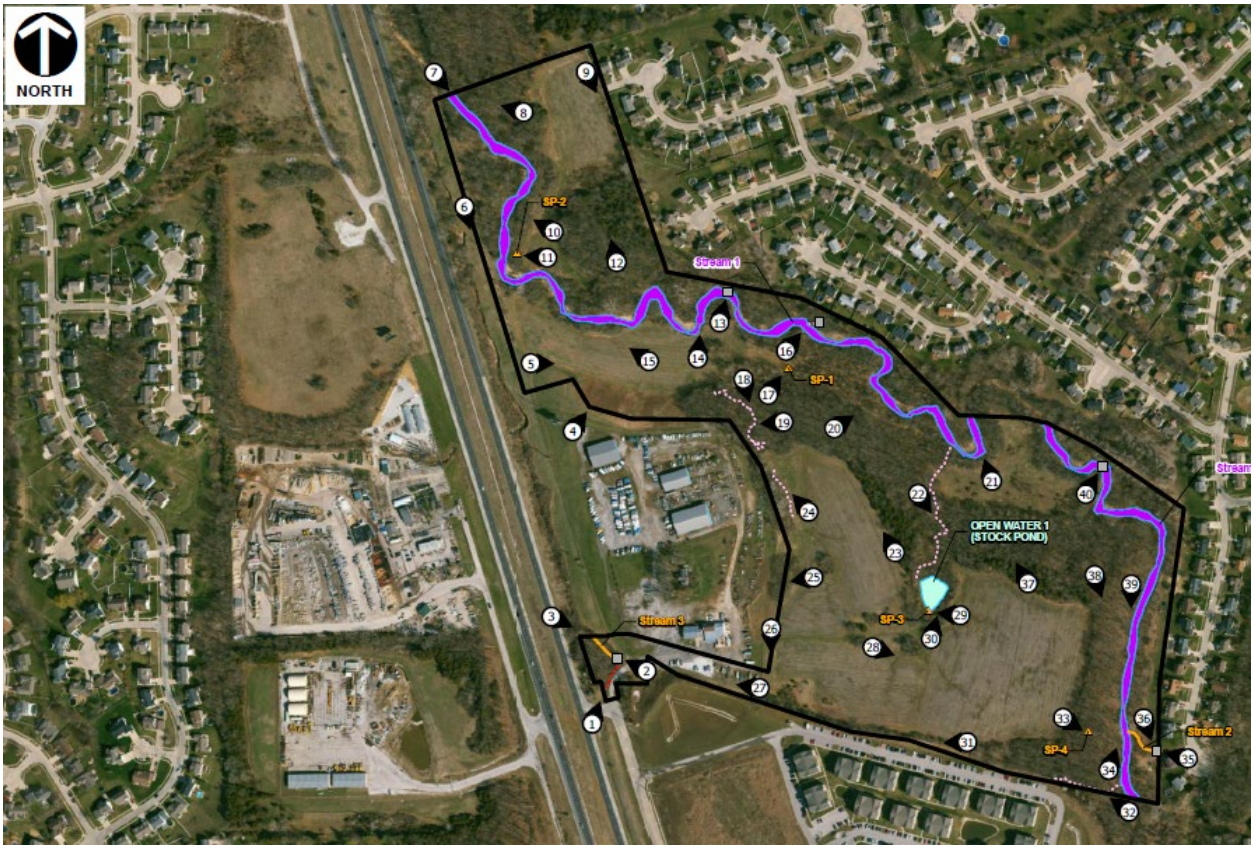
    a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

    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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review includes a 69-acre area, with central geographic coordinates of 38.83433°, -90.851793°, located within Section 13, Township 47 North, Range 1 East, within the USGS Wentzville Quadrangle. The physical address for the site is 1250 N Highway 61 Holt, Wentzville, St. Charles County, Missouri.



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: Stream 2 & 3 flow into Stream 1, an unnamed tributary, which flows into Dry Branch, which then shortly flows into McCoy Creek. McCoy Creek flows into Cuivre River, a primary tributary to the navigable Mississippi River.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

[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.

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 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").[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.

[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.
[7] 51 FR 41217, November 13, 1986.

Open Water 1, non-jurisidictional Section 404 – 0.19 acres

A review of the oldest aerial imagery, taken in 1956, shows the farm pond present. The pond is not shown in 1945, 1956 USGS topographic maps at a broader scale but appears in the lower scale 1973 topographic map. The open water 1 (pond) feature is located within a 12-acre drainage feature. There are no stream channels mapped in any of the years, prior to the ponds construction or after the ponds construction. The pond is mapped in the 2021 USGS topographic map. The pond is mapped as a freshwater emergent wetland by the USFWS NWI mapper. The pond is not mapped by the MDNR Water Quality Standards Map, nor within any of the FEMA Floodmap flood zones.

There is no office review evidence that a water of the U.S. was present/impounded by the construction of the pond. In addition, desktop review and field observations by delineators did not identify any WOTUS impounded or discharging from the pond. As there is no evidence that the pond impounded a water of the U.S., the Corps believes the feature fits the definition of an artificial lake or pond created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, in this case stock watering. The Corps has determined that the Open Water 1 (pond) is an aquatic resource that is generally non-jurisdictional as stated by the 1986 regulations preamble and would not be a jurisdictional water of the U.S.

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

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).

Stream 1, non-jurisdictional, Section 404 – 5,340 linear feet

Mapped as a perennial branch of Dry Branch, by the USGS Topographic map, locally named Crossroads Creek, and as a linear riverine aquatic resource by the USFWS NWI map. The state of Missouri identifies the stream as Waterbody Identification Number 5024 and classifies it as a warm water habitat with designated uses that include: irrigation, secondary contact recreation, whole body contact recreation category B and human health protection. The stream is located within a FEMA mapped flood Zone A along its length within the review area. USGS StreamStats application has the stream channel mapped as an intermittent stream with an approximate drainage area of the stream is approximately 1,800 acres. Stream 1 is a stream order 3 length which begins just upgradient of the Interstate 61 crossing of Stream 1 and becomes a 4th order stream just downstream of the review area boundary. USDA NRCS Soil Web map identifies the predominant soil type along Stream 1 as 67035—Haymond silt loam, 1 to 3 percent slopes, frequently flooded.

Delineators ran the Antecedent Precipitation Tool (APT) and found that normal conditions during the wet season were present at the time of their site investigation and no rainfall had been documented in approximately 15 days (half of a month) preceding the site visit. During the delineators field investigation on October 17, 2024, it was documented that the stream had an Ordinary High Water Mark width of 20-30 feet and at the time of the site visit the streambed was "predominantly dry, with one observed pool at the time of the field delineation" throughout the entire 5,340 linear foot length. The stream channel's hydrology has likely been altered by development in the watershed and increased bedload. The USGS StreamStats application estimates that 25% of the tributaries' watershed areas consists of impervious surface likely contributing to increased

runoff and higher peak flow events. A review of the Low-Flow Statistics Flow Report showed that across the 1 day, 10 year Low flow events that very low flow quantity, 0.000453 cubic feet per second. The Missouri Department of Natural Resources' Springs, Sinkholes, and Losing Gaining Stream layers were reviewed and there were no documented features at this location however the layers are not all inclusive. The delineators identified the stream as an intermittent, relatively permanent water and speculated that the stream channel could be a losing stream with flows going down into groundwater.

A comprehensive review of suitable aerial imagery found that the channel is primarily dry, nearly year-round. In the late winter and spring months there was limited flow present but not consistent throughout the season nor reach. There is heavy deposition bedload across the stream channel, without a low flow area and adjacent gravel bars with graded depositional material. This could indicate that a low flow area is not consistently maintained because velocities are dissipating as the water is flowing and that flow is lost (infiltrating down out of the channel) from the streambed resulting in these depositional characteristics. Limited flow was documented during three of the sixteen aerial images reviewed and APT review found that they were shortly after a rainfall event. In the review of aerial imagery the Corps was not able to find evidence that consistent seasonal flow is predominant within the stream channel. Flow within the stream channel appears to be primarily driven from rainfall events, with the channel potentially contributing to groundwater as a losing stream, but no evidence that flow either from groundwater or surface water runoff is maintaining consistent seasonal flow for a portion of the year. For these reasons the Corps does not concur with the delineator's determination of a relatively permanent water and has determined that the stream channel does not meet the definition of a relatively permanent water and therefore in accordance with the Sackett Supreme Court decision is not a jurisidictional waters of the U.S.

Stream 2, non-jurisdictional, Section 404 – 136 linear feet

Not mapped by USGS Topographic Map, USFWS NWI mapper, MDNR Water Quality Standards Map, FEMA Floodmap but is locally named Rio Run Creek. The channel is mapped by USGS StreamStats application and shows estimates for low flow in very small quantities, with the 1 Day, 10 year flow being 0.00000491 cubic feet per second. The National Hydrological Dataset identifies the stream type as intermittent. The stream appears to be Stream Order 2 length that has two high slope headwater ephemeral channels, both Stream Order 1, that flow together to form Stream 2. Sometime between 1995 and 2003, a residential development appears to have piped the upstream most portion of

Stream 2, just downstream of where the two upstream stream order 1 flow together. Delineators ran the Antecedent Precipitation Tool (APT) and found that normal conditions during the wet season were present at the time of their site investigation. Field observations from delineators on October 17, 2024 found a stream channel with an Ordinary High Water Mark width of 4 feet. No flow was observed at the time of the site visit. Flow characteristics in the reach were found to be flowing in direct response to rainfall and not in a predictable seasonal manner. For these reasons the Corps has affirmed the delineators proposed determination that Stream 2 is a non-relatively permanent water and not a jurisdictional water of the U.S.

Stream 3, non-jurisdictional Section 404 – 131 linear feet

A review of desktop resources found the stream not mapped by USGS Topographic Map, USFWS NWI mapper, MDNR Water Quality Standards Map and not within a FEMA Floodmap floodzone. The stream channel is mapped by the USGS StreamStats application, but low flow statistics were not generated for the stream reach. The watershed area is approximately 25 acres however there is modification in the watershed by development and piping which could influenced realized drainage area.

Field observations from delineators on October 17, 2024 found a stream channel with an Ordinary High Water Mark width of 3-4 feet. Flow was characterized as flowing in direct response to rainfall and no flow was observed at the time of the site visit. For these reasons the Corps has affirmed the delineators proposed determination that Stream 2 is a non-relatively permanent waters and not a jurisdictional water of the U.S.

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. Civil & Environmental Consultants, Inc. *Request for Approved Jurisdictional Determination*, dated 12/6/2024

b. USGS Topographic maps, accessed 2/28/2055

c. HistoricAerials.com, accessed 2/28/2025

d. Regulatory Viewer, accessed 2/28/2025

e. MDNR Water Quality Standards Map, access 2/28/2025

f. USGS StreamStats application, accessed 3/5/2025

g. Google Earth aerial imagery, accessed 3/5/2025

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.