



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

CEMVS-RD

22 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),¹ [MVS-2025-241](#)

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. [Wetland A, 4.0 acres, non-jurisdictional.](#)
 - ii. [Unger Lake, 28 acres, non-jurisdictional](#)
 - iii. [Tributary A, 185 linear feet, non-jurisdictional](#)
 - iv. [Tributary B, 339 linear feet, non-jurisdictional](#)
 - v. [Tributary C, 2,482 linear feet, non-jurisdictional](#)
 - vi. [Tributary D, 55 linear feet, non-jurisdictional](#)
 - vii. [Tributary E, 295 linear feet, non-jurisdictional](#)

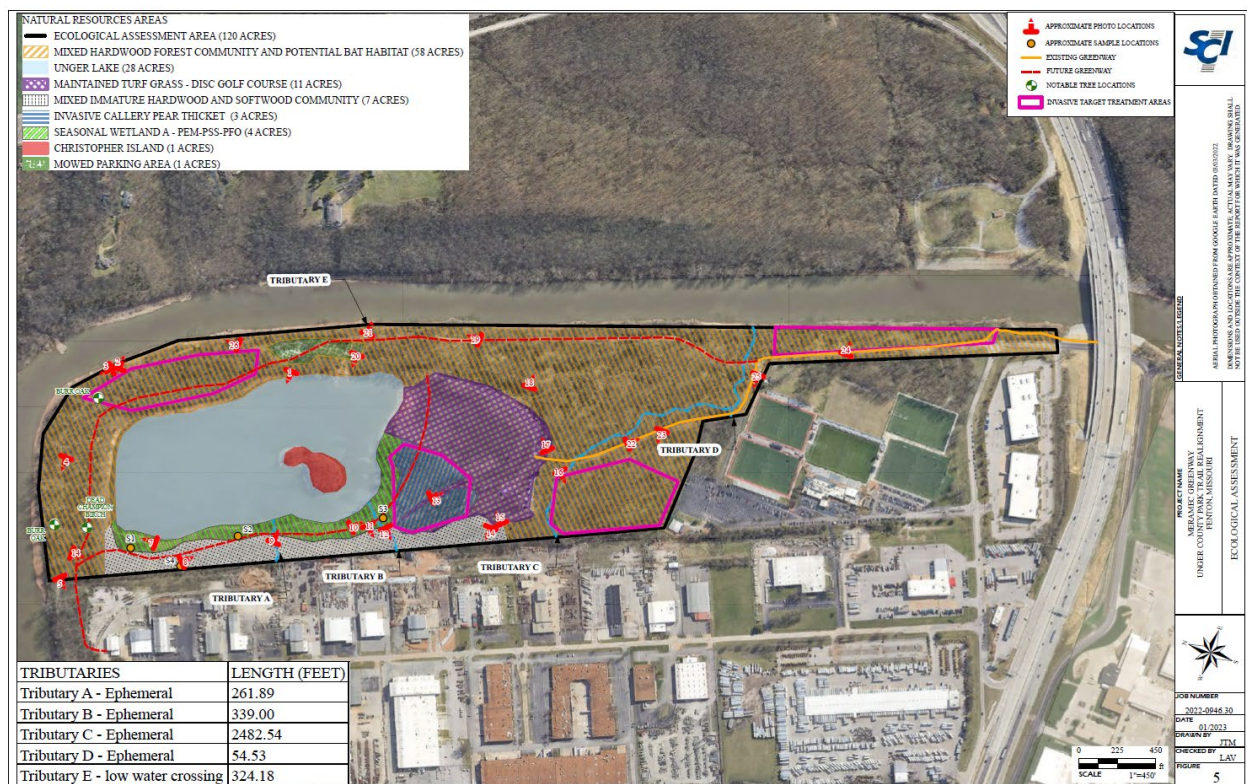
2. REFERENCES.

- 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. 651, 143 S. Ct. 1322 (2023)
- e. [Citing to the 27 September coordination memo, specifically to the language which reads, "Because the Supreme Court in Sackett adopted the Rapanos plurality standard and the 2023 rule preamble discussed the Rapanos plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the Rapanos plurality standard incorporated in paragraphs \(a\)\(3\), \(4\), and \(5\) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended."](#)

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- f. Memorandum To The Field Between The U.S. Department Of The Army, U.S. Army Corps Of Engineers And The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of “Waters Of The United States” Under The Clean Water Act” (March 12, 2025).
3. REVIEW AREA. A 120-acre assessment area located along Yarnell Road and the northwest intersection of Yarnell Road and 1st Street, in Fenton, St. Louis County, Missouri. The project is generally located within the USGS Kirkwood Quadrangle within Section 15, Township 44 North, and Range 5 East. Central Coordinates: 38.553397°, -90.44141°



- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Meramec River](#)
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [The aquatic resources all flow either indirectly or directly to the navigable length of the Meramec River.](#)

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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 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*

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.

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.

Unger Lake, 28 acres, non-jurisdictional

Central Coordinates: 38.5559843273°, -90.4432839557°

Is a floodplain small lake area that is an abandoned gravel mining pit that was originally excavated starting after 1968 and appears to have been abandoned in its current configuration around 1990. Pre-construction aerials show the area primarily as agricultural fields with potentially floodplain sand deposits across the floodplain and USGS topographic maps show the area as an inner bend of the Meramec River floodplain that was cleared in 1940, 1959 and 1967, 1969. USGS Topographic map in 1975, 1982, 1993 identifies the lake as a constructed mining pond. USFWS NWI mapper shows Unger Lake as a Freshwater Pond. The pond was considered for preamble exclusion, however the mining pit/pond’s abandonment and conversion to a recreational public lake made the feature not qualify for this exclusion.

The lake is located within the regulatory Floodway and is hydrologically influenced by Meramec River levels. NOA gauge data in the Meramec River near Valley Park, approximately 2.25 miles upstream of the site. When the Meramec River is at moderate flood state, at 25 feet, the Meramec River begins to close the north side of Yarnell Road near Unger Lake. Within the last 10 years only 5 river crests along the Meramec at Valley Park have exceeded the 25-foot flood stage, which would likely result in water directly discharging from the Meramec River into Unger Lake. Not regularly inundated by Meramec River by surface water and influence is primarily drive by subsurface ground water levels.

Unger Lake was evaluated as a potential tributary and the lack of any historic channels present in the review area being present. The hydrologic regime of Unger Lake does not operate as a tributary system as most surface flows do not result in flow continuing through Unger Lake, through Tributary E, into the downstream receiving Meramec River consistently. Tributary E was found to be an erosional feature, a cut spillway, that per Memo LRL-2023-00466 an erosional feature cannot serve as a tributary connection.

⁷ 51 FR 41217, November 13, 1986.

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The lake is used as a recreational feature as part of the current Unger Park facility but no fees are collected for the use of the park from recreational users nor are their any outfitters for watercraft usage nor vendors at the park. Therefore, the Corps had determined that the small lake does not have a nexus to interstate commerce.

Per 2007 Guidebook three criteria were evaluated on determining whether Unger Lake is a jurisdictional (a)(4) impoundment. As discussed above there is not adequate evidence to support a determination that the impoundment was created from a waters of the U.S. We do not believe that the impoundment meets the criteria of another jurisdictional category, and we do not believe the water has a nexus to commerce.

The Preamble generally not jurisdictional has been meet for the following definition, “waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.” 51 FR 41217 (Nov. 13, 1986). While the feature has been abandoned it does not meet the definition of a waters 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.

Tributary E, 295 linear feet, non-jurisdictional

Central Coordinates: 38.5546364947°, -90.4401354276°

Tributary E is an erosional swale connection that includes a low water crossing that supports Yarnell Road back to the Unger Park Parking Lot. It is not mapped by USFWS NWI Mapper, USGS NHD. A review of aerial imagery shows that the swale appears to have been constructed in conjunction to when the Unger Lake was originally excavated in the Meramec floodplain as a gravel mining operation, likely to help drain the pit sometime between 1971 and 1974. Unger Lake was in its existing contours in 1990 which is when we conservatively estimate that the pit excavations were abandoned, and the swale is visible and appears to rock or concrete spillway structure. Starting in 2002 vegetation starts appearing in the swale and current conditions have swale configuration with washed sand and debris with grasses, forbs, and saplings established in the swale area. Field delineators noted the width of the OHWM of Tributary E to be approximately 2 feet.

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The elevations at the area show that the lake pool could generally be expected to be 390 feet, with this discharge swale's highest elevation along its length at approximately 15 feet higher (405 feet). From the highest point the swale dramatically slopes off into the Meramec River with a normal low water pool elevation of 385 feet in elevation. The only aerials that show flow within the spillway were on March 31, 2008 as floodwaters receded from the fifth highest crest on the Meramec River of 37.83 feet on March 22, 2008 and in the January 1, 2016 aerial following the highest crest on record at 44.11 feet on December 31, 2015.

Discharge from pond to the Meramec River appears to be irregular and flows through the swale primarily appear to be driven by Meramec River into Unger Lake during moderate flood events (greater than flood action levels and minor flooding but less than major river flooding). The swale itself does not have consistent destruction of vegetation and appears to be at such an elevation that flow is not regularly present and does not represent a stream channel but more of an open spillway feature that is generally not considered a jurisdictional 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*
- 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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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland A, 4.0 acres, non-jurisdictional

Central Coordinates: 38.5551494148°, -90.4444549561°

Pre-construction USGS topographic maps do not show wetlands present in the area and post construction of Unger Lake does not show wetlands present. Field delineators noted that the wetland is a mix of palustrine scrub-shrub wetland and forested wetland. The wetland is noted be hydrologically connected to the lake and the Meramec River by flooding and by the outfall discharge from the “Tributary E” swale. The wetlands were noted to be “ephemeral in nature and were quite dry during the October 2022 assessment”. The wetlands are directly abutting the Unger Lake, which has been determined to not be a jurisdictional water of the U.S., and then to Tributary E and swale outfall structure from to Unger Lake to the Meramec River. Unger Lake, while not a WOTUS provides a relatively permanent connection to Tributary E, however, as discussed in the sections for “Tributary E” and “Unger Lake”, Tributary E does constitute a relatively permanent water connection and serves as a physical barrier to connection to the Meramec River. Surface water flow between Unger Lake and the Meramec River appears to be limited to moderate river flooding and does not occur on a normal and reoccurring basis that is consistent at least seasonally. For these reasons the Corps has determined that Wetland A is not adjacent to an (a)(1) navigable waterway, jurisdictional tributary, or jurisdictional impoundment A and does not have a continuous surface connection.

Tributary A, 185 linear feet, non-jurisdictional

Central Coordinates: 38.5547124197°, -90.4446222381°

Tributary B, 339 linear feet, non-jurisdictional

Central Coordinates: 38.5531576534°, -90.443443834°

Tributary A and B both are entirely enclosed upstream of the review area and discharge from pipes in the adjacent industrial park into Unger Park, where they have incised channels that flow into Unger Lake, an abandoned floodplain gravel mining pit. USGS topographic maps show low slope drainage patterns in their locations but no mapped streams. The streams are not mapped by USFWS NWI mapper, USGS NHD. Due to the extensive development of the area it is difficult to determine what piping and watershed drains to these features. Field delineators noted the width of the OHWM of Tributary A to be approximately 2 feet and Tributary B to be approximately 1 foot. These stream channels drain the industrial park area and are primarily driven by stormwater inputs that support flow just after rainfall events.

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Tributary C, 2,482 linear feet, non-jurisdictional

Central Coordinates: 38.5501922981°, -90.4407385391°

Tributary D, 55 linear feet, non-jurisdictional

Central Coordinates: 38.5485561835°, -90.4387719494°

Tributary C is mapped as an intermittent tributary within the review area in the 1:24,000 scale 1933, 1940 and 1954 USGS topographic map. The 1968 aerial image shows the tributary within a forested area with the upper portions (outside of the review area) graded with the riparian removed. USFWS NWI mapper shows Tributary C as a Riverine area and does not map Tributary D. USGS NHD maps Tributary C as a first order, intermittent stream (1,190 In ft), transitioning to perennial tributary (1,148 linear feet) flowing into the Meramec River. The tributary watershed upstream of the review area is entirely piped and the total watershed that drains to the tributary is difficult to determine.

Tributary D is a drainage off of the recreational soccer field park, just outside of the review area that flows into Tributary C. Tributary C, similar to Tributary A & B, is entirely piped upstream, outside of the review area, by the adjacent industrial park and then flows directly to the navigable, Meramec River.

Field delineators identified Tributary C and D as ephemeral streams that are heavily influenced by stormwater flows off of adjacent industrial and commercial inputs. Flow is influenced by runoff and flows for a short duration following rainfall events. The tributary and flow regimes are within a heavily wooded area and aerial imagery cannot be used to evaluate flow regimes. The lack of continuous surface flow at least seasonally does not support a relatively permanent flow and is not a jurisdictional tributary in light of *Sackett*.

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. Ecological Assessment Report, Meramec Greenway – Unger County Park Trail Realignment, Fenton, Missouri, January 9, 2023
 - b. National Water Prediction Service, website accessed 4/15/2025
 - c. USACE Regulatory Viewer, accessed 4/14/2025
 - d. HistoricAerials.com, accessed 4/14/2025

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- e. [Missouri Department of Natural Resources' Water Quality Standards Map Viewer, accessed 4/15/2025](#)
- f. [Google Earth Pro & Google Street View, accessed 4/15/2025](#)

10. OTHER SUPPORTING INFORMATION.

- a. [USEPA & USACE Joint Memorandum on Evaluating Jurisdiction for LRL-2023-00466, signed February 7, 2024](#)

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.