



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, ST. LOUIS DISTRICT  
1222 SPRUCE STREET  
ST. LOUIS, MO 63103-2833

CEMVS-ODR

02 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-2024-00396](#), [MFR 3 of 3](#)<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

CEMVS-ODR

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-00396

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.

- 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. RDW-2; roadside ditch wetland; non-jurisdictional
  - ii. RSW-W06; roadside ditch wetland; 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. Approximately 850 acres (ac); from Lat./Long. 38.8197, -91.1731 (near West Warrenton Boulevard along Interstate 70) to 38.7177, -90.7160 (near Crusher Drive along Interstate 64); within Warren and St. Charles County, Missouri. This site encompasses a portion of the Improve I-70 Initiative for Interstate 70. More specifically this site is within a majority of single independent utility (SIU) 7.

As part of this AJD there are two (2) waters identified within the review area that will be evaluated with an approved jurisdictional determination for permitting decisions within SIU 7. This is MFR 3 of 3. There are two (2) previous AJDs that pertained to other non-jurisdictional waters as part of Project 2 of the Improve I-70 project. As this project evolves more sites in the review area that were previously determined to not be impacted have been included in the impact report. Additionally, there are approximately 325 waters within the review area that are assumed jurisdictional.

The 2 (2) waters as part of the AJD are shown on the attached maps, titled "2025-03-26 AJDWaters\_PreambleMaps#2 2024-396".

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Mississippi River is the closest downstream TNW to the waters listed above. For the St. Louis District, the Mississippi River has been determined to be a TNW. Additionally, the Mississippi River is determined to be a Section 10 Navigable Water as identified in the Section 10 Navigable Waters list on the St. Louis District's webpage.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The roadside ditch wetlands (RDW) transport overland sheet flow from adjacent properties during stormwater events. The RDWs do not have evidence of a direct flow path to a TNW, drain only uplands and do not carry a relatively permanent flow of water. Any flows from rain events and adjacent properties flow (downgrade) a minimum distance of 18 miles to a maximum distance of 30 miles into the Mississippi River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> 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

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</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>8</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.

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”).<sup>9</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. *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.

<i>Waters Name</i>	<i>Size (acres)</i>
<i>RSW-W06</i>	<i>0.21</i>
<i>RDW-W2</i>	<i>0.01</i>

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<sup>9</sup> 51 FR 41217, November 13, 1986.

The 2008 Rapanos guidance states, “In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters.” Note this is a three-part test to determine if a ditch falls within the “generally not jurisdictional” language: 1) excavated wholly in uplands, 2) draining only uplands, and 3) that do not carry relatively permanent flow of water.

These delineated RDWs were evaluated using the Waters of the U.S. Delineations for SIU 7, created by Hg Consult, Inc, HDR, Inc. and Jacobs Engineering Group Inc. In addition, aerial imagery from sources such as Google Earth Pro, historicaerials.com, and the St. Louis District Regulatory GIS Viewer. There is adequate information showing that the above listed waters were excavated in uplands during construction of Interstate 70 and Interstate 64, and other outer roads within the ~850ac project site. The RDWs drain residential and commercial sites within the project site. Minimal flows were observed within these RDWs in any of the aerial imagery reviewed (1945-2023). As such we have determined that the ditches do not have relatively permanent flows. Considering all of the above information we have confirmed that the above listed ditches are excavated wholly in uplands, drain only uplands, and have non-relatively permanent flows. Therefore, the above listed RDWs are not jurisdictional. Please refer to the jurisdictional determination maps, showing the referenced RDWs for further information on these waters.

- 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). [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. [Office analysis concluded 19 March 2025.](#)
  - b. ["Wetland Delineation Report; I-70 Wentzville"; "I-70 Second Tier EIS and ROD Re-evaluation of Section of Independent Utility 7"; "I-70 Project 2 – Wright City Parcels Waters of the U.S. Delineation, Montgomery, Warren, and St. Charles Counties, Missouri"; "I-70 Project 2 Waters of the U.S. Delineation, St. Charles County, MO"](#)
  - c. [KMZ layers including listed waters, provided by the Missouri Department of Transportation.](#)
  - d. [Topographic and Aerial Image on Google Earth Pro; 38 dates between December 1985 and April 2024.](#)
  - e. [Aerial images from \[www.historicalaerials.com\]\(http://www.historicalaerials.com\); aerial images from 1958, 1962 and 1970.](#)
  - f. [LiDAR imagery from the Corps Mississippi Valley Division GIS Map Viewer.](#)
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.](#)



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1222 SPRUCE STREET  
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CEMVS-ODR

5 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),<sup>1</sup> [MVS-2024-00396](#), [MFR 1 of 2](#)<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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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SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-00396

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.

- 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. Please refer to Table 1 and the attached maps for a complete listing of the 34 waters identified within the review area.

## 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. Approximately 850 acres (ac); from Lat./Long. 38.8197, -91.1731 (near West Warrenton Boulevard along Interstate 70) to 38.7177, -90.7160 (near Crusher Drive along Interstate 64); within Warren and St. Charles County, Missouri. This site encompasses a portion of the Improve I-70 Initiative for Interstate 70. More specifically this site is within a majority of single independent utility (SIU) 7.

As part of this approved jurisdictional determination there are thirty-four (34) waters identified within the review area that will be evaluated with an approved jurisdictional determination for permitting decisions within SIU 7. Additionally, there are approximately 325 waters within the review area that are assumed jurisdictional.

The thirty-four (34) waters as part of the approved jurisdictional determination are shown on the attached maps, titled "2025-03-05 AJDWaters\_PreambleMaps 2024-396".



4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Mississippi River and the Missouri River are the closest downstream TNWs to the waters listed in Table 1. For the St. Louis District, the Mississippi River and the Missouri River have both been determined to be TNWs. Additionally, the Mississippi River and the Missouri River are determined to be Section 10 Navigable Waters as identified in the Section 10 Navigable Waters list on the St. Louis District's webpage.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The roadside ditch drainages (RDD) and roadside ditch wetlands (RDW) transport overland sheet flow from adjacent properties during stormwater events. The RDDs and RDWs do not have evidence of a direct flow path to a TNW, drain only uplands and do not carry a relatively permanent flow of water. Any flows from rain events and adjacent properties flow (downgrade) a minimum distance of 18 miles to a maximum distance of 30 miles into the Mississippi River (TNW) and/or the Missouri River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> 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

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</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>8</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.

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”).<sup>9</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. *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.

*Ditch; Concrete Lined (DC)*  
*Tributary (T)*  
*Wetland (W)*

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<sup>9</sup> 51 FR 41217, November 13, 1986.

**Roadside Ditch Drainages (RDD):**

- DC: 2 through 7
- DC: 9 through 13
- DC: 15 through 18
- T: 3 through 8

**Roadside Ditch Wetlands (RDW):**

- LSL Blvd. Wetland (detention basin site)
- RAW-W28 through 30
- RDW-3
- RDW-14
- RDW-16 through 18
- W-2
- W-19

All of the above listed waters are excavated wholly in and draining only uplands and do not carry a relatively permanent flow of water.

The RDDs measure between 68.34 linear feet and 1,130.79 linear feet within the review area.

Waters Name	Size (linear feet)
DC-2	356.98
DC-3	383.52
DC-4	800.94
DC-5	629.38
DC-6	351.54
DC-6B	199.29
DC-7	651.23
DC-9	200.84
DC-10	391
DC-11	463.81
DC-12	461.91
DC-13	233.39
DC-15	302.56
DC-16	469.88
DC-17	1130.79
DC-18	143.4
T-3	94.72
T-4	200.1

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SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-00396

T-5	463.59
T-6	87.54
T-7	68.34
T-8	137.41

The RDWs measure between 0.01ac and 0.34ac within the review area.

Waters Name	Size (acres)
Lake STL Blvd Wetland	0.99
RAW-W28	0.02
RAW-W29	0.01
RAW-W30	0.04
RDW-3	0.01
RDW-14	0.02
RDW-16	0.01
RDW-17	.01
RDW-18	0.01
W-1	0.34
W-2	0.01
W-19	0.02

The 2008 Rapanos guidance states, “In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters.” Note this is a three-part test to determine if a ditch falls within the “generally not jurisdictional” language: 1) excavated wholly in uplands, 2) draining only uplands, and 3) that do not carry relatively permanent flow of water.

These delineated RDDs and RDWs were evaluated using the Waters of the U.S. Delineations for SIU 7, created by Hg Consult, Inc, HDR, Inc. and Jacobs Engineering Group Inc. In addition, aerial imagery from sources such as Google Earth Pro, historicaerials.com, and the St. Louis District Regulatory GIS Viewer. There is adequate information showing that the above listed waters were excavated in uplands during construction of Interstate 70 and Interstate 64, and other outer roads within the ~850ac project site. The RDDs and RDWs drain residential and commercial sites within the city limits of Warrenton, Wright City, Foristell, Wentzville and Lake St. Louis, and primarily drain agricultural or smaller commercial sites outside of these city limits. Minimal flows were observed within these RDDs and RDWs in any of the aerial imagery reviewed (1945-2023). As such we have determined that the ditches do not have relatively permanent

flows. Considering all of the above information we have confirmed that the above listed ditches are excavated wholly in uplands, drain only uplands, and have non-relatively permanent flows. Therefore, the above listed RDDs and RDWs are not jurisdictional. Please refer to the jurisdictional determination maps, showing the referenced RDDs and RDWs for further information on these waters.

- 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). *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. Office analysis concluded 11 February 2025.
  - b. Site visit analysis 04 February 2025.
  - c. “Wetland Delineation Report; I-70 Wentzville”; “I-70 Second Tier EIS and ROD Re-evaluation of Section of Independent Utility 7”; “I-70 Project 2 – Wright City Parcels Waters of the U.S. Delineation, Montgomery, Warren, and St. Charles

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Counties, Missouri”; “I-70 Project 2 Waters of the U.S. Delineation, St. Charles County, MO”

- d. KMZ layers including listed waters, provided by the Missouri Department of Transportation.
- e. Topographic and Aerial Image on Google Earth Pro; 38 dates between December 1985 and April 2024.
- f. Aerial images from [www.historicaerials.com](http://www.historicaerials.com); aerial images from 1958, 1962 and 1970.
- g. Precipitation condition records from the Corps Antecedent Precipitation Tool corresponding to onsite photos during the 04 February 2025 site visit.
- h. LiDAR imagery from the Corps Mississippi Valley Division GIS Map Viewer.

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.



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CEMVS-RD

25 February 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-2024-396 MFR 2 of 2](#))<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Missouri due to litigation.

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. [RSW-W13 – non-jurisdictional PEM wetland - 0.02 acre](#)

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 JD review area is located within a 0.02-acre palustrine emergent wetland, south of Interstate 70, immediately east of Wright City in Section 22, Township 47 North, Range 1 West, Warren County, Missouri \[Latitude: 38.827175, Longitude: -91.009530\].](#)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [The Missouri River is the closest downstream TNW to the water listed above in Section 1.a. Additionally, the Missouri River has been determined to be Section 10 Navigable Waters as identified in the Section 10 Navigable Waters list on the St. Louis District’s webpage.](#)<sup>6</sup>

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.



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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [The subject water does not have evidence of a flow path to a TNW.](#)
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> [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](#)

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<sup>7</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>8</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.

- 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”).<sup>9</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. *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. *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

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<sup>9</sup> 51 FR 41217, November 13, 1986.

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

RSW-W13 is a small depression on the landscape that collects and holds water during wetter times. This wetland does not have a continuous surface connection to a jurisdictional water and are therefore not considered an adjacent wetland. Additionally, this wetland is geographically isolated and disconnected from any tributary system. This is not a water of the U.S. for the reasons described below.

- Topographic maps show the nearest blue line greater than two (2) miles away from the project review area.
- A review of aerial photographs indicates that there are no aquatic resources (streams, tributaries, ditches, ponds, or lakes) or surface connections within the immediate vicinity of any of the wetland boundaries. The nearest stream is approximately 350 linear feet from the delineated wetland.
- A review of Hillshade (LiDAR Shaded Relief) and Digital Elevation Model indicate that the wetland is a depression on the landscape. LiDAR did not indicate the presence of any features that would suggest potential surface connections to any waters of the U.S.
- RSW-W13 is not a paragraph (a)(1) TNWs, is not paragraph (a)(2) interstate waters (i.e., does not cross or serve as a state boundary), is not a lake or pond and is therefore not paragraph (a)(3) waters (i.e., lakes or ponds that support a link to interstate or foreign commerce because they are known to be used by interstate or foreign travelers), is not paragraph (a)(4) impoundments of water of the U.S., is not paragraph (a)(5) tributaries, and is not paragraph (a)(6) territorial seas.
- RSW-W13 is not a paragraph (a)(7) adjacent wetland. Based on the resources consulted, it has been determined that the identified wetland does not physically abut another water of the U.S. (i.e., a TNW, interstate water, jurisdictional impoundment, jurisdictional tributary, or the territorial seas). Additionally, this wetland does not have a continuous surface connection to another water of the U.S. (i.e., do not abut another water of the U.S.; is not connected to another water of the U.S. by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. Therefore, it has been determined that RWS-W13 is not adjacent to another water of the U.S.

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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. 04 February 2025 site visit conducted
  - b. 20 February 2025 office evaluation conducted
  - c. Google Earth Imagery (1995-2023), accessed 20 February 2025
  - d. 1:24k USGS Topographic Map (Wright City), accessed 20 February 2025
  - e. Missouri Elevation Hillshade (LiDAR shaded Relief) and Digital Elevation Model, accessed 20 February 2025
10. OTHER SUPPORTING INFORMATION. MFR 2 of 2; MFR 1 or 2 concerns preamble waters to include roadside ditch drainages and roadside ditch wetlands. The 2008 Rapanos guidance states, “In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters.” Note this is a three-part test to determine if a ditch falls within the “generally not jurisdictional” language: 1) excavated wholly in uplands, 2) draining only uplands, and 3) that do not carry relatively permanent flow of water.
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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**RSW-W13: 0.02-acre PEM Wetland; non-jurisdictional**

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