



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

CEMVSOD-F

14 January 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-2024-67

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 Missouri due to litigation.

1. SUMMARY OF CONCLUSIONS.

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.

CEMVS-OD-F

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-67

- 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. WTL-1, jurisdictional, Section 404
 - ii. WTL-2, non-jurisdictional
 - iii. WTL-3, non-jurisdictional
 - iv. WTL-4, jurisdictional, Section 404
 - v. WTL-5, non-jurisdictional
 - vi. WTL-6, jurisdictional, Section 404
 - vii. WTL-7, non-jurisdictional
 - viii. STR-1, jurisdictional, Section 404
 - ix. STR-2, non-jurisdictional
 - x. STR-3, non-jurisdictional
 - xi. STR-4, non-jurisdictional
 - xii. STR-5, non-jurisdictional
 - xiii. STR-6 (2nd order), non-jurisdictional
 - xiv. STR-6 (3rd order), jurisdictional, Section 404
 - xv. STR-7, non-jurisdictional
 - xvi. STR-8, non-jurisdictional
 - xvii. STR-9, non-jurisdictional
 - xviii. STR-10, jurisdictional, Section 404
 - xix. STR-11, non-jurisdictional
 - xx. STR-12, non-jurisdictional
 - xxi. STR-13, non-jurisdictional
 - xxii. STR-14, non-jurisdictional
 - xxiii. STR-15, non-jurisdictional
 - xxiv. STR-16, non-jurisdictional
 - xxv. STR-17, non-jurisdictional
 - xxvi. STR-18, non-jurisdictional
 - xxvii. STR-19, jurisdictional, Section 404
 - xxviii. STR-20, non-jurisdictional
 - xxix. OWF-1, non-jurisdictional
 - xxx. UDF-1 thru UDF-47, 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).

CEMVS-OD-F

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-67

- 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)
 - e. Quantitative Analysis of Watershed Geomorphology, Strahler 1957
3. REVIEW AREA. Review area is an approximately 91-acre area of interest (AOI) located at 13100 Highway VV, 3 miles north of Bowling Green in Pike County, Missouri. The AOI is comprised of two (2) separate areas within the property limits: AOI – A is 21 acres in the northwestern portion of the property (39.397476, -91.217078) and AOI – B is 70 acres in the southeastern portion of the property (39.390597, -91.207975).
 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 Resources within the review area form the headwaters of Gailey Branch, a tributary to Peno Creek. Peno Creek flows into the Salt River, then into the Mississippi River, a TNW.
 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

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.

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): STR-1 (2097'), STR-6 (3rd order 663'), STR-10 (4154'), & STR-19 (728') were classified as relatively permanent waters due to the presence of at least seasonal flow during the site visits in March & April of 2023 (incipient wetness, wet season, normal conditions). Flow was assessed at the furthest downstream reach of the relevant stream order and was consistent throughout the reach.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): WTL-1 (0.04-acres) & WTL-6 (0.05-acres) abut and have a continuous surface connection to STR-1, a relatively permanent water.

WTL-4 (0.004-acres) wetland formed within the ephemeral stream channel (STR-2), and likely developed initially due to the clearing and construction of the gas pipeline through the area. STR-2 continues to be in a disturbed state due to vehicle access through the area, creating a low lying/depressed area in the channel that created the wetland, not allowing the ephemeral stream channel to re-establish through the area. Due to WTL-4 forming within a tributary, it does not meet the criteria for exclusion as a preamble water. WTL-4 flows 195' through the non-relatively permanent STR-2, to a requisite RPW (STR-1), therefore it possesses a continuous surface connection to an RPW.

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.

OWF-1 (0.014-acres) was created in uplands for aesthetic reasons and is not an impoundment of a tributary. It is separated from STR-6 & STR-10 by at least 300’ of uplands, therefore it lacks a continuous surface connection to a relatively permanent water. Historic aerial imagery and soil maps were reviewed in order to determine OWF-1’s lack of connection, formation in uplands, and previous use.

WTL-5 (0.007-acres), & WTL-7 (0.062-acres) are water filled depressions developed incidental to active vehicle traffic, associated with the construction/operation of the landfill, crossing over drainage features in the area. Construction/expansion of the landfill is active and ongoing. These wetland areas have developed due to vehicle/construction traffic due to the installation of utilities (gas pipeline corridor along northwest and north boundary of AOI and the use of the access and/or the construction/improvement of access through the AOI for clearing activities in preparation of landfill expansion. Historic aerial imagery and soil maps were reviewed in order to determine that these features formed in uplands.

- 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.

Forty-seven (47) upland drainage features (UDF-1 through UDF-47) were also observed during the field reconnaissance. These erosional gullies and vegetated swale features did not have defined bed and banks, OHWMs, or other salient characteristics of streams; did not meet wetland criteria; and do not appear to have groundwater input. These features appear to only convey diffuse sheet-flow in direct response to precipitation events and do not convey seasonal flow.

- 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

⁷ 51 FR 41217, November 13, 1986.

CEMVS-OD-F

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-67

- 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).

WTL-2 (0.01-acres) & WTL-3 (0.003-acres) do not abut a relatively permanent water and are entirely surrounded by uplands.

STR-2 (195’), STR-3 (376’), STR-4 (443’), STR-5 (286’), STR-6 (2nd order 1248’), STR-7 (135’), STR-8 (93’), STR-9 (104’), STR-11 (7’), STR-12 (139’), STR-13 (87’), STR-14 (542’), STR-15 (596’), STR-16 (539’), STR-17 (71’), STR-18 (253’), & STR-20 (55’) were classified as non-relatively permanent waters due to their ephemeral flow regime that exhibits flow only in response to precipitation events and do not exhibit seasonal flow. Flow was assessed at the furthest downstream reach of the relevant stream order and was consistent throughout the reach.

- 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. March 29-30 & April 10 2023
 - b. Waters Delineation Report, dated January 2024
 - c. HistoricAerials.com – accessed 14 January 2025
 - d. WebSoilSurvey – accessed 14 January 2025

CEMVS-OD-F

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVS-2024-67

10. OTHER SUPPORTING INFORMATION. NAP-2023-01223, NWK-2022-00809, SWG-2023-00284, LRB-2023-00451, POH-2023-00187, and NWK-2024-00392
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.