



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

CEMVS-RD

[18 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), [MVS-2025-026](#)

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>1</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>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable [[in Missouri](#)] due to litigation.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

- i. [Wetland C – \(0.75-acre\). 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. [The Review Area is the approximately 23.05-acre area located along St. Charles Street in Cottleville, Missouri with approximate geographic coordinates 38.74898°, -90.65819°.](#)



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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Mississippi River](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [The site drains to Dardenne Creek which flows to the Mississippi River, a TNW.](#)
6. SECTION 10 JURISDICTIONAL WATERS<sup>4</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>5</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](#)

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<sup>4</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>5</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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- 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>6</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.

**Wetland C** (0.75-acre) is an open water wetland located in a depression created incidental to borrow activities for the purpose of obtaining fill for nearby developments. The location of Wetland C appears to have originally been comprised of agricultural ground, but since 2002 the site has been a borrow site for nearby development activities removing as much as 8 ft. of surface soil in some areas. Over the last 5-10 years the site has been receiving fill resulting in significant disturbance to the soil, plant, and hydrological characteristics of the site. Wetland C would fall under the “Generally Non-Jurisdictional Features” listed in the *Preamble of the 1986 Regulations and the 2008 Rapanos Guidance* as a “Waterfilled depression 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.” Historic aerial imagery was reviewed, and it was determined the area of the borrow/disturbance activities within the footprint of Wetland C likely occurred in an upland agricultural field and not within an existing wetland. In addition, the consultant provided an aerial imagery review with historic aerials ranging from 1996 when the borrow/fill activities began to 2024 indicating more recent conditions. Recent borrow/fill activities in the location of Wetland C were indicated in historic aerial images dated 2021, 2022, 2023, and 2024. For these reasons, Wetland C has been determined to be excluded from Corps jurisdiction.

- 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.
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet

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<sup>6</sup> 51 FR 41217, November 13, 1986.

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- 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).
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. [On-Site Soils Site Visit December 17, 2024 & USACE Site Visit, March 3, 2025](#)
- b. [USGS Topographic Maps, Accessed February 12, 2025](#)
- c. [Antecedent Precipitation Tool, Accessed February 12, 2025](#)
- d. [USDA-NRCS Soil Survey, Accessed February 12, 2025](#)
- e. [USFWS National Wetland Inventory, Accessed February 12, 2025](#)
- f. [LiDAR, Accessed February 12, 2025](#)
- g. [Google Earth Pro Aerial Imagery, Accessed February 12, 2025](#)



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10. OTHER SUPPORTING INFORMATION. A review of historic aerial imagery from 1958-1996 indicates the area was used for row crop agriculture with no apparent wetland features present. A 2002 aerial image indicates borrow activities had begun in the northeast portion of the site. By approximately 2009, aerial imagery indicates most of the site had been impacted and significantly disturbed in association with the borrow/fill activities for nearby development. In addition, historic USGS topographic maps from 1975-2021 indicate mapped linear blue-line features bordering the site (Dardenne Creek, Crooked Creek, and a linear blue-line to the south), however no streams/wetlands appear within the review area.

In addition, the consultant provided historic aerial imagery from 1996 to 2024; indicating pre-disturbance conditions before borrow activities began in 1996, the beginning and subsequent gradual expansion of borrow activities and increase in overall footprint of site disturbance in the years following, the addition of a pipeline around 2010, and the development of conditions leading to present day where all of the site has been disturbed and Wetland C has developed.

“Wetland A” and “Wetland B” as indicated on Exhibit A were investigated in the field during the USACE site visit on March 3, 2025, and data sheets were submitted as part of the original submittal from the On-Site Soils site visit on December 17, 2024. The entire site has been significantly disturbed/manipulated going back to 1996 with ongoing borrow/fill activities continuing to present day, specifically in the location of Wetland C. “Wetland A” and “Wetland B” do not currently meet all three (3) parameters to be considered wetlands. The site visit indicated that these areas are not currently dominated by hydrophytic vegetation, hydric soil, and wetland hydrology. In addition, the data sheets submitted by the consultant have inconsistencies and do not properly utilize the methods described in the *1987 Delineation Manual: Midwest Region* for problematic wetland areas where one or more of the three (3) parameters have been significantly disturbed or altered. Much of the site was dominated by early successional upland species that favor disturbance. The Corps has determined the areas where “Wetland A” and “Wetland B” are indicated to be upland.

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.