



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

OD-F

29 SEPTEMBER 2023

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-2022-511 (MFR # 1 of 1)²

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

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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.

[OD-F]

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2022-511]

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in the state of 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. WTL-1 aka “Northern Wetland” (11.3-acres), non-jurisdictional
 - ii. WTL-2 aka “Southern Wetland” (1.65-acres), jurisdictional, Section 404

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. Review area is a 63-acre site, located within the City of Maryland Heights, Missouri (38.7265, -90.4920). Site was formerly used as a golf park/driving range and farmland. The southern boundary of the review area is separated from the rest of the review area by a constructed berm.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Missouri River, which is a navigable-in-fact water.⁶

⁶ 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.

[OD-F]

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2022-511]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS There is no flow path from WTL-1. It is contained by a constructed berm and does not possess any connection to an RPW, or other waters. WTL-2 flows, via culvert, into Creve Coeur Creek (RPW), which flows into the Missouri River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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.

[OD-F]

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2022-511]

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): WTL-2 (1.65) is adjacent, through a continuous surface connection, via 120' culvert, to the relatively permanent Creve Coeur Creek – which flows into the traditionally navigable Missouri River. During non-drought conditions, the water level of WTL-2 and Creve Coeur Creek would be at approximately the same elevation which would allow WTL-2 to directly abut Creve Coeur Creek through the culvert.

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”).⁹ 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

⁹ 51 FR 41217, November 13, 1986.

[OD-F]

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2022-511]

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-1 (11.3-acres) does not possess a continuous surface connection to any waters. It is bounded by a constructed levee and has no outlet. WTL-1 was created incidental to the construction of the levee that separates it from WTL-2. The potential for a shallow subsurface connection between WTL-1 & WTL-2 was considered, but ultimately discounted, for the following reasons:

- While the two wetlands share a soil series (Lowmo), the presence of hydric soil indicators may or may not be due to contemporary hydrology. A Sample point taken during the delineation between the lake and the southern wetland was not hydric, indicating the lake likely does not share a hydrologic connection with the wetlands.
- The separating berm appears to have been constructed between 1974 and 1985, then modified between the years of 1996 and 2002. That levee appears to have established WTL-1 as it severed the farmland from Creve Coeur Creek. The additional hydrology was managed for some time by an installed pump to facilitate agricultural production. WTL-1 did not recede/rise with the fluctuation of WTL-2. When that pump failed/was removed, the lack of connection expanded WTL-1 as the hydrology had no outlet.
- As is indicated by the color of the water on aerial photographs, the source of hydrology for the two wetlands is different. WTL-2 (connected to Creve Coeur Creek via culvert w/flap gate) receives hydrology from road-side ditches along Creve Coeur Mill Road and often has a high sediment load/cloudy appearance. WTL-1 receives runoff from the abandoned golf complex and has a much lower sediment load/clear appearance. There does not appear to be evidence of hydrology “mixing” on aerial imagery or evidence of such observed on site visits.
- WTL-1 is approximately 1.5’ higher in elevation than WTL-2, with no evidence of seepage from WTL-1, thru the berm to WTL-2.

In summary, WTL-1 and WTL-2 have separate and distinct hydrology systems, where if WTL-2 were to be effectively drained, it would have no

[OD-F]

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [MVS-2022-511]

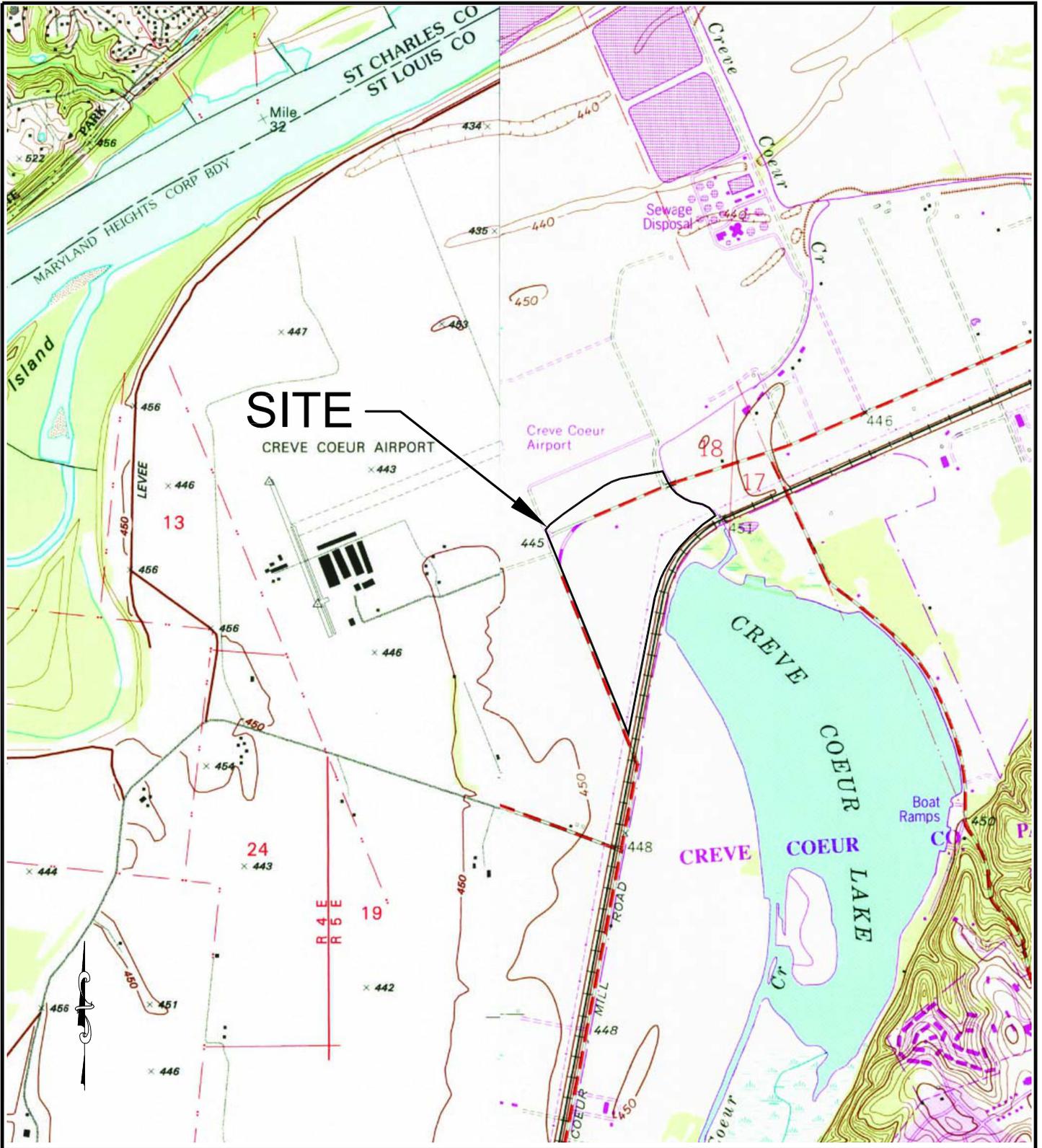
measurable effect on WTL-1. With differing elevations between the two wetlands, hydraulic head pressure should drive the flow from one wetland to the other if a shallow subsurface connection existed, and no evidence of that has been observed. It is for these reasons the St. Louis District feels that there is insufficient data to support a shallow subsurface connection between the two identified wetlands.

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. Site visits conducted on 9 SEP 2022 & 18 SEP 2023. Multiple office reviews were undertaken.
- b. Wetland Delineation Report, dated 4 OCT 2022.
- c. USACE Regulatory Viewer Website, accessed multiple times.
- d. Publicly available websites (Google Earth, Historic Aerials, County Parcel Viewers) accessed multiple times.

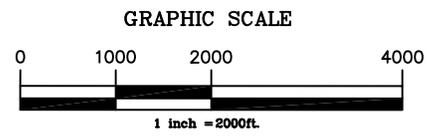
10. OTHER SUPPORTING INFORMATION. Online resources referenced in Section 9 were used to look at historic information, LiDAR, State Stream Resources, etc.

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.

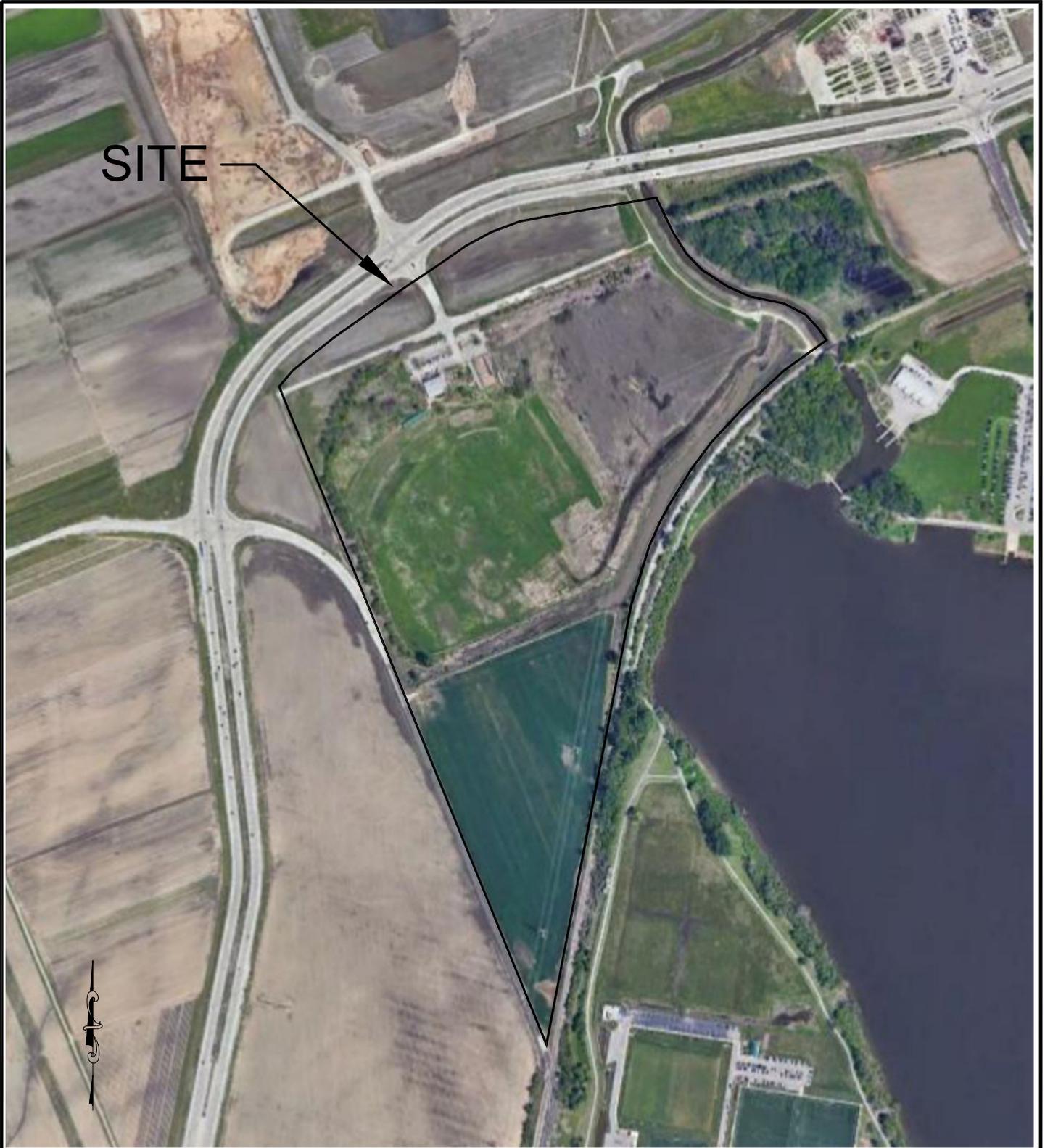


1954 (Revised 1993 Creve Coeur and 1994 Chesterfield, Missouri 7.5-Minute USGS Quadrangle

Figure 1
Location Map
 Maryland Heights Apartments
 MVS-2022-511
 Maryland Heights, Missouri



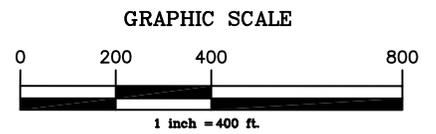
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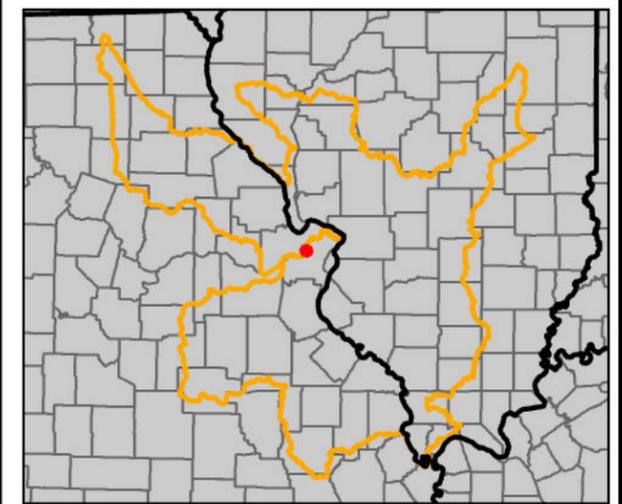
SITE



Figure 2
2021 Aerial Photograph
Maryland Heights Apartments
MVS-2022-511
Maryland Heights, Missouri



MT Job No. 15204



Project Location

Legend

-  Review Area
-  WTL-1
-  WTL-2



**US Army Corps
of Engineers**
St. Louis District

**Exhibit #1
Waters Overview
2022 NAIP Aerial**

Maryland Heights Apartments
MVS-2022-511
St. Louis County, Missouri

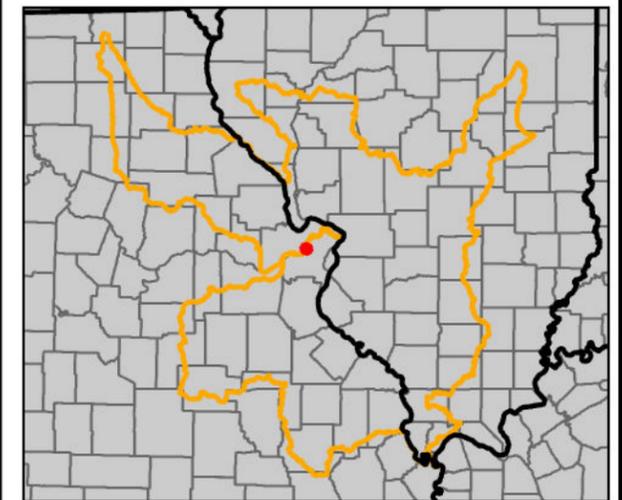
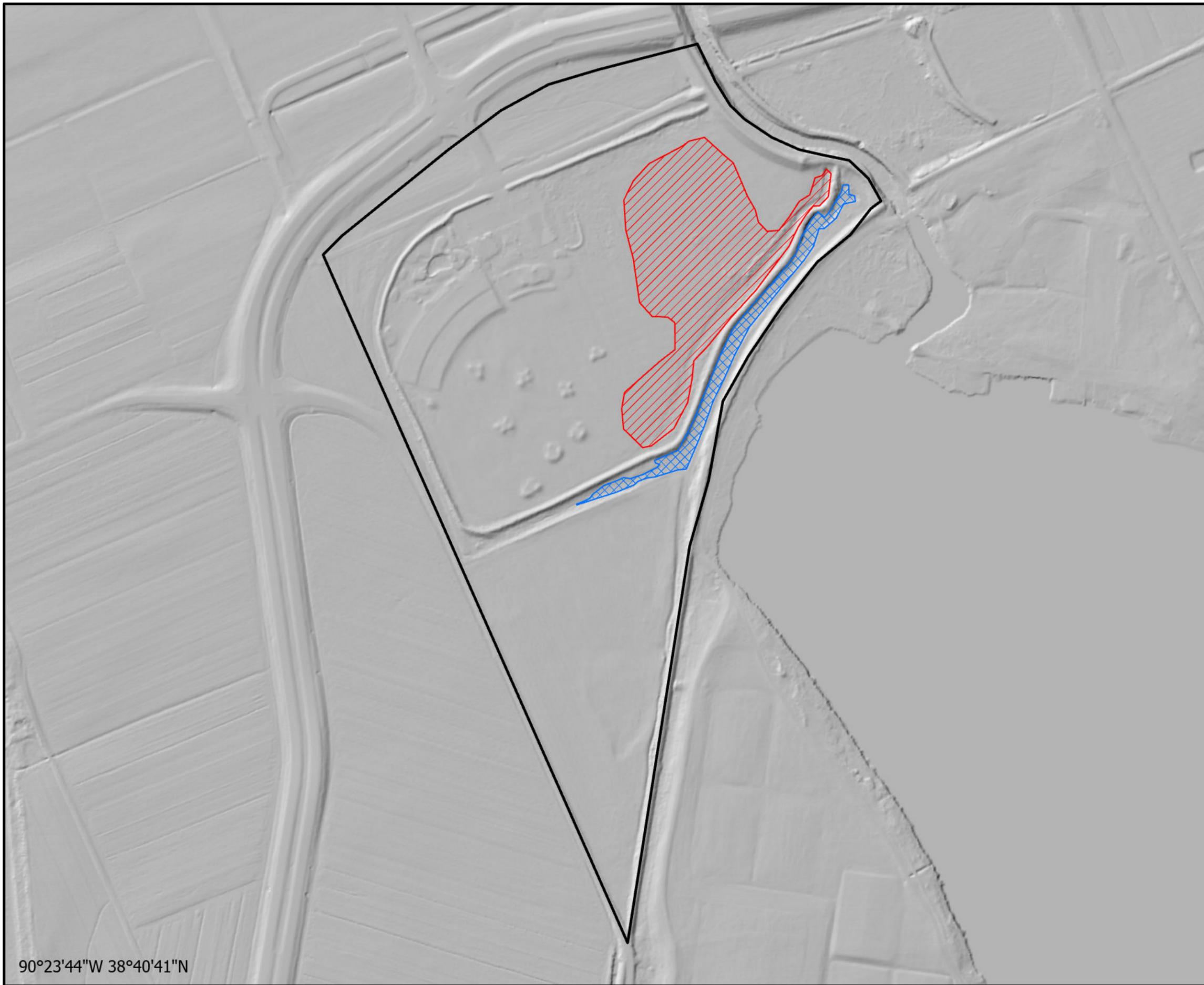


0 400 800 Feet
Map Scale: 1 inch equals 400 feet

Date map created: October 20, 2023
Drawn by: USACE-MVS-Regulatory

Service Layer Credits: MSDISNAIP2022_Detail:

90°23'44"W 38°40'41"N



Project Location

Legend

-  Review Area
-  WTL-1
-  WTL-2



**US Army Corps
of Engineers**
St. Louis District

**Exhibit #2
Waters Overview
3DEP Elevation**

Maryland Heights Apartments
MVS-2022-511
St. Louis County, Missouri



0 400 800 Feet
Map Scale: 1 inch equals 400 feet

Date map created: October 20, 2023
Drawn by: USACE-MVS-Regulatory

Service Layer Credits: 3DEPElevation: SGS National Map 3D Elevation Program (3DEP), July 18, 2023.

90°23'44"W 38°40'41"N

Elevation Profile

