



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

CEMVSOD-F

[25 March 2024]

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-2023-258](#)

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.¹ 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.² For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),³ 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 33 CFR 331.2.

² Regulatory Guidance Letter 05-02.

³ 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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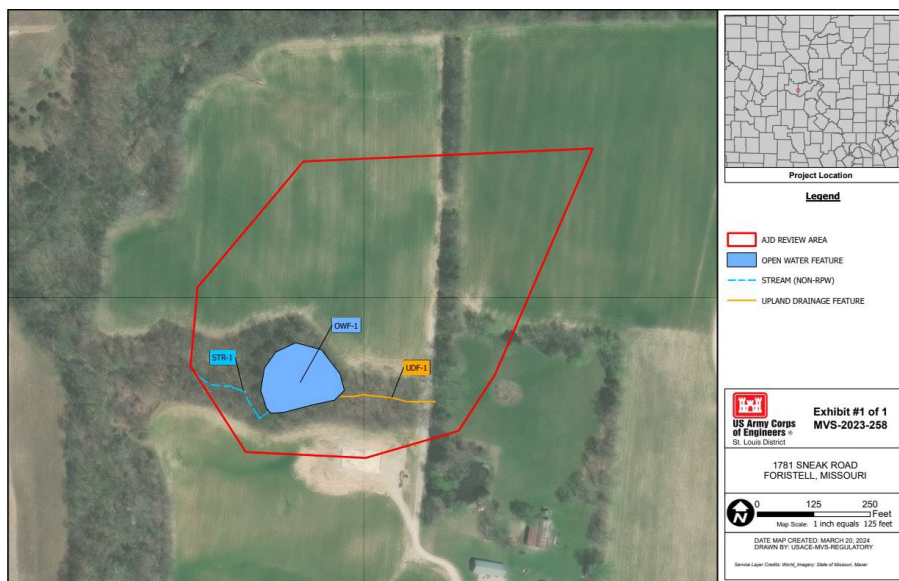
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- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Stream 1 (STR-1), (205 linear feet), non-jurisdictional
 - ii. Pond 1 (OWF-1), (0.48-acre), non-jurisdictional
 - iii. Upland Drainage Feature 1 (UDF-1), (210 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. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The Review Area is the approximately 10-acre area located at 1781 Sneak Road in Foristell, St. Charles County, MO with approximate geographic coordinates 38.706291, -90.956278.



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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Missouri River](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [UDF-1 drains into OWF-1 which outflows into STR-1. STR-1 drains to an unnamed tributary which flows to Callaway Creek, Callaway Creek flows to Femme Osage Creek, Femme Osage Creek flows to the Missouri River. The Missouri River is considered a TNW.](#)
6. SECTION 10 JURISDICTIONAL WATERS⁴: 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 10.⁵ [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](#)

⁴ 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.

⁵ 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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- 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”).⁶ 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.

[Open Water Feature 1 \(OWF-1\) \(0.48-acre\)](#) is a pond that appears to have been created within an erosional feature and outflows to STR-1. OWF-1 contained water at the time of the USACE site visit (05/10/2023) but did not appear to be providing any flow to STR-1. OWF-1 would be considered a “generally non-jurisdictional” preamble water as a body of water created for primarily aesthetic reasons.

- 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.

[Upland Drainage Feature 1 \(UDF-1\) \(~210 linear feet\)](#) is an erosional feature that would flow to OWF-1, likely only in direct response to a precipitation event. UDF-1 originates at a culvert along the gravel road to the east of OWF-1. UDF-1 lacked an ordinary high-water mark (OHWM) and a continuous defined channel. No flow or pools were observed during the USACE site visit (05/10/2023). UDF-1 was determined to be a feature that is “generally not jurisdictional” in the *Rapanos* guidance because it exhibits characteristics typical of erosional features with low volume, infrequent, or short duration flow.

⁶ 51 FR 41217, November 13, 1986.

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- 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).

[Stream 1 \(STR-1\) \(~205 linear feet\) is a non-relatively permanent water that would flow to an unnamed tributary off-site to the west during times when the channel has surface discharge. STR-1 originates from OWF-1 and generally gains channel definition as it meanders west towards its’ confluence with the unnamed tributary. The channel was about an average of 5 ft. wide at the OHWM and contained some pockets of standing surface water immediately below the dam. The stream was mostly dry for a portion of the reach and had some standing water within the channel where it discharged into the unnamed tributary. The channel had a meandering nature and was incised/eroded immediately below the dam and near the confluence with the unnamed tributary. STR-1 likely only flows in direct response to precipitation events and when it receives flow from OWF-1. The stream characteristics appeared typical of infrequent, low volume flows with inconsistent channel definition. STR-1 was determined to be a non-relatively permanent water.](#)

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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. [USACE Site Visit, May 10, 2023](#)
- b. [USGS Topographic Maps, Accessed March 20, 2024](#)
- c. [USGS Stream Stats, Accessed March 20, 2024](#)
- d. [Antecedent Precipitation Tool, Accessed March 20, 2024](#)
- e. [USDA-NRCS Soil Survey, Accessed March 20, 2024](#)
- f. [USFWS National Wetland Inventory, Accessed March 20, 2024](#)
- g. [LiDAR, Accessed March 20, 2024](#)
- h. [Google Earth Pro Aerial Imagery, Accessed March 20, 2024](#)

10. OTHER SUPPORTING INFORMATION. [A review of USGS topographic maps from 1973-2021 identifies the OWF-1 as an open water pond feature. STR-1 is not indicated on any of the USGS topographic maps reviewed. USGS Stream Stats does not identify a stream feature in the vicinity of STR-1. The approximate drainage area to the pond and stream feature is ~10-acres to the confluence with the unnamed tributary off-site \(identified as a dashed blue-line on the USGS maps\). The U.S. Fish & Wildlife Service's \(USFWS\) National Wetland Inventory \(NWI\) mapper indicates the pond feature but does not identify a stream feature in the vicinity of STR-1.](#)

[The Corps visited the site on May 10, 2023, during normal conditions during the wet season, with the drought index indicating a mild drought.](#)

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.