



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MEMPHIS DISTRICT
167 N MAIN STREET
MEMPHIS, TN 38103

CEMVM-R

23 June 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 MVM-2024-209, MFR 1

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 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.

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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. W78 (A&B), 36.5188010, -89.62881610, non-jurisdictional
 - ii. W80 (A&B), 36.5181810, -89.62785310, non-jurisdictional
 - iii. W81, 36.51711890, -89.62785310, non-jurisdictional
 - iv. W83, 36.51714080, -89.63029270, non-jurisdictional
 - v. W85, 36.5170312, -89.6288005, non-jurisdictional
 - vi. W86, 36.517195, -89.628274, non-jurisdictional
 - vii. W87, 36.5172876, -89.6299283, non-jurisdictional
 - viii. W89, 36.5153874, -89.6292578, non-jurisdictional
 - ix. W91, 36.5153874, -89.6292578, non-jurisdictional
 - x. W92, 36.5168131, -89.6276678, non-jurisdictional
 - xi. W98 (A&B), 36.5168131, -89.6276678, non-jurisdictional
 - xii. W99, 36.5190316, -89.6298124, non-jurisdictional
 - xiii. AD, 36.517161, -89.627806, non-jurisdictional
 - xiv. AC, 36.52102, -89.630644, 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. 651, 143 S. Ct. 1322 (2023)
- e. "Memorandum to the Field Between The U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of 'Continuous Surface Connection' Under the Definition of 'Waters of the United States' Under the Clean Water Act" (March 12, 2025)

3. REVIEW AREA. The review area is approximately 27 acres located at 36.5181810, -89.62785310 New Madrid County, Missouri.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. St. Francis River
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

W80A, W80B, W83, W89, W78B are hydrologically isolated from downstream waters.

W78A, W81, W87, W90A, W90B, and W99 flow into a roadside ditch to the northwest of the site. W86 and W91 flow into a non-relatively permanent agricultural ditch to the southwest of the project site. W85 and W92 connect to both the roadside ditch and agricultural ditch. Both ditches drain into ditch AC which is a relatively permanent waterway.

AC> Main Ditch 32> Ditch 52> Little River> Unnamed Stream> Unnamed Stream> Right Hand Shute Little River> Iron Mines Creek> St. Francis River.

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 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

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.

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): Ditch AC (36.52102, -89.630644) is identified by the agent as a relatively permanent water (stream). The reach of stream located on the property in review is approximately 2,764.12 linear feet. AC is approximately 14 feet wide and was observed with flow.
- 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”).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. 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

⁷ 51 FR 41217, November 13, 1986.

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).

Wetlands W78B, W80A, W80B, W83, and W89 are surrounded by uplands, are hydrologically isolated from downstream waters, and lack a continuous surface connection to any relatively permanent waters. Accordingly, they are not considered adjacent and are not jurisdictional under Section 404 of the Clean Water Act.

Wetlands W78A and W81 are hydrologically the same wetland (differentiated only by vegetation). These features connect to a non-relatively permanent agricultural ditch that flows off the subject property. Wetland W85 connects to W99, which connects to W98B, which connects to W98A, which connects to W92 before flowing into non-relatively permanent roadside ditch AD. Wetland W87 connects to W98A (see above) and W91, which connects to a non-relatively permanent ditch that flows off the subject property., Wetland W86 connects to W91 before flowing into a non-relatively permanent ditch that flows off the subject property. These features do not have a continuous surface connection to any RPWs.

- 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.

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- a. Maps, plans, and photos submitted by or on behalf of the AJD requestor:
Olsson, Inc.
- b. U.S. Geological Survey map: 1:24,000 Catron.
- c. Google Earth imagery various dates.
- d. National Regulatory Viewer 3DEP Hillshade Imagery accessed on various dates.
- e. National Hydrography Dataset (accessed through National Regulatory 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.