



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

CEMVMN-R

22 February 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),¹ MVM-2023-327 MFR 1 of 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 in Tennessee 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.

- 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. S-1, non-wetland, jurisdictional, Section 404
 - ii. S-2, non-wetland, jurisdictional, Section 404
 - iii. S-3, non-wetland, jurisdictional, Section 404
 - iv. Upland Swale-1, non-wetland, non-jurisdictional
 - v. Erosional Gully-2, non-wetland, non-jurisdictional
 - vi. Erosional Gully-3, non-wetland, non-jurisdictional
 - vii. Erosional Gully-4, non-wetland, non-jurisdictional
 - viii. Upland Swale-5, non-wetland, non-jurisdictional
 - ix. Non-RPW-6, non-wetland, non-jurisdictional
 - x. Erosional Gully-7, non-wetland, non-jurisdictional
 - xi. Erosional Gully-8, non-wetland, non-jurisdictional
 - xii. Erosional Gully-9, non-wetland, non-jurisdictional
 - xiii. Erosional Gully-10, non-wetland, 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 an approximately 132.71-acre property located in Collierville, Shelby County, Tennessee. The project area is located along the north side of State Route 385 and the east side of Sycamore Road. The approximate Latitude and Longitude for the project area are 35.025438°, -89.671419°. Attached is a map with the boundary of the review area. No previous AJDs have been completed for the review area.
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: S-1 (Nonconnah Creek) flows into the Mississippi River. S-2 (unnamed tributary) and S-3 (unnamed tributary) flow to Nonconnah Creek, then to the Mississippi River. Upland Swale-1, Erosional Gully-2, Erosional Gully-3, Erosional Gully-4 flow to Nonconnah Creek, then to the Mississippi River. Upland Swale-5 flows to Non-RPW-6, then to Nonconnah Creek, then to the Mississippi River. Non-RPW-6 flows to Nonconnah Creek, then to the Mississippi River. Erosional Gully-7 flows to S-2, then to Nonconnah Creek, then to the Mississippi River. Erosional Gully-8, Erosional Gully-9, Erosional Gully-10 flow to S-3, then to Nonconnah Creek, then to the Mississippi 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

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.

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): S-1 (Nonconnah Creek) is a relatively permanent water (typically with year-round flow) that has a drainage area of approximately 2.43 square miles/1,555.2 acres at the project site. S-1 is approximately 20 feet wide and 10-15 feet deep through the project reach. S-1 flows through the project site for approximately 3,689 linear feet.

S-2 is a relatively permanent water (seasonal flow) that has a drainage area of approximately 0.24 square miles/154 acres at the project site. S-2 is approximately 6 feet wide and 6 feet deep through the project reach. S-2 flows through the project site for approximately 468 linear feet. S-2 appears as a broken blueline on the USGS topographic map.

S-3 is a relatively permanent water (typically with year-round flow) that has a drainage area of 1.66 square miles/1,062 acres at the project site. S-3 is approximately 10-12 feet wide and 12-14 feet deep through the project reach. S-3 flows through the project site for approximately 1,026 linear feet. S-3 appears as a solid blueline on the USGS topographic map.

- 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.

Upland Swale-1 (252.37 LF) and Erosional Gully-4 (196.36 LF) do not have a drainage area according to Stream Stats. The channels appear to be constructed agricultural ditches. The upland swale and erosional gully lack indicators of an ordinary high water mark and carry stormwater (non-relatively permanent) flow.

- 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.

Erosional Gully-2 (347.12 LF), Erosional Gully-3 (228.16 LF), Upland Swale-5 (589.13 LF), Erosional Gully-7 (140.9 LF), Erosional Gully-8 (91.13 LF), Erosional Gully-9 (253.14 LF), Erosional Gully-10 (269.43 LF) do not have a drainage area according to Stream Stats. The erosional gullies and upland swale lack indicators of an ordinary high water mark and carry stormwater (non-relatively permanent) flow. No riffles or pools were present. Substrate sorting was absent. There were no indicators of bank scouring. No bars or benches were present.

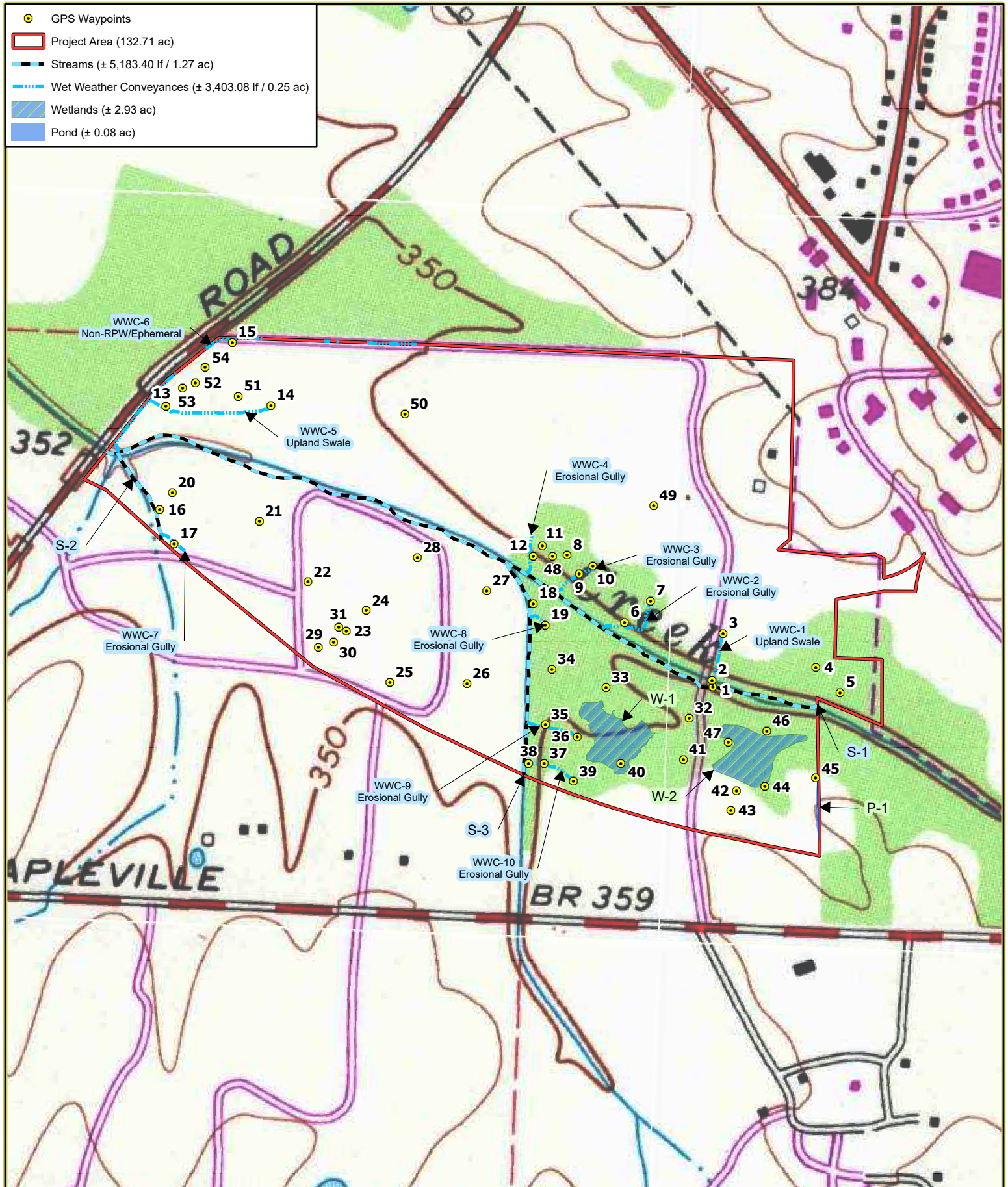
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste 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

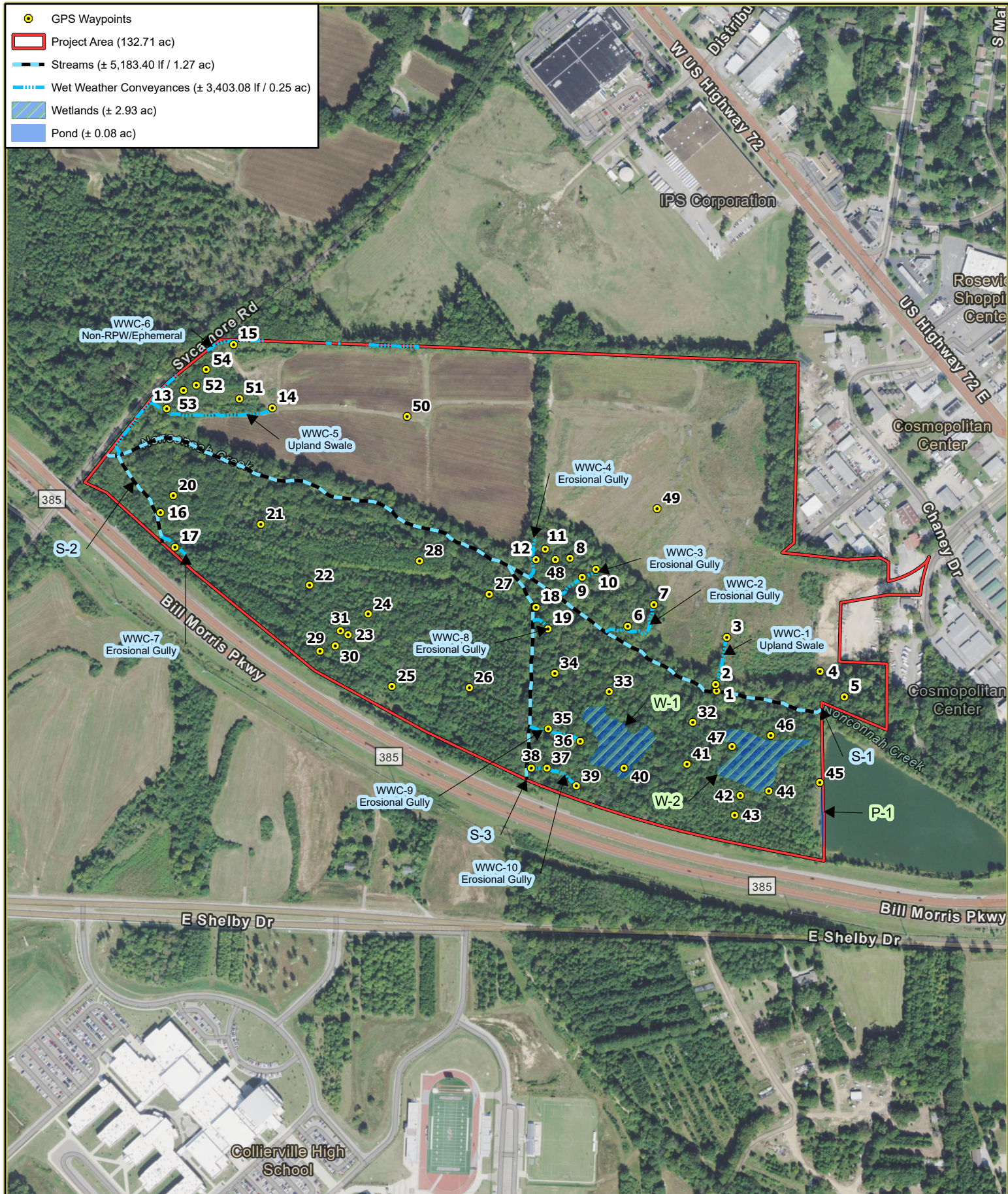
⁷ 51 FR 41217, November 13, 1986.

- 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).

Non-RPW-6 (1,035.34 LF) does not have a drainage area according to Stream Stats. The channel is an ephemeral feature that carries non-relatively permanent (stormwater) flow. The channel does not appear on the USGS topographic map or the National Hydrography Dataset (NHD). Most of the channel has continuous bed and banks present throughout the channel length with clear definition between the bed and banks. There is some substrate sorting of finer material. No bars or benches were present. There is a small amount of deposited substrate within the channel. This channel flows into S-1 (Nonconnah Creek).

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. Office evaluation – February 7, 2024
 - b. Maps and data sheets prepared and submitted by the agent (Headwaters Inc.)
 - c. Aerial photographs including Google Earth (various dates) and photographs provided by the agent.
 - d. State of Tennessee Hydrologic Determination data forms provided by the agent.
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.







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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.

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. W-1, wetland, non-jurisdictional
 - ii. W-2, wetland, 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)
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3. REVIEW AREA. The review area is an approximately 132.71-acre property located in Collierville, Shelby County, Tennessee. The project area is located along the north side of State Route 385 and the east side of Sycamore Road. The approximate Latitude and Longitude for the project area are 35.025438°, -89.671419°. Attached is a map with the boundary of the review area. No previous AJDs have been completed for the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: W-1 and W-2 do not contain any continuous surface connections to downstream TNWs and therefore were considered non-jurisdictional, per current guidance.

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
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 - b. Interstate Waters (a)(2): N/A
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 - 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

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.

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 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*.

W-1 was observed as a 1.42-acre forested wetland located in the southeastern portion of the property. The wetland is surrounded by uplands and has no surface or sub-surface connections to other waters. Erosional Gully-9 is approximately 68 linear feet from W-1. Erosional Gully-10 is approximately 116 linear feet from W-1.

W-2 was observed as a 1.51-acre forested wetland located in the southeastern portion of the property. The wetland is surrounded by uplands and has no surface or sub-surface connections to other waters.

⁷ 51 FR 41217, November 13, 1986.

- 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. Office evaluation – January 19, 2024
 - b. Maps and data sheets prepared and submitted by the agent (Headwaters Inc.)
 - c. Aerial photographs including Google Earth (various dates), hillshade imagery, and photographs provided by the agent.
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.

