



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

CEMVM-R

14 February 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),<sup>1</sup> MVM-2023-121 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.<sup>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 Arkansas due to litigation.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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. WCA001, Non-RPW-1, non-wetland, non-jurisdictional
  - ii. WCA002, Non-RPW-2, non-wetland, non-jurisdictional
  - iii. WCA003, Non-RPW-3, non-wetland, non-jurisdictional
  - iv. WCA004, RPW-4, non-wetland, jurisdictional, Section 404
  - v. WCA005, Non-RPW-5, non-wetland, non-jurisdictional
  - vi. WCA006, Non-RPW-6, non-wetland, non-jurisdictional
  - vii. WCA007, Non-RPW-7, non-wetland, non-jurisdictional
  - viii. WCA008, RPW-8, non-wetland, jurisdictional, Section 404
  - ix. WCA009, Non-RPW-9, non-wetland, non-jurisdictional
  - x. WCA010, Non-RPW-10, non-wetland, non-jurisdictional
  - xi. WCA011, Non-RPW-11, 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 1,711.82-acre property located in Lee and St. Francis County, Arkansas. The approximate Latitude and Longitude for the project area are 34.90458°, -91.08548°. Attached is a map with the boundary

of the review area as well as an aerial photograph with potential aquatic resources identified. 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. White River
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: Non-RPW-1 (WCA001) flows to Non-RPW-3 (WCA003), then to RPW-4 (WCA004), then to Flat Fork Creek, then to Big Creek, then to the White River. Non-RPW-2 (WCA002) flows to RPW-4 (WCA004), then to Flat Fork Creek, then to Big Creek, then to the White River. Non-RPW-3 (WCA003) flows to RPW-4 (WCA004), then to Flat Fork Creek, then to Big Creek, then to the White River. RPW-4 (WCA004) flows to Flat Fork Creek, then to Big Creek, then to the White River. Non-RPW-5 (WCA005) flows to RPW-4 (WCA004), then to Flat Fork Creek, then to Big Creek, then to the White River. Non-RPW-6 (WCA006) flows to an unnamed tributary, then to Big Creek, then to the White River. Non-RPW-7 (WCA007) and Non-RPW-11 (WCA011) flow to RPW-4 (WCA004), then to Flat Fork Creek, then to Big Creek, then to the White River. RPW-8 (WCA008) flows to an unnamed tributary, then to Big Creek, then to the White River. Non-RPW-9 (WCA009) does not have a downstream connection. Non-RPW-10 (WCA010) flows to Non-RPW-9 (WCA009) which does not have a downstream connection.
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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

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<sup>5</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>6</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.

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): RPW-4 is a relatively permanent water (seasonal flow) that has a drainage area of approximately 1,370 acres at the project site according to StreamStats. RPW-4 is approximately 8 feet wide at the ordinary high-water mark (OHWM). RPW-4 flows through the project site for approximately 9,270 linear feet. RPW-4 appears as a broken blueline on the USGS topographic map, but a portion of the channel is indicated in the National Hydrography Dataset as having perennial flow. During the site investigation, the agent observed flow in RPW-4 seven (7) days after the last rainfall. Additionally, RPW-4 is located within soils mapped as Henry silt loam (0-1% slopes), Calhoun silt loam (0-1% slopes), Hilleman silt loam (0-1% slopes), Calloway silt loam (1-3% slopes). Seasonal water tables within these soils range from 0-24 inches from the surface; this is above the depth of the subject channel, indicating a groundwater connection.

RPW-8 is a relatively permanent water (seasonal flow) that has a drainage area of approximately 371 acres at the project site according to StreamStats. RPW-8 is approximately 4 feet wide at the ordinary high-water mark (OHWM). RPW-8 flows through the project site for approximately 948 linear feet. RPW-8 appears as a broken blueline on the USGS topographic map. During the site investigation, the agent observed flow in RPW-8 seven (7) days after the last rainfall. Additionally, RPW-4 is located within soils mapped as Henry silt loam (0-1% slopes) and Calloway silt loam (1-3% slopes). Seasonal water tables within these soils range from 5-23 inches from the surface; this is above the depth of the subject channel, indicating a groundwater connection.

- 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>7</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. 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. Non-RPW-1 (737.71 LF), Non-RPW-3 (3,438.57 LF), Non-RPW-9 (2,078.64 LF), Non-RPW-10 (2,149.30 LF), Non-RPW-11 (630.50 LF) do not have drainage areas according to Stream Stats and do not appear on USGS topographic maps. The channels appear to be constructed or altered agricultural swales for irrigation run-off conveyance. These channels lack indicators of an ordinary high water mark, support a mixture of herbaceous upland and facultative vegetation, do not have groundwater inputs, and lack other geomorphological features indicative of intermittent or greater flow.
- 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

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<sup>7</sup> 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-2 (3,708.75 LF), Non-RPW-5 (6,282.75 LF), Non-RPW-6 (2,516.44 LF), Non-RPW-7 (4,134.56 LF) are ephemeral features that carry non-relatively permanent (stormwater/irrigation water) flow. All 4 channels appear on the USGS topographic maps.

Non-RPW-2 flows as a non-relatively permanent, first-order channel within the review area. Non-RPW-2 flows into RPW-4 within the subject property. According to Stream Stats Non-RPW-2 has a drainage area of approximately 262 acres. However, the agent noted that the topography and agricultural drainage has been altered for this channel and the drainage area is smaller. This channel has flowing water only during, and shortly after, precipitation events in a typical year. Lack of groundwater inputs combined with minimal drainage area preclude Non-RPW-2 from possessing intermittent or greater flow.

Non-RPW-5 flows as a non-relatively permanent, first-order channel within the review area. This channel has experienced cut off up-gradient by land leveling and filling outside of the review area. Non-RPW-5 only receives irrigation/stormwater run-off from portions of three agricultural fields within the review area (approximately 250-acres drainage area). Non-RPW-5 flows into RPW-4 within the subject property. Non-RPW-5 has a limited and/or inconsistent ordinary high water mark. This channel has flowing water only during, and shortly after, precipitation events in a typical year. Lack of groundwater inputs combined with minimal drainage area preclude Non-RPW-5 from possessing intermittent or greater flow.

Non-RPW-6 flows as a non-relatively permanent, first-order channel with the review area. Non-RPW-6 is an excavated, linear channel across relatively high elevation ground, routing irrigation/agricultural stormwater from the review area. It joins another first order stream just south of the subject property. Non-RPW-6 serves as drainage for only one field within the review area (approximately 150 acres). This channel has flowing water only during, and shortly after, precipitation events in a typical year. Groundwater is not a source of water, and runoff from rainfall is the primary source of flow. Due to lack of groundwater inputs, minimal drainage area, and short duration of flow only after rain events, Non-RPW-6 is not considered to possess intermittent or greater flow.

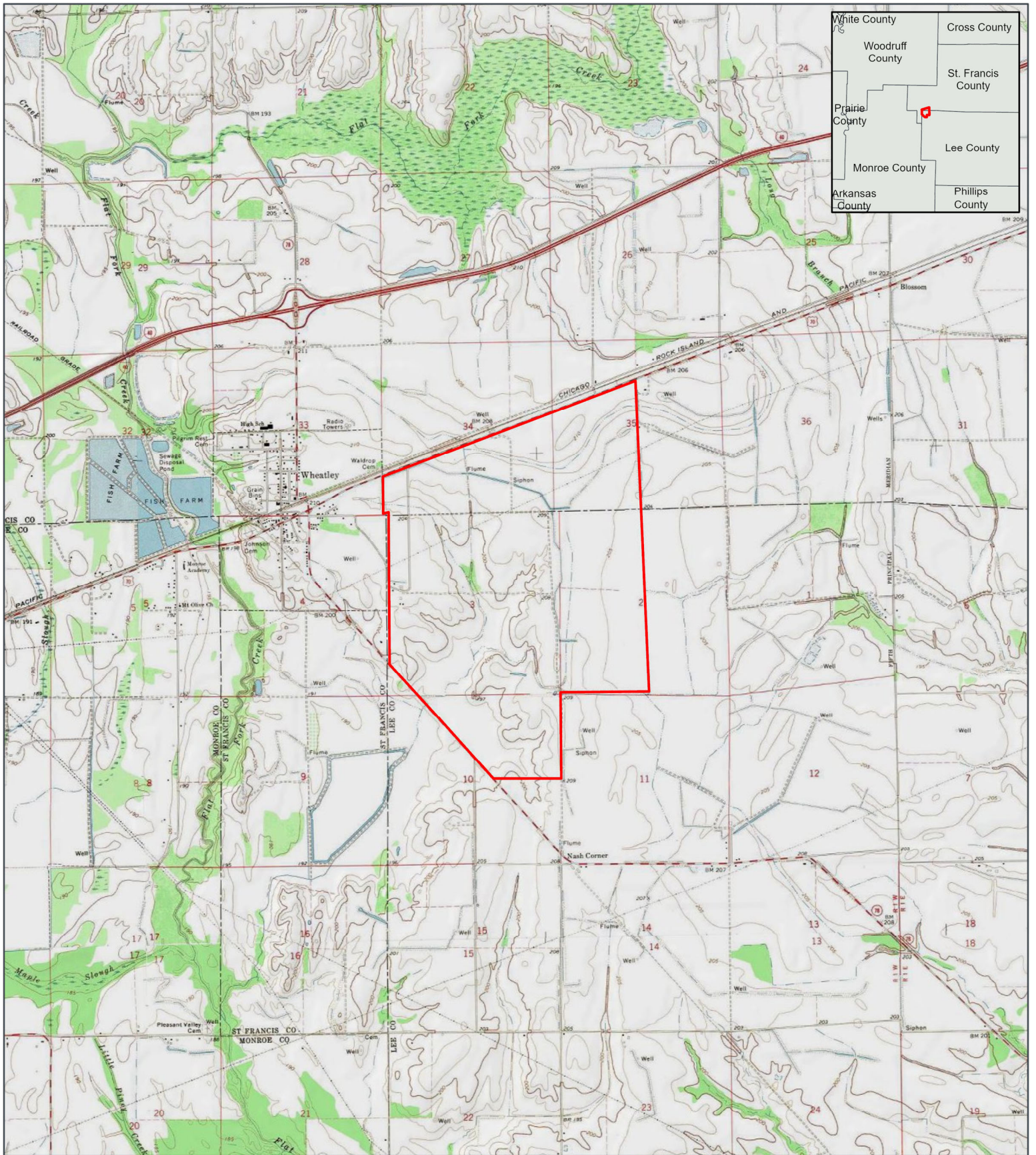
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Non-RPW-7 flows as a non-relatively permanent, first-order channel within the review area. While Non-RPW-7 is mapped on USGS topographic maps, the channel does not possess a defined and consistent ordinary high water mark due to annual tilling and planting across the channel. Non-RPW-7 flows into RPW-4 within the subject property. Agricultural activities and improvements have altered the drainage area with only 185 acres draining into Non-RPW-7. This channel has flowing water only during, and shortly after, precipitation events in a typical year. Due to the lack of groundwater inputs, lacking ordinary high water mark, and minimal drainage area, Non-RPW-7 is not considered to possess intermittent or greater flow.

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 – November 7, 2024
  - b. Maps and data sheets prepared and submitted by the agent (SWCA)
  - c. Aerial photographs including Google Earth (various dates) and photographs provided by the agent.
  - d. National Hydrography Dataset and infrared NAIP imagery (accessed through National Regulatory Viewer)
  - e. U.S. Geological Survey map: 1:24,000 Wheatley, AR
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.

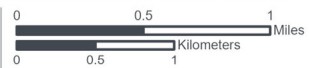




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**Figure A-1.**  
**Vicinity Map**

 Area of Delineation

St. Francis County, AR  
 USGS 7.5' Quadrangle:  
 Wheatley, AR, 34091-H1  
 3N 1W Section 02,03,10  
 4N 1W Section 33,34,35  
 NAD 1983 UTM Zone 15N  
 34.9058°N 91.0858°W

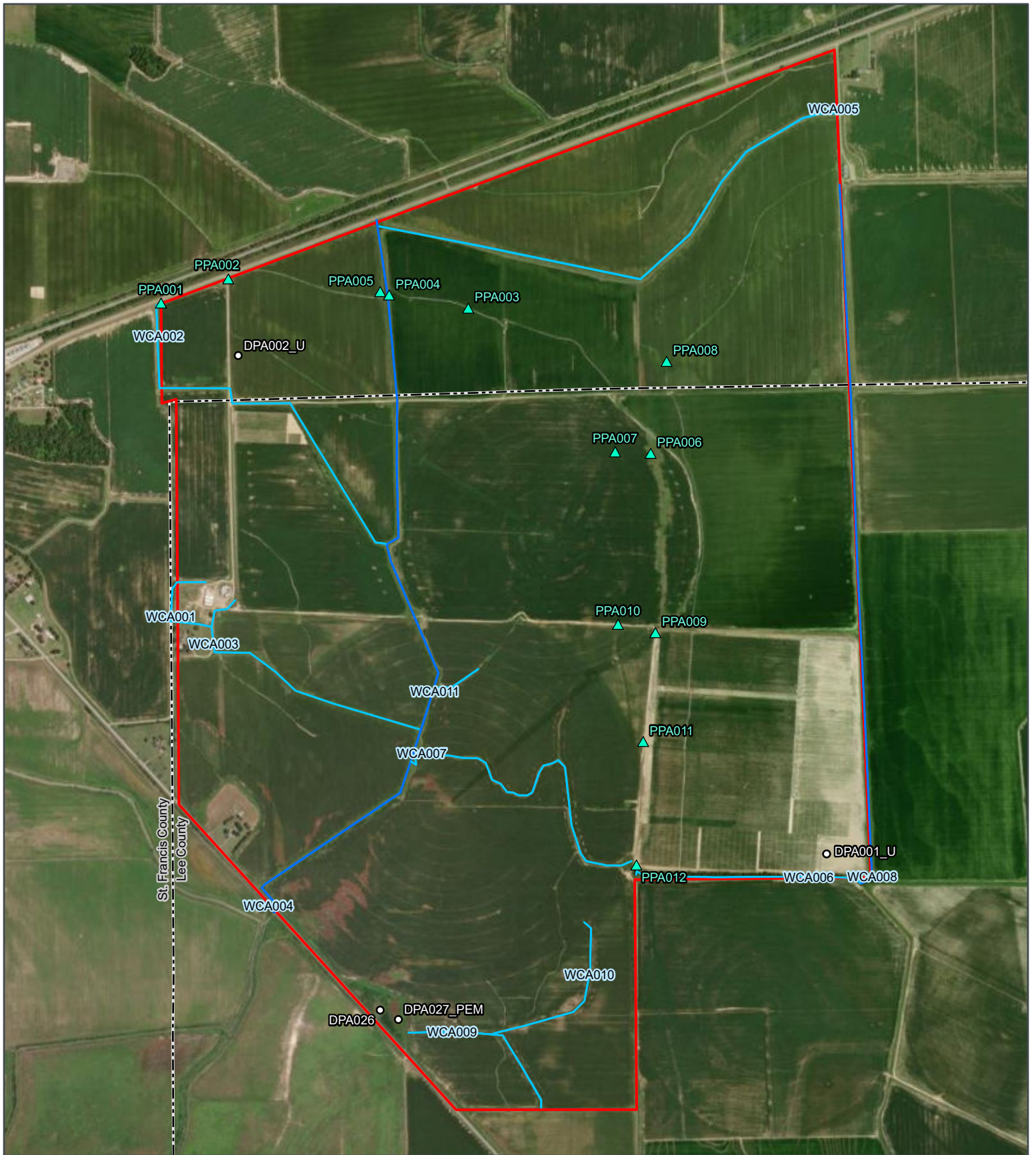


Base Map: ESRI ArcGIS Online,  
 accessed June 2022  
 Updated: 6/24/2022  
 Project No. 73749  
 Layout: 73749 Figure A-1 Vicinity Map  
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**Figure A-4.**  
**Delineated  
Aquatics Map**

- Data Point
- ▲ Photo Point
- Ephemeral Stream
- Intermittent Stream
- Area of Delineation
- County Boundary

St. Francis County, AR  
USGS 7.5' Quadrangle:  
Wheatley, AR, 34091-H1  
3N 1W Section 02,03,10  
4N 1W Section 33,34,35  
NAD 1983 UTM Zone 15N  
34.9058°N 91.0858°W

Base Map: ESRI ArcGIS Online,  
accessed November 2024  
Updated: 11/15/2024  
Project No. 73749  
Layout: 73749 Figure A-4 Delineated  
Aquatics Map  
Aprx: 73749\_riversideSolarARD

0 750 1,500  
0 250 500  
Feet  
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