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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

17 December 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 **SWL-2024-00289**

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 this state 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. EPH-1, ephemeral channel (non-RPW), non-jurisdictional
 - ii. OW-1, man-made farm pond created by excavation and impoundment of EPH-1, non-jurisdictional
 - iii. WET-A, shallow extension of OW-1, 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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately a 24.5 acres site southwest of the intersection of West Monroe Ave. and Spring Creek Rd., west of Lowell, Benton Co., AR. The site is located in the NE ¼, Section 9, Township 18 N., Range 30 W. The site is dominated by upland farm pasture and agricultural farm operations. The surrounding area has heavily increased in residential and commercial development. The coordinates for the center of the review area are 36.2538, -94.1751. Figures 1-4 provide maps highlighting topography and aquatic resources located in the subject property.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River (11110103) is the nearest downstream TNW (Oklahoma) as it is designated as a Section 10 water north of Fort Gibson, Oklahoma (35.86962, -95.23002). Presently, a hydrologic connection no longer exists from the aquatic resources in the project area to the nearest TNW.⁵

⁵ 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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Historically, EPH-1 conveyed flow west of the site into a flashy, losing headwater ephemeral reach of Cross Creek (non-RPW), downstream into a gaining intermittent reach of Cross Creek (RPW) which flows into Spring Creek (RPW) to Osage Creek (RPW) to the Illinois River (TNW). OW-1 is an impoundment of EPH-1. Based on aerial imagery, the man-made impoundment of EPH-1 which created OW-1 (farm pond) and subsequently WET-A, occurred sometime prior to 1990. Additionally, surrounding land use changes and intensive residential development have further severed the hydrologic flowpath from the subject aquatic resources to the nearest RPW.
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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

⁶ 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.

⁷ 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.

- 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”).⁸ 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. One open water feature was identified in the agent report as a man-made farm pond: OW-1 (0.64-acre). This feature is a result of excavation of EPH-1 and has served as stock watering for livestock operations predating 1993. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering are generally not considered jurisdictional according to the November 13, 1986, Federal Register (51 FR, 41217). Both the agent delineation report and Corps site visit revealed that the area west of OW-1 is entirely dominated by upland vegetation, lacking hydrologic indicators or aquatic features.
- 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

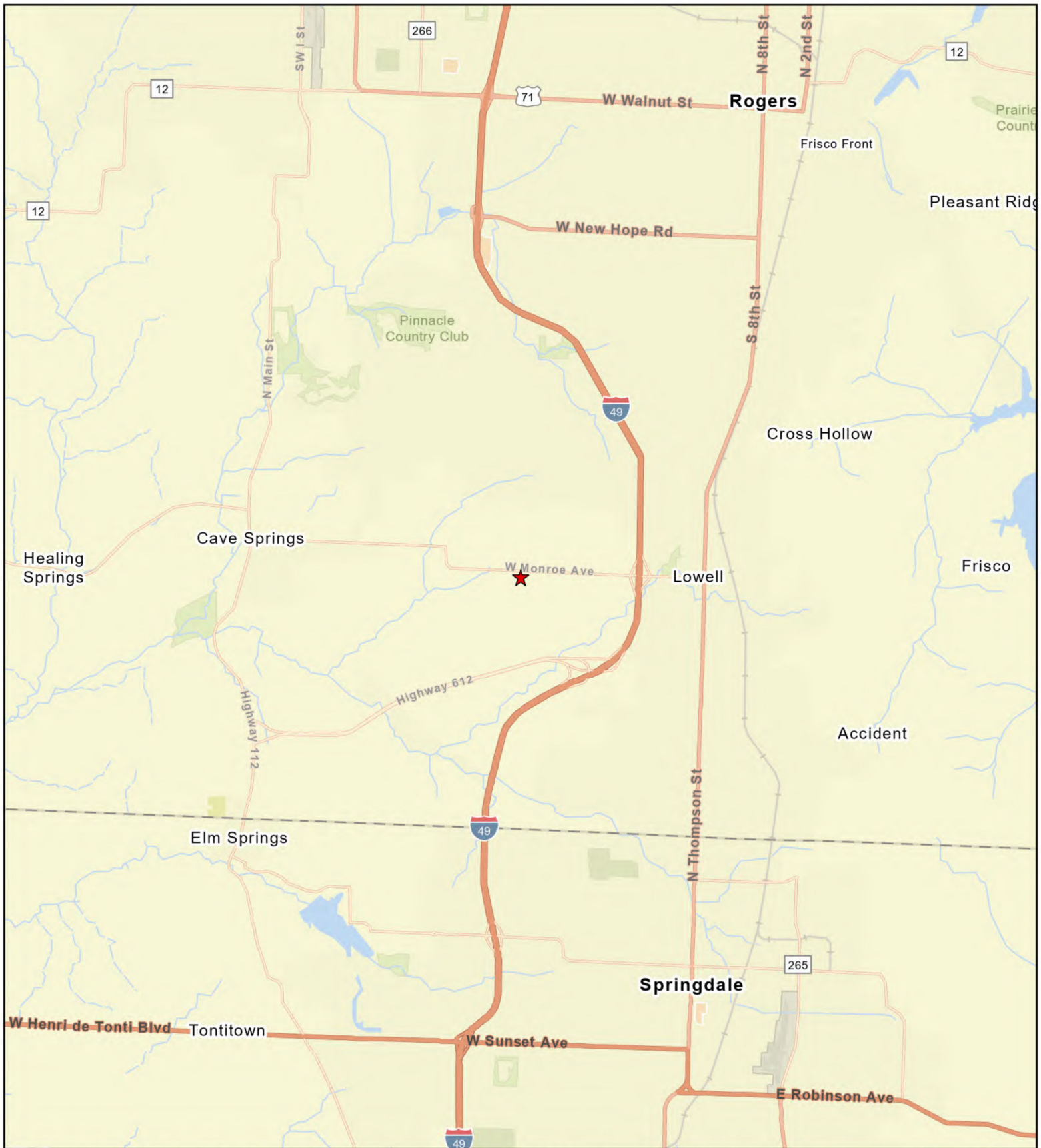
⁸ 51 FR 41217, November 13, 1986.

- 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). One ephemeral drainage feature was identified in the project area: EPH-1 (Non-RPW; 766 lf). EPH-1 flows from the east (at Spring Creek Road) and extends west to the OW-1/WET-A complex. The feature flows occasionally in response to precipitation events and receives the majority of flow from sheetflow of adjacent uplands down slope. EPH-1 channel is fully vegetated and lacks defined bed, bank, and an ordinary high-water mark (OHWM). EPH-1 does not exhibit a hydrologic connection to downstream waters due to the impoundment that was constructed to create a man-made farm pond (OW-1). One wetland was identified in the project area: WET-A (0.56-acre). WET-A is a result of the extension of OW-1 and occasional flow from EPH-1. WET-A consists of a mix of scrub/shrub/herbaceous vegetation which is periodically inundated. OW-1/WET-A complex does not possess a continuous surface connection to jurisdictional waters.
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. A Corps site visit and field inspection (File: SWL-2024-00289 Field Report) was conducted along with a desktop review on December 12, 2024.
 - b. Agent provided Section 404 Delineation Report: 20240822 W. Monroe & Spring Creek - AJD_NPR Request, August 22, 2024.
 - c. NHD data accessed on National Regulatory Viewer, Accessed December 12, 2024.
 - d. USGS Topographic Quadrangle Bentonville South, AR (1:24K), Accessed December 12, 2024.
 - e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed December 12, 2024.

- f. Google Earth Pro. (1993-2024 Imagery). *Lat.* 36.2538°, *Long.* -94.1751°, Accessed December 12, 2024.
- g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed December 12, 2024.
- h. OTHER SUPPORTING INFORMATION.

Leasure, D.R.; Magoulick, D.D.; Longing, S.D. 2016. Natural flow regimes of the Ozark-Ouachita interior highlands region. *River Res. Appl.* 32: 18–35.

10. 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.



W. Monroe & Spring Creek, Lowell, Benton County, AR



★ Project Area

3.5

Miles

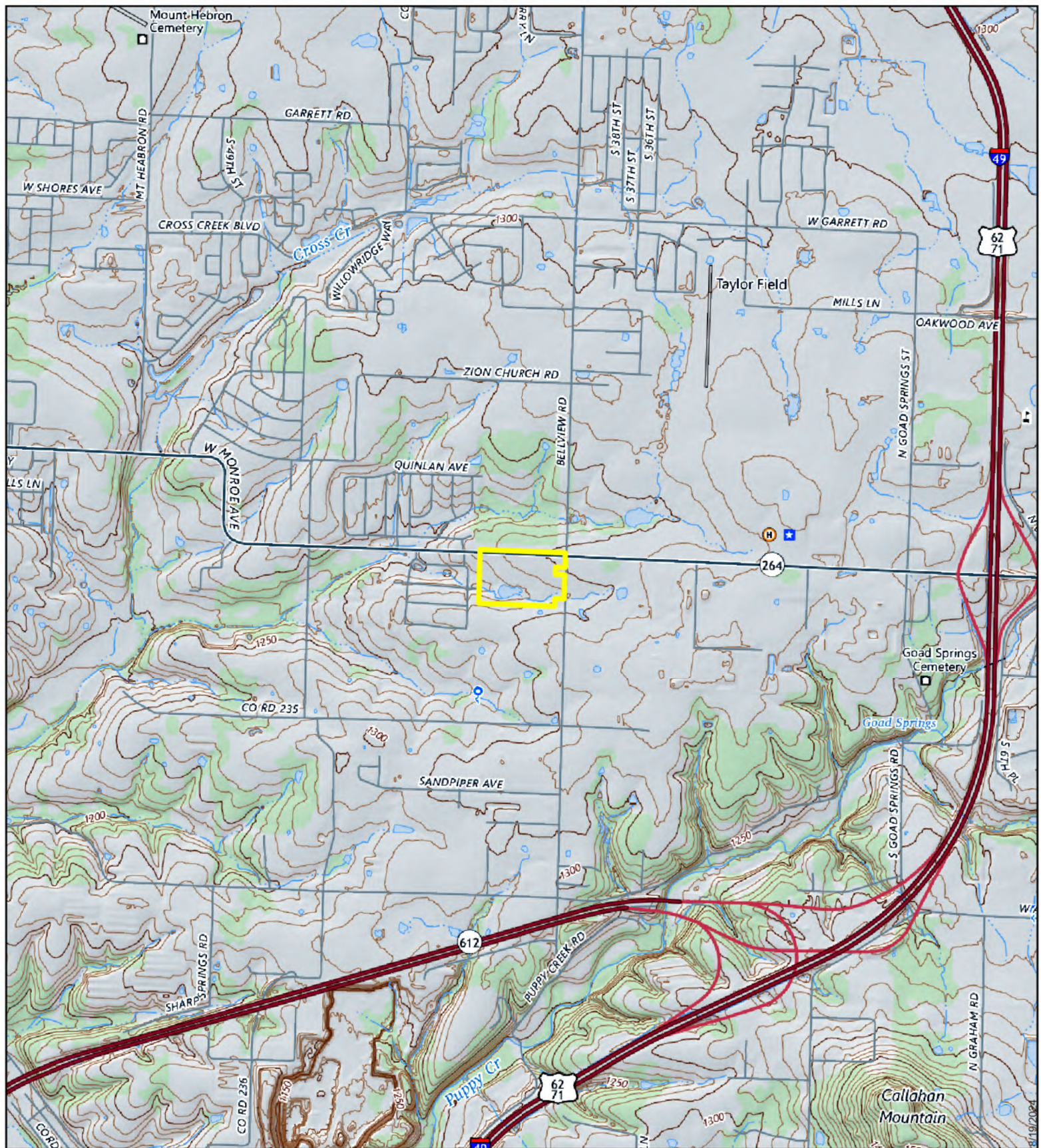


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Background
NRCAN, Esri Ja

Figure 1. Map showing project vicinity overlaid on ESRI

Action No. SWL 2024-00289
Lowell, Benton Co. AR
Lowell - AJD-NPR Proposed Commercial Development
Section: 9 Township: 18N. Range: 30 W.
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W. Monroe & Spring Creek, Lowell, Benton County, AR



Project Area

3,000

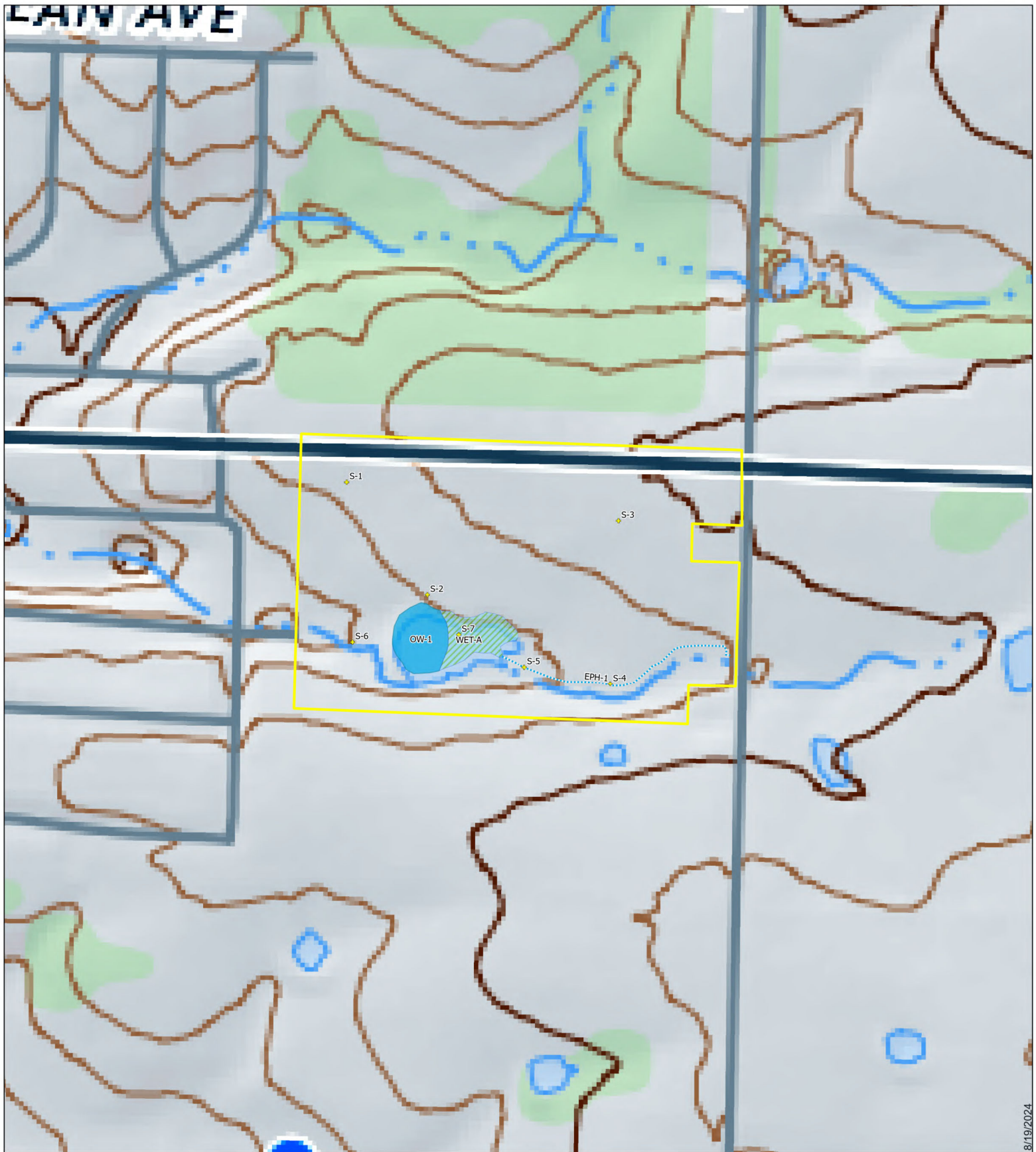
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Figure 2. Map showing project area overlaid on USGS The National Map 7.5

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- Sample Point
- Ephemeral Channel
- Wetland
- Open Water
- Project Area



Figure 3. Map showing project details overlaid on USGS The National Ma

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W. Monroe & Spring Creek, Lowell, Benton County, AR



♦ Sample Point
 Wetland
 Project Area
..... Ephemeral Channel
 Open Water

750

Feet



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Background: <https://gis.ar>

Figure 4. Map showing project details overlaid on 2023 9-inch aerial imagery

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