



**DEPARTMENT OF THE ARMY**  
LITTLE ROCK DISTRICT, CORPS OF ENGINEERS  
POST OFFICE BOX 867  
LITTLE ROCK, ARKANSAS 72203-0867  
www.swl.usace.army.mil

CESWL-RD

8 May 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> **SWL 2023-00283** ¶<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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.

- 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 (~383 linear feet), non-Jurisdictional
  - ii. S-2 (~46 linear feet), non-Jurisdictional
  - iii. S-3 (~323 linear feet), non-Jurisdictional
  - iv. S-4 (~206 linear feet), Jurisdictional, Section 404
  - v. S-5 (~78 linear feet), Jurisdictional, Section 404
  - vi. W-1 (~0.63 acres), non-Jurisdictional
  - vii. W-2 (~0.41 acres), non-Jurisdictional
  - viii. W-3 (~0.31 acres), non-Jurisdictional
  - ix. W-4 (~0.18 acres), Jurisdictional, Section 404
  - x. P-1 (~2.4 acres/non-RPW ~105 linear feet long impoundment of S-3), 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)
- e. 1987 Corps of Engineers Wetlands Delineation Manual, Eastern Mountains and

Piedmont Region Supplement

- f. November 21, 2024, EPA HQ and OASACW jointly signed a memorandum for draft approved JD NWK-2024-00392, the June 25, 2024, EPA HQ and OASACW jointly signed a case-specific memorandum that provided policy guidance regarding meeting the continuous surface connection requirement under *Sackett* for draft approved JD NWK-2022-00809, and the email dated 22 November 2024 stating “EPA HQ and OASACW have determined that the circumstances related to whether Wetlands W-1, W-2, and W-3 of this draft approved JD have a continuous surface connection to a requisite water are also factually similar to those found in the draft approved JD NWK-2022-00809.”
3. REVIEW AREA. The review area is an approximately 23-acre property located in Bryant in Saline County, Arkansas. Approximate center coordinates for the review area are Lat. 34.636621, Long. -92.460406.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. All aquatic resources flow into the Arkansas River which is a Section 10 Waterway and is a TNW.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. All aquatic resources flow from the west/southwest side of the property to the northeast where it exits the review area via S-5 (RPW). S-5 (RPW) is an unnamed tributary to Crooked Creek (RPW) which flows into Fourche Creek (RPW) which flows into the Arkansas River (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> N/A

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<sup>6</sup> 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.

<sup>7</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>8</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

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
  - d. Impoundments (a)(4): N/A
  - e. Tributaries (a)(5):
    - i. S-4 ~1.5 feet wide by 0.2 feet deep 206 linear feet long 1<sup>st</sup> order RPW. During a site visit it was noted this feature has defined bed/banks with riffle-pool morphology. Waterflow indicators including leaf litter, organic debris lines, and a presence of base flow were also noted during the site visit. Historic aerial imagery also supports evidence of relatively permanent flow. Per the Corps Antecedent Precipitation Tool (APT), this feature was observed during normal conditions.
    - ii. S-5 ~1.5 feet wide by 0.2 feet deep 78 linear feet long 2<sup>nd</sup> order RPW. During a site visit it was noted this feature has defined bed/banks with riffle-pool morphology. Waterflow indicators including leaf litter, organic debris lines, and a presence of base flow were also noted during the site visit. Historic aerial imagery also supports evidence of relatively permanent flow. Per the Corps Antecedent Precipitation Tool (APT), this feature was observed during normal conditions.
  - f. The territorial seas (a)(6): N/A

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329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- g. Adjacent wetlands (a)(7): W-4 is an approximately 0.18-acre palustrine forested wetland in the northeastern portion of the review area. W-4 abuts S-4 (RPW) and S-5 (RPW). As such W-4 does have a continues surface connection to a RPW and provides relatively permanent flow to a downstream TNW.

## 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>9</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. 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*. 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

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<sup>9</sup> 51 FR 41217, November 13, 1986.

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

1. S-3, ~1.8 feet wide by 0.3 feet deep 323 linear feet long 1<sup>st</sup> order non-RPW stream. This stream has weakly defined bed/banks with a silt/clay substrate. It lacks any riffle/pool morphology. This stream channel appears to be characterized by infrequent short duration flows after rainfall events (ephemeral). Per the Corps Antecedent Precipitation Tool (APT), this feature was observed during normal conditions. Note S-1, S-2, P-1, and S-3 are separate components of the same 1<sup>st</sup> order tributary as identified based on the procedure in footnote 24 of the 2008 Rapanos guidance with a combined length of 752 linear feet. However, due to discontinuities, in the form of in-line wetlands and the loss of OHWM in these discontinuities, the district evaluated S-1, S-2, P-1, and S-3 as separate waters. W-1 and W-3 are discontinuities in OHWM and were not counted towards the combined tributary length. The tributary (S-1, S-2, P-1, and S-3) was evaluated for relative permanence at the most downstream point of the reach, at the point immediately upstream of where it flows into W-4. Flow was observed to be non-relatively permanent at that point, which indicates that the reach is non-relatively permanent overall.
2. P-1, ~2.4-acre manmade non-RPW impoundment of S-3. Per historic aerial photography this feature was constructed between 1943 and 1955. In review of said historical photography, there is no conclusive evidence that P-1 is an impoundment of jurisdictional features {(a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(6)}. This feature does not provide relatively permanent flow to a downstream TNW. P-1 is part of a tributary reach that classifies as non-RPW overall and as such P-1 does not meet the criteria of a relatively permanent tributary. P-1 also does meet the criteria to be an (a)(3) water.
3. W-1, ~0.63-acre palustrine forested wetland. W-1 abuts P-1 (non-RPW/non-jurisdictional) flows into S-3 (non-RPW,) flows into W-4. W-4 abuts S-5 (RPW). As such W-1s connection is via a non-RPW tributary (ephemeral stream). Per the November 21, 2024, EPA HQ and OASACW jointly signed a memorandum for draft approved JD NWK-2024-00392, the June 25, 2024, EPA HQ and OASACW jointly signed a case-specific memorandum that provided policy guidance regarding meeting the continuous surface connection requirement under *Sackett* for draft approved JD NWK-2022-00809, and the email dated 22 November 2024 stating “EPA HQ and OASACW have determined that the circumstances related to whether Wetlands W-1, W-2, and W-3 of this draft approved JD have a continuous surface connection to a requisite water are also

factually similar to those found in the draft approved JD NWK-2022-00809.” Upon review of the above, Little Rock District has determined that due to the surface connection to the requisite water being via a non-RPW feature with weakly defined bed/banks, silt/clay substrate, lacking any riffle/pool morphology, this does not meet the continuous surface connection requirement.

4. S-2, ~2 feet wide by 0.3 feet deep 46 linear feet long 1<sup>st</sup> order non-RPW stream. This stream has weakly defined bed/banks with a silt/clay substrate. It lacks any riffle/pool morphology. This stream channel appears to be characterized by infrequent short duration flows after rainfall events (ephemeral). Per the Corps Antecedent Precipitation Tool (APT), this feature was observed during normal conditions. Note S-1, S-2, P-1, and S-3 are separate components of the same 1<sup>st</sup> order tributary as identified based on the procedure in footnote 24 of the 2008 Rapanos guidance with a combined length of 752 linear feet. However, due to discontinuities, in the form of in-line wetlands and the loss of OHWM in these discontinuities, the district evaluated S-1, S-2, P-1, and S-3 as separate waters. W-1 and W-3 are discontinuities in OHWM and were not counted towards the combined tributary length. The tributary (S-1, S-2, P-1, and S-3) was evaluated for relative permanence at the most downstream point of the reach, at the point immediately upstream of where it flows into W-4. Flow was observed to be non-relatively permanent at that point, which indicates that the reach is non-relatively permanent overall.
5. W-3, ~0.31-acre palustrine herbaceous emergent wetland. W-3 abuts S-2 (non-RPW). S-2 (non-RPW) flows into W-1. W-1 abuts P-1 (non-RPW/non-jurisdictional impoundment of S-3) flows into S-3 (non-RPW) flows into W-4. W-4 abuts S-5 (RPW). As such W-3s connection is via a non-RPW tributary (ephemeral stream). See section f(3).
6. S-1, ~1.8 feet wide by 0.3 feet deep 383 linear feet long 1<sup>st</sup> order non-RPW stream. This stream has weakly defined bed/banks with a silt/clay substrate. It lacks any riffle/pool morphology. This stream channel appears to be characterized by infrequent short duration flows after rainfall events (ephemeral). Per the Corps Antecedent Precipitation Tool (APT), this feature was observed during normal conditions. Note S-1, S-2, P-1, and S-3 are separate components of the same 1<sup>st</sup> order tributary as identified based on the procedure in footnote 24 of the 2008 Rapanos guidance with a combined length of 752 linear feet. However, due to discontinuities, in the form of in-line wetlands and the loss of OHWM in these discontinuities, the district evaluated S-1, S-2, P-1, and S-3 as separate waters. W-1 and W-3 are discontinuities in OHWM and were not counted towards the combined tributary length. The tributary (S-1, S-2, P-

1, and S-3) was evaluated for relative permanence at the most downstream point of the reach, at the point immediately upstream of where it flows into W-4. Flow was observed to be non-relatively permanent at that point, which indicates that the reach is non-relatively permanent overall.

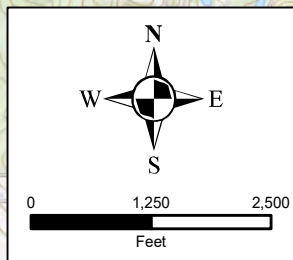
7. W-2, ~0.41-acre palustrine forested wetland. W-2 abuts S-1 (non-RPW). S-1 flows into W-3. W-3 flows into S-2 (non-RPW). S-2 flows into W-1. W-1 abuts P-1 (non-RPW/non-jurisdictional impoundment of S-3) flows into S-3 (non-RPW,) flows into W-4. W-4 abuts S-5 (RPW). As such W-3s connection is via a non-RPW tributary (ephemeral stream). See section f(3).
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. Site visit by Corps personnel was conducted on 7 November 2023; Office review by Corps personnel was conducted on 19 January 2024.
  - b. Alliance Technical Group Delineation Report dated, May 08, 2023 Revised January 12, 2024 , Revised March 13, 2024
  - c. USGS Stream Stats, January 19, 2024
  - d. USGS topoView Alexander, AR 1:24K, January 19, 2024
  - e. Google Earth Pro. (1994-2021 Imagery), January 19, 2024
  - f. USDA Natural Resources Conservation Service Web Soil Survey Saline County, January 19, 2024
  - g. NHD data accessed on National Regulatory Viewer, January 19, 2024
  - h. Historic Aerials via <https://www.historicaerials.com/viewer> , January 19, 2024
  - i. Antecedent Precipitation Tool, February 21, 2024
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



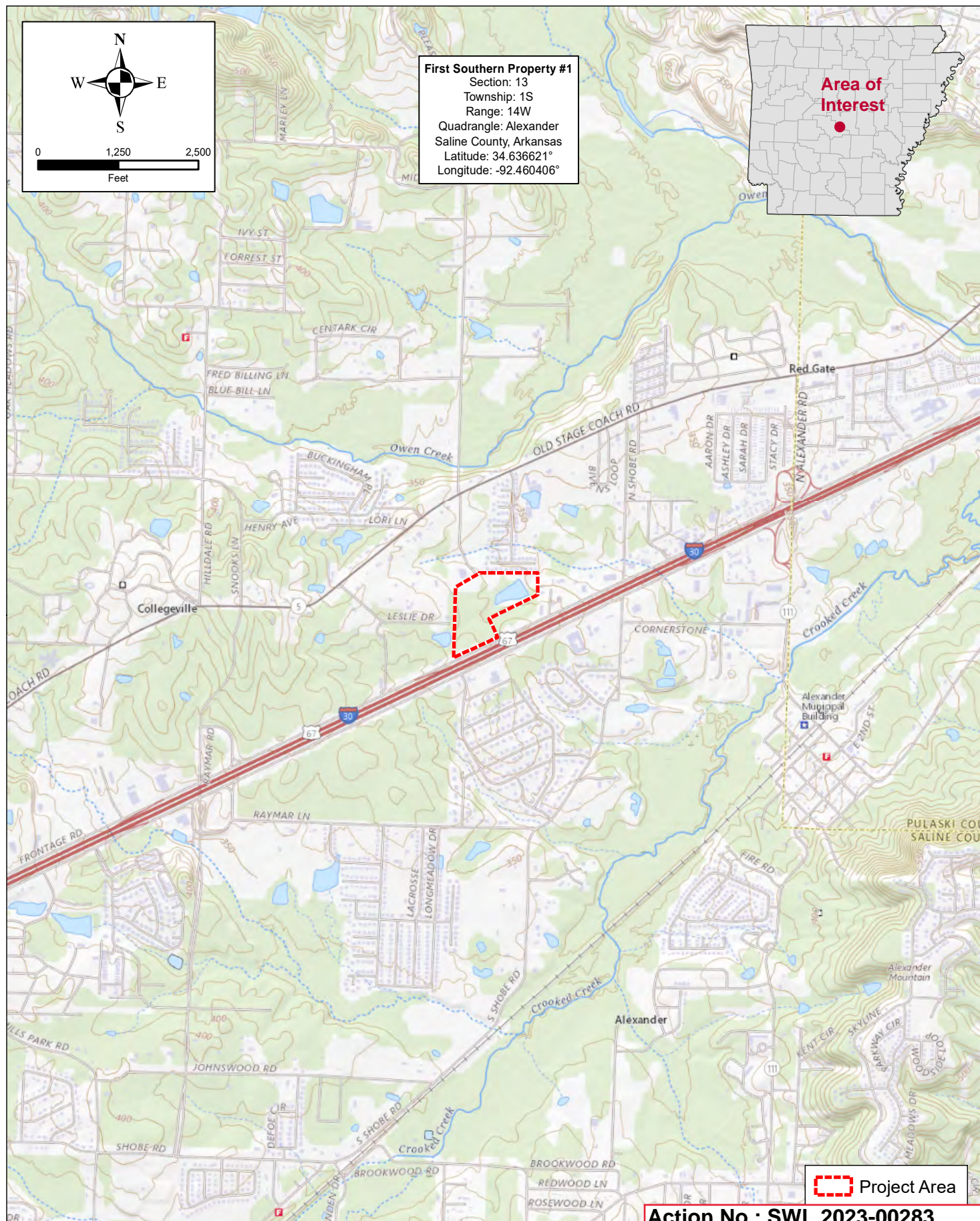
CESWL-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWL 2023-00283

additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



**First Southern Property #1**  
Section: 13  
Township: 1S  
Range: 14W  
Quadrangle: Alexander  
Saline County, Arkansas  
Latitude: 34.636621°  
Longitude: -92.460406°



 Project Area

**Action No.: SWL 2023-00283**  
**Finley I-30 Self-Storage AJD**  
**Bryant, Arkansas**  
**May 2025**

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DESIGNED BY JLP  
CHECKED BY JLP  
APPR. BY GLP  
DRAWN BY ALB

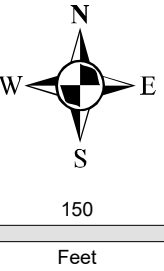
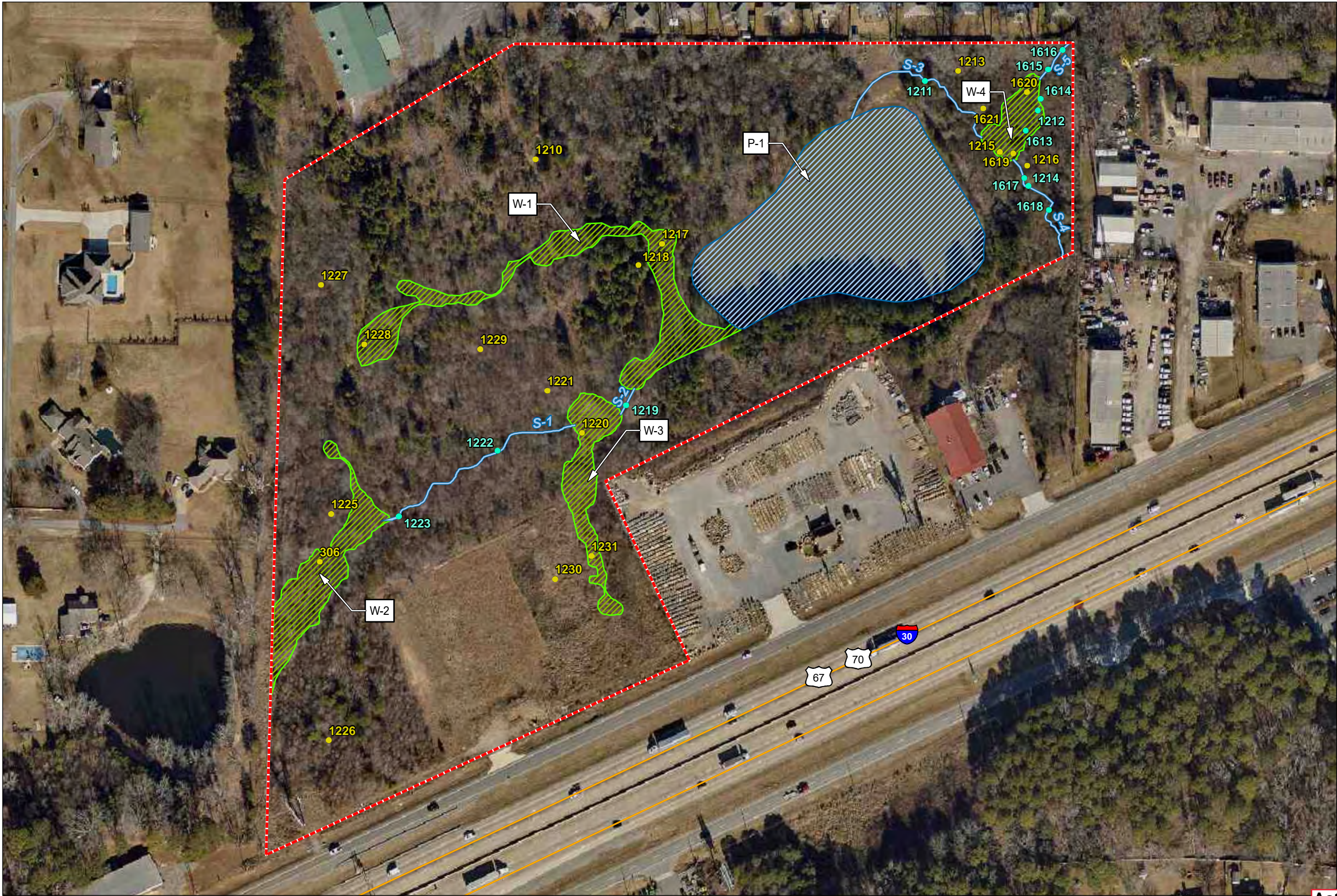


SHEET TITLE

TOPOGRAPHIC  
SITE MAP

JOB NAME  
FIRST SOUTHERN  
JURISDICTION  
SALINE COUNTY





Wetlands	
Name	Area (acres)
W-1	0.63
W-2	0.41
W-3	0.31
W-4	0.18

Open Water Habitat	
Name	Area (acres)
P-1	2.36

Stream	
Name	Length (feet)
S-1	383
S-2	46
S-3	323
S-4	206
S-5	78

- Wetland Determination Point
- Stream Data Point
- Stream
- Wetland
- Open Water Habitat
- Project Area

NO	DATE	REVISION	BY	CK.	APPR.

DESIGNED BY	JLP
CHECKED BY	JLP
APPR. BY	GLP
DRAWN BY	ALB



SHEET TITLE

AERIAL MAP

JOB NAME

FIRST SOUTHERN PROPERTY  
JURISDICTIONAL DETERMINATION  
HOPE CONSULTING  
SALINE COUNTY, ARKANSAS

Action No.: SWL 2023-00283  
Finley I-30 Self-Storage AJD  
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