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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

29 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),¹ **SWL-2024-00399** [MFR 1 of 1]²

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

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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).

Resource Name	Jurisdictional Status	Authority
Wetland A	Non-RPW	N/A
Wetland B	Non-RPW	N/A
Pond A	Non-RPW	N/A
Pond B	Non-RPW	N/A
Channel A	RPW	Section 404 CWA
Channel B	Non-RPW	N/A
Channel C	RPW	Section 404 CWA
Channel D	Non-RPW	N/A
Channel E	Non-RPW	N/A
Channel F	Non-RPW	N/A

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 167 acres, located at Lat: 35.940733, Long: -91.574481, near Cave City, Sharp County, Arkansas. The review area is identified in Attachment 1.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

CONNECTED. The White River is the nearest TNW, and a navigation study determined it to be a TNW.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The unnamed intermittent tributary (Channel A) flows into Barnett Creek (Perennial Creek), which flows into Dry Creek (Perennial Creek), Sullivan Creek (Perennial Creek), and Poke Bayou (Perennial Creek), which flows into the White River a TNW.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ 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.

⁷ 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.

⁸ 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.

- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5):

Channel A (1005 linear feet in the review area) is a second-order intermittent stream in the western area of the review area. It supports a defined bed/bank and exhibited flow at the time of the site visit. The channel has been channelized in the past and generally lacks riffles/runs/pools. It is variable in width from 1 to 4 feet and has a variable depth of up to several inches. The system is fed by groundwater and a natural spring. Due to the intermittent flow, Channel A would be considered jurisdictional under Section 404 of the Clean Water Act.

Channel C (380 linear feet in the review area) is a first-order intermittent stream in the western area of the review area. It supports a defined bed/bank and exhibited flow at the time of the site visit. The channel has been channelized in the past and generally lacks riffles/runs/pools. It is variable in width from 1 to 3 feet and has a depth of up to several inches. The system is fed by groundwater and a natural spring. Due to the intermittent flow, Channel C would be considered jurisdictional under Section 404 of the Clean Water Act.

- 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”).⁹ 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

⁹ 51 FR 41217, November 13, 1986.

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

Wetland A is an approximately 0.42-acre depressional palustrine emergent wetland within the review area. The Corps site visit on April 15, 2025, confirmed its presence and location. This wetland feature does not have a Continuous Surface Connection (CSC) to a jurisdictional feature so that it would be a non-RPW.

Wetland B is an approximately 1.6-acre depressional palustrine emergent wetland within the review area. The Corps site visit on April 15, 2025, confirmed the presence and location of this wetland feature. This wetland feature does not have a CSC to a jurisdictional feature, so it would be a non-RPW.

Pond A is an approximately 1.06-acre open-water pond within the review area. The Corps site visit on April 15, 2025, confirmed the presence and location of this wetland feature. This wetland feature does not have a CSC to a jurisdictional feature, so it would be a non-RPW.

Pond B is an approximately 0.21-acre pond within the review area. The Corps site visit on April 15, 2025, confirmed the presence and location of this wetland feature. This wetland feature does not have a CSC to a jurisdictional feature, so it would be a non-RPW.

Channel B (855 linear feet in the review area) is a first-order ephemeral stream in the western area of the review area. It has no defined bed/bank and did not exhibit flow during the site visit. Channel B is listed as intermittent on NHD; however, it didn't exhibit the characteristics of an intermittent channel. Its width ranges from a few inches to approximately a foot. This feature is ephemeral and would be a non-RPW.

Channel D (315 linear feet in the review area) is a first-order ephemeral stream on the western side of the review area. It has no defined bed/bank and did not exhibit flow during the site visit. Its width ranges from several inches to a few feet. This feature is ephemeral and would be a non-RPW.

Channel E (1145 linear feet in the review area) is a first-order ephemeral stream on the eastern side of the review area. It has no defined bed/bank and did not exhibit flow during the site visit. Its width ranges from several inches to a few feet. This feature is ephemeral and would be a non-RPW.

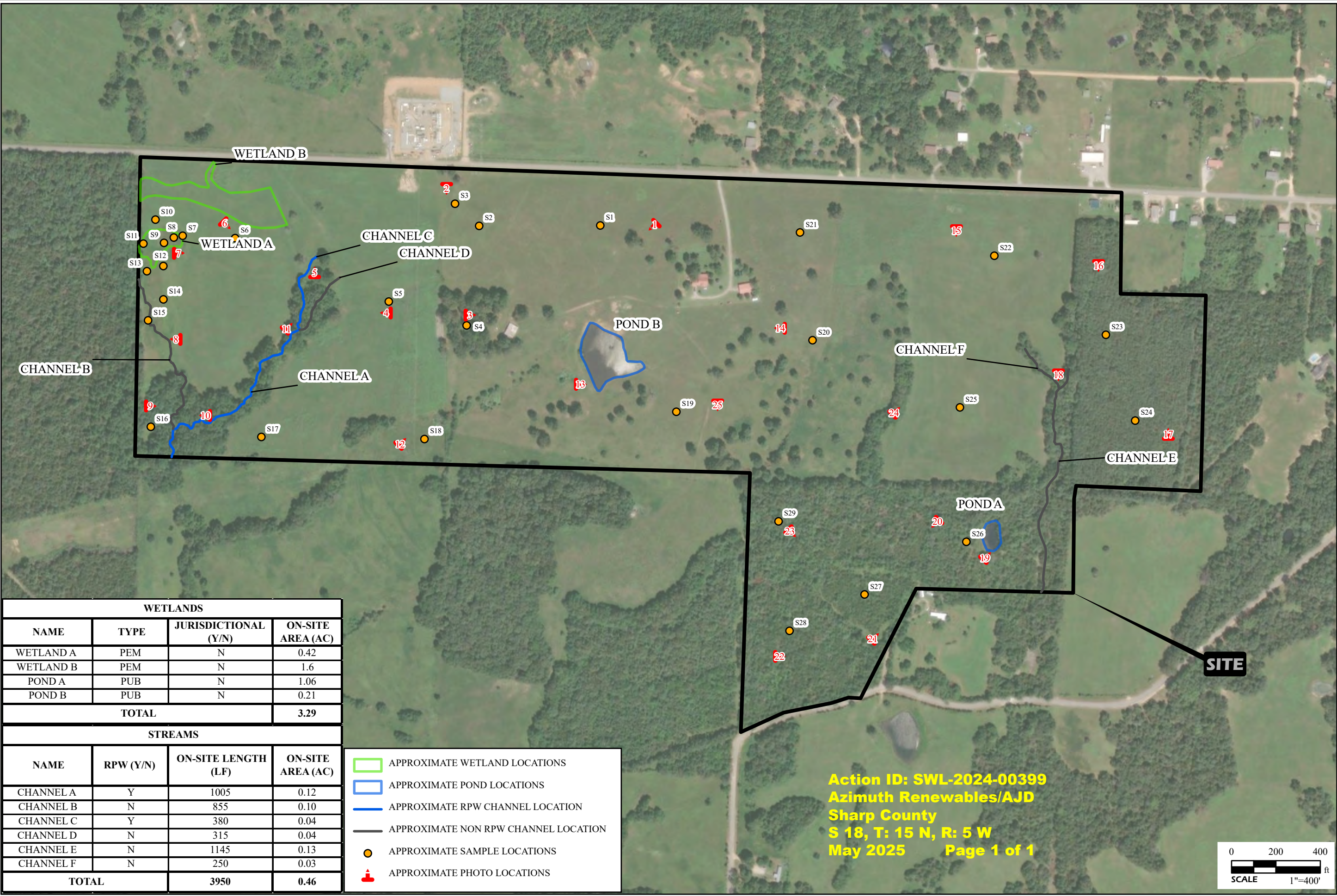
Channel F (250 linear feet in the review area) is a first-order ephemeral stream on the eastern side of the review area. It has no defined bed/bank and did not exhibit flow during the site visit. Its width ranges from several inches to a few feet. This feature is ephemeral and would be a non-RPW.

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 was conducted on April 15, 2025. The desktop review and evaluation completed on May 22, 2025.
 - b. Wetland and Waters Delineation Report Pursuant to Section 404 of the Clean Water Act: SCI Engineering, Inc. Tripoli Solar, Cave City, Arkansas, November 11, 2024
 - c. NHD data accessed on National Regulatory Viewer, May 22, 2025
 - d. National Wetland Inventory maps accessed: May 22, 2025.
10. OTHER SUPPORTING INFORMATION. A field report was completed by the Corps on April 18, 2025, that includes photographs and descriptions of both upland and aquatic features.
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

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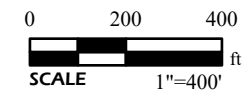
additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



WETLANDS			
NAME	TYPE	JURISDICTIONAL (Y/N)	ON-SITE AREA (AC)
WETLAND A	PEM	N	0.42
WETLAND B	PEM	N	1.6
POND A	PUB	N	1.06
POND B	PUB	N	0.21
TOTAL			3.29
STREAMS			
NAME	RPW (Y/N)	ON-SITE LENGTH (LF)	ON-SITE AREA (AC)
CHANNEL A	Y	1005	0.12
CHANNEL B	N	855	0.10
CHANNEL C	Y	380	0.04
CHANNEL D	N	315	0.04
CHANNEL E	N	1145	0.13
CHANNEL F	N	250	0.03
TOTAL		3950	0.46

- APPROXIMATE WETLAND LOCATIONS
- APPROXIMATE POND LOCATIONS
- APPROXIMATE RPW CHANNEL LOCATION
- APPROXIMATE NON RPW CHANNEL LOCATION
- APPROXIMATE SAMPLE LOCATIONS
- APPROXIMATE PHOTO LOCATIONS

Action ID: SWL-2024-00399
Azimuth Renewables/AJD
Sharp County
S 18, T: 15 N, R: 5 W
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GENERAL NOTES/LEGEND

AERIAL PHOTOGRAPH OBTAINED FROM ARCGIS ONLINE, WORLD IMAGERY.
DIMENSIONS AND LOCATIONS ARE APPROXIMATE; ACTUAL MAY VARY. DRAWING SHALL NOT BE USED OUTSIDE THE CONTEXT OF THE REPORT FOR WHICH IT WAS GENERATED.

PROJECT NAME

TRIPOLI SOLAR
CAVE CITY, ARKANSAS

WETLAND DELINEATION &
AERIAL PHOTOGRAPH

JOB NUMBER

2024-1721.30

FIGURE DATE

04/21/2025

DRAWN BY

ACV

CHECKED BY

MSH

FIGURE

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