



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

31 July 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-2022-00114**

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 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.

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. **Nine non-relatively permanent streams (NRPW) with ephemeral flow regimes (EPH-A, EPH-B, EPH-C, EPH-D, EPH-E, EPH-F, EPH-G, EPH-I, and EPH-J), Non-jurisdictional, Section 404**
 - ii. **Two Relatively Permanent Waters (RPW) with intermittent flow regimes (INT-H and INT-K), Jurisdictional, Section 404**

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 75-acre review area is located directly southwest of the intersection of Chenal Parkway and Chenonceau Boulevard, in west Little Rock, Pulaski County, Arkansas. Review Area Center Coordinates: 34.801180°, -92.481216°.

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

The Little Maumelle River is the nearest downstream TNW and was determined as such because it is on the SWL Navigable Waters of the US List.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.

EPH-A, EPH-B, EPH-C, EPH-D, EPH-E, EPH-F, EPH-G, and EPH-I drain into INT-H (RPW). INT-H drains offsite, through a series of unnamed RPW tributaries, before draining into the Little Maumelle River, a TNW. EPH-J drains offsite and continues generally northward eventually draining into a RPW tributary to the Little Maumelle River. INT-K (RPW) flows offsite, continuing generally northward for before draining into an RPW tributary to the Little Maumelle River.

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**

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.

- c. Other Waters (a)(3): **N/A**
- d. Impoundments (a)(4): **N/A**
- e. Tributaries (a)(5): **Two RPW tributaries (INT-H and INT-K) that possess intermittent flow regimes were identified in the delineation provided by the agent (see attached). Photographic evidence provided by the applicant, a number of remote resources (see Section 9 below), and a site visit by USACE personnel confirmed that these two stream features possessed characteristics of RPW tributaries. INT-H totaled approximately 1,641 linear feet within the review area and possessed RPW indicators such as macroinvertebrates and crayfish. INT-K totaled approximately 360 linear feet within the project area and possessed RPW indicators such as macroinvertebrates and crayfish. A site visit on February 1, 2024, by USACE personnel confirmed the presence of these indicators, as well as other indicators. The additional indicators observed within INT-K and INT-H by USACE personnel include rounded cobbles and stones (indicative of erosion by frequent surface flows), a defined stream bed with 2 to 4-foot cut banks.**
- 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.

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

⁸ 51 FR 41217, November 13, 1986.

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

Nine NRPWs with ephemeral flow regimes (EPH-A, EPH-B, EPH-C, EPH-D, EPH-E, EPH-F, EPH-G, EPH-I, and EPH-J) that do not meet one or more categories of WOTUS, under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett*, were observed within the review area. Due to their classification as NRPWs they are considered non-jurisdictional under Section 404 of the CWA consistent with the Supreme Court’s decision in *Sackett*. See Table 1 below for characteristics of NRPW streams observed onsite.

Table 1. Characteristics of NRPW Streams Observed Onsite

Stream Name	Length of Features	Substrate Type	Approximate OHWM Height	Approximate OHWM Width
EPH-A	435	Leaf Litter and Bare Mineral Soil	1 foot	1.5 feet
EPH-B	803	Cobble, Leaf Litter, and Bare Mineral Soil	1 foot	1.5 feet
EPH-C	209	Cobble, Leaf Litter, Silt	1.5 feet	3 feet
EPH-D	676	Cobble	1.5 feet	3 feet
EPH-E	552	Cobble and Leaf Litter	0.5 foot	2 feet
EPH-F	312	Cobble, Leaf Litter, and Bare Mineral Soil	0.5 foot	1 foot
EPH-G	136	Cobble, Leaf Litter, and Bare Mineral Soil	0.5 foot	1 foot
EPH-I	106	Cobble, Leaf Litter, and Bare Mineral Soil	0.5 foot	1 foot
EPH-J	505	Cobble, Leaf Litter, and Bare Mineral Soil	0.5 foot	1 foot

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 site visit by USACE Regulatory Personnel was conducted on February 1, 2024**
 - b. **USGS 3D Elevation Program (3DEP) Bare Earth DEM, July 18, 2024**
 - c. **Web Soil Survey, <https://websoilsurvey.nrcs.usda.gov/app/>, Accessed February 1, 2024**
 - d. **USGS The National Map Topographic Quadrangle Pinnacle Mountain, Pulaski County, AR, 7.5-minute series 2020, Accessed - February 1, 2024**
 - e. **Google Earth Pro (years of record 1994-2021), February 1, 2024**

CESWL-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWL-2022-00114

f. USACE Antecedent Precipitation Tool, Version 1, Accessed July 18, 2024

10. OTHER SUPPORTING INFORMATION.

Please see the attached Section 404 delineation report prepared by the applicant's agent.

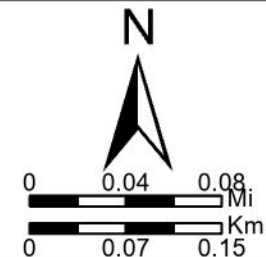
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Action No. CESWL-2022-00114
Little Rock, Pulaski County, AR
Chenal Parkway 75-acre AJD Request

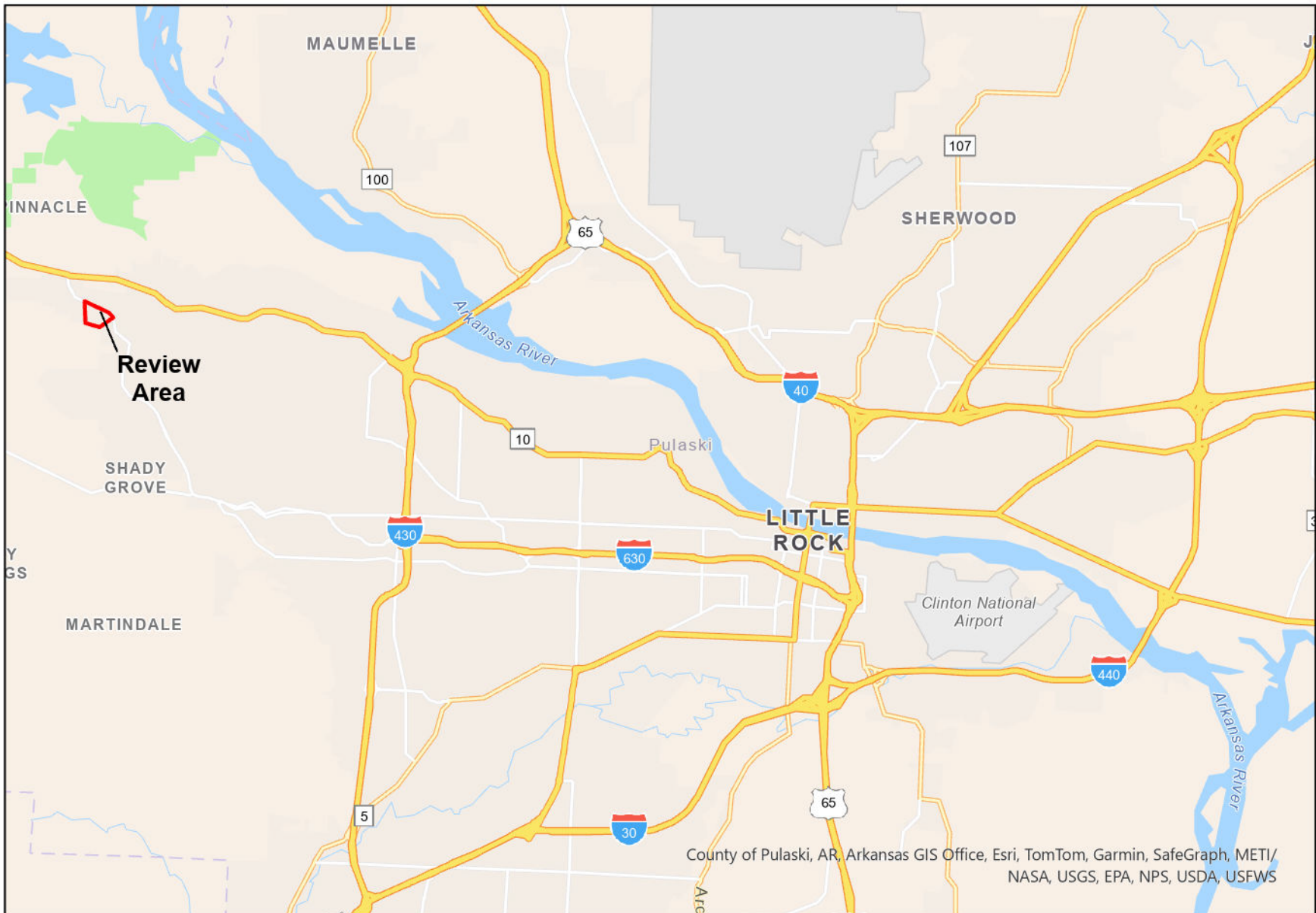
Page: 1 of 2

4/26/2024



Map created by: [REDACTED]

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

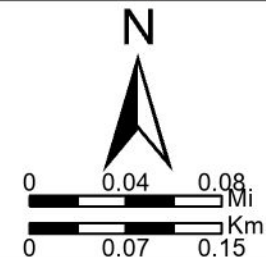


Action No. CESWL-2022-00114
Little Rock, Pulaski County, AR
Chenal Parkway 75-acre AJD Request
Page: 2 of 2

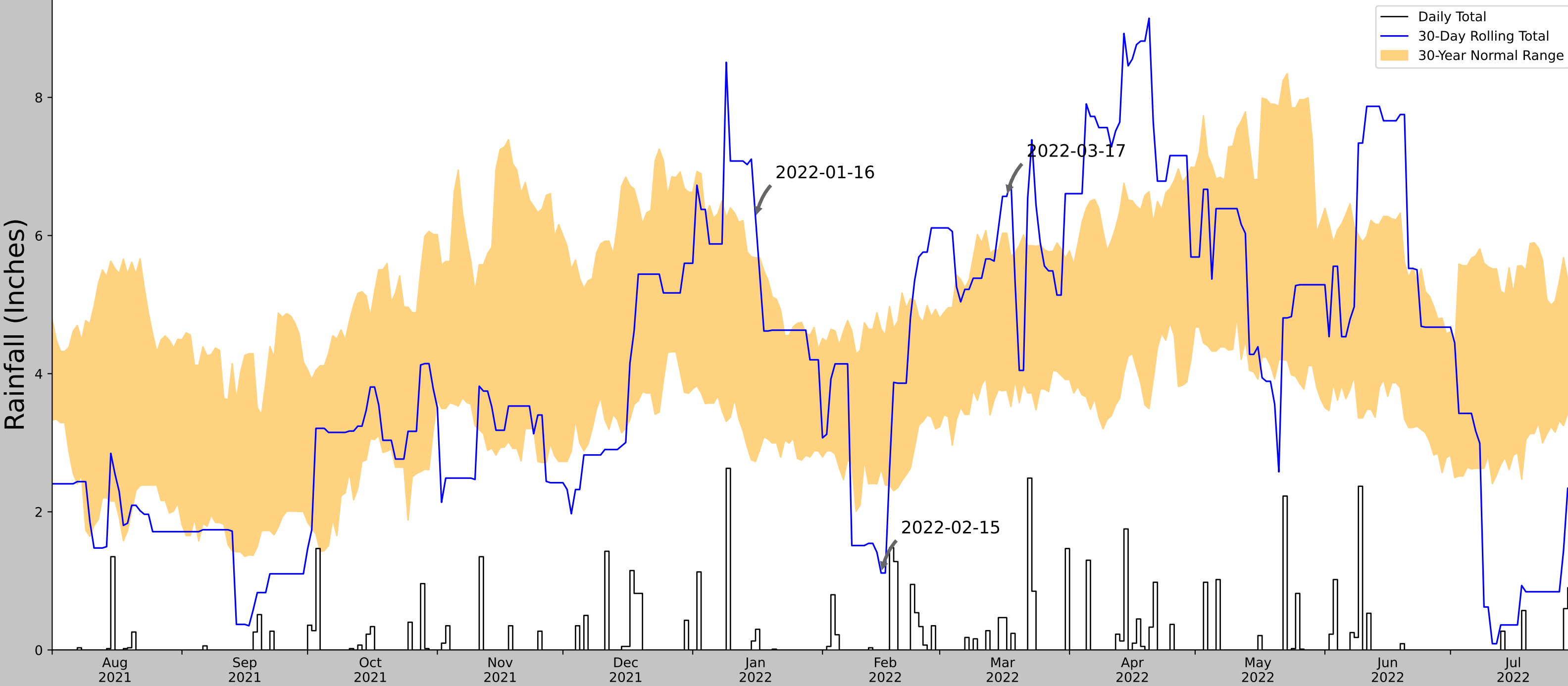
4/26/2024

Map created by: [REDACTED]

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere



Antecedent Precipitation vs Normal Range based on NOAA's Daily Global Historical Climatology Network



Coordinates	34.801581, -92.482040
Observation Date	2022-03-17
Elevation (ft)	438.48
Drought Index (PDSI)	Normal
WebWIMP H ₂ O Balance	Wet Season

30 Days Ending	30 th %ile (in)	70 th %ile (in)	Observed (in)	Wetness Condition	Condition Value	Month Weight	Product
2022-03-17	3.764173	6.034252	6.566929	Wet	3	3	9
2022-02-15	2.625197	4.646063	1.114173	Dry	1	2	2
2022-01-16	2.729134	5.679134	6.255906	Wet	3	1	3
Result							Normal Conditions - 14



Figure and tables made by the
Antecedent Precipitation Tool
Version 1.0

Written by Jason Deters
U.S. Army Corps of Engineers

Weather Station Name	Coordinates	Elevation (ft)	Distance (mi)	Elevation Δ	Weighted Δ	Days Normal	Days Antecedent
CRYSTAL VALLEY	34.6886, -92.4494	395.997	8.023	42.483	3.951	11304	90
LITTLE ROCK 5.8 SW	34.6675, -92.4304	334.974	1.814	61.023	0.927	21	0
LITTLE ROCK 6.4 SW	34.6566, -92.433	323.163	2.399	72.834	1.254	2	0
ALEXANDER 2.9 WNW	34.6528, -92.4856	384.843	3.217	11.154	1.484	11	0
LITTLE ROCK 2.2 N	34.7537, -92.3527	376.969	7.099	19.028	3.33	12	0
BENTON	34.5681, -92.6006	346.129	11.967	49.868	5.982	3	0



March 29, 2022

United States Army Corps of Engineers
Little Rock District – Regulatory Division
700 West Capitol, Room 7530
Little Rock, Arkansas 72201

RE: Chenal Parkway 75-acres – USACE Delineation & AJD Request

Dear Sir or Madam,

PMI visited the proposed 75-acre development site on March 17th 2022 to conduct a wetland and stream delineation. The proposed development site is located directly southwest of the intersection between Chenal Parkway and Chenonceau Boulevard. Refer to Appendix A Site Maps for the approximate property boundary. The owner anticipates construction of a residential development in the near future and requests a United States Army Corps of Engineers (USACE) Approved Jurisdictional Determination on this site.

Jurisdictional Findings

PMI conducted a wetland and stream delineation regarding the presence of jurisdictional wetlands and waters of the United States. The property was investigated for the presence of hydrophytic vegetation, hydric soils, and wetland hydrology as the three parameters required by the USACE wetland determination data form. Eleven streams and no wetlands were identified on the property during the site visit. Data points reflecting these findings are attached as Appendix B and site photographs are attached as Appendix C.

Ephemeral Stream A

Ephemeral Stream A is a jurisdictional stream that flows from south to north and is approximately 435 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Moderate flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream B

Ephemeral Stream B is a jurisdictional stream that flows from south to north and is approximately 803 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream C

Ephemeral Stream C is a jurisdictional stream that flows from south to north and is approximately 209 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream D

Ephemeral Stream D is a jurisdictional stream that flows from south to north and is approximately 676 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Moderate flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream E

Ephemeral Stream E is a jurisdictional stream that flows from south to north and is approximately 552 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream F

Ephemeral Stream F is a jurisdictional stream that flows from south to north and is approximately 312 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream G

Ephemeral Stream G is a jurisdictional stream that flows from south to north and is approximately 136 linear feet within the site. This stream is an unnamed tributary to the Little

Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Intermittent Stream H

Intermittent Stream H is a jurisdictional stream that flows from south to north and is approximately 1,641 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Good flow, sediment sorting, and a well-defined bed and bank were noted at the time of the site visit. The presence macroinvertebrates and crayfish were also observed. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream I

Ephemeral Stream I is a jurisdictional stream that flows from south to north and is approximately 106 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Ephemeral Stream J

Ephemeral Stream J is a jurisdictional stream that flows from south to north and is approximately 505 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Minor flow, sediment sorting, and a moderately defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Intermittent Stream K

Intermittent Stream K is a jurisdictional stream that flows from south to north and is approximately 360 linear feet within the site. This stream is an unnamed tributary to the Little Maumelle River. Good flow, sediment sorting, and a well-defined bed and bank were noted at the time of the site visit. The presence macroinvertebrates and crayfish were also observed. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep.

Upland Data Points

Three upland data points were recorded during the site visit and are attached as Appendix B. These data points are representative of the site which is primarily comprised of a typical upland forest dominated by oaks, hickories, and pines. All hydrology is located within the ephemeral and intermittent streams within the draws. A gravel entrance road and parking area are located south of the site and can be used as access.

Data Point One is located on the west central portion of the site. Wetland hydrology indicators were not present at the time of the site visit. Vegetation consisted of loblolly pine, mockernut hickory, eastern red cedar, and northern red oak. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep and in-field samples indicated a non-hydric soil.

Data Point Two is located on the north central portion of the site. Wetland hydrology indicators were not present at the time of the site visit. Vegetation consisted of loblolly pine, mockernut hickory, pignut hickory, and white oak. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep and in-field samples indicated a non-hydric soil.

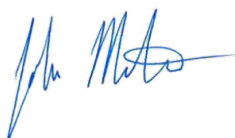
Data Point Three is located on the east central portion of the site. Wetland hydrology indicators were not present at the time of the site visit. Vegetation consisted of loblolly pine, white oak, and pignut hickory. Soils are mapped as the non-hydric unit Carnasaw-Mountainburg association, steep and in-field samples indicated a non-hydric soil.


Summary

On behalf of the owner, PMI requests a USACE Approved Jurisdictional Determination to confirm the locations of jurisdictional features within the site. The owner plans to avoid these jurisdictional features during construction and use best management practices when working around them. If impacts are anticipated, a USACE 404 permit will be obtained prior to impacts of jurisdictional features. If additional information is required, please do not hesitate to contact me at jmetrailer@pmico.com or 501-221-7122.

Sincerely,

PMI





Senior Engineer

WHDA-12597

Appendix A

Site Maps



 CIVIL ENGINEERING AND ENVIRONMENTAL SERVICES	JOB NUMBER: WHDA-12597		SHEET NUMBER: 2	
	DESIGNED BY: [Redacted]	DATE: MAR. 16, 2022	DRAWN BY: [Redacted]	CHECKED BY: [Redacted]
	PR: (501) 221-7122 FX (501) 221-7775	SCALE: N.T.S.	FILE: [Redacted]	

REVISIONS:	NO.	DATE	DESCRIPTION	BY:

SHEET TITLE:	USFWS NATIONAL WETLAND INVENTORY
PROJECT TITLE:	CHENAL PARKWAY 75-ACRE DELINEATION [Redacted] LITTLE ROCK, ARKANSAS

WHDA-12597 - CHENAL PARKWAY LEASE DELINEATION & PERMITTING(DRAWINGS)WHDA-12597 LEASE DELINEATION.DWG



MAP LEGEND

- Area of Interest (AOI)**

 - Area of Interest (AOI)

Soils

 - Soil Map Unit Polygons
 - Soil Map Unit Lines
 - Soil Map Unit Points

Special Point Features

 - Blowout
 - Borrow Pit
 - Clay Spot
 - Closed Depression
 - Gravel Pit
 - Gravelly Spot
 - Landfill
 - Lava Flow
 - Marsh or swamp
 - Mine or Quarry
 - Miscellaneous Water
 - Perennial Water
 - Rock Outcrop
 - Saline Spot
 - Sandy Spot
 - Severely Eroded Spot
 - Sinkhole
 - Slide or Slip
 - Sodic Spot
- Spoil Area
 - Stony Spot
 - Very Stony Spot
 - Wet Spot
 - Other
 - Special Line Features

Water Features

 - Streams and Canals

Transportation

 - Rails
 - Interstate Highways
 - US Routes
 - Major Roads
 - Local Roads

Background

 - Aerial Photography

Map Unit Legend

Map Unit Symbol	Map Unit Name	Acres in AOI	Percent of AOI
CMC	Carnasaw-Mountainburg association, undulating	12.2	14.4%
CMF	Carnasaw-Mountainburg association, steep	72.6	85.6%
Totals for Area of Interest		84.8	100.0%



CIVIL ENGINEERING AND ENVIRONMENTAL SERVICES

PH: (507) 221-7122 FAX: (507) 221-7775

DESIGNED BY: [Redacted]

DRAWN BY: [Redacted]

CHECKED BY: [Redacted]

FILE: [Redacted]

REVISIONS:

NO.	DATE	DESCRIPTION	BY:

USDA SOILS MAP

CHENAL PARKWAY 75-ACRE DELINEATION

LITTLE ROCK, ARKANSAS

JOB NUMBER:
WHDA-12597

SHEET NUMBER:
3