



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT
2488 E 81ST STREET
TULSA, OK 74137-4290

CESWT-RO

1 November 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), SWT-2020-00409

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.¹ 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.² For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),³ 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 Oklahoma due to litigation.

1. SUMMARY OF CONCLUSIONS.

¹ 33 CFR 331.2.

² Regulatory Guidance Letter 05-02.

³ 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. FS-1, Non-jurisdictional, 0.259-acre (1,163 linear feet (lf)), is not a waters of the United States
 - ii. FS-2, Non-jurisdictional, 0.413-acre (2,571 lf), is not a waters of the United States
 - iii. FS-3, Non-jurisdictional, 0.016-acre, Emergent Wetland is not adjacent to jurisdictional stream channel
 - iv. FS-4, Non-jurisdictional, 0.032-acre (232 lf), is not a waters of the United States
 - v. FS-5, Non-jurisdictional, 0.03-acre, Emergent Wetland is not adjacent to jurisdictional stream channel
 - vi. FS-6, Non-jurisdictional, 0.032-acre (233 lf), is not a waters of the United States
 - vii. FS-7, Non-jurisdictional, 0.94-acre, Emergent Wetland is not adjacent to jurisdictional stream channel
 - viii. FS-8, Non-jurisdictional, 0.03-acre (215 lf) is not a waters of the United States
 - ix. FS-9, Jurisdictional, 0.262-acre (633 lf), is a waters of the United States (unnamed tributary of Double Spring Creek)
 - x. FS-10, Jurisdictional, 1.7-acres (900 lf), is a waters of the United States (Double Spring Creek)
 - xi. FS-11, Jurisdictional, 0.146-acre, Emergent Wetland is adjacent to jurisdictional stream channel (Double Spring Creek)
 - xii. FS-12, Non-jurisdictional, 0.104-acre (1,513 lf) is not waters of the United States (Ditch)
 - xiii. FS-13, Non-jurisdictional, 0.104-acre (1,214 lf) is not waters of the United States (Ditch)

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- xiv. FS-14, Non-jurisdictional, 1.18-acres, Emergent Wetlands is not adjacent to jurisdictional stream channel
- xv. FS-15, Non-jurisdictional, 0.115-acre, Emergent Wetlands is not adjacent to jurisdictional stream channel

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 containing is approximately 85.3 acres. The review areas are located in the Sections 22, 23, 26 and 27, Township 17 North, Range 20 East, in Hulbert, Cherokee County, Oklahoma. The review areas are located near Latitude 35.91987, Longitude - 95.15415.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Grand (Neosho) River – Interstate Water

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

The Double Spring Creek and its unnamed tributaries discharge into Lake Fort Gibson, to the Grand (Neosho) River.

6. SECTION 10 JURISDICTIONAL WATERS⁴: 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

⁴ 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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁵ 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

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5):

FS-9 is approximately 633 lf of the unnamed tributary of Double Spring Creek is a relatively permanent water within the review area.

FS-10 is approximately 900 lf of Double Spring Creek is relatively permanent water within the review area. Double Spring Creek discharges into Fort Gibson Lake [Grand (Neosho) River]. This tributary has flow regime consistent with riffle and pool complexes.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

⁵ 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.

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FS-11 is a wetland of Double Spring Creek. This wetland is 0.146 acre within the review area and have been determined to be adjacent with a continuous surface connection to waters of the United States.

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”).⁶ 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. The non-jurisdictional areas are upland depressional areas that may or may not be indicated on the USGS Topo Map, USGS NHD, or USFWS NWI map as aquatic features. Additionally, the requestor’s delineation report indicated hydric soils were not present.
- 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.
- 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.

FS-7 are former sewage lagoons. The waste treatment system are not waters of the United States.

- 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

⁶ 51 FR 41217, November 13, 1986.

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- 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).

List all non-jurisdictional wetland types, sizes, and why they are not jurisdictional.

FS-1 unnamed tributary of Double Spring Creek is 3 to 7 wide foot approximately 2 foot deep 1,613 lf (0.259 acre) is an ephemeral stream channel that was diverted into the road-side drainages; however, the channel is made of silt, cobble and gravel substrates with some boulder and only has water in the channel during a rain event.

FS-2 unnamed tributary of Double Spring Creek is 3 to 7 wide foot approximately 2 foot deep 2,571 lf (0.413 acre) is an ephemeral stream channel that was diverted into the road-side drainages; however, the channel is made of rock and only has water during a rain event.

FS-3 Emergent Wetland (0.016 acre) the small depression are drainage features, within road-side drainages and former agricultural ponds. The features appear to collect storm water (surface run off) from adjacent highway and/or county road and agricultural land.

FS-4 unnamed tributary of Double Spring Creek is 6 wide feet approximately 1 foot deep 232 lf (0.0032 acre) is an ephemeral stream channel that was diverted into the road-side drainages; however, the channel is made of silt, cobble and gravel substrates with some boulder and only has water in the channel during a rain event.

FS-5 Emergent Wetland (0.030 acre) the small depression are drainage features, within road-side drainages and former agricultural ponds. The features appear to collect storm water (surface run off) from adjacent highway and/or county road and agricultural land.

FS-6 Ditch is 6 wide feet approximately 1 foot deep 233 lf (0.032 acre) is a drainage feature that convey storm water (surface run off) from adjacent highway and/or county road and agricultural land. The features were dominated by silt, clay and gravel substrates and exhibited characteristics of ephemeral, upland drainages; however, only has water in the channel during a rain event.

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FS-7 Emergent Wetland (0.030 acre) the small depression are drainage features, within road-side drainages and former agricultural ponds. The features appear to collect storm water (surface run off) from adjacent highway and/or county road and agricultural land.

FS-8 Ditch is 6 wide feet approximately 1 foot deep 215 lf (0.030 acre) is a drainage feature that convey storm water (surface run off) from adjacent highway and/or county road and agricultural land. The features were dominated by silt, clay and gravel substrates and exhibited characteristics of ephemeral, upland drainages; however, only has water in the channel during a rain event.

FS-12 Ditch is 3 wide feet approximately 1 foot deep 1,513 lf (0.104 acre) is a drainage feature that convey storm water (surface run off) from adjacent highway and/or county road and agricultural land. The features were dominated by silt, clay and gravel substrates and exhibited characteristics of ephemeral, upland drainages; however, only has water in the channel during a rain event.

FS-13 Ditch is 2 wide feet approximately 1 foot deep 1,241 lf (0.056 acre) is a drainage feature that convey storm water (surface run off) from adjacent highway and/or county road and agricultural land. The features were dominated by silt, clay and gravel substrates and exhibited characteristics of ephemeral, upland drainages; however, only has water in the channel during a rain event.

FS-14 Emergent Wetland (1.18 acre) the small depression are drainage features, within road-side drainages and former agricultural ponds. The features appear to collect storm water (surface run off) from adjacent highway and/or county road and agricultural land.

FS-15 Emergent Wetland (0.155 acre) the small depression are drainage features, within road-side drainages and former agricultural ponds. The features appear to collect storm water (surface run off) from adjacent highway and/or county road and agricultural land.

The feature denoted as in the requestor's delineation is a non-RPW drainage feature that is and is not depicted on the USGS Topo Map and USGS NHD that for the majority of the feature length, occurs parallels the SH-80.

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.

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- a. The field visit was conducted September 11, 2024, with Marcus Ware USACE and Jared Bechtol, Oklahoma Department of Transportation. The office evaluation was completed on October 16, 2024.
 - b. Oklahoma Department of Transportation for Job Piece 31246(04) SH-80 Hulbert, Cherokee County, Oklahoma dated September 5, 2024.
 - c. USGS Topographic Map, accessed September 5, 2024
 - d. USFWS NWI, accessed September 11, 2024
 - e. ORM Database on September 11, 2024, and October 16, 2024
10. OTHER SUPPORTING INFORMATION. ODOT provided original Corps AJD letter dated December 1, 2020, and September 5, 2024.
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.