



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

CESWT-RO

28 January 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 SWT-2022-00296, MFR 1 of 1.

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 Oklahoma 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.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2022-00296

- 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. EF-1 Non-RPW Erosional Feature characterized by ephemeral flow, approximately 91 linear feet (lf), **Non-jurisdictional, No authority under Section 10/404**
 - ii. EF-2 Non-RPW Erosional Feature characterized by ephemeral flow, approximately 81 lf, **Non-jurisdictional, No authority under Section 10/404**
 - iii. ES-1 Non-RPW Ephemeral Stream, approximately 1143 lf, **Non-jurisdictional, No authority under Section 10/404**
 - iv. S-1a Non-RPW Swale characterized by ephemeral flow, approximately 376 lf, **Non-jurisdictional, No authority under Section 10/404**
 - v. S-2 Non-RPW Swale with less than ephemeral flow, approximately 97 lf, **Non-jurisdictional, No authority under Section 10/404**
 - vi. Pond-1 Excavated Stock Tank, approximately 0.88 acre (ac), **Non-jurisdictional, No authority under Section 10/404**
 - vii. Pond-2 Upland Stock Tank, approximately 0.45 ac, **Non-jurisdictional, No authority under Section 10/404**
 - viii. EW-1 Emergent Wetland, approximately 0.28 ac, **Non-jurisdictional, No authority under Section 10/404**

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)

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2022-00296

- e. US EPA and Office of the Assistant Secretary of the Army, Civil Works (OASACW) Memorandum on NWK-2022-00809, Draft Approved Jurisdictional Determination
 - f. US EPA and OASACW Memorandum on NWK-2024-00392, Draft Approved Jurisdictional Determination
 - g. US EPA, Program Development and Jurisdiction Branch, Coordination Email, 20 December 2024
3. REVIEW AREA. The 93-acre review area is located in Section 23, Township 4 South, Range 1 East, Ardmore, Carter County, Oklahoma. Center coordinates of the review area are Latitude: 34.191442° Longitude: -97.175521°. See attached maps.



4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Red River is the nearest TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The unnamed tributary in the western section of the review area flows to an unnamed tributary, which flows

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2022-00296

into Hickory Creek, which flows into the designated Section 10 portion of the Red River. Hickory Creek headwaters originates in the eastern section of the review area and flows into the Section 10 portion of the Red River. (Landmark: Between River Miles 725.9-817.0)

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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): N/A
 - f. The territorial seas (a)(6): N/A

⁵ 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.

⁶ 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.

- 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”).⁷ 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.

Pond-2 (.45 ac) is an upland stock tank. It was delineated as being on channel to ES2, a headwater of Hickory Creek. NWI and NHD maps indicate that Pond-2 is at the headwater of Hickory Creek, however through onsite investigations, there appears to be no stream connectivity to downstream waters. The pond has no discernible overflow structure present; however, the dam has a breach in it. Downstream of Pond-2’s breach, all channel morphology is lost within the study area. A nearby manmade ditch starts to exhibit channel morphology approximately 250 feet down gradient to Pond-2 and appears to be the headwater to Hickory Creek.

- 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.

S-1a (767 lf) is a non-RPW grass-lined swale with low volume, infrequent and short duration flow from overland sheet flow. It is located at the headwater drainage of ES-1, an unnamed non-RPW with ephemeral flow characteristics. This feature is not identified on any USGS NHD, USGS Topo, nor USFWS NWI maps.

S-2 (97 lf) is a non-RPW leaf-littered swale with low volume, infrequent and short duration flow from overland sheet flow. Historically, S-2 was inundated by Pond-2 during impoundment; this can be identified in historical photos. USGS NHD, USGS Topo, and USFWS NWI maps indicate S-2 originates as the headwater to Hickory Creek within the boundary of Pond-2.

EF-1 (91 lf) is a non-RPW erosional feature with ephemeral flow characteristics. This feature is not identified on any USGS NHD, USGS Topo, nor USFWS NWI maps.

⁷ 51 FR 41217, November 13, 1986.

EF-2 (81 lf) was delineated as a non-RPW ephemeral stream; however, it exhibits features more of an erosional feature within the historical banks of Pond-2 as evidenced in aerial imagery. The breach of Pond-2 has exposed this erosional feature. USGS NHD and USGS Topo identify the feature as part of Pond-2. USFWS NWI map does not identify the feature.

- 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).

ES-1 (1143 lf) a non- RPW is an unnamed tributary of Hickory Creek. ES-1 exhibits features of a non-RPW with ephemeral flow characteristics. Within the review area, ES-1 exhibits a bed and bank with an OHWM upstream of Pond-1. The channel morphology loses OHWM and bed and bank, exhibiting more of a swale-like characteristic downstream of Pond-1. ES-1 loses all channel morphology as it flows into EW-1.

Pond-1 (0.88 ac) is an excavated stock tank located on an ephemeral drainage non-RPW ES-1. Pond-1 does not the threshold of an (a)(3), (a)(4), nor (a)(5) water as ES-1 is a non-RPW and the degradation/destruction of such feature would not affect interstate or foreign commerce.

CESWT-RO

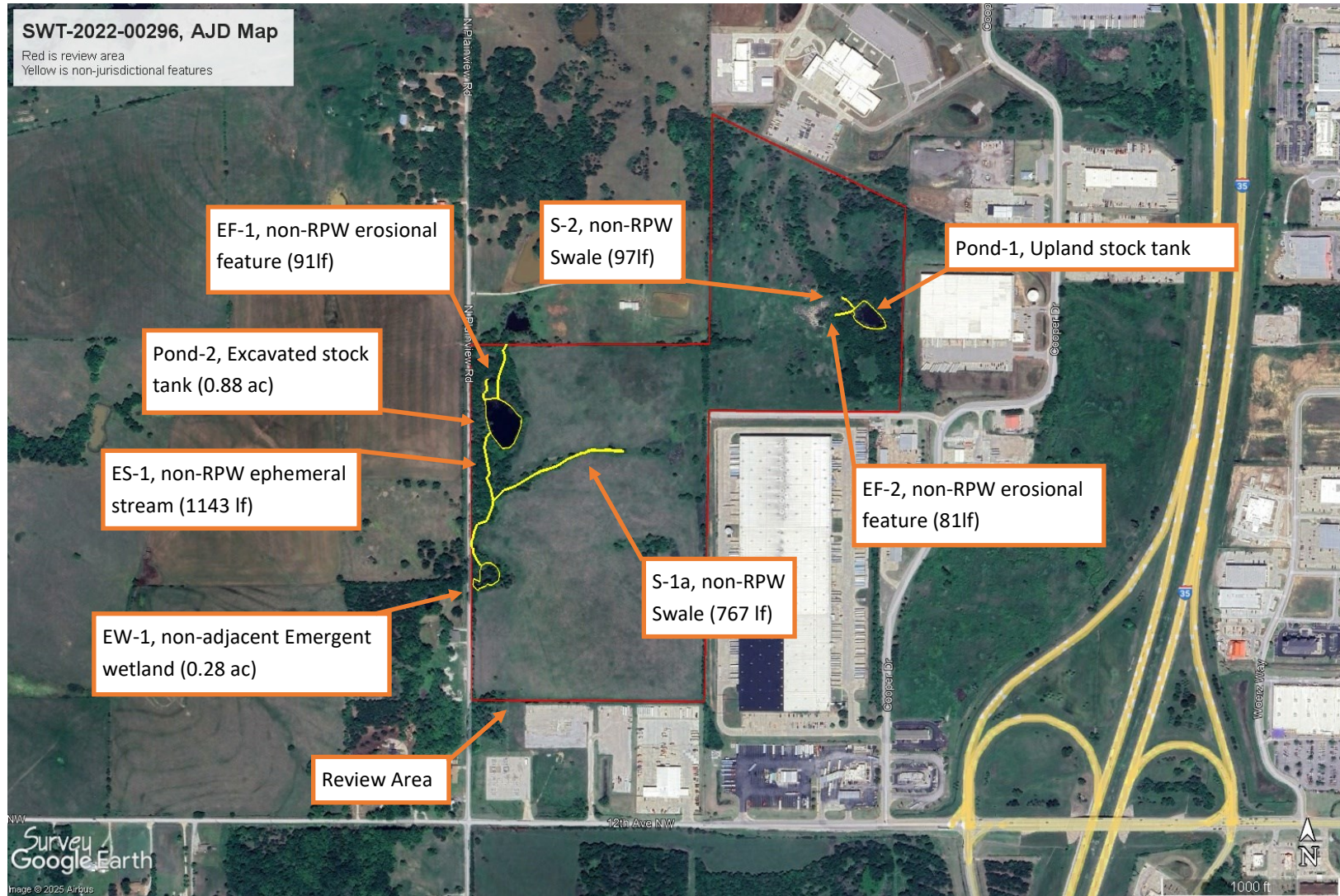
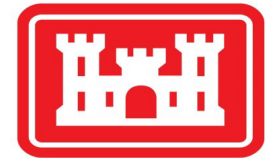
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2022-00296

EW-1 (0.28 ac) is an emergent wetland which essentially replaces ES-1. It is at the most downstream section of ES-1 and essentially replaces it. EW-1 is adjacent to the western boundary of the review area. Directly downstream of EW-1, offsite, channel morphology is reestablished, but has been filled in roughly a couple hundred feet downstream sometime in the 1960's to 1970's. EW-1 flows west for approximately 40 feet through a corrugated metal pipe under the paved road, then flows for approximately 850 feet south along a roadside ditch. The roadside non-RPW ditch flows into the unnamed tributary with unknown RPW status.

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, dated January 25, 2024
 - b. "Waters of the United States Delineation", Terracon, dated March 31, 2022
 - c. USGS NHD Map, Accessed February 09, 2024
 - d. USGS Topo Map, Accessed Via Google Earth, February 09, 2024
 - e. Historical Aerial Photos, www.historicaerials.com, Accessed February 09, 2024
 - f. USFWS NWI Map, FWS wetlands mapper, Accessed February 09, 2024
 - g. Google Earth Pro, Historical satellite imagery, Accessed February 09, 2024
10. OTHER SUPPORTING INFORMATION. Review of EPA's coordination email dated 20 December 2024 and referenced Joint Memorandums for draft approved JD's NWK-2022-00809 and NWK-2024-00392, support the finding of non-jurisdictional wetlands based on distance to nearest RPW, flow frequency and duration of the connected non-RPW waters.
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.



SWT-2022-00296
Approved Jurisdictional Determination



Project Center Coordinates: 34.19144 , -97.17552 Carter County, Oklahoma