



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT
2488 EAST 81ST STREET
TULSA, OKLAHOMA 74137-4209

SWT-RO

11 March 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 SWT-2023-00459 MFR 1 of 1²

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.

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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.

- 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. W-1 and W-2 (single contiguous wetland with two vegetative structures), jurisdictional, waters of the U.S., Section 404
 - ii. PUB-1, non-jurisdictional, not waters of the U.S.
 - iii. W-3, non-jurisdictional, not waters of the U.S.
 - iv. W-4, non-jurisdictional, not waters of the U.S.
 - v. W-5, non-jurisdictional, not waters of the U.S.
 - vi. W-6, non-jurisdictional, not waters of the U.S.
 - vii. W-7, non-jurisdictional, not waters of the U.S.
 - viii. W-8, non-jurisdictional, not waters of the U.S.
 - ix. W-9, non-jurisdictional, not waters of the U.S.
 - x. W-10, non-jurisdictional, not waters of the U.S.
 - xi. W-11, non-jurisdictional, not waters of the U.S.

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)

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- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
 - e. Navigable Waters Subject to Section 10 of the Rivers and Harbors Act within Tulsa District, <https://www.swt.usace.army.mil/Missions/Regulatory/Section-10-Waters/> (accessed February 8, 2024).
3. REVIEW AREA. The AJD review area is an approximately 31-acre tract of land located at latitude 35.18791, longitude -97.49889, in the City of Goldsby, McClain County, Oklahoma. The review area is located entirely within the 100-year flood plain of the Canadian River. The review area is adjacent to agricultural fields to the south and west and industrial development to the north and east.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Canadian River, a Section 10 TNW.
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The subject aquatic resources flow through the unnamed tributary of the Canadian River to the Canadian River, a Section 10 TNW.
 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

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.

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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): NA.
- 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.
- g. Adjacent wetlands (a)(7):
 1. W-1 (6.625 acres) and W-2 (2.725 acres) are a single contiguous jurisdictional adjacent wetland with two varying vegetative structures. Upon review of W-1 and W-2, it could not be clearly demarcated where the unnamed tributary of the Canadian River ends and W-1 and W-2 begins due to the ordinary high-water mark of the unnamed tributary of the Canadian River extending to that of W-1 and W-2. Thus, W-1 and W-2 was determined to exhibit a continuous surface connection with the unnamed tributary of the Canadian River, that is, there is no clear demarcation between the unnamed tributary of the Canadian River and W-1 and W-2.

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.

⁸ 51 FR 41217, November 13, 1986.

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1. PUB-1 (0.139 acre) is a non-jurisdictional waterfilled depression created in dry land incidental to construction activity. Although PUB-1 overflows into W-1, PUB-1 was excavated in the uplands (between 1962 and 1975) prior to the excavation of the drainage channel that is now part of W-1 in which PUB-1 flows. Thus, PUB-1 is a non-jurisdictional waterfilled depression created in dry land.

- 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 non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).
 1. W-3 (0.059 acre) is a non-jurisdictional non-adjacent wetland. W-3 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-3 does not have a continuous

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surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.

2. W-4 (0.172 acre) is a non-jurisdictional non-adjacent wetland. W-4 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-4 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.
3. W-5 (0.011 acre) is a non-jurisdictional non-adjacent wetland. W-5 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-5 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.
4. W-6 (0.342 acre) is a non-jurisdictional non-adjacent wetland. W-6 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-6 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.
5. W-7 (0.021 acre) is a non-jurisdictional non-adjacent wetland. W-7 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-7 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.
6. W-8 (0.381 acre) is a non-jurisdictional non-adjacent wetland. W-8 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-8 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.
7. W-9 (0.018 acre) is a non-jurisdictional non-adjacent wetland. W-9 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-9 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.

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8. W-10 (0.110 acre) is a non-jurisdictional non-adjacent wetland. W-10 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-10 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.

9. W-11 (0.165 acre) is a non-jurisdictional non-adjacent wetland. W-11 is an isolated depressional wetland that can be easily demarcated from waters of the U.S. in their own right. Thus, W-11 does not have a continuous surface connection with waters of the U.S. and is a non-jurisdictional non-adjacent wetland.

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, January 18, 2024.
 - b. Lentic and Lotic Waterbody and Wetland Delineation Study October 23, 2023.
 - c. USGS Topographic and NHD Maps February 8, 2024.
 - d. USFWS NWI Map February 8, 2024.
 - e. Google Earth Aerial Imagery 1995-2023, February 8, 2024.
 - f. Historic Aerials 1956-2021, February 8, 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 additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



SWT-2023-00459 Approved Jurisdictional Determination

