



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

CESWT-RO

23 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-2023-00460, 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.

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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. PUB-1 Stock Pond, approximately 0.701 acre (ac), **Non-jurisdictional, No authority under Section 10/404**
 - ii. PEM1-1 Wetland, approximately 0.382 ac, **Non-jurisdictional, No authority under Section 10/404**
 - iii. PEM1-2 Wetland, approximately 0.007 ac, **Non-jurisdictional, No authority under Section 10/404**
 - iv. PEM1-3 Wetland, approximately 0.038 ac, **Non-jurisdictional, No authority under Section 10/404**
 - v. PEM1-4 Wetland, approximately 0.020 ac, **Non-jurisdictional, No authority under Section 10-404**
 - vi. R6SB-1, approximately 839 linear feet (lf), **Non-jurisdictional, No authority under Section 10/404**
 - vii. R6SB-2, approximately 362 lf, **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)
- 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 November 1, 2023).

- f. US EPA and Office of the Assistant Secretary of the Army, Civil Works (OASACW) Memorandum on NWK-2022-00809, Draft Approved Jurisdictional Determination
 - g. US EPA and OASACW Memorandum on NWK-2024-00392, Draft Approved Jurisdictional Determination
 - h. US EPA, Program Development and Jurisdiction Branch, Coordination Email, 20 December 2024
3. REVIEW AREA. The 31-acre review area is located in Section 4, Township 21 North, Range 14 East, Owasso, Tulsa County, Oklahoma. Center coordinates of the review area are Latitude: 36.32416° Longitude: -95.81404°.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Verdigris River is the nearest TNW in which the unnamed tributaries within the review area flow. The Verdigris River becomes a Section 10 water downstream of the confluence with Caney River approximately 12.5 miles. It was historically and currently is utilized for interstate commerce.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The unnamed tributaries flow from south to north joining East Creek. East Creek flows into Caney River which flows into the Verdigris River approximately 12.5 miles upriver of Section 10 jurisdictional waters.
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

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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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
- 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. **PUB-1 (0.701 ac)** is a stock pond that was excavated and diked entirely in the uplands. PUB-1 contains a small herbaceous overflow that contributes flow to R6SB-1 during and directly after heavy rain events. There is no evidence of relatively permanent flow

⁸ 51 FR 41217, November 13, 1986.

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- 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
- di. 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
- dii. 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-RPW); non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). Features **R6SB-1, (839 If), R6SB-2 (362 If)**, identified in Section 1a above, are ephemeral streams that do not exhibit features of an RPW. They contain inconsistent bed and bank throughout their channel. OHWMs are difficult to identify due to herbaceous growth along and within channel. R6SB-1 originates at the southern end of the project boundary below the outflow of PUB-1 and continues north to project boundary consisting of a drainage area less than 0.20mi². Between where R6SB-1 originates and where it leaves the review area, three sections approximately totaling 233 linear feet of channel do not contain a defined bed and bank with an OHWM. These areas are fed by sheet flow from the surrounding uplands and do not contain any vegetative indicators of wetlands. R6SB-2 is an ephemeral (non-RPW) drainage feature that originates at the edge of PEM1-2. An OHWM is present between R6SB-1 confluence and PEM1-2. R6SB-2 between PEM1-2 and PEM1-3 (185 linear feet) does not show signs of an OHWM, nor any vegetative indicators of a wetland; therefore, is not included in the overall linear footage of said non-RPW or delineated wetland. R6SB-1 and

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R6SB-2 contained no standing or flowing water, and no evidence of recent flows were present by evidence of existing vegetation growth and thatch build up. Flows appear to be present only during precipitation events for short durations. **PEM1-1 (0.382 ac)** is an emergent fringe wetland surrounding PUB-1. The wetland and pond share a surface connection with no clear demarcation between the two. Delineated features **PEM1-2 (0.007 ac)** and **PEM1-3 (0.038 ac)** are linear depressions associated with R6SB-2. PEM1-2 is adjacent to R6SB-2 but does not include it in overall acreage of wetland as it was assessed above the OHWM. PEM1-3 is a depressional feature and does not contribute to the overall linear footage of R6SB-2 as there is no defined OHWM. PEM1-2 and PEM1-3 do not have a continuous surface connection to a jurisdictional RPW. **PEM1-4 (0.020 ac)** is an off-channel depressional feature with no surface connection to the R6SB-2.

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. Field Determination: 16 October 2023
Office Determination: 27 October 2023
 - b. USGS National Hydrography Data - 27 October 2023
 - c. USGS 12-digit HUC map - 110701060711
 - d. Google Earth/Digital Global Aerial Imagery – 1995-2023
 - e. National Wetlands Inventory Mapper – 27 October 2023
 - f. USDA NRCS Soil Survey – 21 October 2023
 - g. USGS Stream Stats – 27 October 2023
10. OTHER SUPPORTING INFORMATION. Inconsistent streambed and vegetative factors plus USGS Stream Stats statistical information support the determination of non-jurisdictional, non-RPW waters for all aquatic features within the project area.
11. The estimated total flow path length to the potentially nearest requisite RPW is 0.60 miles. The OHWM of the potential RPW would not be connected to the wetlands in question as there is a clear demarcation between jurisdictional “waters” and wetlands. The assessment for a requisite RPW was completed through a desktop review as all features outside of the review area are on private property that we have no legal access to. The provided field report, maps, and photographic evidence support the determination of non-RPW for R6SB-1 and R6SB-2.

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12. 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.
13. 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.



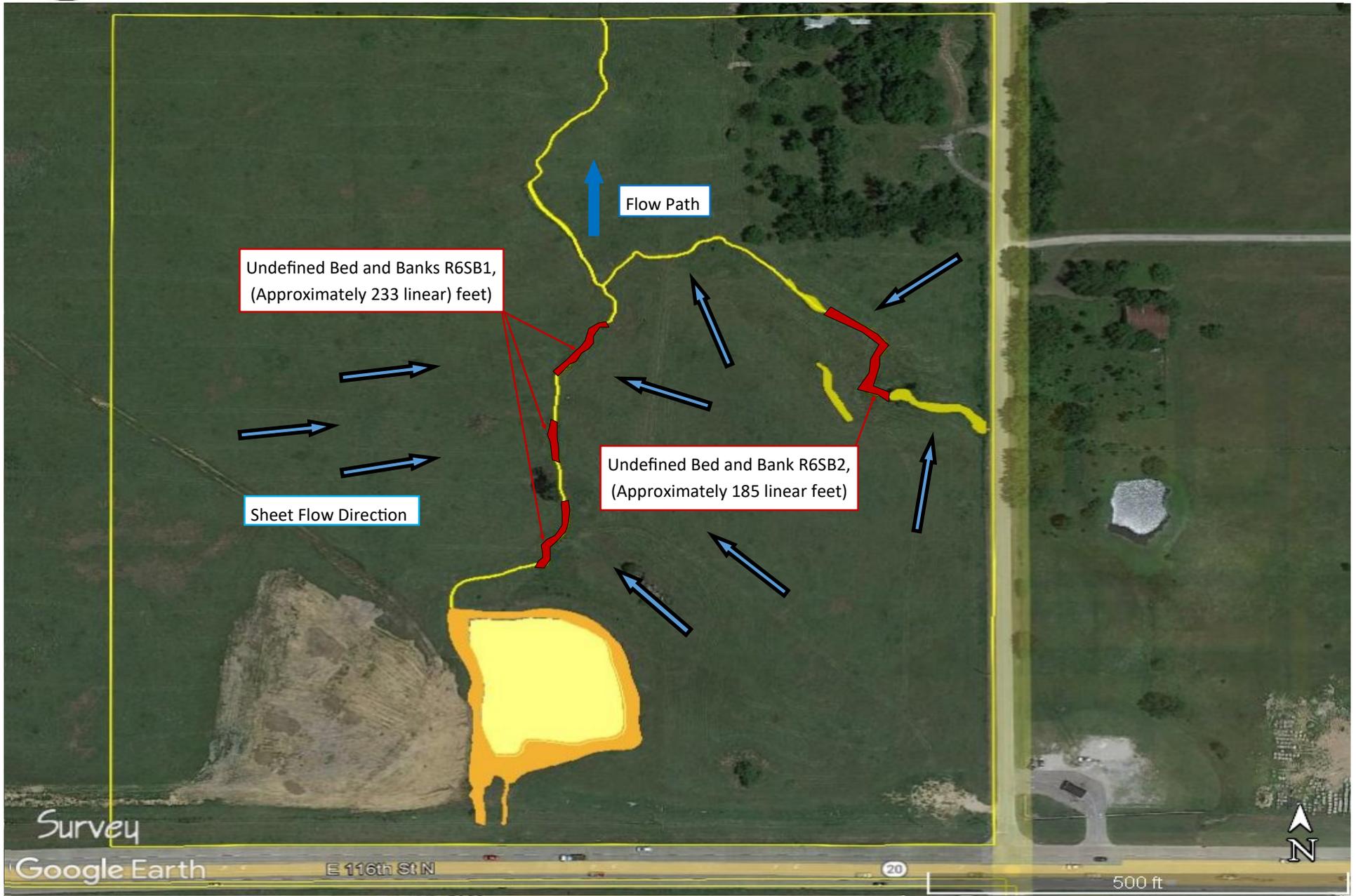
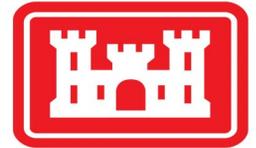
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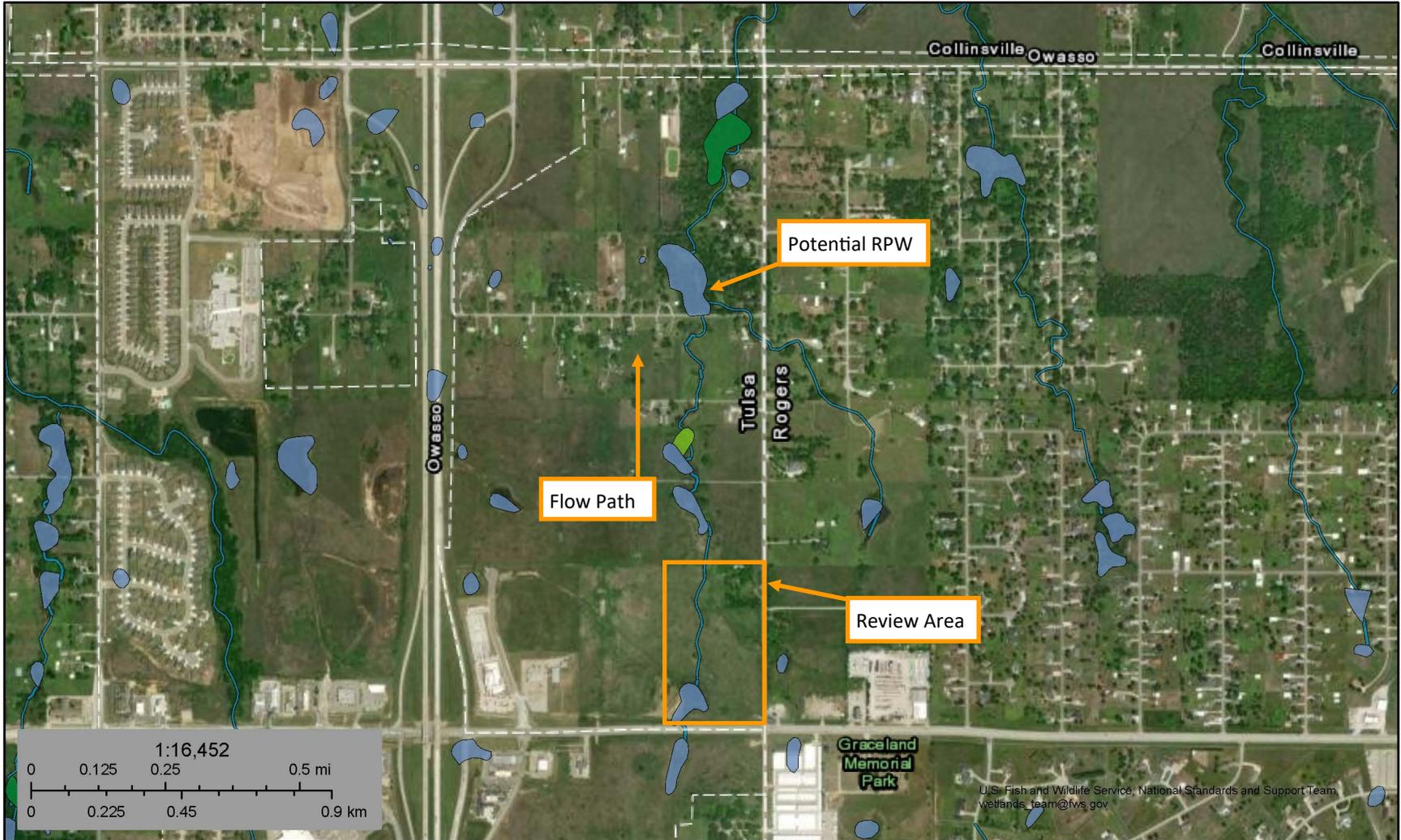
Project Center Coordinates: 36.32416 , --95.81404 Tulsa County, Oklahoma



SWT-2023-00460
Approved Jurisdictional Determination
Joshua W. Mathis



Project Center Coordinates: 36.32416 , --95.81404 Tulsa County, Oklahoma



January 2, 2024

Wetlands

- | | | | | | |
|---|--------------------------------|---|-----------------------------------|---|----------|
|  | Estuarine and Marine Deepwater |  | Freshwater Emergent Wetland |  | Lake |
|  | Estuarine and Marine Wetland |  | Freshwater Forested/Shrub Wetland |  | Other |
| | |  | Freshwater Pond |  | Riverine |

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.