



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

SWT

June 7, 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-2023-505

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. 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-2023-505]

- 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. Unnamed Tributary (WW-1, 75 linear feet), Relatively Permanent Water (RPW), is a jurisdictional water of the United States, Section 404.
 - ii. Ditch 1 (WW-2, 190 linear feet), Non-relatively Permanent Water (NRPW), is not a water of the United States.
 - iii. Ditch 2 (WW-3, 300 linear feet), NRPW, is not a water of the United States.
 - iv. Ditch 3 (WW-4, 220 linear feet), NRPW, is not a water of the United States.
 - v. Wetland (Wet-1, 0.1 acre), NRPW, is not a water of the United States.

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 for this request is split between two specific areas, review area 1 (Lat: 34.526, Long: -96.222) is associated with the unnamed tributary (WW-1) and is approximately 0.7 acre in size. Review area 2 (Lat: 34.5108, Long: -96.226) is associated with the remaining waters (WW-2, WW-3, WW-4, and Wetland 1), which is approximately 8.4 acres, in Coal County, Oklahoma. These two areas are depicted on the associated map(s).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Red River is an interstate water due to it serving as the border for multiple states as well as flowing through other states, in addition, the Red River

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SWT-2023-505]

is also a Section 10 Navigable Water within the reach that the review area is nearest.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The unnamed tributary (WW-1) flows into Brier Creek, which flows into Muddy Boggy Creek and then into the Red River (Interstate/Navigable).
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.

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.

- e. Tributaries (a)(5): The unnamed tributary (WW-1) is a RPW tributary of Brier Creek. This tributary is mapped on USGS Topographic maps as an intermittent feature within the applicable review area. The drainage basin for this tributary is approximately 610 acres. Based on site photos of the tributary, the stream is entirely grass lined and no visible water present. The tributary is a 2nd order stream. Based on the supporting information, this tributary meets the definition of an RPW.
- 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”).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.

Ditches 1, 2, and 3 (WW-2, WW-3, WW-4) are ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (NRPW). These features are not depicted in any resource maps and occur in an area previously disturbed from coal mining activities.

- 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

⁷ 51 FR 41217, November 13, 1986.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SWT-2023-505]

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).

Wetland 1 is a non-jurisdictional, non-adjacent wetland located along the eastern ditch of Railroad Street and extends to the northeast. The source of water for the wetland would be from the road ditch on the east side of the roadside ditch. The agent inspected the surrounding area and found no direct connection to any other water conveyance and is confined to the ditch of railroad road. The gradient of area is to the south, however, there is no culvert under the roadway for this wetland to serve as a connection to a down-grade water. This feature is a non-adjacent feature which clearly lacks a continuous surface connection to a water of the United States, thus is non-jurisdictional.

- 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. Agent delineation report revised date April 2024.
 - b. The Corps in-office review was conducted on May 24, 2024.
 - c. National Wetland Inventory (NWI) Data, March 13, 2024.
 - d. United States Geological Survey (USGS) 1:24,000 Topographical Map (Coalgate), March 13, 2024.
 - e. Google Earth aerial imagery, March 13, 2024.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SWT-2023-505]

f. NRCS Soils data documented in the Agents' report.

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-2023-505

AJD MAP



(Figure 1) (SWT-2023-505) Google Earth aerial imagery dated November 23, 2023.

SWT-2023-505

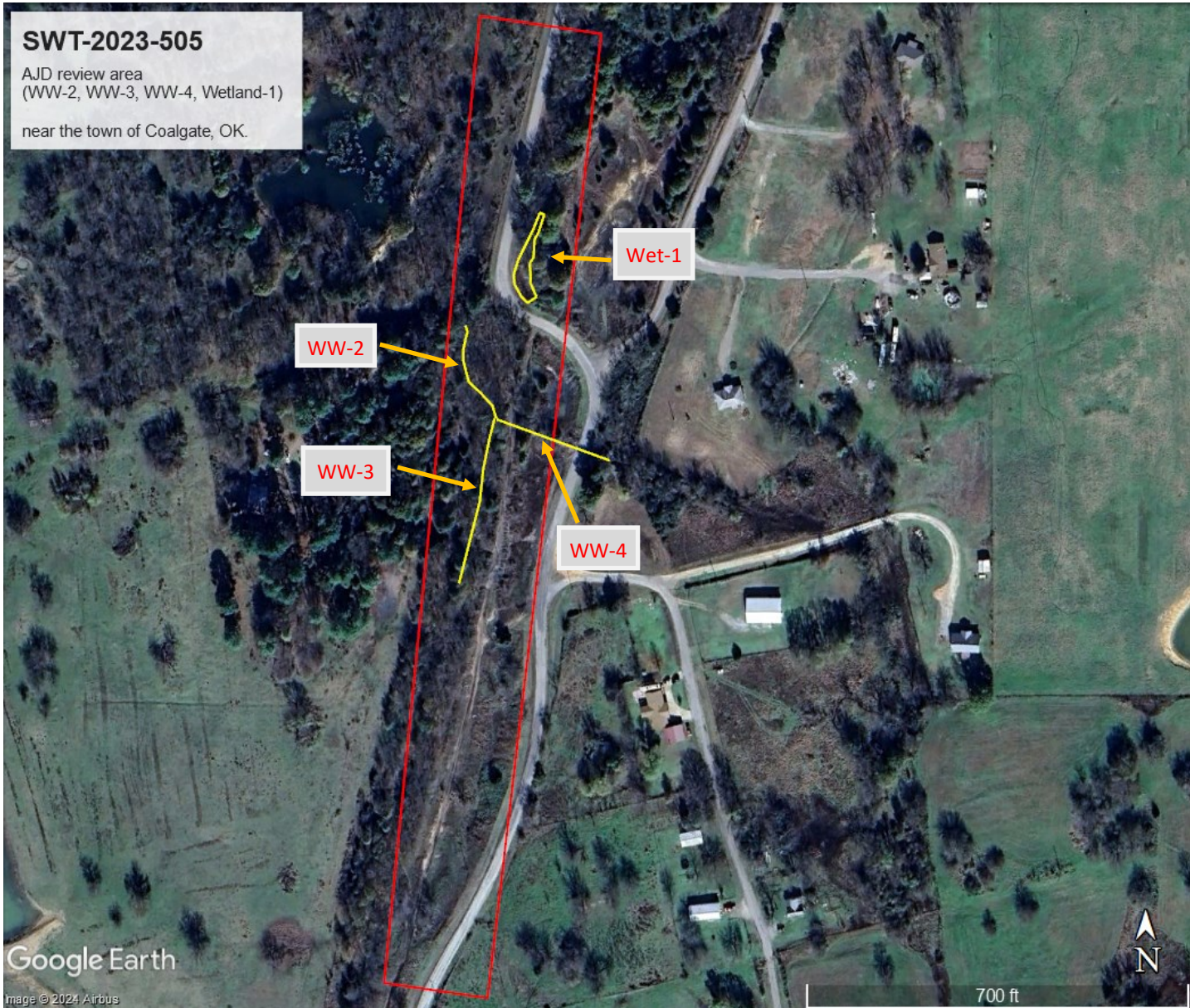
AJD MAP



(Figure 2) (SWT-2023-505) (Lat: 34.526, Long: -96.222) Review area 1, Google Earth aerial imagery dated November 23, 2023.

SWT-2023-505

AJD MAP



(Figure 3) (SWT-2023-505) (Lat: 34.5108, Long: -96.226) Review area 2, Google Earth aerial imagery dated November 23, 2023.