



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

SWT

May 14, 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-2023-528] [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 this state 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. Unnamed Tributary 1 (AR1, 912 linear feet), Jurisdictional, Section 404.
 - ii. Pond 1 (AR2, 4.7 acre), Jurisdictional, Section 404.
 - iii. Emergent Wetland 1 (AR3, 8.2 acre), Jurisdictional, Section 404.
 - iv. Pond 2 (AR4, 0.12 acre), Jurisdictional, Section 404.
 - v. Emergent Wetland 2 (AR5, 0.15 acre), Jurisdictional, Section 404.
 - vi. Unnamed Tributary 2 (AR6, 61 linear feet), Jurisdictional, Section 404.
 - vii. Pond 3 (AR7, 0.05 acre), Non-jurisdictional.
 - viii. Pond 4 (AR8, 0.3 acre), Non-jurisdictional.

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 is approximately 33 acres. The location is 35.57256, -97.423113, in Oklahoma County, Oklahoma. The study area is within the Northern Cross Timbers of the Cross Timbers ecoregion of central Oklahoma. The general vicinity of the review area includes agricultural land and residential

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development with associated infrastructure. The main unnamed tributary within the review area flows from the southeast to the northwest through multiple on-channel impoundments.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED: Eufaula Lake is the nearest Traditional Navigable Water, an officially designated Navigable Water (Section 10 RHA).
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The unnamed tributary (AR1) flows into the Deep Fork River flows, which flows into Arcadia Lake (impoundment of Deep Fork River), the Deep Fork River flows into Eufaula Lake (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 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.

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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- a. TNWs (a)(1): N/A.
- b. Interstate Waters (a)(2): N/A.
- c. Other Waters (a)(3): N/A.
- d. Impoundments (a)(4):

Pond 1 (AR2) is an impoundment of the unnamed tributary (AR1), which are both mapped feature on the USGS Topographic map and NWI maps. The pond has a constructed earthen dam with a piped spillway to convey water downstream. The agents report states that water levels were approximately 6 feet below the spillway during their visit, however, water levels can vary during different periods of the year and hydroperiod.

Pond 2 (AR4) is also an impoundment of the unnamed tributary (AR1), which is a mapped feature on the USGS Topographic map and NWI maps. This feature has a constructed earthen dam and appears to have a breached area where water routinely discharges downstream.

- e. Tributaries (a)(5):

The unnamed tributary 1 (AR1) to the Deep Fork River, is a mapped feature on the USGS Topographic map and NWI maps. The agents report states that this tributary is ephemeral in nature and a non-relatively permanent water (NRPW). However, this tributary is a 3rd order stream based on the confluence of two mapped 2nd order streams within its supporting drainage area. This tributary includes several on-channel ponds (AR2 and AR4), as well as others outside of the review area based on review of aerial imagery and topographic maps. The drainage area is approximately 1200-1300 acres in size, which is sufficient to support a flow regime consistent with a relatively permanent water (RPW). The tributary appears to be altered within the review area due to the straightened nature of the stream within the review area and surrounded by Bermuda grass as stated in the agents' report. The tributary is a relatively permanent water based on the factors considered. The assessment of this feature as relatively permanent was based on information from the agents' report, aerial imagery, and USGS topographic maps.

Unnamed tributary 2 (AR6) to the Deep Fork River, is not a mapped feature within the USGS Topographic map or NWI map. This feature is surrounded by wetland 2 (AR5) and is expected to have sustained seasonal flows supported by two upland excavated ponds (AR7) and (AR8). This limited feature is at the

same elevation as both wetland 2 (AR5) the upper reach of pond 2 (AR4). This feature is an RPW. AR6 also supports the relative permanence of AR1.

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

g. Adjacent wetlands (a)(7):

Emergent wetland 1 (AR3) formed within the historical footprint of the impoundment (AR2) of the unnamed tributary (AR1), thus having a continuous surface connection to an RPW. This wetland feature is characterized as a by-product of the ponds seasonal fluctuation in surface elevation, which has resulted in the formation of portions of the substrate being inundated/saturated and having a monoculture of fogfruit (*Phyla lanceolata*).

Emergent wetland 2 (AR5) formed within the historical footprint of the impoundment (AR4) of the unnamed tributary (AR1), thus having a continuous surface connection to an RPW. This wetland feature sits in the landscape below AR2 and AR4 where the original tributary would have flowed. The wetland is comprised of a monoculture of common spike rush (*Eleocharis palustris*).

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.

Pond 3 (AR7) and Pond 4 (AR8) are both excavated features that hold water and discharge seasonally into the unnamed tributary (AR6). These features were excavated in the uplands based on their landscape setting, and that there is no earthen dam impounding water, but the features are set into the existing contours by excavation, likely due to obtaining fill material from this area. Both features are nearly perfect square shapes, further illustrating their unnatural character.

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.

⁸ 51 FR 41217, November 13, 1986.

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- 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): N/A.
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 report dated November 7, 2023, agent site visit dated November 1, 2023.
 - b. National Wetland Inventory (NWI) Data, Accessed February 2, 2024.
 - c. United States Geological Survey (USGS) 1:24,000 Topographical Map (Spencer), Accessed February 2, 2024.
 - d. Google Earth aerial imagery (2005-present), Accessed February 2, 2024.
 - e. USGS Hydrologic Atlas, NHD Data and USGS 8, 12 Digit HUC Maps, Accessed February 2, 2024.

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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.

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AJD MAP

