



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

SWT

May 9, 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),<sup>1</sup> SWT-2024-0082

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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- 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 (UT-3) (486 linear feet) non-relatively permanent water, non-jurisdictional.
  - ii. Unnamed tributary 2 (UT-2) (167 linear feet) non-relatively permanent water, non-jurisdictional.
  - iii. Unnamed tributary 3 (UT-3) (635 linear feet) relatively permanent water, jurisdictional, Section 404.
  - iv. Upland Swale (840 linear feet) non-jurisdictional.
  - v. Erosional feature (77 linear feet), Non-relatively permanent water, non-jurisdictional.
  - vi. Upland Pond (0.5 acre) non-jurisdictional.
  - vii. Water filled depression 1 (WFD-1) (0.018 acre) non-jurisdictional.
  - viii. Water filled depression 2 (WFD-2) (0.005 acre) non-jurisdictional.
  - ix. Water filled depression 3 (WFD-3) (0.016 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 53 acres, and is located at 35.67849, -97.03707, Lincoln County, Oklahoma. See the review area and depicted aquatic features on the associated map. The review area was historically used for

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agricultural purposes and is being proposed for use as a future residential development. The review area drains from the Southwest to the Northeast generally.

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 Spring Creek, which flows into Arcadia Lake (impoundment of Deep Fork River), the Deep Fork River flows into Eufaula Lake (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup>: 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.

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<sup>5</sup> 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.

<sup>6</sup> 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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b. Interstate Waters (a)(2): N/A.

c. Other Waters (a)(3): N/A.

d. Impoundments (a)(4): N/A.

e. Tributaries (a)(5):

The unnamed tributary (UT-3) is a mapped feature on the USGS Topographic Map and exhibits a bed and bank 7 feet wide and 2 feet deep. The channel is composed of sand, silt and clay substrate and is surrounded by mature post oak and sugarberry trees. The drainage contained saturated substrate and pooled water; however, no flow was observed by the agent during the site visit. The drainage area for this tributary is approximately 40 acres. The tributary is expected to have sufficient seasonal flow to result in this feature being a relatively permanent water.

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”).<sup>7</sup> 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.

The pond was constructed/excavated wholly in the uplands. The feature is at the very top of the drainage. Review of aerial imagery confirms that the feature occurs within an upland setting.

The three water filled depressions were documented during the delineation, these features are all features occurring in the uplands and likely due to past agricultural practices on-site. These features did not exhibit wetland characteristics and are likely dry most of the year.

b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic

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<sup>7</sup> 51 FR 41217, November 13, 1986.

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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.:

The upland swale was constructed down grade from an upland constructed pond as part of past agricultural activities, and the overflow from the pond was piped into the swale. The swale contained saturated soils and some inundation. This feature is non-relatively permanent water.

The erosional feature is a short ditch like feature which drains into the upland pond, this feature only exhibits flow in direct response to rain events. This feature is a non-relatively permanent water.

- 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).

The unnamed tributary (UT-1) is formed below Pond 1 and receives water only when sufficient rain fall has filled the upland pond and contributes flow downstream via the upland swale, which then flows into UT-1. Based on the limited drainage area (10 acres), this feature would flow only in response to direct rain fall events and would not result in persistent seasonal flow. This feature

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does not have sufficient flow duration, frequency, or volume to exhibit more than ephemeral flow. This feature is a non-relatively permanent water, and thus is non-jurisdictional. This feature is not depicted on resource maps as an aquatic resource. The review area has exhibited some grading work which has resulted in this feature receiving flow from the upland swale.

Unnamed tributary 2 (UT-2) is a shortened reach of the originally mapped feature depicted on the USGS topographic map. This feature has been reduced in reach from historical conditions, which is likely due to past agricultural activities. This feature lacks a sufficient drainage area to exhibit more than ephemeral flow. This feature is a non-relatively permanent water, 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. Request for jurisdictional review, dated January 16, 2024.
  - b. The Corps in-office review was conducted on May 7, 2024.
  - c. National Wetland Inventory (NWI) Data, May 7, 2024.
  - d. United States Geological Survey (USGS) 1:24,000 Topographical Map (Wellston), May 7, 2024.
  - e. Google Earth aerial imagery, 2003-Current.
  - f.

10. OTHER SUPPORTING INFORMATION.

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-2024-082

## AJD MAP

