



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

CESWT-RO

11-Feb-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-2024-00527

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 Oklahoma 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.

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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. Kickapoo Creek (S-3), 1,847 linear feet, Jurisdictional, Section 404 CWA
 - ii. Ephemeral Feature (S-1), 708 linear feet, Non-Jurisdictional
 - iii. Ephemeral Feature (S-2), 826 linear feet, Non-Jurisdictional
 - iv. Remnant Artificial Pond (W-1), 0.034 acre, Non-Jurisdictional
 - v. Erosional Feature (NJD-1), 213 linear feet, Non-Jurisdictional
 - vi. Erosional Feature (NJD-2), 118 linear feet, Non-Jurisdictional
 - vii. Erosional Feature (NJD-3), 366 linear feet, Non-Jurisdictional
 - viii. Erosional Feature (NJD-4), 918 linear feet, Non-Jurisdictional
 - ix. Erosional Feature (NJD-5), 537 linear feet, 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 147 acres at Latitude 35.582234, Longitude -97.003759, at the center of the review area in Lincoln County, Oklahoma.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Canadian River, Interstate Water of Texas and Oklahoma
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Kickapoo Creek flows to the Deep Fork River, then to the Canadian River (Eufaula Lake).

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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
 - e. Tributaries (a)(5): Kickapoo Creek is an RPW and within the review area it is indicated on the USGS Topographic Map and USGS NHD as an intermittent, dashed-blue line stream. It flows outside the review area for over 7 miles to where it flows into the Deep Fork River. The majority of Kickapoo Creek outside the review area is indicated as a perennial, solid-blue line stream on the USGS NHD.

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.

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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.

N/A

- 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.

The following erosional features are not indicated on the USGS Topographic Map or the USGS NHD as a stream. All originate and end within the review area. Additionally, the requestor’s delineation and the Corps site visit determined these features were determined to be non-jurisdictional.

Erosional Feature (NJD-1), 213 linear feet
Erosional Feature (NJD-2), 118 linear feet
Erosional Feature (NJD-3), 366 linear feet
Erosional Feature (NJD-4), 918 linear feet
Erosional Feature (NJD-5), 537 linear feet

A remnant artificial pond (W-1), 0.034 acre, is indicated on the USFWS National Wetland Inventory as a 1.26 acre, PUBHh (Palustrine, Unconsolidated Bottom, Permanently Flooded, Diked/Impounded) feature. It appears to have been excavated in dry land in the 1970 – 1980’s and sometime later appears to have breached. The remnant pond does not have a discreet surface connection to an ephemeral feature up or downgradient.

⁷ 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).

The ephemeral feature denoted as S-1 is a non-RPW based on the small drainage area and width, and this feature is not indicated on the USGS Topographic Map or USGS NHD as a stream. This feature originates in the review area and ends just east of Highway 177 where it joins with Kickapoo Creek. The ephemeral feature denoted as S-2 occurs entirely within the review area and was observed to start with a seep/spring, and for approximately 245 linear feet contained pooled water, however, it was discontinuous with the remanent artificial pond and Kickapoo Creek. The segment of S-2 below the remanent artificial pond is indicated on the USGS Topographic Map and USGS NHD as a 295-foot intermittent stream, however, the small drainage area and feature length makes this feature a non-RPW.

- 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.

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- a. The requestor's Aquatic Resources Delineation dated October 2024
- b. USGS Topographic Map, provided with the requestor's delineation
- c. USGS NHD, provided with the requestor's delineation
- d. USFWS NWI, provided with the requestor's delineation
- e. HistoricAerials.com, accessed February 7, 2025
- f. Antecedent Precipitation Tool, dated February 8, 2025.
- g. Corps Photolog, February 10, 2025

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.



US Army Corps
of Engineers®
Tulsa District

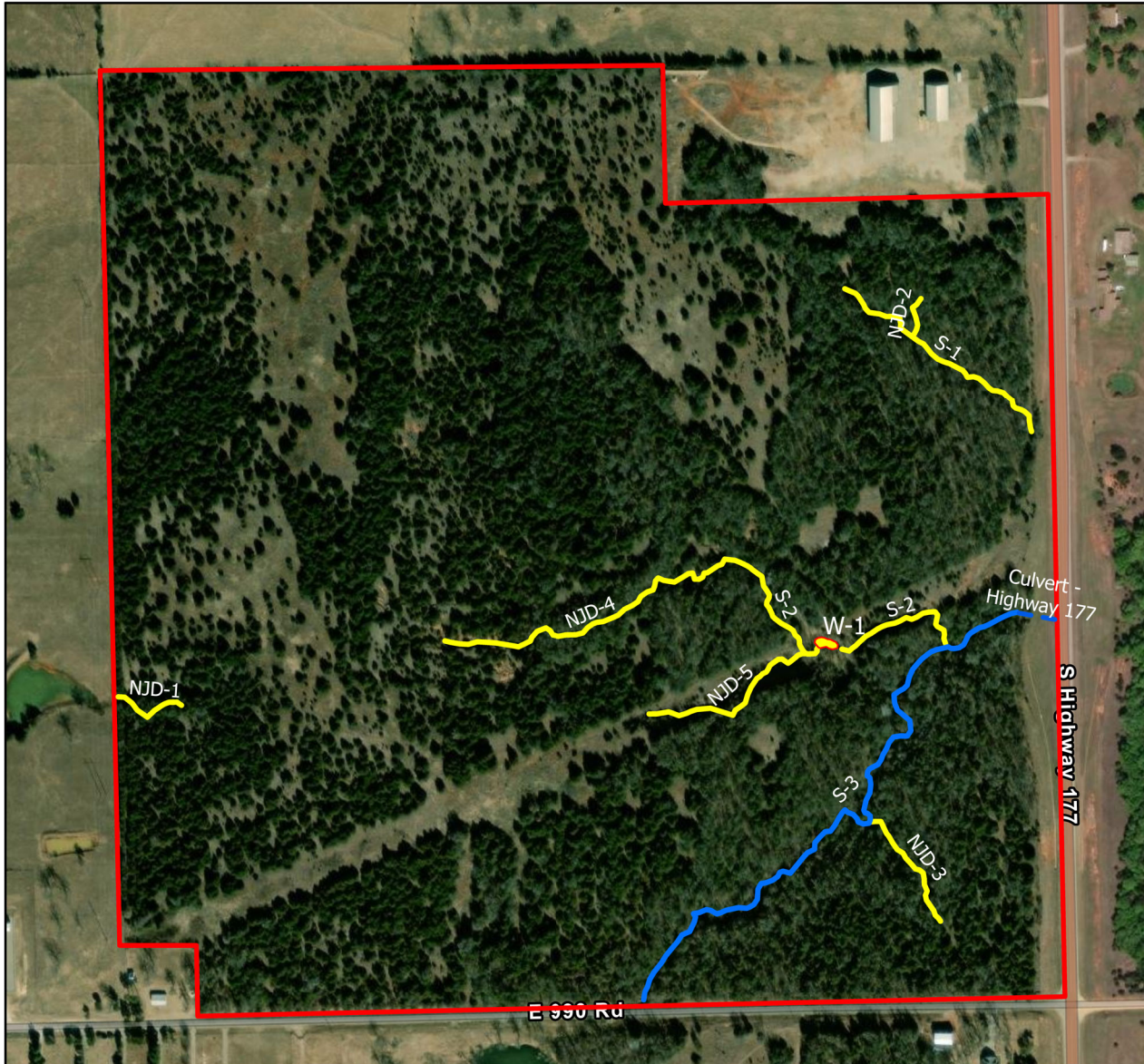
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Legend

- Review Area
- Non-Jurisdictional - Ephemeral or Erosional Feature
- Jurisdictional - Relative Permanent Water (Kickapoo Creek)
- Jurisdictional - Kickapoo Creek - Highway 177 Culvert
- Non-Jurisdictional - Remnant Artificial Pond



0 0.05 0.1 0.2 Miles



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