



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

CESWT-RO

28 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 SWT2024-00058, MFR 1 of 1.

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. R6SB-1, approximately 530 linear feet, Non-jurisdictional, No authority under Section 10/404
 - ii. R6SB-2, approximately 635 linear feet, Non-jurisdictional, No authority under Section 10/404
 - iii. PUB-1, approximately 1.20 acre, Non-jurisdictional, No authority under Section 10/404
 - iv. PUB-2, approximately 0.234 acre, Non-jurisdictional, No authority under Section 10/404
 - v. PEM1-1a, approximately 0.27 acre, Non-jurisdictional, No authority under Section 10/404
 - vi. PEM1-1b, approximately 0.009 acre, Non-jurisdictional, No authority under Section 10/404
 - vii. PEM1-1c, approximately 0.191 acre, Non-jurisdictional, No authority under Section 10/404
 - viii. PEM1-1d, approximately 0.354 acre, Non-jurisdictional, No authority under Section 10/404
 - ix. PEM1-2, approximately 0.179 acre, Non-jurisdictional, No authority under Section 10/404
 - x. PFO1-1, approximately 0.50 acre, 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).

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- 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. U.S. EPA and OASACW Jointly Signed Memorandum for Draft Approved JD NWK-2024-00392.
3. REVIEW AREA. The 125-acre review area is located in Section 36, Township 20 North, Range 16 East, north and east of the intersection of State Highway 412 and South 4180 Road near Inola, Rogers County, Oklahoma. Center Coordinates are Latitude: 36.17289°, Longitude: -95.55617°.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Verdigris River
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Non- RPW R6SB-2, a first order stream, and PEM1-2, flow south offsite for approximately 0.33 miles before reaching the confluence with R6SB-1. Non-RPW R6SB-1, also a first order stream, PUB-1, PEM1-1(a-d) flow south for approximately 0.23 mile before reaching the confluence with R6SB-2. At the confluence of the two tributaries, the unnamed tributary becomes a second order tributary (potential RPW) and continues in a southerly flow for approximately 1.4 miles before reaching the confluence with RPW Commodore Creek. Commodore Creek continues for approximately 2.25 miles before reaching the confluence with the Verdigris River.
 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

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

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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").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.

PUB-2 is an approximately 0.234-acre stock pond excavated in the uplands and has no stream connectivity to downstream waters. NWI/NHD maps, historic

329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

⁷ 51 FR 41217, November 13, 1986.

photos/topographical maps, and LiDAR indicate the stock pond was constructed wholly in the uplands. PUB-2 was constructed prior to 1958, likely to provide water to livestock.

- 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
- 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).

PUB-1 is an approximately 1.2-acre upland stock pond. NWI and NHD maps indicate the stock pond was constructed in the headwaters of R6SB-1, a non-RPW. PUB-1 does not contain a discernible overflow structure, only evidence of erosion from ephemeral flow along the southwestern embankment.

R6SB-1 is an approximate total of 530 linear foot of discontinuous first order non-RPW within a 1600-foot linear section of review area. R6SB-1 contains

discontinuous channel morphology with evidence of ephemeral flow and dominated by silt substrate or grass-lined swale. Within the review area, R6SB-1 loses morphology through 4 separate depressional wetlands and one 130-foot section that contains no channel morphology or wetland characteristics between PEM1-1c and PEM1-1d. There is no supporting evidence that R6SB-1 went below surface and is following a subterranean channel as the soil profile for this area is an Eram-Verdigris complex dominated by a silty loam with a silty alluvium or sandstone and shale parent material. There are no underground artificial tunnels designed for development within the review area. R6SB-1 flows offsite through a grass-lined swale, no bed and bank present, into a roadside drainage of Highway 412 then under the highway through a concrete box culvert. R6SB-1 flows for another 1200 feet through a man-made ditch before reaching the confluence with R6SB-2 and becoming a second order tributary with potential RPW characteristics.

PEM1-1a is an approximately 0.27-acre depressional emergent wetland adjacent to the southern embankment of PUB-1. No bed and bank are present within this depressional feature. The lowest gradient of boundary of PEM1-1a drains into the initial channel morphology of non-RPW R6SB-1 within the review area. PEM1-1a loses all surface connection to R6SB-1 south and down gradient to PEM1-1c.

PEM1-1b is an approximately 0.009-acre depressional wetland on-channel of non-RPW R6SB-1. No bed and bank are present within this depressional feature. PEM1-1b drains back into R6SB-1 where it exhibits channel morphology again. PEM1-1b loses all surface connection to R6SB-1 south and down gradient to PEM1-1c.

PEM1-1c is an approximately 0.191-acre depressional wetland on-channel of non-RPW R6SB-1. No bed and bank present within this depressional feature. No channel morphology is present down-gradient of PEM1-1c for approximately 130 linear feet. PEM1-1a, PEM1-1b, and PEM1-1c lacks a continuous surface connection to an RPW due to the 130 feet of discontinuity in the channel of R6SB-1 between PEM1-1c and PEM1-1d.

PEM1-1d is an approximately 0.354-acre depressional wetland on-channel of non-RPW R6SB-1. No bed and bank present within this depressional feature. PEM1-1d drains into a grass-lined swale still identified as R6SB-1. The pathway from PEM1-1d to the nearest RPW

R6SB-2 is an approximately 635 linear foot first order non-RPW tributary that conveys runoff from a drainage ditch offsite of the review area by way of a small

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metal drainpipe under an entry drive to the property and the adjacent uplands during and immediately after rain events for a short duration. R6SB-2 contains a mixture of silt deposited bed and bank and a grass-lined swale. Near the southern boundary of the review area, R6SB-2 flows into PEM1-2, an emergent wetland. Downstream of PEM1-2, R6SB-2 flows through a cattle trail into a roadside grass-lined swale of Highway 412 and then through a concrete box culvert under the highway where it picks up a bed and bank. R6SB-2 flows for another approximately 610 feet before it reaches the confluence with R6SB-1 and becomes a second order tributary with potential RPW characteristics.

PEM1-2 is an approximately 0.179-acre depressional emergent wetland on-channel of R6SB-2 a non-RPW. PEM1-2 drains to the southeast along the southern boundary fence offsite by way of a cattle trail to a roadside ditch.

PFO1-1 is an approximately 0.50-acre depressional forested wetland. PFO1-1 appears to drain offsite to the east approximately 400 feet into Commodore Creek by way of a grass-lined swale. No flow indicators were present within the swale.

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. Google Earth/Digital Globe Aerial Imagery (1995-2024)
 - b. USGS Topographic Map Layer (Accessed February 14, 2024)
 - c. National Wetland Inventory Maps (Accessed February 27, 2024)
 - d. USDA, NRCS Soil Survey, <https://websoilsurvey.nrcs.usda.gov/app/> (Accessed February 27, 2024)
 - e. Lentic and Lotic Waterbody and Wetland Delineation Study, Proposed Residential Development, Blackbird Environmental LLC (January 17, 2024)
 - f. Site Visit (February 01, 2024)
 - g. Historicaerials.com (Accessed February 14, 2024)
10. OTHER SUPPORTING INFORMATION. Per USACE HQ, "The agencies have not stated that a non-RPW can provide a continuous surface connection".

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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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-Red box is review area
-Yellow is non-jurisdictional features.

