



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MEMPHIS DISTRICT
167 N MAIN STREET
MEMPHIS, TN 38103

CEMVM-R

24 February 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 MVM-2022-296 MFR 2 of 2.²

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.

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2022-296

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Tennessee 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. Wetland 1 (W-1), (34.951392, -88.928190), non-jurisdictional
 - ii. Wetland 2 (W-2), (34.951558, -88.928420), non-jurisdictional
 - iii. Wetland 3 (W-3), (34.953622, -88.924389), non-jurisdictional
 - iv. Wetland 4 (W-4), (34.953705, -88.924080), non-jurisdictional
 - v. Wetland 6/7 (W-6/W-7), (34.952880, -88.920928), 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. 651, 143 S. Ct. 1322 (2023)

- 3. REVIEW AREA. The review area is an approximately 91.43-acre property located along the north side of Highway 72 in Walnut, Tippah County, Mississippi. Latitude 34.953713, Longitude -88.922604. Attached is a map with the boundary of the review area. In addition to the features listed above, there are three separate features listed on the maps (which are labeled W-5, P-1 and S-1) that are not included in this MFR. These three features do not impact any surface connections to the above mentioned wetlands that are being coordinated in this MFR.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Muddy Creek (which crosses the Mississippi-Tennessee State Line) is an interstate water, and the Hatchie River which is listed as a Section 10 TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: Wetland Features (W-1) and (W-2) drain to the south through swales for 75 feet and into a concrete lined ditch along the north side of Highway 72 for 70 feet before entering a culvert that runs to the south underneath Highway 72 for 275 feet and discharges to a non-relatively permanent tributary that then flows for approximately 245 feet before flowing into a relatively permanent (indicated on the National Hydrography Dataset as perennial) unnamed tributary of Big Creek, then to Muddy Creek (which crosses the Mississippi – Tennessee State line), then into the Hatchie River with total distance approximately 14 miles from the project site to the TNW, (Hatchie River). Wetland Feature (W-6/W-7), drains to a roadside drainage ditch which flows from the project site to a wetland area on the south side of Highway 72; there is a defined channel that exits the southeastern corner of the wetland south of Hwy. 72 and flows into Big Creek, then to Muddy Creek, then into the Hatchie River with total distance approximately 14 miles from the project site to the Hatchie River. There are also two isolated wetland features (W-3, W-4), that do not contain a flow path as they are isolated and do not contain a continuous surface connection to any other waters.
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,

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.

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”).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. 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. 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

⁸ 51 FR 41217, November 13, 1986.

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).

Wetlands W-1 and W-2 are emergent wetlands located in the southwestern portion of the property. W-1 is approximately 0.06 acre and W-2 is approximately 0.64 acre. (Aerial photography indicates these areas as forested but they have subsequently been logged.) They are located on either side of an elevated roadway/access feature, and W-1 appears as a distinct drainage feature in hillshade imagery; this indicates that these are separate features and not part of a single wetland. As shown on the consultant’s feature map and noted on the attached hillshade map, feature W-1 is confined to a distinct drainage pattern approximately 30 – 70 feet east of but not adjoining the elevated roadway that separates W-1 and W-2. Both features drain to the south through swales for 75 feet and into a concrete lined ditch along the north side of Highway 72 for 70 feet before entering a culvert that runs to the south underneath Highway 72 for 275 feet and discharges to a non-relatively permanent tributary that then flows for approximately 245 feet before flowing into a relatively permanent (indicated on the National Hydrography Dataset as perennial) unnamed tributary of Big Creek. Although the wetlands have a direct surface connection through the swales, concrete-lined ditch, and culverts (approximately 420 feet) to the non-RPW tributary (which is approximately 245 feet in length), they do not have a continuous surface connection to the downstream relatively permanent (perennial) tributary of Big Creek. Current guidance describes discrete features

such as ditches, swales, pipes, or culverts as establishing the continuous surface connection to relatively permanent waters; in this case, the connection flows through swales, ditches, and culverts to a non-RPW which then flows into the nearest RPW. Therefore, the continuous surface connection is between wetlands W-1 and W-2 and the non-RPW and not the downstream RPW.

Wetlands (W-3 and W-4) are located in the north central portion of the property. W-3 is approximately 0.1 acres and W-4 is approximately 0.04 acres. They were formed from the erosional feature (S-1) draining into the low-lying area. These two wetlands are hydrologically isolated as they are surrounded by uplands and there are no continuous surface connections to other waters.

Wetland (W-6/W-7) is a forested wetland located on the eastern portion of the property. W-6/W-7 is approximately 7.32 acres. W-6 is contiguous with W-7; it appears these features were separated into different resources based on their dominant vegetation type (wooded vs. emergent) and not based on any hydrological separation. Wetland-6/W-7 is hydrologically contiguous with wetlands located off of the project site, to the south of Highway 72 via a culvert connection. Although the National Hydrography Dataset indicates a channel through this area, hillshade and digital elevation imagery show that the channel is no longer present on the south side of Highway 72 until it exits the southeastern corner of the wetland (approximately 700 feet south of Highway 72) and joins with another ditch before entering Big Creek approximately 1,225 feet downstream of the beginning of this channel. After consideration of flow, the number, the types, and the length of connection, the 1,225-foot length of connection here between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland W-6/W-7 does not have a continuous surface connection to the downstream relatively permanent tributary, and consistent with *Sackett*, is not “adjacent”. A review of earlier permit files indicates that no wetland-related permits were required for the widening of U.S. Highway 72 at this location (which occurred in the mid-1990s), suggesting that the wetlands on the north and south sides of the highway were not historically a single wetland.

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. Site visit was conducted on January 31, 2024

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2022-296

- b. Maps and data sheets prepared/submitted and provided by the agent (Headwaters, Inc.)
 - c. USGS Maps 1:24,000 Walnut, MS.
 - d. National Wetlands inventory map Walnut, Tippah County, Mississippi
 - e. Photographs including Google Earth (various dates) and photographs provided by the agent (Headwaters, Inc.)
 - f. Wetland Determination Data Forms provided by the agent (Headwaters, Inc.)
 - g. National Regulatory Viewer Hillshade/DEM imagery
10. OTHER SUPPORTING INFORMATION. In addition to the features listed above, there are three separate features listed on the maps (which are labeled W-5, P-1 and S-1) that are not included in this MFR. These three features do not impact any surface connections to the above mentioned wetlands that are being coordinated in this MFR.
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.