



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

CEMVM-R

17 April 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),<sup>1</sup> MVM-2021-301 (MFR 2 of 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.<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 Tennessee 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. Wetland (W) 2, (34.980184, -89.558665), non-jurisdictional
  - ii. W3, (34.987095, -89.562044), non-jurisdictional
  - iii. W4, (34.977224, -89.536216), non-jurisdictional
  - iv. W5, 34.990238, -89.535081, non-jurisdictional
  - v. Pond (P) 2, (34.979713, -89.563032), non-jurisdictional
  - vi. P3, (34.990089, -89.534985), non-jurisdictional
  - vii. P4, (34.985263, -89.535719), non-jurisdictional
  - viii. P5, (34.982517, -89.535226), non-jurisdictional
  - ix. P6, (34.981749, -89.536243), non-jurisdictional
  - x. P8, (34.975761, -89.540183), non-jurisdictional
  - xi. Stream (S) 6, (34.988307, -89.554906), non-jurisdictional
  - xii. S7, (34.982085, -89.555274), non-jurisdictional
  - xiii. S8, (34.981779, -89.559379), non-jurisdictional
  - xiv. S9, (34.990588, -89.560208), non-jurisdictional
  - xv. S10, (34.989353, -89.562332), non-jurisdictional
  - xvi. S11, (34.983631, -89.564549), non-jurisdictional
  - xvii. S13, (34.989551, -89.536257), non-jurisdictional
  - xviii. S14, (34.989222, -89.535838), non-jurisdictional
  - xix. S15, (34.988957, -89.535864), non-jurisdictional

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- xx. S16, (34.989900, -89.536100), non-jurisdictional
- xxi. S17, (34.990113, -89.535728), non-jurisdictional
- xxii. S22, (34.978026, -89.529801), non-jurisdictional
- xxiii. S25, (34.974800, -89.843400), non-jurisdictional
- xxiv. S26, (34.975800, -89.546400), non-jurisdictional
- xxv. S28, (34.974483, -89.534525), 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)
  - e. "Memorandum to the Field Between The U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of 'Continuous Surface Connection' Under the Definition of 'Waters of the United States' Under the Clean Water Act" (March 12, 2025)
3. REVIEW AREA. The Review area is approximately 914.08 acres of property located north of U.S. Highway 72 and west of Coopwood Road in Byhalia, Marshall County, Mississippi.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest Interstate waters that are hydrologically connected to

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the project site are an unnamed tributary to the Wolf River and Grissom Creek. The nearest TNW is the Wolf River.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. W3, W4, P2, P3, P4, P5, P6, and P8 are hydrologically isolated and do not flow to a TNW, Interstate Water, or Territorial Sea. S7 terminates before connecting to downstream waters and is also hydrologically isolated. S6 flows into P1 (addressed under AJD 1 of 2), which drains into S4 (also addressed under AJD 1 of 2) then flows into S9 off site. W2 drains into S8 which then flows into S9. S10 also flows into S9. S9 is an Unnamed Tributary (Interstate Water) which ultimately flows into the Wolf River.

S11 flows into Lee Creek. Lee Creek>Coldwater River>Arkabutla Lake>Coldwater River>Tallahatchie River>Yazoo River>Mississippi River.

S13, S14, S5, S16 and S17 flow into S12. S12(Grissom Creek) is an Interstate Water which ultimately flows into the Wolf River.

S22, S25, S26, and S28 flow into S27 (PJD 1 of 2). S27 (Unnamed Tributary) is an Interstate Water, which flows into Grissom Creek.

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

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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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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”).<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.

P2 (2.51 acres), P3 (.03 acres), P4 (.1 acres), P5 (.3 acres), P6 (.74 acres), and P8 (.16 acres) are artificial livestock ponds created in uplands and are not impoundments of waters of the U.S.

- 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.

S7 (2030.53 LF) is an upland drainage swale that lacks indicators of an Ordinary High Water Mark and only carries stormwater (non-relatively permanent) flow.

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

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S6 (402.48LF) and S10 (1302.93 LF) are erosional features that lacked indicators of an Ordinary High Water Mark.

- 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*.
- 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).

Features S8 (4206.18 LF), S9 (516.82 LF), S11 (132.8 LF), S13 (117.83 LF), S14 (292.66 LF), S15 (115.56 LF), S16 (125.42 LF), S17 (165.13 LF), S22 (525.17 LF), S25 (207.52 LF), S26 (98.88 LF), and S28 (488.45 LF) are all first-order ephemeral channels that flow only in direct response to precipitation and are not Relatively Permanent Waters (RPW).

W3 (.02 acres) and W4 (.32 acres) are hydrologically isolated wetlands surrounded by uplands. There are no discrete hydrologic or continuous surface connections between W3, W4, and any downstream waters.

W2 (.35 acres) drains directly into S8 (non-RPW) before flowing downstream. W5 (.15 acres) drains directly in S17 (non-RPW). Neither W2 nor W5 directly abuts an RPW; therefore, these features lack continuous surface connections to RPWs and are not jurisdictional.

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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. Maps, plans, and photos submitted by or on behalf of the AJD requestor:  
Headwaters, Inc.
  - b. U.S. Geological Survey map: 1:24,000 Mount Pleasant.
  - c. Google Earth imagery various dates.
  - d. National Regulatory Viewer 3DEP Hillshade Imagery accessed on various dates.
  - e. National Hydrography Dataset (accessed through National Regulatory Viewer)

OTHER SUPPORTING INFORMATION. Features P7, S12, S20, S21, and S24 are addressed on an associated PJD (2 of 2), S27 is addressed on an associated PJD (1 of 2), and W1, P1, S1, S2, S3, S4, S5, S18, S19, and S23 are addressed on an associated AJD (1 of 2).

10. 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.