



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

CEMVM-R

31 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),<sup>1</sup> MVM-2023-079 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.<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 Tennessee due to litigation.

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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.

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2023-079

## 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. WA006, (34.97124°, -90.08268°), non-jurisdictional.
  - ii. WA007, (34.97201 °, -90.08122 °), 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. This project is located within Horn Lake, directly north of MS HWY 302 and east of the Willow Point Planned Unit Development. The property consists mainly of hardwood trees with a small percentage as open field. The majority of the drainage generated from the property flows west via detention basins into an unnamed stream that flows northerly. The approximate Lat and Long for the project area is 34.967620°, -90.079589°. Attached is a map with the boundary of the review area. No previous AJD's have been completed for the review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Horn Lake Creek is the nearest interstate water, which leads to the Mississippi River as the nearest TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The subject resources flow into an unknown tributary and then into Horn Lake Creek. Horn Lake Creek flows into an unknown tributary into the Mississippi River approximately 14.75 miles downstream of the subject property.

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2023-079

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
  - b. Interstate Waters (a)(2): N/A
  - c. Other Waters (a)(3): N/A
  - d. Impoundments (a)(4): 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.

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2023-079

- 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. 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 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

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

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).
- WA006- is approximately 0.06ac in size. This wetland formed within an old, breached farm pond that was constructed in uplands. The attached map shows the limits of the wetland within the project site. Under normal conditions this is a dried farm pond with no connection to other waters. There is a breach in the northeastern portion of the berm that surrounds the wetland that leads to a small erosional swale that spans approx. 428ft until it enters the wetland WA007 (which is described below and is also the result of partially draining an abandoned farm pond). WA007 then enters into a small erosional swale that spans approx. 330ft until it enters wetland WA008, which is outside of the review area. According to the consultant’s report, Wetland WA008 directly abuts to the RPW SA002 (also outside the review area); neither of these features is included in this determination but it appears that the connection between WA008 and SA002 is approximately 580ft from where the swale enters WA008. The approx. total length of the connection between WA006 and the RPW SA002 would be approximately 1,488 ft. After consideration of flow, the number, the types, and the length of connection, the 1,488-foot length of connection here between WA006 and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland WA006 does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not “adjacent.” The determination of jurisdiction was done by site visits done on 26 March and 16 April 2024 as well as a desktop review (including review of hillshade and digital elevation imagery).
  - WA007- is approximately 0.21ac in size. This wetland also formed within an old, breached farm pond that was constructed in uplands. There is a breach along the eastern berm that was constructed to create the pond. This breach, as also described above, connects

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2023-079

WA007 to a small erosional swale that spans approx. 330ft until it enters wetland WA008, which is outside of the review area. According to the consultant's report, Wetland WA008 directly abuts to the RPW SA002 (also outside the review area); neither of these features is included in this determination but it appears that the connection between WA008 and SA002 is approximately 580ft from where the swale enters WA008. The approx. total length of the connection between WA007 and the RPW SA002 would be approximately 910 ft. After consideration of flow, the number, the types, and the length of connection, the 910-foot length of connection here between WA007 and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, Wetland WA007 does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not "adjacent." The determination of jurisdiction was done by site visits on 26 March and 16 April 2024 as well as a desktop review (including review of hillshade and digital elevation imagery).

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 and data sheets prepared/submitted and provided by the agent (W.H. Porter Consultants, PLLC.)
  - b. U.S. Geological Survey Map DeSoto County, MS USGS 7.5' topographic quadrangle Horn Lake, MS, 34090-H1, 1 S SW Section 29,30, NAD 1983 UTM Zone 15N, 90.0793°W 34.9676°N
  - c. Photographs including Google Earth (Various Dates) and Photographs provided by the agent (W.H. Porter Consultants, PLLC.)
  - d. Antecedent Precipitation Tool
  - e. Shelby County Web Soil Survey.
  - f. U.S. Fish and Wildlife, Wetlands Inventory Mapper.
  - g. Google Earth Aerial Photography, January 1997 through February 2022.

CEMVM-R

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), MVM-2023-079

h. U.S.G.S. Earth Explorer Aerial Photography; February 29, 1956; March 21, 1981; February 20, 1992.

i. National Regulatory Viewer, 3DEP Hillshade and 3DEP Digital Elevation Model.

10. OTHER SUPPORTING INFORMATION. EPA Documents: MEMORANDUM ON NWK-2024-00392, and MEMORANDUM ON LRB-2023-00451

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.