



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

CEMVM-R

03 July 2024

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-2023-294 (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.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 Mississippi 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. Pond (P) 1, (34.963535, -89.766219), non-jurisdictional
- ii. P2, (34.964681, -89.769885), non-jurisdictional
- iii. P3, (34.966552, -89.767422), non-jurisdictional
- iv. P4, (34.967655, -89.769475), non-jurisdictional
- v. P5, (34.971133, -89.769836), non-jurisdictional
- vi. P6, (34.970359, -89.767974), non-jurisdictional
- vii. P7, (34.968353, -89.767714), non-jurisdictional
- viii. P8, (34.973176, -89.762909), non-jurisdictional
- ix. S1, (34.963010, -89.765947), non-jurisdictional
- x. S2, (34.967335, -89.765904), non-jurisdictional
- xi. S4, (34.967919, -89.765770), non-jurisdictional
- xii. S5, (34.965738, -89.765522), non-jurisdictional
- xiii. S6, (34.965953, -89.766939), non-jurisdictional
- xiv. S9, (34.971087, -89.772215), non-jurisdictional
- xv. S10, (34.971887, -89.764955), non-jurisdictional
- xvi. S11, (34.972338, -89.759836), non-jurisdictional

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

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- 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 a 234.11 acre site located at 34.968572, - 89.76765 in Olive Branch, Desoto County, Mississippi.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. An unnamed tributary to Nonconnah Creek is the nearest interstate water. This feature flows from MS into TN.
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

P1, P2, P3, P4, P5, P6, P7, P8, S1, and S6 are hydrologically isolated features. However, flows from the subject property generally follow the path for the linear features described below.

Features S5, S2, S4, and S10 flow into S3 (which is addressed on an associated PJD). Feature S7 (addressed on the PJD) and S9 flow into S8 (addressed on the PJD). S3 flows into S8 downstream of the subject property, becoming a 3rd order Unnamed Tributary. The Unnamed Tributary becomes a 4th order stream before crossing into Tennessee and flowing into Nonconnah Creek. The Unnamed Tributary is the nearest interstate water. S11 flows into an unnamed tributary before flowing into the Unnamed Tributary to Nonconnah Creek (interstate water).

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

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.

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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): 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.

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.

⁷ 51 FR 41217, November 13, 1986.

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P1 (0.11 acres), P2 (.18 acres), P3 (.13 acres), P4 (.18 acres), P5 (.19 acres), P6 (.2 acres), P7 (.37 acres), and P8 (.53 acres) are farm ponds that were previously constructed in dry lands and are hydrologically isolated from downstream waters. The attached map shows the limits of each pond within the project site.

- 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.

S1 (196.58 LF) and S6 (316.9 LF) are erosional swales that lack indicators of an ordinary high water mark and do not have a surface connection to downstream waters. S2 (338.87 LF), S4 (150.15 LF), S5 (157.86 LF), S9 (155.26 LF), S10 (254.56 LF), and S11 (278.33 LF) are erosional features that carry only stormwater in direct response to precipitation events. These features lack a continuous bed and bank or indicators of an ordinary high water mark and display evidence of scouring. S5, S10, and S11 are incised from erosion and lack 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*. 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

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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). N/A

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, plots or plat submitted by or on behalf of the PJD requestor: Headwaters, Inc.
 - b. Natural Resources Conservation Service Soil Survey: NRCS Web Soil Survey accessed 06/17/2024
 - c. Photographs: Google Earth images from various dates.
 - d. National wetlands inventory map: NWI Wetlands Mapper accessed 06/17/2024
 - e. National Regulatory Viewer 3DEP Hillshade Imagery accessed 06/17/2024
 - f. USGS Quadrangles: 1:24,000 Olive Branch
10. OTHER SUPPORTING INFORMATION. Streams S3 and S8 are addressed in PJD MVM-2023-294
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.