



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

CEMVM-R

19 December 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),<sup>1</sup> MVM-2023-229 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.

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.

- 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. D01, (35.07415, -90.401941), non-jurisdictional
- II. D02, (35.084506, -90.404866), non-jurisdictional
- III. D03, (35.078642, -90.401955), non-jurisdictional
- IV. D04, (35.087024, -90.406856), non-jurisdictional
- V. D06, (35.076493, -90.410318), non-jurisdictional
- VI. D07, (35.081758, -90.408134), non-jurisdictional
- VII. D08, (35.075527, -90.408436), non-jurisdictional
- VIII. D09, (35.075439, -90.40622), non-jurisdictional
- IX. D10, (35.060941, -90.404196), non-jurisdictional
- X. D11, (35.068119, -90.418162), non-jurisdictional
- XI. D12, (35.072234, -90.437437), non-jurisdictional
- XII. D13, (35.072201, -90.437223), non-jurisdictional
- XIII. D14, (35.071181, -90.437787), non-jurisdictional
- XIV. D16, (35.051937, -90.437682), non-jurisdictional
- XV. D18, (35.047754, -90.424195), non-jurisdictional
- XVI. D19, (35.053734, -90.41318), non-jurisdictional
- XVII. D20, (35.061456, -90.441866), non-jurisdictional
- XVIII. D21, (35.05671, -90.44291), non-jurisdictional
- XIX. D22, (35.054348, -90.442058), non-jurisdictional
- XX. D23, (35.042554, -90.446549), non-jurisdictional
- XXI. D24, (35.037709, -90.446681), non-jurisdictional
- XXII. D25, (35.027117, -90.453187), non-jurisdictional
- XXIII. D28, (35.065946, -90.433936), non-jurisdictional
- XXIV. D29, (35.037718, -90.437807), non-jurisdictional
- XXV. D30, (35.045221, -90.490715), non-jurisdictional
- XXVI. D31, (35.04186, -90.490788), non-jurisdictional
- XXVII. W11, (35.023026, -90.441816), non-jurisdictional
- XXVIII. S18, (35.043604, -90.513384), non-jurisdictional
- XXIX. S19, (35.047219, -90.504843), non-jurisdictional
- XXX. S21, (35.054448, -90.486057), non-jurisdictional
- XXXI. S26, (35.023349, -90.453206), non-jurisdictional
- XXXII. S27, (35.023072, -90.450012), non-jurisdictional
- XXXIII. S28, (35.040502, -90.442193), non-jurisdictional
- XXXIV. S29, (35.061476, -90.47978), non-jurisdictional

## 2. REFERENCES.

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- 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. The Chalk Bluff Solar Energy Project is a proposed utility-scale solar energy facility located on approximately 6,051 acres in the eastern portion of St. Francis County, Arkansas, located approximately 1.2 miles south-southeast of the unincorporated community of Heth, Arkansas. The approximate Lat and Long for the project area is 35.048°N, 90.438°W. A majority of the Project Area consists of cultivated cropland for growing rice, corn, and soybeans. The locations of the delineated ditches, streams, and wetlands are shown on the Features Maps (Enclosed). Attached is a map with the boundary of the review area. No previous AJD's have been completed for the review area. However, there are other potential aquatic features on the site that have been addressed under a preliminary jurisdictional determination.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Blackfish Bayou, St. Francis River
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: Flowpaths vary but generally features on the property flow to the south and west, joining Little Rabbit Bayou and then Big Rabbit Bayou before flowing into Fifteenmile Bayou. Fifteenmile Bayou flows into Blackfish Bayou, the downstream end of which is historically navigable. Blackfish Bayou then flows into the historically navigable St. Francis River.
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

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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.

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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
- 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

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<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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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.

- I. D01, (35.07415, -90.401941), non-jurisdictional 2.34783 ac
- II. D02, (35.084506, -90.404866), non-jurisdictional 0.811777 ac
- III. D03, (35.078642, -90.401955), non-jurisdictional 0.408816 ac
- IV. D04, (35.087024, -90.406856), non-jurisdictional 0.626309 ac
- V. D06, (35.076493, -90.410318), non-jurisdictional 1.516168 ac
- VI. D07, (35.081758, -90.408134), non-jurisdictional 0.30834 ac
- VII. D08, (35.075527, -90.408436), non-jurisdictional 0.17839 ac
- VIII. D09, (35.075439, -90.40622), non-jurisdictional 0.452927 ac
- IX. D10, (35.060941, -90.404196), non-jurisdictional 0.144912 ac
- X. D11, (35.068119, -90.418162), non-jurisdictional 0.119981 ac
- XI. D12, (35.072234, -90.437437), non-jurisdictional 0.55529 ac
- XII. D13, (35.072201, -90.437223), non-jurisdictional 0.434837 ac
- XIII. D14, (35.071181, -90.437787), non-jurisdictional 0.068717 ac
- XIV. D16, (35.051937, -90.437682), non-jurisdictional 0.511063 ac
- XV. D18, (35.047754, -90.424195), non-jurisdictional 0.500572 ac
- XVI. D19, (35.053734, -90.41318), non-jurisdictional 0.258432 ac
- XVII. D20, (35.061456, -90.441866), non-jurisdictional 0.744011 ac
- XVIII. D21, (35.05671, -90.44291), non-jurisdictional 0.66014 ac
- XIX. D22, (35.054348, -90.442058), non-jurisdictional 0.476981 ac
- XX. D23, (35.042554, -90.446549), non-jurisdictional 0.169355 ac
- XXI. D24, (35.037709, -90.446681), non-jurisdictional 0.238112 ac
- XXII. D25, (35.027117, -90.453187), non-jurisdictional 0.276476 ac
- XXIII. D28, (35.065946, -90.433936), non-jurisdictional 0.513574 ac
- XXIV. D29, (35.037718, -90.437807), non-jurisdictional 0.128696 ac
- XXV. D30, (35.045221, -90.490715), non-jurisdictional 0.531542 ac
- XXVI. D31, (35.04186, -90.490788), non-jurisdictional 0.338205 ac

- The features listed above are all ditches that do not carry a relatively permanent flow. Ditches D01, D12, D13, D16, 29, and 31 were constructed in uplands as roadside ditches. Feature D9, D10, and D14 are swales. The remaining non-relatively permanent ditches were constructed and designed to carry runoff from artificially irrigated upland areas that would revert to upland if the irrigation ceased. The majority of these non-relatively permanent features connect to larger channels that could be considered relatively permanent waters (addressed via preliminary jurisdictional determination); however, the transition between non-RPW and potential RPW occurs at the

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

break between reaches of different orders. Ditch D20 differs in that it becomes a potential relatively permanent water within the same stream order as its non-relatively permanent headwater reach; however, the majority of the length of the channel (approximately 2,500 lf of the 3,500 lf reach) is characterized by non-relatively permanent flow. Finally, Ditches D23 and D25 are not connected to any potential downstream relatively permanent waters.

- 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.

XXVIII. Feature S18 is an erosional gully that leads from an agricultural field into feature S17 (which is addressed via PJD).

- 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.

XXVII. W11, (35.023026, -90.441816), non-jurisdictional 0.168915 ac

The features listed above are wetlands within agricultural fields with Prior Converted Cropland designations by the NRCS. Documentation regarding PCC designations was provided by the applicant/agent.

- 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).

XXIX. S19, (35.047219, -90.504843), is identified as an ephemeral roadside channel. This feature is approximately 726 ft in length and is in the corner of a field. The channel develops off a farm road that divides the field and flows into Big Rabbit Bayou.

XXX. S21, (35.054448, -90.486057), is identified as an ephemeral channel. This feature is approximately 2600 ft in length. The channel develops off a farm road that divides the field and flows into a higher order potential RPW that is addressed under a PJD.

XXXI. S26, (35.023349, -90.453206), is identified as an ephemeral channel. This feature is approximately 175 ft in length and is in the corner of a field. The stream develops off a farm road that divides the field and dead ends at a small corner berm.

XXXII. S27, (35.023072, -90.450012), is identified as an ephemeral stream. This feature is approximately 1891 ft in length and is in the corner of a field. The stream develops off a farm road that divides the field and dead ends at a small corner berm.

XXXIII. S28, (35.040502, -90.442193), is identified as an ephemeral channel. This feature is approximately 645 ft in length and is along the eastern edge of a field. The channel does not connect to downstream waters.

XXXIV. S29, (35.061476, -90.47978), is identified as an ephemeral channel. This feature is approximately 125 ft in length. The feature developed in a relatively flat area of the field and expands to being a sheet flow situation.

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 (Energy Renewal Partners, LLC.)
- b. U.S. Geological Survey Map Southwest Memphis, TN 1:24,000 USGS topographic quadrangle
- c. Photographs including Google Earth (Various Dates) and Photographs provided by the agent (Energy Renewal Partners, LLC.)

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- 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.
- 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.
- j. Site Visit: May 22, 2024

9. OTHER SUPPORTING INFORMATION. N/A

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.