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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

17 March 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 **SWL-2025-00037**

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 in this state 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.

- 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. Pond2, man-made farm pond, non-jurisdictional
 - ii. S1, vegetated swale (non-RPW), non-jurisdictional
 - iii. Wet2, shallow extension of Pond2, 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 AJD review area is approximately 11.5 acres of the total 89 acres project site. The review area was part of a livestock operation within the last five years and is dominated in cultivated grass pasture, situated amidst agricultural fields and scattered residential areas. Located in Siloam Springs, Benton County, AR, the review area is bounded by Highway 412 East to the north and Gum Springs Road to the east, located in parts of Sections 03 and 04, Township 17 North, Range 33 West. The geographic center of the review area is approximately located at 36.1767710°, -94.4960055°. This area falls within the Illinois River watershed (HUC 11110103) and does not contain any designated FEMA floodplains.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River (11110103) is the nearest downstream TNW (Oklahoma) as it is designated as a Section 10 water north of Fort Gibson, Oklahoma (35.86962, -95.23002).⁵

⁵ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The subject aquatic resources flow from the site to an unnamed tributary to Sager Creek to Sager Creek to Flint Creek to Illinois River (TNW).
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, 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

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.

- 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. The agent identified a man-made pond created in uplands for the purpose of watering livestock in the review area that was confirmed by Corps personnel: Pond2 (0.4-acre). Pond2 is a small, man-made pond created in uplands and located approximately 5,106.8 linear feet from the nearest RPW. Google Earth imagery confirms the presence of livestock within the last five years. Pond2 possesses hydrology that appears to be primarily driven by surface runoff from the surrounding terrain and direct rainfall. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering are generally not considered jurisdictional according to the November 13, 1986, Federal Register (51 FR, 41217).
- 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. The agent identified a vegetated swale within the AJD request area that was confirmed by Corps personnel: S1 (827 lf). S1 is a vegetated swale feature with ephemeral flow located approximately 1,445.2 linear feet from the nearest RPW. S1 does not exhibit a discernible Ordinary High Water Mark (OHWM), does not have distinct bed and banks, and does not possess hydrologic indicators of conveying flow except for receiving sheet flow during heavy precipitation events. Additionally, S1 was dominated by upland vegetation. Based on a lack of indicators of flow typically found in relatively permanent waters, S1 is to be considered non-jurisdictional.
- 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

⁸ 51 FR 41217, November 13, 1986.

- 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). The agent identified one wetland within the AJD review area that was confirmed by Corps personnel: Wet2 (0.1-acre). Wet2 is a small, depressional wetland area abutting Pond2 and is approximately 6,273.9 linear feet from the nearest RPW. Wet2 is predominantly composed of soft rush (*Juncus effusus*) vegetation. Based on site evaluation and historical imagery, the hydrology of Wet2 appears to be driven by surface runoff from the surrounding landscape and connection to Pond2. Due to lack of a continuous surface connection to other aquatic features via Pond2 and a vegetated swale (S1), and its reliance on indirect precipitation in the form of sheet flow from the adjacent terrain, Wet2 is considered non-jurisdictional.
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. A Corps site visit and field inspection was conducted along with a desktop review on March 12, 2025.
- b. Agent provided Section 404 Delineation Report: 24105100_Steele and Kenwood PCN and AJD Request
- c. NHD data accessed on National Regulatory Viewer, Accessed March 12, 2025.
- d. USGS Topographic Quadrangle Galatin, AR (1:24K), Accessed March 12, 2025.
- e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed March 12, 2025.

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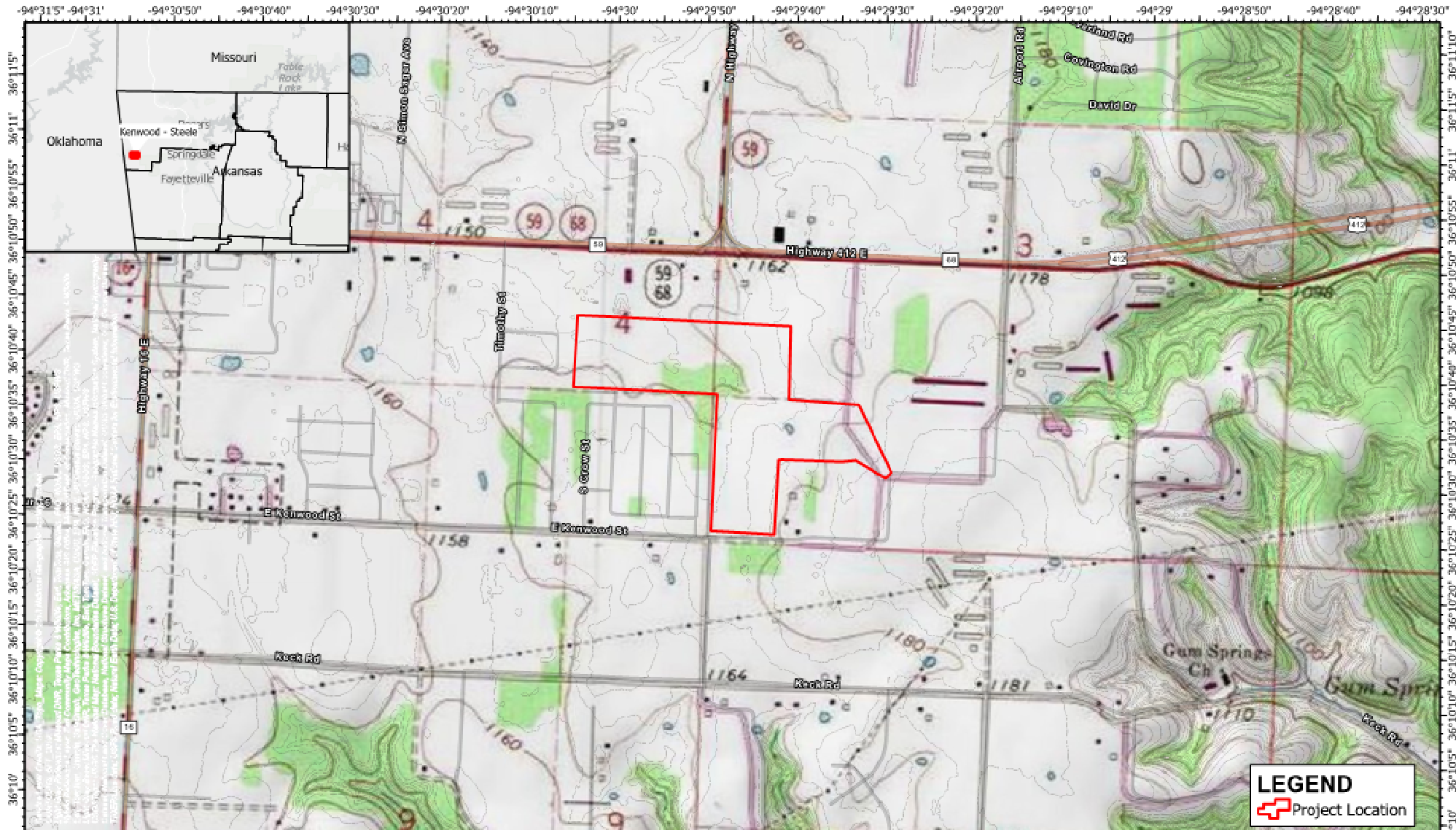
- f. Google Earth Pro. (1993-2024 Imagery). *Lat.* 36.1767710°, *Long* -94.4960055°, Accessed March 12, 2025.
- g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed March 12, 2025.

10. OTHER SUPPORTING INFORMATION.

Leasure, D.R.; Magoulick, D.D.; Longing, S.D. 2016. Natural flow regimes of the Ozark-Ouachita interior highlands region. *River Res. Appl.* 32: 18–35.


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.

Spatial ReferenceName: NAD 1983 StatePlane Arkansas North FIPS 0301 Feet



LEGEND


 Project Location


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214 N. 47th Street, Suite 100, Opaoka, AR 72758
937.224.9231 • 474.602.8231

**KENWOOD ROAD, SILOAM SPRINGS, AR
WOTUS ASSESSMENT**

CT Proj #: 24103400

Figure 1
USGS Topographic Map
T17 N R33 W


Feet
0 500 1000 2000

C:\Projects\0003200 - Steele - Kenwood (Siloam Springs)\AWOTUS\0003 - Steele Kenwood\WOTUS\0003 - Steele Kenwood\WOTUS

USGS Topographic Download: SPL

Action No. SWL 2025-00037
Siloam Springs, Benton Co. AR
Steele - Kenwood Residential Development
AJD Request
Section: 03,04 Township: 17 N. Range: 33 W.
March 2025 Page 1 of 2

Spatial ReferenceName: NAD 1983 StatePlane Arkansas North FIPS 0301 Feet



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**KENWOOD ROAD, SILOAM
SPRINGS, AR
WOTUS ASSESSMENT**

CT Prj #: 14105400

AJD Request

Action No. SWL 2025-00037
Siloam Springs, Benton Co. AR
Steele - Kenwood Residential Development AJD
Request
Section: 03,04 Township: 17 N. Range: 33 W.
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