

## 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> **SWL-2024-00219**

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 this state due to litigation.

## 1. SUMMARY OF CONCLUSIONS.

<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. **Intermittent Stream A, Relatively Permanent Water (RPW), jurisdictional WOTUS under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**
  - ii. **Intermittent Stream D, RPW, jurisdictional under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**
  - iii. **Ephemeral Stream B, non-RPW, non-jurisdictional WOTUS under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**
  - iv. **Ephemeral Stream C, non-RPW, non-jurisdictional WOTUS under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**
  - v. **Ephemeral Stream E, non-RPW, non-jurisdictional WOTUS under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**
  - vi. **Ephemeral Stream F, non-RPW, non-jurisdictional WOTUS under Section 404 of the CWA in accordance with the Pre-2015 Post Sackett Conforming Rule**

## 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. **The 44.1- acre review is in Lockesburg, Sevier County, Arkansas. Approximate center coordinates include: 33.9911, -94.1816. See the attached figures in the delineation report (Sheets 5-6) for a depiction of the review area boundaries.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The nearest TNW is the Little River which is listed on the Little Rock District's list of streams considered navigable within the district. Head of navigation along Little River begins at the Lake Millwood Dam and continues for approximately 16 miles to the confluence of Little River and the Red River. Little River was determined to be the nearest TNW based on a desktop review of its tributaries, which can be traced upstream to delineated features within the review area by using flowline data from the United States Geological Service (USGS) National Hydrography Dataset (NHD).** <sup>5</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. **The flow path below was determined using USGS NHD flowline data.**

**Onsite aquatic resources → Cold Branch (RPW) → Russey Creek (RPW) → Little Cossatot River (RPW) → Cossatot River (RPW) → Little River (a TNW).**

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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>7</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

<sup>5</sup> 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.

<sup>6</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>7</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.

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): **Intermittent Stream A was determined to be a RPW due to the reported presence of minor-flow and a well-defined bed and bank when the delineation was conducted. Photographic evidence (Photograph 3; Sheet 14) within the attached delineation report confirmed the accuracy of the reported RPW indicators. Intermittent Stream A totaled approximately 1,374 linear feet within the review area. The USGS 3DEP Bare Earth DEM was also used to confirm the well-defined bed and banks which indicate that the features experience infrequent flows immediately following precipitation events.**

**Intermittent Stream D was determined to be a RPW due to the reported presence of minor-flow and a well-defined bed and bank when the delineation was conducted. Photographic evidence (Photograph 5; Sheet 15) within the attached delineation report confirmed the accuracy of the reported RPW indicators. Intermittent Stream D totaled approximately 75 linear feet within the review area. The USGS 3DEP Bare Earth DEM was also used to confirm the well-defined bed and banks which indicate that the features experience infrequent flows immediately following precipitation events.**

- 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>8</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 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).

**Four non-RPW channels (Ephemeral Stream B, Ephemeral Stream C, Ephemeral Stream E, and Ephemeral Stream F) characterized by non-RPW ephemeral flow regimes were identified within the review area in the attached delineation report. These four ephemerals were also characterized by no surface flow and weakly defined beds and banks as reported in the attached delineation report. Photographic evidence (Photograph 4, Photograph 6, and Photograph 7; Sheets 14-16) within the attached**

<sup>8</sup> 51 FR 41217, November 13, 1986.

**delineation report confirmed the accuracy of the reported non-RPW indicators. The USGS 3DEP Bare Earth DEM was also used to confirm the weakly defined banks which indicate that the features experience infrequent flows immediately following precipitation events.**

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. **An office evaluation of site was conducted on August 21, 2024, using the resources below.**
  - b. **USGS National Hydrography Dataset (NHD) GIS Layers, August 21, 2024**
  - c. **USDA Web Soil Survey, <https://websoilsurvey.nrcs.usda.gov/app/>, August 21, 2024**
  - d. **USGS 3D Elevation Program (3DEP) Bare Earth DEM, August 21, 2024**
  - e. **Streams Considered Navigable in Little Rock District (“Navigable Waters of the U.S.”), August 21, 2024, extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.swl.usace.army.mil/Portals/50/docs/regulatory/navigablestreams.pdf**

10. OTHER SUPPORTING INFORMATION.

**Please see the attached Section 404 delineation report prepared by the applicant’s agent (Sheets 1-18).**

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.

July 9, 2024

United States Army Corps of Engineers  
Little Rock District – Regulatory Division  
700 West Capitol, Room 7530  
Little Rock, Arkansas 72201

RE: Lockesburg Solar Array – Scenic Hill Solar  
USACE Delineation & Concurrence Request

**Pollution Management, Inc.,** *A Terracon Company* (PMI) visited the proposed Lockesburg Solar Array site on June 26th 2024 to conduct a wetland and stream delineation. The proposed array is located approximately 0.1 miles northwest of the intersection between North Park Avenue and West Rock Hill Road near Lockesburg Arkansas. Refer to Appendix A Site Maps for the approximate property boundary. Scenic Hill Solar anticipates construction of the array in the near future and requests a United States Army Corps of Engineers (USACE) Approved Jurisdictional Determination or Concurrence Letter on this site.

### **Jurisdictional Findings**

PMI conducted a wetland and stream delineation regarding the presence of jurisdictional wetlands and waters of the United States. The property was investigated for the presence of hydrophytic vegetation, hydric soils, and wetland hydrology as the three parameters required by the USACE wetland determination data form. Six streams and no wetlands were identified on the property during the site visit. Data points reflecting these findings are attached as Appendix B and site photographs are attached as Appendix C.

### **Intermittent Stream A**

Intermittent Stream A is a jurisdictional stream that flows from southeast to northwest and is approximately 1,374 linear feet within the site. This stream is an unnamed tributary to Cold Branch. Minor flow and a well-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes.

### **Ephemeral Stream B**

Ephemeral Stream B is a non-jurisdictional stream that flows from east to west and is approximately 216 linear feet within the site. This stream is an unnamed tributary to Cold Branch. No flow and a weakly-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes. This stream was considered non-jurisdictional due to weak stream features observed at the time of the site visit.

### **Ephemeral Stream C**

Ephemeral Stream C is a non-jurisdictional stream that flows from east to west and is approximately 378 linear feet within the site. This stream is an unnamed tributary to Cold Branch. No flow and a weakly-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes. This stream was considered non-jurisdictional due to weak stream features observed at the time of the site visit.

### **Intermittent Stream D**

Intermittent Stream D is a jurisdictional stream that flows from east to west and is approximately 75 linear feet within the site. This stream is an unnamed tributary to Cold Branch. Minor flow and a well-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes. Flow did not continue downgradient of the confluence between Intermittent Stream D and Ephemeral Stream F.

### **Ephemeral Stream E**

Ephemeral Stream E is a non-jurisdictional stream that flows from east to west and is approximately 54 linear feet within the site. This stream is an unnamed tributary to Cold Branch. No flow and a weakly-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes. This stream was considered non-jurisdictional due to weak stream features observed at the time of the site visit.

### **Ephemeral Stream F**

Ephemeral Stream E is a stream that flows from east to west and is approximately 349 linear feet within the site. This stream is an unnamed tributary to Cold Branch. No flow and a weakly-defined bed and bank were noted at the time of the site visit. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes. Upgradient of the confluence between Ephemeral Stream F and Intermittent Stream D was considered non-jurisdictional due to weak stream features observed at the time of the site visit. Downgradient of the confluence between Ephemeral Stream F and Intermittent Stream D was considered jurisdictional due to the nexus between intermittent streams.

### **Upland Data Point**

One upland data points was recorded during the site visit and is attached as Appendix B. This data point is representative of the site which is primarily comprised of a fallow field and wooded draws. All hydrology within the site is located within the stream networks.

Data Point One is located on the central portion of the site. Wetland hydrology indicators were not present at the time of the site visit. Vegetation consisted of dallis-grass, Bermuda grass, American black nightshade, white clover, and Johnson grass. Soils are mapped as the non-hydric unit Pikecity fine sandy loam, one to eight percent slopes and in field samples confirmed a non-hydric soil.

### **Summary**

On behalf of Scenic Hill Solar, PMI requests a USACE Approved Jurisdictional Determination or Concurrence Determination to confirm the locations of jurisdictional features within the site. Scenic Hill Solar plans to avoid these jurisdictional features during construction and use best management practices



when working around them. The proposed solar field will be located in the upland areas of the site. If additional information is required, please do not hesitate to contact me at [jmetrailer@pmico.com](mailto:jmetrailer@pmico.com) or 501-221-7122.

Sincerely,

**Pollution Management, Inc.**, *A Terracon Company*



Senior Engineer

KT247201

Appendix A  
Site Maps



**CIVIL ENGINEERING AND ENVIRONMENTAL SERVICES**  
**PMI**  
 DESIGNED BY: [REDACTED] PH: [REDACTED]  
 DRAWN BY: [REDACTED]  
 CHECKED BY: [REDACTED]  
 DATE: JUN. 24, 2024  
 SCALE: 1" = 100'


**REVISIONS:**

NO.	DATE	DESCRIPTION	BY:

**SHEET TITLE:** AERIAL WITH JURISDICTIONAL WATERS  
**PROJECT TITLE:** LOCKESBURG SOLAR ARRAY  
 LOCKESBURG, ARKANSAS

**JOB NUMBER:** KT247201  
**SHEET NUMBER:** 1



		<b>CIVIL ENGINEERING AND ENVIRONMENTAL SERVICES</b>	
DESIGNED BY:	PH:	DATE:	JUN. 24, 2024
DRAWN BY:		SCALE:	N.T.S.
CHECKED BY:			
<b>JOB NUMBER:</b> KT247201		<b>SHEET NUMBER:</b> 2	
<b>SHEET TITLE:</b> USFWS NATIONAL WETLAND INVENTORY		<b>PROJECT TITLE:</b> LOCKESBURG SOLAR ARRAY	
LOCKESBURG, ARKANSAS		LOCKESBURG, ARKANSAS	

USACE DELINEATION/DRAWINGS/VT247201\_LOCKESBURG\_USACE

REVISIONS:

NO.	DATE	DESCRIPTION	BY:



### MAP LEGEND

<b>Area of Interest (AOI)</b>	Area of Interest (AOI)	Spoil Area
<b>Soils</b>	Soil Map Unit Polygons	Stony Spot
	Soil Map Unit Lines	Very Stony Spot
	Soil Map Unit Points	Wet Spot
<b>Special Point Features</b>	Blowout	Other
	Borrow Pit	Special Line Features
	Clay Spot	<b>Water Features</b>
	Closed Depression	Streams and Canals
	Gravel Pit	<b>Transportation</b>
	Gravelly Spot	Rails
	Landfill	Interstate Highways
	Lava Flow	US Routes
	Marsh or swamp	Major Roads
	Mine or Quarry	Local Roads
	Miscellaneous Water	<b>Background</b>
	Perennial Water	Aerial Photography
	Rock Outcrop	
	Saline Spot	
	Sandy Spot	
	Severely Eroded Spot	
	Sinkhole	
	Slide or Slip	
	Sodic Spot	

### Map Unit Legend

Map Unit Symbol	Map Unit Name	Acres in AOI	Percent of AOI
22B	Ouachita silt loam, 0 to 3 percent slopes, frequently flooded	0.2	0.4%
23D	Peanutrock gravelly fine sandy loam, 3 to 15 percent slopes	6.2	14.2%
24C	Pikecity fine sandy loam, 1 to 8 percent slopes	37.7	85.5%
<b>Totals for Area of Interest</b>		<b>44.1</b>	<b>100.0%</b>



USDA SOILS MAP	
LOCKESBURG SOLAR ARRAY	
LOCKESBURG, ARKANSAS	
<b>REVISIONS:</b>	<b>SHEET TITLE:</b>
NO. DATE DESCRIPTION BY:	<b>PROJECT TITLE:</b>
DESIGNED BY: [Redacted]	DATE: JUN. 24, 2024
DRAWN BY: [Redacted]	SCALE: N.T.S.
CHECKED BY: [Redacted]	FILE NO. [Redacted]
CIVIL ENGINEERING AND ENVIRONMENTAL SERVICES	
JOB NUMBER: KT247201	
SHEET NUMBER: 3	