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CESWL-RD

12 June 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> **SWL-2004-19526-2**.

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.<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.

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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.

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. WET II-a (emergent wetland), non-jurisdictional
  - ii. WET III-a (emergent wetland), 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. The review area is located immediately south of Arkansas State Hwy. 102 in Centerton, Benton County, Arkansas, at approximately 349 East Centerton Boulevard, Centerton, AR 72719. The review area consists of an 18-acre area of a larger parcel. The approximate geographic center is LAT: 36.357036 / LON: -94.283104. The attached figure, illustrate the aquatic resources and approximately subject property boundaries.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A – On-site wetlands do not have a continuous surface connection to a traditional navigable water, interstate water, or territorial sea.<sup>5</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A – On-site wetlands do not have a continuous surface connection to a traditional navigable water, interstate water, or territorial sea.

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<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.

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 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

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<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.

- 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).
  - I. WET II-a is 0.34-acre emergent wetland located within the eastern-central portion of the site. WET II-a lacks a continuous surface connection to any relatively permanent water or non-relative permanent water. Due to the non-adjacency of this wetland to relatively permanent waters, it would not be regulated under Section 404 of the CWA

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

- II. WET III-a is 0.15-acre emergent wetland located within the central portion of the site. WET III-a lacks a continuous surface connection to any relatively permanent water or non-relative permanent water. Due to the non-adjacency of this wetland to relatively permanent waters, it would not be regulated under Section 404 of the CWA
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. Corps site visit(s), 12 December 2023, 20 February 2024, and 4 April 2024, and 24 April 2024.
  - b. Wetland delineation of the subject property by FTN Associates, Ltd. dated January 16, 2023, and revised on 12 December 2024, and lastly on 19 March 2024. Additional datapoints and a revised delineation exhibit was provided on 2 May 2024.
  - c. National Regulatory Viewer was accessed for LiDAR, Natural Resource Conservation Service soil map units, National Hydrological Database (NHD), and U.S. Fish and Wildlife National Wetland Inventory (NWI) maps, April 01, 2024
  - d. Google Earth Pro, April 01, 2024
10. OTHER SUPPORTING INFORMATION.

Five upland data points were taken to prove the wetlands reside solely within the uplands and that no continuous surface connection (inflows or outflows) besides overland flow (sheet-flow) exists.

A wetland delineation by the agent identified two emergent wetlands (WET II-a and WET III-a) within the central regions of the review area that were previously located adjacent to McKisic Creek (RPW). However, McKisic Creek was relocated to the north in 2017 for an approved project associated with this jurisdictional determination. The 2017 project was completed under an Individual Permit utilizing a AJD dated 22 April 2015. The applicants project plans have since changed to due changes in Department of Transportation requirements for the project entrance, which is driving the requirement for a new AJD and Individual Permit.

On 4 April 2024, the Corps performed a site visit to verify the applicant's delineation, completed on 25 January 2024. Discrepancies were noted in the size of wetlands within the central portion of the site and indicators for a wetland delineated within the northern portion of the site could not be found.

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On 24 April 2024, the Corps performed a site visit with the applicant's agent to determine the presence and locations of wetlands on-site. Two discrete wetlands within the review area were identified on site. The agent provided updated exhibits and wetland data sheets on 2 May 2024.

Immediately adjacent to the project area is a deed restricted permittee responsible mitigation area. The project area does not include any of the deed restricted land.

It should be noted that with the relocation of McKisic Creek, hydrology within this site has changed significantly, as all drainage has now been rerouted to the far north and northeast portions of the site.

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.

SWL-2004-19526-2 AJD



Project AJD area: 18 ac  
WET-II-a: 0.34 ac  
WET-III-a: 0.15 ac

**Walmart Supercenter 4248-004**



- Project Area
- Project Wetlands
- Sample Points

200 Feet



Figure 1. Map showing project area details overlaid on 2023 Arkansas Digital Orthophotography Program imagery.