



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, [XX] DISTRICT  
[ADDRESS]  
[CITY, STATE, ZIP]

[DISTRICT OFFICE CODE]

[DAY MONTH YEAR]

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> [ORM Identification Number] [Include number (MFR # of #) as appropriate]<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

<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> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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decision, the Amended 2023 Rule is not applicable [in this state OR for this party] due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area). [Provide a rationale for the dry land determination and DELETE the remainder of section 1, below.]

OR

- 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). [When utilizing this version of section 1.a., DELETE the dry land section 1.a, above]
  - i. [Name of aquatic resource, jurisdictional/non-jurisdictional, if jurisdictional indicate the applicable authority(ies) (i.e., Section 404, Section 10, or Section 10 and Section 404)]
  - ii. [Name of aquatic resource, jurisdictional/non-jurisdictional, if jurisdictional indicate the applicable authority(ies) (i.e., Section 404, Section 10, or Section 10 and Section 404)]
  - iii. [Name of aquatic resource, jurisdictional/non-jurisdictional, if jurisdictional indicate the applicable authority(ies) (i.e., Section 404, Section 10, or Section 10 and Section 404)]

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)

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- d. *Sackett v. EPA*, 598 U.S. \_\_, 143 S. Ct. 1322 (2023)
  - e. [Add references from Appendix A “Pre-2015 Regulatory Regime: List of Resources” as needed]
  - f. [Add references as needed]
  - g. [Add references as needed]
3. REVIEW AREA. [Include review area size, latitude, and longitude (in decimal degrees) at the center of the review area, city, county, and state. Attach relevant figures including one depicting the boundary of the review area. Include any additional relevant site-specific information associated with this AJD request, and any additional details, such as previous JDs (and their outcomes) in the review area.]
  4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Include the name of the nearest downstream TNW, interstate water, or the territorial seas and a discussion of how it was determined the water is a TNW, interstate water, or the territorial seas.]<sup>6</sup>
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [Describe the flowpath from the subject aquatic resources within the review area to the TNW, interstate water, or the territorial seas (whether inside or outside the review area).]
  6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> [N/A or enter rationale/discussion here]

<sup>6</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>7</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>8</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

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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 or describe TNWs within the review area.]
  - b. Interstate Waters (a)(2): [N/A or describe interstate waters within the review area.]
  - c. Other Waters (a)(3): [N/A or describe how this lake or pond meets the interstate/foreign commerce nexus test post-2001 SWANCC]
  - d. Impoundments (a)(4): [N/A or describe impoundments within the review area.]
  - e. Tributaries (a)(5): [N/A or describe tributaries that are relatively permanent waters (RPWs) within the review area. Describe the tributary reach, including the flow regime and how the flow regime was determined.]
  - f. The territorial seas (a)(6): [N/A or describe territorial seas within the review area.]
  - g. Adjacent wetlands (a)(7): [N/A or describe wetlands within the review area that were determined to be adjacent (i.e., having a continuous surface connection to a TNW, interstate water, jurisdictional impoundment, jurisdictional tributary, or the territorial seas)]
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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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>9</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 or enter rationale/discussion here.]
- 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 or enter rationale/discussion here.]
  - 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 or enter rationale/discussion here.]
  - 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 or enter rationale/discussion here.]
  - 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 or enter rationale/discussion here.]
  - 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). [N/A or enter rationale/discussion here.]
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.

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<sup>9</sup> 51 FR 41217, November 13, 1986.

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- a. [List the date(s) that any field visit(s) or office evaluation(s) were conducted]
- b. [Name of data source, date of resource or date accessed.]
- c. [Name of data source, date of resource or date accessed.]
- d. [Name of data source, date of resource or date accessed.]

10. OTHER SUPPORTING INFORMATION. [N/A or Provide any additional discussion to support this determination.]

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.