



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT
819 TAYLOR STREET
FORT WORTH, TEXAS 76102-0300

CESWF-RD

8/14/2024

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),¹ **SWF-2023-00315**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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas due to litigation.

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).

Water Feature	Authority	TNW	Size (ac or lf)	Status	Rationale
Wetland 1	404	No	0.01 ac	Non-WOTUS	Does not meet standing RPW (a)(7) Wetland adjacent to a non-wetland water identified in (a)(1) - (a)(6)
Wetland 2	404	No	0.01 ac	Non-WOTUS	Does not meet standing RPW (a)(7) Wetland adjacent to a non-wetland water identified in (a)(1) - (a)(6)
Stream 1	404	No	0.01 ac	WOTUS	(a)(5) tributaries of waters identified in paragraph (a)(1) - (a)(4), where the tributary is relatively permanent, standing, or continuously flowing body of water
Stream 2	404	No	0.01 ac	WOTUS	(a)(5) tributaries of waters identified in paragraph (a)(1) - (a)(4), where the tributary is relatively permanent, standing, or continuously flowing body of water
Stream 3	404	No	0.01 ac	WOTUS	(a)(5) tributaries of waters identified in paragraph (a)(1) - (a)(4), where the tributary is relatively permanent, standing, or continuously flowing body of water
Stream 4	404	No	0.01 ac	Non-WOTUS	Tributary to a water identified in paragraphs (a)(1) - (a)(4), where the tributary is not relatively permanent, standing or continuously flowing body of water

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Stream 5	404	No	0.05 ac	Non-WOTUS	Tributary to a water identified in paragraphs (a)(1) - (a)(4), where the tributary is not relatively permanent, standing or continuously flowing body of water
Pond 1	404	No	0.05 ac	Non-WOTUS	Does not meet standing RPW identified in (a)(1)-(a)(6)
Pond 2	404	No	0.13 ac	Non-WOTUS	Does not meet standing RPW identified in (a)(1)-(a)(6)
Pond 3	404	No	0.01 ac	Non-WOTUS	Does not meet standing RPW identified in (a)(1)-(a)(6)
Swale 1	404	No	105 lf	Non-WOTUS	Generally non-jurisdictional feature
Swale 2	404	No	88 lf	Non-WOTUS	Generally non-jurisdictional feature
Swale 3	404	No	197 lf	Non-WOTUS	Generally non-jurisdictional feature

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. **Includes approximately 56-acre tract of developed land parallel with a roadway and farmland located in Celina, Denton County, Texas. The applicant is seeking a Nationwide Permit 58 for Water and Other Substances. A desktop review of the provided wetland delineation report, various aerial imagery, NHD, and NWI maps show the delineation of ten aquatic features and three erosional features. See table from section 1.a.**

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **Lake Lewisville is the nearest TNW.**
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. **Little Elm Creek is the nearest waterway which connects to Lake Lewisville.**
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 **No section 10 jurisdictional waters are present within the review area.**
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. **(See table in section 1.a above and attached map.) The 1987 Wetland Delineation Manual and Great Plains Supplement were referenced to identify potential jurisdiction. Indicators described in RGL 05-5 were used to identify the boundaries of non-wetland water features.**
Streams 1, 2, and 3 do have continuous flow at least seasonally. Streams 1, 2, and 3 maintains a continuous surface connection to an unnamed tributary

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.

which connects to Little Elm Creek. Due to their continuous surface connection and flow, these streams are RPWs.

- 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 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. **Ponds 1, 2, and 3 are preamble waters. Each pond appears to have been constructed in uplands. Based on the surrounding area, the ponds were likely used to water livestock. Pond 1 is 0.05 acres, Pond 2 is 0.13 acres, and Pond 3 is 0.01 acres.**
- 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. **Swales 1, 2, and 3 are considered “generally non-jurisdictional” erosional features. The swales do not have an ordinary high-water mark, or any other features which would identify them as an aquatic feature. Swale 1 is 105 linear feet, swale 2 is 88 linear feet, and swale 3 is 197 linear feet.**
- 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

⁸ 51 FR 41217, November 13, 1986.

the review area and describe how it was determined to be a waste treatment system. **N/A – no such features exist in the assessment area.**

- 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 – no such features exist in the assessment area.**
- 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).
Wetland 1 is an excavated and non-adjacent wetland (0.01 acres) that historically may have been a pond constructed in uplands for the purpose of watering livestock. This feature lacks a continuous surface connection to a requisite water.

Wetland 2 (0.01 acres) appears to also have been excavated in the same manner and for the same reason. This feature lacks a continuous surface connection to a requisite water.

Stream 4 (0.01 acres) appears to be a first order stream with ephemeral flow within the project boundary. This feature does not have a continuous flow at least seasonally and generally flows only in response to precipitation.

Stream 5 (0.05 acres) appears to be a first order stream with ephemeral flow within the project boundary. This feature does not have a continuous flow at least seasonally and generally flows only in response to precipitation.

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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. Site Visit(s): **N/A**

b. Resources: **All Historic Aerials.com and Google Earth imagery available – viewed and/or downloaded 12/2023 and 01/2024. USACE National Regulatory Viewer was also utilized for:**

- i. **USFWS National Wetland Inventory Maps**
- ii. **USGS US Topographic 7.5 Minute Index Maps**
- iii. **National Hydrography Dataset Maps**
- iv. **LIDAR 3DEP Digital Elevation Model Maps**
- v. **USA and TEXAS NAIP Imagery**

10. OTHER SUPPORTING INFORMATION. **Wetland delineation report submitted by Applicant.**

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.