



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WALLA WALLA DISTRICT
720 EAST PARK BOULEVARD, SUITE 245
BOISE, IDAHO 83712

CENWW-RD

1 March 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 NWW-2023-00450 (MFR 1 of 1).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.

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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.

- 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).

The review area includes an approximately 25-acre polygon consisting of an alfalfa field on the western half, a fallow agricultural field on the eastern half, and two abandoned remnant depressional features which were described by the project consultant to have historically been sewage/wastewater settlings ponds or lagoons to the north. Vallivue Middle School is located on the property immediately west of the review area. The Forest Canal borders the northern side of the property; however, this feature is not part of the review area. A 15- to 20-foot-wide road runs parallel to and along the length of the canal and the northern property boundary. This road sits at an average of 1' higher elevation difference from the project area and the Forest Canal. There are no features within the review area that currently display aquatic characteristics, including any tributary or wetland indicators. While the National Wetlands Inventory presently suggests the remnant depressions associated with the historical sewage lagoons consist of side-by-side freshwater ponds (PUBHr) measuring approximately 0.81 and 0.29 acres, historic Google Earth aerial imagery suggests that these lagoon features have been abandoned and dry since at least 2019. Had these features not been abandoned, waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA, are not waters of the U.S. under the pre-2015 regulatory regime. A site-visit conducted by Ecosystem Sciences on August 8, 2023, found that these remnant lagoon features do not contain any hydrophytic vegetation or hydrology indicators. The United States Department of Agriculture (USDA) Web Soil Survey database classifies the soil profile at these features as Vickery-Marsing silt loams, a series that does not contain hydric soils. Soil Survey data was also reviewed for soil profiles of the larger review area; of the four soil types identified (Elijah-Chilcott silt loams; Power-Purdam silt loams; Purdam silt loam; and Vickery-Marsing silt loams), none were found to contain hydric ratings. In addition to the alfalfa (*Medicago sativa*, classified as an upland species), Ecosystem Sciences found that the review area was dominated by invasive facultative upland forb and graminoid species, including kochia (*Bassia scoparia*), cheatgrass (*Bromus tectorum*), rush skeletonweed (*Chondrilla juncea*), and Russian thistle (*Salsola tragus*). The only

shrubs or trees found in the project area are a few isolated stands of rabbitbrush (*Chrysomanthus viscidiflorus*), Siberian elm (*Ulmus pumila*), and Tree of Heaven (*Ailanthus altissima*). Though the site is irrigated, there are no apparent irrigation-induced wetlands that would require further, site-specific evaluation in accordance with approved methodologies.

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 project is located within Section 10 of Township 3 North, Range 3 West, near coordinates 43.609° N latitude, and -116.686° W longitude, in Caldwell, Canyon County, Idaho. The review area is approximately 25 acres located south of Forest Canal and East of Vallivue Middle School. A search of the ORM2 data base did not reveal any prior JDs or JD requests associated with this action.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A. There are no aquatic resources within the review area. However, the nearest downstream TNW is the Snake River, designated as navigable under Section 10 of the Rivers and Harbors Act along the Idaho-Washington border to River Mile 445.5.]⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [N/A. There are no aquatic resources within the review area.

⁶ 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.

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6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ [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

⁷ 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.

⁸ 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”).⁹ 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. There are no aquatic resources within the review area. However, as noted above in Section 1, there are two disturbed features in the northern segment of the review area, adjacent to the canal, that display visual remnants of historical sewage lagoons. While the National Wetlands Inventory currently suggests the presence of one approximately 0.81-acre, and one approximately 0.29-acre freshwater pond (PUBHr) side-by-side, historic Google Earth aerial imagery suggests that these lagoon features have been abandoned and dry since at least 2019. A memorandum from the project consultant, dated September 19, 2023, details their observations from desktop review as well as a site visit which was conducted on August 8, 2023. The consultant observed plant species, looked for hydrologic indicators, recorded several GPS located data points and took wetland determination points which were located at the topographically lowest point in each of the remnant depressional features. Neither of the recorded wetland data points indicated signs of hydrophytic vegetation or wetland hydrology; as a result, signs for hydric soils were not assessed. However, the United States Department of Agriculture (USDA) Web Soil Survey database classifies the soil profile at these features as Vickery-Marsing silt loams, a series that does not contain hydric soils. Based off of these observations and in alignment with the USACE 1987 Wetlands Manual, including the appropriate regional supplement, the protocol determined these points were not wetlands. Had these features not been abandoned, waste treatment systems, including treatment ponds or lagoons designed to meet the

⁹ 51 FR 41217, November 13, 1986.

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requirements of the CWA, are not waters of the U.S. under the pre-2015 regulatory regime.]

- 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). [N/A.]
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. Ecosystem Sciences Memorandum, titled *Vallivue Elementary School Project Investigation*, dated September 19, 2023
 - b. Google Earth Aerial Imagery, image dates May 1992 – May 2023, accessed October 5, 2023
 - c. USFWS National Wetlands Inventory, accessed October 5, 2023
 - d. USDA Web Soil Survey, accessed October 5, 2023
10. OTHER SUPPORTING INFORMATION. N/A
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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.