



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WALLA WALLA DISTRICT
COEUR D'ALENE REGULATORY FIELD OFFICE
1910 NORTHWEST BLVD SUITE 210

CENWW-RD

05 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-2023-00164, MFR 1 of 1²

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.

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Idaho 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).
 - i. 0.27 Acres 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 a vacant 40-acre parcel. Presently, the parcel is not being put to any specific use and has not been developed, with the exception that the eastern half of the property was logged within the past several years and only deadfall, stumps, and saplings remain. A channel/swale with no observable ordinary high-water mark is located off property to the northeast with a raised culvert under Providence Road. This raised culvert was observed off site and elevated in such a way that would restrict low flow. The western side of the parcel was previously used as a livestock pasture and there are scattered trees in the northwest corner. The non-jurisdictional wetland identified in Section 1.a. above is also located in the northwest corner. The property is located within Section 01, Township 57 north, Range 2 West, between latitude 48.3162 and longitude -116.5063, near the city of Kootenai, in Bonner County, Idaho.

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

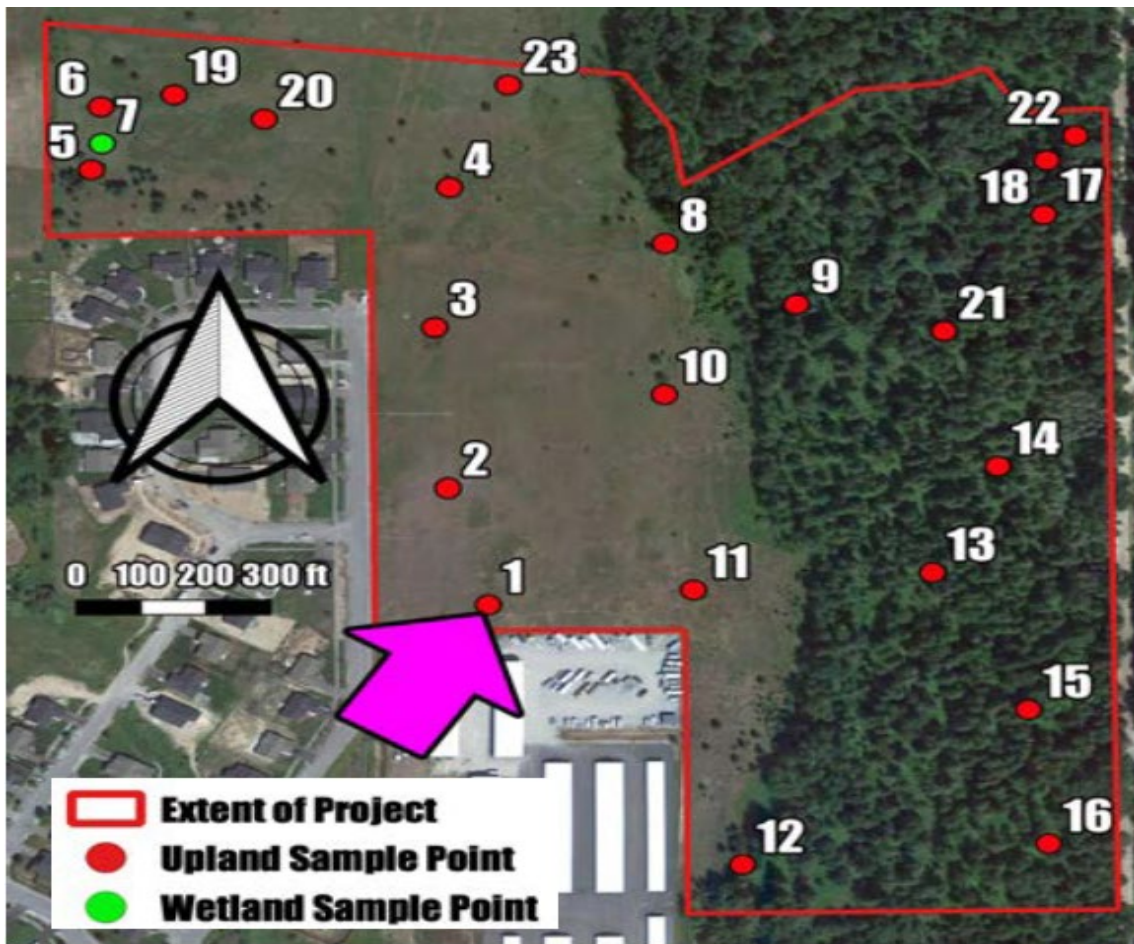


Figure 1: Project area

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164



Figure 2: Project area in relation to Boyer Slough

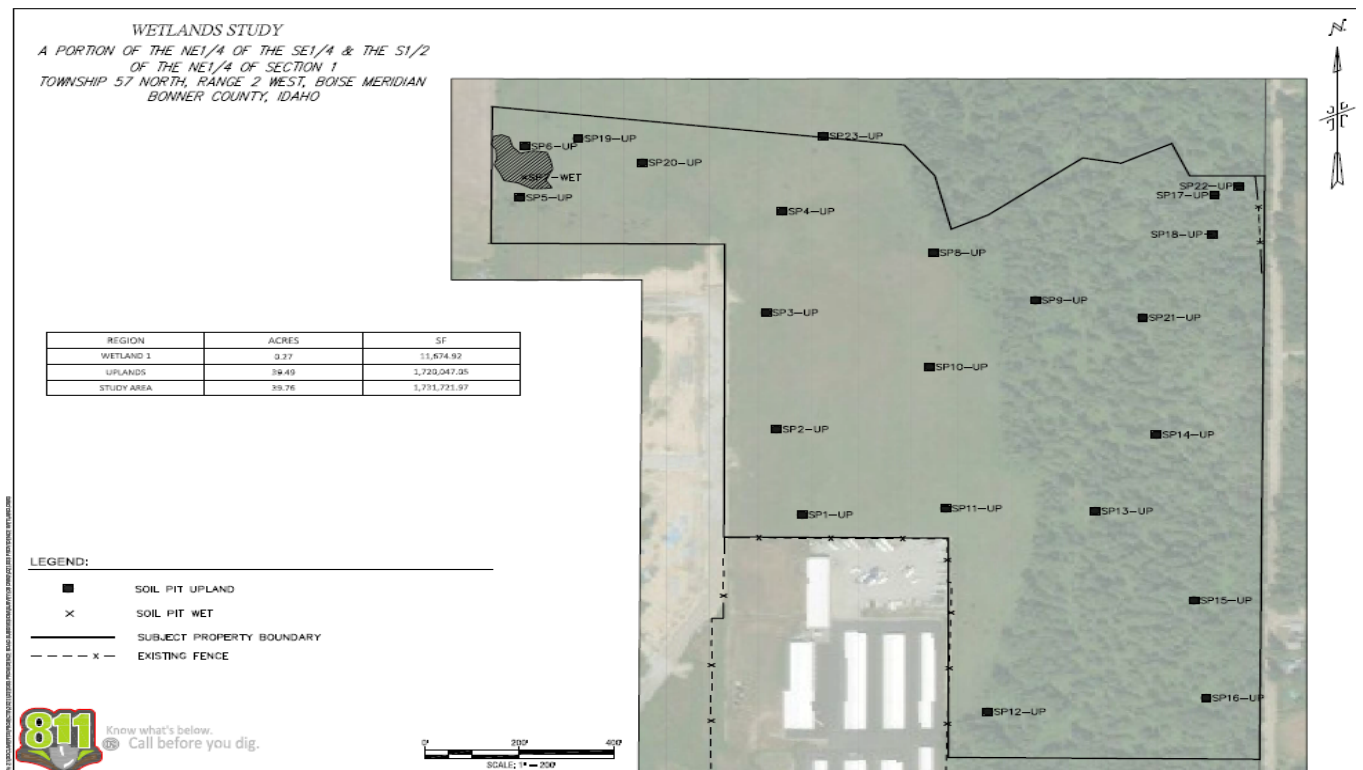


Figure 3: Aquatic Resources Delineation Map

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

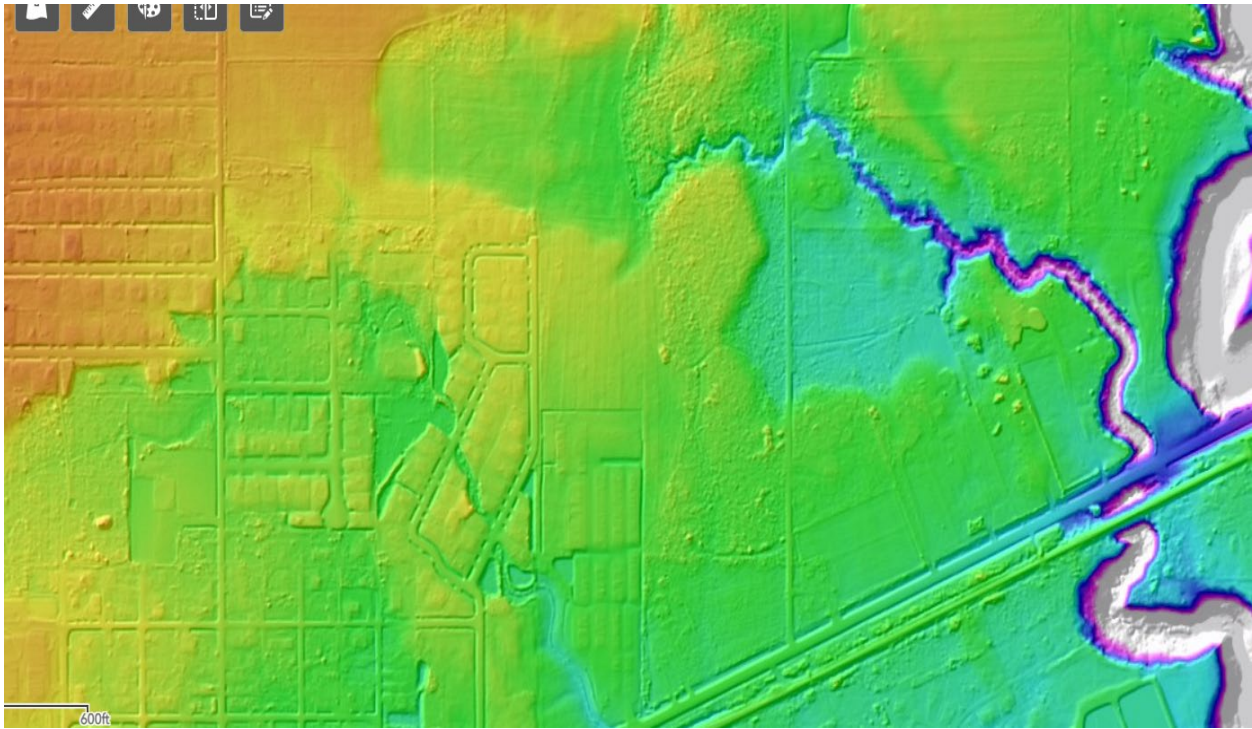


Figure 4: Project Area Lidar

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The wetland identified in Section 1.a. above and pictured in Figure 3 above (Aquatic Resources Delineation Map) has no surface connection to an (a)(1)-(a)(6) water and is itself not part of a larger wetland. A channel/swale with no observable ordinary high-water mark is located off property to the northeast with a raised culvert under Providence Road. According to the contractor on site, flags and stakes were placed to mark the northern property boundaries. Additionally, onsite pictures of these boundary markers/culvert were georeferenced on Google Earth (Providence Road KMZ) to outline where the northern property is in relation to the channel. This raised culvert already mentioned above and seen in photo 1 (images attachment) was observed during the Corps 5 October 2023 site visit and appears to be elevated in such a way that flows would not move from west to east across Providence Road except in extreme high water situations.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

There is no continuous surface connection to a relatively permanent water (RPW) or traditional navigable water (TNW) from the delineated wetland. The wetland identified in the delineation appears to be depressional and isolated by a man-made berm. Additionally, the wetland is not part of a larger wetland, and no other wetlands were observed on-site. This is supported by the aquatic resource delineation report and was confirmed by the Corps via an on-site inspection on 5 October 2023.

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

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

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.

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

- 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. 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.
- 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

⁸ 51 FR 41217, November 13, 1986.

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

- 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).

A site visit on 5 October 2023, confirmed the presence of the delineated 0.27 acres of Palustrine Emergent (PEM) wetland in the northwest corner of the property near sample point #07. The wetland is depressional with no hydrologic, continuous surface connection to a relatively permanent water (RPW) or TNW. Additionally, there is a man-made berm present on the west side of the wetland and a raised landscape to the east. The wetland is also not part of a larger wetland, and no other wetlands were recorded on-site as part of the aquatic resource delineation report or observed during the Corps site visit.

After review of the wetland delineation report, soil pit 8 seems to appear in a possible vegetation transitional zone. However, as confirmed by the consultants, the soil pit area was chosen because it was the lowest point in the landscape that had the greatest chance of being a wetland. After further review, hydrophytic vegetation was dominant, hydric soil indicators were not present (redox features were not prevalent), and there were no signs of hydrology. It is also noted that the elevation started increasing north/northwest of soil pit 8.

Additionally, soil pit 6 indicates both hydrophytic vegetation and hydric soils, with the absence of hydrology indicators during the dry season. The delineator dug a 62" soil pit where no water saturation was present, even after 24 hours of monitoring. However, hydrology indicators in accordance with the regional supplement for western mountains, valleys, and coast regions can't be assumed because a man-made berm is present 60 feet west of this soil pit (hydrologic manipulation) and is not within the zone of influence from any drainage ditch or subsurface drains.

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. Aquatic Resources Delineation Report, Providence Road LLC, March 22,2023
 - b. NHD, October 02, 2023
 - c. Lidar, July 18, 2023.

CENWW-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWW-2023-00164

- d. Antecedent-Precipitation-Tool, October 02, 2023
- e. USFWS National Wetlands Inventory Map, October 02, 2023
- f. Natural Resources Conservation Service Web Soil Survey, October 02, 2023.
- g. Google Earth/Digital Globe Aerials, October 02, 2023.
- h. Corps Site Visit, 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 additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.