



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
600 VESTAVIA PARKWAY, SUITE 203
VESATAVIA HILLS, AL 35216

North Branch
Regulatory Division

23 February 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 SAM-2023-00357-BAM 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.

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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 Mississippi 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).

ID	Latitude	Longitude	Class	Acres	LF	Geographic Authority
Pond	34.278301	-88.568275	POW	2.31		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 2.31 acres within a larger 10-acre parcel, latitude 34.278301, and longitude -88.568275 (in decimal degrees) at the center of the review area, Mooreville, Lee County, Mississippi. See included maps depicting the boundary of the review area.

All potentially jurisdictional aquatic resources on the remainder of the 10-acre parcel were previously reviewed under a preliminary jurisdictional determination (PJD) dated June 29, 2023.

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

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Nearest TNW is the Tennessee-Tombigbee Water Way, a constructed for interstate commerce waterway, 8 linear miles east of the review area.⁶

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

Flow path from the pond is connected to PFO wetland, then through 300 feet of ephemeral stream to an RPW, unnamed tributary, then roughly .3 miles to Bogeufala Creek then flows roughly 19 miles to Mill Creek, which flows 15 miles and connects to the Tennessee Tombigbee Waterway.

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.

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.

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.

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- 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”).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.
- 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.

⁹ 51 FR 41217, November 13, 1986.

- 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*.

Feature listed as “Pond”, is a 2.31-acre water-filled pit dug in uplands created to obtain fill material to be used for the adjacent roadway construction. Pursuant to the preamble to the Final 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the US. See preamble 328.3 Definitions (e), which states the Corps generally does not consider the following water to be waters of the U.S. : "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a))." The operation is abandoned; therefore, further evaluation is required to determine if the abandoned pit is a water of the U.S. It will be reviewed pursuant to paragraph (a)(3) of 33 CFR 328.3 or “other” waters because it does not meet criteria for (a)1 or (a)2 or (a)4-7. “Pond” does not support a link to interstate or foreign commerce. It is not known to support interstate or foreign commerce or known to be used by interstate or foreign travelers for recreation or other purposes. “Pond” does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, or used for industrial purposes by industries in interstate commerce. For all of these reasons, “Pond” does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a) and is not jurisdictional under the Clean Water Act.

- 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. The USACE staff conducted a site visit on June 2, 2023.

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- b. Data used to make determinations included on-site inspection of soils, hydrology and vegetation utilizing the 1987 USACE Wetland Delineation manual, USGS topographic maps, and recent aeriels, and review of the applicant's wetland data sheets.
- c. National Regulatory Viewer (NRV) May-12-29, 2023, LIDAR.
- d. NRV, NHD May 12-28, 2023.
- e. National Wetlands Inventory via NRV May 12-28, 2023.
- f. Waters of the U.S. Assessment Report, Prepared by James Hall of Engineering Service on April 24, 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.

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Project Location Map
Mooreville, Lee County, Mississippi.
34.278274°, -88.568320°

Legend



23-357 project location





AJD Review Area - Pond - 2.34 acres non-jurisdictional



DESIGNED BY: JAH
 DRAWN BY: HMM
 DATE: 04.10.23
 E.S-PROJ. # 23-E-8126

REVISIONS

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2	
3	
4	
5	
6	
7	

EXHIBIT 1

PROJECT:
C Store/Truck Stop
Mooreville, MS
 OWNER:
Majhail, LLC

SHEET NO.