



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, AK DISTRICT
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CEPOA-RD

26 June 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 POA-2017-00511, 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*.

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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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 decision, the Amended 2023 Rule is not applicable in this state 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. Pond 1 (2 acres), 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)
- e. 2008 Rapanos Guidance: List of Resources
- f. 2003 SWANCC Guidance: List of Resources

3. REVIEW AREA. The review area is a 3.3-acre area that includes a 2-acre pond. The area where the pond currently exists was once gravel mined for nearby infrastructure. The review area is located at Section 33, Township 14 N., Range 2 W., Seward Meridian; at Latitude 61.25958° N., Longitude 149.65124° W.; on Joint Base Elmendorf-Richardson (JBER), Alaska 99505.

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The review area is southeast of a runway located on JBER (Bryant Army Airfield). The purpose for the jurisdictional determination is to help plan for an ongoing area hazard mitigation plan, to help mitigate for the potential of bird strike collisions with airplanes. A previous Approved Jurisdictional Determination (AJD) was issued on December 12, 2017, stating the review area contains a non-jurisdictional pond. During the 2017 determination, the area where the pond is currently located was determined to be a wetland, as the ordinary high-water mark has risen over the last two years. The previous AJD was coordinated with EPA before making a final determination. Though water levels have increased since then, no other site conditions have changed since 2017.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Cook Inlet (6.75 miles away), which is a terrestrial sea.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS There are no surface connections to or from the lake that would suggest there is a flow path to the nearest TNW.
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 – The pond in the review area has not been subject to current or past interstate commerce nor does it have the potential for future interstate commerce use. Additionally, the pond is not influenced by the ebb and flow of the tide.
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.

N/A

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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8. 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

9. 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.

Pond 1 (2 acres) is not adjacent to or abutting a jurisdictional water and therefore would not be considered jurisdictional. The nearest jurisdictional water, Gunnery Creek (a tributary) to Ship Creek, is about 0.3 miles east of the review area and is separated due to changes in topography. Pond 1 is in a manmade excavated depression. No outlet culverts are present to facilitate a continuous surface connection to the tributary, as observed in the field.

⁹ 51 FR 41217, November 13, 1986.

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Given the lack of reasonable proximity or hydrologic connection, the review pond is unlikely to have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of Ship Creek or Cook Inlet.

- 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*.

Pond 1 (2 acres) is a non-navigable intrastate water that does not have a nexus to interstate or foreign commerce. It is located on restricted military property and is not accessible to the general public. Pond 1 is not currently being used for commercial navigation, has not historically been used for commercial navigation, nor is susceptible to being used in the future for commercial navigation, including commercial water-borne recreation as it contains no open water. The pond is not adjacent to or abutting a jurisdictional water and therefore would not be considered jurisdictional. Hydrologic connectivity to jurisdictional waters is broken by uplands and lack culverts to support a continuous surface or subsurface connection. Given the absence of reasonable proximity or hydrologic connection to a jurisdictional water and the lack of a nexus to interstate or foreign commerce, the review waterbody is considered an isolated water. This pond would only have been jurisdictional based on the Migratory Bird Rule.

- 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).

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The aquatic resource located in the review area is a pond. A Corps site visit on June 2, 2024, confirmed that there are no visible inlets or outlets to the pond that would qualify as a surface connection. Additionally, there are no wetlands adjacent to the pond that would contain a surface connection or connect the water body to a TNW. The 2017 delineation report, 2023 delineation report, and visible observations from the site visit, confirm the absence of wetlands and the topography would not allow for a hydrologic connection.

10. 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. Natural Resource Soil Conservation. 2024. Soil Survey web map. U.S. Department of Interior, Department of Agriculture. <https://websoilsurvey.sc.egov.usda.gov/>. Accessed: June 17, 2024.
 - b. State of Alaska Department of Military and Veterans Affairs, CFMO Environmental. October 6, 2023. Wetland Delineation Data Sheet and Photographs.
 - c. State of Alaska Division of Geological & Geophysical Surveys. 2018. Anchorage sfm, Glenn Hwy DSM HS and Glenn Hwy Ortho RGB. <https://elevation.alaska.gov/> . Access: June 24, 2024.
 - d. U.S. Army Corps of Engineers. June 17, 2024. MEMORANDUM FOR THE RECORD. SUBJECT: POA-2017-00511, Corps Wetland Delineation Site Verification
 - e. U.S. Army Corps of Engineers. December 12, 2017. POA-2017-00511 Approved Jurisdictional Determination.
 - f. U.S. Air Force. October 6, 2017. Bryant Army Airfield-Bash/Wez Area Hazard Mitigation Project, Preliminary Jurisdictional Determination Report.
 - g. U.S. Fish and Wildlife Service. 2024. National Wetlands Inventory website. U.S. Department of Interior, Fish and Wildlife Service, Washington, D.C. <http://www.fws.gov/wetlands/>. Accessed: June 17, 2024.

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11. OTHER SUPPORTING INFORMATION. Desktop resources show the review area does not contain a connection from the pond to a jurisdictional waterbody. This was observed in 2017 during a delineation, two site visits conducted by the Corps in 2017, a delineation conducted in 2024, and by a site visit conducted by the Corps in 2024. The area has since filled with water after a few seasons of rain and snow and nowhere for the water to drain to. All sides of the pond have steep topography and contain vegetation that does not indicate wetlands are present.

12. 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.