



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, VICKSBURG DISTRICT  
4155 EAST CLAY STREET  
VICKSBURG, MISSISSIPPI 39183

CEMVK-RD

February 24, 2025

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) ,<sup>1</sup> MVK-2020-876

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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 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.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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## 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

Name	Acres/Ft	Lat	Long
MVK-2020-876 Pond 4 (2024)	1.2	34.9099796	-90.00782 Non-WOTUS
MVK-2020-876 S9	410'	34.91058	-90.00722 Non-WOTUS
MVK-2020-876 S3	36'	34.90955	-90.00793 Non-WOTUS
MVK-2020-876 Wetland 10	0.13	34.91076	-90.00873 Non-WOTUS

## 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 subject project is located west of Highway 51 and North of Star landing Road in Desoto County, MS and is associated with an ongoing development of the Desoto County Agri-Education Center and is located at Coordinates 90.0075401°W 34.9100914°N

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Coldwater River
  
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS:  
MVK-2020-8765 S3 flows North for 36' where it enters MVK-2020-876 Pond 4. It then continues north out of MVK-2020-876 Pond 4 through MVK-2020-876 S9 for 410' before exiting the property. Once offsite it continues through a Non-RPW feature (MVK-2020-876 S9) for 930' where it converges with an unnamed tributary of Hurricane Creek. It continues down the unnamed tributary of Hurricane Creek for 4.9 KM before converging with Hurricane Creek where it then continues for 17.2 KM before entering the Coldwater River in Arkabutla Lake. It continues from Arkabutla Lake down the Coldwater River for 80.8 KM before reaching the upper limit of Section 10 authority on the Coldwater River.

MVK-2020-876 Wetland 10 (0.14 acre) is isolated in nature (completely surrounded by uplands) and does not drain offsite so there is no flow route to describe outside of creating a theoretical flow route.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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. 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

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<sup>5</sup> 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.

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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):
- b. Interstate Waters (a)(2):
- c. Other Waters (a)(3):
- d. Impoundments (a)(4):
- e. Tributaries (a)(5):
- f. The territorial seas (a)(6):
- g. Adjacent wetlands (a)(7):

## 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”).<sup>6</sup> 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. MVK-2020-876 Pond 4 (0.14 acres) has been determined to be non-jurisdictional under the Preamble to the 1986 Regulations as it was created in uplands for stock watering. It has no WOTUS inputs or outputs. In addition to this determination, the subject pond was previously determined to be non-jurisdictional under a previously issued JD on (2/12/2021).
- 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.

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<sup>6</sup> 51 FR 41217, November 13, 1986.

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- 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.
- 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.
- 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 or enter rationale/discussion here.]
- 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).

MVK-2020-876 S3 (36’) and MVK-2020-876 S9 (410”) are both Non-Relatively Permanent features that exhibit flow only in response to rainfall events and do not satisfy the Relatively Permanent Standard and as such are Non-Jurisdictional.

MVK-2020-876 Wetland 10 (0.14 acres) was historically a larger wetland, however previously authorized development and permitted discharges associated with Standard Permit (11659702) Nationwide Permit (12644088) issued surrounding this feature have rendered it isolated in nature, (completely surrounded by uplands) with no continuous Surface Connection (CSC) to any WOTUS. In as much this feature has been determined to be non-jurisdictional.

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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. Office determination based on consultant delineation, (Headwaters Inc).
  - b. GIS Data ( Locally created GIS Database consisting of multiple years of AJD's/PJD's)
  - c. Previous JD (MVK-2020-876 (2/12/2021))
  - d. Aerial Photos (Multiple years)
  - e. NHD (National Hydrography Dataset)
  - f. LiDAR (Light imaging, detection, and ranging)
  - g. NWI (National Wetland Inventory)
  - h. ORM Data (OMBIL Regulatory Module)
  - i. Google Earth Pro (multiple years of aerial photos)
  - j. USGS Quadrangle Maps

10. OTHER SUPPORTING INFORMATION.

This site was initially proposed for development of the Desoto County Agri-Center in 2020. An AJD was issued in 2021 and a permit was subsequently issued in October 2021 for the proposed development. The permit authorized discharges into WOTUS, including the subject MVK-2020-876 Wetland 10 that is currently being coordinated. Following the issuance of the Standard Permit, a NW14 was issued in November 2024 for impacts to MVK-2020-876 Wetland 10 (All of the impacts were proposed and mitigated under the initial Standard Permit). Following the construction of the permitted development, a portion of the subject Wetland (0.14 acre) has been rendered isolated and under the current guidance is considered non-jurisdictional since it has no continuous surface connection (CSC) to any WOTUS.

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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.