



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
2000 FORT POINT ROAD
GALVESTON, TEXAS 77550

CESWG-RD-C

17 September 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 SWG-2006-01706, 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas 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. Wetland Area 1, 0.162 acre, non-jurisdictional, non-adjacent, 29.046553, -95.159258
 - ii. Wetland Area 2, 0.089 acre, jurisdictional, adjacent, 29.047191, -95.158563
 - iii. Wetland Area 3, 0.007 acre, non-jurisdictional, non-adjacent, 29.047434, -95.158231

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 is 4.69 acres located at 10202 Bluewater Highway, near Freeport, Brazoria County, Texas. The coordinates for the tract are 29.046303°, -95.159276°.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Christmas Bay⁶

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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland Area 2 flows into a roadside ditch for approximately 84 linear feet, then through an approximate 50-foot culvert under Bluewater Highway, then for approximately 630 linear feet through a non-tidal wetland abutting Christmas Bay to the tidal portion of the wetland abutting Christmas Bay, a 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
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

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.

- e. Tributaries (a)(5): N/A.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland Area 2 abuts a roadside ditch which flows approximately 84 linear feet to an approximate 50-foot culvert continuing under Bluewater Highway to tidal wetlands abutting Christmas Bay; therefore, Wetland Area 2 has a continuous surface connection to Christmas Bay, a TNW. Under the pre-2015 regime and consistent with the *Rapanos* plurality and *Sackett*, adjacent wetlands are jurisdictional when they have a continuous surface water connection with traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments, or relatively permanent tributaries. Although the roadside ditch is not a relatively permanent water, it does contain an ordinary high water mark very low in the profile to serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a traditional navigable waterway, Christmas Bay. Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters, including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water as explained in Regulatory Guidance Memorandum on SWG-2023-00284 and NAP-2023-01223. Therefore, Wetland Area 2 meets the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and is a water of the United States.

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

⁹ 51 FR 41217, November 13, 1986.

- 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
- 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).

Based on our site visit and desk review, Wetland Area 1 and Wetland Area 3 do not have any known continuous surface connection to Christmas Bay, the Gulf of Mexico, or any other water of the United States. There are no swales, erosional features, ditches, or culverts that would potentially serve as surface connections. No more than overland sheet flow would exit the wetlands. Therefore, Wetland Area 1 and Wetland Area 3 do not meet the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and are not waters of the United States.

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. July 6, 2023, Site Visit
 - b. Google Earth 2015, 2017, 2018, 2022, and 2023
 - c. Christmas Point, Texas Quadrangle 1965 (1977 edition).
 - d. Brazoria County National Wetland Inventory
 - e. Wetland Delineation Report dated August 29, 2022, submitted by consultant.
 - f. Texas Water Development Board 2018 Light Detection and Ranging (LiDAR) elevation data.
 - g. National Hurricane Center Tropical Cyclone Report: Hurricane Nicholas dated March 29, 2022
 - h. Desk Reviews July 5, 2023, and February 23, 2024
10. OTHER SUPPORTING INFORMATION. A site visit was conducted on July 6, 2023. All three wetlands were observed during the site visit and the Corps concurred with the wetland boundaries delineated by the consultant. The 2015, 2017, and 2018 Google Earth aerials show wetland signatures between Wetland Area 2 and Wetland Area 3. The 2022 Google Earth aerial shows that sand has been deposited between those two wetlands thus filling in any wetlands between Wetland Area 2 and Wetland Area 3. Hurricane Nicholas occurred on September 14, 2021. According to Figure 6 in the report on Hurricane Nicholas, the Brazoria County coast had inundation of 3 to 6 feet which would account for the sand deposition shown in the 2022 Google Earth aerial. The sandy area between the wetlands has mostly re-vegetated as shown on the 2023 Google Earth aerial. The roadside ditch was extended to the culvert that is under Bluewater Highway between 2018 and 2022 as shown on those aerials. The Christmas Point, Texas 1965 (1977 edition) Quadrangle shows the project area on the Gulf of Mexico side of Bluewater Highway. The USFWS NWI shows a wetland polygon on the project site: M2USP – Marine Intertidal Unconsolidated Shore Irregularly Flooded. The NWI polygon is on the Gulf side of the dunes. The LiDAR contour map shows an 8 to 10-foot berm between Wetland Areas 1 and 2 and the Gulf of Mexico preventing sand deposition in those areas from storms as seen in 2022 Google Earth aerial. The LiDAR Digital

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Elevation Map (DEM) shows the roadside ditch continuing under Bluewater Highway and connecting to the tidal wetlands abutting Christmas Bay.

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.

SWG-2006-01706

Delineation Map
 Review Area (Red Polygon) 4.886 acres
 Center Coordinates 29.046303, -95.159276
 Yellow Pins are Consultant Datapoints
 Google Earth January 2022

