



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

CESWG-RD-C

27 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 SWG-2007-01461²

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 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. Wetland 1, 79.74-acres; [REDACTED]; non-jurisdictional/non-adjacent

b. 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)

2. REVIEW AREA. A 95.88-acre tract located directly north of [REDACTED]

[REDACTED] near Beaumont, Orange County, Texas.

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

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

5. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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.

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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

6. 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
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

7. 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

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.

⁸ 51 FR 41217, November 13, 1986.

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
- 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).
One palustrine forested wetland (PFO) was identified in the review area; Wetland 1 = 79.74-acre of the 95.88-acre tract. Google Earth Aerial Imagery shows that the tract has had the levee present since at least 1989. It has undergone flooding events as recently as 2017 but has largely remained the same. The most recent topographic map as well as the DEM shows the levee approximately 10 feet higher than the wetlands contained within. There are no visible breaks in the levee connecting the wetlands to the Neches River but a small culvert in the southeast corner shows a connection to a manmade ditch. During the desktop review the manmade ditch appeared to connect Wetland 1 to Bairds Bayou but

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the 15 February 2024 site visit determined that there are several breaks in the ditch and it does not serve as a continuous surface connect.

A site visit was conducted on 16 November 2023 to determine the absence/presence of wetland(s) within the project area. A follow-up site visit was conducted on 15 February 2024 to explore the potential connection between Wetland 1 and Baird Bayou via the man-made ditch observed in the DEM. There was a culvert under a driveway immediately east of the property that was observed connecting Wetland 1 to the man-made ditch. The length of the man-made ditch was walked to determine if it served as a continuous surface connection to Baird Bayou. The two subsequent driveways did not have culverts that and approximately 20 feet before the ditch can connect to Bairds Bayou there is an elevation increase of a few feet that ends the drainage ditch. The man-made ditch does not provide a continuous surface connection from Wetland 1 to Bairds Bayou due to the lack of culverted driveways as well and the ditch ending before a connection to Bairds Bayou can be established.

Wetland 1 does not share a continuous surface connection with the Neches River, the nearest TNW, located along the norther boundary of the project site, nor any other waters of the United States via culvert, pipe, ditch, swale, or erosional feature. No more than overland sheet flow would exit the wetlands. Therefore, Wetland 1 does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

8. 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. Desk Review: 09 November 2023
 - b. Site Visit: 16 November 2023 & 15 February 2024
 - c. Aerial Photos: Google Earth Aerial Imagery (1938-2022)
 - d. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); Accessed 09 November 2023
 - e. United State Department of Agriculture (USDA), Natural Resource Conservation Service (NRCS), Soil Survey Geographic Database (SSURGO); Accessed 09 November 2023

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- f. United States Geological Survey (USGS) Topographic (Topo) map: Beaumont East quad 2022 1:24,000. Accessed 09 November 2023
- g. United States Geological Survey (USGS) 2016 FEMA LiDAR: Neches Basin, TX. National Oceanic and Atmospheric Administration (NOAA) Data Access Viewer; Accessed 09 November 2023


9. OTHER SUPPORTING INFORMATION. N/A

10. 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.



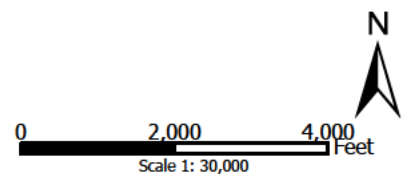
SWG-2007-01461 Vicinity Map
 Approximate 95.88-acre Site

Legend

 Review Area

Prepared 17 January 2024

Coordinate System
 GCS North American 1983







SWG-2007-01461 Delineation

([REDACTED])

Legend

-  Review Area ~ 95.88 acres
-  Wetland 1 ~ 79.74 acres

Prepared 17 January 2024

Coordinate System
GCS North American 1983

