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

CESWG-RD-C 15 November 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-2015-00235[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 1, 1.41 acres, 29.901493°, -95.821088°, non-jurisdictional/non-adjacent

        ii. Wetland 2, 0.01 acres, 29.900481°, -95.820141°, non-jurisdictional/non-adjacent

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 property is approximately 8.1 acres located in Katy, Harris County, Texas. The center coordinates for the site are Latitude 29.901171 North, Longitude -95.821061 West.

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

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

6. SECTION 10 JURISDICTIONAL WATERS[6]: 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] 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

    e. Tributaries (a)(5): N/A

    f. The territorial seas (a)(6): N/A

    g. Adjacent wetlands (a)(7): N/A

[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.

[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. 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 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.

Swale from Wetland 2 to roadside ditch-approximately 71.57 feet. Eastern swale from Wetland 1 to linear feature, approximately 112.7 feet. Western swale from Wetland 1 to linear feature, approximately 91.4 feet. The swales are only identified in the LIDAR, not entirely sure they are present.

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

[8] 51 FR 41217, November 13, 1986.

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Based on our desk review, Wetland 1 (1.41 acre) and Wetland 2 (0.01 acre) do not have a continuous surface connection to Bear Creek, or any other water of the United States. Wetland 1 has two swales that flow from the south of the wetland into a linear feature that is present on the DEM and only faintly seen on aerial photos. This feature is likely a utility right of way. One of these swales may connect Wetland 1 to Wetland 2 as seen on the LiDAR imagery. Wetland 2 abuts a swale that may flow southeast out of the wetland into a roadside ditch. Swales are generally considered to be non-jurisdictional. The flow path from the swale to a relatively permanent section of Bear Creek is as follows: The swale is not a relatively permanent water, it **does not** contain an ordinary high-water mark and/or bed and bank, however, it may flow 71.57 feet southeast into a non-relatively permanent roadside ditch. The roadside ditch flows 65 feet south then converges into a non-relatively permanent drainage feature. Once in this feature, the water could flow east then south 1,756.46 feet into a series of constructed lakes and then flows 1,160.34 feet out of the lakes and flows 2,673.35 feet into another non-relatively permanent ditch to the headwater of Bear Creek. This section of Bear Creek is not relatively permanent. After approximately 2,655.19 feet Bear Creek flows under Katy Hockley Cut Off Road and becomes relatively permanent. The total approximate distance for the flow path of a series of swales and roadside ditches and drainage features of Wetland 2 to reach a relative permanent water is approximately 1.4 miles. Bear Creek then flows for approximately 16.7 river miles until it flows into Langham Creek. Langham Creek flows south for 1.0 river mile then joins South Mayde Creek. After 2.21 river miles, South Mayde Creek flows into Buffalo Bayou. Buffalo Bayou then flows approximately 18.8 river miles before it becomes a traditional navigable waterway. The flow path for Wetland 1 is through the swale seen on LiDAR imagery that may connect Wetland 1 to Wetland 2. Then the flow path is the same as Wetland 2. Although the swales and roadside ditch are not relatively permanent waters, they may serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water, Bear Creek. 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. However, the approximate distance for the flow path to the relatively permanent section of Bear Creek is 1.4 river miles and flows approximately 38.71 river miles to a traditional navigable waterway. This distance is too far to be considered a continuous surface connection. As stated in Regulatory Guidance Memo NWK-2022-00809, weak indicators of flow frequency (e.g. bed and bank and other indicators of a OHWM) and duration as well as long distances and chain of features between the wetlands and the relatively permanent water can be too extended and tenuous to constitute a continuous surface connection. Considering these factors together, and consistent with Sackett, the series of non-relatively permanent features, culverts, and the length do not meet the continuous surface connection requirement for Wetland 2. Because the length of the potential connections for Wetland 1 is even longer than that for Wetland 2, Wetland 1 also does not have a continuous surface connection with a downstream RPW. Therefore, Wetland 1 and Wetland 2 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 subject to Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into Wetland 1 and Wetland 2 does not require a Department of the Army permit.

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) Aerial Photographs*: 31 December 1943, 31 January 2004, June 2, 2023*
b) United States Geological Survey (USGS) Topographic Maps*: Swanson, Texas 1916 1:24, 000, Warren Lake, Tx 1971 1:24, 000, Warren Lake, Tx 2022 1:24, 000*
c) United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map Accessed 13 August 2024
d) US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map Accessed 13 August 2023
e) Texas Water Development Board Lidar 2018 DEM Accessed 8 August 2024
f) Delineation Maps from AJD issued on 28 September 2015

10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on SWG-2023-00284, NAP-2023-01223, and NWK-2022-00809.

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.