



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

CESWG-RD-C

21 January 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),¹ SWG-2017-00473

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 Texas due to litigation.

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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 A, 29.457038°, -95.172978°, approx. 14.9 acres, non-adjacent and 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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Wetland A is located approximately 0.2 miles north of the intersection of Muldoon Parkway and Maple Leaf Drive in League City, Galveston County, Texas. The center coordinates are 29.457038°, -95.172978°. The wetland was previously evaluated in an AJD completed in 2018. They obtained a permit (which is still active) to impact a portion of Wetland A (with mitigation) and the remaining northwestern portion of Wetland A was to be avoided. When the applicant applied for a reverification of Wetland A in this AJD request, we told them that we will only review the portion of the wetland that was to be avoided and not the portion that was covered in the permit where they agreed to mitigation for impacts. This avoided portion of Wetland A is the review area presented in this MFR. Wetland A does continue southeast from the review area into the depression area and is the permitted portion of the wetland. Maple Leaf Drive was constructed through the avoided portion of Wetland A. This work was completed under an additional permit.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁵ Dickinson Bayou is listed on the Galveston District Navigable Waters List

⁵ 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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Water from Wetland A flows north through an enclosed stormwater sewer system under Seven Hls Lane for approximately 622 linear feet to the open stormwater sewer ditch in the median of Muldoon Parkway, an RPW, then flows approximately 1,610 linear feet relatively west to the generally north-south open stormwater sewer ditch, an RPW, for approximately 4,674 linear feet to the Dickinson Bayou Bypass Channel, an RPW, then approximately 1.3 river miles east to Cedar Creek, an RPW, then approximately 1.29 river miles generally south to Dickinson Bayou, a TNW.
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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

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.

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.

- 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

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. 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

⁸ 51 FR 41217, November 13, 1986.

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 desk review and the consultant’s coordination with the project engineer, we determined Wetland A does not have a continuous surface connection to the Dickinson Bayou Bypass Channel, the nearest downstream RPW, or any other water of the United States. Wetland A extends to the southeast of the review area to the east end of the depression. Water flows from the review area portion of Wetland A southeast through a series of box culverts under Muldoon Parkway, then into the depression. There is a culvert present at east end of the depression that was not present on Google Earth photos and was not identified in the previous AJD submission. This culvert drains water from Wetland A into the stormwater sewer system underneath Seven Hls Ln. This underground stormwater sewer system extends 622 feet northward underneath Seven Hls Lane to Muldoon Parkway. The stormwater sewer system discharges to a stormwater drainage ditch, an RPW, located in the median of Muldoon Parkway. We determined that the stormwater drainage ditch in the median of Muldoon Parkway is approximately 1,610 linear feet to the stormwater ditch that flows south to the Dickinson Bayou Bypass Channel, an RPW. The generally north-south stormwater ditch is approximately 4,674 linear feet. Therefore, the total distance from the culvert to the closest RPW is 622 feet. Once the stormwater drainage ditch converges with the Dickinson Bayou Bypass Channel, water flows east 1.3 river miles then flows into Cedar Creek, an RPW. Cedar Creek then flows south 1.29 river miles to converge with Dickinson Bayou, a Traditional Navigable Water. According to joint coordination memo NWK-2024-00392, the number of connections, the types of connections, the indicators of flow, and length of the connection can all inform whether the continuous surface connection requirement is met. As the length of the connection increases, even with stronger indicators of flow (including actual flow, indicators of ordinary high-water mark, etc.), the length of the connection can become no longer physically close (see *Sackett*, 598 U.S. at 667, referenced above), such that the discrete features are no longer providing a continuous physical connection. After consideration of the length of connection, the 622-foot length of connection between Wetland A and the closest RPW, the stormwater sewer system ditch in the medial of Muldoon Road, is not physically close enough to meet the

continuous surface connection requirement. Thus, Wetland A does not have a continuous surface connection to the downstream relatively permanent water and TNW and, consistent with *Sackett*, is not “adjacent.” Wetland A may extend to the west based on lidar and aerial photography, however that area is private property and Hydrex was unable to sample that area to confirm a wetland. However, even if Wetland A extends west and intersects the north-south ditch, a non-RPW, immediately west of the delineated Wetland A, water would have to flow approximately 6,741 linear feet through a series of ditches to reach the nearest RPW, the Dickinson Bayou Bypass Channel. Again, as stated earlier in paragraph 8.f., Wetland A is not physically close enough to provide a continuous surface connection.

Therefore, there is no continuous surface connection to a requisite water.

Therefore, Wetland A does 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.

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 1968, 1 Jan 2004, 31 December 2008, 1 December 2019, 2 October 2020, 27 June 2023
 - b. United States Geological Survey (USGS) Topographic Maps: 1929 *Algoa, Texas 1:24000*, 1956 *Algoa, Texas 1:24000*, 2022 *Algoa, Texas 1:24000*
 - c. United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map Accessed 19 November 2024
 - d. US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map Accessed 19 November 2024
 - e. Texas Water Development Board Lidar 2018 DEM Accessed 19 November 2024
 - f. Wetland Delineation Report submitted by Hydrex Environmental on 4 November 2024
 - g. SWG-2017-00473 NWP from 2021 and 2022
 - h. SWG-2017-00473 AJD completed February 21, 2018
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWK-2024-00392
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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.