



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),<sup>1</sup> SWG-2020-00025<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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 A, 0.01-acre; [REDACTED]; non-jurisdictional/non-adjacent
  - ii. Wetland B, 0.05-acre; [REDACTED]; non-jurisdictional/non-adjacent
  - iii. Wetland C, 0.05-acre, [REDACTED]; non-jurisdictional/non-adjacent
  - iv. Wetland D, 0.17-acre, [REDACTED]; non-jurisdictional/non-adjacent
  - v. Wetland E, 0.09-acre, [REDACTED]; non-jurisdictional/non-adjacent
  - vi. Wetland F, 0.01-acre, [REDACTED]; non-jurisdictional/non-adjacent
  - vii. Ditch 1, 248 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
  - viii. Ditch 2, 261 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
  - ix. Ditch 3, 137 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
  - x. Ditch 4, 202 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
  - xi. Ditch 5, 366 linear feet, [REDACTED]; non-jurisdictional/non-adjacent

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- xii. Ditch 6, 68 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xiii. Ditch 7, 499 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xiv. Ditch 8, 85 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xv. Ditch 9, 361 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xvi. Ditch 10, 328 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xvii. Ditch 11, 657 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xviii. Ditch 12, 867 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xix. Ditch 13, 287 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xx. Ditch 14, 878 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xxi. Ditch 15, 9 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xxii. Ditch 16, 139 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xxiii. Ditch 17, 102 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xxiv. Ditch 18, 105 linear feet, [REDACTED]; non-jurisdictional/non-adjacent
- xxv. Stream A, RPW, 392.05 linear feet, [REDACTED]; jurisdictional

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- xxvi. Boggy Bayou, RPW, 352.91 linear feet, [REDACTED]; 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. Approximate 109.47-acre site located along the [REDACTED]

[REDACTED] in Pasadena, Harris County, Texas.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Buffalo Bayou
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Stream A runs approximately 1.7 miles north of the review area and flows directly into Buffalo Bayou, a TNW.
6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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

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<sup>6</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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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>7</sup> 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): 392.05-linear feet of Stream A occur within the review area. Stream A is a relatively permanent water (RPW) that passes under Highway 225/Pasadena Freeway. Following Stream A north it is shown to have connectivity with Buffalo Bayou, a Traditionally Navigable Water (TNW).

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

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<sup>7</sup> 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.

to as “preamble waters”).<sup>8</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. 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.

The 18 man-made roadway ditches (Ditch 1 thru 18) totaling approximately 5,599-linear feet were dug entirely in uplands to drain uplands and does connect to a jurisdictional water. There are no culverts, pipes, or erosional features that connect these man-made ditches to any nearby RPW or TNW.

- 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).

Six PEM wetlands were observed within the review area, Wetland A, Wetland B,

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<sup>8</sup> 51 FR 41217, November 13, 1986.

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Wetland C, Wetland D, Wetland E, Wetland F totaling approximately 0.38 acres. These wetlands are considered non-adjacent wetlands as they do not share a continuous surface connection with a Water of The United States (WOTUS) thru culverts, pipes, ditches, or swales. Signatures for these wetlands are first visible in the 2004 Google Earth Imagery. They continue to be intermittently visible all the way to present day. The six wetlands identified were not identifiable on the USGS topographic map nor the DEM. Likewise, none of the desktop resources reviewed showed a visible connection between the wetlands and any other aquatic resource. No more than overland sheet flow would exit the wetlands. Therefore, these wetlands 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.

352.91-linear feet of Boggy Bayou, RPW, occurs in the eastern portion of the review area. From 1944 to 1953 Boggy Bayou is shown to connect from the Houston Ship Channel north of the property to a large pond and then running south through the review area. Boggy Bayou north of the review area and the pond was largely filled in by 1989. Present day imagery, topographic maps, and the DEM shows that Boggy Bayou runs north into the refinery but does not show it exiting the area. Harris County relinquished their rights to maintain and/or operate this northern segment of the channel to the current owner Deer Park Refining L.P. Imagery to the south of the review area from 1953 to present shows Boggy Bayou running 2.25 miles south before ending at Red Bluff Road. Neither the DEM nor the topographic map show a connection from Boggy Bayou to the Houston Ship Channel, to any other TNW or RPW. All the resources concur that Boggy Bayou runs both north and south of the property but does not have a continuous surface connection with a Water of the United States via culverts, pipes, ditches, or swales.

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. Desk Review: 4 January 2024
  - b. Maps, plans, plots, and data submitted by or on behalf of the applicant:  
Submitted by [REDACTED] on October 28, 2019
  - c. Aerial Photos: Google Earth Aerial Imagery (1944-2023)
  - d. United States Geological Survey (USGS) 2018 Texas Water Development Board (TWDB) Lidar DEM: Coastal Texas. National Oceanic and Atmospheric Administration (NOAA) Data Access Viewer; Accessed 4 January 2024.

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- e. United States Geological Survey (USGS) Topographic (Topo) map: Pasadena, TX quad 2022 1:24,000; Accessed 4 January 2024.
- f. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); Accessed 4 January 2024.
- g. United State Department of Agriculture (USDA), Natural Resource Conservation Service (NRCS); Accessed 4 January 2024.

10. OTHER SUPPORTING INFORMATION. N/A

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.





**Legend**

- Review Area
- Wetland A ~ 0.01 acres
- Wetland B ~ 0.05 acres
- Wetland C ~ 0.05 acres
- Wetland D ~ 0.17 acres
- Wetland E ~ 0.09 acres
- Wetland F ~ 0.01 acres
- Boggy Bayou ~ 352.91 ft
- Stream A ~ 392.05 ft
- Ditches ~ 5599 ft

## SWG-2020-00025 Delineation Map Overview



Prepared  
04 January 2024

Coordinate System  
GCS North American 1983

