



**DEPARTMENT OF THE ARMY**  
U. S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT  
2000 FORT POINT ROAD  
GALVESTON, TEXAS 77553-1229

June 15, 2022

Compliance Branch

**SUBJECT: SWG-2020-00451**; Waterstone Development Group, LLC, Approved Jurisdictional Determination, Approximate 95-acre tract, Dayton, Liberty County, Texas

Mr. Charles Von Schmidt  
Waterstone Development Group, LLC  
185 Cedar Point Drive  
Livingston, Texas 77351

Dear Mr. Von Schmidt:

This letter is in reference to the June 9, 2020, request for a jurisdictional determination for an approximate 95-acre tract. The subject site is located approximately 1 mile north of the intersection of West Clayton Street and North Cleveland Street in Dayton, Liberty County, Texas.

Based on a desk review and a September 9, 2021 site visit, we determined the approximate 95-acre tract contains seven wetlands, (Wetland A – 7.16-acres, Wetland B – 0.09-acres, Wetland C – 0.23-acres, Wetland D – 1.19-acres, Wetland E – 0.54-acre, Wetland F – 0.1-acre and Wetland G – 0.52-acre), totaling approximately 9.83-acres, and two tributaries, (Stream 1 – 1618.5 linear feet and Stream 2 – 258.55 linear feet) totaling 1874.05 linear feet. At the request of Mr. Charles Von Schmidt, the Corps conducted an Approved Jurisdictional Determination (AJD) on the entire property.

The seven wetlands were identified using the Regional Supplement to the (1987) Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), which requires under normal circumstances, a predominance of hydrophytic vegetation, wetland soils, and sufficient hydrology at/or near the soil surface for adequate duration and frequency to support this aquatic ecosystem. However, these wetlands are isolated and lack any known nexus to interstate commerce, and as such are not waters of the United States subject to Section 404 of the Clean Water Act (Section 404). As such, a Department of the Army permit will not be required for the discharge of fill material on the subject site under Section 404. This approved determination is valid for 5 years from the date of this letter unless new information warrants a revision of the determination prior to the expiration date.

Streams 1 and 2 (Stream 1 – 1618.5 linear feet and Stream 2 – 258.55 Linear feet), are streams with a perennial flow regime, as evidence by the lack of vegetation within the channel and standing water observed during the September 9, 2021 site visit.

Streams 1 and 2 contribute flow directly to Linney Creek which flows into the Trinity River, a Traditionally Navigable Water (TNW). Based on its hydrological connection to the Trinity River and perennial flow regime, Streams 1 and 2 are Relatively Permanent Waters (RPW); and, therefore waters of the United States subject to Section 404 of the Clean Water Act. Therefore, a Department of the Army permit is required prior to the discharge of any dredged and/or fill material into the tributaries.

Areas of Federal Interests (federal projects, and/or work areas) may be located within this proposed project area. Any activities in these federal interest areas would also be subject to federal regulations under the authority of Section 14 of the Rivers and Harbors Act (aka Section 408). Section 408 makes it unlawful for anyone to alter in any manner, in whole or in part, any work (ship channel, flood control channels, seawalls, bulkhead, jetty, piers, etc.) built by the United States unless it is authorized by the Corps of Engineers (i.e., Navigation and Operations Division).

This determination has been conducted to identify the limits of the United States Army Corps of Engineers (USACE) CWA jurisdiction for the particular site identified in this request. However, this determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

This letter constitutes an AJD for your subject site. The AJD is valid for five years from the date of this letter unless new information warrants a revision prior to the expiration date. If you object to the AJD portion determination, you may request an administrative appeal under USACE regulations at 33 CFR Part 331. You will find an enclosed Notification of Appeals Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination, you must submit a completed RFA form to the Southwest Division Office at the following address:

Mr. Jamie Hyslop  
Administrative Appeals Review Officer (CESWD-PD-O)  
Southwest Division (CESWD-PR-O)  
U.S. Army Corps of Engineers  
1100 Commerce Street, Room 831  
Dallas, Texas 75242-1317  
Telephone: 469-216-8834  
Email: [Jamie.r.Hyslop@usace.army.mil](mailto:Jamie.r.Hyslop@usace.army.mil)

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete; that it meets the criteria for appeal under 33 CFR Part 331.5, and that it has

been received by the Division Office within 60 days of the date of the NAP; noting the letter date is considered day 1. It is not necessary to submit an RFA form to the Division office if you do not object to the determination in this letter.

If you have questions concerning this matter, please reference file number **SWG-2020-00451** and contact Mr. Lee Hardy at the letterhead address or by telephone at 409-766-3119. To assist us in improving our service to you, please complete the survey found at <https://regulatory.ops.usace.army.mil/customer-service-survey/> and/or, if you would prefer a hard copy of the survey form, please let us know, and one will be mailed to you.

Sincerely,

A handwritten signature in black ink that reads "Kara Vick". The signature is written in a cursive, flowing style.

Kara Vick  
Team Lead, Compliance Branch

Enclosures





Stream 2 – 258.55 linear feet  
Jurisdictional

Stream 1 – 1618.5 linear feet  
Jurisdictional

Wetland B – 0.09-acres  
Non-Jurisdictional

Wetland C – 0.23-acres  
Non-Jurisdictional

Wetland A – 7.16-acres  
Non-Jurisdictional

Wetland D – 1.19-acres  
Non-Jurisdictional

Wetland E – 0.54-acre  
Non-Jurisdictional

Wetland F – 0.1-acre  
Non-Jurisdictional

Wetland G – 0.52-acre  
Non-Jurisdictional



**APPROVED JURISDICTIONAL DETERMINATION FORM**  
**U.S. Army Corps of Engineers**

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

**SECTION I: BACKGROUND INFORMATION**

**A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 6/14/2022**

**B. DISTRICT OFFICE, FILE NAME, AND NUMBER: SWG 2020-00451**

**C. PROJECT LOCATION AND BACKGROUND INFORMATION:**

State: Texas County/parish/borough: Liberty County City: Dayton  
Center coordinates of site (lat/long in degree decimal format): Lat. 30.060882° N, Long. -94.886986° W.  
Universal Transverse Mercator: 15 R 318099.26 m E, 3327032.39 m N

Name of nearest waterbody: Linney Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Trinity River

Name of watershed or Hydrologic Unit Code (HUC): 12030203

- ☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.  
☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

**D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):**

- ☒ Office (Desk) Determination. Date: 6/14/2022  
☒ Field Determination. Date(s): 9/9/2021

**SECTION II: SUMMARY OF FINDINGS**

**A. RHA SECTION 10 DETERMINATION OF JURISDICTION.**

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

- ☐ Waters subject to the ebb and flow of the tide.  
☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.  
Explain: .

**B. CWA SECTION 404 DETERMINATION OF JURISDICTION.**

There **Are** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

**1. Waters of the U.S.**

**a. Indicate presence of waters of U.S. in review area (check all that apply):<sup>1</sup>**

- ☐ TNWs, including territorial seas  
☐ Wetlands adjacent to TNWs  
☒ Relatively permanent waters<sup>2</sup> (RPWs) that flow directly or indirectly into TNWs  
☐ Non-RPWs that flow directly or indirectly into TNWs  
☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs  
☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs  
☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs  
☐ Impoundments of jurisdictional waters  
☐ Isolated (interstate or intrastate) waters, including isolated wetlands

**b. Identify (estimate) size of waters of the U.S. in the review area:**

Non-wetland waters: 1874.05 linear feet: 30 width (ft) and/or acres.  
Wetlands: acres.

**c. Limits (boundaries) of jurisdiction based on: Established by OHWM.**

Elevation of established OHWM (if known): .

**2. Non-regulated waters/wetlands (check if applicable):<sup>3</sup>**

- ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.  
Explain:

<sup>1</sup> Boxes checked below shall be supported by completing the appropriate sections in Section III below.

<sup>2</sup> For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

<sup>3</sup> Supporting documentation is presented in Section III.F.

The approximate 95 acre site contains seven (7) wetlands comprising approximately 9.83 acres (Wetland A – 7.16-acres, Wetland B – 0.09-acres, Wetland C – 0.23-acres, Wetland D – 1.19-acres, Wetland E – 0.54-acre, Wetland F – 0.1-acre and Wetland G – 0.52-acre). The Trinity River, a traditional navigable water (TNW), is located approximately 4 miles east of the subject site.

Based on a review of multiple exhibits, a 9 September 2021 site visit, topographical maps, historical aerials, the U.S. Fish and Wildlife Service National Wetlands Inventory map, the U.S. Department of Agriculture National Cooperative Soil Survey (NCSS) map data, and the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), there appear to be no discrete surface hydrological connections between the subject wetlands and any water of the U.S. The exact boundaries (as standard with isolated wetlands) were not verified, but the feature polygons were examined via aerial photography and during the 9 September 2021 site visit to ensure that they are enclosed polygons surrounded by uplands.

The subject wetlands are all located outside the 1% annual flood risk zone (100-year floodplain) of any water of the U.S.

- The subject wetlands are neither currently used, nor have been used in the past, nor susceptible to use for interstate or foreign commerce
  - The subject wetlands are not subject to the ebb and flow of the daily tide.
  - The subject wetlands do not cross interstate or tribal boundaries.
- There are no indications that these "Isolated\*" wetlands would 1) affect or be used by any interstate or foreign travelers for recreational or other purposes, 2) affect or be used for fish or shellfish that could be taken and sold in interstate or foreign commerce, or 3) be involved in any direct current use or potential use for industrial purposes by industries in interstate commerce.
  - The subject wetlands are not impoundments of any water of the U.S.
  - The subject wetlands are not part of a surface tributary system to any water body.
  - The subject wetlands are not part of the territorial seas.
- The subject wetlands are not located "Adjacent\*\*" to waters of the U.S. (other than waters that are themselves wetlands).
- The subject wetlands are not located reasonably close to a waters of the US as to infer they are "ecologically adjacent"; for a water/wetland to be determined to "reasonably close" it must be in a geomorphic position such that an ecologic interconnectivity is beyond speculation or insubstantial for a known biologic species that requires both, the subject waters/wetlands and the nearest known waterbody (a known water of the U.S. other than an adjacent wetland) to fulfill spawning and/or life cycle requirements. There are no known species in this geo-region that requires both these waters/wetlands under review and the nearest known waterway to fulfill their life cycle requirements, therefore these waters/wetlands are ecologically isolated.

\* 33 CFR 330.2 (e): Isolated waters means those non-tidal waters of the U.S. that are:  
(1) Not part of a surface tributary system to interstate or navigable waters of the US; and  
(2) Not adjacent to such tributary waterbodies.

\*\* 33 CFR 328.3 (a)(7) adjacent wetlands: Federal regulations, specifically 33 CFR 328.3 c) defines "ADJACENT" as: bordering, contiguous or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

In summary, the subject wetlands have been identified per the Atlantic and Gulf Coastal Plain Region Supplement of the 1987 Corps of Engineers Wetland Delineation Manual. The subject wetlands are not inseparably bound to a water of the U.S., are not adjacent to any water of the U.S., and do not have a discrete hydrological surface connection to any water of the U.S. Therefore, it is the corps determination that the site wetlands are "isolated" with no known nexus to interstate commerce and as such would not be subject to federal jurisdiction under Section 404 of the Clean Water Act..

### **SECTION III: CWA ANALYSIS**

#### **A. TNWs AND WETLANDS ADJACENT TO TNWs**

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

**1. TNW**

Identify TNW: \_\_\_\_\_.

Summarize rationale supporting determination: \_\_\_\_\_.

**2. Wetland adjacent to TNW**

Summarize rationale supporting conclusion that wetland is “adjacent”: \_\_\_\_\_.

#### **B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):**

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are “relatively permanent waters” (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody<sup>4</sup> is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

**1. Characteristics of non-TNWs that flow directly or indirectly into TNW**

**(i) General Area Conditions:**

Watershed size: **Pick List**

Drainage area: **Pick List**

Average annual rainfall: \_\_\_\_\_ inches

Average annual snowfall: \_\_\_\_\_ inches

**(ii) Physical Characteristics:**

**(a) Relationship with TNW:**

☐ Tributary flows directly into TNW.

☐ Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.

Project waters are **Pick List** river miles from RPW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Project waters are **Pick List** aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain: \_\_\_\_\_.

Identify flow route to TNW<sup>5</sup>: \_\_\_\_\_.

Tributary stream order, if known: \_\_\_\_\_.

<sup>4</sup> Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

<sup>5</sup> Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

**Tributary is:** ☐ Natural  
☐ Artificial (man-made). Explain: .  
☐ Manipulated (man-altered). Explain: .

**Tributary** properties with respect to top of bank (estimate):

Average width: feet  
Average depth: feet  
Average side slopes: **Pick List**.

Primary tributary substrate composition (check all that apply):

<input type="checkbox"/> Silts	<input type="checkbox"/> Sands	<input type="checkbox"/> Concrete
<input type="checkbox"/> Cobbles	<input type="checkbox"/> Gravel	<input type="checkbox"/> Muck
<input type="checkbox"/> Bedrock	<input type="checkbox"/> Vegetation. Type/% cover:	
<input type="checkbox"/> Other. Explain: .		

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: .

Presence of run/riffle/pool complexes. Explain: .

Tributary geometry: **Pick List**

Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: **Pick List**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime: .

Other information on duration and volume: .

Surface flow is: **Pick List**. Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .

☐ Dye (or other) test performed: .

Tributary has (check all that apply):

<input type="checkbox"/> Bed and banks	
<input type="checkbox"/> OHWM <sup>6</sup> (check all indicators that apply):	
<input type="checkbox"/> clear, natural line impressed on the bank	<input type="checkbox"/> the presence of litter and debris
<input type="checkbox"/> changes in the character of soil	<input type="checkbox"/> destruction of terrestrial vegetation
<input type="checkbox"/> shelving	<input type="checkbox"/> the presence of wrack line
<input type="checkbox"/> vegetation matted down, bent, or absent	<input type="checkbox"/> sediment sorting
<input type="checkbox"/> leaf litter disturbed or washed away	<input type="checkbox"/> scour
<input type="checkbox"/> sediment deposition	<input type="checkbox"/> multiple observed or predicted flow events
<input type="checkbox"/> water staining	<input type="checkbox"/> abrupt change in plant community
<input type="checkbox"/> other (list):	
<input type="checkbox"/> Discontinuous OHWM. <sup>7</sup> Explain: .	

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

<input type="checkbox"/> High Tide Line indicated by:	<input type="checkbox"/> Mean High Water Mark indicated by:
<input type="checkbox"/> oil or scum line along shore objects	<input type="checkbox"/> survey to available datum;
<input type="checkbox"/> fine shell or debris deposits (foreshore)	<input type="checkbox"/> physical markings;
<input type="checkbox"/> physical markings/characteristics	<input type="checkbox"/> vegetation lines/changes in vegetation types.
<input type="checkbox"/> tidal gauges	
<input type="checkbox"/> other (list):	

(iii) **Chemical Characteristics:**

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: .

Identify specific pollutants, if known: .

<sup>6</sup>A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

<sup>7</sup>Ibid.



(iv) **Biological Characteristics. Channel supports (check all that apply):**

- ☐ Riparian corridor. Characteristics (type, average width): .
- ☐ Wetland fringe. Characteristics: .
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings: .
  - ☐ Fish/spawn areas. Explain findings: .
  - ☐ Other environmentally-sensitive species. Explain findings: .
  - ☐ Aquatic/wildlife diversity. Explain findings: .

**2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:

Properties:

Wetland size: . acres

Wetland type. Explain: .

Wetland quality. Explain: .

Project wetlands cross or serve as state boundaries. Explain: .

(b) General Flow Relationship with Non-TNW:

Flow is: **Pick List**. Explain: .

Surface flow is: **Pick List**

Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .

☐ Dye (or other) test performed: .

(c) Wetland Adjacency Determination with Non-TNW:

- ☐ Directly abutting
- ☐ Not directly abutting
  - ☐ Discrete wetland hydrologic connection. Explain: .
  - ☐ Ecological connection. Explain: .
  - ☐ Separated by berm/barrier. Explain: .

(d) Proximity (Relationship) to TNW

Project wetlands are **Pick List** river miles from TNW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Flow is from: **Pick List**.

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: .

Identify specific pollutants, if known: .

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

- ☐ Riparian buffer. Characteristics (type, average width): .
- ☐ Vegetation type/percent cover. Explain: .
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings: .
  - ☐ Fish/spawn areas. Explain findings: .
  - ☐ Other environmentally-sensitive species. Explain findings: .
  - ☐ Aquatic/wildlife diversity. Explain findings: .

**3. Characteristics of all wetlands adjacent to the tributary (if any)**

All wetland(s) being considered in the cumulative analysis: **Pick List**

Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)

Size (in acres)

Directly abuts? (Y/N)

Size (in acres)

Summarize overall biological, chemical and physical functions being performed: .

### C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

**Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:**

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: .
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

### D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:

☐ TNWs: linear feet width (ft), Or, acres.

☒ Wetlands adjacent to TNWs: 6.81 acres.

2. **RPWs that flow directly or indirectly into TNWs.**

☒ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: Streams 1 and 2, (Stream 1 – 1618.5 linear feet and Stream 2 – 258.55 Linear feet), are streams with a perennial flow regime, as evidenced by the lack of vegetation within the channel, standing water observed during the 9 September 2021 site visit. Streams 1 and 2 contribute flow directly to Linney Creek which flows into the Trinity River, a Traditionally Navigable Water (TNW). Based on its hydrological connection to the Trinity River and perennial flow regime, Streams 1 and 2 are Relatively Permanent Waters (RPW).

- ☐ Tributaries of TNW where tributaries have continuous flow “seasonally” (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).  
☐ Other non-wetland waters: acres.  
Identify type(s) of waters: .

**3. Non-RPWs<sup>8</sup> that flow directly or indirectly into TNWs.**

- ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).  
☐ Other non-wetland waters: acres.  
Identify type(s) of waters: .

**4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.  
☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .  
☐ Wetlands directly abutting an RPW where tributaries typically flow “seasonally.” Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

**5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- ☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

**6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- ☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

**7. Impoundments of jurisdictional waters.<sup>9</sup>**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- ☐ Demonstrate that impoundment was created from “waters of the U.S.,” or  
☐ Demonstrate that water meets the criteria for one of the categories presented above (1 -6), or  
☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

**E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):<sup>10</sup>**

- ☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.

<sup>8</sup>See Footnote #3.

<sup>9</sup>To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

<sup>10</sup>Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- ☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☐ which are or could be used for industrial purposes by industries in interstate commerce.
- ☐ Interstate isolated waters. Explain: .
- ☐ Other factors. Explain: .

**Identify water body and summarize rationale supporting determination:** .

Provide estimates for jurisdictional waters in the review area (check all that apply):

- ☐ Tributary waters: linear feet width (ft).
- ☐ Other non-wetland waters: acres.
- Identify type(s) of waters: .
- ☐ Wetlands: acres.

**F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):**

- ☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- ☒ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
  - ☐ Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- ☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: .
- ☐ Other: (explain, if not covered above): .

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☒ Wetlands: 9.83 acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- ☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- ☐ Lakes/ponds: acres.
- ☐ Other non-wetland waters: acres. List type of aquatic resource: .
- ☐ Wetlands: acres.

**SECTION IV: DATA SOURCES.**

**A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):**

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Submitted Wetland Delineation: SMC Consulting, Dated: June 9, 2020.
- ☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
  - ☒ Office concurs with data sheets/delineation report.
  - ☐ Office does not concur with data sheets/delineation report.
- ☒ Data sheets prepared by the Corps: SP1.
- ☐ Corps navigable waters' study: .
- ☐ U.S. Geological Survey Hydrologic Atlas: .
  - ☐ USGS NHD data.
  - ☐ USGS 8 and 12 digit HUC maps.
- ☒ U.S. Geological Survey map(s). Cite scale & quad name: Earth Point Topographic Map Google Earth Layer: Accessed 13 September 2021..
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: NRCS National Cooperative Soil Survey (NCSS) Google Earth Layer ([http://casoilresource.lawr.ucdavis.edu/soil\\_web/kml/mapunits.kml](http://casoilresource.lawr.ucdavis.edu/soil_web/kml/mapunits.kml)): Accessed 13 September 2021 .
- ☒ National wetlands inventory map(s). Cite name: FWS NWI Online Mapper. (<http://www.fws.gov/wetlands/data/mapper.HTML>): Accessed 13 September 2021..
- ☐ State/Local wetland inventory map(s): .
- ☒ FEMA/FIRM maps: DAYTON, CITY OF, Panel Number 48291C0420D and 48291C0410D effective 01/19/2018 Partial Flood Zone: A; Elevation: 27 feet .
- ☐ 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date): Google Earth Aerial Photos (1985-2018).



- or ☐ Other (Name & Date): .
- ☐ Previous determination(s). File no. and date of response letter: .
- ☐ Applicable/supporting case law: .
- ☐ Applicable/supporting scientific literature: .
- ☐ Other information (please specify): .

## B. ADDITIONAL COMMENTS TO SUPPORT JD:

Streams 1 and 2, (Stream 1 – 1618.5 linear feet and Stream 2 – 258.55 Linear feet), are streams with a perennial flow regime, as evidence by the lack of vegetation within the channel, standing water observed during the 9 September 2021 site visit. Streams 1 and 2 contribute flow directly to Linney Creek which flows into the Trinity River, a Traditionally Navigable Water (TNW). Based on its hydrological connection to the Trinity River and perennial flow regime, Streams 1 and 2 are Relatively Permanent Waters (RPW)

The approximate 95 acre site contains seven (7) wetlands comprising approximately 9.83 acres (Wetland A – 7.16-acres, Wetland B – 0.09-acres, Wetland C – 0.23-acres, Wetland D – 1.19-acres, Wetland E – 0.54-acre, Wetland F – 0.1-acre and Wetland G – 0.52-acre). The Trinity River, a traditional navigable water (TNW), is located approximately 4 miles east of the subject site.

Based on a review of multiple exhibits, a 9 September 2021 site visit, topographical maps, historical arials, the U.S. Fish and Wildlife Service National Wetlands Inventory map, the U.S. Department of Agriculture National Cooperative Soil Survey (NCSS) map data, and the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), there appear to be no discrete surface hydrological connections between the subject wetlands and any water of the U.S. The exact boundaries (as standard with isolated wetlands) were not verified, but the feature polygons were examined via aerial photography and during the 9 September 2021 site visit to ensure that they are enclosed polygons surrounded by uplands.

The subject wetlands are all located outside the 1% annual flood risk zone (100-year floodplain) of any water of the U.S.

- The subject wetlands are neither currently used, nor have been used in the past, nor susceptible to use for interstate or foreign commerce
- The subject wetlands are not subject to the ebb and flow of the daily tide.
- The subject wetlands do not cross interstate or tribal boundaries.
- There are no indications that these "Isolated\*" wetlands would 1) affect or be used by any interstate or foreign travelers for recreational or other purposes, 2) affect or be used for fish or shellfish that could be taken and sold in interstate or foreign commerce, or 3) be involved in any direct current use or potential use for industrial purposes by industries in interstate commerce.
- The subject wetlands are not impoundments of any water of the U.S.
- The subject wetlands are not part of a surface tributary system to any water body.
- The subject wetlands are not part of the territorial seas.
- The subject wetlands are not located "Adjacent\*\*" to waters of the U.S. (other than waters that are themselves wetlands).
- The subject wetlands are not located reasonably close to a waters of the US as to infer they are "ecologically adjacent"; for a water/wetland to be determined to "reasonably close" it must be in a geomorphic position such that an ecologic interconnectivity is beyond speculation or insubstantial for a known biologic species that requires both, the subject waters/wetlands and the nearest known waterbody (a known water of the U.S. other than an adjacent wetland) to fulfill spawning and/or life cycle requirements. There are no known species in this geo-region that requires both these waters/wetlands under review and the nearest known waterway to fulfill their life cycle requirements, therefore these waters/wetlands are ecologically isolated.

- \* 33 CFR 330.2 (e): Isolated waters means those non-tidal waters of the U.S. that are:
- (1) Not part of a surface tributary system to interstate or navigable waters of the US; and
  - (2) Not adjacent to such tributary waterbodies.

\*\* 33 CFR 328.3 (a)(7) adjacent wetlands: Federal regulations, specifically 33 CFR 328.3 c) defines "ADJACENT" as: bordering, contiguous or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

In summary, the subject wetlands have been identified per the Atlantic and Gulf Coastal Plain Region Supplement of the 1987 Corps of Engineers Wetland Delineation Manual. The subject wetlands are not inseparably bound to a water of the U.S., are not adjacent to any water of the U.S., and do not have a discrete hydrological surface connection to any water of the U.S. Therefore, it is the corps determination that the site wetlands are "isolated" with no known nexus to interstate commerce and as such would not be subject to federal jurisdiction under Section 404 of the Clean Water Act..

## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: <b>Waterstone Development Group, LLC</b>	File Number: <b>SWG-2020-00451</b>	Date: 15 June 2022
Attached is:		See Section below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
<input type="checkbox"/>	PERMIT DENIAL	C
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	D
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	E

**SECTION I** - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/appeals.aspx> or Corps regulations at 33 CFR Part 331.

**A: INITIAL PROFFERED PERMIT:** You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

**B: PROFFERED PERMIT:** You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**C: PERMIT DENIAL:** You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**D: APPROVED JURISDICTIONAL DETERMINATION:** You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**E: PRELIMINARY JURISDICTIONAL DETERMINATION:** You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

## **SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT**

**REASONS FOR APPEAL OR OBJECTIONS:** (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

**ADDITIONAL INFORMATION:** The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

### **POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

If you have questions regarding this decision and/or the appeal process you may contact:

Lee M. Hardy, Regulatory Specialist  
Regulatory Division, Compliance Branch (CESWG-RD-C)  
U.S. Army Corps of Engineers, Galveston District  
P.O. Box 1229  
Galveston, Texas 77553-1229  
Telephone: 409-766-3119; Fax: 409-766-3931

If you only have questions regarding the appeal process you may also contact:

Mr. Jamie Hyslop  
Administrative Appeals Review Officer (CESWD-PD-O)  
Southwestern Division (CESWD-PD-O)  
U.S. Army Corps of Engineers  
1100 Commerce Street, Suite 831  
Dallas, Texas 75242-1317  
Telephone: 469-216-8834,  
Email: Jamie.R.Hyslop@UASCE.Army.Mil

**RIGHT OF ENTRY:** Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

\_\_\_\_\_  
Signature of appellant or agent.

Date:

Telephone number: