



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

CESWG-RD-C

28 October 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-2021-00321<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

---

<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.

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00321

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).

Name	Size (acres)	Location		Jurisdictional Status
Wet 2	0.81	29.34642	-95.377209	non-adjacent, non-jurisdictional
Wet 3	0.07	29.352794	-95.355711	non-adjacent, non-jurisdictional
Wet 4	0.12	29.323324	-95.388523	non-adjacent, non-jurisdictional
Wet 5	2.00	29.332239	-95.380847	non-adjacent, non-jurisdictional
Wet 6	1.89	29.333813	-95.380698	non-adjacent, non-jurisdictional
Wet 7	0.26	29.340184	-95.385736	non-adjacent, non-jurisdictional
Wet 8	1.88	29.346567	-95.370362	non-adjacent, non-jurisdictional
Wet 9	0.17	29.337514	-95.386312	non-adjacent, non-jurisdictional
Wet 10	0.28	29.337633	-95.388167	non-adjacent, non-jurisdictional
Wet 12	0.36	29.343989	-95.379848	non-adjacent, non-jurisdictional
Wet 13	0.28	29.341845	-95.381431	non-adjacent, non-jurisdictional
Wet 14	0.43	29.343157	-95.385363	non-adjacent, non-jurisdictional
Wet 15	0.90	29.344245	-95.373746	non-adjacent, non-jurisdictional
Wet 16	0.59	29.340828	-95.377894	non-adjacent, non-jurisdictional
Wet 17	1.70	29.339455	-95.370428	non-adjacent, non-jurisdictional
Wet 18	0.09	29.344472	-95.387778	non-adjacent, non-jurisdictional
Wet 22	1.96	29.33861	-95.37403	non-adjacent, non-jurisdictional
Wet 24	0.70	29.338146	-95.37956	non-adjacent, non-jurisdictional
Wet 25	0.72	29.339435	-95.378735	non-adjacent, non-jurisdictional
Wet 26	0.35	29.342903	-95.375904	non-adjacent, non-jurisdictional
Wet 28	0.53	29.351651	-95.372433	non-adjacent, non-jurisdictional
Wet 29	0.35	29.349815	-95.371978	non-adjacent, non-jurisdictional
Wet 31	0.03	29.345347	-95.365675	non-adjacent, non-jurisdictional
Wet 33	1.78	29.345784	-95.363734	non-adjacent, non-jurisdictional
Wet 34	0.28	29.349857	-95.362117	non-adjacent, non-jurisdictional
Wet 35	0.62	29.347481	-95.360727	non-adjacent, non-jurisdictional
Wet 36	0.03	29.349441	-95.35396	non-adjacent, non-jurisdictional
Wet 37	1.27	29.347273	-95.351242	non-adjacent, non-jurisdictional
Wet 38	0.26	29.352577	-95.348484	non-adjacent, non-jurisdictional
Wet 39	0.42	29.351254	-95.355374	non-adjacent, non-jurisdictional
Wet 40	1.95	29.3434	-95.356342	non-adjacent, non-jurisdictional

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00321

Name	Size (acres)	Location		Jurisdictional Status
Wet 41	0.15	29.344034	-95.344229	non-adjacent, non-jurisdictional
Wet 42	0.03	29.34443	-95.353065	non-adjacent, non-jurisdictional
Wet 48	7.99	29.342186	-95.377541	non-adjacent, non-jurisdictional
Wet 49	2.14	29.338227	-95.371343	non-adjacent, non-jurisdictional
Wet 50	0.75	29.337577	-95.36877	non-adjacent, non-jurisdictional
Wet 51	5.57	29.337122	-95.366466	non-adjacent, non-jurisdictional
Wet 55	3.59	29.34255	-95.350711	non-adjacent, non-jurisdictional
Wet 56	0.59	29.3462	-95.356562	non-adjacent, non-jurisdictional
Wet 57	2.09	29.349035	-95.355567	non-adjacent, non-jurisdictional
Wet 58	0.61	29.346998	-95.349186	non-adjacent, non-jurisdictional
Wet 60	1.22	29.33409	-95.34601	non-adjacent, non-jurisdictional
Wet 62	0.61	29.347744	-95.37854	non-adjacent, non-jurisdictional
Wet 63	2.17	29.348056	-95.366033	non-adjacent, non-jurisdictional
Wet 101	0.76	29.349082	-95.359805	non-adjacent, non-jurisdictional
Wet 102	2.07	29.350297	-95.35807	non-adjacent, non-jurisdictional
Wet 103	0.92	29.352311	-95.356915	non-adjacent, non-jurisdictional
Wet 104	1.74	29.353076	-95.354867	non-adjacent, non-jurisdictional
Wet 105	0.59	29.352168	-95.354147	non-adjacent, non-jurisdictional
Wet 106	1.60	29.347876	-95.372787	non-adjacent, non-jurisdictional
Wet 107	3.55	29.351525	-95.369356	non-adjacent, non-jurisdictional
Wet 108	0.21	29.348795	-95.374758	non-adjacent, non-jurisdictional
Wet 109	0.58	29.349669	-95.375965	non-adjacent, non-jurisdictional
Wet 110	1.97	29.340015	-95.376134	non-adjacent, non-jurisdictional
Wet 111	1.61	29.341589	-95.385361	non-adjacent, non-jurisdictional
Wet 113	2.44	29.342632	-95.386621	non-adjacent, non-jurisdictional
Wet 114	0.34	29.344528	-95.386049	non-adjacent, non-jurisdictional
Wet 115	0.89	29.344561	-95.383994	non-adjacent, non-jurisdictional
Wet 116	0.02	29.345261	-95.365341	non-adjacent, non-jurisdictional
Wet 117	0.29	29.351746	-95.372748	non-adjacent, non-jurisdictional

Name	Size (Linear feet)	Location		Jurisdictional Status
<b>Ditches</b>				
Ditch 20	336.0	29.323509	-95.38847	Non-RPW, Non-jurisdictional
Ditch 21	1,174.8	29.336525	-95.363511	Non-RPW, Non-jurisdictional
Ditch 43	2,307.1	29.340634	-95.375389	Non-RPW, Non-jurisdictional
Ditch 44	4,344.1	29.344501	-95.350341	Non-RPW, Non-jurisdictional
Ditch 45	970.2	29.338347	-95.355173	Non-RPW, Non-jurisdictional
Ditch 53	3,189.5	29.351517	-95.377023	Non-RPW, Non-jurisdictional

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00321

Name	Size (Linear feet)	Location	Jurisdictional Status
<b>Ditches</b>			
Ditch 59	3,765.2	29.333939 -95.346109	Non-RPW, Non-jurisdictional
Ditch 61	7,949.0	29.340854 -95.348627	Non-RPW, Non-jurisdictional
Ditch 64	158.6	29.350681 -95.365868	Non-RPW, Non-jurisdictional
Ditch 65	410.7	29.34638 -95.367348	Non-RPW, Non-jurisdictional
Ditch 66	1,815.8	29.336473 -95.351681	Non-RPW, Non-jurisdictional
Ditch 67	2,536.5	29.335136 -95.349859	Non-RPW, Non-jurisdictional
Ditch 68	3,010.8	29.334118 -95.38033	Non-RPW, Non-jurisdictional
Ditch 71	2,628.2	29.342273 -95.383603	Non-RPW, Non-jurisdictional
Ditch 72	210.0	29.339003 -95.382628	Non-RPW, Non-jurisdictional
Ditch 73	250.3	29.338737 -95.381784	Non-RPW, Non-jurisdictional
Ditch 74	248.4	29.345039 -95.365576	Non-RPW, 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. \_\_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Approximate 2,992-acre property with the northeast corner of the property at the intersection of Farm to Market 1462 and Farm to Market 511, extending west approximately 2.3 miles and south approximately 2.3 miles; located at latitude 29.341858°, longitude -95.369284°, near Rosharon, Brazoria County, Texas. A PJD was done for 11 aquatic features in the project area consisting of 4 tributaries totaling approximately 33,830 linear feet, and 7 wetlands totaling approximately 91.19 acres.

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

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00321

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A.
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 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): N/A
  - f. The territorial seas (a)(6): N/A

---

<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.

<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.

- 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”).<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.

**Ditches, Ditch 20, 21, 43, 44, 45, 53, 59, 61, 64, 65, 66, 67, 68, 71, 72, 73, and 74 (35,305.2 linear feet):**

There are 17 upland cut ditches on the tract. These drainage/irrigation ditches were constructed in uplands to drain uplands and be used as an irrigation source for crops in the area. The drainage ditches only flow in response to precipitation events and do not have relatively permanent flow. Therefore, Ditches 20, 21, 43, 44, 45, 53, 59, 61, 64, 65, 66, 67, 68, 71, 72, 73, and 74 are not waters of the United States.

- 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

---

<sup>8</sup> 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).

**Wetlands, WET 2–10, 12-18, 22, 24-26, 28-29, 31, 33-42, 48-51, 55-58, 60, 62-63, 101-111, 113-117 (70.6 acres total):**

Based on data sources listed in #9 and our 25 April 2024 site visit, we have determined these palustrine wetlands reside in small depressional areas entirely within the review area that collect rainwater from the surrounding countryside. Based on our review, none of these wetlands have any known continuous surface connection to any water of the United States. There are no swales, erosional features, ditches, tributaries, or culverts that would serve as continuous surface connections. The LiDAR Digital Elevation Model (DEM), the Regulatory Viewer LiDAR DEM, and Google Earth aerial photos do not show any continuous surface connections between these wetlands and any TNW, with no more than overland sheet flow exiting from these wetlands to an RPW or TNW. WET 103 does extend off the project site to the north, however, based on the aerial photos, it extends approximately 210 feet to the north but does not extend to any water of the U.S. nor does it have an apparent ditch, swale, tributary, or culvert that would serve as continuous surface connection to a RPW or TNW. The LiDAR Digital Elevation Model (DEM), the Regulatory Viewer LiDAR DEM, and Google Earth aerial photos do not show any continuous surface connection between WET 103 and any TNW, with no more than overland sheet flow exiting from this wetland to an RPW or TNW. WET 2–10, 12-18, 22, 24-26, 28-29, 31, 33-42, 48-51, 55-58, 60, 62-63, 101-111, 113-117 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.

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. Delineation, maps, data sheets prepared by SWCA.

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00321

- a. Desk Review 10 January 2024
- b. Site Visit 25 April 2024
- c. Aerial Photos: Google Earth Aerial Imagery 7 April 2022
- d. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); Accessed 10 January 2024
- e. National Oceanic and Atmospheric Administration (NOAA) Data Access Viewer, 2018 Texas Water Development Board (TWDB) Lidar DEM: Coastal Texas. (<https://www.fisheries.noaa.gov/inport/item/57961>); Accessed 11 January 2024
- f. United States Geological Survey (USGS) Topographic (Topo) map: Liverpool Texas 1963 1:24,000; Rosharon Texas 1963 1:24,000; Accessed 8 February 2024
- g. USACE Texas Regulatory Viewer 3 DEP Digital Elevation Model (DEM) Accessed 27 June 2024

10. OTHER SUPPORTING INFORMATION. N/A

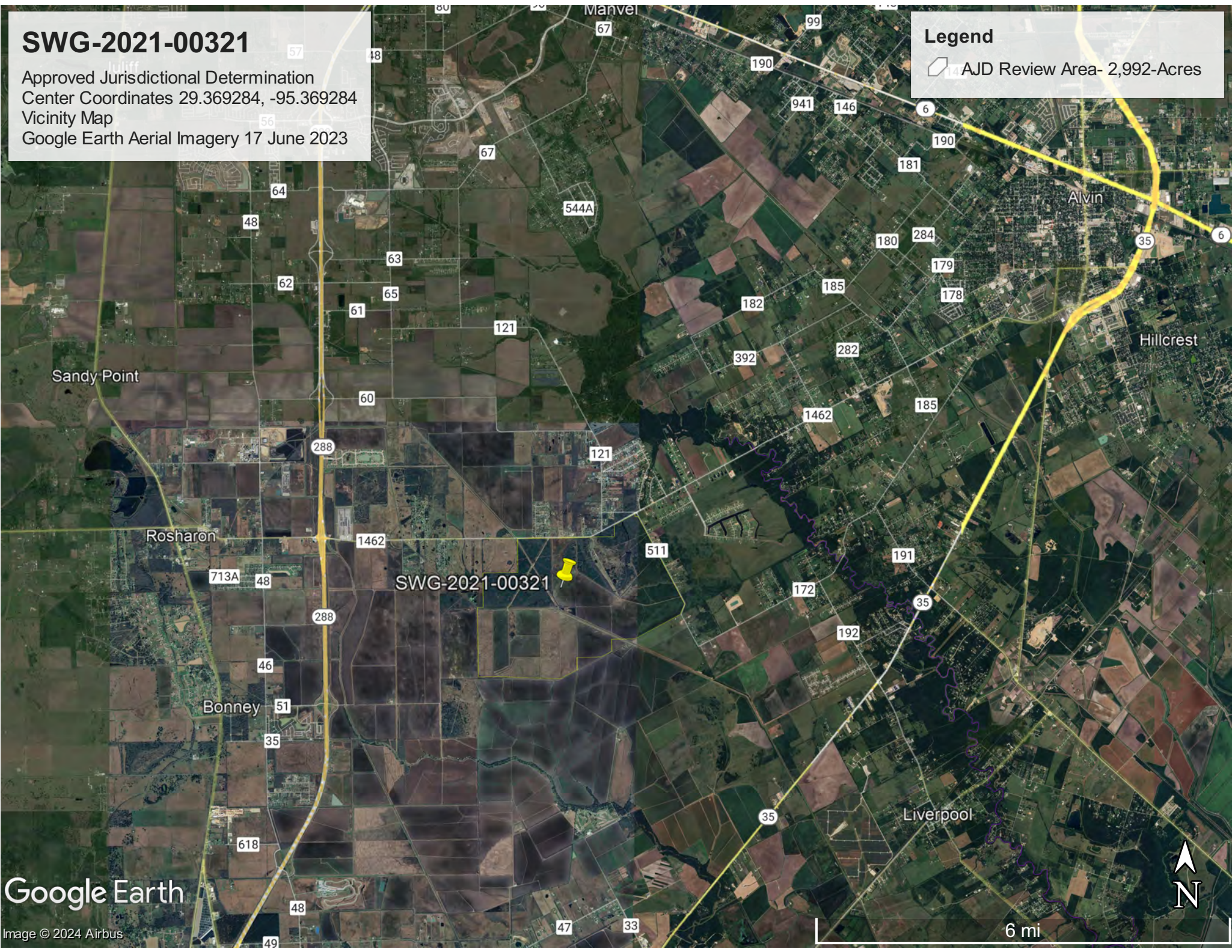
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



# SWG-2021-00321

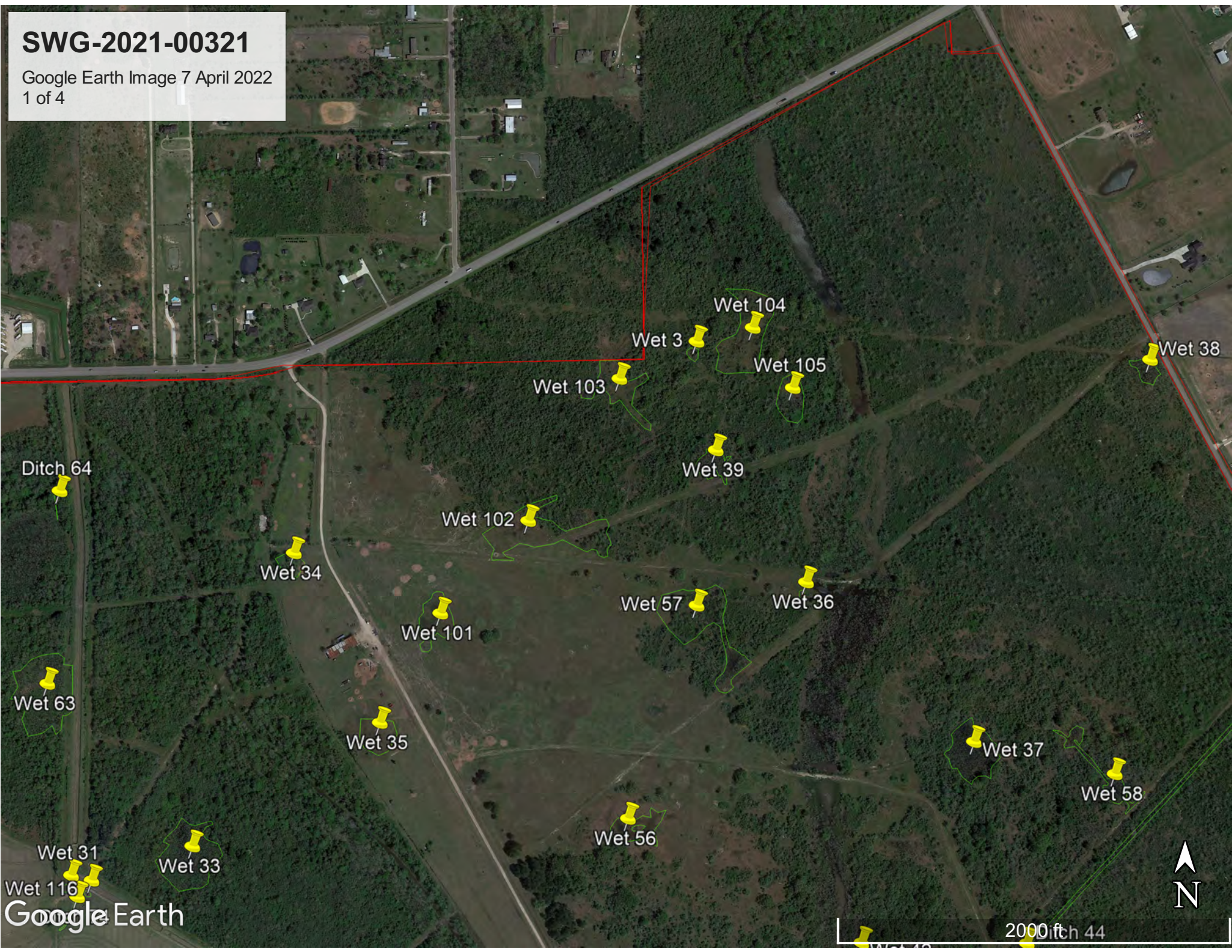
Approved Jurisdictional Determination  
Center Coordinates 29.369284, -95.369284  
Vicinity Map  
Google Earth Aerial Imagery 17 June 2023

**Legend**  
AJD Review Area- 2,992-Acres



# SWG-2021-00321

Google Earth Image 7 April 2022  
1 of 4



# SWG-2021-00321

Google Earth Image 7 April 2022  
2 of 4

1  
74

Wet 33

Wet 56

Wet 37

Wet 58

Wet 42

Ditch 44

Wet 41

Wet 40

Wet 55

Ditch 61

Ditch 45

Ditch 21

Ditch 66

Ditch 67

Wet 60

Ditch 59



# SWG-2021-00321

Google Earth Image 7 April 2022  
3 of 4



**SWG-2021-00321**

Google Earth Image 7 April 2022  
4 of 4

Wet 10

Wet 9

Ditch 73

Ditch 72

Wet 24

Wet 49

Wet 50

Ditch 68

Wet 6

Wet 5

Ditch 20

Wet 4

Google Earth

3000 ft

