



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

CESWG-RD-C

30 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-2021-00427]

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 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.

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, 29.972534° -95.787911°, 0.70 acre, non-jurisdictional/non-adjacent
 - ii. Wetland B, 29.973246° -95.788574°, 0.01 acre, non-jurisdictional/non-adjacent
 - iii. Wetland C, 29.974239° -95.790062°, 0.004 acre, non-jurisdictional/non-adjacent
 - iv. Wetland D, 29.976301° -95.794579°, 0.01 acre, non-jurisdictional/non-adjacent
 - v. Stock Pond 1, 29.976115° -95.794579°, 0.15 acre, non-jurisdictional
 - vi. Swale 1, 29.973878° -95.789632°, 6,349 linear feet, 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)
- e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

3. REVIEW AREA. The tract review area is 29-acres, located 0.8 mile north of Cypress Creek, 0.8 mile west of State Highway 99, and 1.5 miles east of Katy-Hockley Road, Latitude 29.973432° North, Longitude -95.788792° West, in Harris County, Texas.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Cypress Creek, is listed on the Galveston District Navigable Water List.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Swale 1 flows 6,349 river feet to KM 155 tributary (RPW) that flows 0.78 river miles (4,125 feet) to Cypress Creek, a RPW which flows 22.4 river miles to become a TNW.
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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.

- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

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”).⁷ 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.

There is a swale (Swale 1 = 6,349-linear feet) located within the project boundary. Swales or erosional features (e.g., small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they do not meet the definition of a tributary. The swale runs from Stock Pond 1 down to the old large stock pond that was on the property but was filled in 2011/2012. This drainage swale does not have a defined bed or bank and only holds water during times of precipitation as per the antecedent precipitation tool (APT). A site visit and the APT on 25 April 2024 confirmed that Swale 1 was dry in a normal precipitation period during a wet season except for three small areas (Wetlands B, C, and D) that were found within the swale (See Section 8f). Furthermore, based on the site visit and photos taken on 9 May 2018 by the consultant, the swale was dry during a normal precipitation period in a dry

⁷ 51 FR 41217, November 13, 1986.

season. Therefore, based on the Google Earth aerial photos, the USACE site visit, and the consultant's site visit, the swale is a non-relatively permanent water as defined in the pre-2015 regime post Sackett guidance. Therefore, Swale 1 is not a water of the United States and is not subject to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

- 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*.

Stock Pond 1 (0.15-acres) is a man-made pond excavated out of uplands for the purpose of water use for livestock. Stock Pond 1 was constructed on the property sometime between 1977 and 1982 from uplands. It appeared on United States Geological Survey (USGS) aerial imagery in February of 1982. The Stock Pond 1 runs through Swale 1 which does not meet the definition of a tributary and is not jurisdictional. Stock Pond 1 is not an impoundment of a water of the United States. The use, degradation, or destruction of Stock Pond 1 would not affect interstate or foreign commerce including use by interstate or foreign travelers for recreational purposes, from which fish or shellfish are or could be taken and sold in interstate or foreign commerce, or which are used for or could be used for industrial purposes by industries in interstate commerce. Stock Pond 1 is contained wholly within and does not extend beyond the project area boundary. Therefore, Stock Pond 1 is not a water of the United States and is not subject to Section 404 of the Clean Water Act.

- 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).

There are four (4) wetlands (Wetland A = 0.70 acre, Wetland B = 0.01 acre, Wetland C = 0.004 acre; and Wetland D = 0.01 acre) found south of Stock Pond 1 along the route of Swale 1. Wetlands B-D are the result of cattle crossing and "wallowing" areas along Swale 1 that retain water during times of precipitation. Wetland A (see 8e) is the result of a large stock pond that was on the property going back to the early 70s and was filled in between 2011 and 2012. The remnant low areas of the pond filling resulted in Wetland A. The wetlands are connected to the nearest RPW via Swale 1. The nearest RPW for these wetlands is the now restored KM 155 tributary that leads to Cypress Creek. The distances from KM 155 (nearest Relatively Permeant Water) for the wetlands in order of closest are Wetland A = 2,966 LF, Wetland B = 3,595-LF, Wetland C = 4,203-LF; and Wetland D = 5,798-LF. Swales are generally considered non-jurisdictional and this swale does not meet the definition of a tributary. However, as explained in Regulatory Guidance Memorandum NWK-2024-00392, "Non-relatively permanent swales and non-relatively permanent streams are features that can serve as all or part of a continuous surface connection depending on the factual context because they can provide evidence that flow is occurring between the wetland and the requisite covered water, such that the two features are, as a practical matter, indistinguishable. This is because these features can have physical indicators of flow that provide evidence that the features continuously, physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including the length of the connection and physical indicators of flow, more than one feature such as a swale or non-relatively permanent tributary can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water." Furthermore, per Regulatory Guidance Memo NWK-2024-00392, "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 flow, the number, the types, and the length of connection, the 725-foot length of connection here between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement." Therefore, the distance of Wetlands A, B, C, & D are not close enough to the requisite water, KM 155 tributary to be meet the continuous surface connection requirement. As stated in Regulatory Guidance Memo NWK-2022-00809, weak indicators of flow frequency (e.g. bed and bank and other indicators of a OHWM) and duration as well as long distances and chain of features between the wetlands and the relatively permanent water can be too extended and tenuous to

constitute a continuous surface connection. Considering these factors together, and consistent with *Sackett*, the series of non-relatively permanent features, culverts, and the length do not meet the continuous surface connection requirement for Wetlands A, B, C, and D. Therefore, Wetlands A, B, C and D do not meet the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and are not waters of the United States subject to Section 404 of the Clean Water Act.

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 conducted 24 April 2024. Site Visit 25 April 2024.
 - b. Maps, plans, plots, or plat submitted by or on behalf of the applicant/ consultant: Bridgeland Management Development Company, LLC (Bridgeland)/ BGE, Inc.
 - c. U.S. Geological Survey Map(s) 1:24,000 scale, Warren Lake, Texas Quadrangle, 1971, 2010; and 2022
 - d. Data Sheets prepared by the applicant on 9 May 2018 and 22 August 2024.
 - e. USDA Natural Resources Conservation Service Soil Survey: Soil Web
 - f. National Wetlands inventory map: USFWS National Wetlands Mapper
 - g. Photographs: Aerial: Google Earth Aerial Images: 1977, 1995, 2010, 2012; and 2023

Photographs: Other: provided by BGE, Inc. in the Delineation report
 - h. NOAA Digital Coast, Data Access Viewer: 2018 Texas Water Development Board (TWBD) LiDAR and Digital Elevation Model (DEM): Coastal Texas.
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWK-2024-00392 and NWK-2022-00809.
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

SWG-2021-00427

Approved Jurisdictional Determination
Bridgeland Management Company, LLC
Located 0.45-miles South of the Intersection of House Road and Rio Medina Trail
Harris County, Texas
29.973432 N, -95.788792 W

Exhibit

Legend

Project Boundary 29-acres

Stock Pond 0.15-acres

Swale 1, Non RPW 6,349 LF

Wetland A 0.70-acres

Wetland B 0.01-acres

Wetland C 0.004-acres

Wetland D 0.01-acres