



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
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CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RDR

19 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),¹ SWG-2021-00534 (MFR 1 of 1)²

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

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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amended on 8 SEP 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).

Table 1: Features and type within Review Area				
Feature Name	Latitude/ Longitude	Size (AC)	Feature Type	Jurisdiction
WP1NU009	27.75654 N 97.12453 W	0.93	PEM Wetland	404
WP1NU010	27.75694 N 97.12487 W	0.29	PEM Wetland	None
WP1NU012	27.75773 N 97.12378 W	1.89	PEM Wetland	404
WP1NU013	27.76011 N 97.12014 W	0.30	PEM Wetland	None
WP2NU008	27.75458 N 97.12332 W	1.48	PEM Wetland	None
WP2NU009	27.75546 N 97.12673 W	0.17	E2EM Wetland	10/404
WP2NU010_E2EM	27.75615 N 97.12618 W	0.58	E2EM Wetland	10/404
WP2NU010_PEM	27.75661 N 97.12572 W	0.90	PEM Wetland	404
WP2NU011	27.75808 N 97.12476 W	0.02	PEM Wetland	None
WP2NU013_E2EM	27.76024 N 97.12295 W	2.75	E2EM Wetland	10/404
WP2NU013_E2EM_B	27.76082 N 97.12303 W	0.07	E2EM Wetland	404
WP2NU013_E2EM_C	27.76116 N 97.12226 W	0.98	E2EM Wetland	10/404
WP2NU013_E2SS	27.75957 N 97.12388 W	0.17	E2SS Wetland	404
WP2NU013_PEM	27.75989 N 97.12257 W	1.88	PEM Wetland	404
WP2NU013_PEM_B	27.75927 N 97.12420 W	0.09	PEM Wetland	404
WP2NU013_PEM_C	27.76127 N 97.12243 W	0.13	PEM Wetland	404
WP2NU013_PEM_D	27.76157 N 97.12251 W	0.05	PEM Wetland	404

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Feature Name	Latitude/ Longitude	Size (AC)	Feature Type	Jurisdiction
WP2NU013_PEM_E	27.75968 N 97.12364 W	0.46	PEM Wetland	404
WP3NU001	27.75715 N 97.12291 W	0.08	PEM Wetland	None
WP2NU013_E2USP	27.76083 N 97.12279 W	1.07	E2USP Mudflat	10/404
WP2NU013_E2USP_B	27.75980 N 97.12389 W	0.004	E2USP Mudflat	10/404
OWP1NU006	27.75574 N 97.12575 W	3.83	Excavated pond from tidal wetlands	10/404
OWP1NU007	27.76191 N 97.12193 W	2.63	Excavated pond from tidal wetlands	10/404
OWP1NU008	27.76001 N 97.12081 W	0.04	Excavated pond from uplands	None
OWP1NU009	27.75637 N 97.12108 W	0.21	Excavated pond with tidal connection	10/404
OWP2NU003	27.75888 N 97.12367 W	4.17	Excavated pond from non-tidal wetlands	404
SP1NU001	27.75909 N 97.11891 W	0.68	Tidally Influenced Ditch	10/404

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (13 NOV 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (25 AUG 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* (2 DEC 2008)
- d. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximate 114-acre site is located at on Mustang Island approximately six miles southwest of Port Aransas, across from the Gulf Waters Beach Front RV Resort, Nueces County, Texas.

LATITUDE/LONGITUDE (Decimal Degrees):

Latitude: 27.75798° North; Longitude: 97.12237° West

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Corpus Christi Bay⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

The tidal wetlands WP2NU009, WP2NU010_E2EM, WP2NU013_E2EM, and WP2NU013_E2EM_C, the mudflats WP2NU013_E2USP and WP2NU013_E2USP_B, and ponds OWP1NU006, OWP1NU007, and OWP1NU009 are subject to the daily ebb and flow of the tide from Corpus Christi Bay, a Traditionally Navigable Water (TNW).

The pond OWP1NU009 is directly connected, and subject to the daily ebb and flow of the tide from Corpus Christi Bay by way of the tidally influenced ditch SP1NU001.

The wetlands labelled WP1NU009, WP1NU012, WP2NU010_PEM, WP2NU013_E2EM_B, WP2NU013_E2SS, WP2NU013_PEM, WP2NU013_PEM_B, WP2NU013_PEM_C, WP2NU013_PEM_D, WP2NU013_PEM_E, and pond labelled OWP2NU003 are adjacent to the tidal wetlands and tidal waters of Corpus Christi Bay, a TNW.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ Corpus Christi Bay
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

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 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.

⁸ 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.

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): LiDAR, topo, aerial imagery, site visits, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that the mapped features **WP2NU009**, **WP2NU010_E2EM**, **WP2NU013_E2EM**, and **WP2NU013_E2EM_C**, the mudflats **WP2NU013_E2USP** and **WP2NU013_E2USP_B**, and ponds **OWP1NU006**, and **OWP1NU007** are all one contiguous wetland that extends outside of the project area, are adjacent to Corpus Christi Bay, and are subject to the daily ebb and flow of the tide from Corpus Christi Bay, a Traditionally Navigable Water (TNW).

The pond **OWP1NU009** is directly connected with, and subject to the daily ebb and flow of the tide from Corpus Christi Bay by way of the tidally influenced ditch **SP1NU001**.

The tidally influenced ditch, **SP1NU001** is subject to the daily ebb and flow of the tide from Corpus Christi Bay, a TNW.

- 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): LiDAR, topo, aerial imagery, site visits, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that the mapped features labelled **WP1NU009**, **WP1NU012**, **WP2NU010_PEM**, **WP2NU013_E2EM_B**, **WP2NU013_E2SS**, **WP2NU013_PEM**, **WP2NU013_PEM_B**, **WP2NU013_PEM_C**,

WP2NU013_PEM_D, WP2NU013_PEM_E, and pond labelled **OWP2NU003** are all one contiguous wetland that extends outside of the project area and are immediately adjacent to the tidal waters of Corpus Christi Bay, a TNW.

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”).⁹ 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.

Pond OWP1NU008: LiDAR, topo, aerial imagery, site visits, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that this pond was excavated from uplands for the purpose of obtaining fill material and has no connectivity to an RPW or TNW. This pond is best described in the preamble for 33 CFR 328, published in Federal Register Volume 51, Number 219, published 13 NOV 1986 (page 41217), which states, “For clarification, it should be noted that we generally do not consider the following waters to be Waters of the United States (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States”.

- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference

⁹ 51 FR 41217, November 13, 1986.

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).

Wetlands WP1NU010, WP1NU013, WP2NU008, WP2NU011, and WP3NU001: LiDAR, topo, aerial imagery, site visits, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that these palustrine wetlands reside in small depressional areas entirely within the review area that collect rainwater from the surrounding countryside. There is no presence of a continuous surface connection due to slight changes in elevation between these wetlands, with no more than overland sheet flow exiting from these wetlands to an RPW or TNW. 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.

- 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. Wetland Delineation Report: *Wetland Delineation Report Revision 1: 114-acre Bayside Tract, Nueces County, Texas*, prepared by Perennial Environmental Services, LLC, 14 JUL 2023
 - b. Site visits conducted 20 AUG 2021 and 10 NOV 2022
 - c. Aerials (JAN 2016, JAN 2017, JAN 2020 and MAR 2022; source: Google Earth)
 - d. USGS Topographic Map 1:24,000 1:24,000 Port Aransas, Texas (2022) and Port Ingleside, Texas (2022)

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- e. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet vertical root mean square error (RMSEz) in open terrain.
- f. Web Soil Survey Hydric Rating Map for Nueces County, Texas (NRCS website accessed 15 DEC 2021)
- g. National Wetland Inventory (NWI) (USFWS website accessed 15 DEC 2021)
- h. National Hydrologic Dataset (NHD) – 12110202 South Corpus Christi Bay
- i. ORM2 Database: A prior determination was completed for this subject tract (SWG-2021-00534) on 6 DEC 2022.

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.

