



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

CESWG-RD-C

18 March 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-2021-00584]

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. SUMMARY OF CONCLUSIONS.

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.

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- 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 1A, 30.182426° -95.284921°, 0.18-acre, non-jurisdictional
 - ii. Wetland 1B, 30.182426° -95.284921°, 1.06-acres, non-jurisdictional
 - iii. Wetland 2, 30.179898° -95.284072°, 0.02-acre, non-jurisdictional
 - iv. Wetland 3, 30.179232° -95.283080°, 0.10-acre, non-jurisdictional
 - v. Wetland 4, 30.178857° -95.283949°, 0.06-acre, non-jurisdictional
 - vi. Wetland 5, 30.180111° -95.285849°, 0.07-acre, non-jurisdictional
 - vii. Wetland 6, 30.176904° -95.284858°, 0.25-acre, non-jurisdictional
 - viii. Wetland 7, 30.178050° -95.282180°, 0.38-acre, non-jurisdictional
 - ix. Wetland 8, 30.177853° -95.284710°, 0.02-acre, non-jurisdictional
 - x. Wetland 9, 30.179010° -95.281741°, 0.10-acre, non-jurisdictional
 - xi. Wetland 10, 30.176657° -95.279846°, 0.03-acre, non-jurisdictional
 - xii. Wetland 11, 30.176586° -95.284087°, 0.21-acre, non-jurisdictional
 - xiii. Wetland 12, 30.183844° -95.285981°, 0.07-acre, non-jurisdictional
 - xiv. Pond 1, 30.182089° -95.285535°, 0.16-acre, non-jurisdictional
 - xv. Pond 2, 30.177263° -95.283550°, 0.70-acre, non-jurisdictional
 - xvi. Ditch 1, 30.180624° -95.284440°, 449.32-linear feet, non-jurisdictional
 - xvii. Ditch 2, 30.181203° -95.285000°, 392.92-linear feet, non-jurisdictional
 - xviii. Ditch 3, 30.178515° -95.285424°, 2,031.04-linear feet, non-jurisdictional
 - xix. Ditch 4, 30.176588° -95.284728°, 101.93-linear feet, non-jurisdictional

- xx. Ditch 5, 30.176977° -95.284170°, 298.21-linear feet, non-jurisdictional
- xxi. Ditch 6, 30.183316° -95.286530°, 145.59-linear feet, non-jurisdictional
- xxii. Ditch 7, 30.183672° -95.286380°, 185.70-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. 651, 143 S. Ct. 1322 (2023)
 - e. 2008 Rapanos guidance: "In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries."
3. REVIEW AREA. The tract is located 0.55-miles south of the intersection of Cooper Road and Pickering Road (latitude 30.179566 N, longitude -95.283926 W), New Caney, Montgomery County, Texas.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
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

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.

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
- 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

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.

⁷ 51 FR 41217, November 13, 1986.

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 are seven (7) ditches on the property tract. Ditch 1 = 449.32 linear feet in length, Ditch 2 = 392.92 linear feet in length, Ditch 3 = 2,031.04 linear feet in length, Ditch 4 = 101.93 linear feet in length, Ditch 5 = 298.21 linear feet in length, Ditch 6 = 145.59 linear feet in length; and Ditch 7 = 185.70 linear feet in length. All the ditches are non-Relatively Permanent Waters (Non-RPW) that have ephemeral flow. None of the ditches have a bed and bank and only flow in response to precipitation. Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries. Therefore, Ditches 1-7 are not waters of the United States and are 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*.

Pond 1 = 0.16-acre and Pond 2 = 0.70-acre. Pond 1 is a livestock watering pond has been on the property since at least 1959 when it is shown in the 1959 United States Geologic Survey (USGS) Outlaw Pond, 1959 quadrangle. The pond

situated in a slightly lower topographic area of the property at an elevation of ~120 feet with surrounding areas at 122 and 124 feet respectively. Pond 1 drains into ditch 3 (when overflowing) which then flows to ditch 4 and 5 and into Pond 2. Pond 1 does not have any connection off the property to Dry Creek. Pond 2 is a larger stock pond that was constructed sometime between 2006 and 2009 and does not have any connection off the tract area to Dry Creek. The use, degradation, or destruction of Pond 1 and Pond 2 would not affect interstate or foreign commerce. The ponds are not used for interstate or foreign travelers for recreational or other purposes, fish or shellfish are not taken and sold in interstate or foreign commerce and are not used for industrial purpose by industries in interstate commerce. The ponds are not impoundments of a tributary and do not flow to a Traditional Navigable Water; therefore, the ponds are not waters of the United States.

- 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).

Based on our 19 February 2025 desk review, and the information obtained using data sources listed in Section 9, Wetlands 1A and 1B, and Wetlands 2 - 12 (Total 2.55-acres) do not have any known continuous surface connection (CSC) to Dry Creek, a tributary located approximately 0.85-mile northeast of the project site, or any other water of the United States. All wetlands are depressional with only source of hydrology is precipitation. Wetlands 2 – 12 do not extend outside of the review area. No more than overland sheet flow would exit the wetlands. The NOAA Data Access Viewer Digital Elevation Model (DEM), United States Geological Survey (USGS) 2022 Outlaw Pond, Texas quadrangle showed there is no continuous surface connection between the subject tract and Dry Creek. However, Wetland 1 (A & B) continue off the property to an adjacent property that recently had an AJD conducted on it (SWG-2021-00583) and the adjoining wetlands on SWG-2021-00583 were all determined to be non-adjacent and non-jurisdictional after coordination. In an email received from the Environmental Protection Agency (EPA) on 5 February 2024 the question was raised if the wetlands on SWG-2021-00583 extended off the property to the west and if those wetlands had a connection to a RPW. The district replied and in a subsequent email on 12 February 2024 the EPA replied, "With the incorporation of any resulting revisions to articulate the findings and enhance the jurisdictional decision, please consider local level coordination complete". Therefore, the ten wetlands in File SWG-2023-00583 totaling approximately 5.51-acres are not

waters of the United States and are not subject to Section 404 of the Clean Water Act.” Therefore, SWG-2021-00584 Wetlands 1A and 1B, and Wetlands 2 - 12 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. Desk review conducted 19 February 2025
 - b. Maps, plans, plots, or plat submitted by or on behalf of the applicant/ consultant: J.A. Costanza and Associates Engineering, Inc. / Hollaway Environmental + Communications.
 - c. U.S. Geological Survey Map(s) 1:24,000 scale, Outlaw Pond, Texas Quadrangle, 1959, 2010; and 2022,
 - d. Data Sheets prepared by the applicant on 2/9/2021 and 2/23/2021.
 - e. USDA Natural Resources Conservation Service Soil Survey: Soil Web, accessed 19 February 2025
 - f. National Wetlands inventory map: USFWS National Wetlands Mapper accessed 19 February 2025
 - g. Photographs: Aerial: Google Earth Aerial Images: 2010, 2015; and 2022

Photographs: Other: Provided by Hollaway Environmental 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. Accessed 20 February 2025

OTHER SUPPORTING INFORMATION. N/A

10. 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.



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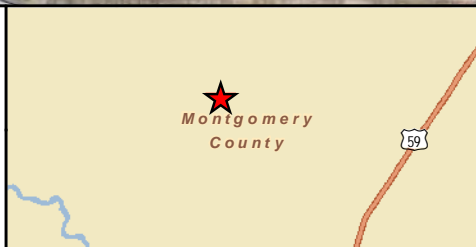
Exhibit 2: 2020 Aerial Photograph with Subject Property

Johnson Tract

Montgomery County, Texas

Date of Imagery: 10/02/2020

Created: 1/19/2021



HOLLAWAY
ENVIRONMENTAL + COMMUNICATIONS



0 140 280
Feet

SWG-2021-00584

Approved Jurisdictional Determination
J.A. Costanza and Associates Engineering, Inc.
Cooper Road
New Caney, Montgomery County, Texas

Delineation Map
30.179566 N, -95.283926 W

Legend

- Ditch 1
- Ditch 2
- Ditch 3
- Ditch 4
- Ditch 5
- Ditch 6
- Ditch 7
- Pond 1 (0.16)
- Pond 2 (0.70 ac)
- Review Area
- WET 10 PEM (0.03 ac)
- WET 11 PEM (0.21 ac)
- WET 1A PEM (0.18 ac)
- WET 1B PFO (1.06 ac)
- WET 2 PEM (0.02 ac)
- WET 3 PEM (0.10 ac)
- WET 4 PEM (0.06 ac)
- WET 5 PEM (0.07 ac)
- WET 6 PEM (0.25 ac)
- WET 7 PEM (1.15 ac)
- WET 8 PEM (0.02 ac)
- WET 9 PEM (0.10 ac)

