



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

CESWG-RD-C

3 December 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-2021-00783]

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 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.

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<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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

## 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, 30.185101° -95.277543°, 0.02 acre, non-jurisdictional/non-adjacent
  - ii. Wetland B, 30.185125° -95.277385°, 0.01 acre, non-jurisdictional/non-adjacent
  - iii. Wetland C, 30.184990°-95.276418°, 0.01 acre, non-jurisdictional/non-adjacent
  - iv. Wetland D, 30.183409°-95.276227°, 0.03 acre, non-jurisdictional/non-adjacent
  - v. Pond 1 30.185142°-95.277438°, 0.03 acre, non-jurisdictional
  - vi. Pond 2 30.186073°-95.278428°, 0.03 acre, non-jurisdictional
  - vii. Ditch 1 30.185235°-95.278078°, 296.89 linear feet, non-jurisdictional
  - viii. Ditch 2 30.186010° -95.277576°, 73.76 linear feet, non-jurisdictional
  - ix. Swale 1 30.183747°-95.275453°, 460 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. 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.”
  - f. 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 29.04-acres, located at Latitude 30.184647°North, Longitude -95.276466°West in 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 WATERS<sup>5</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>6</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

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<sup>5</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>6</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.

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”).<sup>7</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.

Pond 1 (0.03 acre) and Pond 2 (0.03 acre) are man-made ponds excavated out of uplands for the purpose of stock watering. Pond 1 appeared on the property sometime between 1985 and 2004 according to Google Earth images. Water from another stock watering pond off the property flows into Pond 1. Pond 1 does not have any connection off the property to Dry Creek. Pond 2 is part of a larger pond that was constructed off the property to the west and a small portion of that pond extends onto the property tract. The off-site pond (Pond 2) was constructed approximately around 2005. Pond 2 does not have any connection off the project area to Dry Creek. The 1986 preamble to 33 CFR 320-330 regulations states that for clarification it should be noted that we generally do not consider the following waters to be “waters of the United States...(C) artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used

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<sup>7</sup> 51 FR 41217, November 13, 1986.

exclusively for such purposes as stock watering, irrigation, setline basins, or rice growing. Therefore, Pond 1 & Pond 2 are not waters of the United States and are not subject to Section 404 of the Clean Water Act.

- 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 two upland man-made ditches within the property boundary. Ditch 1 (296.89 linear feet) and Ditch 2 (73.76 linear feet). Ditch 1 and Ditch 2 are non-relatively permanent flow, are not tidal, and do not drain wetlands. 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, Ditch 1 and Ditch 2 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.

There is a drainage swale (460 linear feet) located within the project boundary. This drainage swale does not have a defined bed or bank and does not appear on the topographic map; however, it does appear in the DEM. The LIDAR and Google Earth images appear to show drainage features after the swale; however, upon a site visit and further review, the drainage feature on LIDAR and aerials are actually 4x4 tracks. Please see the attached photos from the site visit with accompanying aerial images in the file. A site visit on 29 May 2024 confirmed that Swale 1 is a swale to a certain point and does not have a continuous surface water connection to Dry Creek. The features seen in the older Google Earth aerial images and DEM are indeed 4 x 4 tracks and now a swale. Based on the Google Earth aerial photos, the swale is a non-relatively permanent water as defined in the pre-2015 regime post *Sackett* guidance and is not a water of the United States. 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*. 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).

Based on our 15 April 2024 desk review, site visit on 24 May 2024 and the information obtained using data sources listed in Section 9, Wetlands A (0.02 acre), Wetland B (0.01 acre), Wetland C (0.01 acre) and Wetland D (0.03 acre) do not have any known continuous surface connection to Dry Creek, a tributary located approximately 0.25-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. 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 connection between the subject tract and Dry Creek. Therefore, Wetlands A through 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 and/or Section 10 of the Rivers and Harbors 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 15 April 2024. Site Visit 24 May 2024.
  - 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.

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- c. U.S. Geological Survey Map(s) 1:24,000 scale, Outlaw Pond, Texas Quadrangle, 1959, 1984, 2010; and 2022,
- d. Data Sheets prepared by the applicant on 5 October 2021 and 26 October 2021.
- 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: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.

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.





**Location**  
**30.184647 N,**  
**-95.276466 W**

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Exhibit

