



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

CESWG-RD-P

March 18, 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-2021-00784, 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.

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).
 - i. Pond A, 0.09 acre, non-jurisdictional, 30.0354153°, -95.4565556°
 - ii. Wetland A, 0.16 acre, non-adjacent, non-jurisdictional, 30.0341997°, -95.4567522°
 - iii. Wetland B, 0.01 acre, non-adjacent, non-jurisdictional, 30.0343416°, -95.4573891°
 - iv. Wetland C, 0.03 acre, non-adjacent, non-jurisdictional, 30.0343558°, -95.4575707°
 - v. Wetland D, 0.77 acre, non-adjacent, non-jurisdictional, 30.0345206°, -95.4596547°
 - vi. Drainage Swale A, 1,341 linear feet, non-relatively permanent, non-jurisdictional, 30.0337000°, -95.4554709°
 - vii. Drainage Swale B, 535 linear feet, non-relatively permanent, non-jurisdictional, 30.0322685°, -95.4614506°
 - viii. Stream C (Cypress Creek), 3,100 linear feet, TNW, jurisdictional, 30.0354540°, -95.459949°
 - ix. Westador MUD Flood Relief Channel, 4.21 acres, non-relatively permanent, non-jurisdictional, 30.0341447°, -95.4560800°

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 (25 August 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, or they do not have a significant nexus to downstream traditional navigable waters."
3. REVIEW AREA. The review area is approximately 60 acres located at the terminus of Red Oak Drive, Houston, Harris County, Texas. Latitude 30.0354153° North, Longitude -95.4565556° West.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Cypress Creek⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Cypress Creek is a Traditional Navigable Water within the project boundary subject to Section 10 of the Rivers and Harbors Act of 1899 and is included on the Galveston District Navigable Waters list.⁷
6. SECTION 10 JURISDICTIONAL WATERS⁸: 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

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 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.

⁸ 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 10.⁹ Cypress Creek is a relatively permanent water and Traditional Navigable Water within the project boundary subject to Section 10 of the Rivers and Harbors Act of 1899 and is included on the Galveston District Navigable Waters list. Cypress Creek is shown on the Spring, Texas Quadrangles in 1916, 1920, 1960, 1982, 1995, and 2019.

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): Cypress Creek is a relatively permanent water and Traditional Navigable Water within the project boundary subject to Section 10 of the Rivers and Harbors Act of 1899 and is included on the Galveston District Navigable Waters list. Cypress Creek is shown on the Spring, Texas Quadrangles in 1916, 1920, 1960, 1982, 1995, and 2019.
 - 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

⁹ 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.

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”).¹⁰ 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.

The project area contains two features, Drainage Swale A and Drainage Swale B. These features have a defined bed and bank and ordinary high-water mark. Drainage Swale A appears on the topographic map as an unnamed tributary to Cypress Creek in 1916, 1920, and 1960. It does not appear on the 1982, 1995, and 2019 topographic maps due to development of subdivisions and roads surrounding the project area. The only topographic map Drainage Swale B appears on is the 1960 map. Both features have been cut-off from Cypress Creek due to the development surrounding the project area. The swales exhibit low volume, infrequent, and/or short duration flow indicating that the swales primary source of water is runoff from rainfall. They also do not appear near any of the wetlands on site. Drainage Swale A and Drainage Swale B are not relatively permanent waters as defined in the pre-2015 regime post *Sackett* guidance and are not waters of the United States.

Westador MUD Flood Relief Channel (WMFRC) was created by excavating uplands between 2005 and 2006 according to Google Earth aerials for the purpose of floodwater retention during extreme weather events. Google Earth aerials 2014, 2015, 2019, 2020, and 2022 show the WMFRC as not holding standing water in any of those years. The Google Earth aerial from August 2017 shows water in the flood channel as a result of an extreme weather event, Hurricane Harvey; therefore, the flood channel was functioning as designed to channel stormwater away from adjacent subdivisions. WMFRC is not an open water feature; therefore, it is not relatively permanent. WMFRC is essentially a large swale without a bed and bank or ordinary high-water mark and is not a water of the United States.

¹⁰ 51 FR 41217, November 13, 1986.

- 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*.

One pond was identified, Pond A, totaling 0.09 acre. This pond was constructed out of uplands between 2014 and 2015 according to Google Earth aeriels. The use, degradation, or destruction of Pond A would not affect interstate or foreign commerce. The pond is 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 pond is not an impoundment of a tributary and does not flow to a Traditional Navigable Water, therefore, the pond is not a water of the United States.

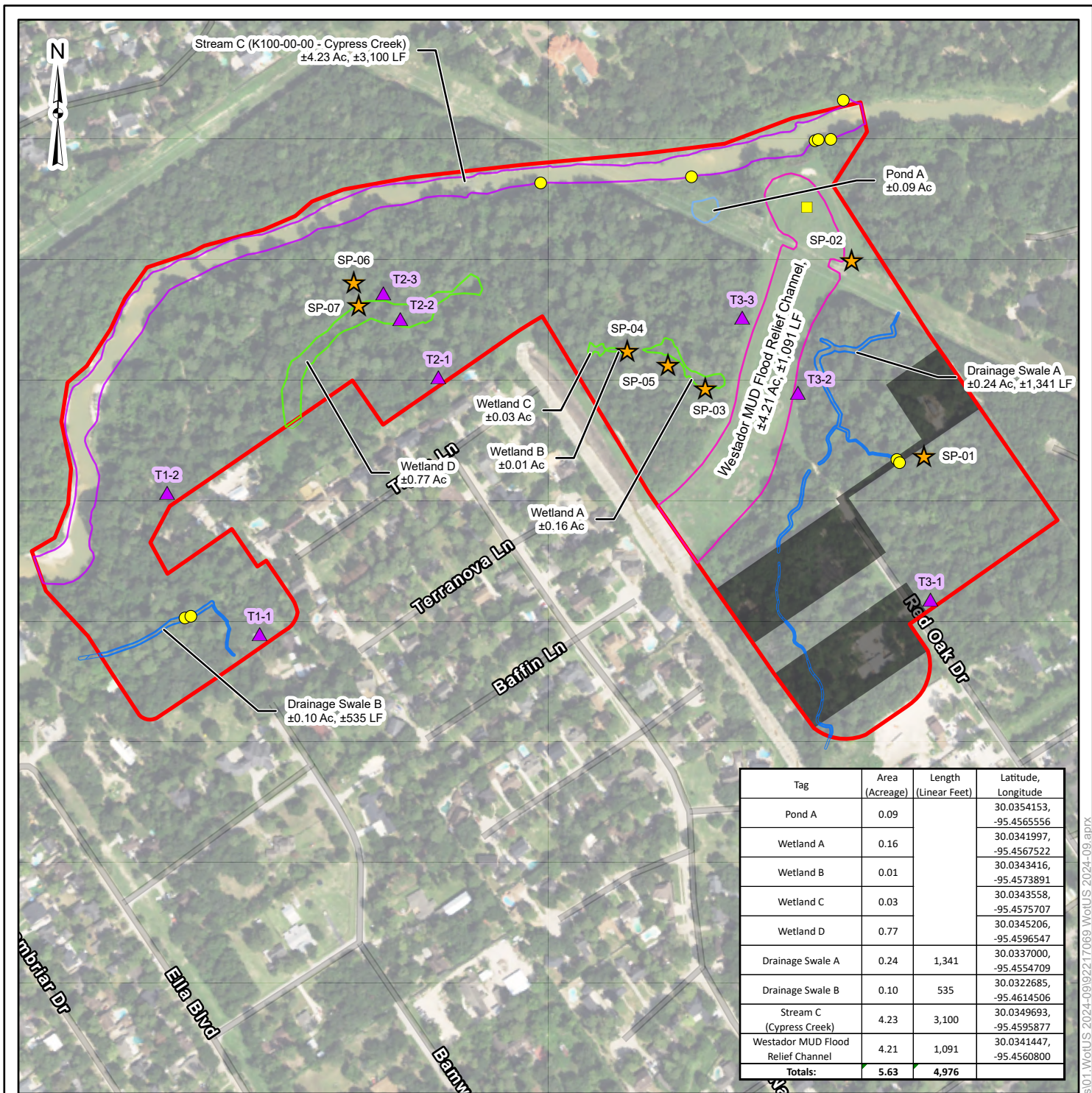
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland A, Wetland B, Wetland C, Wetland D do not directly abut and therefore have no continuous surface connection with Cypress Creek which is a TNW as discussed in Section 6 and Section 7a of this MFR. Wetland A, Wetland B, Wetland C, Wetland 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.

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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. Google Earth 2005, 2006, 2014, 2015, 2017, 2019, 2020, and 2022
 - b. United States Geological Survey Topographic Quadrangle, Spring, Texas 1916, 1920, 1960, 1982, 1995, and 2019
 - c. Waters of the U.S Delineation Report dated 23 October 2023.
 - d. United States Department of Agriculture, Natural Resources Conservation Service, Agricultural Applied Climate Information System (AgACIS) climate data.
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.



Project Limits, ±57 Acres

No Access

Culvert

Box Inlet

Transect Point

Sample Point

0 200 400 800 Feet

DATA SOURCES:

Esri Community Maps Contributors, Baylor University, City of Houston, HPB, Montgomery County, TX GIS Office, Texas Parks & Wildlife, © OpenStreetMap, Microsoft, CONANP, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA, USFWS/TNRIS NAIP Aerial Photograph 2020

Project No.: 92217069
Date: Jan 2025
Drawn By: REW
Reviewed By: JCL



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Aquatic Features Delineation Maps

Waters of the U.S. Assessment
Westador Stormwater Detention Basin
HCFCD Project ID K500-27-00-E001
Houston, Harris County, Texas

Exhibit

8.0