



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

CESWG-RD-C

16 April 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-2021-00151²

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 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).

Feature	Latitude/Longitude	Aquatic Feature Type	Size	Jurisdictional Status
Pine Gully	29.58802166 - 95.01785328	RPW	820 l/f	Jurisdictional/RPW
Wetland 1	29.58790296 - 95.01870814	PEM	0.10-ac	Jurisdictional/Adjacent Wetland
Wetland 2	29.58535329 - 95.01709541	PFO	0.77-ac	Non-Jurisdictional/non-adjacent
Wetland 3	29.58569300 - 95.01699745	PEM	0.25-ac	Non-Jurisdictional/non-adjacent
Wetland 4	29.58594728 - 95.01655667	PFO	0.02-ac	Non-Jurisdictional/non-adjacent
Wetland 5	29.58568676 - 95.01786919	PEM	0.38-ac	Non-Jurisdictional/non-adjacent
Wetland 6	29.58611292 - 95.02012260	PEM	5.25-ac	Non-Jurisdictional/non-Adjacent Wetland
Wetland 7	29.58441509 - 95.01946395	PFO	0.05-ac	Non-Jurisdictional/non-adjacent
Wetland 8	29.58497601 - 95.02057869	PSS	0.18-ac	Non-Jurisdictional/non-adjacent
Wetland 9	29.58512401 - 95.01896268	PFO	0.73-ac	Non-Jurisdictional/non-adjacent
Wetland 10	29.58569973 - 95.01877836	PEM	0.07-ac	Non-Jurisdictional/non-adjacent

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Feature	Latitude/Longitude	Aquatic Feature Type	Size	Jurisdictional Status
Wetland 11	29.58422020 - 95.01901274	PFO	0.01-ac	Non-Jurisdictional/non-adjacent
Wetland 12	29.58524320 - 95.02146318	PFO	0.30-ac	Non-Jurisdictional/non-Adjacent Wetland
Wetland 13	29.58477407 - 95.02287588	PFO	0.31-ac	Non-Jurisdictional/non-adjacent
Wetland 14	29.58504931 - 95.01793538	PFO	0.04-ac	Non-Jurisdictional/non-adjacent
Wetland 15	29.58386411 - 95.02827331	PEM	0.45-ac	Non-Jurisdictional/non-adjacent
Wetland 16	29.58240524 - 95.02647550	PFO	0.10-ac	Non-Jurisdictional/non-adjacent
Wetland 17	29.58233010 - 95.02603752	PFO	0.49-ac	Non-Jurisdictional/non-adjacent
Wetland 18	29.58308588 - 95.02692813	PFO	0.05-ac	Non-Jurisdictional/non-adjacent
Wetland 19	29.58475483 - 95.02463822	PFO	0.12-ac	Non-Jurisdictional/non-adjacent
Wetland 20	29.58271017 - 95.02000970	PSS	0.02-ac	Non-Jurisdictional/non-adjacent
Wetland 21	29.58333306 - 95.01928757	PFO	0.05-ac	Non-Jurisdictional/non-adjacent
Wetland 22	29.58333535 - 95.01847907	PFO	0.04-ac	Non-Jurisdictional/non-adjacent
Wetland 23	29.58377013 - 95.02792145	PFO	0.02-ac	Non-Jurisdictional/non-adjacent
Pond 1	29.58690034 - 95.01777830	OPEN WATER POND	7.27-acre	Non-Jurisdictional

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Feature	Latitude/Longitude	Aquatic Feature Type	Size	Jurisdictional Status
Pond 2	29.58221084 - 95.02666520	OPEN WATER POND	0.03-ac	Non-Jurisdictional
Total Delineated Waters			17.1-ac/820 l/f	

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. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.
3. REVIEW AREA. The tract is located approximately 0.22-mile south of the intersection of Red Bluff Road and State Highway 146 in Seabrook, Harris County, Texas, and is centered at the approximate coordinates of 29.584593°N, 95.021347°W.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Galveston Bay is listed on the Galveston District Navigable Waters List.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Pine Gully flows approximately 1.5 miles east directly into Galveston Bay.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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): **Pine Gully**, 820 linear feet, (29.588002°, -95.017876°) is a tributary that flows east 1.5 miles to Galveston Bay, a TNW. Pine Gully holds a relatively permanent flow, with multiple Google Earth aerials indicating standing water in the creek during drier than normal conditions. Therefore, it is a relatively permanent water subject to Section 404 of the Clean Water Act.

⁶ 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.

⁷ 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.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): **Wetland 1** (0.10 acre) is a PEM wetland that directly abuts and has a continuous surface water connection with Pine Gully, a relatively permanent tributary. Under the pre-2015 regime and consistent with the *Rapanos* plurality and *Sackett*, adjacent wetlands are jurisdictional when they have a continuous surface water connection with traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments, or relatively permanent tributaries. Therefore, Wetland 1 meets the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and is a water of the United States.

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”).⁸ 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. 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 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

⁸ 51 FR 41217, November 13, 1986.

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 2 is a relatively permanent water. The use, degradation, or destruction of the pond would not affect interstate or foreign commerce including which are or could be used by interstate or foreign travelers for recreation or other purposes, from which fish or shellfish are or could be taken and sold in interstate or foreign commerce, or which are used or could be used for industrial purposes by industries in interstate commerce. Pond 2 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).

Based on data sources listed in #9 and our 12 February 2025 Site visit, we have determined that Wetlands 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 reside in small depressional areas entirely within the review area that collect rainwater from the surrounding area. The LiDAR Digital Elevation Model (DEM), the Regulatory Viewer LiDAR DEM, and Google Earth aerial photos do not show any continuous surface connections between these wetlands and any TNW, RPW, or impoundment of either. Our 12 February 2025 site visit shows Wetland 6 is part of a larger wetland extending approximately 240 feet north off the project site with a discrete connection via a 350-foot-long swale north of the project site connecting back to Pine Gully (RPW) which was evident via the site visit and the 2018 LiDAR Digital Elevation Model (DEM). However, as per the 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act, wetlands must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins and the wetland has to be touching the requisite water. Therefore, Wetland 6 is not considered abutting a requisite water; and, therefore, not considered a water of the U.S. All of the above mentioned wetlands do not directly and/or physically touch a requisite water; therefore, wetlands 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 do not meet the

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definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States.

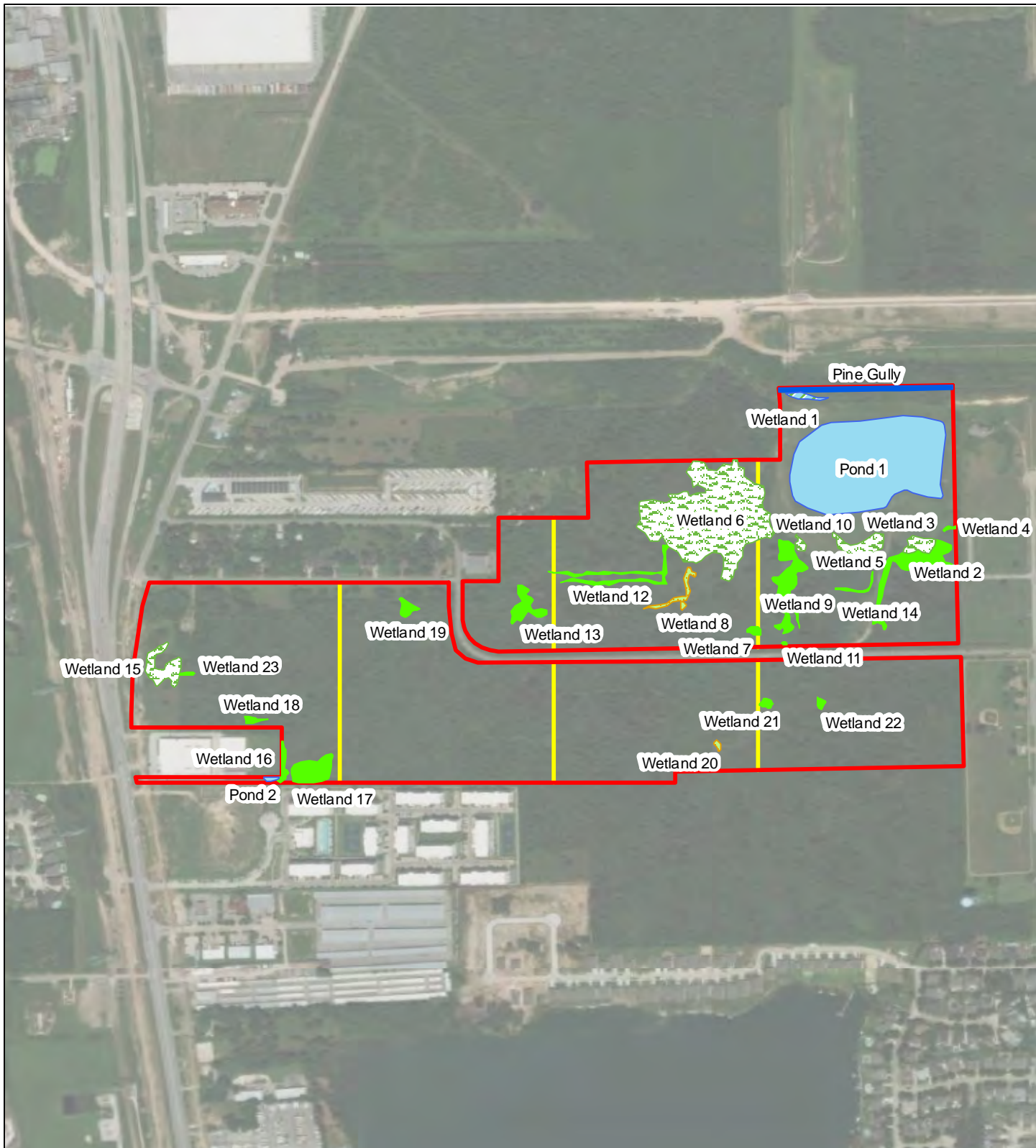
Pond 1 Pond 1 was excavated in 2011 and further expanded in 2013. According to aerial photos and available desktop resources it appears that Pond 1 was excavated from existing wetlands; therefore, Pond 1 will be treated as a wetland. Based on our desk review and site visit, Pond 1 does not directly abut Pine Gully (approximately 100 feet to the north), or any other water of the United States. Pond 1 is surrounded by uplands. Pond 1 does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water 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) Aerial Photographs: *Google earth aerials 1944-2024*
- b) United States Geological Survey (USGS) Topographic Maps: *Earth point Topographic Map; accessed 13 December 2024*
- c) United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map Accessed 13 December 2024
- d) US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map Accessed 13 December 2023
- e) Texas Water Development Board Lidar 2018 DEM Accessed 13 December 2024
- f) Wetland Delineation provided by SSCI on 22 December 2021
- g) Site visit on 12 February 2025

10. OTHER SUPPORTING INFORMATION. MFR coordinated with EPA dated 26 February 2025.

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.



Legend

- | | | |
|--------------|------------------------|--------------------------|
| Project Area | Potential WOTUS | Isolated Features |
| Transect | Intermittent Stream | PFO Wetland |
| | PEM Wetland | PSS Wetland |
| | | PEM Wetland |
| | | Stock Pond |



0 375 750 1,500
 Feet

1 inch = 750 feet

**FIGURE 8
 DELINEATION - KEY MAP**

120-ACRE SITE
 3450 BAYPORT BLVD
 SEABROOK, TEXAS 77586

Prepared by: M. Fontenot, PWS #2202
 Date: November 24, 2021
 Source: ESRI World Imagery (2017)