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

CESWG-RD-E 19 February 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-2022-00327.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States (U.S.) on a parcel or a written statement and map identifying the limits of waters of the U.S 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 Section 404 of the Clean Water Act (CWA) implementing regulations published by the Department of the Army (DA) 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.

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. Wet-4; 1.81 acres, non-jurisdictional, non-adjacent, 29.295250°, -95.419300°

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).

3. REVIEW AREA. The review area is an approximate 1.81-acre palustrine emergent wetland located approximately 1.30 miles northwest of the intersection of State Highway 288 and County Road 48, in Bonney, Brazoria County, Texas (Map enclosed). The center coordinates of the site are Latitude: 29.295250°, Longitude: -95.419300°

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Wet-4 is located approximately 14 river miles upstream from a TNW section of Austin Bayou and is approximately one mile southwest of a RPW section of Austin Bayou.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wet-4 has a continuous surface connection to a non-relatively permanent ditch located directly to the north. The non-relatively permanent irrigation ditch flows east for approximately 0.61-mile until it connects via culvert to an unnamed RPW. This unnamed RPW flows north for approximately 0.22-mile to an unnamed tributary of Austin Bayou. The unnamed tributary flows northeast for approximately 0.57-mile to a RPW section of Austin Bayou. Austin Bayou becomes a TNW approximately 14 river miles downstream.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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.[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

[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.

[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.

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 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 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 data sources listed in #9 and a site visit conducted by the applicant on 16 January 2025, Wet-4 (1.81 acres) is a depressional area entirely within the

[7] 51 FR 41217, November 13, 1986.

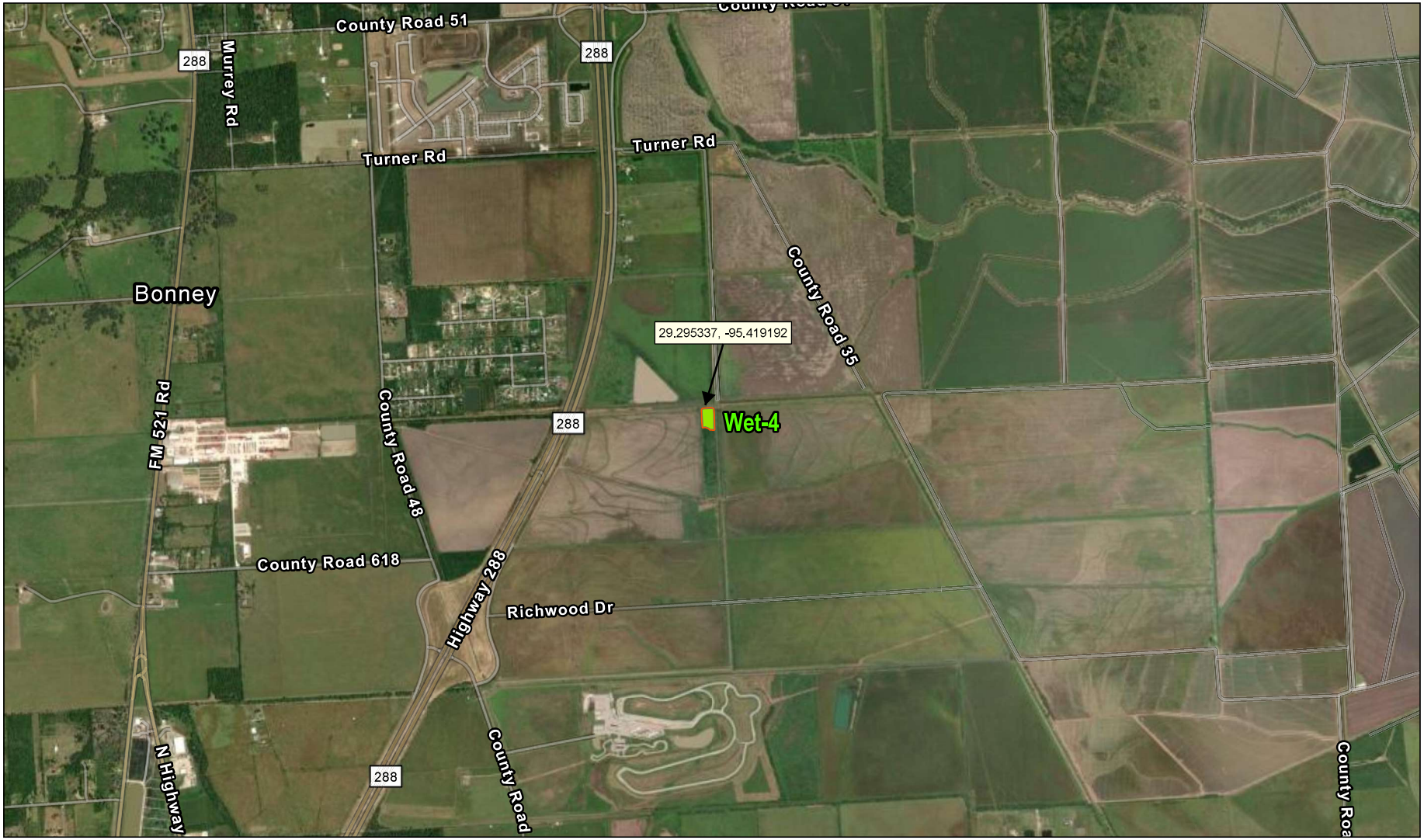
review area that collects rainwater from the surrounding agricultural area. Based on our review, this wetland does not have a continuous surface connection to any water of the United States. Based on our review, Wet-4 drains offsite via a culvert 4,462 feet into a non-relatively permanent irrigation ditch which connects via 2,751 feet to an unnamed tributary of Austin Bayou which is an RPW at this point and becomes a TNW. Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and/or other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters, including storm drain events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water as explained in Regulatory Guidance Memorandum on SWG-2023-00284 and NAP-2023-01223. However, the approximate distance for the flow path to the relatively permanent water is 4,462 feet. This distance is too far to be considered a continuous surface connection. As stated in Regulatory Guidance Memo NWK-2022-00809, weak indicators of flow frequency (e.g. bed and bank and other indicators of a OHWM) and duration as well as long distances and chain of features between the wetlands and the relatively permanent water can be too extended and tenuous to constitute a continuous surface connection. Considering these factors together, and consistent with Sackett, the series of non-relatively permanent features, culverts, and the length do not meet the continuous surface connection requirement for Wet-4. Therefore, Wet-4 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 subject to Section 404 of the Clean Water 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; 8 January 2025. Site Visit; 16 January 2025.
   b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant; Stantec submitted on 4 November 2024. Photos from 16 January 2025 site visit.
   c. U.S. Geological Survey map(s); Rosharon, Texas QUAD 1983
   d. USDA Natural Resources Conservation Service Soil Survey; Accessed 8 January 2025.
   e. National Wetlands Inventory map(s); Accessed 8 January 2025.

10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on SWG-2023-00284, NAP-2023-01223 and NWK-2022-00809.

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 Boundary
- PEM Wetland

N

0 1,500 3,000 Feet

(At original document size of 8.5x11)
1:35,000

Notes

1. Coordinate System: NAD 1983 2011 StatePlane Texas South Central FIPS 4204 FtUS
2. Data Sources:
3. Background:

Stantec

Project Location
Cradle Solar Project
Brazoria County, TX

Prepared by CRH on 2025-01-14

Client/Project
Client - Leeward
Project - Cradle Solar Project
Report - Pre Construction Notification Mapping

235301377

Figure No.
1

Title
Project Vicinity Map

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