



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
5151 FLYNN PARKWAY, SUITE 306
CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RDR

5 September 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-2022-00535 (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.

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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).

Table 1: Features and type within Review Area

Feature Name	Latitude/ Longitude	Size	Feature Type	Jurisdiction
CCDD1 Old Voltz Ditch	26.01006° N 97.51371° W	270 LF	Drainage ditch with relatively permanent flow that flows into a RPW.	Section 404
CCDD1 Olmito Branch	26.02474° N 97.51198° W	204 LF	Drainage ditch with relatively permanent flow that flows into a RPW.	Section 404
CCID6 Irrig Canal 1	26.03231° N 97.51107° W	253 LF	Non-RPW ditch excavated from uplands	None
CCDD1 Drainage Lat 1	26.03972° N 97.50974° W	303 LF	Non-RPW ditch excavated from uplands	None
CCDD1 Ditch No. 2	26.04552° N 97.50580° W	223 LF	Drainage ditch with relatively permanent flow that flows into a RPW.	Section 404
CCDD1 Drainage Lat 2	26.05190° N 97.50347° W	5,073 LF	Non-RPW ditch excavated from uplands	None
CCDD1 Drainage Lat 3	26.06805° N 97.50004° W	1,383 LF	Non-RPW ditch excavated from uplands	None
CCDD1 Drainage Lat 4	26.07199° N 97.49927° W	222 LF	Non-RPW ditch excavated from uplands	None
CCID6 Irrig Canal 2	26.07217° N 97.49922° W	219 LF	Active irrigation canal excavated from uplands	None

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)

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d. *Sackett v. EPA*, 598 U.S.651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximate 135-acre review area sits along an approximate 4.95-mile-long portion of Old Alice Road between the Brownsville Sports Park and the Intersection of State Highway 100, in Los Fresnos, Cameron County, Texas.

LATITUDE/LONGITUDE (Decimal Degrees):

South Terminus Latitude: 26.00408° North; Longitude: 97.51453° West

North Terminus Latitude: 26.07312° North; Longitude: 97.51445° West

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶

FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Features *CCDD1 Old Voltz Ditch*, *CCDD1 Olmito Branch*, and *CCDD1 Ditch No. 2* demonstrate relatively permanent flow through the full length of the feature inside the review area and continuing in this manner to their confluences with *CCDD1 Ditch No. 2*, approximately 1.2 miles east of the review area. *CCDD1 Ditch No. 2* continues downstream an additional approximately 8.5 miles to San Martin Lake, a permanent water subject to the ebb and flow of the daily tide and jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

5. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ N/A

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 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.

⁸ 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.

6. 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):

CCDD1 Old Voltz Ditch (270 LF), CCDD1 Olmito Branch (204 LF), and CCDD1 Ditch No. 2 (223 LF): LiDAR, topo, aerial imagery, applicant-provided wetland delineation report, and a Corps site visit were utilized as part of the desktop analysis to identify that these mapped features are Relatively Permanent Waters that flow through the review area to a point of confluence approximately 1.2 miles east of the review area. CCDD1 Ditch No. 2 continues downstream an additional approximately 8.5 miles to San Martin Lake, a permanent water subject to the ebb and flow of the daily tide and jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into CCDD1 Old Voltz Ditch, CCDD1 Olmito Branch, and/or CCDD1 Ditch No. 2 requires a Department of Army Permit.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

7. 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”).⁹ 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.

CCDD1 Drainage Lat 1 (303 LF), CCDD1 Drainage Lat 2 (5,073 LF), CCDD1 Drainage Lat 3 (1,383 LF), CCDD1 Drainage Lat 4 (222 LF), and CCID6 Irrig Canal 1 (253 LF): LiDAR, topo, aerial imagery, applicant-provided wetland delineation report, and a Corps site visit were utilized as part of the desktop analysis to identify that these features are ditches constructed from uplands for the purpose of conveying stormwater from the review area during and after precipitation events. The ditches do not contain relatively permanent water, are not under tidal influence, and do not act as a tributary to any TNW. The preamble of Section 328.3 (16 November 1986 Federal Register Vol. 51, No. 219) defines waters that are generally non-jurisdictional, including “non-tidal drainage ditches excavated on dry land... Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water (33 CFR 328.3(b)(3).”

CCID6 Irrig Canal 2 (219 LF): This irrigation canal was excavated and constructed within uplands for the conveyance of water from the Rio Grande to agricultural fields. This feature is best described in the preamble for 33 CFR 328, published in Federal Register Volume 51, Number 219, published November 13, 1986 (page 41217), which states, "For clarification, it should be noted that we generally do not consider the following waters to be Waters of the United States...(a) Non-tidal drainage and irrigation ditches excavated on dry land.”

- 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

⁹ 51 FR 41217, November 13, 1986.

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- 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). N/A
8. 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. Maps and attachments provided by the Cameron County Regional Mobility Authority, received 8 January 2024
 - b. Aerials (2018, 2023, 2025; source: Google Earth)
 - c. Site visit conducted 10 October 2024
 - d. USGS Topographic Maps 1:24,000 Olmito, TX and Los Fresnos, TX (2022)
 - e. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet vertical root mean square error (RMSEz) in open terrain.
 - f. Web Soil Survey Hydric Rating Map for Kleberg County, Texas (NRCS website accessed 4 September 2024)
 - g. National Wetland Inventory (NWI) (USFWS website accessed 4 September 2024)

