



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

CESWG-RD-C

18 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),<sup>1</sup> SWG-2022-00749

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.

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1. SUMMARY OF CONCLUSIONS.

**Features Assessed in Determination**

Project Features	Approximate Linear Feet (LF) or Acres	Stream/Wetland Type	Latitude, Longitude	Jurisdiction
Dry Creek Stream (North)	7,798 LF	Non-RPW	29.543803°, -95.794978°	Non-jurisdictional
Dry Creek North Wetlands	1.63 acres	PEM		Non-jurisdictional, no continuous surface connection with a RPW
Wet 05	0.90 acres	PEM	29.543815°, -95.790473°	
Wet 06	0.49 acres	PEM	29.544665°, -95.798345°	
Wet 07	0.18 acres	PEM	29.547309°, -95.806939°	
Wet 08	0.06 acres	PEM	29.547279°, -95.809155°	
Dry Creek Wetlands (South)	0.4 Acres	PEM		Non-jurisdictional, no continuous surface connection with a RPW
Wet 01	0.02 acres	PEM	29.538742°, -95.77675°	
Wet 02	0.03 acres	PEM	29.538692°, -95.777543°	
Wet 03	0.19 acres	PEM	29.538709°, -95.778413°	
Wet 04	0.16 acres	PEM	29.541141°, -95.785737°	
Dry Creek Stream (South)	5,482 LF	Non-RPW	29.542234°, -95.788179°	Non-jurisdictional
Trib 1	88 LF	Non-RPW	29.538907°, -95.776006	Non-Jurisdictional
Theater Ditch (North and South)	6,927 LF	Non-RPW		Non-Jurisdictional
Wet 09	0.17 acres	PEM	29.549533°, -95.786520°	Non-jurisdictional, no continuous surface connection with a RPW
Wet 10	0.30 acres	PEM	29.554408°, -95.78601°	
Rabbs Bayou Extension	3,114 LF	Non-RPW	29.571791°, -95.770304°	Non-jurisdictional
Rabbs Bayou Extension Wetlands				Non-jurisdictional, no continuous surface connection with a RPW
Wet 11	0.13 acres	PEM	29.569470°, -95.774908°	

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Theater Ditch North Culvert Stream	283 LF	Non-RPW	29.565427°, -95.787064°	Non-Jurisdictional
Graeber Road Proposed Project Area	9.5 acres	Dry Land	29.545131°, -95.780492°	Non-jurisdictional
Rabbs Bayou Proposed Detention Pond Area	23.2 acres	Dry Land	29.570783°, -95.768802°	Non-jurisdictional
Total Stream			23, 692 LF	Non-Jurisdictional, Non-RPW
Total Wetlands			2.63 acres	Non-jurisdictional, no continuous surface connection with a RPW

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 review area includes 6 aquatic linear project features: Dry Creek North, Dry Creek South, Theater Ditch Culvert, Theater Ditch (North and South), Trib 1, Rabbs Bayou extension. In addition to the aquatic features, the request includes two proposed dry land project sites: the Graeber Road project area and one 23.2-acre site for the proposed Rabbs Bayou detention pond. The coordinates for all project areas can be found in Section 1. The project areas run throughout the City of Rosenberg in Fort Bend County, Texas.

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

The Brazos River is deemed a Traditional Navigable Water by the Galveston District.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

The northern part of the Theater Ditch drainage feature connects to the Brazos River, north of the city, through the culverts under a developed area, Theater Ditch Culvert under the railroad tracks and Old Richmond Road, an impoundment of the tributary, and a culvert north of the impoundment. Dry Creek South connects to Smither's Lake then continues from the lake and flows into Rabbs Bayou, which flows into the Brazos River.

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 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.

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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.

- 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. 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.

Dry Creek North is a drainage feature constructed in the 1950s. This portion of Dry Creek is approximately 7,798 linear feet. It was constructed out of uplands, drains only uplands, and does not carry a relatively permanent flow of water. Therefore, it is not a water of the United States. The Rabbs Bayou extension is approximately 3,114 linear feet. It was constructed out of uplands, drains only uplands, and does not carry a relatively permanent flow of water. Therefore, it is not a water of the United States.

- 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

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

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).

We determined that the 6 aquatic linear features (Dry Creek North (7,798 linear feet), Dry Creek South (5,482 linear feet), Theater Ditch (North and Southern Sections 6,927 linear feet), Theater Ditch Culvert (283 linear feet), Trib 1 (88 linear feet), and the Rabbs Bayou extension (3,114 linear feet)) are not relatively permanent waters, and; therefore are not subject to Section 404 of the Clean Water Act (CWA). The 11 wetlands, totaling 2.63 acres do not abut a relatively permanent water, a jurisdictional impoundment, or a TNW. Therefore, the discharge of dredged and/or fill material or any work and/or the placement of structures in these aquatic features are not subject to Section 404 or Section 10 and does not require a DA permit. The Graeber Road project site and the Rabbs Bayou Detention Pond (23.2 acres) are proposed project sites that occur in dry land.

- 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. 21 March Site Visit conducted by USACE staff

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b. Revised Delineation report submitted by Compass Environmental Solutions on 26 March 2025

10. OTHER SUPPORTING INFORMATION. Approved Jurisdictional Determination (AJD) completed on 20 December 2023 and the AJD reconsideration completed on 29 March 2024

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.