



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

CESWG-RD-C

29 March 2024

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.

1. SUMMARY OF CONCLUSIONS.

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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.

- 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).

### Features Assessed in Determination

Project Features	Approximate Linear Feet (LF) or Acres	Stream/Wetland Type	Latitude, Longitude	Jurisdiction
Dry Creek Stream (North)	7,589 LF	Non-RPW	29.543803°, -95.794978°	Non-jurisdictional from the confluence of Theater Ditch and Dry Creek (29.543735°, -95.788286°) west to the end of the feature boundary
Dry Creek Wetlands (South)	0.48 acres	PEM	29.541101°, -95.785748°	Jurisdictional from the confluence with Theater Ditch (29.543735°, -95.788286°) and southeast to the end of the feature boundary past Farm-to-Market (FM) 2218; Section 404 CWA
Dry Creek Stream (South)	5,730 LF	RPW	29.542234°, -95.788179°	Jurisdictional from the confluence with Theater Ditch (29.543735°, -95.788286°) and southeast to the end of the feature boundary past FM 2218; Section 404 CWA
Trib 1	88 LF	RPW	29.538907°, -95.776006°	Jurisdictional; Section 404 CWA
Theater Ditch South Stream	4,703 LF	Non-RPW from 29.550361°, -95.785741° and south to the end of the project area  RPW from 29.550361°, -95.785741° and north to the end of the project area	29.551385°, -95.785149°	Non-Jurisdictional from 29.550361°, -95.785741° and south to the end of the feature boundary (2881 LF)  Jurisdictional from 29.550361°, -95.785741° and north to the end of the feature boundary (1822 LF)
Theater Ditch South Wetlands	0.30 acres	PEM	29.549767°, -95.786317°	Jurisdictional; Section 404 CWA
Rabbs Bayou Extension	3,189 LF	Non-RPW	29.571791°, -95.770304°	Non-jurisdictional

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2022-00749

Theater Ditch North Stream	2,235 LF	RPW	29.558568°, -95.787003°	Jurisdictional; Section 404 CWA
Theater Ditch North Wetlands	0.17 acres	PEM	29.555263°, -95.786150°	Jurisdictional; Section 404 CWA
Theater Ditch North Culvert Stream	379 LF	RPW	29.565427°, -95.787064°	Jurisdictional; Section 404 CWA
Graeber Road Proposed Project Area	3,592 LF		29.545131°, -95.780492°	Non-jurisdictional, Dry Land
Rabbs Bayou Proposed Detention Pond Area	23.2 acres		29.570783°, -95.768802°	Non-jurisdictional, Dry Land
Total Stream	27, 505 LF			10, 254 Linear Feet (Jurisdictional)  17, 251 Linear Feet (Non-jurisdictional)
Total Wetlands	0.95 acres			0.95 acres (Jurisdictional)

## 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. \_\_, 143 S. Ct. 1322 (2023)

- e. 2007 Rapanos Approved Jurisdictional Determination Form Instructional Guidebook
  - f. 33 Code of Federal Regulations Part 200 to End; Navigation and Navigable Waters, Revised as of July 1, 2018
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- 3. REVIEW AREA. The review area includes 7 linear project areas (Dry Creek North and Dry Creek South, Theater Ditch Culvert, Theater Ditch North, Theater Ditch South, Graeber Road proposed project area, and Rabbs Bayou Extension) and one 23-acre site for the proposed Rabbs Bayou detention pond. The subject features total approximately 27,505 linear feet of streams and includes approximately 0.95-acre of wetlands within the linear features. The center coordinates for the Dry Creek, Theater Ditch, and Graeber Road portion is 29.544955°, -95.788512°. The coordinates for the Rabbs Bayou project areas are 29.571207°, -95.771142°. The project areas run throughout the City of Rosenberg in Fort County, Texas.
  - 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Theater Ditch South starting at 29.550361°, -95.785741° and moving north toward the end of the project area, Theater Ditch North, and Theater Ditch Culvert connect to the Brazos River, a Traditional Navigable Waterway (TNW) approximately 0.60 river miles north of the end of the Theater Ditch Culvert project boundary. Dry Creek South (measured from the end of the project area) connects to the Brazos River, a TNW, approximately 31.73 river miles away from the end of the Dry Creek South project area.
  - 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL Theater Ditch South starting at 29.550361°, -95.785741° and moving north toward the end of the project area, Theater Ditch North, and Theater Ditch Culvert connects to the Brazos River (TNW) 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 and Trib 1 connects to Smither's Lake southeast of the project areas then continues from the lake and flows into Rabbs Bayou, which flows into Big Creek, which flows into the Brazos River, a TNW.

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.
  - 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): According to the Rapanos Guidance a tributary is defined as a water that contributes flow directly or indirectly into a traditional navigable water (TNW). These tributaries can be natural, man-altered, and man-made. This guidance also states that a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order and that the flow characteristics of a particular tributary generally will be evaluated at the furthest downstream limit of such tributary. However, for purposes of determining whether

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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.

the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. Compass believed that the linear drainage features were considered exclusions as man-made drainage ditches constructed wholly in uplands. These ditches are not classified as exclusions. According the Rapanos Guidance, though drainage ditches are generally not considered jurisdictional, their jurisdictional status will be evaluated on a case-by-case basis. To be considered non-jurisdictional they must be 1. excavated wholly in and 2. draining only uplands and that 3. do not carry a relatively permanent flow of water. Each feature was evaluated using these criteria.

We re-assessed the Stahler stream order for the Dry Creek, Theater Ditch North, and Theater Ditch South project areas. Theater Ditch was constructed to have a higher elevation area which controls the direction of water flow. The approximate middle of the high area occurs at 29.550361°, -95.785741°. The elevation at this point is 95 feet NAVD88. North of the high area, the water flows north towards the Brazos River and south of the high area, the water flows south towards the confluence of Dry Creek and Theater Ditch. Due to a difference in flow paths, Theater Ditch is separated into two different stream reaches. One reach is north of the high area and has a stream order of 1. This reach includes the northern portion of Theater Ditch South, Theater Ditch North, and the Theater Ditch Culvert. This stream reach 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. Both Dry Creek and Theater Ditch South have a stream order of 1 until they converge approximately 400 feet north of the Airport Avenue Bridge. Theater Ditch has a stream order of 1 on either side of the highest point of 95 feet NAVD88 at (29.550361, -95.785741). After the confluence of Theater Ditch South and Dry Creek (29.543735°, -95.788286°), Dry Creek becomes a stream order of 2. It stays a stream order of 2 until it flows into Rabbs Bayou, a stream order of 3. This confluence occurs after Dry Creek exits Smither's Lake at 29.491080°, -95.614243°. At this point as well as before Dry Creek enters Smither's Lake, the Creek is a Relatively Permanent Water (RPW). Smither's Lake is an impoundment of Dry Creek and has been previously determined by the Corps of Engineers to be a RPW subject to Section 404 of the Clean Water Act (CWA). The estimated flow chart submitted by Compass also shows that the Dry Creek South project area is a RPW. Aerial photography shows that a majority of Dry Creek, once it leaves the project area, has permanent flow as it moves towards Smither's Lake. The majority of this Dry

Creek reach has relatively permanent flow, therefore the entire reach from the confluence of Theater Ditch and Dry Creek south to Rabbs Bayou is a RPW. Dry Creek in the project area and Trib 1 reroute and/or extend the OHWM of the natural Dry Creek tributary. They are a RPW that indirectly carries water to the Brazos River, a TNW; therefore, they are a relatively permanent tributary to the Brazos River. Outside of the Dry Creek South and Trib 1 project areas, Dry Creek connects to Smither's Lake then continues from the lake and flows into Rabbs Bayou. Rabbs Bayou flows into Big Creek, which flows into the Brazos River. Therefore, it is a water of the United States and subject to jurisdiction under Section 404 of the Clean Water Act (Section 404). The google earth aerials and the estimated flow chart submitted by Compass, show that the majority of this reach flowing north toward the Brazos River has relatively permanent flow. Therefore, the entire reach is a relatively permanent tributary of the Brazos River. Theater Ditch South starting at 29.550361°, -95.785741° and moving north toward the end of the project area, Theater Ditch North, and Theater Ditch Culvert are waters of the United States subject to jurisdiction under Section 404.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): There are approximately 0.48-acre of wetlands delineated within the channels of the Dry Creek South/Trib 1 tributary. These wetlands are subject to Section 404 as the wetlands have a continuous surface connection to the tributary which flows into the Brazos River, a TNW. Theater Ditch South contains an approximate 0.30-acre wetland. The high point in Theater Ditch South 29.550361°, -95.785741° is in this delineated wetland. Under the current guidance, the entire wetland is subject to Section 404 as the wetland has a continuous surface connection to the Theater Ditch South, Theater Ditch North, and Theater Ditch Culvert tributary, and the Brazos River, a TNW. Additionally, there is an approximate 0.17-acre wetland delineated within Theater Ditch North. This wetland is subject to Section 404 as the wetland has a continuous surface connection to the tributary and to the Brazos River, a TNW.

## 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

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

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 remaining portion of Dry Creek (Dry Creek North) is from the confluence of Theater Ditch and Dry Creek (29.543735°, -95.788286°), west to the end of the project area at 29.547281°, -95.809641°. This is a drainage feature constructed in the 1950s. This portion of Dry Creek is approximately 7,589 linear feet. It was constructed out of uplands, drains only uplands, is not a rerouted tributary, does not extend the OHWM of Theater Ditch or Dry Creek South and does not carry a relatively permanent flow of water. Therefore, it is not a water of the United States.

The second stream reach is Theater Ditch South starting below 29.550361°, -95.785741° and flowing south to the confluence of Theater Ditch and Dry Creek. This stream reach has a stream order of 1. The estimated flow chart submitted by Compass, as mentioned above, shows that this portion of Theater Ditch South does not carry a relatively permanent flow of water. It was constructed out of uplands and drains only uplands. Therefore, this portion of Theater Ditch South is a drainage ditch that is not a water of the United States and is not subject to Section 404.

The Rabbs Bayou extension was constructed out of uplands, drains only uplands, is not a rerouted tributary, does not extend the OHWM of Rabbs Bayou, and does not carry a relatively permanent flow of water. Based on our desk review, Rabbs Bayou extension is not a water of the United States and is not subject to Section 404.

- 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).  
N/A
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.
- *Aerial Photographs: 13 January 1995, 31 December 2001, 31 January 2004, 14 January 2006, 31 March 2006, 19 May 2008, 13 January 2009, 8 January 2010, 27 January 2011, 21 April 2012, 13 January 2014, 2 May 2014, 21 November 2015, 14 July 2016, 24 February 2017, 28 October 2017, 3 December 2018, 1 April 2019, 13 January 2022, 20 March 2022, 6 June 2023*
  - *United States Geological Survey Topographic Maps: Houston, Texas 1950 Richmond 1955 1:62500, 1971 Richmond 1:24, 000, Earth Point Topo 1992 1:10000, 2022 Richmond 1:24,000*
  - *United States Fish and Wildlife Service (USFWS) National Wetland Inventory (NWI): Google Earth NWI Mapper Accessed 8 March 2023*
  - *Federal Emergency Management Agency (FEMA) National Flood Hazard Layer (NFHL): Zone AE Panel 48157C0245L eff. 4/2/2014, Panel 48157C0235L eff. 4/2/2014 Accessed 8 March 2023*
  - *United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) Web Soil Survey: Fort Bend County, Texas Accessed 8 March 2023*
  - *Lidar Data: Texas Water Development Board Lidar 2018*
  - *Antecedent Precipitation Tool*
  - *2022 Delineation report from [REDACTED] submitted 22 November 2022*
  - *AJD Request for Reconsideration from [REDACTED] received on 30 January 2024*

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2022-00749

- *USACE Site Visit conducted on 15 February 2024*

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.