



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

CESWG-RD-C

1 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),¹ [SWG-2023-00047]

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.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 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 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.

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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).

i. Wetland 1, [REDACTED] non-jurisdictional

ii. Wetland 2, [REDACTED] non-jurisdictional

iii. Pond 1, [REDACTED] non-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)

3. REVIEW AREA. The 5.70-acre tract is located [REDACTED] in Seabrook, Harris County, Texas. [REDACTED]

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. There is not a flowpath to a TNW, interstate water or territorial seas as the tract does not have drainage or flow to a TNW, interstate water, or territorial sea.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 Pond 1 is a man-made pond that was excavated from dry land between 1953 and 1977. The pond appears to have been used as a borrow source for material to raise the elevation, this pond was dug out of uplands sometime between 1953 and 1977. There is no connection from the pond to any RPW, TNW nor water of the U.S. Google Earth historic aerial imagery has a gap between 1953 and 1977 as these are the aerial photos that are available for the area. The pond does not appear on a USGS topographic map until the 2010 League City Texas Quadrangle (1:24,000 scale). Pond 1 is 0.07-acres in size.
- 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

⁷ 51 FR 41217, November 13, 1986.

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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 3 October 2023 desk re review (post *Sackett*) and site visit on 21 March 2023, the use of information gained by use of the United States Geological Survey (USGS), 1982 League City Quadrangle, the 2018 NOAA Digital Coast Access Data Viewer Digital Elevation Model (DEM) and site visit on 21 March 2023, we have determined the tract contains two non-tidal palustrine wetlands totaling 0.78-acre, Wetland 1 = 0.13-acre and Wetland 2 = 0.65-acre. The wetlands on the tract do not have a continuous surface connection to the nearest Traditional Navigable Waters (TNW), the Bayport Ship Channel located approximately 0.34-mile northwest of the site or any other waters of the United States. The wetlands do not connect to a drainage feature on the north side of Port Road that empties into the Bayport Ship Channel. There is no downstream connection to the ditch along port road. This was confirmed by walking the areas between the wetlands in the review area and the north side of Port Road to see if there was a culvert connecting them. Wetlands 1 & 2 extend to the west property boundary but do not extend past that boundary as the property to the west is higher in elevation than the subject tract based on LiDAR data and our site visit that confirmed there is a considerable elevation difference of at least 3 feet between the tract to the west and Wetlands 1 and 2. There are three upland data points found between the wetlands and Pond 1 on the north end of the property that is next to Port Road. Data points A1, B1, and C1 from the delineation received in the AJD request. Hydric soil was the only wetland indicator found at these three data points. The soil in these data points also contained limestone. There was no hydrology nor prevalence of hydrophytic plant species at any of the three data points. The predominate plant species found at all three data points were upland species such as *Rosa bracteata* – UPL (Chickasaw Rose), *Bothriochloa ischaemum* – UPL (Yellow Bluestem), and *Euphorbia cordifolia* - UPL (Heartleaf sandmat). No more than overland sheet flow would exit the wetlands. Therefore, Wetlands 1 and 2 do not meet the definition of adjacent as defined in the pre-2015 regime post *Sackett* and are not waters 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.

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- a. Desk review 20 March 2023, Field site visit conducted 21 March 2023
- b. Maps, plans, plots or plat submitted by or on behalf of the applicant/.consultant:
[REDACTED] 20 January 2023
- c. U.S. Geological Survey Map(s) 1:24,000 scale, League City Quadrangle, 1982, 2013; and 2022,
- d. Data Sheets prepared by the Corps 21 March 2023
- e. USDA Natural Resources Conservation Service Soil Survey: Soil Web , accessed 3 October 2023
- f. National Wetlands inventory map: USFWS National Wetlands Mapper accessed 3 October 2023
- g. Photographs: Aerial: Google Earth Aerial Images:1977, 2006, 2020; 2022

Photographs: Other: On Site Photographs 21 March 2023
- h. NOAA Digital Coast, Data Access Viewer: 2018 Texas Water Development Board (TWDB) LiDAR and Digital Elevation Model (DEM): Coastal Texas. Accessed 30 October 2023

OTHER SUPPORTING INFORMATION. We used the DEM LiDAR to determine that the wetlands do not have a continuous surface connection to an RPW or a TNW. The wetlands do not have a ditch or swale that connects them to a water of the United States. This was confirmed by the site visit conducted on 21 March 2023.

10.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.



Aquatic Resources and Review Area

Name

- █ Review Area 5.70-acres
- █ Pond 1 (0.07-acres)
- █ Wetland 1 (0.13-acres)
- █ Wetland 2 (0.65-acres)

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Delineation Map

██████████ Seabrook, Harris County, Texas.
██████████

N

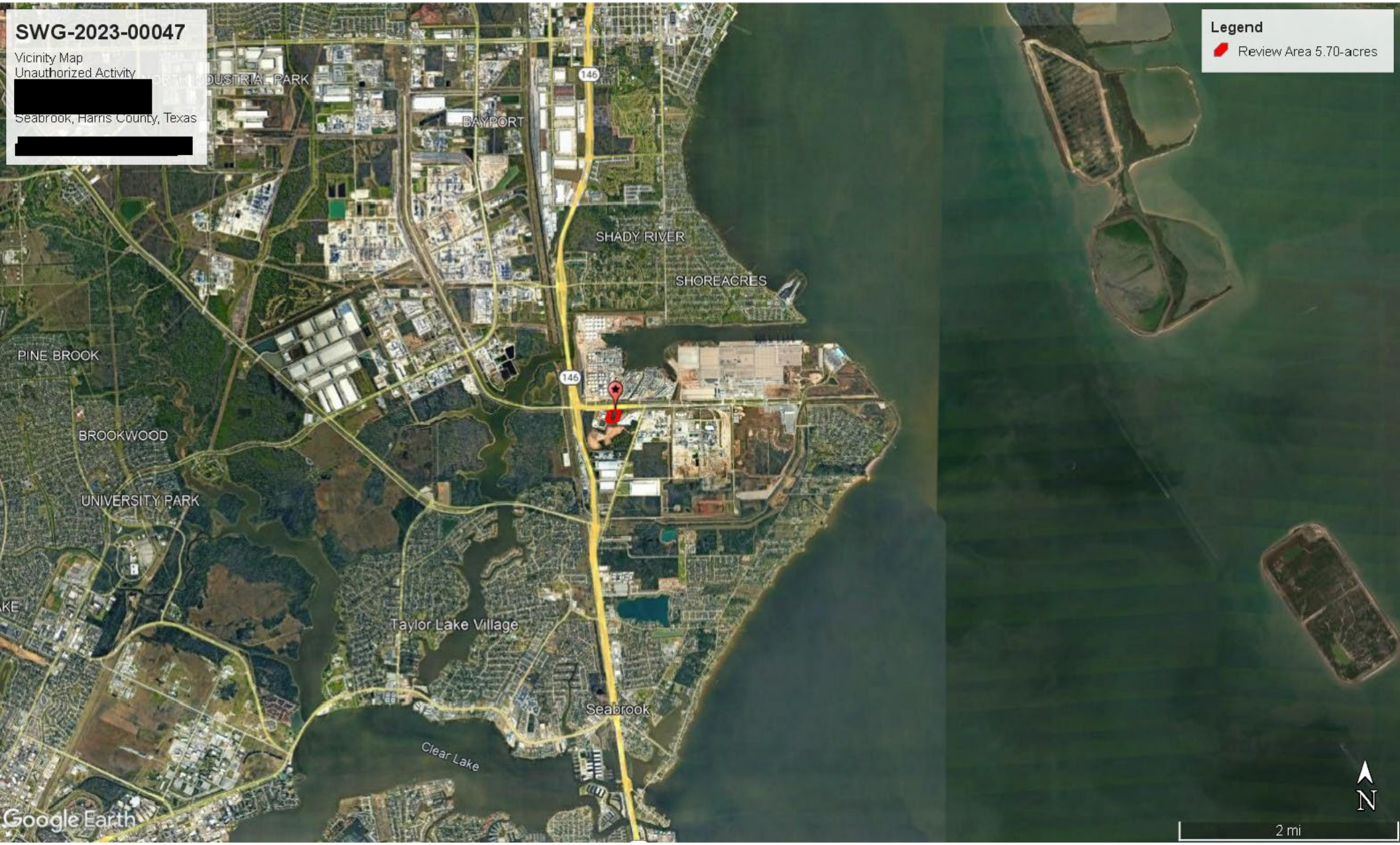


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Mi

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Vicinity Map
Unauthorized Activity
[Redacted]
Seabrook, Harris County, Texas
[Redacted]

Legend
[Red Pin Icon] Review Area 5.70-acres



Google Earth

2 mi

