



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

Corpus Christi Field Office

18 December 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-2023-00087

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 this state 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.

Corpus Christi Field Office

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2023-00087

- 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. Wet1 (0.23 acre), PEM, 28.057870 N; 97.089498 W, 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. An approximately 0.29-acre review area at a residential property located at 224 Rattlesnake Point Dr., Rockport, Aransas County, Texas.

LATITUDE/LONGITUDE (Decimal Degrees):

Latitude: 28.057870 N; Longitude: 97.089498 W

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.

N/A

6. SECTION 10 JURISDICTIONAL WATERS⁵: NA

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.

7. SECTION 404 JURISDICTIONAL WATERS:

- a. TNWs (a)(1): NA
- b. Interstate Waters (a)(2): NA
- c. Other Waters (a)(3): NA
- d. Impoundments (a)(4): NA
- e. Tributaries (a)(5): NA
- f. The territorial seas (a)(6): NA
- g. Adjacent wetlands (a)(7): NA

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”).⁶ 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.

⁶ 51 FR 41217, November 13, 1986.

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).

Wet1: Based on lidar, topographic maps, aerial imagery, site visit photos, and wetland delineation field data forms, we have determined that this palustrine wetland resides within a depressional area and extends outside the review area toward the north and northwest. Wetland conditions were observed to extend approximately 3 feet from the review area boundary. The depressional area collects rainwater from the surrounding countryside. A site visit conducted on November 2, 2023, determined that there is no presence of a continuous surface connection from Wet1 to Salt Lake, the nearest RPW, with no more than overland sheet flow exiting from this wetland to an RPW or TNW. A potential drainage pathway was identified that runs northwest of the delineated wetland in the review area toward a culvert that drains to the cattle pond, which has a continuous surface connection to Salt Lake through approximately 2,000 linear feet of ditches that drain north. Wetland conditions are not continuous between the review area and culvert entrance and were not observed between the culvert exit and the pond, demonstrating that water does not drain from the culvert with sufficient frequency and duration to establish wetland conditions. The culvert entrance is approximately 6 inches higher in elevation than the elevation of the

review area. The culvert exit is approximately 30 inches higher in elevation than the cattle pond's ordinary high water mark. The northwest end of Wet1 and the beginning (ordinary high water mark) of the cattle pond are separated by 117 feet of non-wetland conditions between the two features, including the length of the approximate 30-foot-long culvert. The Environmental Protection Agency Headquarters and Assistant Secretary of the Army for Civil Works Memorandum on NWK-2024-00392 states that as the length of the surface connection increases, even with stronger indicators of flow, the length of the connection can become no longer physically close, such that the discrete features are no longer providing a continuous physical connection. The memorandum further stated that after consideration of flow, the number, the types, and the length of the connection, the 725-foot length of connection between the wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. They concluded that the wetland did not have continuous surface connection to the downstream relatively permanent tributary and not adjacent. In this case, we determined that Wet1, with its 2,000-linear-foot connection to Salt Lake, is not physically close enough to meet the continuous surface connection requirement and is not adjacent to Salt Lake. Therefore, Wet1 is not subject to Section 404 of the Clean Water Act and a Department of Army permit is not required.

9. DATA SOURCES.

- a. Aerials (1995, 2005, 2006, 2008, 2011, 2016, 2017, 2022; source: Google Earth)
- b. USGS Topographic Map 1:24,000 Rockport (2022)
- c. Site visit conducted November 2, 2023
- d. Web Soil Survey Hydric Rating Map for San Patricio and Aransas Counties, Texas (NRCS website accessed May 2, 2023)
- e. National Wetland Inventory (NWI) (USFWS website accessed May 2, 2023)
- f. National Hydrologic Dataset (NHD) – 12100405 Aransas Bay
- g. ORM2 Database – No previous jurisdictional determinations have been conducted for this review area.
- h. FEMA Floodplain Map – 48007C0240G, effective February 17, 2016
- i. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet

Corpus Christi Field Office

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2023-00087

vertical root mean square error (RMSE_z) in open terrain.

10. OTHER SUPPORTING INFORMATION. Environmental Protection Agency Headquarters and Assistant Secretary of the Army for Civil Works Memorandum on NWK-2024-00392, dated 21 November 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.

SWG-2023-00087 Vicinity Map - Rockport, TX topo (2022)





SWG-2023-000087

Approved Jurisdictional Determination
Approx. 0.29-ac Review Area

Wet1 (0.23 ac): 28.058780 -97.089498

Legend

-  Review Area
-  Wetland



Rattlesnake Point Rd

Rattlesnake Point Rd

Rattlesnake Point Rd

Rattlesnake Point Rd

Google Earth

Image © 2024 Airbus

Jancoek Rd

200 ft



