



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

CESWG-RD-C

28 March 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-2023-00127]

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. 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.

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2023-00127

- 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, 29.207943° -94.943943°, 3.34-acre, non-jurisdictional
 - ii. Wetland 2, 29.207105° -94.940103°, 0.78-acres, non-jurisdictional
 - iii. Wetland 3, 29.208657° -94.939347°, 0.02-acres, non-jurisdictional
 - iv. Pond 1, 29.207767° -94.941737°, 23.72-acre, non-jurisdictional
 - v. Pond 2, 29.207291° -94.945452°, 0.21-acre, non-jurisdictional
 - vi. Pond 3, 29.207809° -94.944611°, 0.06-acre, 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. 651, 143 S. Ct. 1322 (2023)
- e. 2008 Rapanos guidance: "In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries."
- f. 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 tract is located 0.55-miles south of the intersection of Cooper Road and Pickering Road (latitude 30.179566 N, longitude -95.283926 W), New Caney, Montgomery County, Texas.
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: 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

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.

- 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”).⁷ 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. Pond 2 = 0.21-acre; and Pond 3 = 0.06-acre. Ponds 2 and 3 have been on the tract since at least 1954 (Google Earth Aerial Image) and the USGS 1954 Lake Como Texas Quadrangle when the area was used for agriculture. Therefore, Ponds 2 & 3 are not waters of the United States.
- 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

⁷ 51 FR 41217, November 13, 1986.

- 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*.

Pond 1 = 23.72-acre, Pond 1 is the result of material that was excavated to be used for a large construction project in the mid-90s to around 2004. The use, degradation, or destruction of Ponds 1-3 would not affect interstate or foreign commerce. The ponds are not used for interstate or foreign travelers for recreational or other purposes, fish or shellfish are not taken and sold in interstate or foreign commerce and are not used for industrial purpose by industries in interstate commerce. The ponds are not impoundments of a tributary and do not flow to a Traditional Navigable Water; therefore, Pond 1 is not a water of the United States.

- 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).

Based on our 18 March 2025 desk review, and the information obtained using data sources listed in Section 9, Wetlands 1-3 (Total 4.14-acres) do not have any known continuous surface connection (CSC) to the Gulf of America (GoA) a Traditionally Navigable Waterway (TNW) approximately 0.43-miles south of the project site, or Lake Como, also a TNW approximately 0.25-miles to the northwest of the project site, or any other water of the United States. Wetland 1 is a combination of fringe wetland that is found around the shoreline of the Pond 1 and PEM wetland on the northern part of the tract. Wetland 3 is a fringe wetland found around a small island within Pond 1. Wetland 2 is depressional with only source of hydrology is precipitation. Wetlands 1-3 do not extend outside of the review area. No more than overland sheet flow would exit the wetlands. The NOAA Data Access Viewer Digital Elevation Model (DEM), United States Geological Survey (USGS) 2022 Lake Como, Texas quadrangle showed there is no continuous surface connection between the subject tract and the GoA nor Lake Como. Therefore, the three wetlands totaling approximately 4.14-acres are not waters of the United States and are not subject to Section 404 of the Clean Water Act.” Therefore, Wetlands 1-3 do not meet the definition of adjacent as

defined in the pre-2015 regime post Sackett guidance 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.
 - a. Desk review conducted 18 March 2025
 - b. Maps, plans, plots, or plat submitted by or on behalf of the applicant/ consultant: SA 2008 LLC. / Compass Environmental Solutions.
 - c. U.S. Geological Survey Map(s) 1:24,000 scale, Lake Como, Texas Quadrangle, 1959, 2010; and 2022,
 - d. Data Sheets prepared by the applicant on 7/19/2022.
 - e. USDA Natural Resources Conservation Service Soil Survey: Soil Web, accessed 18 March 2025
 - f. National Wetlands inventory map: USFWS National Wetlands Mapper accessed 18 March 2025
 - g. Photographs: Aerial: Google Earth Aerial Images: 1982, 1989, 1995, 2004; and 2025

Photographs: Other: Compass Environmental Solutions in the Delineation Report
 - h. NOAA Digital Coast, Data Access Viewer: 2018 Texas Water Development Board (TWBD) LiDAR and Digital Elevation Model (DEM): Coastal Texas. Accessed 18 March 2025

OTHER SUPPORTING INFORMATION. N/A

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.

SWG-2023-00127

SA 2008 LLC.
Shipra Lakes Estates
Approved Jurisdictional Determination
Farm to Market Road (FM) 3005
Galveston, Galveston County, Texas

Exhibit

Legend

- Pond 1 23.72-acres
- Pond 2 0.21-acres
- Pond 3 0.06-acres
- Review Area 46.4-Acres
- Wetland 1 3.34-acres
- Wetland 2 0.78-acres
- Wetland 3 0.02-acres

