



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

CESWG-RD-P

26 JUL 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-2023-00170

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.

- 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. WB001, wetland, non-adjacent, non-jurisdictional, 0.07 ac, 30.039898, -95.590584.
 - ii. SB001, upland roadside ditch, non-jurisdictional, 82 LF, 30.040462, -95.590252.
 - iii. SB002, upland roadside ditch, non-jurisdictional, 154 LF, 30.04003, -95.589996.
 - iv. SB003, upland roadside ditch, non-jurisdictional, 488 LF, 30.042649, -95.591204.
 - v. SB004, upland roadside ditch, non-jurisdictional, 1108 LF, 30.035372, -95.587834.
 - vi. SB005, upland roadside ditch, non-jurisdictional, 66 LF, 30.033751, -95.587259.
 - vii. SB006, upland roadside ditch, non-jurisdictional, 45 LF, 30.029889, -95.586731.

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. 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, or they do not have a significant nexus to downstream traditional navigable waters.”

- f. 2003 SWANCC guidance.
 - g. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988)).
 - h. 24 July 2020 Memo, “Joint Memorandum to the Field Between the U.S. Department of the Army, Corps of Engineers and the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act”.
- 3. REVIEW AREA. The proposed project, an approximate 1.6-mile widening, reconfiguration, and new roadway construction is located 3.9 miles southeast of Tomball, Texas, approximately 500 feet north of the intersection of Ezekiel and Hufsmith-Kohrville roads. The road will proceed south approximately 1.6 miles along Hufsmith-Kohrville Road and terminate approximately 700 feet north of the intersection of Hollow Glen Lane and Hufsmith-Kohrville Road, Harris County, Texas. Approximate center is 30.035372,-95.587834. No known previous AJDs have been conducted within this tract. Site map attached.
 - 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

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.

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): 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").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. N/A

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.

⁷ 51 FR 41217, November 13, 1986.

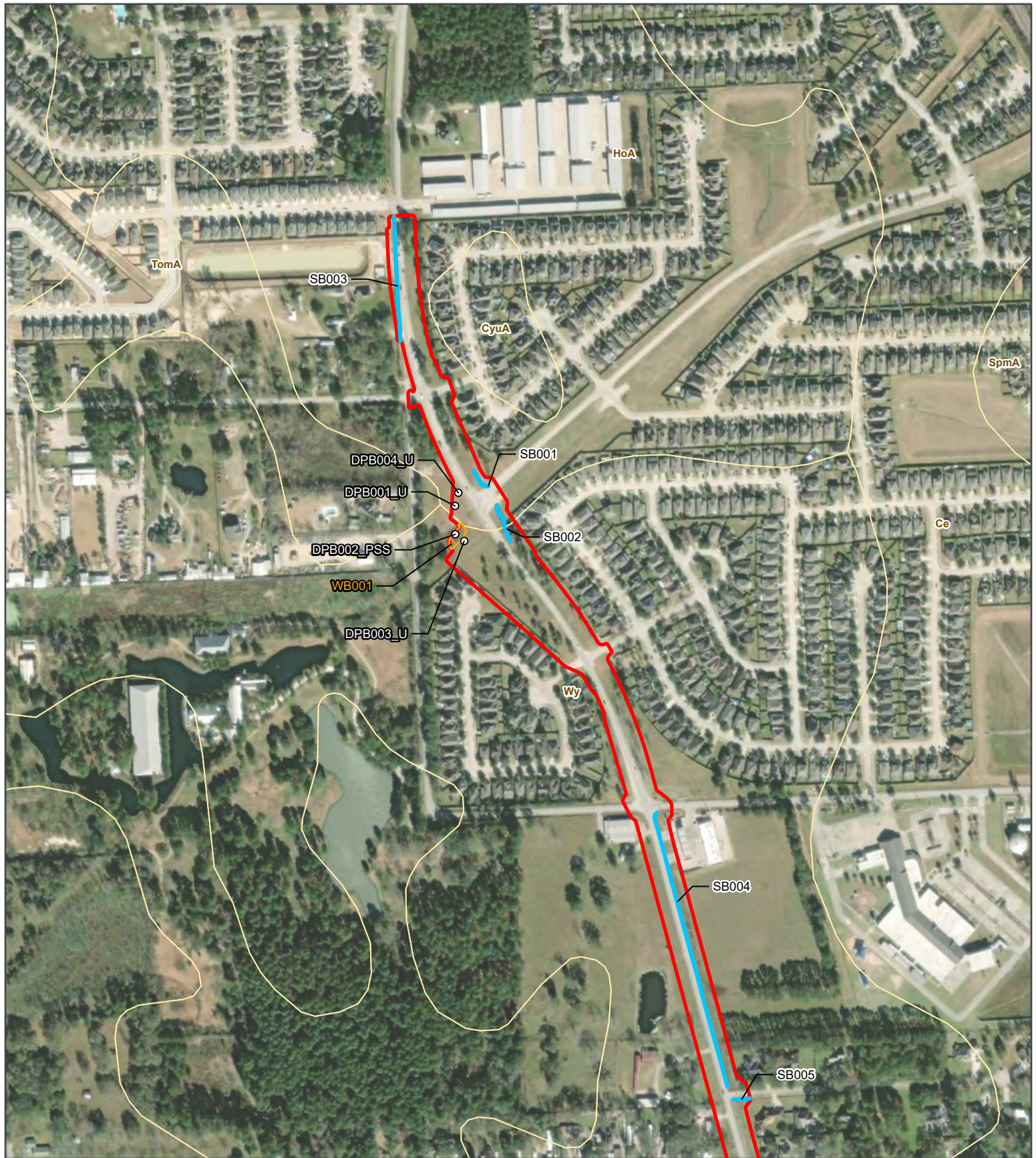
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.

Based on desk review, SB001, SB002, SB003, SB004, SB005, and SB006 are upland roadside ditches. They are upland cut (during road construction) drainage ditches displaying an ephemeral flow regime. They do not extend the OHWM of any water of the U.S. They do not relocate or replace a tributary or other water of the U.S. They are not tidal waters of U.S. Based on 2008 Rapanos Guidance, 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.

- 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). WB001 (0.07 ac) is scrub shrub wetland that is a result of modified hydrology due to road construction in the last ten years. WB001 does not have any known continuous surface connection to Pilot Gully, a tributary located approximately 0.62-mile

south of the project site, or any other water of the United States. WB001 is depressional with its only source of hydrology is precipitation. No more than overland sheet flow would exit the wetland. The NOAA Data Access Viewer Digital Elevation Model (DEM), United States Geological Survey (USGS) 2022 Tomball, Texas quadrangle showed there is no connection between the subject tract and Pilot Gully. Therefore, WB001 does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water 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. Office evaluation(s) were conducted on 20 MAR 23 and 06 Jun 24.
 - b. Wetland Delineation Report: SWCS “Wetland Delineation Report for the Hufsmith- Kohrville Road Expansion in Harris County, Texas”. Dec 2022
 - c. Google Earth. 2022. Historical satellite imagery. Available at: <https://www.google.com/earth/>. Accessed December 2022.
 - d. U.S. Geological Survey (USGS). 2022a. National Hydrography Dataset (NHD). Available at: <https://www.usgs.gov/core-science-systems/ngp/national-hydrography>. Accessed December 2022.
 - e. Historical Palmer Drought Indices. Palmer Drought Severity Index Divisional Data. Available at: <https://www.ncdc.noaa.gov/temp-and-precip/drought/historicalpalmers/psi/202007-202007>. Accessed December 2022.
 - f. U.S. Department of Agriculture (USDA). 2019. Web Soil Survey. <http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx> (Accessed July 24, 2023).
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.



HUFSMITH-KOHRVILLE ROAD
EXPANSION PROJECT
**Wetland Delineation
Map**

Figure 2
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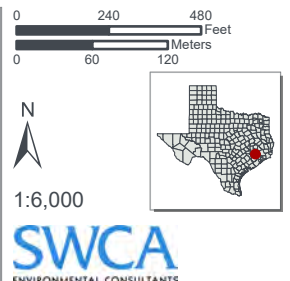
- Survey Corridor
- Data Point
- Ephemeral Waterbody
- Scrub-shrub Wetland
- NRCS Soil Unit Boundary

Soil Unit Key

Ce: Clodine-Urban land complex, 0-1% slopes
HoA: Hockley fine sandy loam, 0-1% slopes
Wy: Wockley-Urban land complex

Harris County, TX
USGS 7.5' Quadrangle:
Tomball, TX, 30095-A5
NAD 1983 StatePlane Texas
South Central FIPS 4204 Feet
30.0394°N 95.5898°W

Base Map: ESRI ArcGIS Online,
accessed December 2022
Updated: 12/16/2022
Project No. 76209
Layout: 2_WDR
Aprx: 76209 Hufsmith Kohrville





HUFSMITH-KOHRVILLE ROAD
EXPANSION PROJECT
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Figure 2
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Harris County, TX
USGS 7.5' Quadrangle:
Tomball, TX, 30095-A5
NAD 1983 StatePlane Texas
South Central FIPS 4204 Feet
30.0338°N 95.5874°W

Base Map: ESRI ArcGIS Online,
accessed December 2022
Updated: 12/16/2022
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