



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

Corpus Christi Field Office

July 24, 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-2023-00284<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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amended on September 8, 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.

- 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 (0.126 ac.), jurisdictional, Section 404
  - ii. Wetland 2 (0.077 ac.), jurisdictional, Section 404

## 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 0.58-acre review area consists of four conjoined properties (Lots 52-55) on Lola Johnson Rd. Corpus Christi, Nueces County, Texas.

LATITUDE/LONGITUDE (Decimal Degrees):

Latitude: 27.647783° N; Longitude: 97.283015° W

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

Wetlands 1 and 2 have a continuous surface connection to the Laguna Madre, a TNW subject to the ebb and flow of the tide and presently used to transport interstate commerce via the Gulf Intracoastal Waterway.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Wetland 1 abuts a tidally-influenced ditch outside of the review area that extends from the Laguna Madre, a TNW. Wetland 2 abuts the same ditch; however, the tidal reach does not extend to Wetland 2. The flow path from Wetland 2 to the tidally influenced portion of the ditch extends eastward along Lola Johnson Road approximately 115 feet through two culverts underneath driveways.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: NA

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): 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):

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<sup>6</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.

Wetland 1 (0.126 acre): Based on observations from the June 9, 2023, and May 16, 2024 site visits and review of 2018 LiDAR data, Wetland 1 is jurisdictional because it abuts, and has a continuous surface connection to, a tidally-influenced ditch, which is considered an extension of the Laguna Madre, a TNW. The Laguna Madre is a TNW because it is subject to the ebb and flow of the tide and is presently used to transport interstate commerce via the Gulf Intracoastal Waterway. The ditch receives tidal influence from the Laguna Madre through a culvert that goes underneath Laguna Shores Rd, and through culverts underneath two driveways before reaching Wetland 1.

Wetland 2 (0.077 acre): Based on observations from the June 9, 2023, and May 16, 2024 site visits and review of 2018 LiDAR data, Wetland 2 is jurisdictional based on its continuous surface connection through a discrete feature to the Laguna Madre, a TNW. The Laguna Madre is a TNW because it is subject to the ebb and flow of the tide and is presently used to transport interstate commerce via the Gulf Intracoastal Waterway. Wetland 2 abuts the same drainage ditch as Wetland 1; however, the tidal reach in the ditch does not extend to Wetland 2. The drainage ditch appears to carry only ephemeral flow after precipitation events and is thus a non-relatively permanent tributary to a traditional navigable water. The ditch appears to be developing bed/bank characteristics along the portion of the ditch's reach that abuts Wetland 2.

## 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 the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

NA

- 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.

NA

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

- 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.

NA

- 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.

NA

- 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*.

NA

- 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).

NA

- 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. Site visit June 9, 2023
- b. Aerials (1956,1961, 1979,1990, 1995, 2003 2016, 2020; source: Google Earth)
- c. USGS Topographic Map 1:24,000 Oso Creek NE

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- d. Web Soil Survey Hydric Rating Map for Aransas County, Texas (NRCS website accessed June 5, 2023)
  - e. National Wetland Inventory (NWI) (USFWS website accessed June 5, 2023)
  - f. National Hydrologic Dataset (NHD) – 12110203 North Laguna Madre
  - g. ORM2 Database – No previous jurisdictional determinations at this location, however information from the previously issued aquatic resource delineation was used.
  - h. FEMA Floodplain Map – 48355C0545G, effective October 13, 2022
  - i. Google street view
10. OTHER SUPPORTING INFORMATION. "Memorandum On SWG-2023-00284," issued by the U.S. EPA and OASACW (June 25, 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-2023-00284**

Oso Creek NE, TX Quad  
Vicinity Map  
Lots 52-55 Lola Johnson Rd.  
Corpus Christi, TX 78418





# SWG-2023-00284

Approved Jurisdictional Determination  
Approx. 0.58-ac Review Area

Wetland 1 (0.126-ac): 27.647698 -97.28284

Wetland 2 (0.077-ac): 27.647907 -97.283226



Google Earth



## SWG-2023-00284 Connection





# SWG-2023-00284 DEM

Review Area:  
27.647786 -97.283015

Elevation (feet)



0 0.05 0.1 0.2 Miles