



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

CESWG-RD-C

16 September 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-2023-00434

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 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.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

- 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).

Feature	Latitude/Longitude	Wetland Type	Acres	Jurisdictional Status
WA001	29.497815, -95.084036	PEM	0.01	Non-adjacent/Non-jurisdictional
WA002	29.498463, -95.083281	PEM	2.61	Non-adjacent/Non-jurisdictional
WA002b	29.498463, -95.083281	PSS	0.05	Non-adjacent/Non-jurisdictional
PA001	29.498803, -95.084638	Pond	0.01	Preamble water/non-jurisdictional
<b>Total Delineated Waters</b>			2.68	

## 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 tract is located 0.15-mile south of the intersection of Highway 3 and Washington St. in League City, Galveston County, Texas. The center coordinates for the project site are 29.498861°, -95.083507°.

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 WATERS<sup>5</sup>: 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.<sup>6</sup> 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

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<sup>5</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.

<sup>6</sup> 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.

## 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.

The pond (PA001) identified on the property is present in aerial photography since the 1940s. The pond was dug in uplands, has a berm around it, and was likely used for watering livestock seen on the property in historical aerial photos. The 1986 preamble to 33 CFR 320-330 regulations states that for clarification it should be noted that we generally do not consider the following waters to be “waters of the United States...(c) artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. Therefore, the pond is a non-jurisdictional feature listed in the preamble of the 1986 regulations and the 2008 Rapanos Guidance.

- 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

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

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).

The project area has been used historically for agriculture as seen in the aerial photographs. No other development has occurred on the property. The topo maps show that the 25-foot contour line runs through the center of the property. These maps also show that the property has no connection to any other aquatic resources in the area. The NWI map identifies a Palustrine, Scrub-Shrub, Broad-Leaved Deciduous, Seasonally-Flooded, Excavated (PSS1Cx) wetland in the location identified in the delineation as the pond PA001. Based on our desk review, these 3 wetlands do not have any known continuous surface connection to Clear Creek, a Traditional Navigable Water (TNW) located approximately 1.5 miles northwest of the project site, or any other water of the United States. These wetlands do not abut any ditch, swale, or erosional feature connecting to the nearest TNW and no more than overland sheet flow would exit the wetlands. Therefore, wetlands WA001, WA002, and WA002b 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 subject to Section 404 of the Clean Water Act.

There is a culvert located at 29.499235, -95.084414 on the property boundary. The culvert touches wetland WA002 and is nearly filled in and is not likely to be functional. In the photo of the culvert provided in the delineation, it looks like water flows down the side of the culvert rather than through it. This culvert used to drain water from a neighboring field onto the subject property. The culvert is not located in a swale, ditch, or tributary and does not have a connection to any other identified wetland or neighboring waterbody as seen in aerial photography, topo maps, and the DEM.

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. Aerial Photographs: 31 December 1943, 31 December 2001, 8 January 2008, 5 April 2017, 13 February 2024
- b. United States Geological Survey (USGS) Topographic Maps: 1929 Dickinson,

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- Texas, 1955 Dickinson, Texas, Earth Point 1995 Dickinson, Seabrook Texas*
- c. United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map *Accessed 17 June 2024*
  - d. US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map *Accessed 17 June 2024*
  - e. Texas Water Development Board Lidar 2018 DEM *Accessed 17 June 2024*
  - f. Wetland Delineation Report submitted by Environmental Consulting & Technology, Inc. on 24 July 2023, revised in October 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.



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Wizard Bess AJD Request  
League City, Galveston, Texas

Exhibit Map



Google Earth

3

800 ft