



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

CESWG-RD-C

21 January 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),<sup>1</sup> SWG-2023-00599<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

---

<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.

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.

- 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. W001, 0.15-acre; 29.1547432, -95.6546031; jurisdictional
  - ii. W002, 0.02-acre; 29.1548101, -95.6552279; non-jurisdictional/non-adjacent
  - iii. W003, 0.14-acre, 29.1547058, -95.6555453; non-jurisdictional/non-adjacent
  - iv. Stream 1, NRPW, 123-linear feet, 29.1554698, -95.6549088; 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. Approximate 5.4-acre site located half a mile southeast of Highway 36 and Hogg Ranch Road (latitude 29.1546546, longitude -95.6548460) in West Columbia, Brazoria County, Texas.
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Brazos River

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Stream 1 was observed to cross under Oil Field Road via a culvert. Stream 1 connection runs north 1.38 miles to a large, ponded area and wetland complex that then connects with Varner Creek, a Relatively Permanent Water (RPW). Varner Creek continues southeast approximately 3 miles, flowing directly to the Brazos River, a Traditionally Navigable Water (TNW).
6. SECTION 10 JURISDICTIONAL WATERS<sup>6</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>7</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

---

<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.

<sup>7</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.

- 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”).<sup>8</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. 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.
- 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

---

<sup>8</sup> 51 FR 41217, November 13, 1986.

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).

Three wetlands were identified in the review area: W001 (0.15 acre), W002 (0.02 acre) and W003 (0.14 acre). The wetlands total approximately 0.31 acre of the approximate 5.4-acre tract. Two wetlands (W002 (0.02 acre) and W003 (0.14 acre) identified and delineated within the review area do not share a continuous surface connection with W001 or Stream 1 or Varner Creek (the nearest RPW), or any other RPW/TNW. Stream 1, a non-RPW approximately 123-linear feet, was observed within the project area. Stream 1 provides a continuous surface connection between W001 and Varner Creek but does not have at least 3 months of continuous flow and is a non-relatively permanent water as evident via the consultant's report, aerial imagery, and LiDAR DEM. There is an absence of any swales, erosional features, ditches, or culverts that would potentially serve as surface connections to W002 and W003. No more than overland sheet flow would exit the wetlands. Therefore, W002 and W003 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.

Reviewing the 1995 Google Earth imagery there is a small non RPW observed to near the western edge of the boundary that does not share a surface connection with W002 or W003 or any other aquatic resource within the review area. The non RPW is visible four of the twelve years used for review and does not appear in the topo or DEM. The DEM also shows wetland signatures for W002 and W003 but does not show a connection between the wetlands, other aquatic resources, nor to any RPW or TNW. This desktop review supports the Corps determination that wetlands W002 and W003 are non-adjacent/non-jurisdictional.

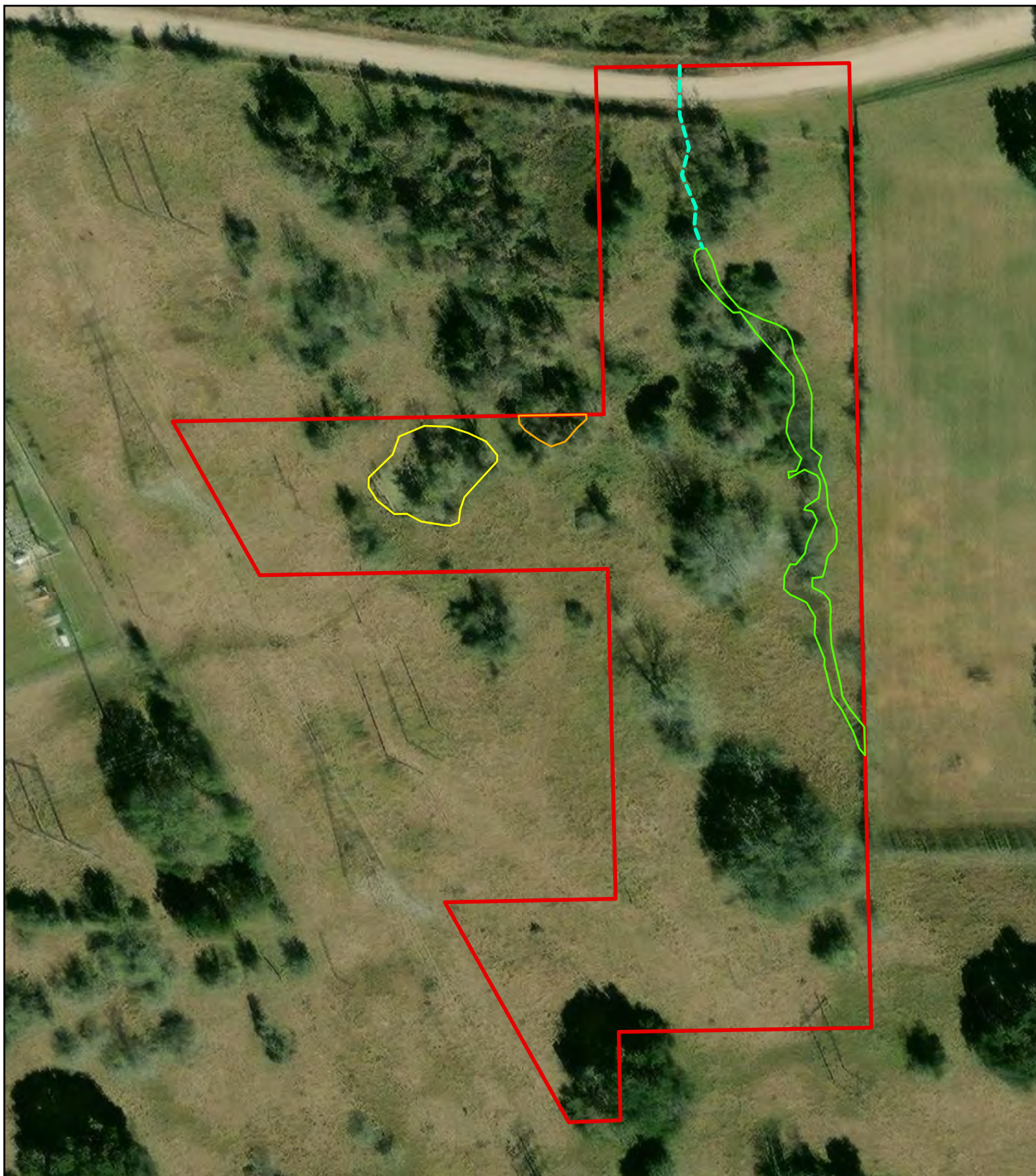
W001 (0.15-acres) connects to Stream 1 (123-linear feet), which runs 1.38 miles north to a large, ponded area and wetland complex. The earliest Google Earth Imagery available dated 1944 shows Stream 1 as indistinguishable from W001. As time progressed Stream 1 becomes less apparent, and Wetland 1 established becoming a part of the wetland complex observed off to the east of the property. There is a culvert that crosses underneath Oil Field Road that serves as the surface connection between Stream 1 on the property and the wetland complex to the north. The NWI shows no wetlands within the review area but a large wetland complex to the north that connects to Varner Creek. The DEM shows a surface connection between W001 and Stream 1 to the pond/wetland complex to the north of the review area. This complex then shares a surface connection with Varner Creek. The wetland complex in turn shares a surface connection with

Varner Creek. Varner Creek is a RPW that flows directly to the Brazos River, a TNW. As per Regulatory Guidance Memo NWK-2022-00809, depending on the factual context, the requirement can be met when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a continuous surface connection between an adjacent wetland and a covered water, such as a relatively permanent water connected to a traditional navigable water. Non-relatively permanent swales and non-relatively permanent streams are features that can serve as all or part of a continuous surface connection depending on the factual context because they can provide evidence that flow is occurring between the wetland and the requisite covered water, such that the two features are, as a practical matter, indistinguishable. This is because these features can have physical indicators of flow that provide evidence that the features continuously, physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including the length of the connection and physical indicators of flow, more than one feature such as a swale or non-relatively permanent tributary can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water. This approved JD indicates that W001 has a continuous surface connection via a non-relatively permanent water and an adjacent wetland to Varner Creek, a relatively permanent water. The total length is 1.38 miles to a relatively permanent water. As per Regulatory Guidance Memo NWK-2022-00809, after consideration of flow, the number, the types, and the length of connection, the 1.38 mile length of connection here between this wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement. Thus, W001 does not have a continuous surface connection to the downstream relatively permanent tributary and, consistent with *Sackett*, is not “adjacent.” Therefore, W001 is not a water of the United States subject to Section 404 of the Clean Water Act.

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: 25 January 2024
  - b. Maps, plans, plots, and data submitted by or on behalf of the applicant consultant: Submitted by Environmental Resources Management (ERM) on 13 September 2023
  - c. Aerial Photos: Google Earth Aerial Imagery (1944-2022)

- d. NOAA Data Viewer, 2018 Texas Water Development Board Lidar: Coastal Texas. Accessed 25 January 2024.
  - e. United States Geological Survey (USGS) Topographic Map, Quad West Columbia, TX 2022 1:24,000. Accessed 25 January 2024.
  - f. United States Department of the Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); FWS NWI Esri Layer. (<https://www.arcgis.com/home/item.html?id=8f4d417569704a829e5d5ac7e49102db>); Accessed 25 January 2024.
  - g. United States Department of Agriculture (USDA), National Resource Conservation Service (NRCS), Soil Survey Geographic Database (SSURGO), USA Soil Map Units Esri Layer. (<https://www.arcgis.com/home/item.html?id=06e5fd61bdb6453fb16534c676e1c9b9>) Accessed 25 January 2024.
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWK-2024-00392 and NWK-2022-00809.
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-2023-00599 Delineation

(Latitude 29.1546546, Longitude -95.6548460)

### Legend

- ▭ Review Area
- ▭ W001 ~ 0.15-acres
- ▭ W002 ~ 0.02-acres
- ▭ W003 ~ 0.14-acres
- Stream 1 ~ 123 Linear Feet

Prepared 25 January 2024

Coordinate System  
GCS North American 1983

