



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

CESWG-RD-C

4 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),<sup>1</sup> SWG-2023-00728

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.

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- 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; 3.22 acres, non-jurisdictional, non-adjacent, 29.622973, -95.038690
  - ii. Wetland 2; 0.09 acre, non-jurisdictional, non-adjacent, 29.621878, -95.039320
  - iii. Wetland 3; 1.78 acres, non-jurisdictional, non-adjacent, 29.622503, -95.040906
  - iv. Ditch 1; 908 linear feet, non-jurisdictional, 29.622007, -95.039058
  - v. Ditch 2; 425 linear feet, non-jurisdictional, 29.621972, -95.037564
  - vi. Ditch 3; 68 linear feet, non-jurisdictional, 29.621651, -95.040170
  - vii. Ditch 4; 79 linear feet, non-jurisdictional, 29.621677, -95.039576

## 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. 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)

3. REVIEW AREA. The proposed project area is an approximate 27-acre tract located at 11235 Choate Road, Pasadena, Harris County, Texas (Map enclosed). The center coordinates of the site are 29.622026 N, -95.038805 W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. A ditch is located 0.01-mile east of the project site that is subject to the ebb and flow of the tide from Taylor Bayou, located south of the project site.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 2 flows northeast through Ditch 1 for 525 linear feet, through a culvert that is 99 linear feet to the tidal drainage ditch. Wetland 3 flows southeast through Ditch 3 for 34 linear feet, through a culvert in Ditch 3 for 36 linear feet, through Ditch 3 for 42 linear feet, through Ditch 1 to the northeast for 182 linear feet, through a culvert in Ditch 1 for 23 linear feet, through Ditch 1 for 97 linear feet, though Wetland 2 for 97 linear feet, through Ditch 1 for 525 linear feet, through a culvert that is 99 linear feet to the tidal drainage ditch. The tidal drainage ditch flows south and drains into Taylor Bayou.
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

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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.

- 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”).<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. 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.

Ditch 3 is a swale and does not have an Ordinary High Water Mark. Therefore, Ditch 3 is not a tributary and does not meet the definition of a Water of the United States. Ditch 2 and Ditch 4 have an Ordinary High Water Mark, however, they were excavated from uplands, drain only uplands, and are not relatively permanent. Therefore Ditch 2 and Ditch 4 are not waters of the United States. Ditch 1 has an Ordinary High Water Mark, was excavated from uplands, drains wetlands, and is not relatively permanent. Therefore, we evaluated Ditch 1 under the 7 categories of Waters of the United States. Ditch 1 is not a TNW, an Interstate Water, an Other Water, an Impoundment, a Territorial Sea, or an Adjacent Wetland. Therefore, we evaluated Ditch 1 under the Tributaries category of Waters of the United States. Because Ditch 1 is not relatively permanent, it does meet the Tributary definition of Waters of the United States. Ditch 1 is not a Water of the United States. The Google Earth Aerial imagery over multiple dates do not show standing or flowing water in the ditches (1989 - 2020).

- 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

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

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).

Based on our 21 February 2024 site visit and 1 March 2024 desk review, Wetland 1 (3.22 acres), Wetland 2 (0.085 acres), and Wetland 3 (1.781 acres) do not have any known continuous surface connections to the tidal drainage ditch approximately 0.05-mile east of the tract or any other water of the United States. Wetland 1 was determined to be higher in elevation than the nearby Ditch 1. No more than overland sheet flow would exit the wetland. Therefore, Wetland 1 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.

Although not represented on the delineation map, Ditch 3, a swale, connects to the southeastern portion of Wetland 3 and flows to Ditch 1, a tributary, which flows to the tidal drainage ditch, a TNW. Wetland 2 was constructed along Ditch 1 in 2011 which connects the wetland to the tidal drainage ditch, a TNW, based on aerial photos. The flow path for Wetland 2 is as follows: Water from flows northeast through Ditch 1 for 525 linear feet, through a culvert that is 99 linear feet to the tidal drainage ditch. The flow path totals 624 linear feet.

The flow path from Wetland 3 is as follows: water from Wetland 3 flows southeast through Ditch 3 for 34 linear feet, through a culvert in Ditch 3 for 36 linear feet, through Ditch 3 for 42 linear feet, through Ditch 1 to the northeast for 182 linear

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feet, through a culvert in Ditch 1 for 23 linear feet, through Ditch 1 for 97 linear feet, through Wetland 2 for 97 linear feet, through Ditch 1 for 525 linear feet, through a culvert that is 99 linear feet to the tidal drainage ditch. The flow path for Wetland 3 totals 1,135 linear feet. Therefore, there is no continuous surface connection to a requisite water.

According to EPA Headquarters and Office of the Assistant Secretary (Civil Works) Memorandum NWK-2024-00392, the number of connections, the types of connections, the indicators of flow, and length of the connection can all inform whether the continuous surface connection requirement is met. As the length of the connection increases, even with stronger indicators of flow (including actual flow, indicators of ordinary high-water mark, etc.), the length of the connection can become no longer physically close, such that the discrete features are no longer providing a continuous physical connection. After consideration of the length of connection, the 1,135-foot length of connection between Wetland 3 and the requisite water and the 624-foot length of connection between Wetland 2 and the requisite water, the tidal ditch that flows into Taylor Bayou, are not physically close enough to meet the continuous surface connection requirement. Thus, Wetland 2 and Wetland 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 subject to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors 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; 1 March 2024 and Site Visit 21 February 2023
  - b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant; [REDACTED] submitted on 18 September 2023
  - c. U.S. Geological Survey map(s); In Delineation Report
  - d. National Wetlands Inventory map(s); In Delineation Report
  - e. Google Earth aerial photos
  - f. LiDAR Digital Elevation Model
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWK-2024-00392
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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.