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

CESWG-RD-C 14 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) ,[1] SWG-2011-00059[2]

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.[3] 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.[4] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[5] 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

[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] 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.).
[3] 33 CFR 331.2.
[4] Regulatory Guidance Letter 05-02.
[5] 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).

Name	Size (acres)	Location		Jurisdictional Status
Wet A	1.74	29.940471	-95.182380	non-adjacent, non-jurisdictional
Wet B	0.17	29.940984	-95.181412	non-adjacent, non-jurisdictional
Wet C	1.47	29.941195	-95.177624	non-adjacent, non-jurisdictional
Wet D	1.84	29.940559	-95.177898	non-adjacent, non-jurisdictional

Name	Size (Linear feet)	Location		Jurisdictional Status
Ditches/Swale				
Ditch 1	2,733	29.941668	-95.182229	Non-RPW, Non-jurisdictional
Ditch 2	2,739	29.941534	-95.181354	Non-RPW, Non-jurisdictional
Ditch 3	2,630	29.940799	-95.180615	Non-RPW, Non-jurisdictional
Ditch 4	2,596	29.940712	-95.179576	Non-RPW, Non-jurisdictional
Ditch 5	1,021	29.940641	-95.186221	Non-RPW, Non-jurisdictional
Ditch 6	1,772	29.941137	-95.186775	Non-RPW, Non-jurisdictional
Ditch 7	581	29.941294	-95.186890	Non-RPW, Non-jurisdictional
Ditch 8	919	29.941616	-95.186359	Non-RPW, Non-jurisdictional
Swale 1	738	29.941884	-95.184573	Non-RPW, 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*, 651 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Approximate 60-acre property with the southeast corner of the property approximately 0.15 miles north of the intersection of West Lake Houston Parkway and Summer Lake Ranch Drive, extending west approximately 0.7 miles and north approximately 0.15 miles; located at Latitude 29.941364°, Longitude -95.181862°, Houston, Harris County, Texas.

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

   San Jacinto River is listed on Galveston District Navigable Waters List.

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

   The flow path from the wetlands to the nearest relatively permanent water is west through ditches 3 and 4, south through swale 1, then southwest for approximately 5,989 linear feet. From there, the flow path to the nearest traditional navigable waterway is east to Lake Houston and then south through the lake into the San Jacinto River, totaling approximately 3.98 river miles.

6. SECTION 10 JURISDICTIONAL WATERS[6]: 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.[7] 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

[6] 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.

[7] 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.

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

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").[8] 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.

Ditches, Ditch 1,2,3,4,5,6,7,8, Swale 1 (15,729 Linear Feet):

There is 8 upland cut ditches on the tract approximately 14,991 linear feet. The ditches, with the exception of ditch 6, flow into swale 1 and then flow off the property. Ditch 6 flows off the property to the west and does not abut or drain any

[8] 51 FR 41217, November 13, 1986.

wetlands on the property. Swale 1 is a naturally occurring drainage feature at the lowest point of the property caused by the topography of the land. The topo map doesn't show a tributary present. The swale drainage feature appears to have formed due to onsite and neighboring construction activities. The drainage ditches were constructed in uplands and used to drain uplands in preparation for new construction. The drainage ditches and swale only flow in response to precipitation events and do not have relatively permanent flow. Neither the ditches nor the swale have a defined bed or bank and/or ordinary high water mark. Therefore, Ditches 1,2,3,4,5,6,7,8 and Swale 1 are not waters of the United States.

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).

Wetlands, WET A, B, C, D (5.22 acres total):

Based on data sources listed in #9 and our 14 November 2024 desk review, we have determined these wetlands reside in small depressional areas entirely within the review area that collect rainwater from the surrounding countryside. Based on our review, none of these wetlands have any known continuous

surface connection to any water of the United States. Wetland A (1.74 acres) has a non-relatively permanent upland drainage ditch that flows west in Ditch 4 approximately 440 feet and then turns south into Swale 1 and flows off the property. The flow path of the ditch from the wetland to the nearest relatively permanent water is southwest for approximately 4,538 linear feet. Wetland B (0.17 acre) has a non-relatively permanent upland drainage ditch that flows west in Ditch 3 approximately 882 feet and then turns south into Swale 1 and flows off the property. The flow path of the ditch from the wetland to the nearest relatively permanent water is southwest for approximately 5,011 linear feet. Wetland C (1.47 acres) has a non-relatively permanent upland drainage ditch that flows west in Ditch 3 approximately 2,037 feet and then turns south into Swale 1 and flows off the property. The flow path of the ditch from the wetland to the nearest relatively permanent water is southwest for approximately 6,046 linear feet. Wetland D (1.84 acres) has a non-relatively permanent upland drainage ditch that flows west in Ditch 4 approximately 1,879 feet and then turns south into Swale 1 and flows off the property. The flow path of the ditch from the wetland to the nearest relatively permanent water is southwest for approximately 5,989 linear feet. From there, the flow path to the nearest traditional navigable waterway is east to Lake Houston and then south through the lake into the San Jacinto River, totaling approximately 3.98 river miles. Although the ditches are not relatively permanent waters, they may serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water, Lake Houston. Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters, including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water as explained in Regulatory Guidance Memorandum on SWG-2023-00284 and NAP-2023-01223. However, the approximate distance for the flow path to the relatively permanent section of Lake Houston is 0.86 river miles and flows approximately 3.98 river miles to a traditional navigable waterway. This distance is too far to be considered a continuous surface connection. As stated in Regulatory Guidance Memo NWK-2022-00809, weak indicators of flow frequency (e.g. bed and bank and other indicators of a OHWM) and duration as well as long distances and chain of features between the wetlands and the relatively permanent water can be too extended and tenuous to constitute a continuous surface connection.

Considering these factors together, and consistent with Sackett, the series of non-relatively permanent features, culverts, and the length do not meet the continuous surface connection requirement for Wetlands A, B, C, and D. Therefore, Wetlands A, B, C and D 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. Any discharge of dredged and/or fill material into Wetlands A, B, C and D does not require a Department of the Army permit.

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. Delineation, maps, data sheets prepared by Terracon

   a. Desk Review 14 November 2024

   b. Aerial Photos: Google Earth Aerial Imagery 20 June 2023, 7 October 2024

   c. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); Accessed 14 November 2024

   d. United States Geological Survey (USGS) Topographic (Topo) map Harmaston Texas 1954 1:24,000

   e. USACE Texas Regulatory Viewer 3 DEP Digital Elevation Model (DEM) Accessed 14 November 2024

10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on SWG-2023-00284, NAP-2023-01223 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.