



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

CESWG-RD-C

9 May 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-2024-00079

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

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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).a

Feature	Latitude/Longitude	Feature Type	Acres	Jurisdictional Status
GIWW	28.696065°, -95.947183°	Traditional Navigable Waterway	54.75	Jurisdictional, adjacent
EEM-1	28.696844°, -95.947068°	Estuarine Emergent	45.88	Jurisdictional, adjacent
ESS-1	28.701742°, -95.942717°	Estuarine Intertidal Scrub-Shrub	9.95	Jurisdictional, adjacent
PEM-1	28.697371°, -95.950071°	Palustrine Emergent	0.10	Non-Jurisdictional, non-adjacent
PEM-2	28.698197°, -95.949861°	Palustrine Emergent	0.22	Non-Jurisdictional, non-adjacent
PEM-3	28.703808°, -95.946202°	Palustrine Emergent	0.05	Non-Jurisdictional, non-adjacent
PEM-4	28.708481°, -95.946174°	Palustrine Emergent	1.41	Jurisdictional, adjacent
PEMS-1	28.700030°, -95.952618°	Palustrine Emergent Swale	0.18	Non-Jurisdictional, non-adjacent
PEMS-2	28.698200°, -95.956031°	Palustrine Emergent Swale	0.09	Non-Jurisdictional, non-adjacent
OW-1	28.700640°, -95.953280°	Excavated Open-Water Feature	0.79	Non-Jurisdictional
OW-2	28.704302°, -95.942894°	Remnant Drainage Corridor Impoundment	0.20	Jurisdictional
OW-3	28.705655°, -95.945998°	Excavated Open-Water Feature	0.11	Non-Jurisdictional
OW-4	28.697562°, -95.951728°	Excavated Open-Water Feature	0.02	Non-Jurisdictional
UPSW-1	28.698913°, -95.945724°	Ditch/Erosional Feature	0.44	Non-Jurisdictional
Total Waters			112.19	Jurisdictional
			2.0	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. 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))
 - f. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.
3. REVIEW AREA. The review area is for a 253-tract located along South Gulf Road, east of the existing Matagorda Harbor in Matagorda, Matagorda County, Texas. The center coordinates are 28.699578°, -95.948314°.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Gulf Intracoastal Waterway
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS PEM-4 and EEM-1, ESS-1, and OW-2 are part of one wetland complex that abuts the GIWW.
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ The Gulf Intracoastal Waterway

⁵ 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.

⁶ 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.

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): The Gulf Intracoastal Waterway (GIWW)
 - b. Interstate Waters (a)(2): The Gulf Intracoastal Waterway
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): OW-2 is 0.2 acres and is located within wetland ESS-1. This feature is a naturally occurring pond that holds water. It is a relic feature from the historical drainage area on the east boundary of the project site. It is part of the EEM-1 and ESS-1 wetland complex.
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): N/A
 - g. Adjacent wetlands (a)(7): EEM-1 and ESS-1 are adjacent and are part of a relic drainage feature and abut the GIWW. Joint coordination memo NWO-2003-60436, states that divided wetland can function as one wetland if they meet certain indicators. PEM-4 is located northwest of the EEM-1, ESS-1 wetland complex. The property boundaries separate these wetlands. Topo maps and aerial photography show that PEM-4 and EEM-1, and ESS-1 are part of a historical drainage feature that abuts the GIWW. LiDAR shows that all of these wetlands are part of the same depressional drainage feature and the soil map shows that all of these features share the same hydric soil complex. The EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003-60436 states that "slopes and topography allow for a shallow subsurface connection from wetlands" and "multiple pieces of evidence to assess whether divided wetland areas are separate, distinct wetlands or are functioning

as one wetland” can be assessed to provide valuable information including historic conditions “to determine if a divided wetland is functioning as one wetland”. This valuable information includes hydrologic connection, similarities in plant communities, slope, topography, soils and hydrologic indicators. Therefore, PEM-4 is part of the same wetland complex as EEM-1 and ESS-1 and is therefore subject to Section 404. Any discharge of fill material into PEM-4, EEM-1, ESS-1 requires a Department of the Army permit.

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”).⁷ 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.

Open water features OW-1, OW-3, and OW-4 were excavated in uplands in an area historically used for agricultural purposes. They were likely used for livestock watering.. 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, setline basins, or rice growing. Therefore, Ponds OW-1, OW-3, and OW-4 are not waters of the United States and are not subject to Section 404 of the Clean Water Act. Therefore, any discharge of fill material into OW-1, OW-3, and OW-4 does not require a Department of the Army permit.

- 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.

UPSW-1 is a man-made upland drainage swale that does not carry relatively permanent flow. It does not have a continuous surface connection to a TNW or a Relatively Permanent Water (RPW). Swales are generally not considered Waters of the United States and are not subject to Section 404. Therefore, any discharge of fill material into UPSW-1 does not require a Department of the Army permit.

⁷ 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. 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).

PEM-1, PEM-2, PEM-3 are palustrine emergent wetlands, and PEMS-1 and PEMS-2 are palustrine emergent swales. These are non-adjacent features that do not abut or have a continuous surface connection to a TNW or a Relatively Permanent Water (RPW). Therefore, they are not subject to Section 404. Any discharge of fill material into PEM-1, PEM-2, PEM-3, PEMS-1 and PEMS-2, totaling 0.64 acre, 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. Aerial Photographs: *31 December 1942, 22 December 2022, 10 October 2024*
- b. United States Geological Survey (USGS) Topographic Maps: *1952 Matagorda, Tx 1:24, 000, 2010 Matagorda, Tx 1:24, 000, 2022 Matagorda, Tx 1:24, 000*
- c. United States Fish and Wildlife Service (USFWS) National Wetlands

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- Inventory (NWI) Map Accessed 18 April 2025
 - d. US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map Accessed 18 April 2025
 - e. USGS National Map 3D Elevation Program (3DEP) LiDAR 2 January 2025 Accessed 22 April 2025
 - f. Delineation Report submitted by Anchor QEA on 12 December 2023
 - g. Additional data submitted by Anchor QEA on 17 February 2025
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003-60436
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.