



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

CESWG-RD-C

Day Month Year

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-2024-00092²

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.

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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. Wetland 1, 0.83-acre; 30.0127187, -95.1642535; non-jurisdictional
 - ii. Wetland 2, 0.94-acre; 30.0103015, -95.1704454, non-jurisdictional
 - iii. Pond, 0.18-acre; 30.0130997, -95.1622837; non-jurisdictional
 - iv. Swale, 287-linear feet; 30.0124291, -95.1660585; 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 35.1-acre site located 0.15 miles north of the intersection of West Lake Houston Parkway and Kings Parkway (latitude 30.011954, longitude -95.167325) in Atascocita, Harris County, Texas.

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 WATERS⁶: 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 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

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.

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.

A drainage swale was identified within the project boundary. This drainage swale (287 linear feet) is a loosely defined topographical swale with no clearly defined bed or bank or ordinary high water mark. The swale was observed upon exiting the eastern review area and flowed into the ditch along Pinehurst Trail Drive and into a stormwater drain. Neither the DEM, the site visit nor the topo map show any aquatic resources within the property connected to this swale.

- 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*.

⁸ 51 FR 41217, November 13, 1986.

There is a pond on the site that is located at the western end of a series of ponds that appear to connect Rockpool Gully, which flows to Lake Houston. During the site visit no connection between the pond within the review area and the golf course ponds was observed. There were no culverts or drainages that connected the pond, or any other aquatic resource to Rockpool Gully. Therefore, the pond does not have a hydrologic connection to Lake Houston, the nearest RPW or any TNW. The pond could not be used by interstate or foreign travelers for recreational or other purposes; is not a water where fish or shellfish could be taken and sold in interstate or foreign commerce; and could not be used for industrial purposes by industries in interstate commerce. Therefore, the pond on the project site is not a water of the United States.

- 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).

Two Wetlands (Wetland 1 - 0.83-acre and Wetland 2 – 0.94-acre) totaling approximately 1.77 acres were observed within the review area. Wetland one is located entirely within the project area and Wetland 2 extends off the project site to the southwest but ends at the rise in elevation at the CVS Drug Store detention basin. Wetland 2, based on observation from the site visit, has no connection to the detention basin.

Based on our desk review of Google Earth aerial photos, the LiDAR Digital Elevation Model (DEM), and site visit, Wetland 1 and Wetland 2 do not have any known continuous surface connection to any water of the United States. There are no swales, erosional features, ditches, or culverts that would potentially serve as continuous surface connections between Wetland 1 and Wetland 2 and any Relatively Permanent Water of Traditional Navigable Water. No more than overland sheet flow would exit the wetlands. Wetland 1 and Wetland 2 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.

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: 10 March 2024

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- b. Site visit: 5 March 2024
- c. Maps, plans, plots, and data submitted by or on behalf of the applicant consultant: N/A
- d. Aerial Photos: Google Earth Aerial Imagery (1944-2023)
- e. NOAA Data Viewer, 2018 Texas Water Development Board Lidar: Coastal Texas. Accessed 10 March 2024.
- f. United States Geological Survey (USGS) Topographic Map, ESRI Layer. Accessed 10 March 2024.
- g. 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 10 March 2024.
- h. 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 10 March 2024.

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.



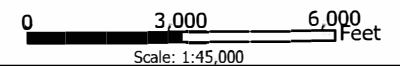
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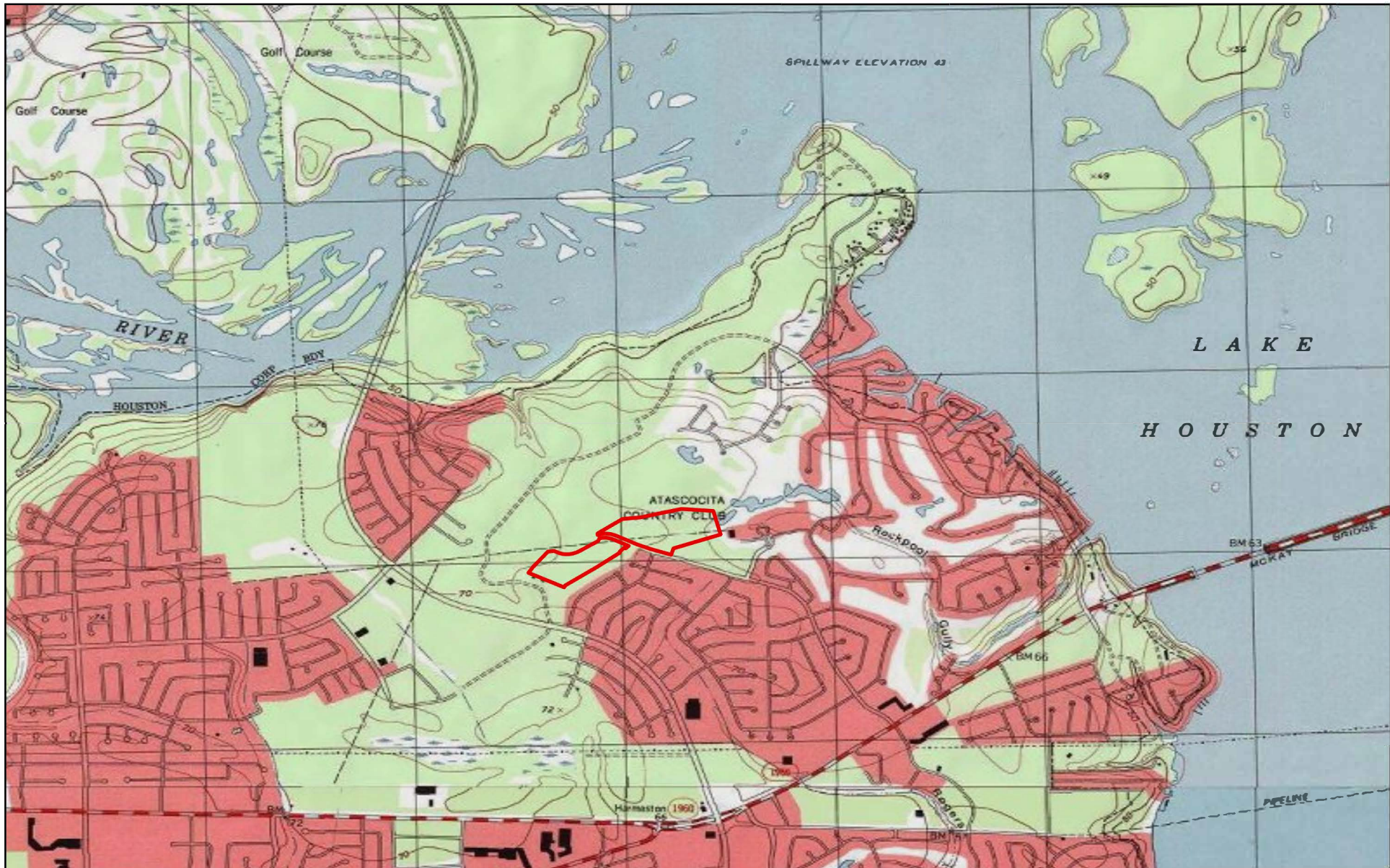
 Review Area

SWG-2024-00092 Vicinity Map
Approximate 35.1-acre Site
(Latitude 30.011954, Longitude -95.167325)

Prepared
05 April 2024

Coordinate System
GCS North American 1983





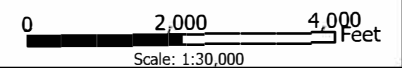
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 Review Area

SWG-2024-00092
USGS ESRI USA Topo Map Layer
(Latitude 30.011954, Longitude -95.167325)

Prepared
05 April 2024

Coordinate System
GCS North American 1983





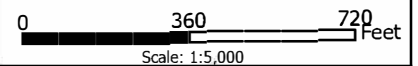
Legend

- ▭ Review Area ~ 35.10-acres
- ▭ Pond ~ 0.18-acres
- ▭ Wetland 1 ~ 0.83-acres
- ▭ Wetland 2 ~ 0.94-acres
- Swale ~ 287-linear feet

SWG-2024-00092 Delineation
 (Latitude 30.011954, Longitude -95.167325)





Prepared
05 April 2024



Coordinate System
GCS North American 1983





DEM in feet

-  Review Area ~ 35.10-acres
-  Pond ~ 0.18-acres
-  Wetland 1 ~ 0.83-acres
-  Wetland 2 ~ 0.94-acres

-  Swale ~ 287-linear feet
-  38.332
12.48

SWG-2024-00092 DEM

**NOAA Data Access Viewer - 2018 TWDB Coastal Texas Lidar
(Latitude 30.011954, Longitude -95.167325)**

Prepared
05 April 2024

Coordinate System
GCS North American 1983

