








Aerial Imagery Date: 5/9/2022

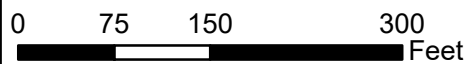
Legend

-  Project Area
-  Project Area Buffer (25')
-  Proposed Access Road Centerline
-  Access Road Buffer (50')
-  Sampling Point
-  PSS Wetland
-  PEM Wetland

FAA DWH ATCT

Spring, Harris Co., Texas

Figure 05 - Delineation Map





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

CESWG-RD-C

15 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*, 598 U.S. 651, 143 S. Ct. 1322 (2023),¹ SWG-2024-00252.

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.

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2024-00252

- 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. WDP01_PEM; 0.02 acre, (30.066543, -95.555615), Non-adjacent, non-jurisdictional
 - ii. WDP01_PSS; 0.04 acre, (30.066588, -95.555624), Non-adjacent, non-jurisdictional
 - iii. WDP02_PEM; 0.48 acre, (30.064830, -95.555720), Non-adjacent, non-jurisdictional
 - iv. WDP03_PEM; 0.05 acre, (30.066588, -95.555624), Non-adjacent, 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. 2008 Rapanos guidance: "In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters."
- f. 24 July 2020 Memo, "Joint Memorandum to the Field Between the U.S. Department of the Army, Corps of Engineers and the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act".

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2024-00252

3. REVIEW AREA. The project area is a 5.1-acres tract located at 9125 Boudreaux Road, Tomball, Harris County, Texas. The center coordinates of the site are Latitude 30.065336 N, Longitude -95.555847 W
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Cypress Creek: Listed on the Galveston District Navigable Waters List
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The WDP02_PEM about a non-relatively permanent drainage ditch, Path A, which then flows 3.55 river miles to a relatively permanent water (RPW), Theiss Gully. Theiss Gully flows approximately 3.19 river miles before connecting to Spring Gully an (RPW) the at flows approximately 1.07 miles to Cypress Creek, a Traditional Navigable water (TNW).
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 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.

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.

- 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):
- 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”).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. They are not waters of the United States as per the preamble.
- 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. N/A
- 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

⁷ 51 FR 41217, November 13, 1986.

- 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 the data sources listed in #9 and our 9 August 2024 desk review, we have determined WDP01_PEM (0.02 acre), WDP01_PSS (0.04) extends west northwest 406 feet and WDPO3_PEM (0.05) extends east, 12 feet outside of the review area, reside in small depressional areas. Wetlands, WDP01_PEM WDP01_PSS and WDPO3_PEM are surround by uplands. These aquatic features do not touch a tributary, culvert, ditch, and swale. WDP02_PEM (0.05 acre) extends 174 feet outside of the review area. The WDP02_PEM abut a non-relatively permanent drainage ditch, Path A, which then flows 3.55 river miles (18744 linear feet) to a relatively permanent water (RPW), Theiss Gully. Theiss Gully flows approximately 3.19 river miles (16,819 linear feet) into Spring Gully (1.07 river miles) to Cypress Creek before connecting to Cypress Creek, a Traditional Navigable water (TNW). The non-relatively permanent drainage ditch is created from uplands, does not meet the definition of a tributary, and is non-jurisdictional. Several Google Earth aerials (December 2019, November 2020, February 2022, April 2022, and July 2022) do not indicate water present in the drainage ditch, Path A. Theiss Gully is a relatively permanent water as all of the Google Earth photos show water present and is a named waterbody in the 2022 Tomball Quad Topographic Map which connects to Spring Gully and then Cypress Creek, a requisite water, this distance of 3.55 river miles from Wetland WDP02_PEM to Thiess Gully, the nearest RPW is too far to be considered a continuous surface connection. Although the ditch is non relatively permanent water, it may serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. “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. 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, ditches, culverts, and the length do not meet the continuous surface connection requirement for WDP02_PEM, Furthermore, the Environmental Protection Agency Headquarters and Assistant Secretary of the Army for Civil Works Memorandum on NWK-2024-00392 states that “as the length of the surface connection increases, even with stronger indicators of flow, the length of the connection can become no longer physically close, such that the discrete features are no longer providing a continuous physical connection”. The memorandum further stated that “after consideration of flow, the number, the types, and the length of the connection, the 725-foot length of connection between the wetland and the requisite covered water is not physically close enough to meet the continuous surface connection requirement”. They concluded that the wetland did not have continuous surface connection to the downstream relatively permanent tributary and not adjacent. In this case, we determined that Wetland WDP02_PEM with its 3.55 river mile connection to Theiss Gully, the nearest requisite water, is not physically close enough to meet the continuous surface connection requirement and is not adjacent to Theiss Gully. Therefore, WDP01_PEM, WDP01_PSS, WDP02_PEM, WDP03_PEM 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. These wetlands are not 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; 9 August 2024
 - b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant; Jacobs Engineering Group submitted on 17 April 2024
 - c. U.S. Geological Survey map(s); 2022 Tomball, Texas Quadrangle
 - d. USDA Natural Resources Conservation Service Soil Survey; Accessed January 2024
 - e. National Wetlands Inventory map(s); Accessed January 2024

CESWG-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2024-00252

- f. Goggle Earth Aerials; December 2019, February 2022, April 2022, July 2022
- g. FAA DWH ATCT Figure 06-2018 LiDAR Map Spring Harris Co., Texas Accessed LiDAR 13 January 2018

10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandums on SWG-2023-00284, NAP-2023-01223, NWK-2022-00809, and 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 additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.