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

CESWG-RD-C 24 July 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-2024-00856

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.

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).

Summary of Aquatic Features Delineated Within Hackberry Park					
Feature Name[1]	**Feature Type[2]**	**Latitude, Longitude**	**Jurisdictional Decision**	**Size (acre)**	**Length (feet)**
D122-00-00 (Hackberry Park)	Upland-cut drainage ditch	29.69625701, -95.6030511	Jurisdictional, relatively permanent water	0.29	797.22
H WET 1	PEM wetland	29.69408035, -95.60380124	Non-adjacent, Non-jurisdictional	0.02	-
H WET 2	PEM wetland	29.69429309, -95.60352772	Non-adjacent, Non-jurisdictional	0.10	-
H WET 3	PFO wetland	29.69461628, -95.60374653	Non-adjacent, Non-jurisdictional	0.13	-
H WET 4	PFO wetland	29.69506729, -95.60377147	Non-adjacent, Non-jurisdictional	0.11	-
H WET 5	PEM wetland	29.69533928, -95.60400227	Non-adjacent, Non-jurisdictional	0.01	-
H WET 6	PEM wetland	29.69538993, -95.60373015	Non-adjacent, Non-jurisdictional	0.02	-
H WET 7	PEM wetland	29.6956382, -95.60367756	Non-adjacent, Non-jurisdictional	0.04	-
H WET 8	PEM wetland	29.69572728, -95.60324752	Non-adjacent, Non-jurisdictional	0.02	-
H WET 9	PEM wetland	29.69490547, -95.60334693	Non-adjacent, Non-jurisdictional	0.01	-
H WET 10	PFO wetland	29.69563284, -95.60287158	Non-adjacent, Non-jurisdictional	0.05	-
H WET 11	PFO wetland	29.69557399, -95.60242708	Non-adjacent, Non-jurisdictional	0.04	-
H WET 12	PEM wetland	29.69528895, -95.60202576	Non-adjacent, Non-jurisdictional	0.04	-
H WB 1	Pond	29.69367923, -95.60353872	Preamble water, Non-jurisdictional	0.37	-
H WB 2	Pond	29.69426644, -95.60349237	Preamble water, Non-jurisdictional	0.03	-
H WB 3	Pond	29.6951006, -95.60299663	Preamble water, Non-jurisdictional	0.80	-
H WB 4	Pond	29.69330275, -95.60304176	Preamble water, Non-jurisdictional	0.28	-
H WB 5	Pond	29.69462267, -95.60220944	Preamble water, Non-jurisdictional	0.28	-
H WB 6	Pond	29.69354106, -95.60229256	Preamble water, Non-jurisdictional	0.87	-
TOTAL NON-WETLAND FEATURES		**2.92**		**797.22**	
TOTAL WETLAND FEATURES		**0.59**		**-**	

TOTAL FEATURES	**3.51**	**797.22**

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 site approximately 23.92 acres located east of South Dairy Ashford Road and north of Ashford River Road in Houston, Harris County, Texas. Located at Latitude 29.694500° and Longitude -95.602977°

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 D122-00-00 drainage ditch flows into to Brays Bayou. Brays Bayou is a relatively permanent water that becomes a traditional navigable waterway approximately 17.3 river miles east of the confluence of the D122-00-00 drainage ditch and the bayou.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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.

    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): The Google Earth aerials and the latest topo maps show that the drainage ditch is relatively permanent, and the Harris County Flood Warning System map and the aerial photos show that the drainage ditch flows into to Brays Bayou. Brays Bayou is a relatively permanent water that becomes a traditional navigable waterway approximately 17.3 river miles east of the confluence of the D122-00-00 drainage ditch and the bayou. Therefore, drainage ditch D122-00-00 is a relatively permanent tributary to Brays Bayou subject to

[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.

subject to Section 404 of the Clean Water Act. Any discharge of dredge and/or fill material into drainage ditch D122-00-00, totaling 797.22 linear feet, does require a Department of the Army permit.

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.

H WB 1-6 are ornamental ponds that were excavated in uplands for aesthetic purposes. Furthermore, these ponds do not abut a TNW, RPW, and/or a jurisdictional impoundment. Therefore, they are preamble waters. 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… (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons. Therefore, ponds H WB 1-6 are not a water of the United States and are not subject to Section 404 of the Clean Water Act. Therefore, any discharge of fill material into H WB 1-6, totaling 2.63 acres, do 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.

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

[7] 51 FR 41217, November 13, 1986.

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 desk review and a review of the submitted delineation, we have determined that H Wetlands 1-12 do not meet the continuous surface connection standard for adjacent wetlands as they do not abut a relatively permanent water, a jurisdictional impoundment, or a traditional navigable water. Therefore, these wetlands are not waters of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredge and/or fill material into these wetlands, totaling 0.59 acres, 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*: Google Earth Aerials 31 December 1943 through 10 April 2025*
   b. United States Geological Survey (USGS) Topographic Maps*: 1970 Alief, Tx 1:24,000, 1995 Alief, Tx 1:24,000, 2010 Alief, Tx 1:24,000, 2019 Alief, Tx 1:24,000, 2022 Alief, Tx 1:24,000*
   c. United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) Map *Accessed 17 July 2025*
   d. US Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) Soil Map *Accessed 17 July 2025*
   e. USGS National Map 3D Elevation Program (3DEP) LiDAR 2 January 2025 *Accessed 18 July 2025*

f. Harris County Flood Warning System Map: https://www.harriscountyfws.org Accessed *17 July 2025*
g. Delineation Report submitted by Hollaway Environmental + Communications on 5 December 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.

SWG-2024-00856

Hackberry Park AJD
Houston, Harris County, Texas

Exhibit Map