



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT  
5151 FLYNN PARKWAY, SUITE 306  
CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RD-R

15 September 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),<sup>1</sup> SWG-2025-00188, MFR 1 of 1.<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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).

Feature Name	Latitude/ Longitude	Size (ac)	Type of Feature	Authority Over Feature	JD Action Type
PEM-01	26.04769° N 97.43883° W	27.36	Palustrine Emergent Wetland	404	AJD
PEM-02	26.05165° N 97.43793° W	21.70	Palustrine Emergent Wetland	N/A	AJD
PEM-03	26.05596° N 97.43714° W	33.10	Palustrine Emergent Wetland	N/A	AJD
PEM-04	26.06478° N 97.43805° W	0.46	Palustrine Emergent Wetland	N/A	AJD
PEM-05	26.06215° N 97.43563° W	4.66	Palustrine Emergent Wetland	N/A	AJD
PUB-01	26.05007° N 97.43940° W	0.68	Ag Stock Pond	N/A	AJD
PUB-02	26.06452° N 97.43824° W	0.16	Ag Stock Pond	N/A	AJD
PUB-03	26.06029° N 97.43820° W	0.61	Construction Borrow Pit	N/A	AJD
PUB-04	26.06181° N 97.43798° W	2.61	Construction Borrow Pit	N/A	AJD
PUB-05	26.06027° N 97.43939° W	0.50	Ag Stock Pond	N/A	AJD
PUB-06	26.06041° N 97.43733° W	0.11	Ag Stock Pond	N/A	AJD
PUB-07	26.05930° N 97.43707° W	0.08	Ag Stock Pond	N/A	AJD
PUB-08	26.06071° N 97.43595° W	2.39	Construction Borrow Pit	N/A	AJD
PUB-09	26.06067° N 97.43489° W	0.54	Construction Borrow Pit	N/A	AJD

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## 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)
- e. 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 an approximate 492-acre parcel located approximately 2.37 miles east of Los Fresnos, in Cameron County, Texas. The coordinates for the tract are Latitude: 26.05599° North; Longitude: 97.43904° West
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup> San Martin Lake
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

The feature labelled PEM-1 has a continuous surface connection with wetlands outside of the review area that extend south approximately 1,240 feet to Main Ditch Number 2, a relatively permanent water that carries flow for approximately 6 miles to San Martin Lake, a tidally influenced extension of the Bahia Grande, which is a Traditionally Navigable Water.

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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):

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<sup>7</sup> 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.

<sup>8</sup> 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.

**Feature PEM-01 (27.36 ac):** Based on data sources listed in the Resources Reviewed section and a site visit, we have determined that this feature exhibits hydrophytic vegetation, hydric soil, and wetland hydrology, and is a palustrine wetland that has a continuous surface connection with wetlands outside of the review area that extend south approximately 1,250 feet to Main Ditch Number 2, a relatively permanent water that carries flow for approximately 6 miles to San Martin Lake, a tidally influenced extension of the Bahia Grande, which is a Traditionally Navigable Water subject to the ebb and flow of the daily tide. Any discharge of dredged and/or fill material into PEM-1 requires a Department of 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”).<sup>9</sup> 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.

**Features PUB-01 (0.68 ac), PUB-02 (0.16 ac), PUB-05 (0.50 ac), PUB-06 (0.11 ac), and PUB-07 (0.08 ac):** Based on data sources listed in the Resources Reviewed section, we have determined that these features are stock ponds excavated from uplands. The preamble of Section 328.3 (16 November 1986 Federal Register Vol. 51, No. 219) defines waters that are generally non-jurisdictional, including “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, settling basins, or rice growing. (33 CFR 328.3(b)(5)).”

**Features PUB-03 (0.40 ac), PUB-04 (2.61 ac), PUB-08 (2.39 ac), and PUB-09 (0.54 ac):** Based on data sources listed in the Resources Reviewed section, we have determined that these features are active borrow pits excavated from uplands for providing fill material for construction purposes. The preamble of Section 328.3 (16 November 1986 Federal Register Vol. 51, No. 219) defines waters that are generally non-jurisdictional, including “Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (33 CFR 328.3(b)(7)).”

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<sup>9</sup> 51 FR 41217, November 13, 1986.

- 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 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 PEM-02 (21.70 ac), PEM-03 (33.10 ac), PEM-04 (0.46 ac), and PEM-05 (4.66 ac):** Based on data sources listed in the Resources Reviewed section, we have determined these palustrine wetlands reside in depressional areas completely within the review area that collect rainwater from the surrounding terrain. There is no presence of a continuous surface connection, nor is there any evidence of sheet flow from these wetlands to an RPW or TNW. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with pre-2015 regulatory regime in light of *Sackett v. EPA*, a wetland is considered adjacent if connected by a continuous surface connection, meaning that the wetland must physically abut or touch the paragraph a(1) or relatively

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permanent water, or be connected to the paragraph (a)(1) or relatively permanent water by a discrete feature (i.e. non-jurisdictional ditch, swale, pipe, or culvert).

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. Information provided by the applicant, 22 April 2025
- b. Office evaluation conducted 10 June 2025
- c. Site Visit conducted 25 June 2025
- d. Google Earth Aerials dated: December 2018, March 2020, June 2023
- e. USGS Topographic Map/Scale: Los Fresnos, Texas; 1:24,000 (2022)
- f. Soil Survey Hydric Rating Map: Cameron County, Texas; NRCS website accessed 10 June 2025
- g. US Fish and Wildlife Service (FWS) National Wetland Inventory (NWI): Web Mapper dated 10 June 2025
- h. NOAA 2018 Light Detection and Ranging (LiDAR) elevation data.
- i. ORM2 Database: No prior determination has been made for this review area.

10. OTHER SUPPORTING INFORMATION.

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.

