



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

CESWG - RD

5 November 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-2025-00319

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 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.

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. Palustrine forested wetland, non-jurisdictional, 29.9258109, -93.900207
 - ii. Drainage ditch, non-jurisdictional, 29.926272, -93.904096
 - iii. Erosional feature, non-jurisdictional, 29.926637, -93.903716

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. 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 a 30.05-acre tract located near West Crane Bayou, at the intersection of Gulfway Drive and Village East Boulevard in Port Arthur, Jefferson County, Texas; 29.9258109, -93.900207
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A.⁵

⁵ 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.

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

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.

- 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”).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 2008 *Rapanos* guidance that swales and erosional features are “generally non-jurisdictional.”

Erosional Feature (Approximately 90 linear feet):

During the site visit conducted on 22 September 2025, an approximately 90-foot-long erosional feature was observed at a location approximately 415 feet southwest (SW) of Village East Boulevard on the SE bank of the drainage channel. The erosional feature was connected to a clearing within the palustrine forested (PFO) wetland that contained herbaceous vegetation and standing water. This erosional feature appears to be related to the lower elevation signature that was observed on USGS 3D Digital Elevation Program (3DEP) digital elevation model (DEM) imagery along the northwest (NW) boundary of the review area, extending SE from the drainage ditch on the NW corner of the review area toward a clearing with herbaceous vegetation. This erosional feature did not have a defined bed and bank, nor did it have an ordinary high water mark, or other features characteristic of a tributary. The erosional feature was also unvegetated and did not meet the criteria for categorization as a wetland. The 2008 *Rapanos* guidance states that swales and erosional features are generally non-jurisdictional. Therefore, this erosional feature was determined to be non-jurisdictional and not a water of the United States under Section 404 of the CWA. Any discharge of fill material into this erosional feature does not require a Department of the Army (DA) permit.

Drainage Ditch (Approximately 1,000 linear feet)

⁸ 51 FR 41217, November 13, 1986.

Based on a desk top review of historical USGS 7.5-minute topographic maps, historical Google Earth aerial photography, and USGS 3D Digital Elevation Program (3DEP) digital elevation model (DEM) imagery, it appeared that a drainage feature was present on the NW side of the review area. The 1943 and 1957 USGS Port Arthur North 7.5-minute quadrangle maps indicate that a Kansas City railroad line was present in the vicinity of this present-day drainage feature and was at an elevated position within uplands. However, the drainage feature did not appear on any of the Port Arthur quadrangle maps that were reviewed from 1943, 1957, 1993, and 2022. Historical aerial photography from Google Earth in 1938 does not show the drainage feature but does show the curved path that the railroad line would eventually occupy. Historical aerial photos of the review area from 1989 and 1996 showed what appears to be a drainage ditch along the NW boundary of the review area in the same area as the railroad from the 1943 and 1957 quadrangle maps, but the railroad was no longer there. The drainage ditch appeared to connect to a concrete lined channel through a culvert on the west end of the ditch and to West Crane Bayou through a culvert on the east end of the ditch at Village East Boulevard.

A site visit was conducted on 4 September 2025 to investigate the current status of the drainage ditch along the NW side of the review area. We observed that the drainage ditch has a defined bed and bank, with the top of the bank being approximately 4 to 5 feet above the bed of the channel. The ordinary high water mark (OHWM) was estimated to be approximately 2 feet above the bottom of the channel based on discoloration of tree trunks and exposed tree roots. This area is not concrete-lined and had trees and other vegetation growing within the riparian zone. This drainage channel was dry for the majority of the reach within the review area, with small pockets of standing water (< 1 inch deep) and herbaceous vegetation consisting mostly of poison ivy (*Toxicodendron radicans*) and swamp smartweed (*Persicaria hydropiperoides*). Antecedent Precipitation Tool (APT) results show that rainfall conditions over a 30-day period were Normal, although the month of August exhibited mild drought conditions.

Although the drainage ditch appeared to be connected to a concrete lined drainage canal on the SW side of the review area through two culverts and sluice gates, the sluice gates were closed, and the applicant stated that the gates were rusted shut and not able to be opened. As such, water cannot flow between the drainage ditch within the review area and the concrete-line drainage canal outside of the review area. The culvert at the east end of the ditch, leading under Village East Boulevard was positioned at of height of approximately 1 to 2 feet above the OHWM of the ditch and only extremely high flow events would allow water to flow from the ditch through this culvert toward West Crane Bayou

outside of the review area. Based on these observations, it was determined that there is not relatively permanent flow within the drainage ditch. Per the 2008 Rapanos Guidance, 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 jurisdictional. Therefore, the drainage ditch on the NW side of the review area is not jurisdictional and not a water of the United States under Section 404 of the CWA. Any discharge of fill material into this drainage ditch does not require a Department of the Army (DA) permit.

- 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).

Palustrine Forested Wetland (30 acres):

The applicant did not provide a full delineation of the review area but did provide site photos and the National Wetlands Inventory map to indicate that most of the review area is occupied by a PFO wetland. The PFO wetland is bordered by a levee and/or berm that can be seen as a higher elevation on the DEM imagery on the SW, SE, and NE sides of the larger property boundary. These levees/berms are uplands that separate the wetland from having a continuous surface connection with West Crane Bayou, a drainage ditch on the East side of

CESWG - RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2025-00319

the property, and a concrete-lined channel to the SW just outside of the review area. The NW side of the PFO wetland is bordered by the drainage ditch which was determined to be a non-relatively permanent water and non-jurisdictional. As such, this PFO wetland does not have a continuous surface connection with a relatively permanent water or traditional navigable water. Therefore, under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett*, the PFO wetland within the review area was determined to be non-jurisdictional and not waters of the US. Any discharge of fill material into this PFO wetland does not require a Department of the Army (DA) 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. Site visit conducted on 4 September 2025.
 - b. USGS Topographic Maps – Port Arthur North 7.5-minute Quadrangle from 1943, 1957, 1993, and 2022, Accessed on 29 October 2025.
 - c. USGS Map 3D Elevation Program (3DEP) Digital Elevation Model (DEM) from 14 July 2025, Accessed on 18 July 2025.
 - d. Google Earth Aerial Photos from 1938, February 1989, and January 1996, Accessed on 29 October 2025.
 - e. Antecedent Precipitation Tool, Accessed on 3 September 2025.
 - f. Report for Wetlands Jurisdictional Opinion 30-Acre Tract at Village East Boulevard provided by the applicant and dated 17 January 2025.
 - g. National Wetlands Inventory map provided by applicant in the Report for Wetlands Jurisdictional Opinion 30-Acre Tract at Village East Boulevard provided by the applicant and dated 17 January 2025.
10. OTHER SUPPORTING INFORMATION. N/A

CESWG - RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2025-00319

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.

PREPARED BY:



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Regulatory Project Manager

Date: 5 November 2025

REVIEWED/APPROVED BY:



Andria Davis
Leader, North Branch
Regulatory Division, Galveston District

Date: 5 November 2025

SWG-2025-00319

Approved Jurisdictional Determination Map

Legend

- Drainage Ditch (1000 feet)
- Erosional Feature (90 feet)
- Review Area
- PFO Wetlands (30 acres)

