



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT
819 TAYLOR STREET
FORT WORTH, TEXAS 76102

CESWF-RDE

October 17, 2023

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 [SWF-2023-00192](#)

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 this state 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.

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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. Pond (PUB) OSW5 – non-jurisdictional
 - ii. Pond (PUB) OSW9 – non-jurisdictional
 - iii. Pond (PUB) OSW12 – non-jurisdictional
 - iv. Pond (PUB) OSW17 – non-jurisdictional
 - v. Pond (PUB) OSW19 – non-jurisdictional
 - vi. Pond (PUB) OSW21 – non-jurisdictional
 - vii. Pond (PUB) WI – 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. The review area approximately is 800 acres and located in rural Robertson County, Texas. The center point of the proposed project area is 31.219257°, -96.409863°. Reference Table 1 for specific locations of each pond within the proposed project boundary. There is no other relevant site-specific information or previous JDs associated with the proposed review area. Reference Map 1 .

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. These ponds do not have a hydrologic continuous surface connection to a TNW, interstate water, or territorial sea.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Not applicable.

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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 [Not applicable](#).
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): [Not applicable](#)
 - b. Interstate Waters (a)(2): [Not applicable](#)
 - c. Other Waters (a)(3): [Not applicable](#)
 - d. Impoundments (a)(4): [Not applicable](#)
 - e. Tributaries (a)(5): [Not applicable](#)
 - f. The territorial seas (a)(6): [Not applicable](#)
 - g. Adjacent wetlands (a)(7): [Not applicable](#)

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.

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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. All available information referenced in Section 9 indicate that the subject ponds listed in Section 1a are human constructed within dry land (i.e., upland). The ponds meet the description of water features that generally are not considered waters of the United States as detailed in the 1986 preamble of the regulations—33 CFR, part 328.3 (c)—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.
- 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. Not applicable.
- 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. Not applicable.
- 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. Not applicable.
- 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*. Not applicable.

⁷ 51 FR 41217, November 13, 1986.

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- 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). [Not applicable](#).
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 June 13, 2023. Observations during the site visit confirmed that a continuous hydrologic surface connection is not present between each pond and the nearest RPW. Additional tools were used during desktop evaluation on October 13, 2023.](#)
 - b. [National Wetlands Inventory, National Hydrography Dataset, 3DEP Hillshade, USGS Topo Map—National Regulatory Viewer-SWD-Texas, October 13, 2023.](#)
 - c. [Maps, delineation of aquatic resources, and other information submitted on behalf of the applicant—Maps enclosed, additional project information available within the electronic project file, SWF-2023-00192.](#)
 - d. [Google Earth Pro and Historic Aerials \(.com\) – all available years, October 13, 2023.](#)
10. OTHER SUPPORTING INFORMATION. [None](#)
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.





Table 1

Waters_Name	Amount	Units	Latitude	Longitude
OSW12 Palustrine Unconsolidated Bottom	0.59	Acres	31.213798	-96.420297
OSW17 Palustrine Unconsolidated Bottom	0.04	Acres	31.217893	-96.415217
OSW19 Palustrine Unconsolidated Bottom	0.30	Acres	31.217338	-96.404230
OSW21 Palustrine Unconsolidated Bottom	0.13	Acres	31.212992	-96.411793
OSW5 Palustrine Unconsolidated Bottom	0.80	Acres	31.221990	-96.401658
OSW9 Palustrine Unconsolidated Bottom	0.45	Acres	31.217511	-96.426197
WI Palustrine Unconsolidated Bottom	0.12	Acres	31.223248	-96.409963

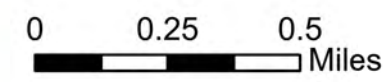


White Rock Solar & Storage Robertson County

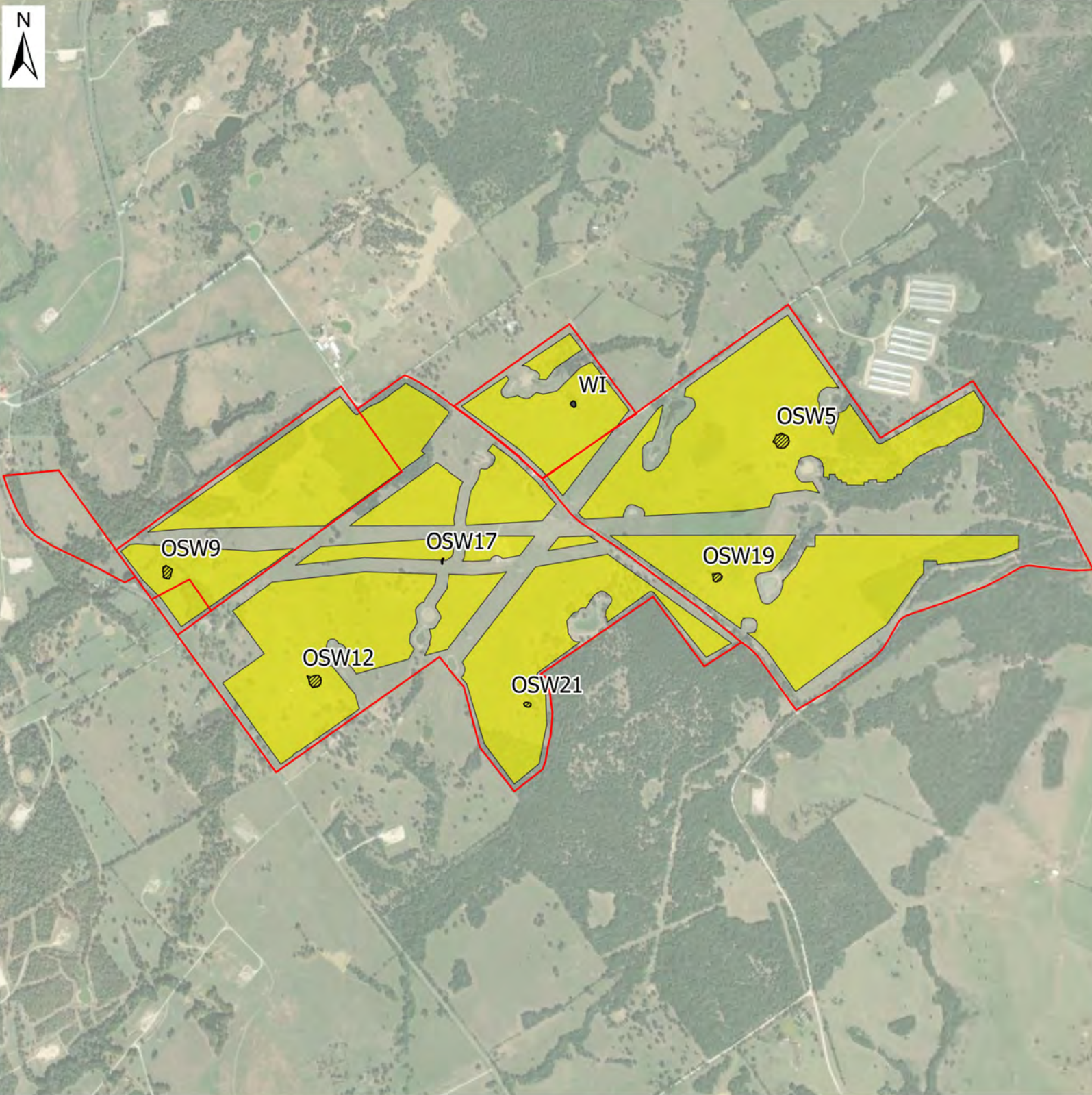
Buildable Area Isolated Features
AJD

-  Parcel Boundary
-  Buildable Area
-  Isolated Pond
-  Isolated Pond

The area in yellow (i.e., the buildable area) is the area of assessment for the AJD.



Enclosure 2, page 7



Map 1

Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community.
N. Pellegrini, 7/11/23