



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT  
P. O. BOX 17300  
FORT WORTH, TEXAS 76102

CESWF-RDE

28 March 2024

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), SWF-2023-00081.

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>1</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>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</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 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.

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<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</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.

## 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).

Table 1. Aquatic Resources Identified Within the Review Area

No.	ID	Classification (Cowardin)	Length (Linear Feet)	Area (Acres)	Jurisdictional Opinion	Basis
1	S-01a	Intermittent Stream (R4)	1,951	0.40	Jurisdictional	RPW
2	S-01b	Ephemeral Stream (R6)	1,822	0.38	Non-jurisdictional	Non-RPW/ Non-TNW
3	S-02	Ephemeral Stream (R6)	3,821	0.54	Non-jurisdictional	Non-RPW/ Non-TNW
4	P-01	Freshwater Pond (PUB)	N/A	0.27	Non-jurisdictional	Lacking Continuous Surface Connection to a RPW or TNW
RPW – Relatively Permanent Water TNW – Traditional Navigable Water						

## 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. James, A., Nadeau, T.-L., Fritz, K.M., Topping, B., Fertik Edgerton, R., Kelso, J., and Mazor, R. 2023. User Manual for a Beta Streamflow Duration Assessment Method for the Great Plains of the United States. Version 1.1. Document No. EPA-840-B-22009.
- f. U.S. Army Corps of Engineers (USACE). 1987. Corps of Engineers Wetland Delineation Manual. Wetland Research Program Technical Report, Y-87-1. U.S. Army Corps of Engineers Environmental Laboratory, Vicksburg, Mississippi.

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- g. U. S. Army Corps of Engineers (USACE). 2005. Regulatory Guidance Letter: Subject: Ordinary High Water Mark Identification. RGL 05-05. 7 December 2005.

### 3. REVIEW AREA

**Review Area Location: ±168-acre Boerne Stage Road**

**State: Texas City: San Antonio County: Bexar**

**Center Coordinates of Review Area:**

**Latitude 29.7115422 Longitude -98.6968542**

**Area of site: ±168 acres**

**Attachment 1: +/- 168-Acre Boerne Stage Road Delineation Of Waters Of The U.S. Aquatic Features Map**

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

**Waters in the review area drain to the Medina River, approximately 52 miles south of the review area. The waters then drain to the San Antonio River and into the Guadalupe River, which empties into the Gulf of Mexico. The San Antonio and Guadalupe Rivers are designated Section 10 waters within the Galveston District. The Gulf of Mexico is a Territorial Sea as it is part of the Atlantic Ocean.**

- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

**Leon Creek Tributary M > Leon Creek > Medina River > San Antonio River > Guadalupe River > Gulf of Mexico.**

- 6. SECTION 10 JURISDICTIONAL WATERS<sup>4</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

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<sup>4</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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>5</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): **Stream S-01 entered the review area through the northeastern boundary of the review area and drained south offsite through the southern boundary. Federal Emergency Management Agency (FEMA) data identified this stream as Leon Creek Tributary M. This stream was divided into two sections based on the results of the Streamflow Duration Assessment Method (SDAM) reports and a change in vegetation from forested to agricultural fields . The first section of the stream (S-01a) was classified as intermittent because the majority of this stream section was classified as intermittent in the SDAM reports. This section was observed to have a consistent ordinary high water mark (OHWM) throughout the channel, which was determined by the presence of bed and banks, absent vegetation, and sediment sorting (USACE 2005). Since S-01a appears relatively permanent with an intermittent flow regime, S-01a is considered a WOTUS.**

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<sup>5</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.

a. The territorial seas (a)(6): **N/A**

b. 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”).<sup>6</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. **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 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

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<sup>6</sup> 51 FR 41217, November 13, 1986.

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).

**Stream section S-01b has a less-defined OHWM than section S-01a. The OHWM was determined by the presence of bed and banks sediment sorting (USACE 2005). Since all of the assessed SDAM reaches in S-01b were classified as ephemeral, S-01b is considered a non-RPW. In addition, substantial evidence in historic aerial imagery suggests that the linear improved pasture segment of S-01b was also dug from uplands. Therefore, S-01b is not considered a WOTUS.**

**Stream S-02 entered the review area through the western boundary, drained east through the review area, and converted into overland flow that led to S-01. This feature was depicted in several desktop resources, and it was labeled as an unnamed stream in FEMA data. This stream was observed to have a consistent OHWM, except for two breaks of overland flow in the downstream end of the stream. The OHWM was identified using bed and banks and absent vegetation (USACE 2005). Water was observed in parts of S-02 during the 2021 site visits, but not in 2023. Since the majority of the SDAM reaches in S-02 were classified as ephemeral, S-02 is non-relatively permanent. Therefore, S-02 is not considered a WOTUS.**

**The freshwater pond P-01 was identified in the northeastern corner of the review area. Based on a review of historic aerial imagery, the pond was man-made and excavated in uplands since this area is not in any 100-year floodplain and the pond was not visible until the 1983 historical aerial photograph. In addition, the pond is dry throughout many years of the available historic aerial imagery. Although Stream S-01b was determined to drain through Pond P-01, Stream S-01b is not considered a WOTUS and given the historical dry conditions of Pond P-01, it is not considered a WOTUS.**

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.

**Federal Emergency Management Agency (FEMA). 2023. FEMA's National Flood Hazard Layer (NFHL) Viewer. U.S. Department of Homeland Security, FEMA, Washington, D.C.**

**National Resources Conservation Service (NRCS). 2024a. Hydric Soils, U.S. Department of Agriculture (USDA).  
[www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/](http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/)**

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**National Resources Conservation Service (NRCS). 2024b. Web Soil Survey. U.S. Department of Agriculture (USDA). <http://websoilsurvey.nrcs.usda.gov/>.**

**United States Department of Agriculture (USDA). 1938. Bexar Historic Imagery, 1938-10-26. Web. 2024-01-23.**

**United States Department of Agriculture (USDA) Geospatial Enterprise Operations (GEO). 1983. Texas NHAP Imagery, 1983-01-27. Web. 2024-01-19.**

**United States Department of Agriculture (USDA). 2018. Texas NAIP Imagery, 2018-12-31. Web. 2022-09-08.**

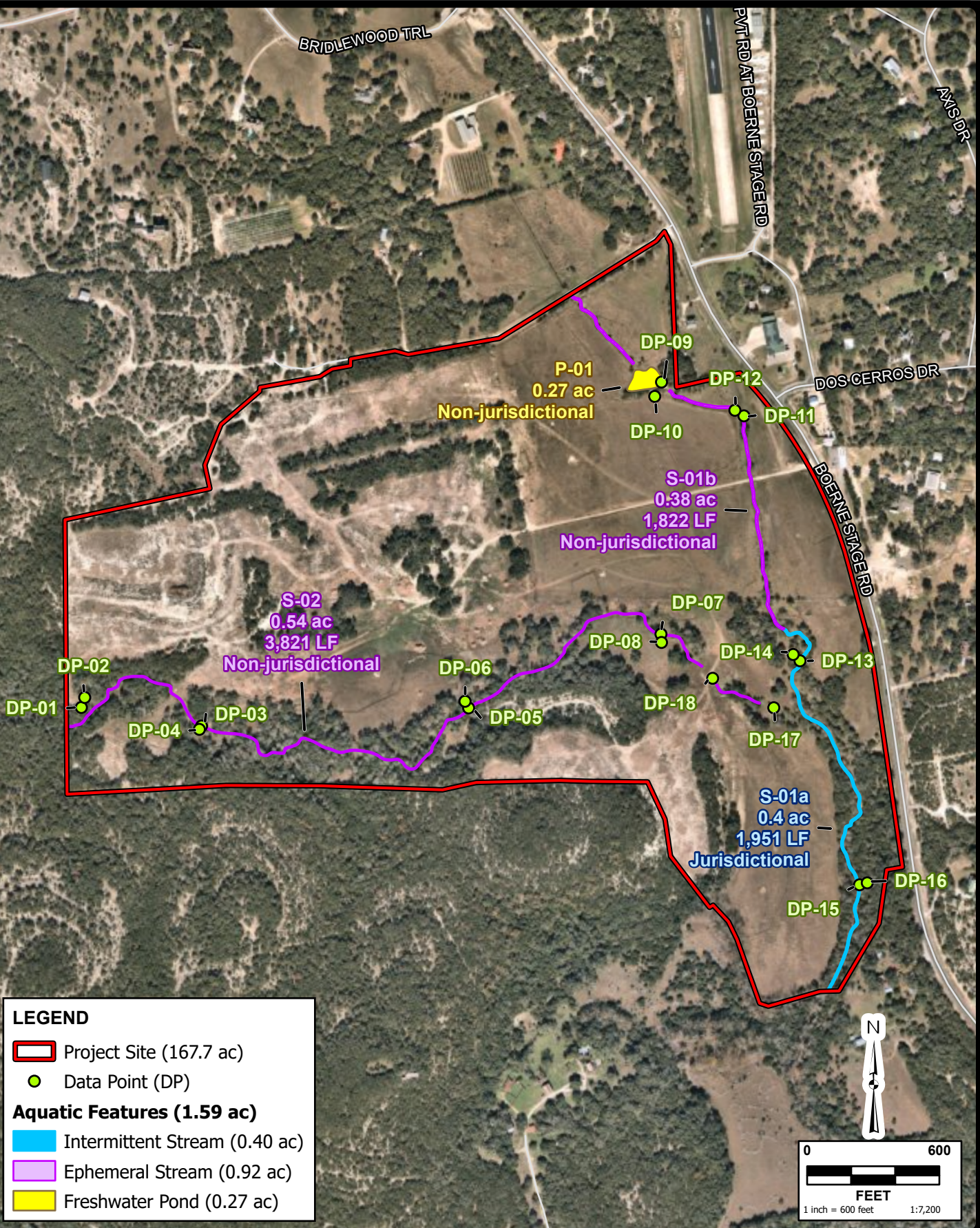
**U.S. Fish and Wildlife Service (USFWS). 2021. National Wetlands Inventory website. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.**

**U.S. Geological Survey (USGS). 1953. Van Raub, TX 7.5-Minute Topographic Quadrangle, 1:24,000. 7.5-Minute Series. Van Raub, Texas: United States Department of the Interior, USGS.**

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.





JOB NO.	12580-01
DATE	Mar 2024
DRAWN	KT
CHECKED	VC
SHEET	EXHIBIT 13

**±168-ACRE BOERNE STAGE ROAD**  
**DELINEATION OF WATERS OF THE U.S.**  
**AQUATIC FEATURES MAP**

**PAPE-DAWSON ENGINEERS**  
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TEXAS ENGINEERING FIRM #470 | TEXAS SURVEYING FIRM #10028800