



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SWF DISTRICT
819 TAYLOR STREET, ROOM 3A37
FORT WORTH, TEXAS, 76102

CE-SWF-RE

1 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),¹ SWF-2024-00104.

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.

- The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).

There are no aquatic features on the site.

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.

Site is generally flat and located at 1,860 feet above mean sea level (AMSL) and is undeveloped rangeland. One soil type on site: Mereta clay loam, dry, 1 to 3 percent slopes, not hydric. USDA NRCS Web Soil Survey Web database also indicates that there are no hydric soils were present. Vegetation is predominantly mesquite shrubland. Average annual precipitation is 21.15 inches according to the NRCS WETS table. Two habitat types: Native Invasive: Mesquite Shrubland (95%) and Urban High Intensity (5%). Eco-region: Broken Red Plains in the Edwards Plateau, Western Part (MLRA 81A) of the Southwest Plateaus and Plains Range and Cotton Region (LRR 1). Site is 3.59 miles northeast of Goodfellow Air Force Base. Per the NHD there are no features were mapped. USFWS NWI also indicates that there are no aquatic features. Site is completely outside the 500-year floodplain.

- Latitude 31.490860, and Longitude: -100.385275.
- USGS 7.5-MINUTE Quadrangle map for San Angelo South, Texas (1978)

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- Watershed: Goodfellow Air Force Base-Concho River sub-watershed: HUC 12-120901050203.
 - FEMA FIRM # FM48451C0485E, Eff. 6/19/2012
 - Eco-region: Broken Red Plains in the Edwards Plateau, Western Part (MLRA 81A) of the Southwest Plateaus and Plains Range and Cotton Region (LRR 1).
 - Precipitation Data
 - ATP – Conditions were “drier than normal” at the time of the site visit on May 10, 2023.
 - Palmer Drought Severity Index (PDSI) - Data indicated a severe long-term drought occurred at time of site visit.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
- 183 miles northwest of the Colorado River (TNW).
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
- Nearest water body is an unnamed pond, 550 ft to the southwest of the site. The Concho River is 2.02 miles to SE, and O.C. Fisher Lake in San Angelo, Texas is 5.76 miles east of the site. Flows continue through several tributaries and eventually connects to the Colorado River.
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 N/A

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.

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): 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. 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

⁷ 51 FR 41217, November 13, 1986.

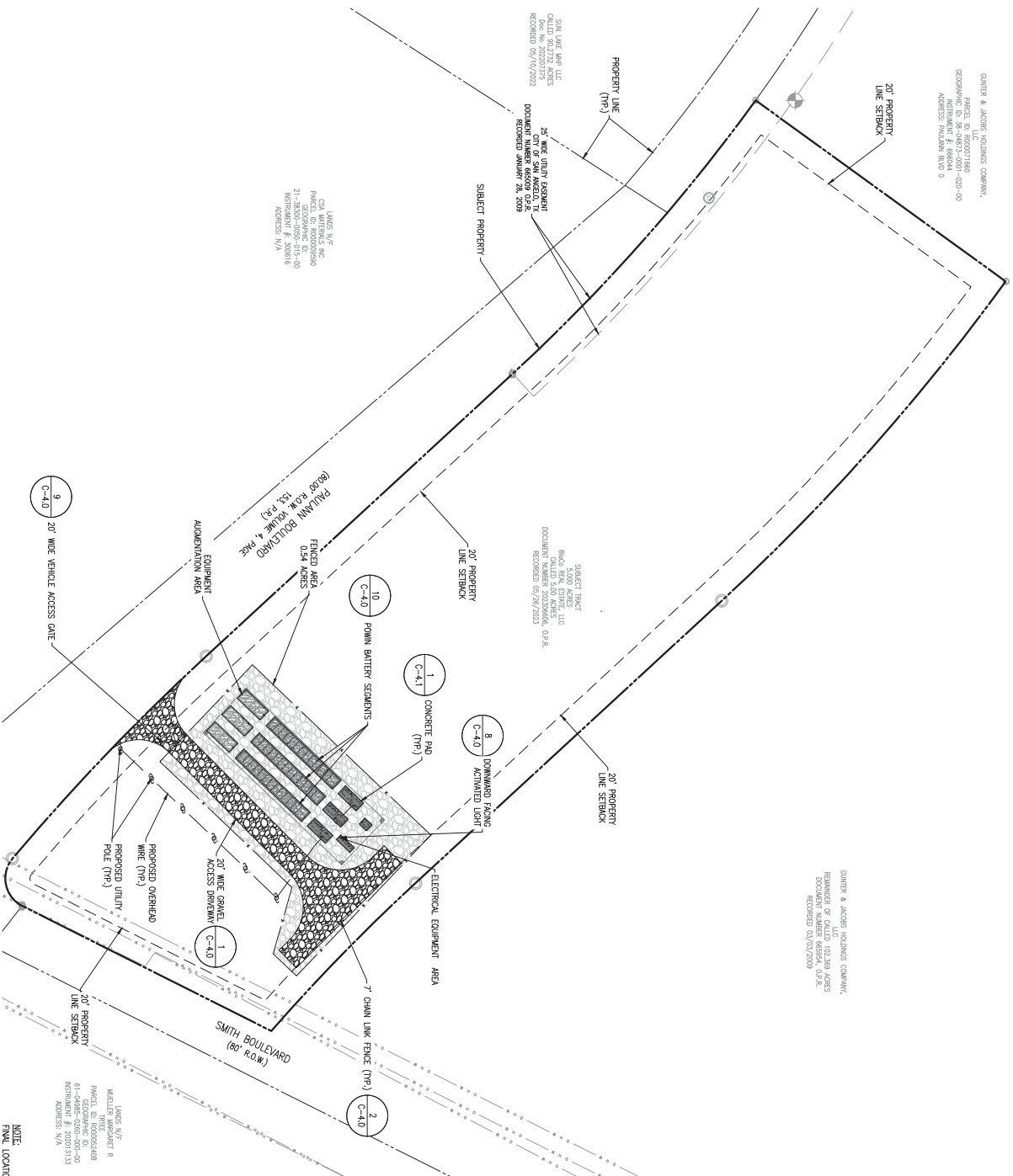
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste 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). N/A
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. May 10, 2023, Contractor Site Visit; February 26, 2024, USACE in-office review
 - b. Brune, Gunnar. 1975. *Major and Historical Springs of Texas*. Austin, Texas: Texas Water Development Board.
https://www.twdb.texas.gov/publications/reports/numbered_reports/doc/R189/R189.pdf.
 - c. Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1)*. Vicksburg, MS: U.S. Army Engineer Waterways Experiment Station.

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- d. Federal Emergency Management Agency. 2023. Hazards/FEMA-NFHL-Floodplains. Accessed 2020. <https://gis1.harcresearch.org/arcgis/services>. FIRM # FM48451C0485E, Eff. 6/19/2012, Eff. 6/19/2012.
 - e. Griffith, Glenn, Sandy Bryce, James Omernik, and Anne Rogers. 2007. *Ecoregions of Texas*. Austin, Texas: Texas Commission on Environmental Quality.
 - f. Natural Resource Conservation Service. 2023. "Web Soil Survey." Accessed 2023.
 - a. <https://websoilsurvey.nrcs.usda.gov/>.
 - g. Pierce, Robert J, and Sam Collinson, 2023. *Nationwide Permits Complete*. 2023 Edition.
 - a. Greenwood, New Mexico: Wetland Training Institute.
 - h. Texas Southwestern Regulatory Map Viewer – several layers
 - i. U.S. Department of Agriculture. 2023. *AgACIS*. Accessed May 29, 2013. <http://agacis.rccacis.org/?fips=48479>.
 - j. U.S. Fish and Wildlife Service. 2017. *National Wetlands Inventory*. June 5. Accessed 2023. <https://www.fws.gov/wetlands/data/Mapper.html>.
 - k. U.S. Geological Survey. 2014. *National Hydrography Dataset available on the World Wide Web*. Accessed June 5, 2023. <https://nhd.usgs.gov/>.
 - l. USACE and EPA. 2007. *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*.—. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (Version 2.0)*. Edited by J.S. Wakeley, R.W. Lichvar and C.V. Noble. Vicksburg, MS: U.S. Army Engineer Research and Development Center.
10. OTHER SUPPORTING INFORMATION. Water Resources Evaluation, Approximately 4.99 Acres Off Paulann Blvd – San Angele, TX SAS, San Angelo, Tome Green County, Texas, dated June 22, 2023, prepared by ESE Partners, LLC.
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.

GUNTER & JACOBS HOLDINGS COMPANY,
LLC
REMAINDER OF CALLED 102.369 ACRES
DOCUMENT NUMBER 665954, O.P.R.
RECORDED 03/03/2009



NOTE:
FINAL LOCATION OF 4' ACCESS GATES SHALL BE
DETERMINED PRIOR TO ISSUANCE OF A BUILDING PERMIT.
SEE DETAIL 3.

LAYOUT AND MATERIALS PLAN

SCALE: 1" = 40'



| REV | DATE | DRAWN | CHECKED | RELEASE LEVEL |
|----------|------|-------|---------|---------------|
| 02/06/24 | CG | LD | SUP SET | |
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PROJECT NUMBER:
120-1339

PROJECT NUMBER:
120-1339

SITE USE PERMIT SET
OFF PAULANN BLVD
SAN ANGELO, TX 76905

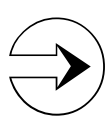
TO ALTER ANY POLICIES WHICH REQUIRE THE SIGNATURE OF A PROFESSIONAL ENGINEER, UNDER THE EIGHTH ARTICLE OF THE CONSTITUTION, THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER.

NOT FOR
CONSTRUCTION



C-2.0

FINAL AQUATIC FEATURES MAP



0 200'
1 inch = 200 feet

LEGEND
 Approximate Property Boundary

Projection: NAD 1983 StatePlane Texas
Central FIPS 4203 Feet
Source: Esri, Maxar, Earthstar
Geographics, and the GIS User Community

FIGURE 8