

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

CESWF-RDE

30 September 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),<sup>1</sup> SWF-2024-00396.

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 iurisdiction.

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.

<sup>&</sup>lt;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>&</sup>lt;sup>2</sup> 33 CFR 331.2.

<sup>&</sup>lt;sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>&</sup>lt;sup>4</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.

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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).

Resource ID	Resource Type	Jurisdictional	Authority
S1a	Non-RPW, ephemeral	Not WOTUS	N/A
S1b	Non-RPW, ephemeral	Not WOTUS	N/A
S1c	Non-RPW, ephemeral	Not WOTUS	N/A
S1d	Non-RPW, ephemeral	Not WOTUS	N/A
S1e	Non-RPW, ephemeral	Not WOTUS	N/A
S2	Non-RPW, ephemeral	Not WOTUS	N/A
W1	Non-adjacent wetland	Non Adjacent	N/A

#### 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 site consists of 30.9 acres in the City of Fort Worth, Tarrant County, Texas. The site is south of Robertson Road on Boat Club Road, north of the Trails of Marine Creek community, north of Ferncreek Lane and adjacent to the existing Eagle Mountain Water Treatment Plant's western fence line. The site is within the Grand Prairie ecoregion (EPA Level IV) of the Cross Timbers (EPA Level III) and has elevations ranging from 808 to 798 feet. The overall topography is relatively flat throughout the site. The existing land-use is open, upland pasture with a relatively large riparian corridor running north to south. A portion of the project site is within the fenced compound of the existing WTP. Adjacent land use is urban, primarily consisting of housing developments, commercial businesses, pastures and some streams. The site is not within a FEMA flood zone.

Central Coordinates: 32.859770, -97.423989.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. West Fork Trinity River (approximately 10 miles.)
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Drainage from the ephemeral streams and sheet flow runs southeast into Marine Creek Lake and exits the lake through Marine Creek. Marine Creek drains into West Fork Trinity River, which becomes a state listed TNW east of downtown Fort Worth and Interstate Highway 35. The West Fork of the Trinity River will also merge with the Trinity River, another TNW east of Loop 12 in Dallas, Texas.
- 6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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.

<sup>&</sup>lt;sup>5</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>&</sup>lt;sup>6</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.

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- 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").<sup>7</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.
- 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

<sup>&</sup>lt;sup>7</sup> 51 FR 41217, November 13, 1986.

- 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).

Feature ID	Feature Type	Coordinates	Acres in Project	Length in Project	Potential Jurisdictional Status
S1a		32.860848	0.016	208	
S1b		32.859446,	0.014	110	
		-97.423254			
S1c		32.859122,	0.003	54	Non-RPW, 1 <sup>st</sup> order
	Ephemeral	-97.42302			stream
S1d		32.858882,	0.002	31	
		-97.422875			
S1e		32.858320,	0.005	90	
		-97.422602			
Total Stream 1		0.04	493		
S2	Ephemeral	32.858609,	0.01	232	Non-RPW, 1 <sup>st</sup> order
	-	-97.422475			stream
WL 1	PEM1E,	32.860282,	0.295	NA	Non-adjacent
	emergent	-97.424740			isolated, depression
					surrounded by
					uplands

**Stream 1** (S1a-S1e) are remnants of an intermittent, blue line stream (S1). The historic feature was an unnamed tributary to the Marine Creek Reservoir as mapped in a USGS-map but was observed as an ephemeral stream during the field survey. An estimated total of 493 linear feet (0.04 acre) for the combined stream segments of this feature is within the Study Area where it flows from the northwest to southeast. The ordinary high-water mark (OHWM) of the stream was not consistent and not established at multiple segments throughout the Study Area. OHWM characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, lack of vegetation, and scour were found on small remnants. In segments where the OHWM was inconsistent,

surface water sheet flow was observed. The inconsistent OHWM is potentially due to a combination of factors including the observed dense clay pan layer at surface, minimal elevation changes throughout the Study Area, and a thick root layer from a densely wooded riparian zone. The stream averaged a depth of 8 inches of water at the time of the field survey in the spring. The banks of the stream averaged 10 inches in height on either side. Conditions were wetter than normal (Antecedent Precipitation Tool), and flooding in Texas was present at the time of the field survey. Riparian zones were approximately 25 feet wide on each side.

**Stream 2** (S2) is an unnamed tributary to the Marine Creek Reservoir located in the SE corner was an unmapped feature and was observed to be an ephemeral stream that provides overflow for S1 (between segments S1d and S1e) where the OHWM disappears and changes to sheet flow. An estimated total of 232 LF (0.01 acre) is within the Study Area flowing from the northwest to the southeast. The OHWM was approximately 2-4 LF wide. The stream was clear and absent of color with an average depth of 4 inches of water present at the time of the field survey (high moisture period with regional flooding). The banks of the stream averaged 6 inches in height on either side. The streambank erosion potential is low, and substrate is clay.

**Wetland 1 (WL1)** – PEM1E (Palustrine, Emergent, Persistent, Seasonally Flooded/Saturated Wetland, 0.295-acre) was found within the northeast portion of the Study Area, east of Boat Club Road and south of a gravel road leading to the Eagle Mountain WTP. The wetland is a non-adjacent wetland located in an upland depression which likely receives water from surface water runoff during rain events. It does not have a continuous surface connection to a relatively permanent water (RPW).

- 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. Contractor site visits occurred on May 9-10 and September 13, 2024. Office evaluation occurred on August 13, 2024, September 4, 2024, and September 27, 2024.
  - b. National Regulatory Viewer, SWD, September 4, 2024.
  - c. Fort Worth Eagle Ranch Station (KTXFORTW500) weather data (0.71-mile northwest of the Study Area.)
  - d. Google Earth Pro, 2024

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- 10. OTHER SUPPORTING INFORMATION. Preliminary Wetland Delineation Report: Eagle Mountain Water Treatment Plant, Prepared for: City of Fort Worth, Prepared by GarverUSA.com, June 2024.
- 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.













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