



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

CESWF-RDE

April 14, 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 [SWF-2022-00361](#), [MFR 1 of 1](#)²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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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.

- 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).

Water Feature	TNW	Size	Status	Rationale
S1	No	1207 LF	Not Jurisdictional	Does not meet (a)(5)
S2	No	1400 LF	Not Jurisdictional	Does not meet (a)(5)
EF	No	523 LF	Not Jurisdictional	Rapanos Guidance

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)

3. REVIEW AREA. [The review area is approximately a 93-acre tract of land located in Brazos County, Texas (Enclosure 1). Aerial imagery and a site visit confirms that land use within the site was pastureland used for grazing livestock. The area is partially open pasture and partially wooded, along S1, S2, and EF corridors. Construction of a building and parking area has occurred since the site visit and request for AJD. There is no other relevant site-specific information or previous JDs associated with the proposed review area.]

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [S1 & S2 are unnamed tributaries that flow west and discharge into

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to Hopes Creek. Hopes Creek flows southwest and discharges into the Brazos River approximately 4 miles from S1 and S2.^{6]}

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [Reference explanation in 4.]
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ [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]

⁶ 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.

⁷ 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.

⁸ 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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- 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”).⁹ 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. [Desktop tools (i.e., topo maps, NWI, NHD) indicate that the erosional feature was not part of a stream system.]
- 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]

⁹ 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).

[Stream 1 is a first-order reach that is approximately 1587 linear feet (LF) in length. It begins on site, flows west, off the review area, and discharges into Hopes Creek. Approximately 78% of S1 is within the review area. S1 has been modified by humans through the construction of two in-channel impoundments. The impoundment within the review area has modified the flow regime downstream. The channel post dam ranges from a barely identifiable OHWM to a highly eroded and deeply incised just prior to exiting the review area. Evidence provided by the consultant and independently obtained by the PM indicates that the stream has only relatively permanent pooling water within the impounded areas during normal conditions. Thus, a percentage calculation was performed (Table 1) and Stream 1 is 84% non-RPW. Also, the drainage area for Stream 1 is less than 50 acres and there is no evidence of springs or alternate sources of hydrology other than annual precipitation. Therefore, because of small drainage area, onsite observation, information provided by the consultant, and information obtained independently by the PM, Stream 1 has an ephemeral flow duration and does not provide sufficient flow duration to constitute sustained, seasonal flow and is not a relatively permanent water. Stream 1 flows only in direct response to precipitation events, as evidence detailed herein indicates. Thus, S1 does not meet (a)(5) stream criteria.]

Table 1: Stream 1 RPW / non-RPW Eval.	
RPW (LF)	Non-RPW (LF)
520.2	249.5
808.0	552.8
362.3	1136.3
1690.5	179.8
	2118.4
Total Length	3808.9
Percent RPW	0.44
Percent non-RPW	0.56
Within Review Area	1674.0 (0.44)
Outside Review Area	2134.9 (0.56)

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[Stream 2 is a first-order reach that is approximately 3808 linear feet (LF) in length. It begins on site, flows northwest, off the review area, and discharges into Hopes Creek. Approximately 44% of S2 is within the review area. S2 has been modified by humans through the construction of one in-channel impoundment. The impoundment is within the review area and has modified the flow regime downstream. The channel post dam is highly eroded and deeply incised just prior to exiting the review area. Evidence provided by the consultant and independently obtained by the PM indicates that the stream has only relatively permanent pooling water within the impounded area during normal conditions. Thus, a percentage calculation was performed (Table 2) and Stream 2 is 56% non-RPW. Also, the drainage area for Stream 2 is less than 40 acres and there is no evidence of springs or alternate sources of hydrology other than annual precipitation. Therefore, because of small drainage area, onsite observation, information provided by the consultant, and information obtained independently by the PM, Stream 2 has an ephemeral flow duration and does not provide sufficient flow duration to constitute sustained, seasonal flow and is not a relatively permanent water. S2 flows only in direct response to precipitation events, as evidence detailed herein indicates. Thus, S1 does not meet (a)(5) stream criteria.]

Table 2: Stream 2 RPW / non-RPW Eval.	
RPW (LF)	Non-RPW (LF)
• 249.4	780.8
	557.2
	1338.0
Total Length	1587.4
Percent RPW	0.16
Percent non-RPW	0.84
Within Review Area	1233.3 (0.78)
Outside Review Area	354.1 (0.22)

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. USACE site visit was conducted on September 8, 2022. Conference calls with the consultant followed by a desk-top review of all available information listed herein was used for this determination, multiple dates of review.

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- b. Maps, delineation of aquatic resources, and other information submitted on behalf of the applicant by the consultant, multiple submittal dates.
- c. National Wetlands Inventory, National Hydrography Dataset, 3DEP Hillshade and Slope, USGS Topo Map, Soils Maps, National Regulatory Viewer-SWD-Texas, multiple assessment dates.
- d. 1987 Wetland Delineation Manual and Great Plains Supplement were referenced to identify potential jurisdiction.
- e. Regulatory Guidance Letter 2005-05 was used to identify the boundaries of non-wetland water features.
- f. Aerial imagery provided by online resources, Google Earth Pro and Historicaerials.com, all available years, multiple assessment dates.




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.

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Review Area For AJD

Legend

-  Hopes Creek
-  Review Area (Pink)
-  S1 & S2

Stream 1

Stream 2

EF

Google Earth

Image © 2025 Airbus



1000 ft