



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT
100 WEST OGLETHORPE AVENUE
SAVANNAH GEORGIA 31401

SAS-OD-RC

March 5, 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 SAS-2024-00089

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 Georgia 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.

SAS-OD-RC

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2024-00089

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).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 2	Non-JD	N/a
Wetland 3	Non-JD	N/a
Wetland 4	Non-JD	N/a
Pond 1	Non-JD	N/a
Pond 2	Non-JD	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.

- A. Project Are Size (in acres): 19.61 acres
- B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 32.253697 Longitude: -81.189821
- C. Nearest City or Town: Rincon
- D. County: Effingham
- E. State: Georgia
- F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2022-00984	Delineation Concurrence	All waters reviewed under the delineation concurrence were considered jurisdictional
SAS-2023-00487	Delineation Concurrence	All waters reviewed under the delineation concurrence were considered jurisdictional

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

SAS-OD-RC

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2024-00089

A. Name of nearest downstream TNW, Territorial Sea or interstate water: Abercorn Creek is ~0.5 miles east of the project site, is a TNW.

B. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum and a review of the SAS Section 10 list (for a water body that is navigable-in-fact under federal law for any purpose (such as Section 10, RHA), that water body categorically qualifies as a Section 404 "traditional navigable water" subject to CWA jurisdiction under 33 CFR 328.3(a)(1)).

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

On-site resources do not connect or have a continuous surface connection that would constitute a flow path.

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

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

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.

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.

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Pond 1	0.09	Pond was dug in uplands and does not have a CSC.
Pond 2	0.05	Pond was dug in uplands and does not have a CSC.

Ponds 1 and 2 were dug solely in uplands as a borrow pit. The area is surrounded by uplands and historically does not have attributes to signify potential wetlands present prior to excavation. During the site visit ponds 1 and 2 do not have a CSC or outlet that connects to a waters of the US.

- 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

⁷ 51 FR 41217, November 13, 1986.

- 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).

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Wetland 2	0.26	Wetland lacks a continuous surface connection to water of the US
Wetland 3	0.42	Wetland lacks a continuous surface connection to water of the US
Wetland 4	0.07	Wetland lacks a continuous surface connection to water of the US

Wetland 2 is a depressionnal concave wetland may have been upland dug “bowls”. Currently the area meets wetland parameters and does not have a connection to wetland one (either surface or subsurface) and these wetlands do not function as one wetland system.

Wetland 2 does not have a discrete feature that would constitute a continuous surface and is not jurisdictional.

Wetland 3 is depressionnal wetland that is surrounding solely by uplands. The wetland does not have a discrete feature that would constitute a CSC. Wetland 3 is not jurisdictional.

Wetland 4 continues offsite and is a depressionnal wetland. The wetland is surrounded by uplands. To the south of the wetland is a 25-foot drive way that does not have a culvert. There was no evidence of subsurface flow underneath the road. Additionally, a wetland was delineated to the south of Wetland 4 but uplands have been verified

SAS-OD-RC

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2024-00089

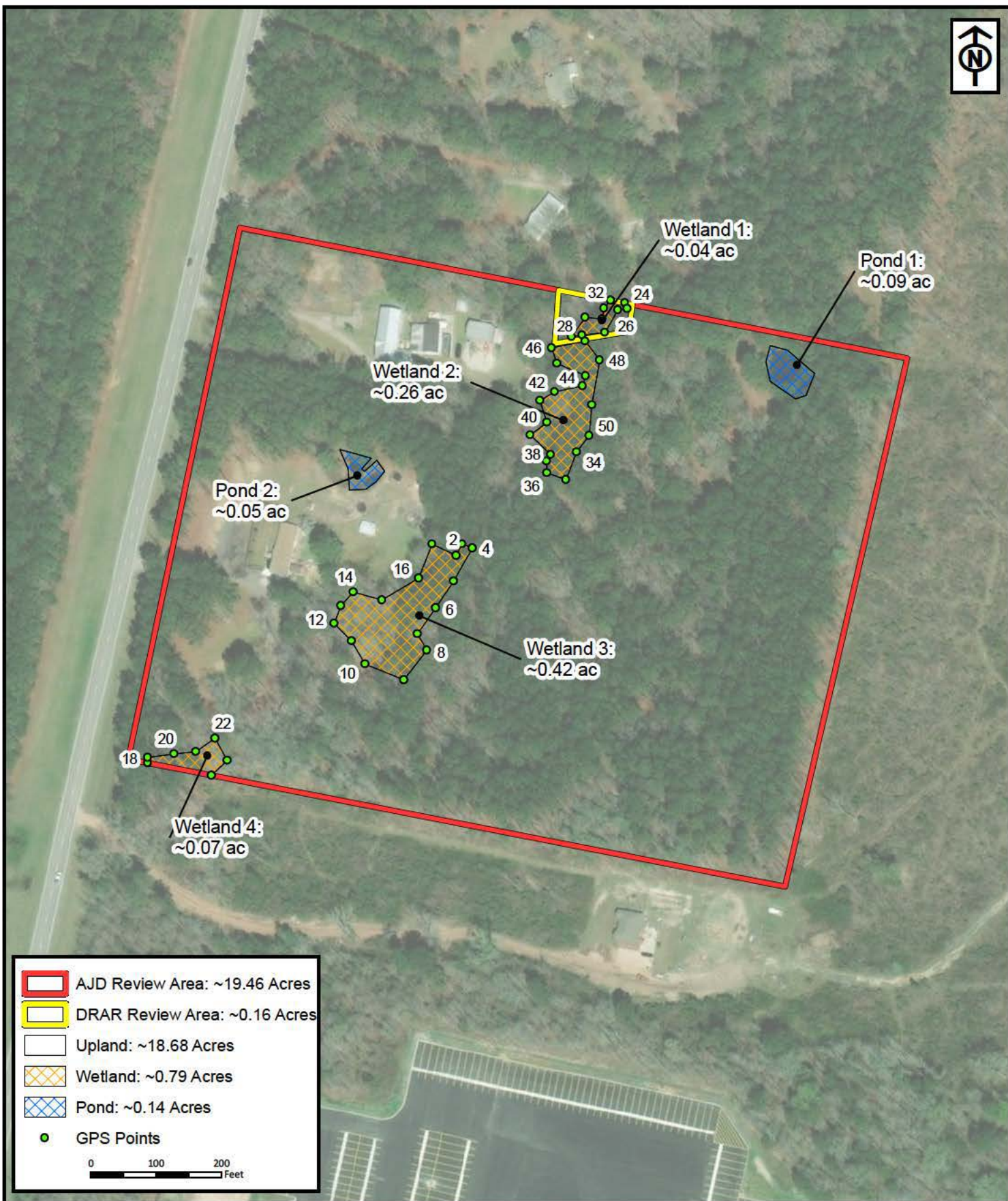
between the wetland and the driveway south of wetland 4. In total there is approximately 115 feet of uplands between the two wetlands and are functioning as separate wetland systems.







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. 1. Date of Office (desktop review): 2/2/2024
2. Date(s) of Field Review (if applicable): 2/9/2024
- b. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor: Aquatic Resource Delineation GPS Exhibit dated 1/26/2024. Wetland delineation submitted by applicant dated 3/1/2024
 - Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: SAS-2022-00737 dated July 19, 2023, SAS-2023-00487 dated July 19, 2023, SAS-2009-00984 dated April 24, 2019
 - Photographs: Site Visit 2/9/2024
 - Aerial Imagery: 2022 Aerial Imagery dated 1/26/2024; 1999 Color-Infrared Imagery dated 1/26/2024
 - LIDAR: NOAA Topographic Lidar dated 1/26/2024 from applicant. Lidar – with feature description and lidar projection maps from Corps (using NOAA topographic lidar)
 - USDA NRCS Soil Survey: NRCS Soil Map dated 1/26/2024
 - USFWS NWI maps: National Wetlands Inventory, dated 1/26/2024
 - USGS topographic maps: USGS Topographic Map dated, 1/26/2024
 - USGS NHD data/maps: 2/28/2024 TNW MAP
 - Section 10 resources used: SAS Navigable Waters List
 - Other sources of Information: Wetland 4 non-adjacent determination map

10. OTHER SUPPORTING INFORMATION.

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.



-  AJD Review Area: ~19.46 Acres
 -  DRAR Review Area: ~0.16 Acres
 -  Upland: ~18.68 Acres
 -  Wetland: ~0.79 Acres
 -  Pond: ~0.14 Acres
 -  GPS Points
- 0 100 200 Feet

RLC Project No.:	23-337.1
Figure No.:	8
Prepared By:	ZM
Sketch Date:	3/1/2024
Map Scale :	1 inch = 200 feet

**Butler/Belfort
Warehouse**
Effingham County, Georgia

**Aquatic Resource
Delineation GPS Exhibit**
Prepared For: ██████████

