



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT
4751 BEST ROAD, SUITE 140
COLLEGE PARK, GEORGIA 30337

CESAS-RDP

March 11, 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), SAS-2024-00099

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

¹ 33 CFR 331.2.

² Regulatory Guidance Letter 05-02.

³ 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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- i. *Stormwater Pond*, non-jurisdictional

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 approximately 6.5-acre subject review area is located to the north of King Mill Road, south of Purple Lane and west of Macon Street in McDonough, Henry County, Georgia. The approximate coordinates of the center point of the site are latitude: 33.406985 north and longitude -84.133274 west. The review area encompasses a single aquatic resource.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Ocmulgee River. Historically, the river was used to ship goods to the coast. By 1690, English traders from the Carolinas had established a post adjoining the "Ocmulgee town" on the river's east bank, near present-day Macon. However, with the building of the railroads in the late 1830s and early 1840s, the Ocmulgee's importance for shipping cotton traffic from its rich bottomlands to the coast dwindled.

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

- i. *Stormwater Pond* (5-acre): The subject feature drains from a stormwater pipe into an unnamed intermittent tributary to Tussahaw Creek. The nearest named waterbody is the Tussahaw Creek, located approximately 0.91-mile to the northeast of the site property. The unnamed intermittent tributary flows approximately 0.91-mile and enters Tussahaw Creek. Tussahaw Creek flows approximately 16.3 miles and enters Lake Jackson. The flow exits Lake Jackson at approximately 23.5 miles and enters the Ocmulgee River, the closest TNW.

6. SECTION 10 JURISDICTIONAL WATERS⁴: 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. 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): 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

⁴ 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.

to as “preamble waters”).⁵ 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.
 - i. *Stormwater Pond* (5 acres): The subject water is an open water feature that exclusively functions as a stormwater detention pond. Based on a review of historic aerial imagery, the pond was constructed in mid-2018. It appears that the feature was constructed as a settling basin to intercept runoff and sediment. This man-made detention basin was designed to retain and hold surface water at a predetermined level controlled by an outlet control structure (OCS), located in the northeastern end of the basin. In an effort to show that this detention basin only retains water due to this man-made impoundment collecting storm water runoff as designed, rather than seasonal groundwater influence, the OCS was opened, and the basin allowed to drain. It is the agent’s understanding that this basin began draining the week of 7/17/2023 and has since then been drained. A follow up site inspection was completed by the agent on 8/1/2023 to once again assess this man-made detention basin under current conditions. Upon inspection and current conditions of the detention basin, the agent observed that there is no longer an open water pond. It was also noted that the surrounding edges of the basin are showing signs of soil cracking as well as overall appearance of drying up. Soil samples were also taken through various points in the basin using an auger to look for hydric soils typically seen in wetlands, streams and open water pond. No anaerobic/hydric soils were observed within this detention basin. There is no indication that any tributary was impounded to form the stormwater pond.

⁵ 51 FR 41217, November 13, 1986.

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- 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. The original field delineation was conducted on June 22, 2023 by the agent. A follow up site visit was conducted on August 1, 2023. Office evaluations were conducted by CESAS-RDP on March 8, 2024.
 - b. Maps, plans, plots, and plats: Submittal dated February 2, 2023, as prepared by the agent, Figure 1: Subject Project Location Map.
 - c. Delineation Exhibit: Submittal received via email on February 2, 2024, as prepared by the agent, Figure 2: Aquatic Resource Map.
 - d. FEMA/FIRM map: Submittal dated February 2, 2024, as prepared by agent, Figure 4: Floodplains, received by our office on February 2, 2024.
 - e. NWI: Submittal as prepared by agent, Figure 4: National Wetlands Inventory, dated January 30, 2024, received by our office on February 2, 2024.
 - f. USDA NRCS Soil Survey: Submittal received on February 2, 2024, as prepared by agent, Web Soil Survey dated January 20, 2024.

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g. LiDAR imagery (National Regulatory Viewer), March 8, 2024

h. Historic aerial imagery (Google Earth), accessed March 8, 2024.

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.



FIGURE 2: AQUATIC RESOURCE MAP

	<p>LEGEND</p> <p> Review Area</p> <p>Approximate Scale</p>	<p>PROJECT</p> <p>AJD</p> <p>Southern Gateway - Pad E</p> <p>Henry County, Georgia</p>
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