



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

CESAS-RDP

22 October 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023),
SAS-2024-00374

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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Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 1	Non-JD	No Authority
Wetland 2	Non-JD	No Authority
Wetland 3	Non-JD	No Authority
Ditch 1	Non-JD	No Authority
Ditch 2	Non-JD	No Authority

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 (2023)

3. REVIEW AREA. The 90.35-acre review area is located north of Clever Way, south of Robins International Boulevard, east of Sullivan Road and west of Georgia Highway 41 in Byron, Peach County, Georgia. The central site coordinates are latitude 32.593069 north and longitude -83.72659 west.

- A. Project Area Size (in acres): 90.35 acres
- B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 32.593069 Longitude: -83.72659
- C. Nearest City or Town: Byron
- D. County: Peach
- E. State: Georgia

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. 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 "traditional navigable water" subject to CWA jurisdiction under 33 CFR 328.3(a)(1). N/A. The aquatic resources are not connected to a downstream TNW.

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

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- i. Based on a review of StreamStats and contours, Wetlands 2 and 3 are physically connected by an agricultural ditch cut through these wetlands that extends offsite. Wetland 2 (underlain by Grady soils) is physically connected to Ditch 2 (located within uplands). Ditch 2 is a ditch constructed in uplands that contains significant amounts of leaf litter and has vegetation growing in it. The length of Ditch 2 is 429 feet between Wetland 2 and Wetland 3. The ditch continues through and abuts Wetland 3 (underlain by Grady soils) for approximately 784 feet to the boundary of the review area. The boundary of Wetland 3 extends offsite and the ditch abuts the wetland within the wetland boundary which extends for approximately 1,150 feet. Although Ditch 1, Wetland 2 and Wetland 3 connect to Ditch 2, at Clever Way, the ditch loses channelization and sheet flows over uplands along Clever Way for approximately 287 feet before becoming channelized again and entering a discrete feature (a culvert). The 287 foot segment of the roadside sheet flow has been recently graded and does not exhibit active flow, an ordinary high water mark, bed or bank, nor the presence of water on August 6, 2024. Based on aerial photographic records, a ditch previously ran along Clever Way and then drained through a culvert underneath the road to the south. The area where the ditch was located has been graded and the connection to downstream waters has been severed because there is no continuous surface connection or discrete feature in this area to convey downstream flow. Therefore, the aquatic resources in the review area do not connect to a TNW, interstate water, or the territorial seas.
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

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.

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”).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. N/A

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).

Name of excluded feature	Size (in acres)	Flow Regime and additional description of the tributary and Method for determining flow regime
Wetland 1	7.32 acres	This feature is an isolated forested wetland with Grady soils. Based on desktop review and submitted information, there is no evidence of a continuous surface connection to an RPW. There are no ditches or other discrete features extending from the wetland.
Wetland 2	18.97 acres	Wetland 2 (underlain by Grady soils) is a forested wetland that does not have a continuous surface connection to a jurisdictional water. The wetland does have a ditch cut into it that extends outside of the wetland (identified as Ditch 2). Wetland 2 (underlain by Grady soils) is physically connected to Ditch 2 (located within uplands). Ditch 2 is a ditch constructed in uplands that contains significant amounts of leaf litter and has vegetation growing in it. It has no indicators of flow occurring in it during both normal and wetter than normal precipitation conditions. The length of Ditch 2 is 429 feet between Wetland 2 and Wetland 3. The ditch has weak indicators of flow frequency and duration. Because of these reasons, Ditch 2 does not provide a continuous surface connection to a downstream relatively permanent water. Because Ditch 2 does not provide a continuous surface connection, Wetland 2 does not have a continuous surface connection to a downstream relatively permanent water. The boundary of Wetland 3 extends offsite and a ditch abuts the wetland within the wetland boundary which extends for approximately 1,150 feet. At Clever Way, the ditch loses channelization and sheet flows over uplands along Clever Way for approximately 287 feet before becoming channelized again and entering a discrete feature (a culvert). The 287 foot segment of the roadside sheet flow has been recently graded

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		and did not exhibit active flow, an ordinary high water mark, bed or bank, nor the presence of water on August 6, 2024. Based on aerial photographic records, a ditch previously ran along Clever Road and then drained through a culvert underneath the road to the south. The area where the ditch was located has been graded and the connection to downstream waters has been severed because there is no continuous surface connection or discrete feature in this area to convey downstream flow.
Wetland 3	3.98 acres	Wetland 3 (underlain by Grady soils) is a forested wetland that does not have a continuous surface connection to a jurisdictional water. The boundary of Wetland 3 extends offsite and a ditch abuts the wetland within the wetland boundary which extends for approximately 1,150 feet. At Clever Way, the ditch loses channelization and sheet flows over uplands along Clever Way for approximately 287 feet before becoming channelized again and entering a discrete feature (a culvert). The 287 foot segment of the roadside sheet flow has been recently graded and did not exhibit active flow, an ordinary high water mark, bed or bank, nor the presence of water on August 6, 2024. Based on aerial photographic records, a ditch previously ran along Clever Road and then drained through a culvert underneath the road to the south. The area where the ditch was located has been graded and the connection to downstream waters has been severed because there is no continuous surface connection or discrete feature in this area to convey downstream flow. Because this connection has been severed, Wetland 3 does not have a continuous surface connection to a downstream relatively permanent water.
Ditch 1	19 linear feet (0.001-acre)	The subject feature is a ditch excavated in uplands for the purpose of draining the adjoining fields and wetland but does not have relatively permanent flow. The ditch is understood to contain water only in response to precipitation. The ditch contained leaf litter and an ordinary high water mark was not observed on August 6, 2024. Historic aerial imagery indicates that this segment of the ditch was established on dry land since at least 1955. The ditch does extend into the boundary of Wetland 2. Flow or standing water was not observed on March 22, 2024, nor on April 12, 2024, during wetter than normal conditions. Flow or standing water was also not observed on August 6, 2024, under normal conditions. There is no soil-based evidence of a high water table within the ditch. The northern extent of this ditch that extends offsite was determined to be non-jurisdictional on November 28, 2023, under SAS-2023-00775.
Ditch 2	429 linear feet (0.3-acre)	The subject feature is a ditch excavated in uplands for the purpose of draining the adjoining fields and wetland. The ditch is understood to contain water only in response to precipitation. The ditch contained leaf litter, vegetation, and an ordinary high water mark was not observed on August 6, 2024. Historic aerial imagery indicates that the ditch was established on dry land since at least 1955. The ditch does extend into Wetland 2 and 3. Flow or standing water was not observed on March 22, 2024 nor on April 12, 2024 during wetter than normal conditions. Flow was also not observed on August 6, 2024, during normal conditions. There is no soil-based evidence of a

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		high water table within the ditch. Therefore, the ditch has non-relatively permanent flow. The ditch does not provide a continuous surface connection between Wetland 2 and Wetland 3.
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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 Review: June 10, 2024-August 23, 2024, desktop. March 22, 2024, and April 12, 2024, on site by agent. August 6, 2024, onsite by CESAS-RD-P.

b. Data sources used to support this determination (included in the administrative record).

- Aquatic Resources delineation submitted by, or on behalf of, the requestor:** 1) "Figure No. 2 USGS Topographic Survey" dated April 23, 2024, 2) "Figure No 3: NRCS Soil Survey", dated April 23, 2024, 3) "Figure 4: National Wetlands Inventory", dated April 23, 2024, 4) Figure No. 8 Aquatic Resource Delineation GPS Exhibit" dated April 23, 2024, 5) Wetland Data Forms, dated April 10, 2024.
- Photographs:** "Figure 9: Site Photographs", received on May 1, 2024, Photographs taken on April 12, 2024, Site photographs taken by CESAS-RD-P on August 6, 2024.
- Aerial Imagery:** 1) National Regulatory Viewer USA NAIP Imagery, accessed July 23, 2024, 2) "Figure 5: Ortho Aerial" dated April 23, 2024, 3) 1955 Historic Aerial accessed from Historicaerials.com on July 23, 2024.
- LIDAR:** 1) "Figure 7 NOAA Topographic Lidar", dated April 23, 2024.
- USGS topographic maps:** "Figure No. 2 USGS Topographic Survey", dated April 23, 2024.(cited above)
- USGS NHD data/maps:** National Regulatory Viewer (NRV), NHD layer, data accessed July 23, 2024.
- Antecedent Precipitation Tool Analysis:** Reviewed for March 22, 2024, April 12, 2024, climatic conditions were wetter than normal. On August 6, 2024, climatic conditions were normal.
- Other sources of Information:** USGS Stream Stats WIM Tool date accessed June 10, 2024, National Regulatory Viewer (NRV).

10. OTHER SUPPORTING INFORMATION. Site photographs provided by the agent dated September 12, 2023, and Flowpath Map prepared by CESAS-RD-P on October 8, 2024.

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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.



	Project Area: ~90.35 Acres
	Upland: ~60.05 Acres
	Wetland: ~30.27 Acres
	Ditch: ~0.03 Acre/~448 Linear Feet
	GPS Point

0 125 250 500 Feet

RLC Project No.:	19-009.3
Figure No.:	8
Prepared By:	MW
Sketch Date:	4/23/2024
Map Scale:	1 inch = 250 feet

Flint Energies RIIP Tract
Peach County, Georgia

Aquatic Resource Delineation GPS Exhibit
Prepared For:
Peach County Development Authority

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