



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

CESAS-RDP

16 July 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-2023-00760 (Euharlee Road - Hardin Bridge Road Site, Bartow County)

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. SUMMARY OF CONCLUSIONS.

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.

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- 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
OW 1	Non-JD	N/A
OW 2	Non-JD	N/A
OW 3	Non-JD	N/A
OW 4	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): 220 acres**
- B. Center Coordinates of the Project Site (in decimal degrees)**
Latitude: 34.159213 Longitude: -84.934093
- C. Nearest City or Town: Euharlee**
- D. County: Bartow County**
- E. State: Georgia**

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

A. Name of nearest downstream TNW, Territorial Sea or interstate water: The Coosa River, which is a TNW and an interstate water. The project review area is approximately 1-mile west of the Etowah River.

B. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum, 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)), and documented (include in AR) occurrences of boating traffic on the identified water. For interstate waters, based on a review several maps listed in Section 9 of this memorandum, the identified water is shown as an aquatic feature and crossing the interstate boundary of Georgia/Alabama.

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

N/A

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.

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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)	Specific exclusion a-e
OW 1	0.25 acre	This pond was constructed as an artificial pond created by excavating or diking dry land to collect and retain water and which are used exclusively for aesthetic purposes, as verified by historic aerial imagery. Based on desktop review and available resources, the feature does not have a direct surface connection to any RPW.
OW 2	0.23 acre	This pond was constructed as an artificial pond created by excavating or diking dry land to collect and retain water and which are used exclusively for aesthetic purposes, as verified by historic aerial imagery. Based on desktop review and available resources, the feature does not have a direct surface connection to any RPW.
OW 3	0.11 acre	This pond was constructed as an artificial pond created by excavating or diking dry land to collect and retain water and which are used exclusively for aesthetic purposes, as verified by historic aerial imagery. Based on desktop review and

⁷ 51 FR 41217, November 13, 1986.

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		available resources, the feature does not have a direct surface connection to any RPW.
OW 4	0.43 acre	This pond was constructed as an artificial pond created by excavating or diking dry land to collect and retain water and which are used exclusively for aesthetic purposes, as verified by historic aerial imagery. Based on desktop review and available resources, the feature does not have a direct surface connection to any RPW.

- 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]
- 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	Type of resource generally not jurisdictional
Northeast Drainage Feature	200 linear feet	The northeast drainage feature was no more than a couple hundred feet long and was mostly vegetated. This feature is a non-relatively permanent water. Flow was determined by using

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		the NCDDWQ Version 4.1.1 Stream Identification Form. Based on the data forms, the feature displayed weak geomorphology, hydrology, biology, and displayed no evidence of hydric soils or an OHWM; therefore, there would be no OHWM width.
Southeast Drainage Feature	1,000 linear feet	The southeast drainage feature did not have a consistent channel and was mostly vegetated with rooted plants and lots of leaf litter. Feature is a non-relatively permanent water. Flow was determined by using the NCDDWQ Version 4.1.1 Stream Identification Form. Based on the data forms, the feature displayed weak geomorphology, hydrology, and biology. This feature had no evidence of hydric soils or an OHWM; therefore, there would be no OHWM width.

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): February 2, 2024-July 8, 2024
2. Date(s) of Field Review (if applicable): Consultant Field Visit conducted on August 8, 2023
- b. Data sources used to support this determination (included in the administrative record).

- ☒ **Aquatic Resources delineation submitted by, or on behalf of, the requestor:** " Figure 6: Euharlee Road and Hardin Bridge Road Site, Delineated Waters Map", dated August 8, 2023.
- ☒ **Photographs:** Photolog, submitted by consultant Photograph No. 1-6 and supplemental photographs 1-6
- ☒ **Aerial Imagery:** Maxar, Global Enhanced GEOINT Delivery: Digital Earth Globe Tiled Aerial Imagery, date accessed March 26, 2024.
- ☒ **LIDAR:** National Regulatory Viewer (NRV), LiDAR with Hillshade layers, date accessed March 26, 2024.
- ☒ **USGS topographic maps:** USGS Website, Map Locator, NRV USGS topographic basemap date accessed March 26, 2024.
- ☒ **USGS NHD data/maps:** National Regulatory Viewer (NRV), NHD layer, data accessed March 26, 2024.
- ☒ **Antecedent Precipitation Tool Analysis:** SAS-2024-00029 APT document of August 8, 2023, accessed on June 10, 2024
- ☒ **Other sources of information:** U.S. Drought Monitor, Fulton County, date accessed March 26, 2024; USGS StreamStats WIM Tool date accessed June 10, 2024, National Regulatory Viewer (NRV), FEMA data layers, date accessed June 10, 2024.

10. OTHER SUPPORTING INFORMATION. N/A

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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.



Euharlee Road and Hardin Bridge Road Site
Bartow County, Georgia

0 250 500 1,000
Feet
1 inch = 500 feet



Figure 6
Delineated Waters Map

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