



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT  
100 W. OGLETHORPE AVENUE  
SAVANNAH, GEORGIA 31401-3604

SAS-RD-C

February 22, 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),<sup>1</sup> SAS-2022-00739

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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 this state due to litigation.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00739

## 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).

<b>Name of Aquatic Resource</b>	<b>JD or Non-JD</b>	<b>Section 404/Section 10</b>
Wetland A	JD	Section 404
Wetland B	JD	Section 404
Wetland C	Non-JD	N/A
Wetland D	Non-JD	N/A

Although labelled Wetland A and Wetland B, Wetland A and Wetland B function as one wetland as part of a larger wetland system. This wetland system surrounds the northeast corner of the project area and continues through a culvert under Abercorn Road where it continues and abuts Abercorn Creek, a TNW.

## 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)
- e. 2007 Rapanos Approved Jurisdictional Determination Form Instructional Guidebook
- f. 20190625 Section 10 Waters List - Savannah District

3. REVIEW AREA. The review area is an approximately 24.32-acre site located adjacent to and east of Old Augusta Road, approximately 3.1 miles north of Georgia Highway 21, in Rincon, Effingham County, Georgia (Latitude 32.2561, Longitude -81.1876).

SAS-RD-C

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00739

Regulatory File No.	Type	Outcome
SAS-2022-00737	ARDR	Delineation of Aquatic Resources (letter dated July 19, 2023)
SAS-2022-00739	ARDR	Delineation of Aquatic Resources (letter dated July 12, 2023)
SAS-2022-00740	ARDR	Delineation of Aquatic Resources (letter dated March 4, 2023)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>5</sup> Abercorn Creek is the nearest TNW. The review area is located approximately 0.45 miles from Abercorn Creek. This determination was made based on a review of the desktop data resources listed in Section 9 of this memorandum including review of the SAS Section 10 Waters list, and Corps site visits on February 8, 2023, and February 14, 2024.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland A and Wetland B are wetlands that meet the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic Gulf Coastal Plain Regional Supplement. Although labelled Wetland A and Wetland B, Wetland A and Wetland B function as one wetland as part of a larger wetland system. This wetland system surrounds the northeast corner of the project area and continues through a culvert under Abercorn Road (CSC) where the wetland system continues and abuts Abercorn Creek, a TNW.
6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> N/A

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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

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):

Name of Aquatic Resource	Size (in acres)	Contiguous with or abutting? If so, list water	Describe continuous surface connection
Wetland A (Wetland A/B) Wetland B	0.60  0.03	No	Wetland A and Wetland B function as one wetland as part of a larger wetland system. This wetland system surrounds the northeast corner of the project area

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329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

			and continues through a culvert under Abercorn Road (CSC) where the wetland system continues and abuts Abercorn Creek, a TNW.
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Based on a field visit conducted on February 8, 2023, and review of desktop data resources including NWI mapping, aerial imagery, and LiDAR, Wetland A and Wetland B function as one wetland (Wetland A/B) as part of a larger wetland system. This wetland system surrounds the northeast corner of the project area and continues through a culvert under Abercorn Road where the wetland system continues and abuts Abercorn Creek, a TNW. During a field visit on February 14, 2024, the culvert under Abercorn Road was observed and the areas on either side of Abercorn Road had similar hydrology, topography, and vegetation as viewed from the road. The culvert is functioning and acts a physical conveyance between the two wetlands.

## 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”).<sup>8</sup> 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
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference

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<sup>8</sup> 51 FR 41217, November 13, 1986.

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).

<b>Name of excluded feature</b>	<b>Size (in acres)</b>	<b>Type of resource generally not jurisdictional</b>
Wetland C (WC)	1.64	Wetland lacks a continuous surface connection to water of the US
Wetland D (WD)	0.22	Wetland lacks a continuous surface connection to water of the US

The non-jurisdictional wetlands total 1.86 acres located at the project area. The wetlands are approximately 0.5 miles from the nearest TNW (Abercorn Creek). An area of upland was observed between Wetland C and Wetland D during the site visit on February 8, 2023, and an area of higher elevation is shown between Wetland C and Wetland D on LiDAR as well. The perimeters of Wetland C and Wetland D were observed, and WC and WD were determined to be closed, depressional wetlands without a continuous surface connection to a water of the US. Based on site inspection and desktop review including data sources listed in Section 9, Wetland C and Wetland D are non-jurisdictional.

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. Office (Desk) Determination: February 22, 2024.  
Field Visit: February 8, 2023, and February 14, 2024.

SAS-RD-C

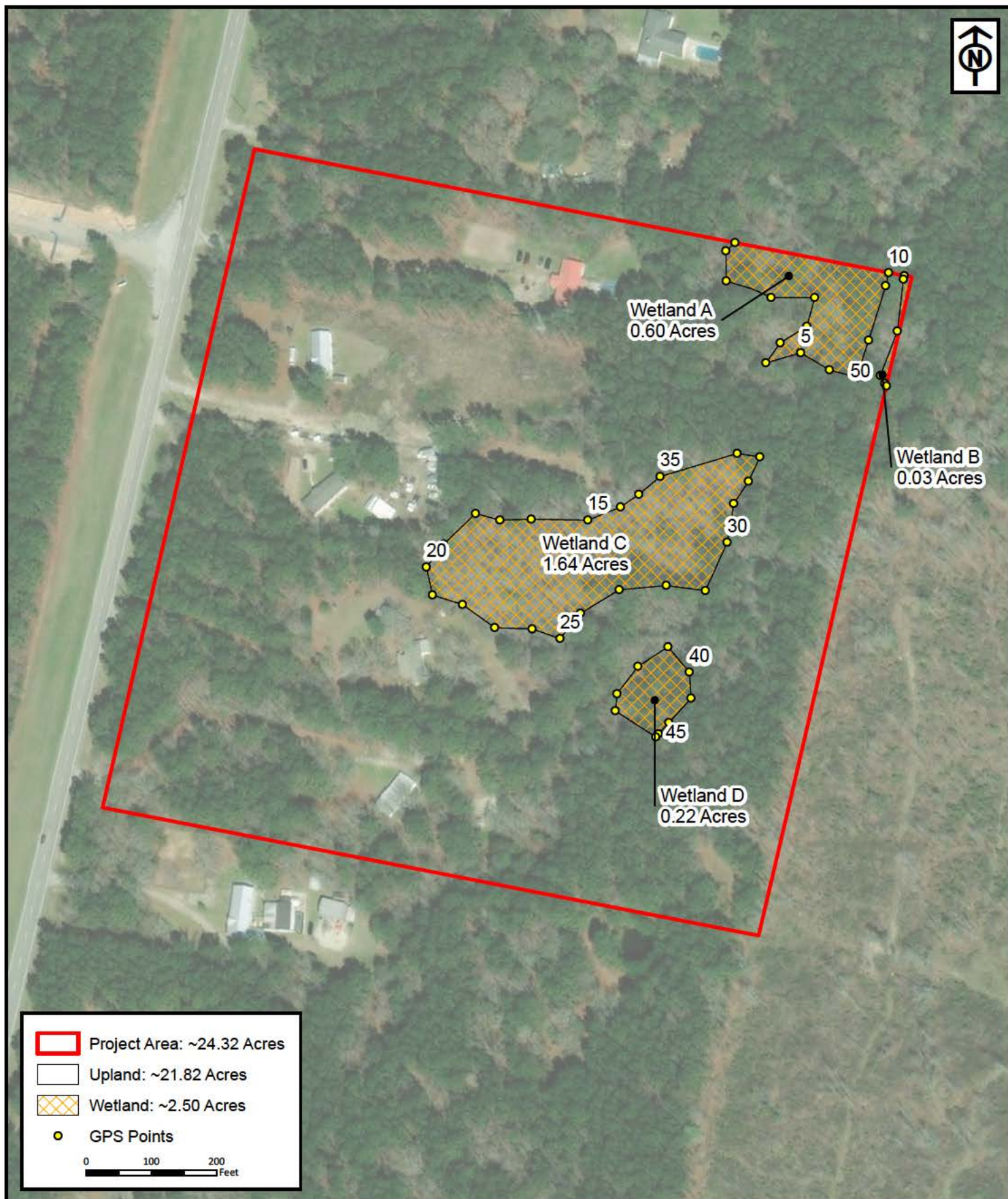
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00739

- b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Approved Jurisdictional Determination request and exhibit submitted by [REDACTED].
- c. Data sheets prepared/submitted by or on behalf of the applicant/consultant: submitted by [REDACTED].
- d. U.S. Geological Survey map(s): Effingham County 1'=200 ft.
- e. U.S. Geological Survey Hydrologic Atlas: HUC 12 - 030601090305.
- f. USDA Natural Resources Conservation Soil Survey: Effingham County, GA.
- g. National Wetlands Inventory map(s): Effingham County, GA.
- h. Photographs: 2023 and 2011 Google Earth Aerial Imagery and Ortho Aerial Imagery.
- i. FEMA/FIRM maps: Panel ID: 13103C0289E.
- j. NOAA Topographic LiDAR: 2018 NOAA LiDAR.
- k. Antecedent Precipitation Tool Analysis: Corps site visit on February 8, 2023, and Corps site visit on February 14, 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.





21-351.6
Figure No.: 8
Prepared By: ZM
Sketch Date: 2/12/2024
Map Scale : 1 inch = 200 feet

**The Trade at Old Augusta**  
Effingham County, Georgia

**Aquatic Resource  
GPS Exhibit**  
Prepared For: [REDACTED]