



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

SAS-2023-00615

February 13, 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-2023-00615

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 Georgia due to litigation.

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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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 WSK	Non-JD	N/A
Wetland WSH	Non-JD	N/A
Wetland WSF	Non-JD	N/A
Wetland WRC	Non-JD	N/A
Wetland WSD	Non-JD	N/A
Ephemeral Stream SRD	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. 121.5-acre review area
- b. Latitude: 32.776284, Longitude: -83.43373
- c. Dry Branch
- d. Twiggs County
- e. Georgia

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

- a. The nearest TNW to the subject water is the Oconee River, located approximately 27 miles to the southeast. However, the subject aquatic resources are not hydrologically connected to the nearest TNW, or any other aquatic resources.

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- b. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum, a site visit by CESAS-RD-P 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)), and documented occurrences of boating traffic on the identified water.

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

The subject aquatic resources do not have a continuous surface connection to a TNW or any other potentially jurisdictional water.

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

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.

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- 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
- 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

⁵ 51 FR 41217, November 13, 1986.

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- 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 WSK	0.08	Wetland lacks a continuous surface connection to a water of the US
Wetland WSH	0.08	Wetland lacks a continuous surface connection to a water of the US
Wetland WSF	0.03	Wetland lacks a continuous surface connection to a water of the US
Wetland WRC	0.04	Wetland lacks a continuous surface connection to a water of the US
Wetland WSD	0.02	Wetland lacks a continuous surface connection to a water of the US
Ephemeral Stream SRD	151 linear feet (0.003-acre)	Tributary is not a relatively permanent water.

Wetlands WSK, WSH, WSF, WRC and WSD are depressional emergent wetlands located within a lower lying topographical draw but do not exhibit a continuous surface connection to each other. Gaps between the wetlands are relatively small, ranging from 60-100 linear feet. Wetland WRC is directly connected to Ephemeral Stream SRD, which flows for 151 linear feet onsite. Ephemeral Stream SRD then transitions to overland sheet flow, losing all indicators of an ordinary high water mark. The ephemeral flow regime of SRD is documented on an NCDWR data form as described in Section 9. Historic aerial imagery indicates that the subject review area and areas within the immediate vicinity were historically cleared and have been used in the past for agricultural practices. The area has been repeatedly cleared since at least 1955.

During the site visit by the Corps project manager, it was observed that no tributary or surface connection entered or exited the wetlands with the exception of Wetland WRC which connects to Ephemeral Stream SRD, which is not a relatively permanent water and does not connect to a downstream TNW. The wetlands are small depressional wetlands located along a draw and hydrology is provided by runoff from the slopes and landfill to the west.

- 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.

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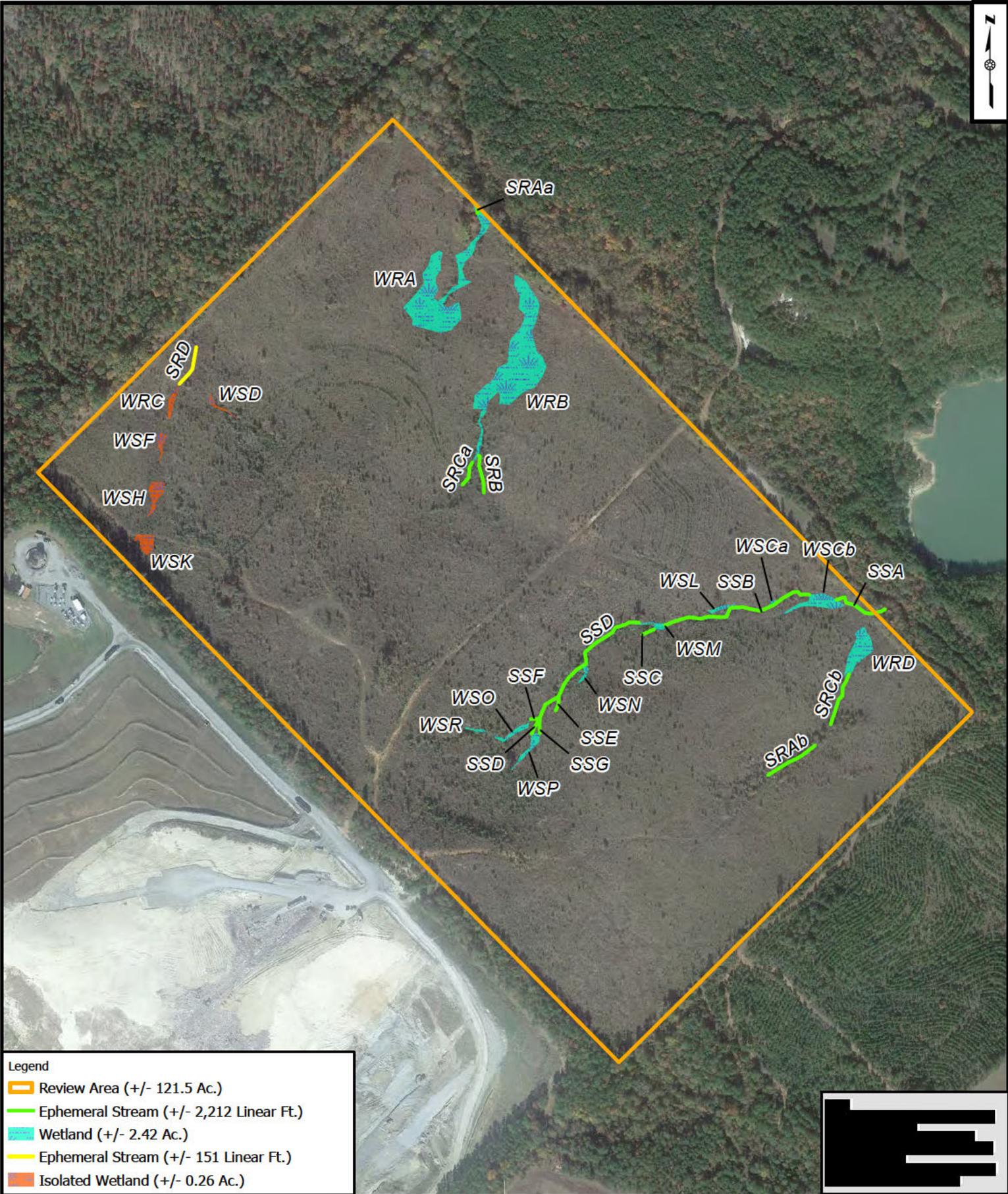
- a. Office (desktop) determination: The determination of the jurisdictional status of the subject water was completed by CESAS-RDP on February 12, 2024.
- b. Field determination: The determination of aquatic resource limits within the review area was completed by CESAS-RDP on December 18, 2023.
- c. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wolf Creek MSWLF Borrow Area Dry Branch, Twigs County, GA Aquatic Resource Delineation Review and Approved Jurisdictional Request dated August 7, 2023 prepared by [REDACTED]
 - Aquatic Resources delineation prepared by the USACE:
 - Wetland field data sheets: Sampling Points WSH4 Wetland and WSH 4 Upland, as prepared by [REDACTED], and dated November 14, 2022
 - OHWM data sheets prepared by the USACE: Title and Date
 - Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
 - Photographs: Site Photographs Wolf Creek MSWF Borrow Area October/November 2022 Pages 4-8 of 10 prepared by [REDACTED]
 - Aerial Imagery: Depicted on National Wetlands Inventory Map detailed below and Historic Aerials reviewed by CESAS-RDP on February 12, 2024
 - LIDAR: 3DEP DEM and Hillshade imagery, accessed from the National Regulatory Viewer by CESAS-RDP on December 15, 2023
 - USDA NRCS Soil Survey: USDA hydric soil rating data, accessed by CESAS-RDP on February 12, 2024; and Figure 3 - Soils Map, USDA Web Soil Survey prepared by [REDACTED] on June 9, 2023
 - USFWS NWI maps: National Wetlands Inventory Map, prepared by [REDACTED] on June 9, 2023
 - USGS topographic maps: Figure 2 Topographic Map, prepared by [REDACTED] on dated June 9, 2023
 - USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP on February 12, 2024
 - Section 10 resources used: Title and Dates
 - NCDWR stream identification forms prepared by HHNT dated 11-14-2022
 - Antecedent Precipitation Tool Analysis: List Date(s) APT data (conditions were normal), retrieved by [REDACTED] on 10-27-2022, 11-14-2022 and 11-18-2022
 - Other sources of Information: DEM Delineation Map annotated and prepared by [REDACTED] at direction of CESAS-RDP on December 18, 2023

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.



DISCLAIMER:
 DEPICTED WATERS OF THE U.S. DELINEATION REMAINS AN OPINION
 OF [REDACTED] UNTIL IT IS FORMALLY VERIFIED IN WRITING BY THE U.S. ARMY
 CORPS OF ENGINEERS VIA A FORMAL DETERMINATION LETTER.

