



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

CESAS-RDP

March 18, 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-2011-01104 (**West Project Area**)²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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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).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
01WL (Wetland 1)	Non-JD	N/A
02IS (Intermittent Stream 2)	Non-JD	N/A
03WL (Wetland 3)	Non-JD	N/A
04WL (Wetland 4)	Non-JD	N/A
05WL (Wetland 5)	Non-JD	N/A
06IS (Intermittent Stream 6)	Non-JD	N/A
07ES (Ephemeral Stream 7)	Non-JD	N/A
08OW (Open Water 8)	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 Acreage: Approximately 30 acres
- B. Center Coordinates of the Project Site
Latitude: 34.1355 Longitude: -83.9321
- C. Nearest City or Town: Flowery Branch
- D. County: Hall
- E. State: Georgia

F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2011-01104	Expanded PJD	Review of jurisdictional waters at the quarry, including 610 linear feet of intermittent stream and 0.17-acre of wetland. Delineation verified on June 29, 2012. Based on the applicant's description to excavate the aquatic resources within the quarry, the described methods were evaluated as non-regulated activities.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Oconee River, with Section 10 navigability limits located approximately 83 miles south of the project site. These on-site aquatic resources would not connect to this TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: N/A.
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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

⁶ 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.

⁷ 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.

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”).⁸ 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

⁸ 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):

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
01WL (Wetland 1)	0.08-acre	Wetland lacks a continuous surface connection to water of the US
02IS (Intermittent Str. 2)	921 feet	A tributary that does not have relatively permanent, flowing, or continuously flowing water; intermittent stream flow has been severed by ongoing quarry operations occurring to the immediate south of this channel.
03WL (Wetland 3)	0.03-acre	Wetland lacks a continuous surface connection to water of the US
04WL (Wetland 4)	0.02-acre	Wetland lacks a continuous surface connection to water of the US
05WL (Wetland 5)	0.04-acre	Wetland lacks a continuous surface connection to water of the US
06IS (Intermittent Str. 6)	128 feet	A tributary that does not have relatively permanent, flowing, or continuously flowing water; intermittent stream flow has been severed by ongoing quarry operations occurring to the immediate south of this channel.
07ES (Ephemeral Str. 7)	69 feet	A tributary that does not have relatively permanent, flowing, or continuously flowing water
08OW (Open Water 8)	0.13-acre	Open water lacks a continuous surface connection to water of the US

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): March 19, 2024, by USACE
 2. Date(s) of Field Review (if applicable): January 12, 2023, by consultant

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- b. Data sources used to support this determination (included in the administrative record):
- ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Combined AJD-ARDR request, dated August 14, 2023.
 - ☐ Aquatic Resources delineation prepared by Corps:
 - ☐ Wetland field data sheets prepared by Corps:
 - ☐ OHWM data sheets prepared by Corps:
 - ☒ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: SAS-2011-01104, Expanded PJD, verified on June 29, 2012.
 - ☐ Photographs:
 - ☒ Aerial Imagery: Figure 7A: Wetland and Surface Water Delineation-West (via ESRI Basemap World Imagery-MAXAR, dated October 5, 2020).
 - ☒ LIDAR: National Regulatory Viewer, dated March 19, 2024.
 - ☒ USDA NRCS Soil Survey: Figure 5, Soils Map (via NRCS Web Soil Survey, Hall County, dated Sept. 13, 2021).
 - ☒ USFWS NWI maps: Figure 6, National Wetland Inventory Map (via USFWS Geodatabase Feature Class, dated October 6, 2022).
 - ☒ USGS topographic maps: Figure 3A, USGS Topography with 8-Digit HUCs (7.5 minute quadrangle, via USGSTopo and ESRI Basemap services, no date provided).
 - ☒ USGS NHD data/maps: Figure 3B, USGS National Hydrography Dataset with 12-Digit HUCs (via USGS, no date provided).
 - ☐ Section 10 resources used:
 - ☐ NCDWR stream identification forms
 - ☒ Antecedent Precipitation Tool Analysis: Prepared by USACE, to evaluate consultant's referenced site visit, performed on January 12, 2023. APT provides "wetter than normal" results (precipitation within the wetter range over a preceding 30-year period).
 - ☒ Other sources of Information: Figure 1: Location and Vicinity Map (via National Geographic World ESRI Basemap, no date provided).

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.

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Non-Jurisdictional Aquatic Features				
Types	IDs	On-Site/Off-Site	Linear FT	Acreage
Ephemeral Stream	07ES	On-Site	69	0.01
Intermittent Stream	02IS	On-Site	799	0.06
		Off-Site	122	0.01
	06IS	On-Site	128	0.01
Pond	08OW	On-Site	0	0.13
Wetland	01WL	On-Site	0	0.08
		Off-Site	0	0.005
	03WL	On-Site	0	0.03
	04WL	On-Site	0	0.02
	05WL	On-Site	0	0.04

Legend

Project Boundary (75.8 Ac.±)

Non-Jurisdictional On-Site Aquatic Features

Ephemeral Stream (0.01 Ac.± / 69 LF.±)

Intermittent Stream (0.07 Ac.± / 927 LF.±)

Pond (0.13 Ac.±)

Wetland (0.17 Ac.±)

Non-Jurisdictional Off-Site Aquatic Features

Intermittent Stream (0.01 Ac.± / 122 LF.±)

Wetland (0.005 Ac.±)

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PROJECT NO.	20231279.001A
DRAWN:	1/3/2023
DRAWN BY:	NL
CHECKED BY:	AWN
FILE NAME:	22-1227-Friendship IP-WetSW-West.mxd

Wetland and Surface Water Delineation - West	FIGURE
Vulcan Materials Company Friendship Quarry USACE IP Application Hall County, Georgia	7A