



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

CESAS-RD-C

09 April 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-2023-00432, MFR 1 or 1²

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 this state 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
Canal (non-tidal)	JD	Section 404
Canal (tidal)	JD	Section 404
Wetland A	JD	Section 404
Wetland B	JD	Section 404
Wetland C	Non-JD	NA
Upland Dug Ditch system	Non-JD	NA
Upland Dug Pond	Non-JD	NA

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 Area Size (in acres): 56.863
- B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 32.028186 Longitude: -81.179494
- C. Nearest City or Town: Savannah
- D. County: Chatham
- E. State: Georgia
- F. Other associated Jurisdictional Determinations (including outcomes). N/A
- G. Any additional, relevant site-specific information: N/A

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶

A. Name of nearest downstream TNW, Territorial Sea or interstate water: Salt Creek, a TNW

B. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum, a field visit conducted on 2 November 2023, 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.

Wetland A and Wetland B have a connection to an unnamed canal which is a relatively permanent water (RPW). The unnamed canal flows into Salt Creek, a traditionally navigable water (TNW). The Ordinary High Water Mark (OHWM) of the unnamed canal was indicated by the following physical characteristics: natural line impressed on the bank, shelving, and absence of vegetation.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ N/A

⁶ 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.

⁷ 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.

⁸ 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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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):

Name of Aquatic Resource	Size (in acres)	Flow Regime and additional description of the tributary	Method for determining flow regime
Canal (non-tidal)	0.53	The non-tidal portion of the unnamed canal flows into the tidal portion of the unnamed canal then into Salt Creek, a TNW. Salt Creek flows into the Little Ogeechee River which flows into Ossabaw Sound and the Atlantic Ocean.	National Hydrologic Dataset, NOAA LiDAR, and aerial imagery
Canal (tidal)	0.9	The tidal portion of the unnamed canal flows directly into Salt Creek, a TNW. Salt Creek flows into the Little Ogeechee River which flows into Ossabaw Sound and the Atlantic Ocean. This portion of the canal was determined to be tidal through eyewitness accounts by the agent and landowner. This area was reviewed as Section 404 tidal and not Section 10 tidal since it falls below the High Tide Line but above Mean High Water.	National Hydrologic Dataset, NOAA LiDAR, and aerial imagery

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	1.33	Yes, unnamed canal	The southwest corner of the wetland boundary is connected to the unnamed canal, a RPW, via a functioning, non-collapsed culvert. The culvert is approximately 12-inches in diameter and shows signs of water transfer from the wetland to the canal. Due to the wetland's elevation being at least 10 feet above the canal, water does not routinely transfer backwards from the canal to the wetland.
Wetland B	0.32	Yes, unnamed canal	The wetland boundary has continuous surface connection to the unnamed canal. Due to the wetland's elevation being at least 10 feet above the canal, water does not routinely transfer from the canal to the wetland.

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”).⁹ 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
Upland dug pond	0.83	This pond is an artificial pond created by excavating dry land as a borrow pit and to collect and retain water. There is an outfall pipe within the pond, however the pipe was severely damaged and clogged. There was no evidence of water transport outside of the pond through the outfall pipe.

- 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.

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Upland dug ditch system	0.54	The ditch systems across the property (including the ditches in the middle of the property and the southwest corner) are completely vegetated with upland grasses and do not exhibit the three wetland characteristics or an ordinary high water mark. The ditch systems appear to be excavated from dry land. Additionally, there was no evidence of water transport or flow patterns within any of the labelled ditches.

⁹ 51 FR 41217, November 13, 1986.

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- 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 (in acres)	Type of resource generally not jurisdictional
Wetland C	0.06	Wetland lacks a continuous surface connection to water of the US. There was a 3’ to 4’ berm between the wetland and the canal. There are no signs of water transfer from the wetland to the ditch.

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): 29 March 2024
2. Date(s) of Field Review: 02 November 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:
[REDACTED]
 - ☒ Photographs: Site visit photos from 02 November 2023

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- ☒ Aerial Imagery: Source Google Earth, 29 March 2024
- ☒ LIDAR: Source NOAA Digital Coast: Data Access Viewer, 27 March 2024
- ☒ USDA NRCS Soil Survey: Titled “Custom Soil Resource Report for Bryan and Chatham Counties, Georgia”, 28 March 2024.
- ☒ USFWS NWI maps: Titled “National Wetland Inventory”, 28 March 2024
- ☒ USGS NHD data/maps: Titled “NHD”, 27 March 2024
- ☒ Section 10 resources used: Savannah District Section 10 Waterway List, 29 March 2024
- ☒ Antecedent Precipitation Tool Analysis: 19 May 2023 and 02 November 2023

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.

