



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

SAS-RD-C

April 23, 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-2024-00202

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 in this state due to litigation.

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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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 | JD | Section 404 |
| Ditch | JD | Section 404 |

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

3. REVIEW AREA. The project review area is an approximately 2.82-acre site located adjacent to Towne Park Drive, approximately 0.09 miles east of US Highway 21, in Rincon, Effingham County, Georgia (Latitude 32.2702, Longitude -81.2233).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. ⁵ Mill Creek is the nearest TNW. The project review area is located approximately 2.8 miles from Mill Creek. This determination was made based on a review of desktop data resources described in Section 9 of this memorandum

⁵ 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.

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including review of the SAS Section 10 Waters list, and a field visit conducted on March 13, 2024.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The Ditch meets 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. The Ditch begins along the western boundary of the project area near the edge of the Wetland, then travels into and along the border of the Wetland ending near the eastern boundary of the project area. The Wetland is a wetland that meets 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. The Wetland abuts Willowpeg Creek, a named RPW, that flows into Sweigoffer Creek, another named RPW, which connects to Mill Creek, a TNW.
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 references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

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.

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- 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 | 0.18 | No | Wetland abuts Willowpeg Creek, a named RPW, that flows into Sweigoffer Creek, another named RPW, which connects to Mill Creek, a TNW. |
| Ditch | 0.02 | No | Ditch begins along the western boundary of the project area near the edge of the Wetland, then travels into and along the border of the Wetland. |

During the site visit, the Ditch was viewed and determined to be an aquatic resource. The Ditch meets 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. The Ditch begins along the western boundary of the project area near the edge of the Wetland, then travels into and along the border of the Wetland ending near the eastern boundary of the project area. This wetland ditch has a continuous surface connection with the Wetland. The Ditch loses channelization in the Wetland and the Wetland continues as part of a larger wetland system that abuts Willowpeg Creek. The Ditch is determined to be jurisdictional with a continuous surface to a water of the US via the Wetland. The Wetland was observed, and it was determined that the wetland meets the hydrophytic vegetation, wetland

hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. The Wetland is part of a wetland that abuts Willowpeg Creek, a named RPW. Willowpeg Creek flows into Sweigoffer Creek, a named RPW, that connects to Mill Creek, a TNW. This determination is supported by site observations and data sources listed in Section 9 of this memorandum (i.e., LiDAR, NWI mapping, National Hydrography datasets, and aerial imagery). This Wetland has a continuous surface connection to a water of the US and is therefore determined to be jurisdictional.

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 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

⁸ 51 FR 41217, November 13, 1986.

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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). N/A

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.

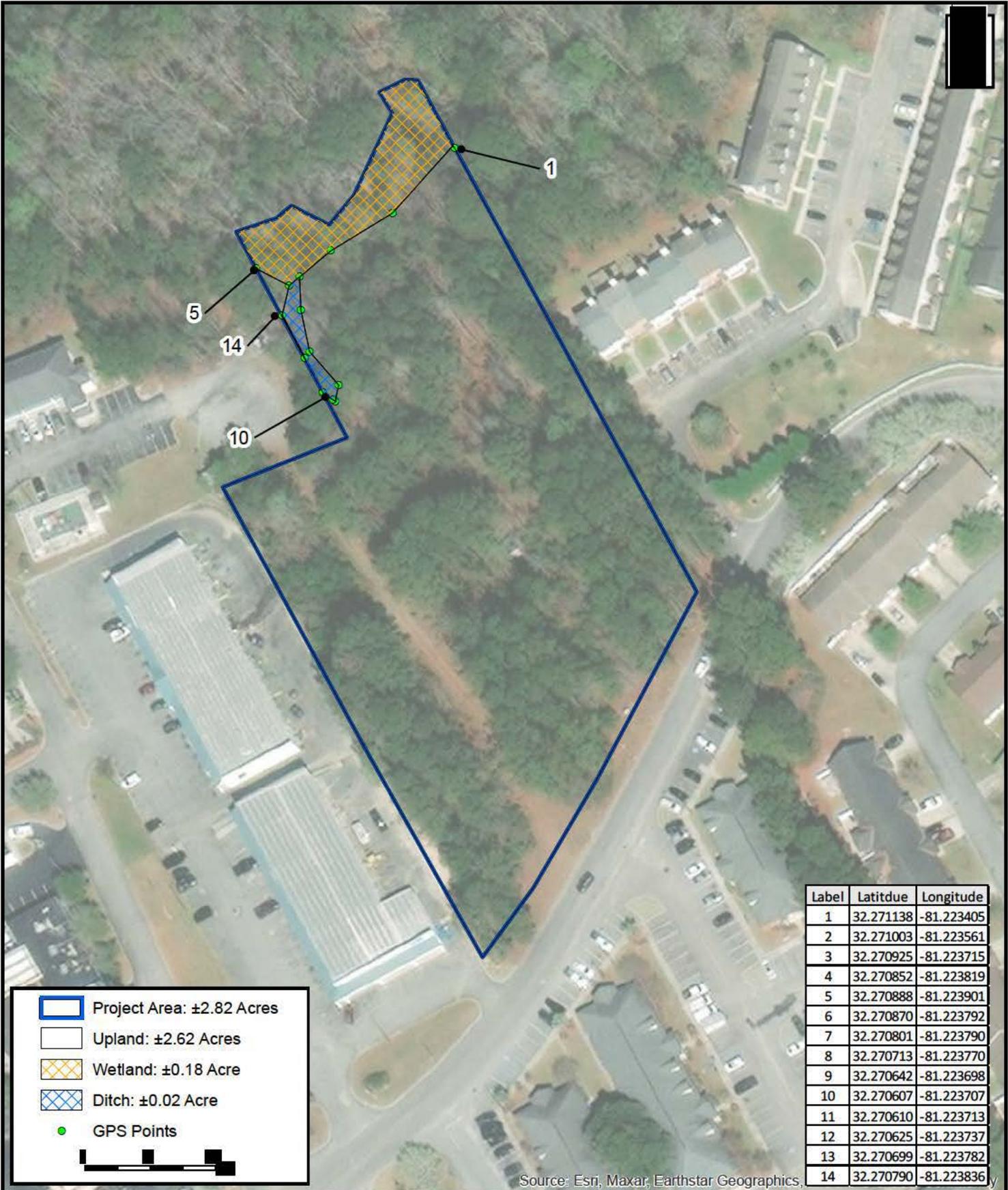
- a. Office (Desk) Determination: April 23, 2024
Field Visit: March 13, 2024
- b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Approved Jurisdictional Determination request and exhibit submitted by [REDACTED].
- c. Data sheets prepared/submitted by or on behalf of the applicant/consultant: submitted by [REDACTED].
- d. U.S. Geological Survey map(s): Effingham County 1’=2,000 ft.
- e. U.S. Geological Survey Hydrologic Atlas: HUC 030601090305.
- f. USDA Natural Resources Conservation Soil Survey: Effingham County, GA.
- g. National Wetlands Inventory map(s): Effingham County, GA.
- h. Photographs: Google Earth Aerial 2023 and 2022 Ortho Aerial.
- i. NOAA Topographic LiDAR: 2018 NOAA LiDAR.
- j. Antecedent Precipitation Tool Analysis: [REDACTED] agent site visit on February 20, 2024, and Corps site visit on March 13, 2024.
- k. 20190625 Section 10 Waters List Savannah District

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.



| Label | Latitdue | Longitude |
|-------|-----------|------------|
| 1 | 32.271138 | -81.223405 |
| 2 | 32.271003 | -81.223561 |
| 3 | 32.270925 | -81.223715 |
| 4 | 32.270852 | -81.223819 |
| 5 | 32.270888 | -81.223901 |
| 6 | 32.270870 | -81.223792 |
| 7 | 32.270801 | -81.223790 |
| 8 | 32.270713 | -81.223770 |
| 9 | 32.270642 | -81.223698 |
| 10 | 32.270607 | -81.223707 |
| 11 | 32.270610 | -81.223713 |
| 12 | 32.270625 | -81.223737 |
| 13 | 32.270699 | -81.223782 |
| 14 | 32.270790 | -81.223836 |

Project Area: ±2.82 Acres
 Upland: ±2.62 Acres
 Wetland: ±0.18 Acre
 Ditch: ±0.02 Acre
● GPS Points

Source: Esri, Maxar, Earthstar Geographics,

RLC Project No.: 23-444
 Figure No.: 8
 Prepared By: [Redacted]
 Sketch Date: 4/5/2024
 Map Scale : [Redacted]

[Redacted]

[Redacted]

[Redacted]