DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT

100 W. OGLETHORPE AVENUE SAVANNAH, GEORGIA 31401-3604

May 2, 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-2022-00663

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 pre2015 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.

[^0] of Sackett v. EPA, 143 S. Ct. 1322 (2023), SAS-2022-00663

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 AA (WAA) | JD | Section 404 |
| Wetland BB (WBB) | JD | Section 404 |
| Wetland CC (WCC) | JD | Section 404 |
| Wetland DD (WDD) | JD | Section 404 |
| Wetland J (WJ) | JD | Section 404 |
| Wetland JJ (WJJ) | JD | Section 404 |
| Wetland N (WN) | JD | Section 404 |
| Wetland P (WP) | JD | Section 404 |
| Wetland Q (WQ) | JD | Section 404 |
| Wetland R (WR) | JD | Section 404 |
| Wetland S (WS) | Non-JD | N/A |
| Wetland T (WT) | JD | Section 404 |
| Wetland U (WU) | JD | Section 404 |
| Wetland V (WV) | JD | Section 404 |
| Wetland X (WX) | Non-JD | N/A |
| Wetland Y (WY) | JD | Section 404 |
| Wetland Z (WZ) | 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. 2003 SWANCC guidance
f. 2007 Rapanos Approved Jurisdictional Determination Form Instructional Guidebook

## g. 2008 RAPANOS Guidance

3. REVIEW AREA. The review area is an approximately 200.97-acre site located approximately 1.51 miles east of Interstate 95 with access from Islands Highway in Midway, Liberty County, Georgia (Latitude 31.7836, Longitude -81.3420).
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. ${ }^{5}$ Jones Creek is the nearest TNW. The review area is located approximately 0.55 miles from Jones Creek. This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum including review of the SAS Section 10 Waters list.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetlands AA, BB, J, N, Q, R, T, U, and V 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 AA, Wetland BB, Wetland J, Wetland N, Wetland Q, Wetland R, Wetland T, Wetland U and Wetland V, WAA, WBB, WJ, WN, WQ, WR, WT, WU and WV function as one wetland (Wetland AA/BB/J/N/Q/R/T/U/V). This larger wetland that includes Wetland $A A / B B / J / N / Q / R / T / U / V$ abuts Jones Creek, a TNW. Wetlands CC, DD, JJ, P, Y, and Z 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 CC, Wetland DD, Wetland JJ, Wetland P, Wetland Y, and Wetland Z, WCC, WDD, WJJ, WP, WY and WZ function as one wetland (Wetland CC/DD/JJ/P/Y/Z). This larger wetland that includes Wetland CC/DD/JJ/P/Y/Z abuts Jones Creek, a TNW.

[^1]6. SECTION 10 JURISDICTIONAL WATERS ${ }^{6}$ : 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.
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):

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| Name of Aquatic Resource | Size (in acres) | Contiguous with or abutting? If so, list water | Describe continuous surface connection |
| :---: | :---: | :---: | :---: |
| Wetland AA/BB/J/N/Q/R/T/U/V <br> Wetland AA <br> Wetland BB <br> Wetland J <br> Wetland N <br> Wetland Q <br> Wetland R <br> Wetland T <br> Wetland U <br> Wetland V | $\begin{aligned} & 4.27 \\ & 1.68 \\ & 0.15 \\ & 0.90 \\ & 0.64 \\ & 0.09 \\ & 0.47 \\ & 0.01 \\ & 0.24 \\ & 0.09 \end{aligned}$ | Yes, Jones Creek | Although labelled Wetland AA, Wetland BB, Wetland J, Wetland N, Wetland Q, Wetland R, Wetland T, Wetland $U$, and Wetland V, WAA, WBB, WJ, WN, WQ, WR, WT, WU and WV function as one wetland (Wetland AA/BB/J/N/Q/R/T/U/V). This larger wetland that includes Wetland AA/BB/J/N/Q/R/T/U/V abuts Jones Creek, a TNW. |
| Wetland CC/DD/JJ/P/Y/Z <br> Wetland CC <br> Wetland DD <br> Wetland JJ <br> Wetland $P$ <br> Wetland Y <br> Wetland Z | $\begin{aligned} & 44.08 \\ & 2.35 \\ & 0.02 \\ & 10.21 \\ & 30.08 \\ & 0.83 \\ & 0.59 \end{aligned}$ | Yes, Jones Creek | Although labelled Wetland CC, Wetland DD, Wetland JJ, Wetland P, Wetland Y, and Wetland Z , WCC, WDD, WJJ, WP, WY and WZ function as one wetland (Wetland CC/DD/JJ/P/Y/Z). This larger wetland that includes Wetland CC/DD/JJ/P/Y/Z abuts Jones Creek, a TNW. |

Based on review of desktop data resources described in Section 9 of this memorandum and a Corps site visit on September 28, 2022, Wetland $\mathrm{AA} / \mathrm{BB} / \mathrm{J} / \mathrm{N} / \mathrm{Q} / \mathrm{R} / \mathrm{T} / \mathrm{U} / \mathrm{V}$ is determined to be jurisdictional. Although labelled Wetland AA, Wetland BB, Wetland J, Wetland N, Wetland Q, Wetland R, Wetland T, Wetland U and Wetland V, WAA, WBB, WJ, WN, WQ, WR, WT, WU, and WV function as one wetland (Wetland $A A / B B / J / N / Q / R / T / U / V$ ). This larger wetland that includes Wetland $A A / B B / J / N / Q / R / T / U / V$ abuts Jones Creek, a TNW. This determination is supported by LiDAR (which shows that based off of 1' contours, there is no significant increase in elevation between the wetlands), NWI and NRCS hydric soil mapping which shows similar hydric soils in the area of the
wetlands. Based on review of desktop data resources described in Section 9 of this memorandum and a Corps site visit on September 28, 2022, Wetland CC/DD/JJ/P/Y/Z is determined to be jurisdictional. Although labelled Wetland CC, Wetland DD, Wetland JJ, Wetland P, Wetland Y, and Wetland Z, WCC, WDD, WJJ, WP, WY, and WZ function as one wetland (Wetland CC/DD/JJ/P/Y/Z). This larger wetland that includes Wetland CC/DD/JJ/P/Y/Z abuts Jones Creek, a TNW. This determination is also supported by LiDAR ((which shows that based off of 1' contours, there is no significant increase in elevation between the wetlands), NWI and NRCS hydric soil mapping which shows similar hydric soils in the area of these 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"). ${ }^{8}$ 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

[^3]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 <br> excluded <br> feature | Size <br> (in acres) | Type of resource generally not <br> jurisdictional |
| :---: | :--- | :--- |
| Wetland S | 0.52 | Wetland lacks a continuous surface <br> connection to water of the US |
| Wetland X | 2.33 | Wetland lacks a continuous surface <br> connection to water of the US |

Wetland $S$ is a closed, depressional 0.52 -acre wetland. During the Corps site visit on September 28, 2022, Wetland S was determined to be surrounded by uplands with no surface connection such as ditches or swales found between this wetland and other jurisdictional waters. There was no evidence of surface water flow to or from Wetland S. Wetland S lacks a continuous surface connection to a water of the US and is determined to be non-jurisdictional. Wetland X is a closed, depressional 2.33-acre wetland surrounded by uplands approximately 1-2 feet higher in elevation than the average surface elevation within the wetland. During the Corps site visit on September 28,2022 , no surface connection such as ditches or swales were found between this wetland and other jurisdictional waters. There was no evidence of surface water flow to or from Wetland X. Wetland X lacks a continuous surface connection to a water of the US and is determined to be non-jurisdictional. Additionally, NRCS Custom Soil Report shows Wetland $S$ and Wetland $X$ in area consisting of Ocilla loamy fine sand - Oc with a Hydric Rating by Map Unit of five compared to the jurisdictional wetlands in the project review area consisting of mainly Ellabelle loamy sand - Ee with a Hydric rating by map unit of 100.
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 2024

Corps Site Visit: September 28, 2022

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b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Approved Jurisdictional Determination request and exhibit submitted by
c. Data sheets prepared/submitted by or on behalf of the applicant/consultant: submitted by
d. U.S. Geological Survey map(s): Liberty County 1'=1,000 ft.
e. U.S. Geological Survey Hydrologic Atlas: HUC 12-030602040501.
f. USDA Natural Resources Conservation Soil Survey: Liberty County, GA.
g. National Wetlands Inventory map(s): Liberty County, GA.
h. 20190625 Section 10 Waters List - Savannah District
i. Photographs: 1993, 2006 and 2023 Google Earth Aerial Imagery
j. NOAA Topographic LiDAR: 2018 NOAA LiDAR.

## 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.




[^0]:    ${ }^{1}$ 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.
    233 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.

[^1]:    ${ }^{5}$ 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.

[^2]:    ${ }^{6} 33$ 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.

[^3]:    851 FR 41217, November 13, 1986.

