



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

CESAS-RDP

15 May 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-2017-00814 (Cedartown North Business Park Expansion -Polk County)

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 Georgia due to litigation.

1. SUMMARY OF CONCLUSIONS.

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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- a. A five-acre portion of the review area located along the western boundary is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in this review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).
- b. 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).

Based on a review of desktop data resources listed in Section 9 of this memorandum, there are four pits located in the western portion of the project area that do not exhibit an Ordinary High-Water Mark, or the Three (3) wetland parameters as described in the 1987 Corps of Engineers Wetland Delineation Manual or any of the applicable regional supplements. The remaining 266-acre review area consist of features that are and are not waters of the United States.

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 1	Non-JD	N/A
Wetland 2	Non-JD	N/A
Ephemeral Stream 1	Non-JD	N/A
Pond 1	Non-JD	N/A
Pit 1	Non-JD	Uplands
Pit 2	Non-JD	Uplands
Pit 3	Non-JD	Uplands
Pit 4	Non-JD	Uplands

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)

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d. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

The project review area is located north of Davis Road, west of Pine Pitch Road, and east of Burkhalter Road, within the city of Cedartown, Polk County, Georgia. The project area is located within the Cedar Creek [HUC 8] Watershed 03150105.

A. Project Area Size (in acres): **271 acres**

B. Center Coordinates of the Project Site (in decimal degrees)

Latitude: **34.0491** Longitude: **-85.2192**

C. Nearest City or Town: **Cedartown**

D. County: **Polk**

E. State: **Georgia**

F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2017-00814	AJD	Previous AJD was verified on Dec 20, 2017, under the Rapanos (SWANCC) rule. The AJD determined that Ephemeral Stream 1 and Wetland 6 (Wetland 2 in current AJD) were Waters of the United States with an indirect connection to Cedar Creek. The AJD also determined that Pond 1 and Wetland 5 (Wetland 1 in current AJD) were isolated non-jurisdictional waters.

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

The nearest TNW to this review area is the Coosa River, located approximately 28 river miles north of the project area.

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

N/A

6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

⁵ 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

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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 10.⁶

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): **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").⁷ Include size of the aquatic resource or feature within

"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.

⁶ 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.

⁷ 51 FR 41217, November 13, 1986.

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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
Pit 1	0.02 acres	Pit 1 is a seasonally filled depression created in dry land incidental to previous construction activity and the pit was excavated in dryland for the purpose of obtaining fill material. During the Agent's site visit in 2023, the pits could not be observed because of dense vegetation. Additionally, faint signatures of the pits identified in the LiDAR imagery. This feature does not provide any relatively permanent flow or connection to downstream features.
Pit 2	0.02 acres	Pit 2 is a seasonally filled depression created in dry land incidental to previous construction activity and the pit was excavated in dryland for the purpose of obtaining fill material. During the Agent's site visit in 2023, the pits could not be observed because of dense vegetation. Additionally, faint signatures of the pits identified in the LiDAR imagery. This feature does not provide any relatively permanent flow or connection to downstream features.
Pit 3	0.04 acres	Pit 3 is a seasonally filled depression created in dry land incidental to previous construction activity and the pit was excavated in dryland for the purpose of obtaining fill material. During the Agent's site visit in 2023, the pits could not be observed because of dense vegetation. Additionally, faint signatures of the pits identified in the LiDAR imagery. This feature does not provide any relatively permanent flow or connection to downstream features.
Pit 4	0.04 acres	Pit 4 is a seasonally filled depression created in dry land incidental to previous construction activity and the pit was excavated in dryland for the purpose of obtaining fill material. During the Agent's site visit in 2023, the pits could not be observed because of dense vegetation. Additionally, faint signatures of the pits identified in the LiDAR imagery. This feature does not provide any relatively permanent flow or connection to downstream features.

- 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

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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*.

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Pond 1	0.19 acre	Pond 1 was identified on the eastern-central portion of the review area. This feature is determined to be an isolated feature without a natural or anthropogenic surface connection to an RPW or TNW. . The lateral limits were verified using remote desktop tools, verification of data forms, and maps.

- 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 1	0.013 acre	The boundary of this wetland was determined based on distinct differences in large vegetation, hydrology, soils, and topography consisting of the following: 1) Transition from a sparsely vegetated concave surface lacking vegetation to an upland; 2) Transition from the primary hydrology indicators of saturation, surface water, a high-water table, and water stained leaves and the secondary indicators of geomorphic position and sparsely vegetated concave surface, to a lack of wetland hydrology indicators within the adjacent uplands, and 3)

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		Transition from depleted matrix hydric soils to well-drained non-hydric soils. The lateral limits were verified using remote desktop tools, verification of data forms, and maps. Wetland 1 lacks a continuous surface connection to water of the US. This feature is determined to be an isolated feature without a natural or anthropogenic surface connection to an RPW or TNW.
Wetland 2	4.22 acre	The boundary of this wetland was determined based on distinct differences in large vegetation, hydrology, soils, and topography consisting of the following: 1) Transition from a sparsely vegetated concave surface lacking vegetation to an upland; 2) Transition from the primary hydrology indicators of saturation, surface water, a high-water table, and water stained leaves and the secondary indicators of geomorphic position and sparsely vegetated concave surface, to a lack of wetland hydrology indicators within the adjacent uplands, and 3) Transition from depleted matrix hydric soils to well-drained non-hydric soils. The lateral limits were verified using remote desktop tools, verification of data forms, and maps. Wetland 2 lacks a continuous surface connection to water of the US. This feature is determined to be an isolated feature without a natural or anthropogenic surface connection to an RPW or TNW.
Ephemeral Stream 1	1379 Linear feet (0.15 acre)	This feature meets the characteristics of having an OHWM and show signatures from the 3DEP LiDAR imagery of an aquatic feature. Based on previous anthropogenic alterations of this feature, and previous delineations, Ephemeral Stream 1 does not carry a relatively permanent flow. At the time of the delineation the climate showed drier than normal conditions according to the APT. The lateral limits were verified using remote desktop tools, verification of data forms, and maps.

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): April 22, 2024 and May 15, 2024
2. Date(s) of Field Review (if applicable): Agent conducted field visit on November 14, 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:** York Property, Delineation of Aquatic Resources Map, prepared on November 20, 2023
 - ☒ **Photographs:** Photolog from November 20, 2023, site visit, Photographs No. 1-8.
 - ☒ **Aerial Imagery:** Maxar, Global Enhanced GEOINT Delivery: Digital Earth Globe Tiled Aerial Imagery, date accessed April 22, 2024.
 - ☒ **LIDAR:** National Regulatory Viewer (NRV), LiDAR with Hillshade layers, date accessed April 22, 2024.

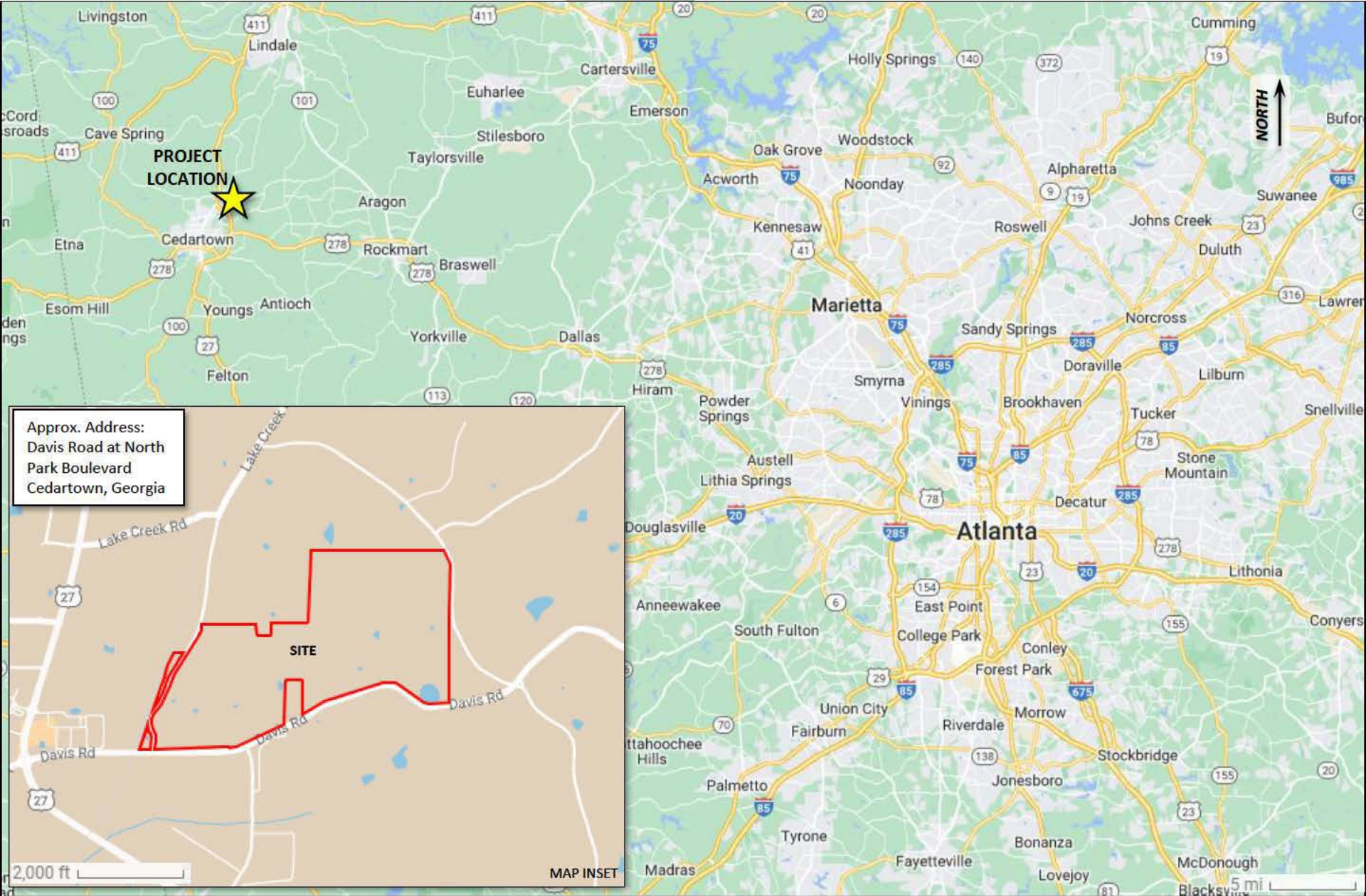
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- ☒ **USGS topographic maps:** USGS Website, Map Locator, NRV USGS topographic basemap date accessed April 22, 2024.
- ☒ **USGS NHD data/maps:** National Regulatory Viewer (NRV), NHD layer, data accessed April 22, 2024.
- ☒ **Antecedent Precipitation Tool Analysis:** York Property APT results from November 14, 2023, completed May 2, 2024
- ☒ **Other sources of Information:** U.S. Drought Monitor, Polk County, date accessed April 22, 2024; USGS StreamStats WIM Tool date accessed April 22, 2024, National Regulatory Viewer (NRV), FEMA data layers, date accessed April 22, 2024.

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.



VICINITY MAP

**DELINEATION OF AQUATIC RESOURCES
YORK + FAIRBURN PROPERTY
POLK COUNTY, GEORGIA**

**PREPARED FOR:
CEDARTOWN DEVELOPMENT AUTHORITY**

**EXHIBIT 1
PREPARED 12/14/2023 BY:**





AERIAL PHOTO W/ AQUATIC RESOURCE LOCATIONS

PREPARED FOR:
CEDARTOWN DEVELOPMENT AUTHORITY

**DELINEATION OF AQUATIC RESOURCES
YORK + FAIRBURN PROPERTY
POLK COUNTY, GEORGIA**

EXHIBIT 3
PREPARED 12/14/2023 BY:

