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

CESAS-RDP May 14, 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-2022-00927

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 Georgia 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.

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
SWA	Non-JD	N/A
SWB	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 391 acres
   B. Center Coordinates of the Project Site:
      Latitude: 32.7423 Longitude: -83.2739
   C. Nearest City or Town: Jeffersonville
   D. County: Wilkinson County
   E. State: Georgia
   F. Other Associated Jurisdictional Determinations (including outcomes): N/A.
   G. Any additional, relevant site-specific information: Site has ongoing mining operation activities occurring within other portions of this tract (kaolin mine).

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

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

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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.[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. N/A. (Remaining on-site jurisdictional aquatic resources to be evaluated under ARDR, in conjunction with this AJD request.)

   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.

[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 "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.

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 the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. Two upland dug ponds exist on the subject property, which were historically associated with mining activities at the site and were utilized for sediment retention purposes.

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
SWA	0.51	Artificial pond created by excavating dry land to collect and retain water, used exclusively for settling basins, etc. Water lacks continuous surface connection to waters of US.
SWB	0.59	Artificial pond created by excavating dry land to collect and retain water, used exclusively for settling basins, etc. Water lacks continuous surface connection to waters of US.

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 resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. N/A.

[7] 51 FR 41217, November 13, 1986.

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. 1. Date of Office (desktop review): May 14, 2024
2. Date(s) of Field Review (if applicable): N/A.

b. Data sources used to support this determination (included in the administrative record).

☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Request for JD submittal, dated September 13, 2022
☐ Aquatic Resources delineation prepared by the Corps: N/A.
☐ Wetland field data sheets prepared by the Corps: N/A.
☐ OHWM data sheets prepared by the Corps: N/A.
☐ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: N/A.
☒ Photographs: Pages 1-19, Site Photographs (Consultant), dated July 2022; and Figure 7: Photo Location Map, dated Aug. 31, 2022
☐ Aerial Imagery: N/A.
☒ LIDAR: Index Map (Dec. 2023) and LiDAR Maps (Pages 1-11, Jan. 2024) (via ESRI ArcGIS Online)
☒ USDA NRCS Soil Survey: Figure 3: Soils Map, dated Aug. 31, 2022
☒ USFWS NWI maps: Figure 4: NWI Map, dated Aug. 31, 2022
☒ USGS topographic maps: Figure 2: USGS Topo Map, dated Aug. 31, 2022
☐ USGS NHD data/maps: N/A.
☐ Section 10 resources used: N/A.
☐ NCDWR stream identification forms: N/A.
☒ Antecedent Precipitation Tool Analysis: July 19 & July 22, 2022 (via APT tool)
☒ Other sources of Information: Exhibit 1: Location Map, dated Aug. 31, 2022 (via ArcGIS-ESRI); Figure 5: FEMA Map; and Figure 6: Delineation Map

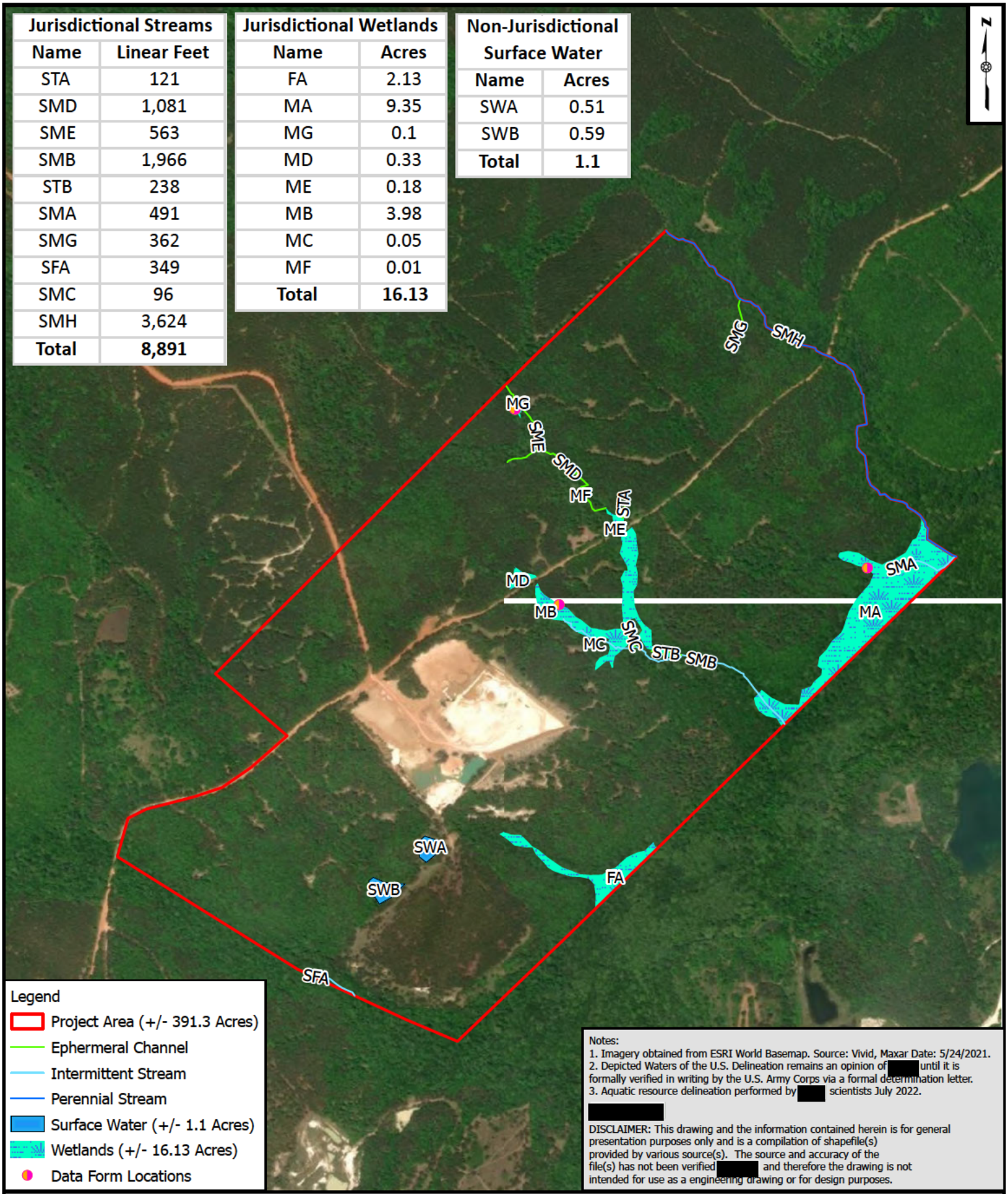
10. OTHER SUPPORTING INFORMATION: Field site visit was conducted between on July 19, 2022, and July 22, 2022, by consultant. Results of the APT provides a "normal conditions" response, within a period of mild drought, for the dates of this field event (precipitation was within the normal range over a preceding 30-year period).

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.

Jurisdictional Streams	
Name	Linear Feet
STA	121
SMD	1,081
SME	563
SMB	1,966
STB	238
SMA	491
SMG	362
SFA	349
SMC	96
SMH	3,624
Total	**8,891**

Jurisdictional Wetlands	
Name	Acres
FA	2.13
MA	9.35
MG	0.1
MD	0.33
ME	0.18
MB	3.98
MC	0.05
MF	0.01
Total	**16.13**

Non-Jurisdictional Surface Water	
Name	Acres
SWA	0.51
SWB	0.59
Total	**1.1**



Legend
- Project Area (+/- 391.3 Acres)
- Ephermeral Channel
- Intermittent Stream
- Perennial Stream
- Surface Water (+/- 1.1 Acres)
- Wetlands (+/- 16.13 Acres)
- Data Form Locations

Notes:
1. Imagery obtained from ESRI World Basemap. Source: Vivid, Maxar Date: 5/24/2021.
2. Depicted Waters of the U.S. Delineation remains an opinion of [redacted] until it is formally verified in writing by the U.S. Army Corps via a formal determination letter.
3. Aquatic resource delineation performed by [redacted] scientists July 2022.

[redacted]

DISCLAIMER: This drawing and the information contained herein is for general presentation purposes only and is a compilation of shapefile(s) provided by various source(s). The source and accuracy of the file(s) has not been verified [redacted] and therefore the drawing is not intended for use as a engineering drawing or for design purposes.

Figure 6 - Delineation Map

8/31/2022

900 450 0 900 Feet

[redacted]
Wilkinson County, Georgia

[redacted]