



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

SAS-2024-00334

June 4, 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), SAS-2024-00334

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.¹ 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.² For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),³ 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 33 CFR 331.2.

² Regulatory Guidance Letter 05-02.

³ 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
ES1	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. ~2 acres
- b. Latitude: 33.3314, Longitude: -83.3694
- c. Eatonton
- d. Putnam County
- e. Georgia

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

- a. The nearest TNW to the subject water is the Oconee River, located approximately 13.5 kilometers to the southeast.
- b. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum and 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. N/A

ES1 flows offsite to the southeast into an unnamed tributary of Rooty Creek. The unnamed tributary of Rooty Creek flows southwest into Rooty Creek. Rooty Creek flows relatively southward into Little Creek. Little Creek flows relatively southward into the Lake Sinclair, an impoundment of the Oconee River.

6. SECTION 10 JURISDICTIONAL WATERS⁴: 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. 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

⁴ 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.

- 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”).⁵ 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 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).

⁵ 51 FR 41217, November 13, 1986.

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Name of excluded feature	Size	Type of resource generally not jurisdictional
ES1	669 linear feet (0.02-acre)	Tributary lacks relatively permanent, standing or continuously flowing water

ES1 is located in the southeastern limits of the subject property. Based on observations in the field by the Agent and a score of 13.5 on the NC DWQ Stream Identification Form Version 4.11, the tributary was determined to have an ephemeral flow regime. Photographs from the delineation depict a channel that lacks water and is filled with leaf litter. The tributary flows only in response to precipitation events and lacks relatively permanent water. Therefore, it does not meet the definition of an (a)(5) water.

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 (desktop) determination: June 2024 (CESAS-RDP)
- b. Field determination: March 29, 2023 (Agent)
- c. Data sources used to support this determination (included in the administrative record).
 - ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Exhibit 1: Wetland Delineation Exhibit, dated 04/03/2023, provided on PDF Page 37 of the AJD Request
 - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
 - ☐ Wetland field data sheets:
 - ☐ OHWM data sheets prepared by the USACE: Title and Date
 - ☐ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
 - ☒ Photographs: Photo 25 and Photo 26, dated 03/29/2023, provided on PDF Page 61 of the AJD Request
 - ☒ Aerial Imagery: Historic aerial imagery, accessed from Google Earth by CESAS-RDP in June 2024
 - ☒ LIDAR: 3DEP DEM and Hillshade imagery, accessed from the National Regulatory Viewer by CESAS-RDP in May 2024
 - ☒ USDA NRCS Soil Survey: Exhibit 5: Soil Survey Map, dated 12/18/2023, provided on PDF Page 30 of the AJD Request
 - ☒ USFWS NWI maps: National Wetlands Inventory (NWI) Map, dated 12/18/2023, provided on PDF Page 30 of the AJD Request
 - ☒ USGS topographic maps: Exhibit 1: Topographic Map, dated 12/18/2023, provided on PDF Page 26 of the AJD Request

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- ☒ USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP on 06/03/2024
- ☐ Section 10 resources used: Title and Dates
- ☐ NCDWR stream identification forms
- ☒ Antecedent Precipitation Tool Analysis: 03/29/2023 (Normal Conditions)
- ☒ Other sources of Information: Exhibit 4: Flood Insurance Rate Map (FIRM), dated 12/18/2023, provided on PDF Page 29 of the AJD Request; NC DWQ Stream Identification Form Version 4.11, dated 12/18/2023, provided on PDF Page 53 of the AJD Request; and StreamStats data, accessed by CESAS-RDP in June 2024

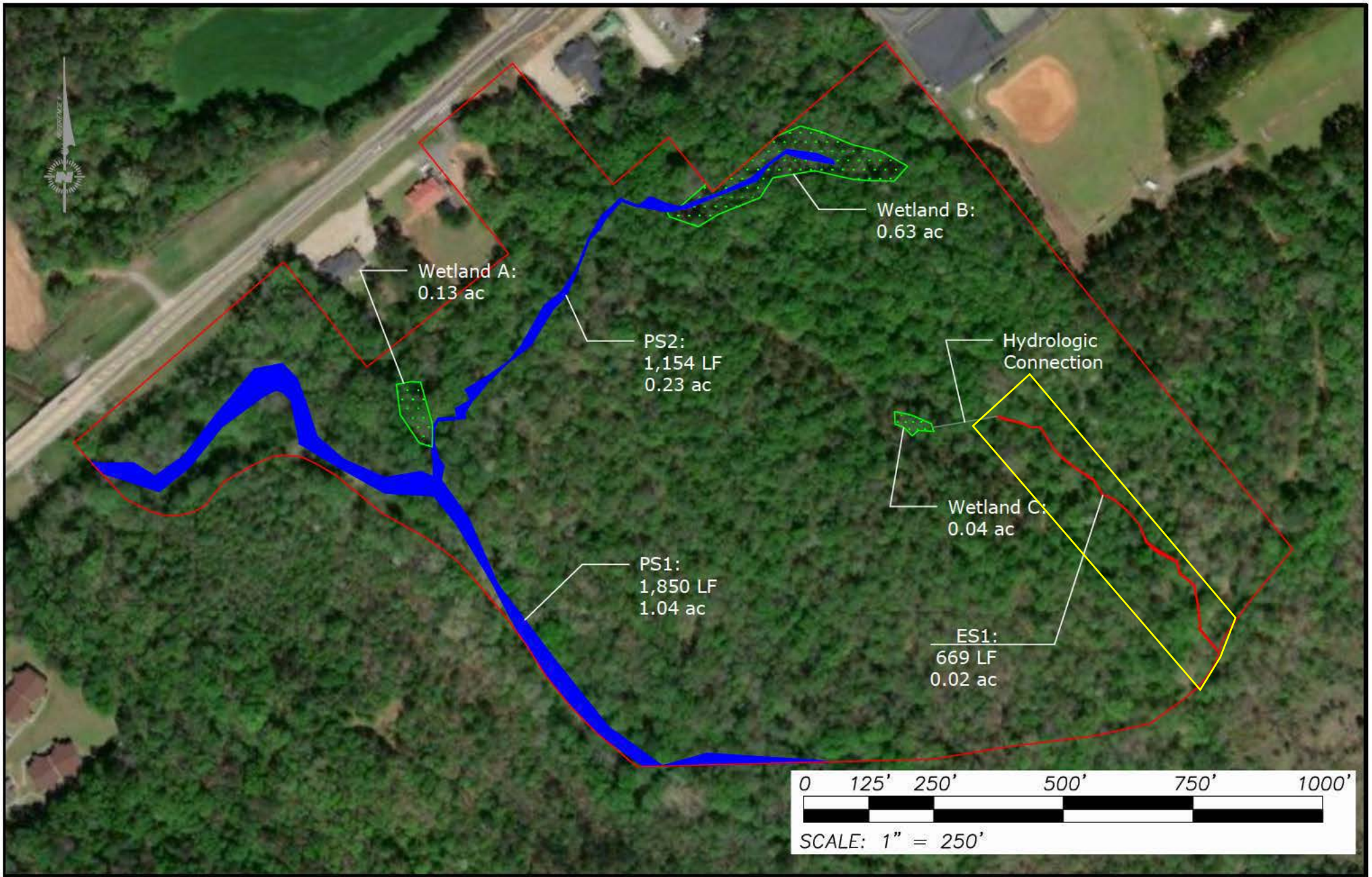
10. OTHER SUPPORTING INFORMATION. N/A

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.



A horizontal scale bar with markings at 0, 0.5, 1, and 2 miles. A black rectangle is positioned between the 0.5 and 1 mile marks.

Map Created by: CESAS-RDP
Date: 6/4/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



Legend

- = Approximate Project Area (~45.94 acres)
- ... = Wetland Area (~0.80 acres; 1.74%)
- = Perennial Stream (~3,004 LF; 1.27 acres; 2.76%)
- = Ephemeral Stream (~669 LF; 0.02 acres; 0.04%)
- = AJD Review Area (~2 acres)

Project Manager:

ML

Drawn By:

ML

Checked By:

MB

Approved By:

MB

Project No.:

HN237035A

Scale:

A1; 1:250

File Name:

002; REVISED 4/3/2023

Date:

APR 2023

Wetland Delineation Map

Putnam County School Site
Delineated 1/23/2020 and 3/29/2023
Map Revised 4/3/2023
140 Sparta Highway
Eatonton, Putnam County, Georgia

Exhibit

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