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

SAS-RD-C 14 June 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-2024-00268 (MFR 1 of 1)[2]

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.[3] 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.[4] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[5] 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

[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] When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).
[3] 33 CFR 331.2.
[4] Regulatory Guidance Letter 05-02.
[5] 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.

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. 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
Wetlands A	JD	Section 404
Wetlands B	JD	Section 404
Pond	Non-JD	NA

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 Are Size (in acres): 16.77
   B. Center Coordinates of the Project Site (in decimal degrees)
   Latitude: 31.8523 Longitude: -81.5523
   C. Nearest City or Town: Flemington
   D. County: Liberty
   E. State: Georgia
   F. Other associated Jurisdictional Determinations: N/A

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

   A. Name of nearest downstream TNW, Territorial Sea or interstate water: Peacock Creek, which is a TNW that is 0.17 miles from the site.

B. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum, 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 occurrences of boating traffic on the identified water.

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

   The wetlands onsite are connecting and contiguous with an unnamed tributary which abuts the entire boundary along the northeast side of the project area. The unnamed tributary is a relatively permanent water (RPW) which flows to Peacock Creek, a traditionally navigable water (TNW).

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

[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.

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):

Name of Aquatic Resource	**Size (in acres)**	**Contiguous with or abutting? If so, list water**	**Describe continuous surface connection**
Wetlands A	1.36	Yes, unnamed tributary (an RPW)	The wetland boundary is connecting and contiguous with an unnamed tributary (an RPW). The tributary connects to Peacock Creek (A TNW). Wetland A and Wetland B are part of a larger wetland system off property that connects directly to Peacock Creek.
Wetlands B	1.44	Yes, unnamed tributary (an RPW)	The wetland boundary continues off property and is connecting and contiguous with an unnamed tributary (an RPW). The tributary connects to Peacock Creek (a TNW). Wetland A and Wetland B are part of a larger wetland system off property that connects directly to Peacock Creek.

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.

Name of excluded feature	**Size (in acres)**	**Specific exclusion a-e**
Pond	0.27	This artificial pond was created by excavating dry land to collect and retain water and which only drains uplands. The pond is

[8] 51 FR 41217, November 13, 1986.

		surrounded by uplands and does not have a continuous surface connection to any wetlands.

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). 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. Date of Office (desktop review): 30 May 2024
b. Data sources used to support this determination (included in the administrative record).

☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Titled "[redacted]

☒ Aerial Imagery: Source: Google Earth and dated 31 May 2024

☒ LIDAR: Source: NOAA, titled "NOAA LIDAR", and dated 31 May 2024

☒ USDA NRCS Soil Survey: Titled "Custom Soil Resource Report" and dated 30 May 2024

☒ USFWS NWI maps: Titled "NWI" and dated 31 May 2024

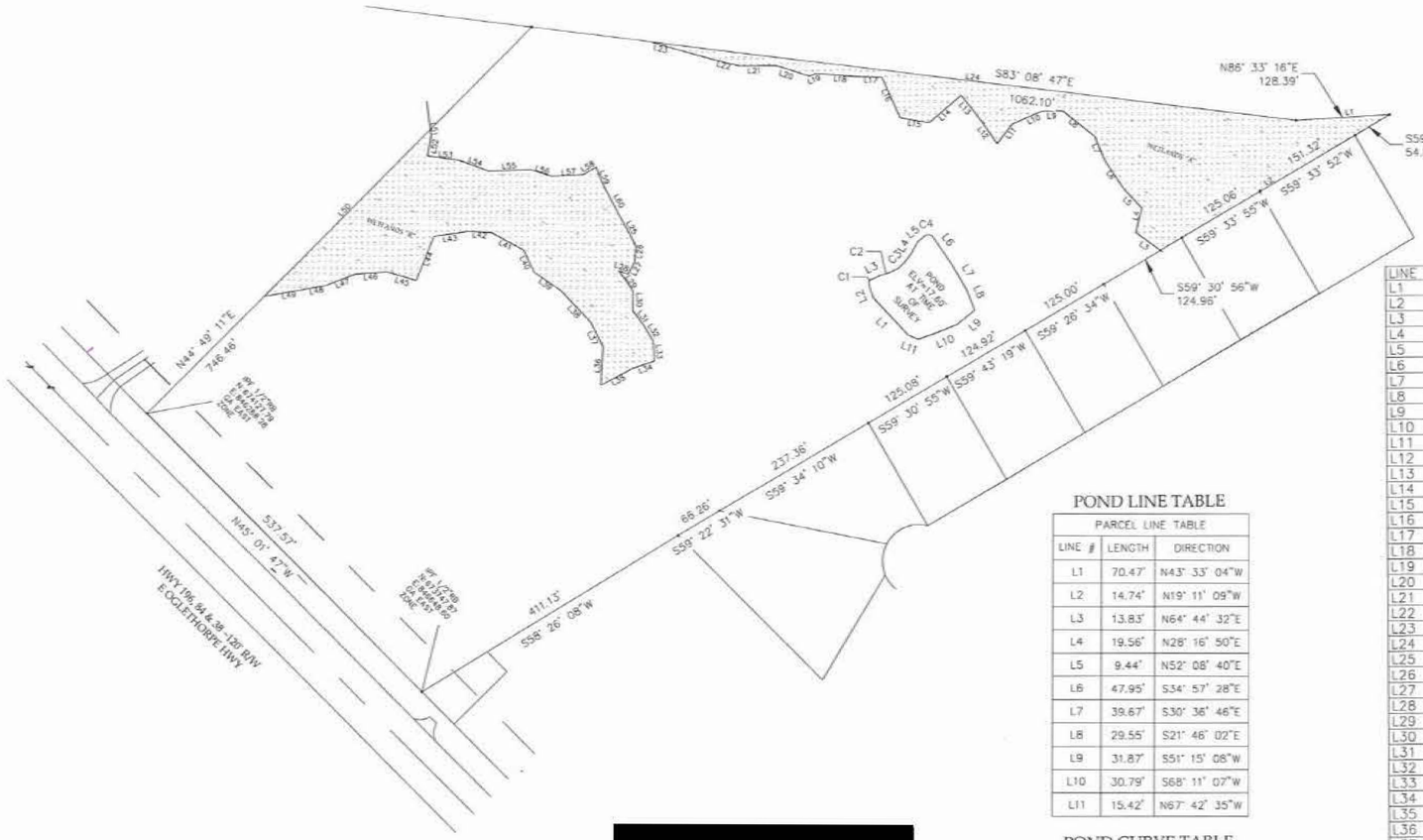
☒ USGS NHD data/maps: Titled "NHD" and dated 31 May 2024

☒ Section 10 resources used: Title and Dates

☒ Antecedent Precipitation Tool Analysis: List Date(s) 27 July 2023

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.



[redacted]

POND LINE TABLE

PARCEL LINE TABLE		
LINE #	LENGTH	DIRECTION
L1	70.47'	N43° 33' 04"W
L2	14.74'	N19° 11' 09"W
L3	13.83'	N64° 44' 32"E
L4	19.56'	N28° 16' 50"E
L5	9.44'	N52° 08' 40"E
L6	47.95'	S34° 57' 28"E
L7	39.67'	S30° 36' 46"E
L8	29.55'	S21° 46' 02"E
L9	31.87'	S51° 15' 08"W
L10	30.79'	S68° 11' 07"W
L11	15.42'	N67° 42' 35"W

POND CURVE TABLE

CURVE TABLE				
CURVE #	LENGTH	RADIUS	CHORD DIRECTION	CHORD LENGTH
C1	5.25'	3.34'	N47° 39' 36"E	4.73'
C2	27.08'	77.81'	N68° 37' 40"E	26.95'
C3	24.84'	108.86'	N42° 50' 08"E	24.78'
C4	14.89'	8.62'	N80° 29' 14"E	13.10'

ACREAGE SUMMARY

PROPERTY TOTAL	16.77 AC
UPLANDS	13.97 AC
WETLANDS A	1.36 AC
WETLANDS B	1.44 AC
POND	0.27 AC

WETLAND LINE TABLE

LINE	BEARING	DISTANCE
L1	N86°33'16"E	128.39'
L2	S59°32'43"W	365.55'
L3	N54°30'28"W	42.22'
L4	N14°31'43"E	34.31'
L5	N43°37'41"W	37.91'
L6	N33°46'02"W	45.19'
L7	N22°42'08"W	35.16'
L8	N51°27'42"W	57.09'
L9	S89°31'26"W	27.75'
L10	S66°39'47"W	45.15'
L11	S38°01'45"W	33.86'
L12	N35°24'32"W	37.10'
L13	N38°05'05"W	45.43'
L14	S49°14'02"W	57.92'
L15	N80°05'46"W	40.98'
L16	N24°21'06"W	60.75'
L17	N88°38'03"W	36.68'
L18	N85°47'14"W	54.24'
L19	S70°26'01"W	10.20'
L20	N72°32'49"W	46.80'
L21	S89°52'40"W	52.46'
L22	N76°10'01"W	38.00'
L23	N74°40'38"W	90.32'
L24	S83°08'47"E	898.99'
L25	S29°03'55"E	49.21'
L26	S05°25'26"W	22.05'
L27	S30°06'37"W	18.60'
L28	N68°03'30"W	13.22'
L29	S35°11'45"E	33.81'
L30	S00°22'25"E	26.89'
L31	S36°12'25"E	25.53'
L32	S31°39'58"E	25.60'
L33	S03°24'05"E	26.81'
L34	S71°22'51"W	33.07'
L35	S61°42'49"W	48.09'
L36	N03°09'49"E	52.86'
L37	N26°55'34"W	37.11'
L38	N43°23'16"W	58.88'
L39	N55°40'03"W	45.26'
L40	N26°18'06"W	33.18'
L41	N61°47'03"W	50.51'
L42	N86°18'47"W	31.96'
L43	S81°32'45"W	47.94'
L44	S21°42'21"W	64.85'
L45	N73°47'00"W	42.49'
L46	S85°23'02"W	43.84'
L47	S68°52'28"W	44.35'
L48	S79°51'06"W	30.05'
L49	S79°43'13"W	55.26'
L50	N44°49'11"E	323.05'
L51	S07°38'56"E	8.84'
L52	S10°13'05"W	27.84'
L53	S82°31'52"E	43.13'
L54	S70°35'59"E	45.02'
L55	N87°44'09"E	57.06'
L56	S73°03'46"E	30.53'
L57	N86°44'57"E	43.17'
L58	N59°37'57"E	20.48'
L59	S21°13'02"E	23.53'
L60	S28°00'08"E	49.04'

GRAPHIC SCALE

200 0 100 200 400 800

(IN FEET)

1 inch = 200 ft.

DRAWING COMPLETED BY:

REVISED:

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COE

DATE: 11-3-2023

FILE NO: 2023-42PRJ

SHEET: