

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

SAS-2023-00213

May 23, 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-2023-00213

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	ID or Non- ID	Section 404/Section 10
Watland 1		Section 404/Section 10
wetland 1	Non-JD	N/A
Wetland 2	Non-JD	Section 404
Wetland 3	JD	Section 404
Wetland 4	JD	Section 404
Wetland 5	JD	Section 404
Wetland 6	JD	Section 404
Wetland 7	JD	Section 404
Wetland 8	JD	Section 404
Wetland 9	JD	Section 404
Wetland 10	JD	Section 404
Wetland 11	JD	Section 404
Wetland 12	JD	Section 404
Wetland 13	JD	Section 404
Wetland 14	JD	Section 404
Wetland 15	JD	Section 404
Wetland 16	JD	Section 404
Wetland 17	JD	Section 404
Wetland 18	JD	Section 404
Wetland 19	JD	Section 404
Wetland 20	JD	Section 404
Perennial Stream 1	JD	Section 404
Intermittent Stream 1	JD	Section 404
Intermittent Stream 2	JD	Section 404
Intermittent Stream 3	JD	Section 404
Intermittent Stream 4	JD	Section 404
Ephemeral Stream 1	Non-JD	N/A
Pond 1	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:

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- a. 380 acres
- b. Latitude: 34.288430, Longitude: -84.788442
- c. White
- d. Bartow County
- e. Georgia
- f. The oldest historical aerial imagery available of the review area was dated 1945. The aerial imagery indicates that the subject property was in agricultural use during that time. There are wooded areas interspersed with pastured open fields. One blue line stream is depicted on the topographic map dated 1944. Historic topographic maps and historic aerial imagery indicate the existence of two agricultural ponds on the site beginning in 1972. Topographic maps from 1974 onward depict the location of the stream as shifted to the west and the existence of a small pond at the top of the stream. Site visits confirmed that the newer topographic maps no longer reflect the conditions on the site. Aerial photography shows evidence of selective timber harvest across the majority of the site between the years of 2008 and 2018. The corridor of the blue line stream remained intact. Since that time, the site was allowed to naturalize and revegetate until 2023 when extensive grading occurred and construction of a large building in the upland areas began. A topographic ridge runs along the northern portions of the site, hydrologically splitting the property. Therefore, the aquatic resources in the north drain to the north offsite and the aquatic resources in the center of the site and the southern portion drain to the south.
- 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 Etowah River, located approximately 9 linear miles to the south.
 - 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 and commercial uses on the identified water.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

The subject aquatic resources located on the northern portion of the site drain to the north out of the property and into South Fork Two Run Creek for 1.5 miles before

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entering Two Run Creek for approximately 14 miles before draining into the Etowah River. The aquatic resources located on the southern portion of the site drain to the south out of the property for 3 miles before entering Petit Creek for 9 miles before draining into the Etowah 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):

Name of Aquatic Resource	Size	Flow Regime and additional description of the tributary	Method for determining flow regime
Perennial Stream 1	1,551 linear feet (0.18- acre)	Perennial; See further explanation below table.	observed flow during site visit during normal and wetter

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.

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			than normal precipitation conditions
Intermittent Stream 1	2,290 linear feet (0.21- acre)	Intermittent; See further explanation below table.	observed flow during site visits during normal and wetter than normal precipitation conditions
Intermittent Stream 2	5 linear feet (0.0003- acre)	Intermittent; See further explanation below table.	observed flow during site visit during normal and wetter than normal precipitation conditions
Intermittent Stream 3	4,196 linear feet (0.48- acre)	Intermittent; See further explanation below table.	observed flow during site visit during normal and wetter than normal precipitation conditions
Intermittent Stream 4	27 linear feet (0.001-acre)	Intermittent; See further explanation below table.	observed flow during site visit during normal and wetter than normal precipitation conditions

Perennial Stream 1 was identified on the south portion of the study area. It originated from the south end of Intermittent Stream 3 as it transitioned from intermittent to perennial. It was up to five feet wide, entrenched up to three feet and contained silt, sand, gravel, and cobble.

Intermittent Stream 1 was identified on the central-west portion of the study area. It originated from Wetland 6 and flowed generally southeast before exiting the south boundary of the study area. It was up to four feet wide, entrenched up to two feet, and contained sand and gravel substrates.

Intermittent Stream 2 was identified on the south portion of the study area. It originated from a head cut proximal to Perennial Stream 1 and flowed shortly southwest before forming a confluence with Perennial Stream 1. It was up to three feet wide, entrenched up to two feet, and contained sand and gravel substrates.

Intermittent Stream 3 was identified on the east and southeast portions of the study area. It originated near the east boundary of the study area along Great Valley Parkway and flowed southwest before transitioning into Perennial Stream 1. It was up to 5 feet wide, entrenched up to four feet, and contained silt, sand, gravel, and cobble substrates.

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Intermittent Stream 4 was identified on the east portion of the study area. It originated from a head cut proximal to Intermittent Stream 3 and flowed shortly west before forming a confluence with Intermittent Stream 3. It was up to two feet wide, entrenched up to two feet, and contained sand and gravel substrates.

All of the above streams are relatively permanent streams that are tributaries of Petit Creek. Therefore, they meet the definition of an (a)(5) water.

f. The territorial seas (a)(6): N/A

Name of Aquatic	Size (in acres)	Contiguous with or abutting? If	Describe continuous surface connection
Wetland 3	0.016	No	Wetland 3 is a wetland that has a continuous surface connection to Wetland 4 (which directly abuts and
Wetland 4	0.1	Yes	Wetland 4 continues offsite to the south and directly abut Perennial Stream 1 offsite.
Wetland 5	0.34	No	Wetland 5 is a wetland that has a continuous surface connection (CSC) from its connection to an RPW by a discrete feature (culvert).
Wetland 6	0.58	Yes	Directly abuts Intermittent Stream 1, an RPW.
Wetland 7	0.025	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 8	0.001	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 9	0.064	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 10	0.008	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 11	0.1	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 12	0.008	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 13	0.007	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 14	0.012	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 15	0.002	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 16	0.029	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 17	0.33	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 18	0.21	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 19	0.006	Yes	Directly abuts Intermittent Stream 3, an RPW.
Wetland 20	0.98	No	Wetland 20 is a wetland that has a continuous surface connection (CSC) to an RPW by a discrete feature (culvert).

g. Adjacent wetlands (a)(7):

Wetlands 3 and 4 were found in the southwest portion of the study area. The majority of the site, including the southwest portion that contains these wetlands, was disturbed in the past by timber harvest and geotechnical exploration activities. Wetland 3 is connected to Wetland 4 through a swale formed along a dirt road visible in the field and on Lidar. This swale measures approximately 45 linear feet by one foot wide and contained flowing water during the site visit on May 8, 2023. The swale, though not jurisdictional itself, is a discrete feature that provides a continuous surface connection

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between Wetlands 3 and 4 which continue offsite and directly abut Perennial Stream 1 offsite. Therefore, these wetlands meet the definition of (a)(7) waters.

Wetland 5 was identified on the northeast portion of the study area, adjacent to Cass Pine Log Road Northeast. Wetland 5 drains to a culvert that flows underneath Cass Pine Log Road and connects to a tributary of South Fork Two Run Creek, both RPWs. Wetland 5 is a wetland that has a continuous surface connection (CSC) from its connection to an RPW by a discrete feature (culvert). Therefore, it meets the definition of an (a)(7) water.

Wetland 6 was identified on the west-central portion of the study area, at the top end of Intermittent Stream 1. This wetland directly abuts Intermittent Stream 1, an RPW, therefore, this wetland meet the definition of an (a)(7) water.

Wetlands 7, 8, 9, 10, 11, 12, 13, 14, and 15 were identified on the east and southeast portions of the study area, adjacent to Intermittent Stream 3. These wetlands abut Intermittent Stream 3, an RPW, therefore, they meet the definition of (a)(7) waters.

Wetlands 16, 17, 18, and 19 were identified on the northeast portion of the study area, adjacent to Intermittent Stream 3. These wetlands abut Intermittent Stream 3, an RPW, therefore, they meet the definition of (a)(7) waters.

Wetland 20 was identified on the northeast portion of the study area. This wetland drains via a culvert that flows underneath Cass Pine Log Road and connects to a tributary on the north side of the road that flows to South Fork Two Run Creek, both RPWs. Wetland 20 is a wetland that has a continuous surface connection (CSC) to an RPW by a discrete feature (culvert). Therefore, it meets the definition of an (a)(7) water.

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.

Name of excluded feature	Size	Specific exclusion a-e
Pond 1	0.78-acre	c: Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

⁵ 51 FR 41217, November 13, 1986.

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Pond 1 is located in the northeastern portion of the site. Historic aerial imagery indicates that the feature was not present until 1972. Pond 1 is located in the northeastern portion of the study area. It is circular in shape and is about 1,500 square feet in size. It was not connected to other waters Pond 1 is understood to be an artificial feature excavated in dry land for the purpose of stock watering, irrigation, settling basins, or rice growing. Therefore, it meets the definition of a (c) preamble water.

- 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. NA.
- 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).

Name of excluded feature	Size	Type of resource generally not jurisdictional
Ephemeral Stream 1	513 linear feet (0.01-acre)	Tributary lacks relatively permanent, standing or continuously flowing water
Wetland 1	0.54-acre	Wetland lacks a continuous surface connection to waters of the US

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 Wetland 2
 0.56-acre
 Wetland lacks a continuous surface connection to waters of the US

Ephemeral Stream 1 (E1) is located in the southwest portion of the site. The ephemeral stream drains the surrounding uplands following rain events and drains to Wetland 1. During the Corps site visit on May 8, 2024, E1 had flowing water, likely in response to a recent rain event. On January 5, 2023, E1 was observed to have flowing water. During the other site visits, no water was present in the feature. The ephemeral stream lacks relatively permanent, standing or continuously flowing water. Therefore, it does not meet the definition of (a)(5) waters.

Wetland 1 does not have a continuous surface connection to waters of the U.S. Wetland 1 lacked down-valley connections to Wetland 3 and Wetland 4 and is therefore considered non-jurisdictional. The majority of the site, including the southwest portion that contains Wetland 1, was disturbed in the past by timber harvest and geotechnical exploration activities. This resulted in altered plant communities including hydrophytic plant communities and hydrologic indicators being present in upland areas where upland soils were present. The Corps project manager visited the site on May 8, 2024 and was unable to locate a continuous surface connection to downstream waters.

Wetland 2 does not have a continuous surface connection to waters of the U.S. Wetland 2 lacked down-valley connections to Wetland 3 and Wetland 4 and is therefore considered non-jurisdictional. The majority of the site, including the southwest portion that contains Wetland 2, was disturbed in the past by timber harvest and geotechnical exploration activities. This resulted in altered plant communities including hydrophytic plant communities and hydrologic indicators being present in upland areas where upland soils were present. The Corps project manager visited the site on May 8, 2024 and was unable to locate a continuous surface connection to downstream waters.

- 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: April-May, 2024
 - b. Field determination(s): September 13, 2022, December 20, 2022, and January 5, 2023 (Agent); May 8, 2024 (CESAS-RDP and 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: SAS-2023-00213, Exhibit 3 dated October 16, 2023 and annotated on 5/21/2024, by CESAS-RDP.
 - $\hfill\square$ Aquatic Resources delineation prepared by the USACE: Title and Date

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⊠ Wetland field data sheets: Wetland data forms and associated photographs, dated 01/06/2023.

□ 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: Wetland data forms and associated photographs, dated 1/05/2023; and Mapped Photo Log.

Aerial Imagery: Aerial Imagery, accessed from the National Regulatory Viewer by CESAS-RD-P.

LIDAR: LIDAR imagery (3DEP Slope, 3DEP DEM, and 3DEP Hillshade), accessed from the National Regulatory Viewer by CESAS-RDP on 05/14/2024.
 USDA NRCS Soil Survey: NRCS Soil Survey, prepared 10/16/2023; and

USDA hydric soil rating data, accessed by CESAS-RDP on 05/21/2024.

☑ USFWS NWI maps: National Wetlands Inventory, dated 10/16/2023.

⊠ USGS topographic maps: Prepared 10/16/2023 and Historic topographic maps, accessed by CESAS-RDP in May 2024.

☑ USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP on 05/21/2024.

- □ Section 10 resources used: Title and Dates
- ☑ NCDWR stream identification forms dated 01/06/2023 and 05/08/2024.

Antecedent Precipitation Tool Analysis: List Date(s) 09/13/2022 (Wetter than Normal Conditions); 12/20/2022 (Normal Conditions); 01/05/2023 (Wetter than Normal Conditions); and 05/08/2024 (Normal Conditions)

☑ Other sources of Information: FEMA Floodplain Map prepared October 16, 2023; and StreamStats accessed data by CESAS-RDP in May 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.





DELINEATION OF AQUATIC RESOURCES HIGHLAND 75

