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

SAS-RD-C June 26, 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-2020-00107

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 this state due to litigation.

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[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.

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 1	Non-JD	N/A
Wetland 2	Non-JD	N/A
Wetland 3	Non-JD	N/A
Pond 1	Non-JD	N/A
Pond 2	Non-JD	N/A
Pond 3	Non-JD	N/A
Ditch 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)

   e. 2008 Rapanos Guidance

3. REVIEW AREA. The project review area is an approximately 15.83-acre site located northwest of the intersection of Grange Road and GA Highway 21, in Port Wentworth, Chatham County, Georgia (Latitude 32.1374, Longitude -81.1720).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[5] The Savannah River is the nearest TNW. The project review area is located approximately 1.7 miles from the Savannah River; however, the aquatic resources within the review area are not connected to the Savannah River. This

[5] This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

determination was made based on a review of desktop data resources described in Section 9 of this memorandum including review of the SAS Section 10 Waters list.

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

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 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

[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.

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").[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. 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 or enter rationale/discussion here.]

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

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

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 (W1)	0.003	Wetland lacks a continuous surface connection to water of the US
Wetland 2 (W2)	0.55	Wetland lacks a continuous surface connection to water of the US
Wetland 3 (W3)	0.59	Wetland lacks a continuous surface connection to water of the US
Pond 1 (P1)	0.08	Wetland lacks a continuous surface connection to water of the US
Pond 2 (P2)	0.16	Wetland lacks a continuous surface connection to water of the US
Pond 3 (P3)	0.60	Wetland lacks a continuous surface connection to water of the US
Ditch 1 (D1)	0.06	Wetland lacks a continuous surface connection to water of the US

During the Corps site visit on May 22, 2024, all aquatic resources within the project review area were observed and the delineated boundaries were verified. Pond 1 is a 0.08-acre stormwater pond dug in uplands which drains stormwater from the surrounding parking lots. Pond 2 is a 0.16-acre stormwater pond which drains stormwater from the surrounding parking lots. During the site visit, we observed the uplands around Pond 1 and Pond 2 and did find any connections between P1 and P2 and other wetlands on site. Pond 1 and Pond 2 lack a continuous surface connection to a water of the US and are determined to be non-jurisdictional. Pond 3 is a 0.60-acre pond that connects to the adjacent offsite stormwater pond to the north. Wetland 1 (W1), Wetland 2 (W2), and Wetland 3 (W3) are wetlands that meet the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic Gulf Coastal Plain Regional Supplement. Wetland 1 is a 0.003-acre strip of wetland between Pond 3 and the adjacent offsite stormwater pond to the north. Wetland 2 is a 0.55-acre wetland that is adjacent to Pond 3 and the offsite stormwater pond to the north. Wetland 3 is a 0.59-acre wetland that is adjacent to Pond 3 and abuts the offsite stormwater pond to the north. Ditch 1 starts within Wetland 2 and connects to Pond 3. Ditch 1 was observed to have relatively permanent flow and exhibit characteristics of OHWM. The offsite stormwater pond to the north (which Wetland 1, Wetland 2, Wetland 3 and Pond are adjacent to) continues towards Augusta Road where it flows into a culvert that travels under Augusta Road into a ditch system. This ditch system continues along Augusta Road to the south for

approximately 1.25 miles but does not connect to a water of the US. The ditch system does not have continuous relativity permanent flow and loses channelization and characteristics that would constitute a discrete feature at several points along the road. At these points along the road, the ditch is no longer continuous with areas of vegetation in between. JDM:SWG-2023-00284 addresses non-RPW roadside ditches as potential CSCs under the pre-2015 regulatory regime stating " Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water. In this case, for Wetland W-D-4, the approximately 2.1 mile physical connection between the wetlands and the relatively permanent water is long, and the connection is via ditches and culverts that have weak indicators of flow frequency and duration. Considering these factors together, and consistent with Sackett, the agencies concur with the District that in the factual context of Wetland W-D-4, the series of non-relatively permanent waters and culverts do not meet the continuous surface connection requirement for the Wetland W-D-4." The 1.25 mile ditch along Augusta Road also exhibits weak indicators of flow frequency and duration. The non-relatively permanent ditch does not exhibit OHWM characteristics and flows in response to storm events. It ends about 30-40 feet before reaching the nearest named waterway Pipemakers Canal. Due to the similar significantly long 1.25 mile distance of this ditch, the tenuous and non-continuous surface connection with areas of vegetation and no channelization along the ditch, and the lack of confluence of the ditch with the canal, Wetland 1, Wetland 2, Wetland 3, Pond 3 and Ditch 1 lack a continuous surface connection to a water of the US and are determined to be non-jurisdictional.

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 (Desk) Determination: June 2024

   b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Approved Jurisdictional Determination request and exhibit submitted by [redacted].

c. Data sheets prepared/submitted by or on behalf of the applicant/consultant: submitted by [redacted].

d. U.S. Geological Survey map(s): Chatham County 1'=2,000 ft.

e. U.S. Geological Survey Hydrologic Atlas: HUC 030601090307.

f. USDA Natural Resources Conservation Soil Survey: Chatham County, GA.

g. National Wetlands Inventory map(s): Chatham County, GA.

h. Photographs: Aerial: Google Earth 2023, 2021, 2019, 2004, and 1995 and Ortho Aerial 2022

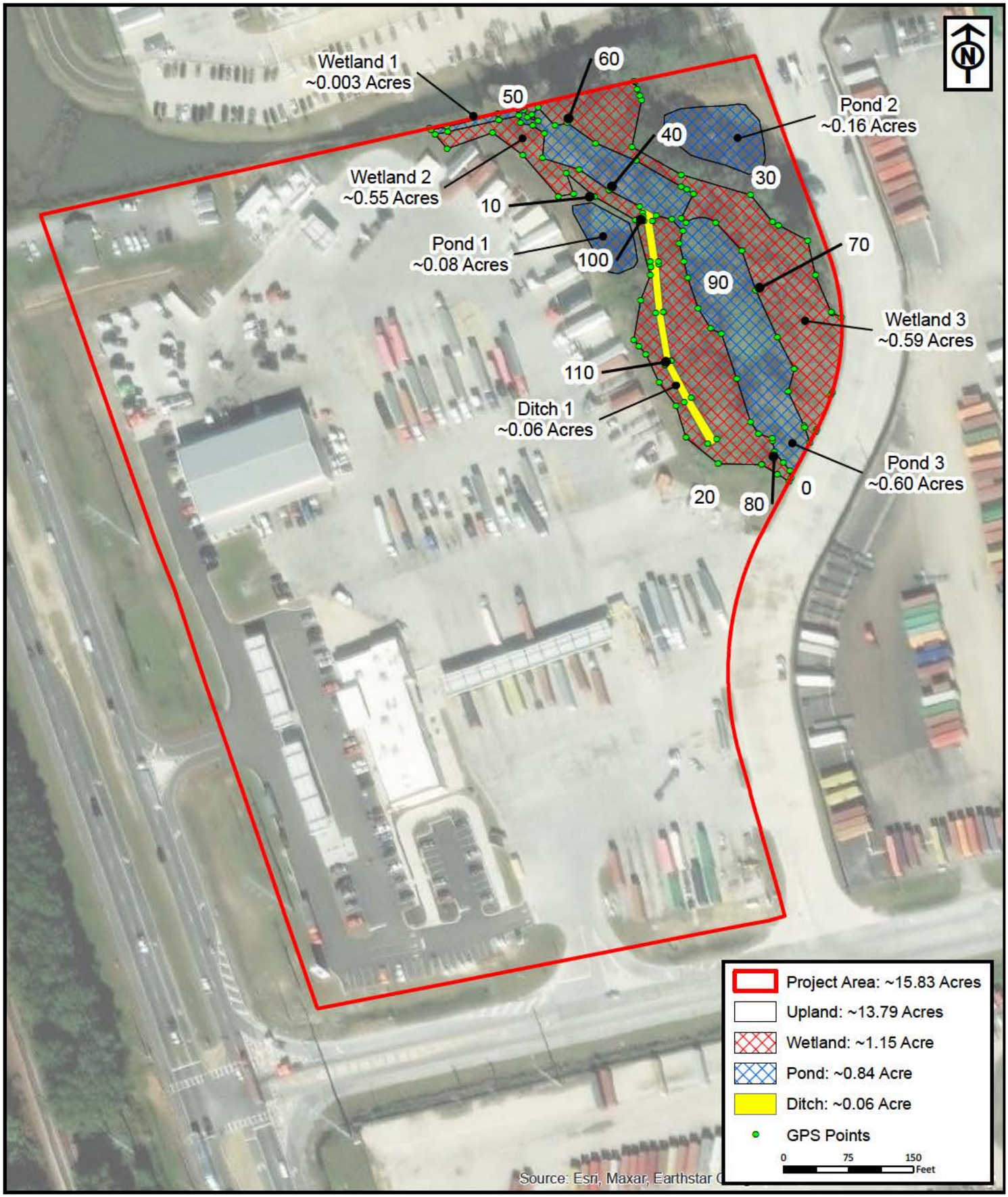
i. 20190625 Section 10 Waters List – Savannah District.

j. NOAA Topographic LiDAR: 2018 NOAA LiDAR.

k. Antecedent Precipitation Tool Analysis: [redacted] agent site visit on February 27, 2024, and Corps Site Visit on May 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.



[redacted] Project No.:	24-003
Figure No.:	8
Prepared By:	[redacted]
Sketch Date:	6/24/2024
Map Scale :	1 inch = 150 feet

Port Fuel Center

Chatham County, Georgia

Aquatic Resource GPS Delineation Exhibit

Prepared For: [redacted]

[redacted]

[redacted]

Source(s): 2019 NOAA Digital Coast Lidar; ESRI Basemap, 2022 Ortho Aerial

Label	Latitude	Longitude
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