

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

CESAS-RDP May 3, 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-2023-00901

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.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

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
WA001	Non-JD	N/A
WA002	Non-JD	N/A
WA003	Non-JD	N/A
WA006	Non-JD	N/A
WA007	Non-JD	N/A
WA010a	Non-JD	N/A
WA010b	Non-JD	N/A
WA014	Non-JD	N/A
WA015	Non-JD	N/A
WA026	Non-JD	N/A
WA027	Non-JD	N/A
WA028	Non-JD	N/A
WA029	Non-JD	N/A
WA036	Non-JD	N/A
WA040	Non-JD	N/A
WA043	Non-JD	N/A
WA046	Non-JD	N/A
WA056	Non-JD	N/A
WA059	Non-JD	N/A
WA060	Non-JD	N/A
WA061	Non-JD	N/A
WA062	Non-JD	N/A
WA066	Non-JD	N/A
WA067	Non-JD	N/A
WA076	Non-JD	N/A
WA077	Non-JD	N/A
WA078	Non-JD	N/A
WA081	Non-JD	N/A
WA092	Non-JD	N/A
WA094	Non-JD	N/A
WA095	Non-JD	N/A
WA096	Non-JD	N/A
WA097	Non-JD	N/A
WA099	Non-JD	N/A
WA102	Non-JD	N/A
WB002	Non-JD	N/A
WC001	Non-JD	N/A
WC002	Non-JD	N/A
SA001	Non-JD	N/A
SA002	Non-JD	N/A
SA003	Non-JD	N/A
SA005	Non-JD	N/A
SA006	Non-JD	N/A
SA009	Non-JD	N/A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

SA019	Non-JD	N/A
SA020	Non-JD	N/A
SA021	Non-JD	N/A
SA031	Non-JD	N/A
SA032	Non-JD	N/A
SA036	Non-JD	N/A
SA037	Non-JD	N/A
SA039	Non-JD	N/A
SA044	Non-JD	N/A
SA045	Non-JD	N/A
SA047	Non-JD	N/A
SA051	Non-JD	N/A
SA053	Non-JD	N/A
SA060	Non-JD	N/A
SA063	Non-JD	N/A
SA071	Non-JD	N/A
SA072	Non-JD	N/A
SA076	Non-JD	N/A
SA078	Non-JD	N/A
SA079	Non-JD	N/A
SA080	Non-JD	N/A
SA081	Non-JD	N/A
SA092	Non-JD	N/A
SA095	Non-JD	N/A
SA099	Non-JD	N/A
SA117	Non-JD	N/A
SA118	Non-JD	N/A
SB001	Non-JD	N/A
WB004	Non-JD	N/A
WB005	Non-JD	N/A
WB009	Non-JD	N/A
WB010	Non-JD	N/A
WB011	Non-JD	N/A
WB017	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.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), SAS-2022-00189

A. Project Acreage: ~10,206.0 acres

B. Center Coordinates of the Project Site: Latitude: 31.9977 Longitude: -84.0031

C. Nearest City or Town: Americus

D. County: Sumter County

E. State: Georgia

- F. Other Associated Jurisdictional Determinations (including outcomes): N/A.
- G. Any additional, relevant site-specific information: AJD/ARDR field site visit performed by Corps and Consultant, on April 17-19, 2023. The survey area is located west of Lake Blackshear, within the Middle Flint Watershed. Major tributaries within the survey area include Dominy Branch, Spring Creek, and Lime Creek.
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED: Flint River/Lake Blackshear (Section 10 TNW) is located east of and adjacent to this project area.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: On-site aquatic resources drain east, towards Lake Blackshear, located east of and adjacent to this property.
- 6. SECTION 10 JURISDICTIONAL WATERS⁵: 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

_

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.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

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.

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"). 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

5

⁷ 51 FR 41217, November 13, 1986.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), SAS-2022-00189

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.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

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 (in acres)	Type of resource generally not jurisdictional	
WA001	0.1	Wetland lacks a continuous surface connection to water of the US.	
WA002	0.5	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA003	0.3	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA006	1.0	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA007	1.0	Wetland lacks a continuous surface connection to water of the US.	
WA010a	2.7	Wetland lacks a continuous surface connection to water of the US.	
WA010b	1.0	Wetland lacks a continuous surface connection to water of the US.	
WA014	0.5	Wetland lacks a continuous surface connection to water of the US.	
WA015	5.4	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA026	1.8	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA027	14.2	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA028	4.2	Wetland lacks a continuous surface connection to water of the US.	
WA029	1.5	Wetland lacks a continuous surface connection to water of the US.	
WA036	11.0	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA040	1.1	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA043	1.5	Wetland lacks a continuous surface connection to water of the US.	
WA046	1.7	Wetland lacks a continuous surface connection to water of the US.	
WA056	0.7	Wetland lacks a continuous surface connection to water of the US.	
WA059	3.7	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA060	0.2	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA061	0.7	Wetland lacks a continuous surface connection to water of the US.	
WA062	0.2	Wetland lacks a continuous surface connection to water of the US.	

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

WA066	0.9	Wetland lacks a continuous surface connection to water of the	
		US.	
WA067	0.3	Wetland lacks a continuous surface connection to water of the US.	
WA076	1.4	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA077	0.3	Wetland lacks a continuous surface connection to water of the US. Separated by berm or obstruction.	
WA078	1.9	Wetland lacks a continuous surface connection to water of the US.	
WA081	2.0	Wetland lacks a continuous surface connection to water of the US.	
WA092	0.1	Wetland lacks a continuous surface connection to water of the US.	
WA094	1.3	Wetland lacks a continuous surface connection to water of the US.	
WA095	0.2	Wetland lacks a continuous surface connection to water of the US.	
WA096	0.1	Wetland lacks a continuous surface connection to water of the US.	
WA097	0.4	Wetland lacks a continuous surface connection to water of the US.	
WA099	0.2	Wetland lacks a continuous surface connection to water of the US.	
WA102	0.1	Wetland lacks a continuous surface connection to water of the US.	
WB002	0.1	Wetland lacks a continuous surface connection to water of the US.	
WC001	0.5	Wetland lacks a continuous surface connection to water of the US.	
WC002	3.9	Wetland lacks a continuous surface connection to water of the US.	
SA001	144.7 LF	Stream lacks a continuous surface connection. Separated by berm or obstruction.	
SA002	18.7 LF	Ephemeral stream is a non-relatively permanent water.	
SA003	644.3 LF	Ephemeral stream is a non-relatively permanent water.	
SA005	157.4 LF	No continuous surface connection to water of the US.	
SA006	412.9 LF	No continuous surface connection to water of the US.	
SA009	549.7 LF	Ephemeral stream is a non-relatively permanent water.	
SA019	3,381.1 LF	Ephemeral stream is a non-relatively permanent water.	
SA020	790.0 LF	Ephemeral stream is a non-relatively permanent water.	
SA021	293.0 LF	Ephemeral stream is a non-relatively permanent water.	
SA031	152.1 LF	Ephemeral stream is a non-relatively permanent water.	
SA032	228.2 LF	Ephemeral stream is a non-relatively permanent water.	
SA036	704.3 LF	Ephemeral stream is a non-relatively permanent water.	
SA037	912.8 LF	Ephemeral stream is a non-relatively permanent water.	
SA039	2,236.9 LF	Ephemeral stream is a non-relatively permanent water.	
SA044	853.7 LF	Ephemeral stream is a non-relatively permanent water.	
SA045	289.7 LF	No continuous surface connection to water of the US.	
SA047	553.0 LF	No continuous surface connection to water of the US.	
SA051	123.5 LF	Ephemeral stream is a non-relatively permanent water.	
SA053	694.4 LF	Ephemeral stream is a non-relatively permanent water.	
SA060	75.2 LF	Ephemeral stream is a non-relatively permanent water.	
SA063	178.8 LF	No continuous surface connection to water of the US.	

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

SA071	2,399.9 LF	No continuous surface connection to water of the US.
SA072	1,102.3 LF	Ephemeral stream is a non-relatively permanent water.
SA076	1,236.2 LF	Ephemeral stream is a non-relatively permanent water.
SA077	4,297.3 LF	Ephemeral stream is a non-relatively permanent water.
SA078	653.5 LF	Ephemeral stream is a non-relatively permanent water.
SA079	382.2 LF	Ephemeral stream is a non-relatively permanent water.
SA080	308.0 LF	Ephemeral stream is a non-relatively permanent water.
SA081	440.2 LF	Ephemeral stream is a non-relatively permanent water.
SA092	690.7 LF	Ephemeral stream is a non-relatively permanent water.
SA095	345.9 LF	Ephemeral stream is a non-relatively permanent water.
SA099	1,118.3 LF	Ephemeral stream is a non-relatively permanent water.
SA117	299.0 LF	Ephemeral stream is a non-relatively permanent water.
SA118	488.1 LF	Ephemeral stream is a non-relatively permanent water.
SB001	513.3 LF	Ephemeral stream is a non-relatively permanent water.
WB004	0.1-ac.	No continuous surface connection to water of the US.
WB005	1.9 ac.	No continuous surface connection to water of the US.
WB009	0.5-ac.	No continuous surface connection to water of the US.
WB010	0.2-ac.	No continuous surface connection to water of the US.
WB011	0.2-ac.	No continuous surface connection to water of the US.
WB017	1.7 ac.	No continuous surface connection to water of the US.

- 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): N/A.
 - Date(s) of Field Review (if applicable): April 17-19, 2023 (by Corps and Consultant).
 - b. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor:

 Original submittal dated January 17, 2021, and revised submittal, dated February 1, 2024.
 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: Digital Photos, taken by consultant, dated May 2018 and May 2019 (performed during various field investigation dates).

 ✓ Aerial Imagery: Index Map and Aquatic Resources Maps (Pages 1-11), date
 - Aerial Imagery: Index Map and Aquatic Resources Maps (Pages 1-11), dated Jan. 2024 (via ESRI ArcGIS Online); 1:15,000 scale.
 - ☑ LIDAR: Index Map (Dec. 2023) and LiDAR Maps (Pages 1-11, Jan. 2024)
 (via ESRI ArcGIS Online)

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2022-00189

USDA-NRCS Soil Survey Data, Sumter Co., Georgia; and ESRI ArcGIS Online)
□ USFWS NWI maps: Figure 3-2: NWI and NHD Data (via previous)
consultant), dated July 2020 (Digital Globe 2016, USGS, and USFWS)
☑ USGS topographic maps: USGS 7.5' Quads (Pages 1-11), dated Jan. 2024,
Methvins, Drayton, Leslie, and Cobb, Georgia (via USGS Topos)
□ USGS NHD data/maps: Figure 3-2: NWI and NHD Data (prepared by
previous consultant), dated July 2020 (via Digital Globe 2016, USGS, and
USFWS)
☐ Section 10 resources used: N/A.
□ NCDWR stream identification forms: N/A.
☑ Other sources of Information: Exhibit 1 - Vicinity, dated Sept. 2023 (via ESRI
World Imagery); and Exhibit 5 - FEMA Flood Zone Data, dated Sept 2023 (via
NFHL FEMA Flood Zone Data (2022); Douglas Co., Georgia; and ESRI World
Imagery Map)

- 10. OTHER SUPPORTING INFORMATION: Field site visit was conducted between April 17-19, 2023, by Corps and 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.























