



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

SAS-2024-00666

October 17, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination considering *Sackett v. EPA*, 598 U.S. 651 (2023), SAS-2024-00666

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. SUMMARY OF CONCLUSIONS.

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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- 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
Ephemeral feature	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. 651 (2023)

3. REVIEW AREA (“Ferry Cove”):

- A. 16.81-acres
- B. Latitude: 34.140014° north, Longitude: latitude and longitude -84.002156° west
- C. North of Buford
- D. Gwinnett County
- E. Georgia

F. Any additional, relevant site-specific information: Aerial imagery (since 1955) indicate that the property was historically used for agriculture. However, the property was gradually allowed to vegetate after the mid-to-late 1960’s and has remained forested.

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

The Chattahoochee River is the nearest TNW to which the subject aquatic resource in the review area connects. It is located approximately 34,119 linear feet (~6.46 linear miles) west of the review area.

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

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Ephemeral feature flows southward into Intermittent Stream 3. Intermittent Stream 3 flows generally southeastward and converges with Perennial Stream 1. Perennial Stream 1 flows westward and exits the review area.

According to the agent's onsite delineation, Intermittent Stream 3 flows for approximately 298 feet south and converges with Perennial Stream 1. Based on our review of the USGS Burford Dam 7.5-minute Quadrangle Topographical Map and USGS Suwanee 7.5-minute Quadrangle Topographical Map, Perennial Stream 1 flows southwestward and exits the review area. Perennial Stream 1 flows southwest from the boundary of the review area for approximately 6,200 feet (~1.17 mile) and enters an Unnamed Tributary to Richland Creek. The Unnamed Tributary to Richland Creek flows west approximately 2,540 feet (~0.48 mile) and enters Richland Creek. Richland Creek flows west approximately 24,510 (~4.65 miles) and enters the Chattahoochee River, the closest TNW.

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 10.⁵ **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.

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.

⁵ 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.

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- 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. 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”).⁶ 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**

⁶ 51 FR 41217, November 13, 1986.

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- 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
Ephemeral feature	0.011	Tributary lacks a relatively permanent presence of water, during wetter than normal precipitation conditions.

Ephemeral feature: Ephemeral feature 1 is a tributary to Intermittent Stream 3, located in the center of the review area. During the agent’s onsite delineation, no water was observed in the tributary’s channel. The delineation was completed during normal climatic conditions, based on results from the Antecedent Precipitation Tool. Additionally, the tributary received a score of 6 on the NC DWQ Stream Identification Form Version 4.11. The tributary does not have a relatively permanent presence of water, being understood to only flow in response to precipitation events. Therefore, it does not meet the definition of a Tributary (a)(5).

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: September 2024 (CESAS-RDP)
- b. Field determination(s): April 17, 2024 (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: April 17, 2024
 - Aquatic Resources delineation prepared by the USACE: Title and Date
 - Wetland field data sheets prepared by the Corps: Title and Date
 - 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: Tallman Environmental, Ferry Cove Photographs, April 17, 2024
 - Aerial Imagery: Google Earth, Site Location Map, June 19, 2024
 - LIDAR: NRV, SAS-2024-00666, October 11, 2024
 - USDA NRCS Soil Survey: Web Soil Survey, June 19, 2024

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- USFWS NWI maps: NRV, SAS-2024-00666, October 2, 2024
- USGS topographic maps: Topographic Map, June 19, 2024
- USGS NHD data/maps: NRV, SAS-2024-00666, October 2, 2024
- Section 10 resources used: USACE SAS Section 10 of the RHA of 1899 Listed Waters
- NCDWR stream identification forms
- Antecedent Precipitation Tool Analysis: April 17, 2024
- Other sources of Information: List

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.

