



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

15 November 2024

CESAS-RD-P

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023),¹ SAS-2006-00109

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 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.

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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	JD or Non-JD	Section 404/Section 10
I1	JD	Section 404

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.

- A. Project Area Size (in acres): 19.64
- B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 34.26896, Longitude: -84.17731
- C. Nearest City or Town: Cumming
- D. County: Forsyth
- E. State: Georgia
- F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2006-00109	AJD	Starr Creek identified as a jurisdictional WOTUS under <i>Rapanos</i> , January 20 2006

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

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A. Name of nearest downstream TNW, Territorial Sea or interstate water: Coosa River

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 field visit conducted on DATE (if applicable), 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 (include in AR) occurrences of boating traffic on the identified water. For interstate waters, based on a review several maps listed in Section 9 of this memorandum, the identified water is shown as an aquatic feature and crossing the interstate boundary of Georgia/South Carolina, or Georgia/North Carolina, Georgia/Tennessee, Georgia/Alabama, or Georgia/Florida.

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

IS1 is a relatively permanent water (RPW) and is an unnamed tributary to an unnamed tributary that is located north of and outside the boundary of the project site. The northern unnamed tributary flows to the southwest to Starr Creek, a RPW. Starr Creek flows north to Settingdown Creek, a RPW. Settingdown Creek flows northeast to the Etowah River, a RPW. The Etowah River flows east to the Coosa River, a traditionally navigable water (TNW). The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks.

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

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.

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 (in acres)	Flow Regime and additional description of the tributary	Method for determining flow regime
I1	0.016	See attached delineation map	I1 is a relatively permanent water, flow was observed during drier than normal precipitation conditions, NCDWR stream identification form.

- 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”).⁷ 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
 - 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.

⁷ 51 FR 41217, November 13, 1986.

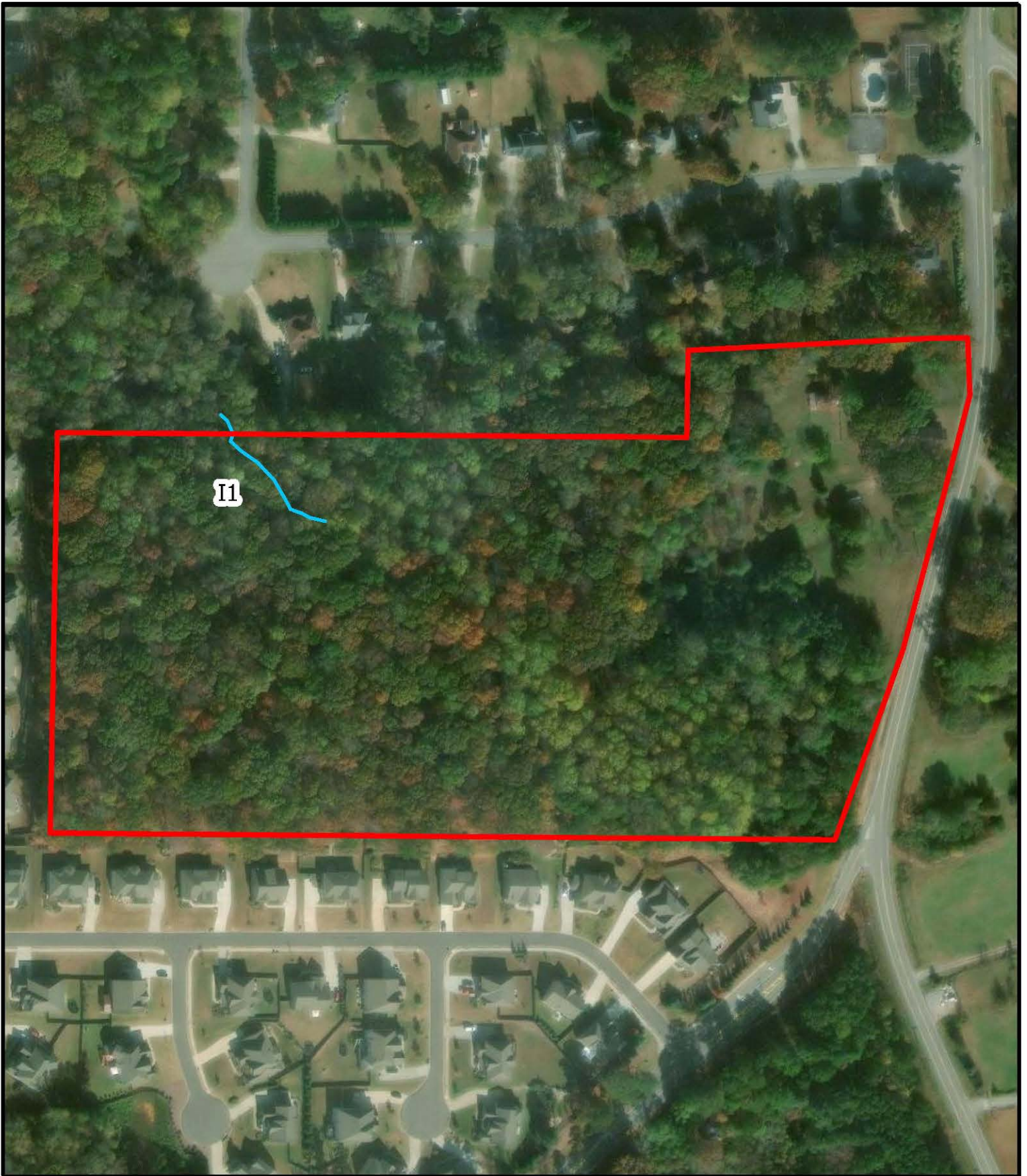
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- a. 1. Date of Office (desktop review): November 12 2024
2. Date(s) of Field Review (if applicable): August 19 2024 by consultant
- b. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation: Provided by consultant: Figure 2 dated August 19 2024.
 - Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: SAS-2006-00109, January 20 2006.
 - Photographs: Provided by consultant , Attachment C Site Photos, dated August 19, 2024
 - Aerial Imagery: Provided by consultant, Figure 2, dated August 19 2024.
 - LIDAR: USACE , SAS-2006-00109_ LIDAR, dated November 1 2024.
 - USDA NRCS Soil Survey: provided by consultant, Figure 3, August 14 2024.
 - USFWS NWI maps: Provided by Consultant, dated August 14 2024.
 - USGS topographic maps: Provided by USACE, SAS-2006 00109_USGSTOPO, dated November 12 2024.
 - USGS NHD data/maps: Provided by USACE, SAS-2006-00109_NHD, dated November 12 2024.
 - NCDWR stream identification forms, Provided by consultant, dated August 19 2024.
 - Antecedent Precipitation Tool Analysis: Provided by USACE, dated August 24 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.



Produced By:



KF Environmental

**FIGURE 2: AQUATIC RESOURCE
DELINEATION MAP**

Dr Bramblett Road Site
Forsyth County, Georgia
For
Grand Communities, LLC
24KFE08105
August 19, 2024

LEGEND

-  Property Boundary
-  Intermittent Stream

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