



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

SAS-2024-00568

November 21, 2024

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),  
SAS-2024-00568

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.<sup>1</sup> 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.<sup>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</sup> 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. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</sup> 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
Intermittent Stream 1	JD	Section 404
Wet Weather Conveyance	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.

- A. ~2.15 acres
- B. Latitude: 34.0933, Longitude: -83.8416
- C. Braselton
- D. Gwinnett County
- E. Georgia
- G. Onsite waters are associated with an unnamed tributary of Wheeler Creek (*Intermittent Stream 1*). Historic aerial imagery indicates that the review area was forested and undeveloped until the area was established as a residential lot (in between 1993 and 1999). The neighboring lot to the northwest was constructed in between 2007 and 2008. *Wet Weather Conveyance* was constructed in conjunction with this the neighboring lot, emerging on 2008 aerial imagery.

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

- A. The Middle Oconee River, located approximately 140,000 linear feet (43 linear kilometers) southeast of the subject review, is the nearest TNW.
- 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

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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 on the identified water.

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

Water within Wet Weather Conveyance flows southeastward into Intermittent Stream 1. Intermittent Stream 1 flows southeastward and exits the review area. From the limits of the review area, Intermittent Stream 1 is understood to continue to flow southeastward for approximately 2,700 feet and enters Wheeler Creek. From the confluence of Intermittent Stream 1 and Wheeler Creek, the flowpath is understood to continue southeastward via Wheeler Creek, Duncan Creek, and Mulberry River for approximately 42 kilometers (~14,000 feet) until entering the Middle Oconee River, the nearest TNW.

6. SECTION 10 JURISDICTIONAL WATERS<sup>4</sup>: 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

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<sup>4</sup> 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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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 linear feet)	Flow Regime and additional description of the tributary	Method for determining flow regime
Intermittent Stream 1	261	Intermittent; See additional description below.	observed flow during site visit during normal precipitation conditions; NC DWQ stream identification form

Intermittent Stream 1: The subject water is located in the western half of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), Intermittent Stream 1 was observed to be composed of a single flow regime. The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine flow regime. The stream received a score 23, concluding a intermittent flow regime. The stream is understood to flow seasonally (relatively permanently). The stream is a relatively permanent tributary of Wheeler Creek, an RPW and tributary of the Oconee River. Therefore, Intermittent Stream 1 meets the definition of an (a)(5) water.

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").<sup>5</sup> 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 (feet)	Specific exclusion a-e
Wet Weather Conveyance	~100	a) Non-tidal drainage and irrigation ditches excavated on dry land.

<sup>5</sup> 51 FR 41217, November 13, 1986.

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Wet Weather Conveyance: The subject water is located along the northwestern boundary of the review area. Based on available information/data, there were no natural waters located within the current footprint of Wet Weather Conveyance. Based on historic aerial imagery, the subject water was established in conjunction with the development of the residential lot located northeast of the review area (circa 1998). The feature is understood to have been constructed to convey water from upland areas during precipitation events. As a non-tidal drainage feature constructed in uplands, Wet Weather Conveyance meets the definition of an (a) 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. 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

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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: July-November 2024 (CESAS-RDP)
  - b. Field determination(s): August 28, 2023 (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: *Delineation Map*, as prepared by the Agent, and dated 8/28/2023.
    - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
    - ☒ Wetland field data sheets
    - ☒ 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: Photo Key Map: *Delineation Map and Photographic Log* (comprised of Photo Nos. 1-8), as collectively prepared by the Agent and dated 8/28/2023.
    - ☒ Aerial Imagery: Figure 1: *Site Location Map*, as prepared by the Agent and provided to CESAS-RDP on 7/11/2024.
    - ☒ LIDAR: LIDAR imagery (3DEP DEM and 3DEP Hillshade), retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in 11/24.
    - ☒ USDA NRCS Soil Survey: Web Soils Survey, as retrieved by the Agent 8/28/2023; and USDA hydric soil rating data, retrieved by CESAS-RDP in 11/24.
    - ☒ USFWS NWI maps: NWI data retrieved by the Agent and provided to CESAS-RDP on 7/11/2024.
    - ☒ USGS topographic maps: Figure 2: Topographic Map, as prepared by the Agent and provided to CESAS-RDP on 7/11/2024; and historic topographic maps (1891-2024), retrieved by CESAS-RDP in 11/24.
    - ☒ USGS NHD data/maps: NHD data, retrieved from the NRV by CESAS-RDP in 7/2024.
    - ☐ Section 10 resources used: Title and Dates
    - ☒ NC DWQ stream identification forms
    - ☒ Antecedent Precipitation Tool Analysis (List Date(s)): APT Data from 8/28/2023 (all "Normal Conditions").
    - ☒ Other sources of Information: USDM - Georgia (8/26/23), retrieved by CESAS-RDP; FEMA Flood Hazard data, retrieved from the NRV by CESAS-RDP in 11/2024; StreamStats data retrieved by CESAS-RDP in 11/2024; and 2-foot contour imagery retrieved from the NRV by CESAS-RDP in 11/2024.

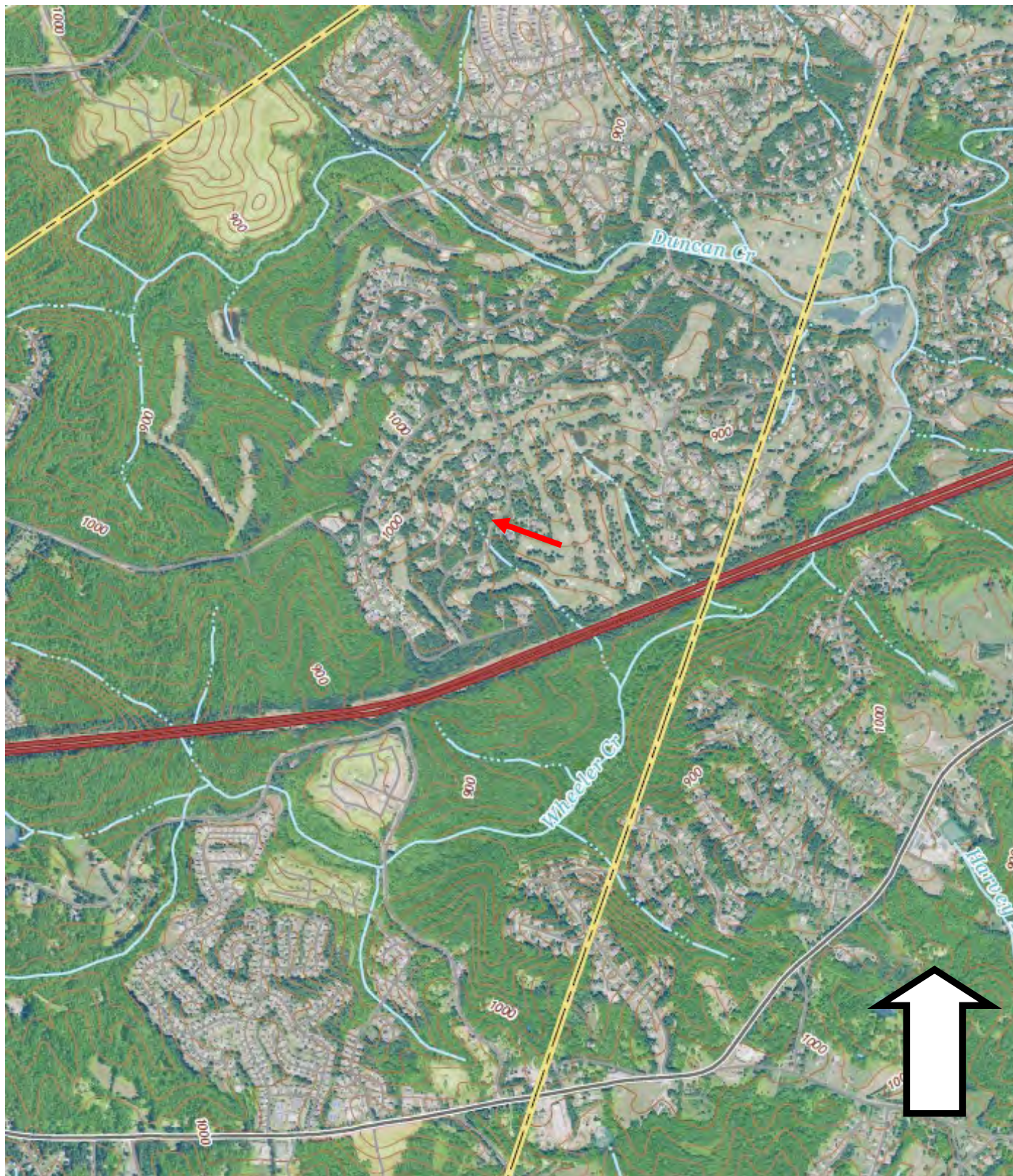
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10. OTHER SUPPORTING INFORMATION. N/A

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.





SOURCE: Auburn, Georgia 7.5-minute topographic quadrangle map (2020)

Figure 2  
Scale: 1"=2,000'

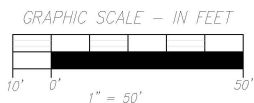
Topographic Map  
1870 Kathy Whitworth Drive  
Gwinnett County, Georgia

Tallman Environmental, Inc.  
2095 Highway 211 NW, 2F #116  
Braselton, Georgia 30517  
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678.468.2288



WET WEATHER  
CONVEYANCE

UPPER LIMIT  
INTERMITTENT STREAM  
STREAM 1



**1870 Kathy Whitworth Drive**  
Delineation Map

DRAWN BY	AJT
CHECKED BY	AJT
8-28-2023	

**Tallman Environmental, Inc.**

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