

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

SAS-2024-00865

December 16, 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-2024-00865

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 iurisdiction.

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 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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- 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
Perennial Stream (a)(5)	JD	Section 404
Intermittent Stream 1 (a)(5)	JD	Section 404
Intermittent Stream 2 (a)(5)	JD	Section 404
Ephemeral Stream (a)(5)	JD	Section 404
Wetland 1 (a)(7)	JD	Section 404
Wetland 2 (a)(7)	JD	Section 404
Wetland 3 (a)(7)	JD	Section 404
Wetland 4 (a)(7)	JD	Section 404
Wetland 5 (a)(7)	JD	Section 404
Wetland 6 (a)(7)	JD	Section 404
Wetland 7 (a)(7)	JD	Section 404
Wetland 8 (a)(7)	JD	Section 404
Stormwater Pond 1	Non-JD	N/A
Stormwater Pond 2	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. 651 (2023), 143 S. Ct. 1322 (2023)
- 3. REVIEW AREA. ("Sierra Creek Phase 3")
 - A. ~50.2-acres
 - B. Latitude: 34.057156, Longitude: -83.867944
 - C. Hoschton
 - D. Gwinnett County
 - E. Georgia

G. Onsite waters are associated with Little Mulberry River. Historic aerial imagery indicates that the review area remained undisturbed until upland areas for the roads

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were cleared (between 2002 and 2007). According to aerials, no other activities have occurred in the review area, and the trees have been allowed to revegetate.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
 - A. The Oconee River, located approximately 122 miles 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 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 from Wetland 3 (~0.004-acre) flows southward into Intermittent Stream 1.
 - Water from Wetland 4 (~0.006-acre) flows northward into Intermittent Stream 1.
 - Water from Wetland 5 (~0.001-acre) flows southward into Perennial Stream.
 - Water from Wetland 6 (~0.008-acre) flows southward into Perennial Stream.
 - Water from Wetland 7 (~0.008-acre) flows westward into Intermittent Stream 2.
 - Water from Intermittent Stream 2 (~411 linear feet) flows northwestward and converges with Perennial Stream.
 - Water from Perennial Stream (~1,654 linear feet) flows northwestward through Wetland 8 (~0.942-acre).
 - Water from Perennial Stream and Wetland 8 flow northward, exiting the review area. Based on the available information, it is understood that water from Perennial Stream and Wetland 8 continue to flow for approximately 215 linear feet to the Little Mulberry River.
 - Water from Ephemeral Stream (~351 linear feet) flows northwestward and becomes Intermittent Stream 1.
 - Intermittent Stream 1 (~615 linear feet) flows northwestward through Wetland 2 (~0.108-acre) and into Wetland 1 where it loses OHWM.

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- Water from Wetland 1 (~0.147-acre) flows northward, exiting the review area. Based on the available information, it is understood that water from Wetland 1 continues to flow for approximately 130 linear feet to the Little Mulberry River.
- It is understood that waters from within the review area flow via Little Mulberry River, Mulberry River, Middle Oconee River, Oconee River, Lake Oconee, and Lake Sinclair, for approximately 122 miles southeast and enter the Oconee River (TNW) at its point of navigability south of the Lake Sinclair Dam, Milledgeville, Baldwin County.
- 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. 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):

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.

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Name of Aquatic Resource	Size (in linear feet)	Flow Regime and additional description of the tributary	Method for determining flow regime
Perennial Stream	1,654	Perennial; See additional description below.	observed flow during site visit during drier than normal precipitation conditions; NC DWQ stream identification form
Intermittent Stream 1	615	Intermittent; See additional description below.	observed flow during site visit during drier than normal precipitation conditions; NC DWQ stream identification form
Intermittent Stream 2	411	Intermittent; See additional description below.	observed flow during site visit during drier than normal precipitation conditions; NC DWQ stream identification form
Ephemeral Stream	351	Ephemeral; See additional description below.	No flow was observed during site visit during drier than normal precipitation conditions; NC DWQ stream identification form

- Perennial Stream: The subject water is located in the northern portion of the review area. During the Agent's onsite delineation (conducted during drier than normal conditions based on the WETS table for the Cumming 2N, GA station), the stream was assessed to determine its flow regime. The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine flow regime. The stream (1,654 linear feet) received a score of 35, indicating a perennial flow regime. The stream is understood to maintain a continuous flow (relatively permanently). It is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Oconee River. Therefore, Perennial Stream meets the definition of an (a)(5) water.
- Intermittent Stream 1: The subject water is located in the southern portion of the review area. During the Agent's onsite delineation (conducted during drier than normal conditions based on the WETS table for the Cumming 2N, GA station), the stream was assessed to determine its flow regime. The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine flow regime. The stream (615 linear feet) received a score of 23.5, indicating an intermittent flow regime. The stream is understood to flow seasonally (relatively permanently). It is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Oconee River. Therefore, Intermittent Stream 1 meets the definition of an (a)(5) water.
- Intermittent Stream 2: The subject water is located in the northeastern portion of the review area. During the Agent's onsite delineation (conducted during drier than normal conditions based on the WETS table for the Cumming 2N, GA station), the stream was assessed to determine its flow regime. The scoring

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system of the NC DWQ Stream Identification Form Version 4.11 was used to determine flow regime. The stream (411 linear feet) received a score of 26.5, indicating an intermittent flow regime. The stream is understood to flow seasonally (relatively permanently). It is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Oconee River. Therefore, Intermittent Stream 1 meets the definition of an (a)(5) water.

- Ephemeral Stream: The subject water is located in the southern portion of the review area. During the Agent's onsite delineation (conducted during drier than normal conditions based on the WETS table for the Cumming 2N, GA station), the stream was assessed to determine its flow regime. The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine flow regime. The stream (351 linear feet) received a score of 14.5, indicating an ephemeral flow regime. The stream is understood to flow only in response to precipitation events (non-relatively permanently). However, in accordance with the pre-2015 regulatory regime as reflected in the 2008 Rapanos Guidance, a tributary is the entire reach of the stream that is of the same order: and the flow characteristics generally will be evaluated at the farthest downstream limit of such a tributary. If the data indicates the flow regime at the downstream limit is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with different flow. Therefore, due to the length of Intermittent Stream 1 (615 linear feet) in comparison to the length of Ephemeral Stream (351 linear feet), the entire feature is categorized as a relatively permanently water. As a RPW, it is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Oconee River, a TNW. Therefore, Ephemeral Stream meets the definition of an (a)(5) water.
- Name of Size (in Contiguous with Describe continuous surface connection Aquatic acres) or abutting? If so, Resource list water Wetland 1 ~0.147 The wetland boundary is abutting and contiguous with Yes Tributary Intermittent Stream 1, an RPW. Wetland 2 ~0.108 Yes The wetland boundary is abutting and contiguous with Tributary Intermittent Stream 1, an RPW. ~0.004 Wetland 3 Yes The wetland boundary is abutting and contiguous with Tributary Intermittent Stream 1, an RPW. ~0.006 Wetland 4 Yes The wetland boundary is abutting and contiguous with Tributary Intermittent Stream 1, an RPW.
- g. Adjacent wetlands (a)(7):

f. The territorial seas (a)(6): N/A

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Wetland 5	~0.001	Yes	The wetland boundary is abutting and contiguous with
			Tributary Perennial Stream, an RPW.
Wetland 6	~0.008	Yes	The wetland boundary is abutting and contiguous with
			Tributary Perennial Stream, an RPW.
Wetland 7	~0.008	Yes	The wetland boundary is abutting and contiguous with
			Tributary Intermittent Stream 2, an RPW
Wetland 8	~0.942	Yes	The wetland boundary is abutting and contiguous with
			Tributary Perennial Stream, an RPW.

- Wetland 1: The subject water is in the northwestern portion of the review area. The wetland abuts Intermittent Stream 1 and drains northward offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 1 meets the definition of an (a)(7) water.
- Wetland 2: The subject water is in the northwestern portion of the review area. The wetland abuts Intermittent Stream 1 and drains into Intermittent Stream 1. Intermittent Stream 1 drains northward into Wetland 1 where it loses OHWM. The water drains offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 2 meets the definition of an (a)(7) water.
- Wetland 3: The subject water is in the western portion of the review area. The wetland abuts Intermittent Stream 1 and drains southward into Intermittent Stream 1. Intermittent Stream 1 drains northward into Wetland 1 where it loses OHWM. The water drains offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 3 meets the definition of an (a)(7) water.
- Wetland 4: The subject water is in the western portion of the review area. The wetland abuts Intermittent Stream 1 and drains northward into Intermittent Stream 1. Intermittent Stream 1 drains northward into Wetland 1 where it loses OHWM. The water drains offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 4 meets the definition of an (a)(7) water.
- Wetland 5: The subject water is in the southeastern portion of the review area. The wetland abuts Perennial Stream and drains southward into Perennial Stream. Perennial Stream drains northwestward offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 5 meets the definition of an (a)(7) water.
- Wetland 6: The subject water is in the southeastern portion of the review area. The wetland abuts Perennial Stream and drains southward into Perennial Stream. Perennial Stream drains northwestward offsite into the Little Mulberry

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River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 6 meets the definition of an (a)(7) water.

- Wetland 7: The subject water is in the southeastern portion of the review area. The wetland abuts Intermittent Stream 2 and westward into Intermittent Stream 2. Intermittent Stream 2 drains into Perennial Stream which drains northwestward offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 7 meets the definition of an (a)(7) water.
- Wetland 8: The subject water is in the northwestern portion of the review area. The wetland abuts Perennial Stream and drains northward offsite into the Little Mulberry River, an RPW tributary of the Oconee River, a TNW. Therefore, Wetland 8 meets the definition of an (a)(7) water.
- 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").⁵ 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.

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Stormwater Detention Pond 1	0.66	Waste Treatment System Exclusion
Stormwater Detention Pond 2	0.50	Waste Treatment System Exclusion

⁵ 51 FR 41217, November 13, 1986.

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- Stormwater Detention Pond 1: The subject water is in the southwestern portion of the review area. It is a stormwater detention pond; and therefore, generally excluded from regulatory jurisdiction.
- Stormwater Detention Pond 2: The subject water is in the northwestern portion of the review area. It is a stormwater detention pond; and therefore, generally excluded from regulatory jurisdiction.
- 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.
 - a. Office (desktop) determination: September-November 2024 (CESAS-RDP)
 - b. Field determination(s): September 17, 2023 (Agent); November 22, 2024 (USACE)
 - c. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor: Exhibit 3: *Delineation of Aquatic Resources*, as prepared by the Agent, and dated September 18, 2024.
 - □ Aquatic Resources delineation prepared by the USACE: Title and Date
 - \boxtimes Wetland field data sheets

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- $\hfill\square$ 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: Site photographs collectively prepared by the Agent, and dated September 18, 2024 and October 24, 2024; and Site photographs collected and prepared by CESAS-RDP in November 2024.
- Aerial Imagery: Aerial imagery retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in November 2024.
- ☑ LIDAR: LIDAR imagery (3DEP DEM + 3DEP Hillshade and 3DEP Hillshade + 2 foot contours), retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in November 2024.
- ☑ USDA NRCS Soil Survey: Exhibit 5: *USDA Soils Survey*, as prepared by the Agent, and dated September 18, 2024; and USDA hydric soil rating data, retrieved by CESAS-RDP in November 2024.
- ⊠ USFWS NWI maps: Exhibit 6: *NWI Map*, as prepared by the Agent, and dated September 18, 2024.
- ☑ USGS topographic maps: Exhibit 2: *USGS Quadrangle Map*, as prepared by the Agent, and dated September 18, 2024.
- ☑ USGS NHD data/maps: NHD data, retrieved from the NRV by CESAS-RDP in November 2024.
- □ Section 10 resources used: Title and Dates
- \boxtimes NC DWQ stream identification forms
- ⊠ WETS table for Cumming 2N, GA Station: for June, July, and August (all "Drier than Normal Conditions"), dated September 18, 2024.
- ☑ Other sources of Information: Exhibit 8: *FEMA Flood Hazard Map*, as prepared by the Agent, and dated September 18, 2024; StreamStats data retrieved by CESAS-RDP in November 2024; and 2-foot contour imagery retrieved from the NRV by CESAS-RDP in November 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.



AERIAL PHOTO W/ AQUATIC RESOURCE

DELINEATION OF AQUATIC RESOURCES SIERRA CREEK PHASE 3 GWINNETT COUNTY, GEORGIA PREPARED SEPTEMBER 18, 2024 NELSON ENVIRONMENTAL, INC.

PREPARED FOR: SIERRA CREEK ATLANTA, LLC

www.NelsonEnvironmental.us PH:404/862-1665