



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

SAS-2024-00768

December 26, 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-2024-00768

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 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
Wetland 1	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), 143 S. Ct. 1322 (2023)

3. REVIEW AREA. ("Harmony at Lake Alice")

- A. ~7.95-acres
- B. Latitude: 34.195515, Longitude: -84.122819
- C. Cumming
- D. Forsyth County
- E. Georgia
- G. Onsite waters are associated with Lake Sidney Lanier. Historic aerial imagery indicates that the review area was used in agriculture until approximately 1963. There is a gap in the recorded history. However, from 1981 to now, the review area has remained predominantly forested. According to aerials, no other activities have occurred in the review area.

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

- A. The Chattahoochee River, located approximately 4 miles southeast of the subject review, is the nearest TNW.

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- 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 1 (~0.42-acre) flows southward, exiting the review area.
- Based on the available information, it is understood that water from Wetland 1 continues to flow for approximately 111 linear feet to a buried corrugated metal culvert.
- Based on the available information, it is understood that after discharging from the culvert, water from Wetland 1 continues to flow within an unnamed tributary for approximately 440 linear feet to Little Ridge Creek.
- It is understood that waters from within the review area flow via Little Ridge Creek, Baldrige Creek, and Lake Sidney Lanier for approximately 4 miles southeast and enter the Chattahoochee River (TNW) at its point of navigability south of the Lake Sidney Lanier Dam, Buford, Forsyth 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

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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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): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):

Name of Aquatic Resource	Size (in acres)	Contiguous with or abutting? If so, list water	Describe continuous surface connection
Wetland 1	~0.42	Yes	The wetland has a continuous surface connection with an unnamed tributary to Little Ridge Creek, an RPW.

- Wetland 1: The subject water is in the southeastern portion of the review area. The water drains offsite through a continuous surface connection to Little Ridge Creek, a RPW tributary of the Chattahoochee River, a TNW. Therefore, Wetland 1 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

⁵ 51 FR 41217, November 13, 1986.

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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.
- a. Office (desktop) determination: September-December 2024 (CESAS-RDP)
 - b. Field determination(s): April 3, 2024 (Agent); November 13, 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 7: *Wetland Delineation Map*, as prepared by the Agent, and dated November 2024.
 - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
 - ☒ Wetland field data sheets
 - ☐ OHWM data sheets prepared by the USACE: Title and Date

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- ☐ 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 April 2024.
- ☒ Aerial Imagery: Aerial imagery retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in September 2024.
- ☒ LIDAR: LIDAR imagery (3DEP DEM + 3DEP Hillshade), retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in September 2024.
- ☒ USDA NRCS Soil Survey: Exhibit 4: *NRCS Soil Map*, as prepared by the Agent, and dated April 2024; and USDA hydric soil rating data, retrieved by CESAS-RDP in September 2024.
- ☒ USFWS NWI maps: Exhibit 3: *NWI Map*, as prepared by the Agent, and dated April 2024.
- ☒ USGS topographic maps: Exhibit 2: *Topographic Map*, as prepared by the Agent, and dated April 2024.
- ☒ USGS NHD data/maps: NHD data, retrieved from the NRV by CESAS-RDP in September 2024.
- ☐ Section 10 resources used: Title and Dates
- ☐ NC DWQ stream identification forms
- ☒ Antecedent Precipitation Tool Analysis (List Date(s)): APT Data April 3, 2024 (all "Wetter Than Normal Conditions").
- ☒ Other sources of Information: Exhibit 5: *FEMA Flood Map*, as prepared by the Agent, and dated April 2024; StreamStats data retrieved 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.



Legend

- Boundary (7.95 acres)
- Wetlands
- Datpoint Location

Feet
0 105 210 420

DATA SOURCES:
ESRI - Basemaps

Project No.:	49247036
Date:	Nov 2024
Drawn By:	ANM
Reviewed By:	JWB



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terracon.com

Wetland Delineation Map

Harmony at Lake Alice
Cumming, Forsyth County, Georgia

Exhibit

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