

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

CESAS-RDP

March 14, 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ [SAS-2024-01057]

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 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 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).

The following three (3) aquatic resources were identified within the AJD review area during the applicant's field surveys (conducted on July 8-9, 2024 and October 9, 2024).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 02	Non-JD	Section 404
Wetland 03	Non-JD	Section 404
Wetland 04	Non-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. _, 143 S. Ct. 1322 (2023)
- 3. REVIEW AREA.
 - A. Project Area Size (in acres): Approximate 28-acre review area.
 - B. Center Coordinates of the Project Site (in decimal degrees):
 - Latitude: 32.3427 Longitude: -81.1892
 - C. Nearest City or Town: Rincon
 - D. County: Effingham
 - E. State: Georgia
 - F. Other associated Jurisdictional Determinations (including outcomes): N/A.

G. Any additional, relevant site-specific information: This review area is located within a total 186 acres of property. The review area contains three wetlands which present non-adjacent/non-CSC features, which will be further described below. Georgia Power's existing Plant McIntosh is located to the northeast, and a Georgia Pacific Plant site is located to the southwest of this review area. State Route 123/Nellie Road/service

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road borders the northern limits of this review area. The review area is also bisected by a separate service road.

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

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

B. Determination based on: This determination was made based on a review of the SAS Section 10 list, as a water body that is navigable-in-fact under federal law (Section 10, RHA).

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

Aquatic resources within the review area (and subject property) would drain to the north towards an unnamed tributary(an RPW), then drain into Lockner Creek (an RPW), and then drain to the east until reaching its confluence with Savannah River (a TNW).

- 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.
- 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

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.

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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): N/A.
- 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.

⁷ 51 FR 41217, November 13, 1986.

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- 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).

Name of excluded	Size (in	Type of resource generally not jurisdictional	
feature	acres)		
Wetland 02	4.08	Wetland 02 lacks a continuous surface connection to any waters of the US. This forested depressional wetland system is surrounded by an upland planted pine community (wind rows seen in aerial photography), with some portions of the planted pine extending into the wetland's boundary limits. No tributaries flow into or out of this wetland. Review of topographic maps indicates that this wetland may connect to other adjacent wetlands to the north or west, however, service roads exist and limit drainage from this wetland to other resources. A review of the applicant's land description (pine wind rows, service roads with no culverts, and a western upland berm with no culverts, separating the wetland(s) on GPC's property from an off-site stormwater pond), digital photography, and LiDAR all suggest that an upland break exists, with no continuous surface connection between Wetland 02 and any adjacent aquatic resources. (Reference Photos 1, 7, 8, 9, 10, and 11).	
Wetland 03	0.38	Wetland 03 lacks a continuous surface connection to any waters of the US. This forested depressional system is surrounded by an upland planted pine community (wind rows seen in aerial photography), with some portions of the planted pine extending into the wetland's boundary limits. No tributaries flow into or out of this wetland. Standing water to a depth of approximately 6 inches was observed within the lowest point of the wetland. Representative photos of this wetland were provided by the applicant, depicting the depressional feature and visible inundation at the surface of this wetland. Review of topographic maps indicates that this wetland may connect to other adjacent wetlands to the north, however, a	

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		review of the applicant's land description (pine wind rows and a service road with no culverts, and uplands located immediately north of this wetland), digital photography, and LiDAR all suggest that an upland break exists, with no continuous surface connection between Wetland 03 and any adjacent aquatic resources. (Reference Photos 2 and 3.)
Wetland 04	1.76	Wetland lacks a continuous surface connection to water of the US. Wetland 04 is a forested depressional system located within a topographic bowl surrounded by planted pine uplands. Some portions of the planted pine extend into the wetland boundary. No tributaries flow into or out of this wetland. Standing water to a depth of approximately 2 inches was observed within the lowest point of the wetland. Review of topographic maps indicates that this wetland may connect to other adjacent wetlands to the north, however, a review of the applicant's land description (pine wind rows and a service road with no culverts, and uplands located immediately north of this wetland), digital photography, and LiDAR all suggest that an upland break exists, with no continuous surface connection between Wetland 04 and any adjacent aquatic resources. (Reference Photos 4, 5, and 6.)

Additional site findings (provided by Consultant):

No culverts or drainage features were observed along the northern private access road that borders the AJD review area. No drainage features (swales, ditches, etc.) were observed that drain to and/or under the road. All of the wetlands within the AJD review area (Wetlands 02, 03, and 04) are depressional bowls that do not drain towards this service road. Though not within the overall AJD/ARDR request area, we have seen similar wetlands located within the Plant McIntosh property where small, depressional wetlands are located on ridges and flat-topped terraces. Guess just part of the natural geology for that area.

A man-made berm is located along the southwestern-most boundary of Wetland 02. The berm is elevated several feet above the wetland and no culverts are associated with the berm, which is located along the boundary for Georgia Power's property. The attached photos document the presence of the berm. This berm represents a physical barrier between the offsite detention pond located to the south. At it's closest, the detention pond is approximately 125 feet south of the Wetland 02 boundary.

Soil profiles within the AJD review area include Fuquay loamy sand (0-to-2 percent slopes); Pickney mucky sand (0-to-1 percent slopes, frequently flooded); and Stilson loamy sand (0-to-2 percent slopes), with Pickney mucky sand being identified as the only hydric soil component within the western portion of this AJD review area (and limited to the area surrounding Wetland 02).

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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. 1. Date of Office (desktop review): February 19, 2025, by Corps.
- 2. Date(s) of Field Review (if applicable): July 8-9, 2024 and October 9, 2024, by Consultant.
 - b. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor: Fig. 7: Environmental Survey Findings.
 - \Box Aquatic Resources delineation prepared by the USACE: N/A.
 - \Box Wetland field data sheets prepared by the Corps: N/A.
 - □ OHWM data sheets prepared by the USACE: N/A.
 - □ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: N/A.
 - Photographs: Digital Photographs 1-6, dated July 2024 and October 2024 (Consultant's original field visits); and Digital Photographs 7-11, dated February 25, 2025 (Consultant's follow-up visit).
 - Aerial Imagery: Fig. 1: Project Location and Fig. 2: Aerial Imagery (via ESRI World Imagery).
 - ⊠ LIDAR: Fig. 4: LiDAR-1-ft. Contour (Source Unknown).
 - ☑ USDA NRCS Soil Survey: Fig 6: NRCS Soils (via NRCS Web Soil Survey).
 - ☑ USFWS NWI maps: Fig. 5: NWI Map (Source Unknown).
 - ☑ USGS topographic maps: Fig. 3: USGS Topography.
 - \Box USGS NHD data/maps: N/A.
 - \Box Section 10 resources used: N/A.
 - \Box NCDWR stream identification forms: N/A.
 - Antecedent Precipitation Tool Analysis: July 8-9, 2024 and Oct. 9, 2024.
 - □ Other sources of Information: List
- 10. OTHER SUPPORTING INFORMATION. Results of the APT provides a "normal conditions" response per the various dates of this Consultant's field review (precipitation occurring within the normal range over a preceding 30-year period). Based on all available data and supporting information from the Consultant, including the description of natural depressional wetland features not presenting any excess flow throughout the site (during separate field events), nor exhibiting any continuous surface connections to other adjacent wetlands or streams, the Corps has determined that these various wetlands would not be regulated by the CWA.

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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.

NON-ADJACENT WETLANDS		ADJACENT WETLANDS		SUMMARY OF FEATURES		
FEATURE		FEATURE	AREA (ACRES)	TYPE	AREA (ACRES)	
	ANEA (AONES)	WETLAND 01	0.77	NON-ADJACENT WETLANDS	6.22	STRUCTUR
WETLAND 02	4.08	WETLAND 05	9.48	ADJACENT STREAMS	0.85	
WETLAND 03	0.38	WETLAND 06	12.2	DRAINAGE FEATURES	0.03	
WETLAND 04	1.76	WETLAND 07	0.27	UPLAND	186.05	
TOTAL	6.22	WETLAND 08	0.04			
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INTERMITTENT STREAM 02	1350			A CARLON		
INTERMITTENT STREAM 03	250					
INTERMITTENT STREAM 04	1095					
INTERMITTENT STREAM 05	644		Service and			
PERENNIAL STREAM 01	3197				自己的 经公司	NAME ADAK 7
TOTAL	6726					STRUCTURE 292
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	ACCESS ROAD 01	INTERMITTENT STREAM 01	INTERMITTENT ST	REAM 02 NITERMITTEN	T STREAM 03	ACCESS ROAD 02 WETLAND 03 STRUGTURE 223 STRUGTURE 6
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GEORGIA POWER COMPANY PLANT MCINTOSH PROPOSED THERMAL PROJECT EFFINGHAM COUNTY, GA ENVIRONMENTAL SURVEY FINDINGS

AERIAL IMAGERY

DRAINAGE FEATURE 02 (RIPRAP)

CULVERT (48 IN CONCRETE)

CULVERT (48 IN CONCRETE) STRUCTURE

STRUCTURE 4

CULVERT (36 IN CMP)

INTERMITTENT STREAM 05

STRUCTURE4

STRUCTURE 4A

STRUCTURE7

STRUCTURE 4A

CULVERT (36 IN PLASTIC)

WETLAND 07

STRUCTURES

STRUCTURE5

STRUCTURE 8

CULVERT (36 IN CONCRETE)





