

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

CESAS-RD-P

January 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, 598 U.S. 651 (2023), SAS-2024-00870

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.

<sup>&</sup>lt;sup>1</sup> 33 CFR 331.2.

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

<sup>&</sup>lt;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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- 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
Isolated Wetland 1	Non-JD	N/A
Isolated Wetland 2	Non-JD	N/A
Isolated Wetland 3	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)
- 3. REVIEW AREA.
  - A. 26 acres
  - B. Latitude: 32.644689, Longitude: -83.737200
  - C. East of Byron
  - D. Peach County
  - E. Georgia

G. Historic aerial imagery (since 1955) indicates that the property containing the subject of the review has only been used for agriculture. Ongoing agricultural operations have resulted in alterations of the review area.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
  - A. The Ocmulgee River, located approximately 12 miles southeast of the subject review area, 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

N/A. The subject waters do not have a flowpath to a TNW, interstate water, or the territorial seas.

- 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
  - b. Interstate Waters (a)(2): N/A

<sup>&</sup>lt;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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- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. 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. 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

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

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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 feature	Size	Type of resource generally not jurisdictional
Isolated Wetland 1	0.65-acre	Wetland lacks a continuous surface connection to water of the US
Isolated Wetland 2	1.80-acre	Wetland lacks a continuous surface connection to water of the US
Isolated Wetland 3	0.38-acre	Wetland lacks a continuous surface connection to water of the US

Isolated Wetland 1 (IW1): The subject water is located on the southwest portion of the study area. Its boundary was determined based on distinct differences in vegetation, hydrology, soils, and topography consisting of the following: 1) Transition from a wetland community dominated by willow oak (Quercus phellos), American sweetgum (Liquidambar styraciflua), and lanceleaf greenbrier (Smilax smallii), to an upland community dominated by sawtooth blackberry (Rubus argutus), tall goldenrod (Solidago altissima), and kudzu (Pueraria montana); 2) Transition from the primary wetland hydrologic indicator of water-stained leaves and the secondary hydrologic indicator of microtopographic relief to a lack of wetland hydrology indicators within the adjacent upland; and 3) Transition from depleted matrix hydric soils to well-drained non-hydric soils located in the center review area. The wetland is contained wholly in a topographic depression which is bordered to the north and south by agricultural fields, to the west by James Williams Industrial Drive, and to the east by mixed hardwood/pine forest. No streams, other wetlands, drainage patterns, ditches, or other discrete physical features serve to connect IW1 to other aquatic areas that would be considered jurisdictional waters of the U.S. The distance from the boundary of IW1 to the nearest downstream aquatic resource (IW2) is approximately 360 linear feet. Therefore, Isolated Wetland 1 does not meet the definition of an (a)(7) water.

Isolated Wetland 2 (IW2): was identified on the central portion of the study area. Its boundary was determined based on distinct differences in vegetation, hydrology, soils, and topography consisting of the following: 1) Transition from a wetland community dominated by American elm (*Ulmus americana*), American sweetgum (*Liquidambar styraciflua*), willow oak (*Quercus phellos*), and Chinese privet (*Ligustrum sinense*), to an upland community dominated by American elm (*Ulmus americana*), Americana), American sweetgum (*Liquidambar styraciflua*), willow oak (*Quercus phellos*), chinese privet (*Ligustrum sinense*), to an upland community dominated by American elm (*Ulmus americana*), American sweetgum (*Liquidambar styraciflua*), willow oak (*Quercus phellos*), Chinese privet (*Ligustrum sinense*), American beautyberry (*Callicarpa americana*), and sawtooth blackberry (*Rubus argutus*); 2) Transition from the primary wetland hydrologic indicator

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of water-stained leaves and the secondary wetland hydrologic indicators of sparsely vegetated concave surface and microtopographic relief to a lack of wetland hydrology indicators within the adjacent upland; and 3) Transition from depleted matrix hydric soils to well-drained non-hydric soils. IW2 was found to be contained in a topographic depression, that drains and narrows to the northeast. The valley area northeast from IW2 was fully examined as it exited the study area leading off-site towards the off-site, USGS mapped, intermittent stream (a relatively permanent water). While IW2 does, extend northeast and off the subject study area, its easterly end is at least 225 linear feet away from the off-site stream which is the nearest RPW. Throughout the 225-foot corridor west of the USGS-mapped steam, no other streams, other wetlands, drainage patterns, ditches, or other discrete physical features were found that would connect IW2 to other aquatic areas that would be considered jurisdictional waters of the U.S. Therefore, Isolated Wetland 2 does not meet the definition of an (a)(7) water.

Isolated Wetland 3 (IW3): was identified on the east portion of the study area. This feature is likely a former Grady pond. Its boundary was determined based on distinct differences in vegetation, hydrology, soils, and topography consisting of the following: 1) Transition from a wetland community dominated by false daisy (Eclipta prostrata) to an upland community dominated by Canadian horse weed (Erigeron canadensis) and tall goldenrod (Solidago altissima); 2) Transition from the primary wetland hydrology indicator of inundation visible on aerial imagery and the secondary wetland hydrology indicator of microtopographic relief to a lack of wetland hydrology indicators within the adjacent upland; and 3) Transition from redox dark surface hydric soils to well-drained non-hydric soils. The wetland was found to be contained in a topographic depression, and it extends off-site to the east. An agricultural ditch was observed approximately 50 feet northeast of the offsite portion of IW3, and no discrete drainage feature was found between the off-site IW3 and the drainage feature. At one time, based on aerial imagery, the agricultural ditch extended into IW3 in a possible attempt to drain it. The ditch currently originates approximately 50 feet from the offsite boundary of IW3. Although this distance is not long, there is a higher elevation farm road located between IW3 and the agricultural ditch. There is no evidence that IW3 discharges into the ditch and there is no culvert beneath the road. No discrete physical feature(s) were found that would connect IW3 to other aquatic features that would be considered jurisdictional. Therefore, Isolated Wetland 3 does not meet the definition of an (a)(7) water.

- 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

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- b. Field determination(s): September 19, 2024 (Agent); January 8, 2024 (CESAS-RDP and 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: Exhibit 3: Aerial Photo W/Aquatic Resource Locations, as prepared by the Agent and dated 9/23/2024.
  - $\hfill\square$  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: Site photographs (Photos 1-14), prepared by the Agent, and dated 9/23/2024; Site visit photolog, prepared by CESAS-RDP, photos taken on 1/8/2025, photolog generated on 1/12/2025.
  - Aerial Imagery: Exhibit 4: *Aerial Photograph*, as prepared by the Agent and dated 9/23/2024.
  - LIDAR: LIDAR (3DEP DEM and 3DEP Hillshade) and 2-foot contour imagery, retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP from 1-7/2025.
  - ☑ USDA NRCS Soil Survey: Exhibit 5: USDA Soil Survey, prepared by Agent, and dated 9/23/2024; and Hydric Rating by Map Unit, retrieved by CESAS-RDP in 1/2025.
  - ☑ USFWS NWI maps: Exhibit 6: *USFWS NWI Map*, prepared by Agent, and dated 9/23/2024.
  - ⊠ USGS topographic maps: Exhibit 2: *USGS Quadrangle Map*, prepared by Agent, and dated 9/23/2024.
  - □ USGS NHD data/maps:
  - □ Section 10 resources used: Title and Dates
  - □ NC DWQ stream identification forms
  - Antecedent Precipitation Tool Analysis (List Date(s)): APT Data from 9/19/2024 and 1/8/2025 (both Drier than Normal Conditions).
  - $\boxtimes$  Other sources of Information: FEMA Flood Zone data by the agent dated 9/23/2024; and StreamStats data from the agent dated 9/23/2024.

### 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

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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 LOCATIONS

DELINEATION OF AQUATIC RESOURCES JAMES WILLIAMS INDUSTRIAL DRIVE PROPERTY PEACH COUNTY, GEORGIA EXHIBIT 3 PREPARED SEPTEMBER 23, 2024 NELSON ENVIRONMENTAL, INC.

PREPARED FOR: MODUTEK INTERNATIONAL, LLC

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