



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT
701 SAN MARCO BOULEVARD
JACKSONVILLE, FLORIDA 32207

CESAJ-RD

October 15, 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),¹
SAJ-2024-04103-BAL MFR #1 of #1²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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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 Florida due to litigation.

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).
 - i. Wetland 1, Non-jurisdictional
 - ii. Ditch, non-jurisdictional

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)
- e. Policy Memorandum on NWK-2024-00392, from the US Environmental Protection Agency and the Office of the Assistant Secretary of the Army (2024)

3. REVIEW AREA. The review area is a 1.59-acre parcel located at 5220 42nd Street Northeast, Naples, Collier County, Florida. The site is in Section 4 of Township 48 South, Range 28 East with GPS center coordinates of 26.327437 North and - 81.523348 West. The review area has been undeveloped wetlands from at least 1950 to modern day. The excavation of a north-south oriented ditch along the western extent of the review area occurred sometime between 1952 and 1969 along with roadway construction in the area. The ditch appears to be a part of a larger ditch/berm network that extends throughout the area. The review area contains 1.51 acres of wetlands which are currently undeveloped, containing multiple hydrophytic species present throughout, 104 linear feet (0.04 acres) of ditch, and 0.04 acres of road right of way. Adjoining property use has been observed to be wooded, undeveloped land to the north and east and single-family residences to the west and south.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Caloosahatchee River which is located approximately 26.7 miles north of the review area. The downstream end of the Caloosahatchee River is a Section 10 water and is tidal.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Two potential flow paths from the parcel are a ditch measuring 104 linear feet, located along the western border of the review area, and a low-lying, trail/flow path on the eastern portion of the property. The ditch along the western border flows southward along the eastern side of 42nd Street NE, westward across residential back yards to the Fakah Union Canal, then southward until the canal empties into Faka Union Bay. The measured distance of the potential flow path was approximately 32 miles. The trail/flow path on the eastern portion of the property flows southward through residential back yards for approximately 383 feet until reaching a split that extends westward towards the canal system or southwest toward the canal system. Once in the canal system the flow follows the same pathways as the ditch along the western border.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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,

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 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.

⁸ 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.

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): 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”).⁹ 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

⁹ 51 FR 41217, November 13, 1986.

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).

The review area was found to contain a total of 1.55 acres of aquatic features which includes 1.51 acres of forested wetlands (Wetland 1) and 0.04 acres (104 linear feet) of a ditch (Ditch). The Assessment area consists of wetlands that were once part of a larger system that is now disconnected by roads, canals, and surrounding residential development. Utilizing desktop resources, including USGS Digital Elevation Models (DEMs), it appeared that the on-site wetlands potentially extend outside of the review area to the south and east. These potential wetlands were found to be bordered in all directions by higher elevation areas that appear to cut off their connection to any RPW through anything other than the ditch system that runs along roadways. The ditch along the western border of the review area did not exhibit evidence of relatively permanent flow. The feature lacked an ordinary high-water mark and hydrophytic vegetation, contained leaf litter exhibiting decomposition, and open sandy substrates, which indicates that the ditch is only inundated during and in response to precipitation events. Desktop review found that the topographic feature continues in a north-south manner along the roadway, westward across residential back yards to the Fakah Union Canal, then southward until the canal empties into Faka Union Bay a Section 10 water. Evidence of relatively permanent flow could not be discerned consistently within these features from aerial imagery observations and would not be considered (a)(5) tributaries. In consideration of the *MEMORANDUM TO*

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THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE PROPER IMPLEMENTATION OF "CONTINUOUS SURFACE CONNECTION" UNDER THE DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT dated March 12, 2025, the roadside ditch identified above is considered a discrete features and therefore does not provide a continuous surface connection from onsite Wetland 1 to an (a)(1)-(a)(6) water. The wetland does not have a directly abutting hydrologic connection and is not considered an (a)(7) TNW-adjacent wetland. Therefore, the on-site Wetland 1 is not a non- is not jurisdictional.

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. USACE Application for Department of the Army Permit, with diagrams including wetland data sheets, wetland map with data points, and project impact map, received February 2, 2024.
 - b. Review of LIDAR and DEM imagery from National Regulatory Viewer accessed May 8, 2025.
 - c. National Hydrography Dataset. National Regulatory Viewer accessed May 8, 2025
 - d. Google Earth Pro 7.3.3.7786. Imagery Data 1985-2024 accessed April 28, 2025
 - e. USGS National Map 3D Elevation Program (3DEP) accessed May 8, 2025.
 - f. USGS EROS Archive – Aerial Photography accessed April 28, 2025.

10. OTHER SUPPORTING INFORMATION. N/A

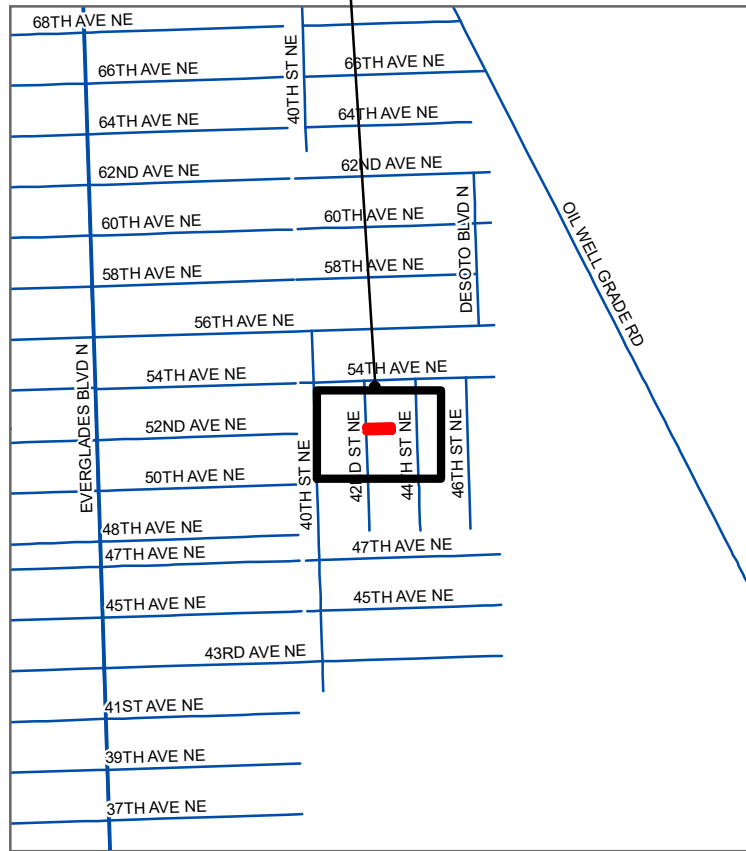
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Enclosures

1. Delineation Map



SUBJECT PROPERTY



COLLIER COUNTY



SUBJECT PROPERTY

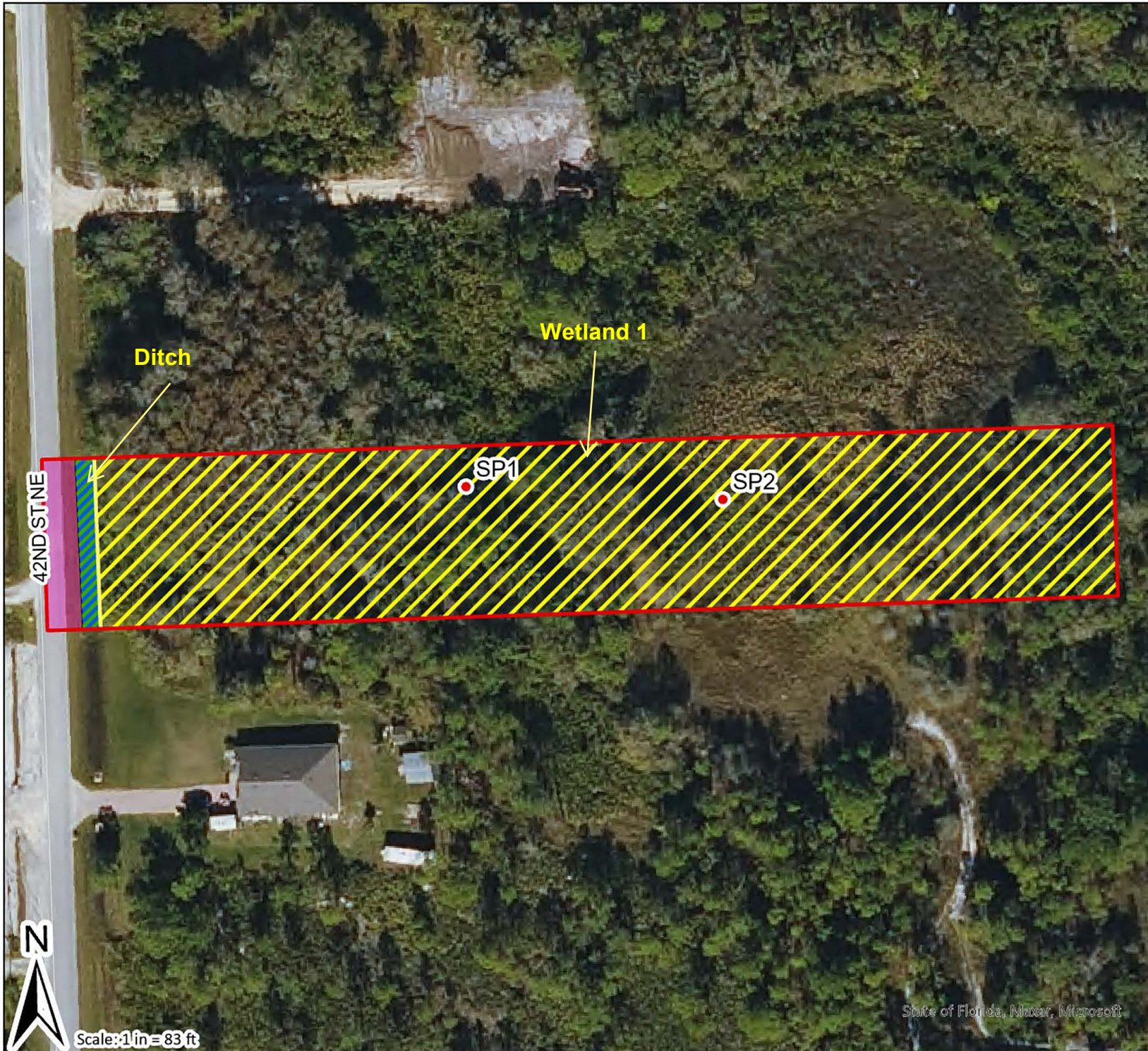
Section: 4
Township: 48
Range: 28

Project **Mariel Ribera - 39024400000 - 42nd St NE**
Collier County, Florida

Map Type **Location Map**

Date **10/18/23**





TITLE:
Aquatic Resources Map

PROJECT:
Mariel Ribera - 39024400000
- 42nd St NE



Collier County, Florida

- Legend**
- Subject Property (1.59 Ac)
 - Road ROW (0.04 Ac)
 - Ditches (0.04 Ac)
 - Wetlands (1.51 Ac)
 - Sample Points (2)

Note:
1. 2025 Aerials obtained from Collier County Property Appraiser.
2. All acreages are approximate.

PROJECT MANAGER: Chris Romanchak
DRAWN BY: ChrisRomanchak
DATE: 7/3/2025

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