



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
1949 INDUSTRIAL PARK ROAD, ROOM 140
CONWAY, SOUTH CAROLINA, 29526

CESAC-RDE

27 FEB 2024

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 SAC-2014-00877, (MFR 1 of 1)²

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 AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as

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.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2014-00877]

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state 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).

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F)	JD or Non-JD	Section 404/Section 10
Non-Jurisdictional Wetland 1	0.66 acre	Non-JD	Section 404
Non-Jurisdictional Wetland 2	1.33 acre	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: 21.09 acres
- b. Center Coordinates of the review area: Latitude: 33.7631°N, Longitude: -78.8876°W
- c. Nearest City: Myrtle Beach
- d. County: Horry
- e. State: South Carolina

The review area is 29 acres of forested land that is zoned for a new public elementary school. The site has 2 wetlands that were previously determined to be non-jurisdictional on October 24, 2014 (SAC-2014-00877-3B).

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2014-00877]

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A. The aquatic resources onsite were determined to be non-jurisdictional and are not connected to a TNW.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A.
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, 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. N/A.
 - a. TNWs (a)(1): N/A.
 - b. Interstate Waters (a)(2): N/A.

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.

- 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 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

⁹ 51 FR 41217, November 13, 1986.

resource or feature, and how it was determined to be an “isolated water” in accordance with SWANCC. N/A.

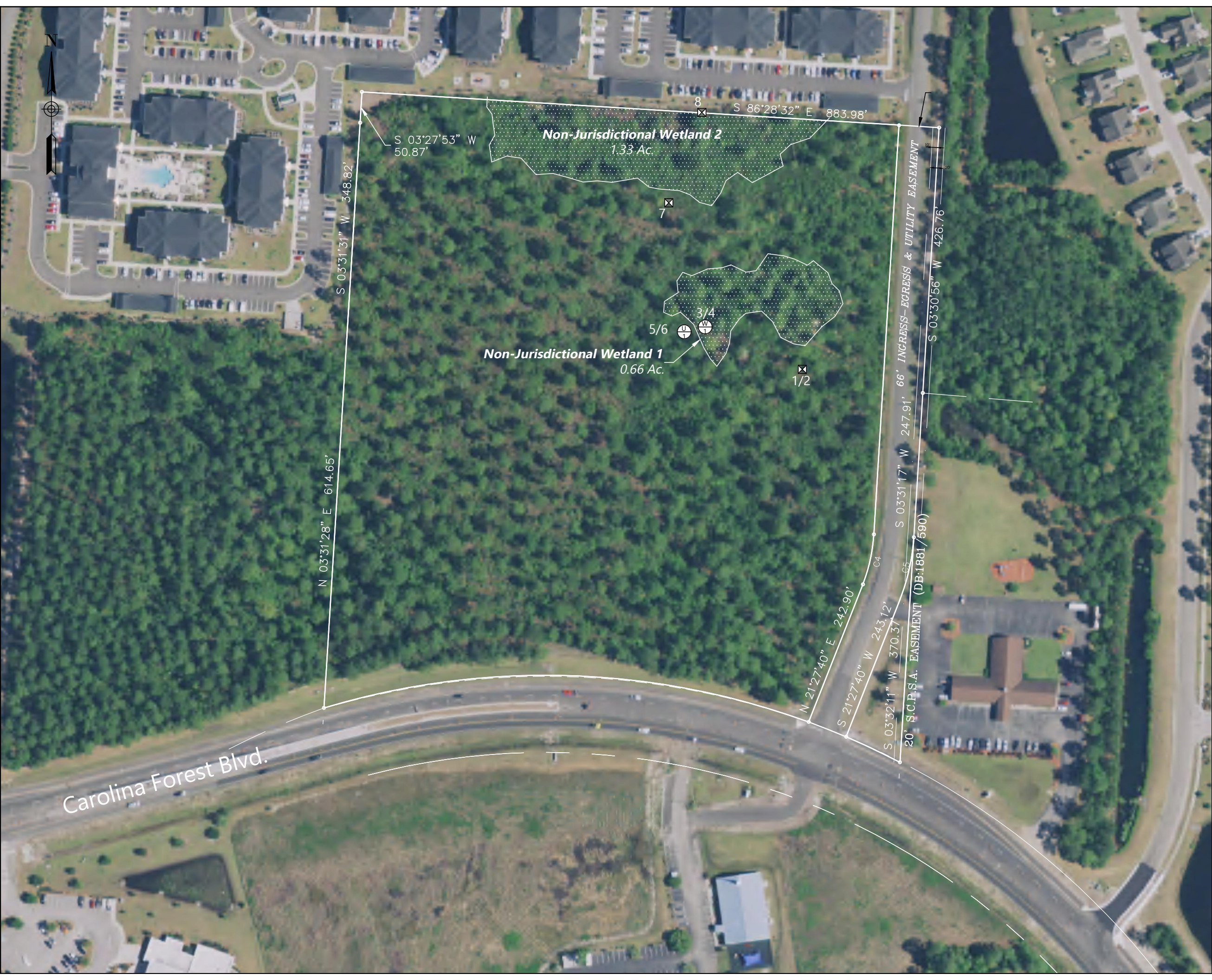
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). The review area contains two (2) wetlands (Non-Jurisdictional Wetland 1 – 0.66-acre, Non-Jurisdictional Wetland 2 – 1.33-acre) that were assessed and determined to be isolated, non-jurisdictional wetlands. These depressional wetlands exhibit hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Corps’ Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. All water located within or draining toward these wetlands have no discernible or traceable outfall or connection to any Waters of the United States (WOUS). Additionally, Non-Jurisdictional Wetland 1 is surrounded by forested uplands and Non-Jurisdictional Wetland 2 is surrounded by forested uplands and a developed residential subdivision which further disrupts possible connections to any WOUS. The topographic map depicts these wetlands as forested uplands within the project boundary. No blue line features or other potential WOUS are depicted on the topo map near these two wetlands. The aerials and LiDAR depict the wetland as forested with two potential linear features. After reviewing the previous Approved Jurisdictional Determination and information submitted by the consultant, these features were determined to be old logging trails that do not constitute a continuous surface connection to WOTUS. The NWIs depict both wetlands as uplands, and the soil survey maps these wetlands as Lynn Haven (hydric classification). A previous Jurisdictional Determination for this property documented under SAC-2014-00877-3B, dated October 24, 2014, determined these two wetlands as non-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. Review Performed for Site Evaluation: Office (Desk) Determination.
Date: February 8, 2024
Site visit conducted for previous AJD on September 23, 2014.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2014-00877]

Wetland delineation package including data sheets and maps of review area for the HCS-New Elementary School Site 1 provided by the Brigman Company in the submittal dated February 17, 2023.

- c. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NR (Map Service).
 - d. LiDAR: 3DEP Digital Elevation Model (DEM)
LiDAR map depicts two linear features. One feature bisects the property from the southeast corner to the northwest corner. The other feature bisects the property from east to west toward the norther property boundary. After reviewing the previous Approved Jurisdictional Determination and information submitted by the consultant, these features were determined to be old logging trails.
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
 - e. USDA NRCS Soil Survey: Lynn Haven, Echaw, Leon. SSURGO Database.
 - f. USGS topographic maps: 7.5 Minute – Nixonville Quad: Quad sheet depicts the site as mostly uplands. A wetland is depicted in the northwest corner of property in close proximity to Non-Jurisdictional Wetland 2.
 - g. National Wetland Inventory (NWI): NWI depicts the entire review area as uplands.
10. OTHER SUPPORTING INFORMATION. Previous Approved Jurisdictional Determination documented under SAC-2014-00877-3B, dated October 24, 2014.
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.



Wetland Delineation/Determination

HSC- New Elementary School

Site 1

Conway Township,
Horry County, South Carolina
Tax Map Number 164-00-01-017

Area Summary:

Jurisdictional Wetland	0.00
Non-Jurisdictional Wetlands	1.99
Uplands	19.10
Total	21.09

Notes

1. Potential wetland/non-wetland areas depicted here on have not been verified by the US Army Corps of Engineers. Areas depicted as wetlands were identified using a combination of available remote sensing and onsite investigation. Prior to any land disturbing activities, or land transactions a final jurisdictional determination should be obtained from the US Army Corps of Engineers.

2. Boundary information taken from a plat prepared by TBC for Horry County Schools Dated August 13, 2014.

3. Onsite inspection was conducted on 2-15-23.

Legend

Line Legend

Boundary	<div></div>
Adjacent Boundary	<div></div>
Right of Way	<div></div>
Jurisdictional Ditch	<div></div>
Non-Jurisdictional Ditch	<div></div>
Dirt Road	<div></div>
Bulkhead	<div></div>

Hatch Legend

Jurisdictional Wetland	<div></div>
Non-Jurisdictional Wetland	<div></div>

Symbol Legend

Data Point	<div></div>
Photo Point	<div></div>
Property Corner	<div></div>

Prepared For

Horry County Schools

Job #

02343-23013

Date

2-16-23

Graphic Scale

150'

SCALE IN FEET

0

150'

TBC

THE BRIGMAN CO.

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