

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

CESAC-RDE

April 10, 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 SAC-2024-00439, (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 quidance (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.

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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.)	Waters of the U.S. (JD or Non-JD)	Section 404/Section 10
Wetland W1	116.75 Ac.	JD	Section 404
Wetland W4	35.40 Ac.	JD	Section 404
Wetland W5	3.82 Ac.	Non-JD	N/A
Wetland W7	4.50 Ac.	Non-JD	N/A
Wetland W8	3.26 Ac.	Non-JD	N/A
Wetland W9	14.65 Ac.	Non-JD	N/A
Wetland W10	1.32 Ac.	Non-JD	N/A
Wetland W11	1.00 Ac.	Non-JD	N/A
Wetland W12	0.68 Ac.	Non-JD	N/A
Wetland W13	3.98 Ac.	Non-JD	N/A
Stream S1	1,085 L.F.	JD	Section 404
Non-jurisdictional Ditch 1	691.5 L.F.	Non-JD	N/A
Non-jurisdictional Ditch 2	1,588.9 L.F.	Non-JD	N/A

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Non-jurisdictional Ditch 3	1,276.6 L.F.	Non-JD	N/A
Non-jurisdictional Ditch 4	75 L.F.	Non-JD	N/A
Non-jurisdictional Ditch 5	514.1 L.F.	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. _, 143 S. Ct. 1322 (2023)
- e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))
- f. EPA Memorandum dated March 12, 2025, titled "MEMORANDUM TO 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
- 3. REVIEW AREA.
 - a. Project Area Size: 1,400-acres
 - b. Coordinates of the review area: 33.8447°N, -80.4288°W
 - c. Nearest City: Sumter
 - d. County: Sumter
 - e. State: South Carolina

The review area is majority actively managed agricultural lands. Small tracts of pine silviculture hardwood stands are scattered throughout the site. Within the review area there are approximately 19 whole or in part, Carolina Bay features ranging in size from

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1.5 to 47 acres. The majority of these features have been cleared during the early to mid-20th century and have been extensively ditched and drained. Wetlands associated with an unnamed tributary of Nasty Branch are located along the eastern property boundary, extending through the central portion of the review area. Four major roads intersect the property creating distinct regions of hydrology for wetlands. The northwest section of the review area contains eight (8) wetlands that were determined to be isolated and therefore not adjacent to any other waters of the U.S. (Wetland W5, W7, W13, W11, W9, W8, W10, W12). Wetlands W8, W10, and W12 are connected to each other by means of a series of upland excavated ditches (Non-jurisdictional ditch 2, 3, 4, and 5). Non-jurisdictional Ditch 5, the lowest of this series in elevation, terminates at Gwendale Road with no connection to any other waters of the U.S. Wetland W1 directly abuts an unnamed tributary of Nasty Branch, which flows directly into Shulers Pond, an impoundment. Waters leaving Shulers Pond enter an unnamed impoundment before joining Nasty Branch upstream of Cain Millpond. Wetland W4, a portion of Harvin Bay, is separated from Wetland W1 by Harriet Harvin Road and directly abuts an unnamed tributary of Nasty Branch. Waters from Wetland W4 then enter Nasty Branch approximately 1.86 miles east of the review area. Waters from both Wetland W1 and W4 enter Cain Millpond after joining Nasty Branch. Nasty Branch continues for 1.23 miles before joining Cane Savannah Creek meeting the Pocotaligo River 2 miles downstream. The Pocotaligo River flows for approximately 31 miles before joining the Black River, a TNW, approximately 7 miles northwest of Kingstree, SC.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
 - a. Nearest downstream TNW, Territorial Sea, or interstate water: The Black River is the nearest downstream TNW which the onsite aquatic resources are connected.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS:
 - a. Wetland W1 116.75 Acre: The onsite wetland was determined to flow down gradient to the east into an unnamed tributary continuing to Nasty Branch. It then enters Cains Millpond before joining Cane Savannah Creek. Cane Savannah Creek then joins the Pocotaligo River 2 miles downstream. The Pocotaligo River flows through Sumter and Williamsburg counties for 31 miles before joining the Black River approximately 7 miles northwest of Kingstree, SC.

- b. Wetland W4 35.40 Acre: The onsite wetland was determined to flow down gradient to the southeast into Harvin Bay then joining an unnamed tributary continuing to Nasty Branch. It then enters Cains Millpond before joining Cane Savannah Creek. Cane Savannah Creek then joins the Pocotaligo River 2 miles downstream. The Pocotaligo River flows through Sumter and Williamsburg counties for 31 miles before joining the Black River approximately 7 miles northwest of Kingstree, SC.
- c. Stream S1 1,085 Linear Feet: The onsite stream receiving waters from an unnamed Carolina Bay offsite was determined to flow down gradient to the northwest into Wetland W1. Waters continue into an unnamed tributary connecting to Nasty Branch. It then enters Cains Millpond before joining Cane Savannah Creek. Cane Savannah Creek then joins the Pocotaligo River 2 miles downstream. The Pocotaligo River flows through Sumter and Williamsburg counties for 31 miles before joining the Black River approximately 7 miles northwest of Kingstree, SC.
- 6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ 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

⁶ 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.

⁷ 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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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):
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
 - a. "Stream S1" (1,085 L.F.) was determined to be a man made tributary connecting waters of an offsite Carolina Bay wetland to the east to the waters of Wetland W1. This feature exhibited a clearly defined bed and bank with a channel free of aquatic vegetation and debris indicating this feature is a relatively permanent water which flows year-round or at least seasonally and not just in response to precipitation events. The tributary displays signs of mechanical maintenance with spoil piles directly adjacent to the feature. This feature flows directly into the waters of Wetland W1, maintaining a continuous surface connection to an offsite unnamed tributary, an (a)(5) water, that joins Nasty Branch, an (a)(5) water, then directly outfalling into Shulers pond, an (a)(4) water. Leaving Shulers Pond, Nasty branch directly outfalls into Cains Millpond, an (a)(4) water, before joining Cane Savannah Creek, an (a)(5) water which joins the Black River, a TNW.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):
 - a. "Wetland W1" (116.75 AC.) was determined to have a continuous surface connection to an offsite unnamed tributary, an (a)(5) water, that joins Nasty Branch, an (a)(5) water, then directly out falling into Shulers pond, an (a)(4) water. Leaving Shulers Pond, Nasty branch directly outfalls into Cains Millpond, an (a)(4) water, before joining Cane Savannah Creek, an (a)(5) water. Cane Savannah Creek joins the Pocotaligo River, an (a)(5) water which joins the Black River, a TNW.

- b. "Wetland W4" (35.40 AC.) was determined to have a continuous surface connection to an offsite unnamed tributary, an (a)(5) water, that joins Nasty Branch, an (a)(5) water, then directly out falling into Shulers pond, an (a)(4) water. Leaving Shulers Pond, Nasty branch directly outfalls into Cains Millpond, an (a)(4) water, before joining Cane Savannah Creek, an (a)(5) water. Cane Savannah Creek joins the Pocotaligo River, an (a)(5) water which joins the Black River, a TNW.
- 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").⁸ 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.
 - 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
 - a. "Non-jurisdictional Ditch 1" (691.5 L.F.) as depicted on the referenced map was determined to have been dug wholly in uplands, only draining uplands, and not carrying relatively permanent flow, drains uplands adjacent to Harriet Harvin Road conveying stormwater and runoff only in response to precipitation events.
 - b. "Non-jurisdictional Ditch 2" (1,588.9L.F.) as depicted on the referenced map was determined to have been dug wholly in uplands, and not carrying relatively permanent flow, drains adjacent agricultural areas and only flows in response to precipitation events.
 - c. "Non-jurisdictional Ditch 3" (1,276.6L.F.) as depicted on the referenced map was determined to have been dug wholly in uplands, and not carrying relatively permanent flow, drains adjacent agricultural areas and only flows in response to precipitation events.
 - d. "Non-jurisdictional Ditch 4" (75 L.F.) as depicted on the referenced map was determined to have been dug wholly in uplands, and not carrying

⁸ 51 FR 41217, November 13, 1986.

relatively permanent flow, drains adjacent agricultural areas and only flows in response to precipitation events.

- e. "Non-jurisdictional Ditch 5" (514.1 L.F.) as depicted on the referenced map was determined to have been dug wholly in uplands, and not carrying relatively permanent flow, drains the adjacent agricultural areas and utility right of way and only flows in response to precipitation events.
- 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).
 - a. "Wetland W5" (3.82 Ac.) as depicted on the referenced map, is a portion of an offsite Carolina Bay feature. This area is currently utilized for pine silviculture operations and as a result maintains a network of internal offsite ditches, concentrating water towards the center of the bay offsite. The feature is mapped as Coxville-Rains complex, a hydric soil, and is surrounded by nonhydric sediments within the area of review. Wetland W5 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.

- b. "Wetland W7" (4.50 Ac.) as depicted on the referenced map is a portion of an offsite Carolina Bay feature. This area is partially utilized for pine silviculture and partially comprised of mixed hardwoods. This feature is shallow and exists at a higher elevation than the larger Carolina Bay, Wetland W5, to its northeast. There are no features such as ditches or swales that could convey waters from this feature to any surrounding wetland. The feature is mapped as Rains-Coxville-Lynchburg complex and is surrounded by material of the same character. However, more intensive silviculture practices around the extents of this feature have increased local elevation and as a result Wetland W7 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.
- c. Wetland W8 (3.26 Ac.) as depicted on the referenced map contains two small depressional features located within active pine silviculture stands. The area is mapped as Rains-Coxville-Lynchburg complex, a hydric soil, and is surrounded by Norfolk-Butters complex a relatively well-drained soil. The northeastern portion of this wetland borders an active agricultural field, and saturation can be seen along the borders of the wetland on aerial imagery. While the southeastern portion of this wetland is contained within a larger Carolina Bay feature, only a small portion displayed characteristics sufficient to satisfy the 1987 Corps' Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement due to extensive silvicultural modification of the area. An upland excavated ditch is present adjacent to this wetland yet does not carry a permanent flow. A ditch cannot render an otherwise isolated wetland an adjacent wetland unless the ditch itself is a tributary, which in this case it is not. Therefore, Wetland W8 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.
- d. "Wetland W9" (14.65 Ac.) as depicted on the referenced map is a complete Carolina Bay feature. This feature is mapped as Coxville-Rains complex and is surrounded by well-drained soils. The depressional wetland exhibited 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. Furthermore, this area has been excluded from historical agriculture and silviculture practices, indicating its unsuitability for products requiring well drained soils. There are no features such as ditches or swales that could connect this feature to any other water therefore Wetland W9 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.

- e. "Wetland W10" (1.32 Ac.) as depicted on the referenced map is a small depressional feature located between several Carolina Bays. The feature is mapped as Autryville-Norfolk complex, typically a non-hydric well drained soil, however the feature exists within a utility right of way that has been cleared of vegetation. The combination of routine compaction of these soils in conjunction with decreased evapotranspiration from removed vegetation have created hydric soils which support hydrophytic vegetation and indicators of hydrology satisfying the criteria set forth in the 1987 Corps' Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. One upland excavated ditch is located adjacent to the northern extents of this wetland yet does not carry a relatively permanent flow and only flows in response to precipitation events. A ditch cannot render an otherwise isolated wetland an adjacent wetland unless the ditch itself is a tributary, which in this case it is not. Therefore, Wetland W10 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.
- f. "Wetland W11" (1.00 Ac.) as depicted on the referenced map is a shallow depressional feature mapped as Rains-Coxville-Lynchburg complex in the same unit as Wetlands W7 and W13. While the feature is surrounded by hydric soils, its shallow topography concentrates water from surrounding silvicultural areas into its center satisfying all three criterion required by the 1987 Corps' Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. Wetland W11 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.
- g. "Wetland W12" (0.68 Ac.) as depicted on the referenced map is a small depressional feature located between several Carolina Bays. The feature is mapped as Coxville-Rains complex, non-hydric soil. The feature exists within a utility right of way that has been cleared of vegetation. The decreased evapotranspiration from removed vegetation have enhanced the wetland hydrology of the area satisfying the criteria set forth in the 1987 Corps' Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. One upland excavated ditch is located adjacent to the southeastern extents of this wetland and yet does not carry a relatively permanent flow and only flows in response to precipitation events. A ditch cannot render an otherwise isolated wetland an adjacent wetland unless the ditch itself is a tributary, which in this case it is not. Therefore, Wetland W12 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.

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- h. "Wetland W13" (3.82 Ac.) as depicted on the referenced map is a shallow depressional feature mapped as Rains-Coxville-Lynchburg complex in the same unit as Wetlands W7 and W11. While the feature is surrounded by hydric soils, its shallow topography concentrates water from surrounding silvicultural areas into its center satisfying all three criterion required by the 1987 Corps' Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. Wetland W13 is surrounded by uplands and lacks a direct connection to any (a)(1)-(6) waters.
- 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: March 24, 2025.
 - b. AJD Submittal, or on behalf of the requestor: Wetland Determination package including upland datasheets and associated maps provided by ECS Southeast LLC in the submittal dated April 10, 2024.
 - c. South Carolina Revenue and Fiscal Affairs Office: Statewide Aerial Imagery 2023 (Map Service)
 - Lidar: 3DEP Digital Elevation Model (DEM) https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServ er
 - e. Lidar: United States Geological Survey, 2024: 2022 Lidar DEM; Savannah Pee Dee, SC, https://www.fisheries.noaa.gov/inport/item/65959
 - f. USDA NRCS Soil Survey: Alaga loamy coarse sand, Autryville-Norfolk complex, Coxsville-Rains complex, Goldsboro-Noboco complex, Johnston mucky sandy loam, Lynchburg-Rains complex, Norfolk-Butters complex, Norfolk-Noboco complex, Rains sandy loam, Rains-Coxsville-Lynchburg complex, Wagram-Norfolk-Lucknow complex. SSURGO database. The site is majority well drained and non-hydric soils, while wetland areas and Carolina Bays maintain higher hydric class soils.
 - g. National Wetland Inventory (NWI): NWI https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlan ds/MapServer/0

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- h. U.S. Geological Survey map(s): 7.5 Minute Index/ Privateer / 1:240000; USGS topographic survey information depicts
- i. Antecedent Precipitation Tool (APT) Version 2.0: ERDC/TN WRAP-23-2. Vicksburg, MS: US Army Engineer Research and Development Center. Antecedent Precipitation Tool (APT) data for typical year determination was calculated based on field collection data denoted on the originally included wetland delineation data forms. Output from the APT indicated "Mild wetness" at the time of data collection by the agent. The APT tabulates data from weather stations in the vicinity and calculates field conditions using a combination of historical and recent observations.

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.

