



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
69A HAGOOD AVENUE
CHARLESTON, SOUTH CAROLINA 29408

CESAC-RDE

1 AUGUST 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-2021-02046, 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.

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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).
 - i. Non-Jurisdictional Wetland 1 - 0.735 acre non-jurisdictional wetland
 - ii. Non-Jurisdictional Wetland 2 – 0.353 acre non-jurisdictional wetland
 - iii. PRPW – 3,584 linear feet jurisdictional tributary
 - iv. Jurisdictional Wetland 3 – 20.808 acre jurisdictional wetland

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: 133.75 acres
- b. Center Coordinates of Review Area: Latitude: 33.0521 , Longitude: - 80.2841
- c. Nearest City: Summerville
- d. County: Dorchester
- e. State: South Carolina

The review area consists of 133.75 acres of undeveloped, partially forested land northwest of the City of Summerville, in Dorchester County, South

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Carolina. Two non-jurisdictional wetlands totaling 1.088 acre are located on site. Additionally, one jurisdictional tributary (3,584 linear feet) with one adjacent wetland (20.808 acres) is present on site. The remainder of the site consists of uplands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Ashley River.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The onsite jurisdictional waters of the US flow into the Ashley River via the onsite jurisdictional tributary, which continues north off site and enters the Ashley River approximately 6.3 river miles downstream.
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 references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

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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- 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): The onsite jurisdictional tributary labeled “Perennial Tributary” on the plans, which totals 3,584 linear feet, was determined to be a natural stream with relatively permanent flow. The topographic map and aerials depict this stream as a linear feature that continues north and flows into Platt Branch. Platt Branch flows into Cypress Swamp, which flows south into the Ashley River, a TNW. The NWIs map this tributary as a riverine system (R4SBC), and the soil survey maps this tributary and the adjacent wetlands as Grifton fine sandy loam, which is a hydric soil.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): The onsite jurisdictional wetland (“Jurisdictional Wetlands”), which totals 20.808 acres, was determined to be adjacent to the onsite jurisdictional tributary. The soil survey maps this wetland and the adjacent tributary as Grifton fine sandy loam, which is a hydric soil. The NWIs map this wetland (PFO1A) as intersecting the boundary of the onsite tributary. According to information submitted by the agent, the jurisdictional wetland on site abuts the OHWM of the onsite jurisdictional tributary and is physically bisected by the tributary.

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. 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

⁸ 51 FR 41217, November 13, 1986.

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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
 - 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). Two non-jurisdictional wetlands totaling 1.088 acre are located within the review area. These wetlands are depicted on the NWIs as uplands with no potential waters nearby. The NHD does not depict any potential tributaries or other linear features near these wetlands. Based on a review of the data sources as well as information submitted by the agent, the two on-site non-jurisdictional wetlands were determined to be surrounded by uplands with no potential connection to waters of the US nearby.
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. Aquatic Resources Delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including data sheets,

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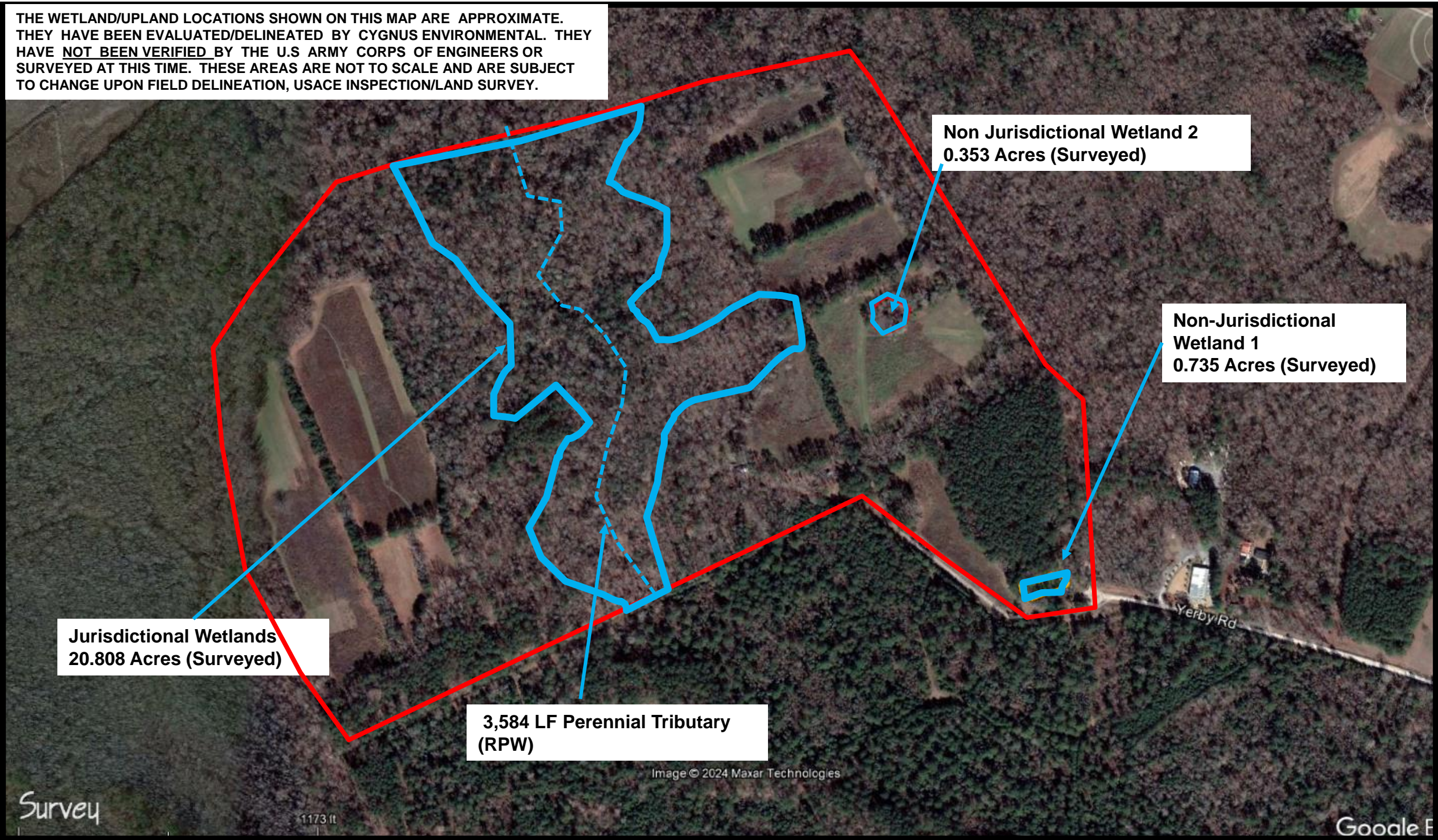
associated maps, and sketch for the Hutson Tract provided by Cygnus Environmental.

- b. Aerial Imagery: 2020 SCDNR Aerial; 2020 SCDNR Aerial SC_2020_NIR (Map Service)
- c. National Wetland Inventory (NWI): NWI depicts the jurisdictional waters as PFO1A and R4SBC.
- d. USGS Topographic Map: 7.5 Minute – Ridgeville Quad: The topographic map depicts the majority of this site as forested uplands. The onsite jurisdictional tributary is depicted as a blue line that flows north into Platt Branch.
- e. USDA-NCSS SSURGO and STATSGO digital soil survey: The soil survey maps this site as Grifton fine sandy loam, Emporia loamy fine sand, Izagora silt loam, Jedburg loam, and Noboco loamy sand.
- f. National Hydrography Dataset (NHD): The NHD depicts the onsite linear feature as a blue line tributary.
- g. USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic service: The 3DEP imagery depicts the jurisdictional waters of the US as a lower elevation than the remainder of the site.


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.

THE WETLAND/UPLAND LOCATIONS SHOWN ON THIS MAP ARE APPROXIMATE. THEY HAVE BEEN EVALUATED/DELINEATED BY CYGNUS ENVIRONMENTAL. THEY HAVE NOT BEEN VERIFIED BY THE U.S ARMY CORPS OF ENGINEERS OR SURVEYED AT THIS TIME. THESE AREAS ARE NOT TO SCALE AND ARE SUBJECT TO CHANGE UPON FIELD DELINEATION, USACE INSPECTION/LAND SURVEY.



LEGEND

 **Approximate Property Boundary**

 **Approximate Wetland Areas**

SOURCE:

Google Earth

NOT TO SCALE

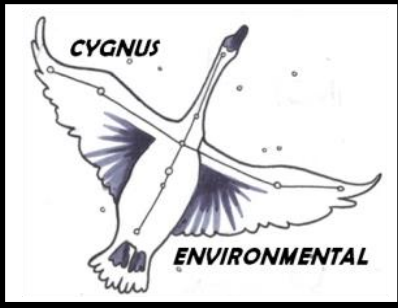
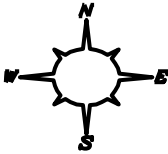


FIGURE 5

WETLAND DELINEATION MAP

TMS 120-00-00-017

Yerby Road Hutson et al (133.75 Acres)

Summerville, Dorchester County, SC

Cygnus Project 2021-068