



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT  
69 HAGOOD AVENUE  
CHARLESTON, SOUTH CAROLINA, 29403

CESAC-RDS

09 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),<sup>1</sup> [SAC-2023-01194] [MFR 1 of 1]<sup>2</sup>

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

---

<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01194]

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 US (WOUS)	Section 404/ Section 10
Jurisdictional Wetland 1	0.05-acre	Yes	Section 404
Non-Jurisdictional Feature 1	324-linear feet / 0.10-acre	No	N/A
Non-Jurisdictional Wetland 2	0.12-acre	No	N/A
Non-Jurisdictional Wetland 3	1.14-acre	No	N/A
Non-Jurisdictional Wetland 4	0.08-acre	No	N/A
Non-Jurisdictional Wetland 5	0.24-acre	No	N/A
Non-Jurisdictional Wetland 6	0.32-acre	No	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)

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01194]

d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)

### 3. REVIEW AREA.

- a. Project Area Size: 19.11 acres
- b. Center Coordinates of Review Area: 32.8841, -79.8063
- c. Nearest City: Mount Pleasant
- d. County: Charleston
- e. State: South Carolina

The 19.11 acres review area consists forested areas and residential dwellings.

Three (3) AJDs have been issued for aquatic resources within the review area. The first AJD, documented under SAC-2012-00736-2JU, dated November 13, 2012, described Non-Jurisdictional Feature 1 as a Jurisdictional Seasonal RPW. The second AJD, also documented under SAC-2012-00736-2JU, and dated November 26, 2014, described Non-Jurisdictional Feature 1 as a Jurisdictional Seasonal RPW. The third AJD, documented under SAC-2020-01219, dated October 8, 2020, was issued for a 9.06 acres area on the eastern portion of the current review area. The AJD contained a part of wetlands currently named as “Non-Jurisdictional Wetland 3” and “Non-Jurisdictional Wetland 5”, and the entire boundary of “Non-Jurisdictional Wetland 6”. All wetlands reviewed under the previous AJD were determined to be non-jurisdictional.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Horlbeck Creek: Section 10 waterbody subject to tidal influence. The navigable limits of the Horlbeck Creek are documented in the Corps’ Navigability Study of 1997, Cooper River Area Report No. 4. Horlbeck Creek flows to the south and then to the west into the tidally influenced Wando River, which flows to the southwest into the Charleston Harbor and Atlantic Ocean <sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

---

<sup>6</sup> 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.

Jurisdictional Wetland 1: Jurisdictional Wetland 1 directly abuts a swale that flows offsite to the southeast and then south into an unnamed tributary. The unnamed tributary, depicted as a blue line on USGS and visible on LiDAR, flows to the east, southeast, and then south. Flow is maintained throughout the reach via a series of culverts. The unnamed tributary ultimately flows into Holrbeck Creek, a tidally influenced TNW.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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.<sup>8</sup> [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
  - c. Other Waters (a)(3): N/A
  - d. Impoundments (a)(4): N/A

---

<sup>7</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.

<sup>8</sup> 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.

- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): The review area contains one (1) jurisdictional wetland; Jurisdictional Wetland 1, totaling 0.05-acre.

Jurisdictional Wetland 1: Jurisdictional Wetland 1 is a 0.05-acre wetland that 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. A site visit was conducted by the Corps on October 18, 2023, to confirm the wetland boundary. According to NRCS soils data, Jurisdictional Wetland 1 is mapped as Yonges Loamy Fine Sand (100% hydric rating). LiDAR imagery indicates Jurisdictional Wetland 1 is a depressional area, lower in elevation relative to the surrounding uplands. Jurisdictional Wetland 1 has a continuous surface connection to a TNW, as described in Section 5 of this MFR, and is subject to jurisdiction under Section 404 of the Clean Water Act.

## 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>9</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.

---

<sup>9</sup> 51 FR 41217, November 13, 1986.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01194]

- 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 contains five (5) non-jurisdictional wetlands, totaling 1.95 acres, that do not have a continuous surface connection to a jurisdictional water and one (1) non-jurisdictional tributary, totaling 0.10-acre and 324 linear feet, that does not have a relatively permanent flow.

Non-Jurisdictional Feature 1: Non-Jurisdictional Feature 1 is a non-relatively permanent first-order tributary, with a 324 linear foot, 0.10-acre, portion within the review area. Based on a review of historic topographic maps, it appears this feature is a historically modified and channelized tributary. The overall reach extends approximately 3,500 feet, and the review area is located at the most downstream portion of the reach. Non-Jurisdictional Feature 1 is depicted as a blue line (i.e., perennial stream) on USGS topographic maps and as a flow line on NWI. Based on a review of NWI, USGS NHD, LiDAR, and aerial imagery, it was determined this feature predominately receives overland sheet flow from uplands, but LiDAR suggests a portion of the feature is cut through wetlands and may facilitate wetland drainage. A site inspection was conducted by the Corps on October 18, 2023. The photographs taken during the site visit depict the feature as having no distinct ordinary high-water mark (OHWM). The banks consisted of maintained grassy vegetation, and the bottom of the feature consisted of aquatic vegetation (*Rumex sp.*), pooled water, and accumulated leaf litter. Additional photographs upstream of the review area were obtained by the Corps on May 23, 2024. Upstream of the review area, an OHWM is present in some areas, evident by undercut banks, changes in soil characteristics, and water staining. However,

the majority of the reach is heavily dominated with aquatic vegetation (*Saururus cernuus*, *Alternanthera philoxeroides*, and *Pontederia cordata*). Culverts were also observed upstream of the review area at three (3) road crossings. The culverts are perched, and they do not facilitate flow through the reach, except in direct response to high rainfall events. A previous Approved Jurisdictional Determination, SAC-2012-00736-2JU, dated November 26, 2014, determined the feature was a Jurisdictional Seasonal RPW. However, jurisdiction was asserted based off a Significant Nexus Determination, which is not applicable under the 2015 Regime Post-*Sackett*. Based on the information above, it was determined this feature does not contain a relatively permanent flow and is not subject to regulation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

Non-Jurisdictional Wetland 2: This 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. All water located within or draining toward this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). USGS NHD and NWI do not depict any flow lines near Non-Jurisdictional Wetland 2. According to NRCS soils data, the wetland is mapped as Yonges Loamy Fine Sand (100% hydric rating). LiDAR imagery indicates Non-Jurisdictional Wetland 2 is a depressional area, lower in elevation and completely surrounded by uplands. A site visit was conducted by the Corps on October 18, 2023, which further confirmed the wetland boundary. A potential discrete linear conveyance, visible on LiDAR and located to the west of the wetland, was investigated. However, the feature increased in elevation leaving the wetland, and evidence of a clearly defined conveyance dissipated into uplands. Therefore, no features were identified that could provide a continuous surface connection to a TNW.

Non-Jurisdictional Wetland 3: This 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. All water located within or draining toward this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). USGS NHD does not depict any flow lines near Non-Jurisdictional Wetland 3. According to NRCS soils data, the wetland is mapped as both Yonges Loamy Fine Sand (100% hydric rating) and Hockley Loamy Fine Sand (6% hydric rating). LiDAR imagery indicates Non-Jurisdictional Wetland 3 is a depressional area, lower in elevation and completely surrounded by uplands. A site visit conducted by the Corps on October 18, 2023, which further confirmed the wetland boundary. Additionally, no features were identified that could provide

a continuous surface connection to a TNW. A previous AJD, dated October 8, 2020, depicted the eastern 0.22-acre of the wetland as a non-jurisdictional wetland.

Non-Jurisdictional Wetland 4: This 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. All water located within or draining toward this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). USGS does not depict any flow lines near Non-Jurisdictional Wetland 2. This wetland is depicted as uplands on USGS topo maps and on NWI maps. According to NRCS soils data, the wetland is mapped as Yonges Loamy Fine Sand (100% hydric rating). LiDAR imagery indicates Non-Jurisdictional Wetland 4 is a depressional area, lower in elevation and completely surrounded by uplands. A site visit conducted by the Corps on October 18, 2023, which further confirmed the wetland boundary. Additionally, no features were identified that could provide a continuous surface connection to a TNW.

Non-Jurisdictional Wetland 5: This 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. All water located within or draining toward this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). USGS does not depict any flow lines near Non-Jurisdictional Wetland 2. This wetland is depicted as uplands on USGS topo maps and on NWI maps. According to NRCS soils data, the wetland is mapped as Yonges Loamy Fine Sand (100% hydric rating). LiDAR imagery indicates Non-Jurisdictional Wetland 5 is a depressional area, lower in elevation and completely surrounded by uplands. A site visit conducted by the Corps on October 18, 2023, which further confirmed the wetland boundary. Additionally, no features were identified that could provide a continuous surface connection to a TNW. A previous AJD, dated October 8, 2020, depicted the eastern 0.25-acre portion of the wetland as non-jurisdictional.

Non-Jurisdictional Wetland 6: This 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. USGS depicts Non-Jurisdictional Wetland 6 as uplands with no nearby low lines. All water located within or draining toward this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). Non-Jurisdictional Wetland 6 is depicted on



CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01194]

NWI as a forested wetland. LiDAR imagery indicates Non-Jurisdictional Wetland 6 is a depressional area, lower in elevation and completely surrounded by uplands. According to NRCS soils data, Non-Jurisdictional Wetland 6 is mapped as Yonges Loamy Fine Sand (100% hydric rating). USGS NHD does not have a flow line near the location of Non-Jurisdictional Wetland 6. A field inspection conducted was by the Corps on October 18, 2023, and no features were observed that would provide a continuous surface connection downstream. A previous AJD, dated October 8, 2020, depicted the wetland 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. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets for the review area, provided by Passarella & Associates, inc., dated August 25, 2021. Aquatic resource map dated October 20, 2023.
  - b. Site visit conducted by the Corps on October 18, 2023. Includes supplemental photographs of Non-Jurisdictional Feature 1.
  - c. Photographs from upstream of Non-Jurisdictional Feature 1, prepared by the Corps, dated May 23, 2024, depicting the feature as vegetated.
  - d. USFWS NWI Map Service: "COVINGTON PHASE 3 / AERIAL WITH NATIONAL / WETLANDS INVENTORY", prepared by agent, dated February 2, 2024, depicts the review area as predominately uplands with one (1) linear feature and one (1) wetland.
  - e. USGS Topographic maps: 7.5 minute – Cainhoy Quad. "FIGURE 4. QUAD SHEET (CAINHOY) / COVINGTON PHASE 3", prepared by agent, dated February 2, 2024, depicts the review area as uplands with one (1) blue line feature. "1943 USGS Topographic Map", prepared by the Corps, dated May 24, 2024.
  - f. National Hydrographic Dataset (NHD): "NHD for SAC-2023-01194", obtained by the Corps on April 29, 2024.
  - g. Soil Survey: USDA-NCSS SSURGO and STATSGO Digital Soil Survey. "COVINGTON PHASE 3 / SOILS MAP", prepared by the agent, dated February 2, 2024. The review area contains Hockley Loamy Fine Sand, Seabrook Loamy Fine Sand, Wadmalaw Fine Sandy Loam, and Yonges Loamy Fine Sand.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01194]

- h. Aerial Imagery: “COVINGTON PHASE 3 / AERIAL WITH BOUNDARY”, prepared by the agent and dated February 2, 2024, depicts the review as forested with residential dwellings.
  - i. LiDAR: USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic Service. “LiDAR and Hillshade”, prepared by the Corps, dated May 6, 2024, depicts the wetlands lower in elevation to the surrounding uplands. “Flow Path from Jurisdictional Wetland 1 to a TNW”, prepared by the Corps, dated May 3, 2024, depicts the continuous surface from Jurisdictional Wetland 1 connection to a TNW.
10. OTHER SUPPORTING INFORMATION. Previous AJDs, documented under SAC-2012-00736-2JU, dated November 13, 2012, and November 16, 2014; and, SAC-2020-01219, dated October 8, 2020.
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.

J:\SOUTH CAROLINA\2021\SC-21\GL3445\GIS\WITH\_BOUNDARY\_AND\_FEATURES\_041524.MXD



PROJECT NAME: COVINGTON PHASE 3

APPLICANT: DFH CRESCENT, LLC

AERIAL WITH BOUNDARY AND FEATURES MAP

DWG. No. SC-21\GL3445-2

DRAWN BY: R.F./L.C.

REVISIONS: 10/20/23

SHEET: 2 OF 9

DATE: 05/30/23

SCALE: 1"=200'