



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

CESAC-RD

7 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-2024-00152, (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).

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F.)	Waters of the U.S. (JD or Non-JD)	Section 404/Section 10
Jurisdictional Stream A	0.20 acres/584 linear feet	JD	404
Non-jurisdictional Wetland A	0.90 acres	Non-JD	N/A
Non-jurisdictional Pond A	1.2 acres	Non-JD	N/A
Non-jurisdictional linear feature A	0.037/803 linear feet	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)

3. REVIEW AREA.

- a. Project Area Size: 70 acres
- b. Center Coordinates of the review area: Latitude: 34.2823 °, Longitude -82.0998 °
- c. Nearest City: Greenwood

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- d. County: Greenwood
- e. State: South Carolina

The review area consists of an approximate 70 acre property that is predominantly an undeveloped forested site. There is a metal building on the site and behind the structure is an 1.2 acre upland dug pond that has no connection to waters of the U.S.. There is a 0.90 acre forested wetland on the site. The wetland drains off-site via a non-jurisdictional linear feature (did not have an OHWM). The non-jurisdictional ditch dissipates/loses bed and bank form near the property line and overland sheet flows across the landscape into a maintained field off-site. The nearest tributary is approximately 3,000 feet off-site and there is no discernable feature (pipe, tributary, non-jurisdictional ditch) that provides a discrete continuous surface connection to the downstream tributary. The wetland does not have a continuous surface connection to other waters of the U.S. via adjacency (directly abutting) or an identifiable discrete feature.

There is a jurisdictional perennial tributary located along a small section of the property boundary. This tributary is a named blue line stream (Quarter Creek).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Quarter Creek (on-site perennial tributary) flows approximately 1.5 miles off-site until it flows into Lake Greenwood. Lake Greenwood is a TNW due to the fact that it is currently used (and has been used in the past) for interstate commerce. It is a recreational lake that provides commerce due to the recreational activities (commercial and private fishing, boat rentals, etc.) that it offers.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Quarter Creek (on-site perennial tributary) flows off-site for approximately 1.5 miles before it enters the TNW (Lake Greenwood).
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

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.

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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.

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 site contains 584 linear feet of perennial tributary. The tributary is depicted as a blue line feature on the USGS topo map. It is a named blue line (Quarter Creek). Site photos provided by the agent clearly depict a bed & bank, OHWM, and water in the tributary. A review of the USGS topo map indicates the tributary is a 3rd order stream. The Corps has determined this tributary to be a perennial RPW.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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. 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 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).

Non-jurisdictional Wetland A is a 0.90 acre forested wetland on the site. There is a man-made ditch that appears to be constructed in uplands to drain the wetland (identified as Non-jurisdictional Linear Feature A). The ditch had a bed and bank

⁸ 51 FR 41217, November 13, 1986.

for approximately 800 feet but did not exhibit an OHWM or other stream characteristics. The non-jurisdictional ditch dissipates/loses bed and bank form near the property line. Non-jurisdictional Wetland A drains off-site via the ditch. However, the ditch loses form at the property line and overland sheet flows across the landscape into a maintained field off-site. The nearest tributary is approximately 3,000 feet off-site and there is no discernable discrete feature (pipe, tributary, non-jurisdictional ditch) that provides a continuous surface connection to the downstream tributary. The Corps made this observation during the site visit on March 20, 2024. In conclusion, the wetland does not have a continuous surface connection to other waters of the U.S. via adjacency (directly abutting) or continuous surface connection via discrete feature.

The site also contain a 1.2 acre upland dug pond. The USGS topo map and NWI map depicts the pond as potentially being constructed at the top of a tributary or wetland drain. However, according to NRCS soil survey info, the pond was dug in EnB (Enon sandy loam) non-hydric soils. The historical 1980 Greenwood County USDA soil survey depicts the pond in uplands and no tributary or wetland finger/wetland drain below it. The pond appears to have been dug in a low area on the property. There are no downstream jurisdictional resources on the other side of the pond dam. Therefore according to available maps and the Corps site visit, the pond was constructed in uplands and has no connection to any jurisdictional waters of the U.S.

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. Site visit conducted by the Corps on March 20, 2024.
 - b. USGS Topo Map provided by the agent on January 25, 2024.
 - c. NWI Map provided by the agent on January 25, 2024.
 - d. NRCS Soil Map provided by the agent on January 25, 2024.
 - e. Resource Map provided by the agent on May 14, 2024.
 - f. Site photos provided by the agent on January 26, 2024 and April 26, 2024.
 - g. 1980 Greenwood County USDA published soil survey obtained by the Corps.

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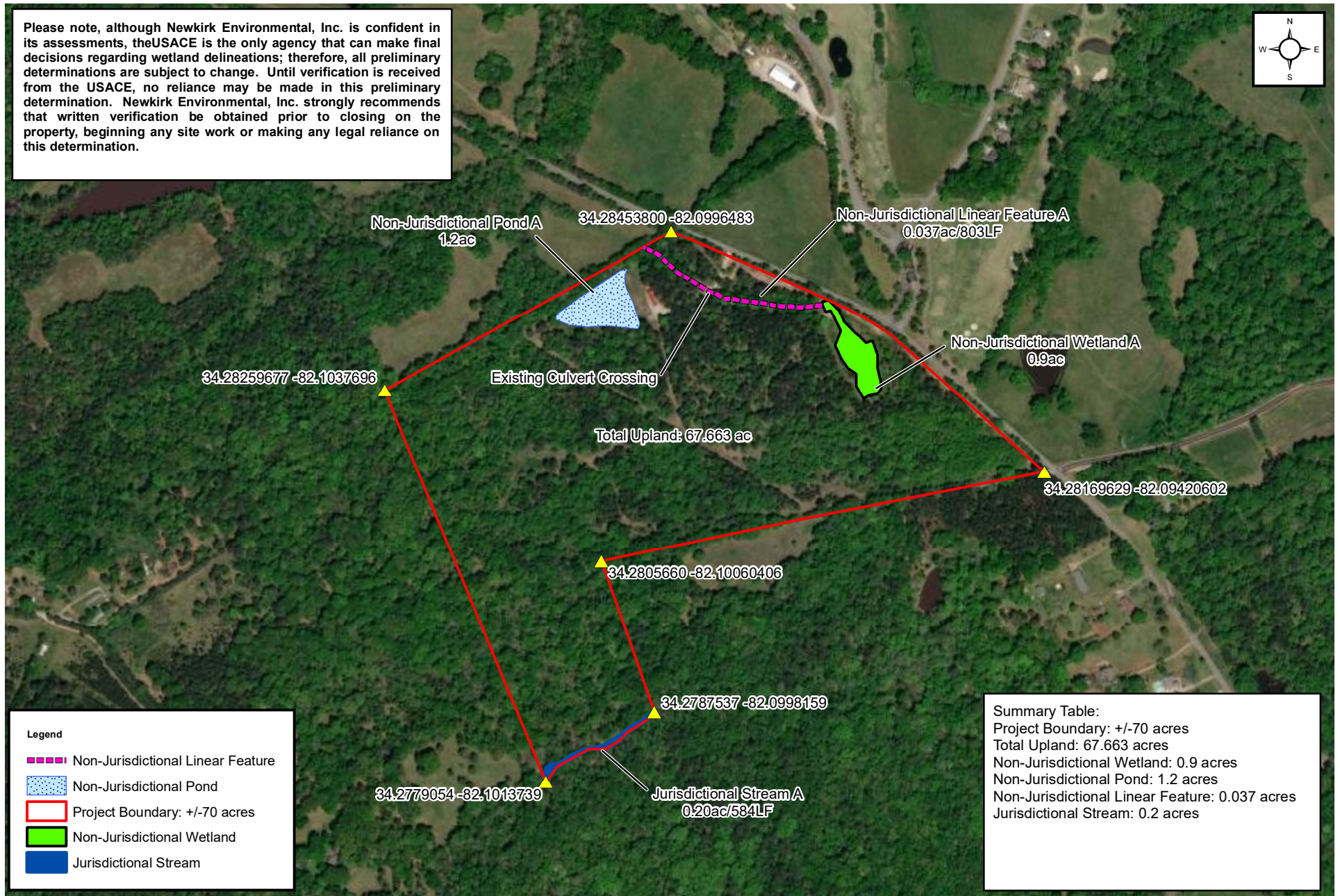
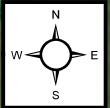
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- h. National Reg Viewer maps provided by the Corps, NRCS soil survey data and aerial photos.

10. OTHER SUPPORTING INFORMATION. See attached maps.

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.

Please note, although Newkirk Environmental, Inc. is confident in its assessments, theUSACE is the only agency that can make final decisions regarding wetland delineations; therefore, all preliminary determinations are subject to change. Until verification is received from the USACE, no reliance may be made in this preliminary determination. Newkirk Environmental, Inc. strongly recommends that written verification be obtained prior to closing on the property, beginning any site work or making any legal reliance on this determination.



Legend

- Non-Jurisdictional Linear Feature
- Non-Jurisdictional Pond
- Project Boundary: +/-70 acres
- Non-Jurisdictional Wetland
- Jurisdictional Stream

Summary Table:
 Project Boundary: +/-70 acres
 Total Upland: 67.663 acres
 Non-Jurisdictional Wetland: 0.9 acres
 Non-Jurisdictional Pond: 1.2 acres
 Non-Jurisdictional Linear Feature: 0.037 acres
 Jurisdictional Stream: 0.2 acres



Project Oakley - 70 acres
 Greenwood County, South Carolina

Project #: 04-5629a Date: May 14 2024
 Created by: CAB

Figure 6: Resource Map

