



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

CESAC-RD

18 July 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-2024-00586

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 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.

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<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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

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- 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).

<b>Name of Aquatic Resource</b>	<b>Acres (ac) / Linear Feet (lf)</b>	<b>Waters of the US (WOUS)</b>	<b>Section 404/ Section 10</b>
JD Wetland A	27.35 ac	Yes	Section 404
JD Wetland P	0.40 ac	Yes	Section 404
JD Wetland Q	0.03 ac	Yes	Section 404
JD Wetland R	11.64 ac	Yes	Section 404
NJW B	0.01 ac	No	N/A
NJW C	0.01 ac	No	N/A
NJW D	0.07 ac	No	N/A
NJW E	0.53 ac	No	N/A
NJW F	0.83 ac	No	N/A
NJW G	0.41 ac	No	N/A
NJW H	0.86 ac	No	N/A
NJW I	0.65 ac	No	N/A
NJW J	0.35 ac	No	N/A
NJW K	0.49 ac	No	N/A
NJW L	0.21 ac	No	N/A
NJW M	0.62 ac	No	N/A
NJW N	1.47 ac	No	N/A
NJW O	2.55 ac	No	N/A
NJW R	0.01 ac	No	N/A
NJW S	0.008 ac	No	N/A
NJW T	0.02 ac	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)

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

3. REVIEW AREA.

- a. Project Area Size: 220 acres
- b. Center Coordinates of the review area: Latitude: 33.2894°, Longitude -80.4363°
- c. Nearest City: Holly Hill
- d. County: Orangeburg
- e. State: South Carolina

The review area is a forested 220-acre site. The site consists of 39.42 acres of Jurisdictional Wetlands and 9.098 acres of Non-Jurisdictional Wetlands.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is the Edisto River.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: Wetland A abuts and flows from an intermittent stream to a perennial stream called Home Branch that then leads to Four Holes Swamp that then flows into TNW Edisto River. Wetlands P, Q, and R connects to the perennial Stream Home Branch that flows to Four Holes Swamp and then on into the TNW Edisto River.
- 6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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

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<sup>5</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>6</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.

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): [N/A]
- f. The territorial seas (a)(6): [N/A]
- g. Adjacent wetlands (a)(7): Based on a review of USGS topo, LiDAR, and aerial photos, Wetland A directly abuts an off-site unnamed tributary shown as a dashed blue line on the USGS topo and is visible on LiDAR and aerial imagery. This unnamed tributary passes through a culvert under Garder Blvd and continues 3,055 feet to the solid blue line named tributary Home Branch which flows to the Four Holes Swamp that then flows into the TNW Edisto River. Wetlands P, Q, and R directly abuts named tributary Home Branch which flows to the Four Holes Swamp that then flows into the TNW Edisto River. Considering these factors together, and consistent with *Sackett*, the Corps has determined that Wetlands A, P, Q, and R are jurisdictional by abutting tributaries that serve as a physical connection that meets the continuous surface connection requirement and the wetlands are therefore "adjacent" to the Edisto River, a traditional navigable water.

## 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>7</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]
- 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 Wetlands B, C, D, E, F, G, H, I, J, K, L, M, O, R, S, and T totaling 9.098 acres are features that contains all three parameters that define a wetland as outlined in the 1987 Corps of Engineers Wetland Delineation Manual and the Regional Supplement for Atlantic and Gulf Coastal Plain Regional Supplement (Version 2.0). The wetlands are not adjacent (abutting) to waters of

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<sup>7</sup> 51 FR 41217, November 13, 1986.

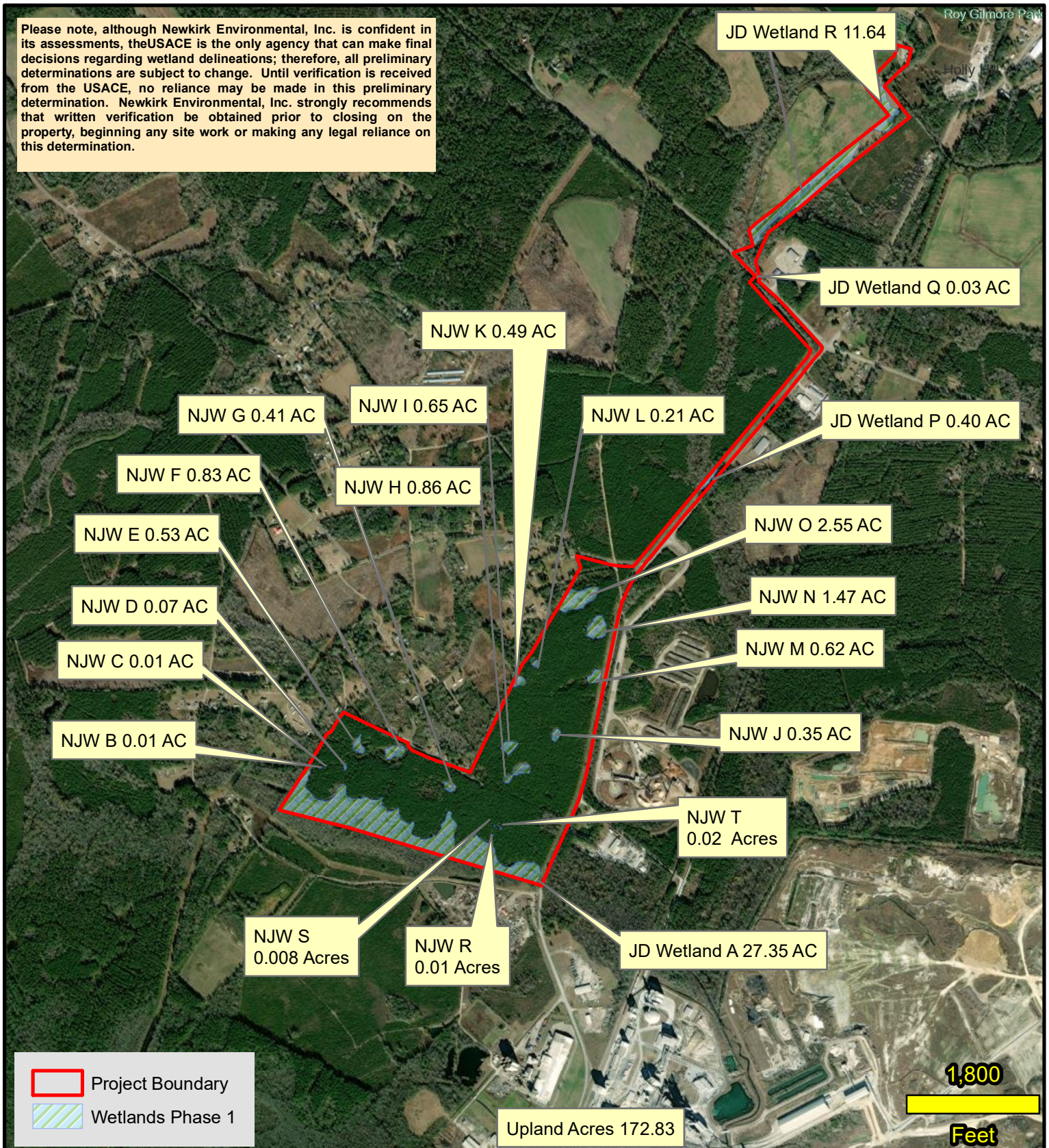
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the U.S. nor is there a continuous surface connection via a discrete feature to waters of the U.S.

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. Review Performed for Site Evaluation: Office (Desk) Determination. Date: July 9, 2024. Field Determination. Date: July 10, 2024
  - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including wetland determination forms, associated data maps, and aquatic resource map titled "Grooms Tract Phase 1" dated May 2024, prepared by Newkirk Environmental Inc.
  - c. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC\_2020\_NIR (Map Service), National Regulatory Viewer – South Atlantic Division
  - d. LIDAR: 3DEP Digital Elevation Model (DEM)
  - e. USGS topographic maps: 7.5 Minute Index / 1:24000 Holly Hill Quad
  - f. Photographs: Photos provided by Newkirk Environmental Inc.
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.

Please note, although Newkirk Environmental, Inc. is confident in its assessments, the USACE 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.



Depiction Map

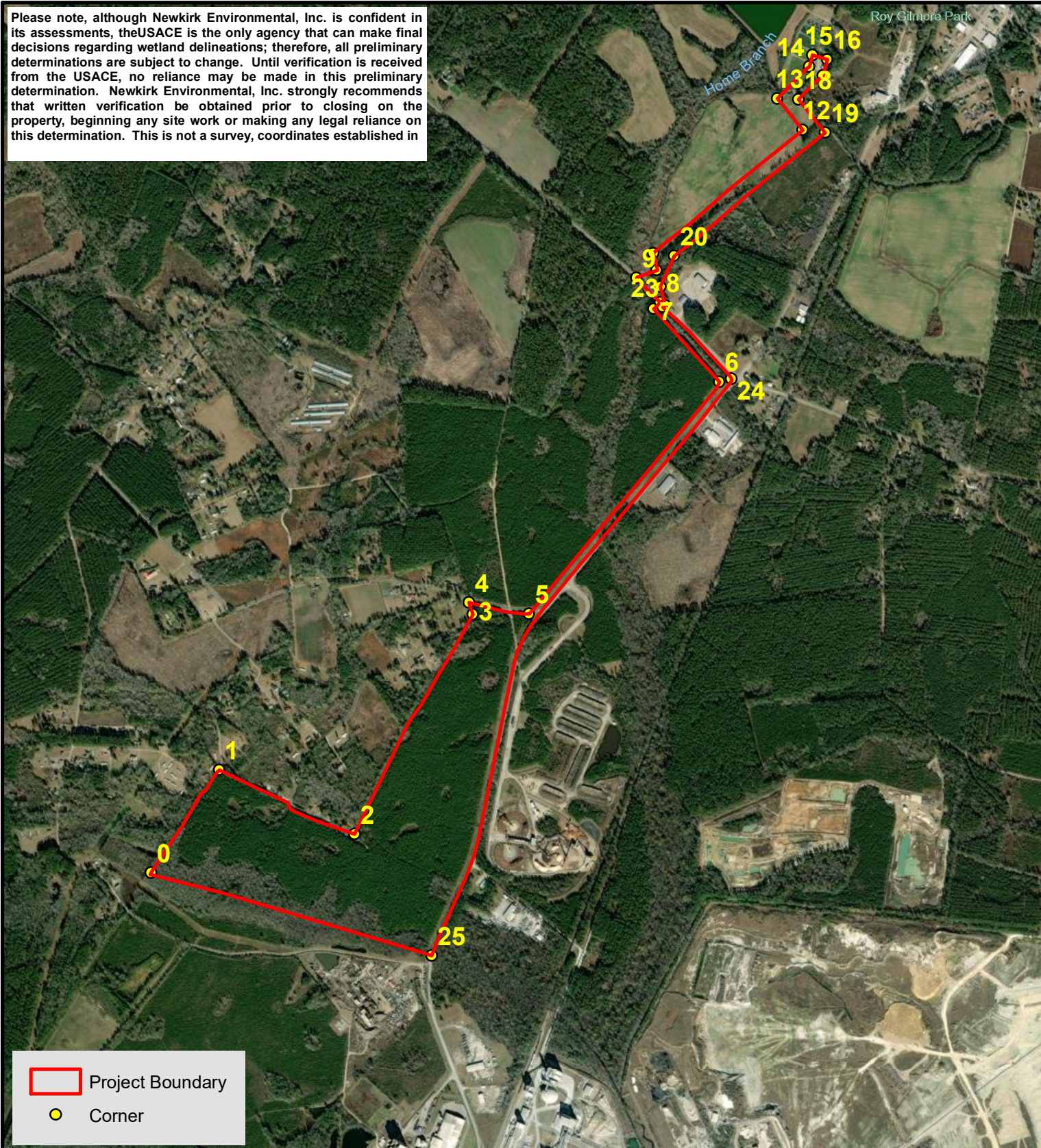
Project #: 01-5549a Date: May 2024

Created by: LAB



Grooms Tract Phase 1  
Orangeburg County, South Carolina


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Coordinates Map

Project #: 01-5549a Date: July 2024

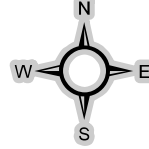
Created by: LAB



**Newkirk**  
ENVIRONMENTAL INC.

1,600

Feet



Grooms Tract  
Orangeburg County, South Carolina

FID	Shape *	Id	Lat	Long
0	Point	0	33.2896495597363	-80.4465004211945
1	Point	0	33.2932197846744	-80.4436490064045
2	Point	0	33.2909566896675	-80.4380515977633
3	Point	0	33.2985826786041	-80.4330952882769
4	Point	0	33.2989959347174	-80.4332535973131
5	Point	0	33.2985961401978	-80.4307659341794
6	Point	0	33.3066305598573	-80.4228342019382
7	Point	0	33.3091710159292	-80.4255369548489
8	Point	0	33.3094010503187	-80.4252561786152
9	Point	0	33.3102615168459	-80.4262468628073
10	Point	0	33.3105252957168	-80.4253921982792
11	Point	0	33.3111230246883	-80.4255448396919
12	Point	0	33.3153747390398	-80.4193043517682
13	Point	0	33.3164785345693	-80.4203627941214
14	Point	0	33.3175835880087	-80.419033849114
15	Point	0	33.317978747801	-80.4189020334127
16	Point	0	33.3178304918494	-80.4182715084759
17	Point	0	33.3172676962107	-80.4184592462911
18	Point	0	33.3164423411252	-80.4194874800843
19	Point	0	33.3152861659899	-80.4183788313204
20	Point	0	33.3110196807655	-80.424676257876
21	Point	0	33.3099536532113	-80.4252634823079
22	Point	0	33.3093038137256	-80.4250599436777
23	Point	0	33.3092297724309	-80.4251467155994
24	Point	0	33.3067361532876	-80.4223265244601
25	Point	0	33.2867116704629	-80.4348865089872