



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

CESAC-RDS

30 December 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-2023-00955, (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 US (JD or Non-JD)	Section 404/Section 10
Non-Jurisdictional Wetland 1	0.04 AC.	Non-JD	N/A
Non-Jurisdictional Feature 1 (Ditch)	96 LF	Non-JD	N/A
Non-Jurisdictional Feature 2 (Ditch)	245 LF	Non-JD	N/A
Non-Jurisdictional Feature 3 (Ditch)	739 LF	Non-JD	N/A
Non-Jurisdictional Feature 4 (Ditch)	81 LF	Non-JD	N/A
Non-Jurisdictional Feature 5 (Pond)	0.1 AC	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. 651, 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))

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3. REVIEW AREA.

- A. Project size: 17.9 acres
- B. Center Coordinates of the review area:
Latitude: 33.2072 Longitude: -80.4535
- C. Nearest City: Saint George
- D. County: Dorchester
- E. State: South Carolina

The review area is located within an undeveloped parcel, consisting of forested uplands, a freshwater wetland, and one (1) pond.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

- A. Edisto River, which is a TNW. Navigable limits of the Edisto River are documented in the Corps' Navigability Study of 1977, Edisto River Area Report No. 03.
- B. Determination based on: A review of desktop data resources listed in Section 9 of this memorandum.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS N/A.

Non-Jurisdictional Wetland 1: Non-Jurisdictional Wetland 1 is 0.04-acre in size and continues offsite through Non-Jurisdictional Feature 1. From there, the water continues down Non-Jurisdictional Feature 1 for approximately 280 feet until it intersects with the off-site continuation of Non-Jurisdictional Feature 2. The water then continues to flow down Non-Jurisdictional Feature 2 for approximately 570 feet in a north by northwest direction until it passes under Creighton Street via culvert. Water then flows in a northwest direction for approximately 1,200 feet, passing through culverts under Hill Street, then Dash Street. From there the water will flow north for approximately 365 feet, then turn west for approximately 1,680 feet, then southwest for approximately 1,520 feet, before entering Tom and Kate Branch, the nearest requisite water. From Tom and Kate Branch, the water then flows into Indian Field/Polk Swamp before finally entering the Edisto River, a TNW.

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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.
 - 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): N/A.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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. 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.
- b. 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.
- c. 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
- d. 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*.

Aquatic Resource Name	Resource Type	Reason the AR is not jurisdictional
Non-jurisdictional Feature 5 (Pond)	Non-jurisdictional pond	The onsite Non-jurisdictional Pond was excavated in uplands, and historic aerial imagery indicates it was constructed between 1999 and 2005. The pond is excavated entirely in uplands, drains only uplands, and does not have a relatively permanent flow.

The review area contains one upland dug pond (Non-Jurisdictional Feature 5 (Pond)) that, according to the applicant, was constructed sometime prior to 1993 for the purposes of being a livestock pond when the property was formerly used as a pasture for cattle. The pond is not considered a tributary because the ditch that connects the pond to the tributary network lacks an ordinary high water mark and relatively permanent flow. The determinate features of the pond point to upland excavated depression that primarily uses precipitation and surface water retention as recharge for its stock watering uses in the past. Although not currently utilized for stock watering or other agricultural uses, the upland situated capture and retention features of the pond remain in place. The pond is

excavated from the same uplands that Non-Jurisdictional Feature (ditch) 2 and 5 were created in and therefore pond was created from uplands, is draining only uplands, and does not carry or contribute to relatively permanent flow. According to the NRV desktop review the area surrounding the pond was dug in soils that the NRCS did not identify as Hydric, is located in an area identified in the USGS topographic resources devoid of wetlands, tributaries, other aquatic features, and is not located in an area depicted as wetlands on USFWS NWI resources.

Additionally, the following interstate commerce factors that are described in paragraph (a)(3) of the 1986 definition of WOTUS do not apply to Non-Jurisdictional Feature 5 (Pond), “All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.”

- e. 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 1 is a wetland feature that has a long (approximately 5,615 feet) and weak connection to the nearest requisite water, Tom and Kate Branch, and does not constitute a CSC. Non-Jurisdictional Wetland 1 is not abutting or contiguous with a TNW or an RPW. It does not have a continuous surface connection to TNW/RPW. Due to the extended length of multiple conveyances, indeterminate condition of multiple offsite conveyances, lack of a discernable OHWM where observation was possible, lack of flowing water onsite as indicated in resources presented by the agent and available by remote sensing data, and consistent with the direction in EPA-Army memo NWK 2022-00809, it was determined that Non-Jurisdictional wetland does not meet the physical connection requirement to constitute a CSC. There is not a requisite water along the flowpath that is physically close enough to meet the continuous surface connection requirement.

Non-Jurisdictional Features (Ditches) 1-4: The review area contains 17.76 acres

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of dryland and has four linear features that total approximately 1,161 linear feet. Through site photographs and aerial photographs, these four Non-Jurisdictional Features (Ditches) have been determined to lack evidence of an OHWM, constructed in dry land, and do not carry relatively permanent flow.

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 (desktop) Determination.
Date: September 18, 2024
 - b. Map submitted by or on behalf of, the applicant/consultant: "WETLANDS EXHIBIT, DR HORTON – SHORT CUT TRACT, DORCHESTER COUNTY, SC", map dated September 19, 2024, and revised by this office on October 2, 2024, with information provided by the agent.
 - c. Wetland Delineation Data Sheets: Prepared and submitted by or on behalf of the applicant/consultant. This office concurs with the data sheets/delineation report.
 - d. Site Photographs: Photos provided by Red Bay Environmental, submitted as part of the JD request dated June 26, 2024, with additional photos provided by email on September 19, 2024.
 - e. USGS Topographic map: 7.5 Minute – Harleyville: Quad depicts the review area as partially forested / partially unforested. No symbols that typically represent potential waters of the US are depicted on the USGS topographic maps.
 - f. USFWS National Wetland Inventory (NWI) Map Service: NWI depicts the review area as upland with one freshwater forested/shrub wetland. <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=1eb5aab71973402fbdb879cbb7bd3595>
 - g. National Hydrographic Dataset (NHD): NHD does not depict any linear features within the review area.
<https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer>
 - h. USDA NRCS Soil Survey: Soil survey depicts the following soil types: Lynchburg loamy sand (0 to 2 percent slopes), and Rains sandy loam, 0 to 2 percent slopes). This layer displays soil map units derived from the SSURGO database. <https://arcportal-ucop>

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corps.usace.army.mil/s0portal/home/item.html?id=045a6ccb74954698892c0cc5106beee5

- i. USGS 3D Elevation Program (3DEP) Map Service: <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=8ba4619c2e60467a909a1bc31e3a06cc>
- j. Aerial Imagery: ESRI base layer imagery, 2020 SCDNR IR Aerial_2020_NIR (Map Service)
https://tiles.arcgis.com/tiles/RvqSyw3dil7dTKo5/arcgis/rest/services/SC_2020_NIR/MapServer

10. OTHER SUPPORTING INFORMATION.

- a. MEMORANDUM ON NWK-2022-00809, U.S. Environmental Protection Agency and U.S. Department of the Army (June 25, 2024)
- b. MEMORANDUM ON LRL-2023-00466, U.S. Environmental Protection Agency and U.S. Department of the Army (February 16, 2024)
- c. MEMORANDUM ON NWK-2024-00392, U.S. Environmental Protection Agency and U.S. Department of the Army (November 21, 2024)
- h. 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 APPROXIMATE WETLAND
BOUNDARIES DEPICTED ON THIS
MAP ARE NOT FINAL AND ARE
SUBJECT TO CHANGE BY THE
U.S. ARMY CORPS OF ENGINEERS.

Non-Jurisdictional
Wetland 1

Non-Jurisdictional Feature 1 (Ditch):
~96 linear feet

~~Jurisdictional Wetland 1:~~
~0.04 acre

Non-Jurisdictional Feature 3 (Ditch):
~739 linear feet

Upland
~17.76 acres

Non-Jurisdictional Feature 4 (Ditch):
~81 linear feet

Non-Jurisdictional Feature 2 (Ditch):
~245 linear feet

Non-Jurisdictional Feature 5 (Pond):
~0.1 acre

TMS# 036-00-00-261
approx 17.9 acres

Revised by the Corps on 11/20/2024 with
information provided by the agent.

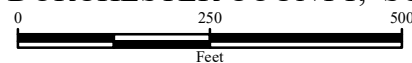
EXTERNAL SOURCES: NAIP 2021 TRUE COLOR AERIAL, U.S. CENSUS ROADS,
DORCHESTER COUNTY GIS PARCEL

Created By: Stephen Bennett
Date Created: June 28, 2023
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mapping\usace\wet_exhibit.mxd
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Disclaimer: This map is a graphic representation of data obtained from various
sources. All efforts have been made to warrant the accuracy of this map. However,
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REVISED: 9/19/2024

WETLANDS EXHIBIT DR HORTON - SHORT CUT TRACT DORCHESTER COUNTY, SC



LEGEND

- PROPERTY BOUNDARY: +/- 17.9 AC
- JURISDICTIONAL WETLANDS: +/- 0.04 AC
- NON-JURISDICTIONAL FEATURE 5 (POND): +/- 0.1 AC
- NON-JURISDICTIONAL FEATURES 1-4 (DITCHES): +/- 1161 LF
- UPLAND: +/- 17.76 AC
- ROADS

Long: -80.249176 -80.4535
Lat: 33.033654 33.2072