



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT  
1519 TAYLOR STREET, COLUMBIA, SC 29201-2918

CESAC-RD

October 29, 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-2024-01006, NexMetro Clearwater, Aiken County, SC](#)

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.

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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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1. SUMMARY OF CONCLUSIONS.

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F.)	Waters of the U.S. (WOUS)	Section 404/ Section 10
<a href="#">Wetland C</a>	<a href="#">1.79 AC</a>	<a href="#">No</a>	<a href="#">None</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. [The AJD review area is limited to the specified review area depicted on the attached figure "Figure 4. Delineated Wetlands" at coordinates Latitude: 33.5110°, Longitude: -81.8932°. Project Area size: 25.72 Acres. Nearest City: Clearwater, Aiken County SC.](#)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A](#)

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

Resource Name	Flows into	Section 10 TNW
<a href="#">Wetland C</a>	<a href="#">No connection found</a>	<a href="#">N/A</a>

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 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

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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.

## 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

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

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- 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).

Aquatic Resource	Size (acre)	Rationale
Wetland C	1.79	<p>This 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).</p> <p>LiDAR, DEM, and Satellite photos indicate a possible drainage feature south of the wetland, but USACE field site visit on 28Oct2024 determined that this drainage feature does not exhibit indicators of any normal hydrologic flow, and the feature ends within review boundaries over 500 feet from the nearest aquatic resource. No discrete surface connection to any relatively permanent water was found.</p> <p>Based on the information above, this wetland feature does not have a continuous surface connection to a jurisdictional water and does not meet the definition of "waters of the United States."</p>

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. Agent report dated September 16, 2024
- I. Field photos (field visit May 11, 2022; Sep 5, 2024)
  - II. Wetland Determination Field Data Sheets

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- III. Feature Description Narratives
- IV. USGS Topo and USDA Soils Maps
- V. DEM and NWI Maps
- b. USACE field visit conducted October 28, 2024
  - I. Site Visit Notes
- c. National Regulatory Viewer Layers accessed August 28, 2024
  - I. USFWS NWI Map Service
  - II. USGS NHD Map Service
  - III. NRCS SSURGO Map Service
  - IV. USDA Soils Hydric Class Map Service
  - V. USGS 3D Elevation Program (3DEP) Map Service
  - VI. USGS 3DEP Bare Earth DEM Dynamic Map Service
  - VII. ORM Project layers
- d. Google Earth accessed August 28, 2024
  - I. Historic aerial imagery

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.





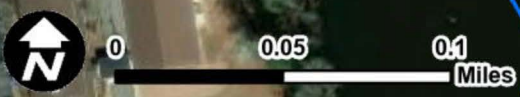
Name	Acreage	Potential Jurisdictional Status
Wetland C	1.79	Non-Jurisdictional

Map ID	Latitude	Longitude
PB1Wet	33.50998	-81.89284
PB1Up	33.50996	-81.89301
PB2Wet	33.51095	-81.89325
PB2Up	33.51111	-81.89342
PB3Up	33.50918	-81.89237
PB4Up	33.50856	-81.89227

ID	Latitude	Longitude
ID 1	33.50845	-81.89324
ID 2	33.50871	-81.8934
ID 3	33.50875	-81.89342
ID 4	33.50879	-81.89345
ID 5	33.50892	-81.89318
ID 6	33.50916	-81.89334
ID 7	33.50896	-81.89377
ID 8	33.50879	-81.89366
ID 9	33.50879	-81.8938
ID 10	33.5088	-81.89389
ID 11	33.50881	-81.89395
ID 12	33.50883	-81.89406
ID 13	33.50888	-81.89441
ID 14	33.5092	-81.89458
ID 15	33.50969	-81.89483
ID 16	33.50999	-81.89584
ID 17	33.51043	-81.89581
ID 18	33.511	-81.89458
ID 19	33.51155	-81.89423
ID 20	33.51114	-81.89294
ID 21	33.5111	-81.89283
ID 22	33.51109	-81.89282
ID 23	33.51111	-81.89272
ID 24	33.50653	-81.88954
ID 25	33.50653	-81.88955
ID 26	33.5065	-81.88969
ID 27	33.50649	-81.88971
ID 28	33.50803	-81.89078
ID 29	33.50761	-81.89272



Imagery Date: 2/14/2024



**Legend**

Project Area (25.72 Acres)

Non-Jurisdictional Wetland

Culvert

Streams

Boundary Vertex Points

**Delineation Data Point**

Wetland

Upland

**Figure 4. Delineated Wetlands**

NexMetro - Clearwater SC  
Aiken County, South Carolina

Job No.	6480220117
Drawn By:	CEB
Reviewed By:	MJC
Date:	11/15/2024

The map shown here has been created with all due and reasonable care and is strictly for use with WSP USA Environment & Infrastructure Inc. (WSP) project number 6480220117. WSP assumes no liability, direct or indirect, whatsoever for any such third party or unintended use.