



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

CESAC-RD

February 13, 2025

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-2023-01399](#), [CDP Barnwell 3](#), [Barnwell 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.² 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.³ For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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-2023-01399](#)

1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).
- b. Satellite, field photos, National Wetland Inventory, National Hydrography Database, LiDAR, DEM, and Hydric Soil layers do not indicate or show presence of any features that may be considered waters.

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 "ALTA/NSPS Boundary Survey for: CDP Barnwell 3, LLC" at coordinates 33.2484°, -81.3481°. Project Area size: 2.153 Acres. Nearest City: Barnwell, Barnwell 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: N/A

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SAC-2023-01399](#)

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

- 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").⁷ Include size of the aquatic resource or feature within

⁵ 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.

⁶ 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.

⁷ 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-2023-01399](#)

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). N/A
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 October 27, 2023](#)
 - I. [Field photos \(field visit conducted September 6, 2023\)](#)
 - II. [Wetland Determination Field Data Sheets](#)

CESAC-RD

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- III. Feature Description Narratives
- IV. USGS Topo Map

b. National Regulatory Viewer Layers accessed February 12, 2025

- 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

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.

NOTE "A"

SURFACE AND ENVIRONMENTAL CONDITIONS WERE NOT EXAMINED OR CONSIDERED DURING THIS SURVEY. ALL BUILDINGS, SURFACE AND SUBSURFACE IMPROVEMENTS ON AND ADJACENT TO THE SITE ARE NOT NECESSARILY SHOWN HEREIN. NO STATEMENT IS MADE CONCERNING THE EXISTENCE OF UNDERGROUND UTILITIES WHICH MAY AFFECT THE USE OF THIS TRACT.

NOTE "B"

THE LOCATION OF UNDERGROUND UTILITIES SHOWN HEREIN ARE BASED ON VISIBLE EVIDENCE AND UTILITY INFORMATION PROVIDED BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION AND ARE APPROXIMATE LOCATIONS BASED ON SURVEY DATA OBTAINED DURING THE FIELD SURVEY. OTHER UTILITIES MAY EXIST. CONTACT THE APPROPRIATE UTILITY COMPANIES FOR INFORMATION CONCERNING ANY ADDITIONAL BURIED UTILITIES.

NOTE "C"

ALL DISTANCES ARE HORIZONTAL. GROUND DISTANCES WERE DETERMINED BY COORDINATE COMPUTATION. ALL BOUNDARY CORNERS WERE FOUND/SET AND IDENTIFIED PER LEGEND, UNLESS NOTED OTHERWISE.

NOTE "D"

IF ANY JURISDICTIONAL MATTERS OR OTHER CONDITIONS WHICH MAY BE REGULATED BY FEDERAL OR STATE OR LOCAL AGENCIES WERE NOT INVESTIGATED DURING THIS SURVEY, INDIAN BURIALS AND OTHER RESTRICTIONS ON DEVELOPMENT MAY BE REQUIRED.

NOTE "E"

PARCELS SHOWN HEREIN IS LOCATED IN THE FLOOD ZONE "X" DESIGNATION FROM MAP NUMBER: 450103030 COMMUNITY NUMBER: 450323, CITY OF BARNWELL, PARCELS NUMBER: 326, DATED SEPTEMBER 29TH, 2010.

NOTE "F"

THIS PARCEL HAS (0) DEFINED PARKING SPACES.

NOTE "G"

NO EVIDENCE OF RECENT EARTHWORK OR BUILDING CONSTRUCTION OBSERVED WHILE CONDUCTING FIELDWORK.

NOTE "H"

SUBJECT PARCELS SHOWN HEREIN IS ZONED:

NO ZONING PER BARNWELL COUNTY PLANNING SETBACKS/ROW/IN/A SIDE/NA/ REAR/NA

NOTE "I"

THIS PARCEL MAY BE SUBJECT TO ANY EASEMENTS AND/OR RIGHT-OF-WAYS.

NOTE "J"

(C) ENCROACHMENTS OBSERVED DURING FIELD SURVEY AND NOT IDENTIFIED IN SITE SEARCH.

NOTE "K"

SUBJECT PARCELS REFERENCE DOCUMENTS:

(1) PLAT BY J.L. FAY LAND SURVEYOR OF 23.72 ACRES RECORDED IN PG. T. PG. 106, BARNWELL COUNTY R/O.

(2) PLAT BY GREGORY SURVEYORS, INC. FOR "WICHARD FINSON" RECORDED IN PG. 1237 PG. 9-B, BARNWELL COUNTY R/O.

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SURVEYOR'S LEGAL DESCRIPTION

All that tract or parcel of land lying and being approximately 0.76 miles Northeast of the Town of Barnwell, in the County of Barnwell, State of South Carolina, and being the land conveyed to CDP Barnwell 3, LLC by Deed Book _____, dated _____, 2024 and recorded in the Barnwell County Register of Deeds and being more particularly described as follows:

Commencing at a #4 rebar w/flag found on the northern right of Way of Main Street (SC Route #70) at the northeastern corner of said CDP Barnwell 3, LLC property and the southeast corner of the KA Holdings, LLC Property as described in Deed Book 1370 page 32 and labeled Point of Beginning; thence with said Right of Way S 45° 10' 27" E 346.01 feet to a #4 rebar set at the northeast corner of the Dean E. Owens property as described in Deed Book 157 page 671; thence leaving said Right of Way with the Dean property N 45° 20' 55" W 271.00 feet to a #4 rebar set; thence with the Dean property N 45° 19' 27" W 346.01 feet to a #4 rebar w/flag at the northeastern corner of said KA Holdings property; thence said KA Holdings Property N 45° 20' 55" W 271.00 feet to the Point of Beginning, containing 2.153 Acres (93,763.36 square feet), more or less.

Bearings based on South Carolina Grid North, NAD83

Surveyed by: N/F Dean E. Owens
PIN: p/o 091-03-03-019
DB 157 pg. 671
PB T pg. 156
(16.56 Ac.)

Surveyed by: N/F KA Holdings, LLC
PIN: p/o 091-03-03-022
DB 1370 pg. 32
PC A, Side 237 pg. 9-B
(1.00 Ac.)

Surveyed by: N/F Govin Oil Red Estate, LLC
PIN: 091-03-02-010
DB 1229 pg. 80
PB E pg. 3
(18.83 Ac.)

Surveyed by: N/F SC Department of Public Safety
PIN: 091-03-02-008
DB 749 pg. 131
PB T pg. 71

Surveyed by: N/F Govin Oil Red Estate, LLC
PIN: 091-03-02-010
DB 1229 pg. 80
PB E pg. 3
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DB 1229 pg. 80
PB E pg. 3
(18.83 Ac.)

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DB 1