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

CESAC-RD February 4, 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-2024-01112, 3671 Foothills Way, York 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.

1. SUMMARY OF CONCLUSIONS.

    i. Non Jurisdictional Impoundment Pond 100 (Upland Dug Pond) is not a water of the United States

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 "Aquatic Resources Sketch Map – Foothills Way Figures 1a and 1b" at coordinates 35.0916°, -80.9353°. Project Area size: 0.435 acres Nearest City: Fort Mill, York 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

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

[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.

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 the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

        The review area contains one upland excavated small pond depicted as Non Jurisdictional Impoundment Pond 100 on the associated delineation map. This pond is surrounded by man made berms on 2 out of 4 sides and upland area on 2 out of 4 sides, and has no visible aquatic feature mapped for an inlet or outlet.

[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.

This pond was not constructed on waters of the US and is a Preamble water (51 FR 41217)
Reference page 16 of 59:
https://archives.federalregister.gov/issue_slice/1986/11/13/41202-41260.pdf
Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing (51 FR 41217).

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 September 3, 2024
        I. Field photos (field visit conducted July 26, 2024)
        II. Wetland Determination Field Data Sheets
        III. Feature Description Narratives
        IV. USGS Topo Map
        V. DEM and NWI Maps

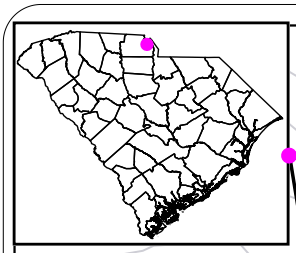
    b. National Regulatory Viewer Layers accessed January 31, 2025
        I. USFWS NWI Map Service
        II. USGS NHD Map Service
        III. NRCS SSURGO Map Service
        IV. USDA Soils Hydric Class Map Service
        V. USGS 3D Elevation Program (3DEP) Map Service
        VI. USGS 3DEP Bare Earth DEM Dynamic Map Service
        VII. ORM Project layers

    c. USC Libraries Digital Collection accessed January 31, 2025
        I. Historic topographical indexes, 1942-1968

10. OTHER SUPPORTING INFORMATION. Prior USACE AJD SAC-2021-00657

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.

Aquatic Resources Sketch Map



Sketch Map provided for illustrative purposes and preliminary planning only. Not intended to be relied upon for exact location, dimension, or orientation. All findings and assessments are subject to verification from the Army Corps of Engineers, SC DES, and/or other appropriate local authorities. Do not reproduce map set except in its entirety.

Coordinates
1: 35.0910921,-80.9384599
2: 35.0912511,-80.9389507
3: 35.0909388,-80.9388882
4: 35.0905117,-80.9386731
5: 35.0901574,-80.9384162
6: 35.0903257,-80.9379656
7: 35.0900111,-80.9377596
8: 35.0898370,-80.9381873
9: 35.0893282,-80.9378208

Foothills Way

York Co. Parcel
Number:7230000079

Upland

Upland

Impoundment
Pond 100: ~ 0.038 Ac.
Non Jurisdictional Impoundment

AJD Review Area:
~ 0.435 Acre

Legend
- AJD Review Area
- Project Area
- York Co. Parcels
- Contours: 2 Ft

Delineation
- Pond

Coordinate Point: 1

0 50 100 150 200 Ft

ATLAS ENVIRONMENTAL

Project Name: Foothills Way

Location: 3671 Foothills Way Fort Mill, SC 29708

For: Phelan Development Company Attn: Jess Knigge

Coordinates: 35.091598°, -80.935314°

Date: Jan. 31, 2025

JACOB TRAVIS SINCLAIR 3180 PWS PROFESSIONAL WETLAND SCIENTIST

Aquatic Resources Sketch Map

ATLAS ENVIRONMENTAL

Page 2 of 2 Figure: 1b

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For: Phelan Development Company Attn: Jess Knigge	
Coordinates: 35.091598°, -80.935314°	Date: Jan. 31, 2025