



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

CESAC-RD

14 January 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023),¹
SAC-2024-00804, (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.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 1598 U.S. 651 (2023), SAC-2024-00804

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).

NJW-A Wetland, 5.12 acres in size, non-jurisdictional
NJF-1 Ditch 847 linear feet, non-jurisdictional

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: 44 acres
- b. Center Coordinates of the review area: Latitude: 33.4446°, Longitude: -80.7286°
- c. Nearest City: Orangeburg
- d. County: Orangeburg
- e. State: South Carolina
- f. Map entitled "Aerial Exhibit Project Pizza 3.0 at OCCIP +/- 44 Acres" prepared by S&ME, Inc. and dated June 12, 2024
- g. AJD SAC-2014-00619 form 2 of 2 issued in a letter dated August 18, 2015 under *Rapanos* determined the same 5.12 acre wetland was non-jurisdictional stating "Since no surface connection was found to waters of the U.S., this depressional feature was determined to be isolated and therefore non-jurisdictional and not subject to the Clean Water Act." The review area for AJD SAC-2014-00619 is larger and inclusive of the subject 44 acre review area.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 1598 U.S. 651 (2023), SAC-2024-00804

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶ N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 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.

⁸ 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.

- 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”).⁹ 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.

NJF-1 is an 847 linear foot ditch. The ditch is not an aquatic resource since it doesn’t exhibit an ordinary high-water mark and doesn’t have relatively permanent flow. As detailed in the 2008 *Rapanos* preamble “In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.” NJF-1 was constructed in the uplands, only drains uplands, and doesn’t carry relatively permanent flow.

- 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

⁹ 51 FR 41217, November 13, 1986.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 1598 U.S. 651 (2023), SAC-2024-00804

- 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).

This office verified that NJW-A contains all three parameters that define a wetland as outlined in the 1987 Corps of Engineers Wetland Delineation Manual and Atlantic and Gulf Coastal Plain Regional Supplement (Version 2.0) and is 5.12 acres in size. Reference map entitled “Aerial Exhibit Project Pizza 3.0 at OCCIP +/- 44 Acres” prepared by S&ME, Inc., and dated June 12, 2024.

- 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. Desktop review completed by the Corps on November 8, 2024.
 - b. Wetland delineation package submitted by the agent dated June 14, 2024, which included wetland delineation data sheets for the site completed on June 11, 2024.
 - c. Additional details site information was provided by the agent in an email on November 15, 2024.
 - d. LIDAR: 3DEP Digital Elevation Model (DEM) prepared by the Corps during the November 8, 2024, desk review.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 1598 U.S. 651 (2023), SAC-2024-00804

- e. Historical aerial photography review prepared by the Corps during the November 8, 2024, desk review.
- f. USGS topographic maps provided in the wetland delineation package submitted by the agent dated June 14, 2024.
- g. USDA NRCS Soil Survey (USDA NRCS, Esri) provided in the wetland delineation package submitted by the agent dated June 14, 2024.
- h. AJD SAC-2014-00619 issued in a letter dated August 18, 2015.

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.

Drawing Path: T:\Columbia-1610\Projects\2024\24610298_Alliance Consulting Engineers, Inc._Project Pizza 3.0 at OCCIP_Orangeburg SC\ENV\GIS\mxd\Project Pizza 3.0 at OCCIP Aerial Exhibit.mxd plotted by chandley 06-12-2024

REFERENCE:

PLEASE NOTE THIS EXHIBIT IS FOR INFORMATIONAL PURPOSES ONLY. IT IS NOT MEANT FOR DESIGN, LEGAL, OR SURVEY USES. THERE ARE NO GUARANTEES ABOUT ITS ACCURACY. S&ME, INC. ASSUMES NO RESPONSIBILITY FOR ANY DECISION MADE OR ANY ACTIONS TAKEN BY THE USER BASED UPON THIS EXHIBIT.



APPROXIMATE SITE LOCATION
33.4455, -80.7286

NJF-1 (Ditch)

Portion of Orangeburg Co. TMS
0235-00-01-005.000



Site Location

1. 33.4461, -80.7314
2. 33.4465, -80.7262
3. 33.4440, -80.7259
4. 33.4431, -80.7268
5. 33.4427, -80.7295
6. 33.4437, -80.7312

Feature Information

NJW-A: 5.12 ac

NJF-1 (Ditch): 847 LF

Total Aquatic Resources: 0 ac
Total Site Acreage: 44

- Site Location
- Photograph Location & Direction
- Upland Data Point Location
- Wetland Data Point Location
- Non-Jurisdictional Feature (Ditch)
- Non-Jurisdictional Wetland (NJW)
- Approximate Boundary

0 405 810 FEET



Aerial Exhibit

Project Pizza 3.0 at OCCIP +/- 44 Acres

Orangeburg, Orangeburg County, South Carolina

Source: World Imagery 2022

SCALE:
1" = 400'

DATE:
6-12-24
PROJECT NUMBER
24610298

EXHIBIT NO.

3