



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

CESAC-RD

23 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*, 143 S. Ct. 1322
(2023),¹ SAC-2024-01160, (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 (WOUS)	Section 404/Section 10
Jurisdictional Tributary 1	4,175 L.F.	yes	Section 404
Jurisdictional Wetland #1	5.83 AC.	yes	Section 404
Jurisdictional Wetland #2	4.96 AC.	yes	Section 404
Jurisdictional Wetland #3	5.26 AC.	yes	Section 404
Non-jurisdictional Feature (Pond)	0.5 AC	no	

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.

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- a. Project Area Size: 89.87 acres
- b. Center Coordinates of the review area: Latitude: 33.9067°, Longitude - 78.6948°
- c. Nearest City: Simpson Creek Township
- d. County: Horry
- e. State: South Carolina

The project area is comprised of timberlands.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Waccamaw River: Section 10,
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS:

Jurisdictional Wetlands “#1 & #2” totaling 10.79 acres are adjacent to onsite jurisdictional Tributary (“Jurisdictional Tributary 1”), a relatively permanent tributary, which flows west to its confluence with Joyner Swamp which flows to Grissett Swamp which flows to Seven Creek which outfalls into the Waccamaw River a TNW.

Jurisdictional Wetland “#3” totaling 5.26 acres is adjacent to the offsite Joyner Swamp tributary by a offsite non-jurisdictional ditch. The ditch is culverted under S.C. Highway 9 and outfalls directly into Joyner Swamp (offsite Tributary with the flow regime of perennial). Joyner Swamp flows to Grissett Swamp which flows to Seven Creek which outfalls into the Waccamaw River a TNW.

Jurisdictional Tributary “#1” is a relatively permanent tributary which flows west to its confluence with Joyner Swamp which flows to Grissett Swamp which flows to Seven Creek which outfalls into the Waccamaw River a TNW.

- 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

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

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): Onsite is 4,175 LF of tributary determined to be a relatively permanent tributary. The tributary flows west offsite to its confluence with Joyner Swamp which flows to Grissett Swamp which flows to Seven Creek which outfalls into the Waccamaw River a TNW.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): The review area contains three (3) jurisdictional wetlands; Wetlands W #1 through W #3 totaling 16.05 acres. Wetlands #1 & #2 are non-tidal wetlands that were determined to have a continuous surface connection to the onsite tributary which flows west to a series of named relatively permanent tributaries that outfall into the Waccamaw River a TNW. Wetland #3 is adjacent to an upland excavated ditch that drains directly to the offsite relatively permanent tributary (Joyner Swamp) which flows to a series of named relatively permanent tributaries that outfall into the Waccamaw River a TNW.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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 other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁸ 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 ornamental pond depicted as non-jurisdictional pond on the associated wetland sketch. This pond was determined to be a Preamble waters (51 FR 41217) Reference page 16 of 59: https://archives.federalregister.gov/issue_slice/1986/11/13/41202-41260.pdf

Preamble waters (51 FR 41217), in part, are: *Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons are Preamble waters* (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.

The review area contains several upland excavated ditches totaling approximately +/- 500 linear feet. These features are identified as Upland-Excavated, Non-Jurisdictional Ditches on the associated wetland sketch. These features were determined to have been excavated wholly in uplands do not carry a relative permanent flow of water.

- 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

⁸ 51 FR 41217, November 13, 1986.

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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. Review Performed for Site Evaluation: Desktop Review
Date: January 13, 2025.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation submittal for the Simple Man Holdings Property provided by the Brigman Company in the submittal dated July 9, 2024.
 - c. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NIR (Map Service)
 - d. LIDAR: 3DEP Digital Elevation Model (DEM)
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
 - e. USDA NRCS Soil Survey: Woodington, Yonges, Nansemond, Kenansville, and Rutlege. SSURGO database.
 - f. USGS topographic maps: 7.5 Minute – Goretown Quad: Quad depicts upland forested areas as well open upland areas. USA Topo Map
 - g. National Wetland Inventory (NWI): NWI depicts the delineated boundaries of the Jurisdictional Wetlands as forested wetlands (PFO4/1B for wetlands # 1 & #2) and PFO4Bd for Wetland #3. The onsite upland pond (non-jurisdictional) is depicted as PUBHx. The locations of the upland excavated ditches are depicted as uplands on the NWI map.
<https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0>

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- h. National Hydrography Dataset (NHD): NHD shows a flow path of onsite wetlands through a series of relatively permanent tributaries that outfall into the Waccamaw River a TNW

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.



Wetland Delineation/Determination

Simple Man Holdings

Simpson Creek Township,
Horry County, South Carolina
PIN# 177-00-00-0036, & 177-11-02-0001

Area Summary:	
Jurisdictional Wetland	16.05
Jurisdictional Tributary	4175 L.F.
Non-Jurisdictional Feature (Pond)	0.31
Uplands	73.82
Total	89.87

- Notes
1. Potential wetland/non-wetland areas depicted here on have not been verified by the US Army Corps of Engineers. Areas depicted as wetlands were identified using a combination of available remote sensing and onsite investigation. Prior to any land disturbing activities, or land transactions a final jurisdictional determination should be obtained from the US Army Corps of Engineers.
 2. Boundary information taken from Horry County GIS/Tax Parcel information.
 3. Onsite inspection was conducted on 7-8-24.

Legend

Line Legend

Boundary	
Adjacent Boundary	
Right of Way	
Jurisdictional Tributary	
Non-Jurisdictional Ditch	
Dirt Road	
Bulkhead	

Hatch Legend

Jurisdictional Wetland	
Non-Jurisdictional Wetland	
Critical Area/Section 10	

Symbol Legend

Data Point	
Photo Point	
Property Corner	

Prepared For	Thomas & Hutton
Job #	00692-24204
Date	7-9-24 (revised 10-3-24)

