



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

CESAC-RDS

29 July 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),¹ [SAC-2023-00504] [(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 U.S. (WOUS)	Section 404/ Section 10
Jurisdictional Tributary 1	529 L.F.	Yes	Section 404
Jurisdictional Tributary 2	270 L.F.	Yes	Section 404
Jurisdictional Wetland 1	5.07 ACRES	Yes	Section 404
Jurisdictional Wetland 3	.51 ACRES	Yes	Section 404
Jurisdictional wetland 2	8.08 ACRES	Yes	Section 404
Non-Jurisdictional Feature 1	3.34 ACRES	No	None
Non-Jurisdictional Feature 2	479 L.F.	No	None
Non-Jurisdictional Feature 3	436 L.F.	No	None
Non-Jurisdictional Feature 4	574 L.F.	No	None
Non-Jurisdictional Feature 5	2461 L.F.	No	None
Non-Jurisdictional Feature 6	54 L.F.	No	None
Non-Jurisdictional Wetland 1	.19 ACRES	No	None

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)

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- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))
- f. 2008 Rapanos guidance

3. REVIEW AREA.

- a. Project Area Size: 78.5 acres
- b. Center Coordinates of the review area: Latitude: 32.3388 °N, Longitude: - 80.9481 °W
- c. Nearest City: Okatie
- d. County: Jasper
- e. State: South Carolina

The review area is one of Beaufort-Jasper Water & Sewer Authority's (BJWSA) eight Water Reclamation Facilities known as Cherry Point WRF. The Cherry Point WRF serves a large portion of the BJWSA's wastewater system south of the Broad River. The review area consists of 61.29 acres of uplands which include the water treatment facility and upland planted pine community, 13.66 acres of Section 404 palustrine forested wetlands, 799 linear feet of Section 404 tributaries, 0.19-acre of a freshwater wetland that does not contain a continuous surface connection to a jurisdictional water, 3.34 acres and 2,940 linear feet of a waste treatment system, and 1,064 linear feet of non-jurisdictional ditches.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is the Okatee River and New River, both are classified as "Navigable waters of the U.S."⁶
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

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.

Jurisdictional Tributary 1: This aquatic resource flows Northwest directly into a culvert system, which immediately discharges to an offsite man-altered unnamed tributary system outside of the review area that flows directly into the Okatee River, a TNW.

Jurisdictional Wetland 1: This aquatic resource physically abuts Jurisdictional Tributary 1. The wetland drains into Jurisdictional Tributary 1, which then flows northwest into a culvert system that directly discharges into a man-altered unnamed tributary that flows directly into the Okatee River, a TNW.

Jurisdictional Tributary 2: This aquatic resource flows from east to west, accepting surface hydrology from wetlands directly abutting the feature. The flow travel west through a man-altered unnamed tributary offsite, which directly discharges into the New River, a TNW.

Jurisdictional Wetland 2: This aquatic resource physically abuts Jurisdictional Tributary 2. The wetland drains into the tributary system which carries the flow west offsite through a man-altered unnamed tributary, which directly discharges into the New River, a TNW.

Jurisdictional Wetland 3: This aquatic resource has a continuous surface connection through a man-altered ditch that directly discharges into the New River, a TNW. The wetland physically abuts and drains into a man-altered ditch that flows west offsite into the New River, a TNW.

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

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.

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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):

Jurisdictional Tributary 1 (529 L.F.): Based on a review of USGS Quad maps, aerial imagery, USGS 3D Elevation Program (3DEP) Map Services, and a site visit conducted by the Corps on May 8, 2024, it appears that Tributary 1 was excavated out of wetlands in the early 1900s. This feature contains a bed and bank, an Ordinary High Water Mark, and was flowing during the Corps site visit. The tributary exhibits flow characteristics of seasonally flowing system, such as interspersed sediment sorting and lack of aquatic vegetation. Based on the above information, it has been determined that the tributary has a relatively permanent flow regime.

Jurisdictional Tributary 2 (270 L.F.): This tributary is depicted on USGS National Hydrography Dataset as a perennial blue line stream. The feature contains well defined bed and banks, assorted substrate, and an Ordinary High Water Mark (OHWM). The tributary exhibits flow characteristics of seasonally flowing system, such as interspersed sediment sorting and lack of aquatic vegetation. Based on the above information, it has been determined that the tributary has a relatively permanent flow regime.

- f. The territorial seas (a)(6): N/A.
- g. Adjacent wetlands (a)(7):

Jurisdictional Wetland 1, 2, and 3: The review area contains 13.66 acres of Section 404 freshwater palustrine forested wetlands. Review of the submitted Wetland Determination Data Forms and additional information included in this review reveal these features contain 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). Flow for the on-site jurisdictional wetlands occurs regularly during the wet season and in response to precipitation events when the soils within the wetlands become saturated and reach storage capacity.

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. 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.

The review area contains a waste treatment system comprising of a 3.34 acres pond and 2,940 linear feet of associated ditch system. These features are covered under the NPDES Stormwater General Permit Tracking Number SCR10E649 and have been designed to meet the requirements of the CWA. Therefore, these features were determined to be excluded from being potential jurisdictional waters of the U.S.

- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference

⁹ 51 FR 41217, November 13, 1986.

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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).

The review area contains one non-tidal wetland labeled as Non-Jurisdictional Wetland 1, which does not have a continuous surface connection to a jurisdictional water. During a site visit conducted by the Corps on May 8, 2024, the Corps observed the proposed Non-jurisdictional Wetland 1 and found that the feature sits in a depressional landform that is wholly contained within the depression. Even though this feature meets the three parameters of a wetland listed in the 1987 Wetlands Delineation Manual, this feature does not have any form of continuous surface connection to a jurisdictional water. Therefore, it was determined to be non-jurisdictional.

There are 3 non-jurisdictional ditches (Non-jurisdictional Feature 3: 436 linear feet, Non-Jurisdictional Feature 4: 574 linear feet, and Non-Jurisdictional 6: 54 linear feet) within the review area of this form. These ditches do not carry a relatively permanent flow, are excavated wholly out of dryland, and do not exhibit a bed and bank, nor Ordinary High-Water Mark. Therefore, it was determined that these features were non-jurisdictional.

- 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: Office (Desk) Determination. Date: May 28, 2024. Field Determination. Date: May 8, 2024.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:

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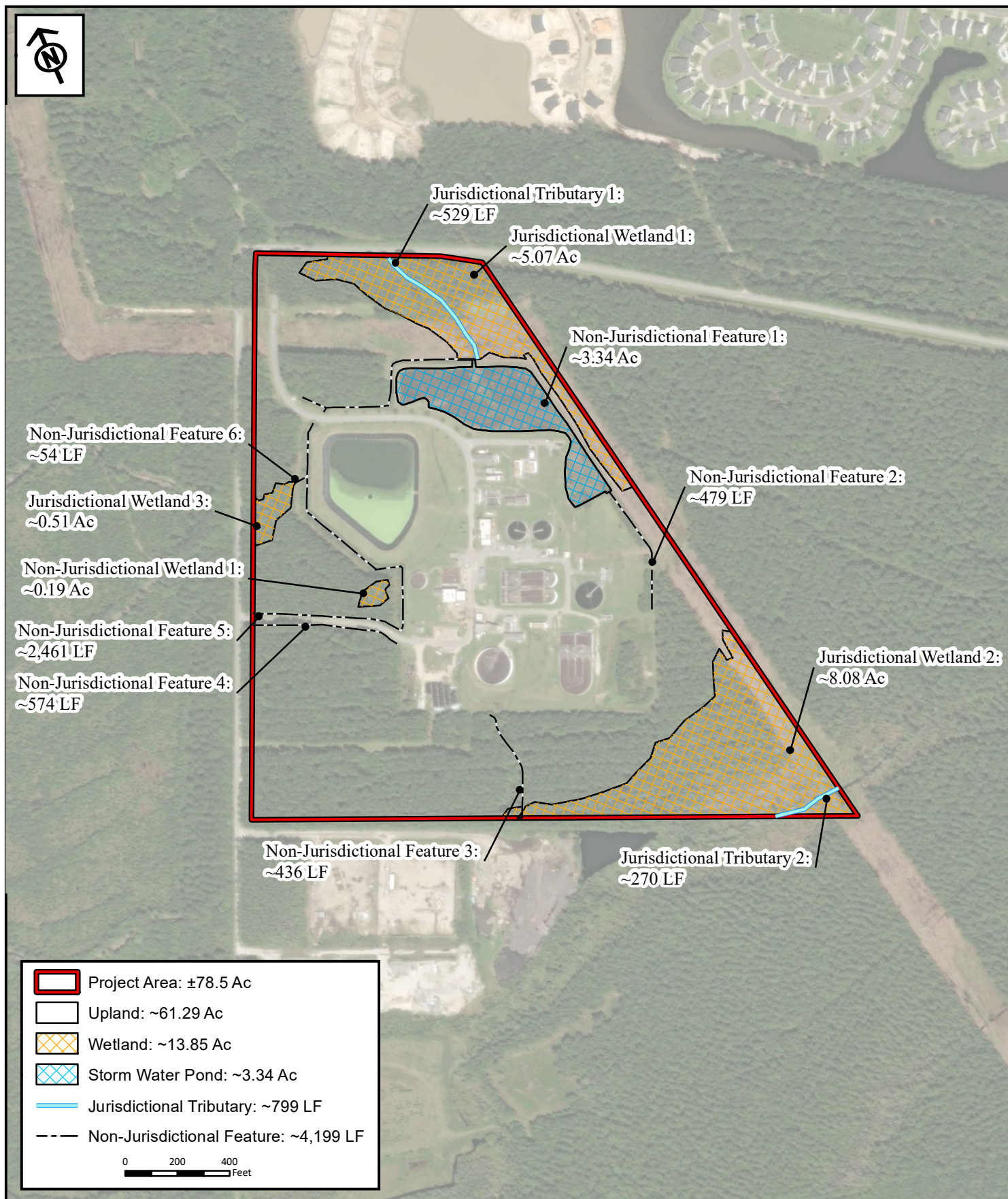
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Approved Jurisdictional Determination Request package including wetland determination forms, associated data maps, and aquatic resource map titled “Aquatic Resource GPS Delineation Exhibit” dated May 28, 2024, prepared by Resource+Land Consultants.

- c. Aerial Imagery Map: “2019 Ortho Aerial” source: ESRI Basemap, World Imagery; prepared by Resource+Land Consultants dated April 12, 2023.
- d. National Wetland Inventory Map: “National Wetlands Inventory” source: USFWS NWI, Jasper County, SC; ESRI Basemap, World Imagery; prepared by Resource+Land Consultants dated April 12, 2023.
- e. Natural Resource Conservation Survey: “NRCS Soil Survey” sources: USDA Soil Survey of Jasper County, SC; ESRI Basemap, World Imagery; prepared by Resource+Land Consultants dated April 12, 2023.
- f. U.S. Geological Survey Map: “USGS Topographic Survey” source: USGS Topographic Survey Jasper County, SC, Quad; prepared by Resource+Land Consultants dated April 12, 2023.
- g. NOAA LiDAR Elevation Map: “NOAA Topographic Lidar” source: 2020 NOAA Topographic Lidar, Jasper County, SC prepared by Resource+Land Consultants dated April 12, 2023.
- h. USGS National Hydrography Dataset: “SAC-2023-00504 Aerial/Flow Path Map” prepared by the Corps dated February 27, 2024.
- i. Infrared Imagery: “2009 Color Infrared” source: 2009 Colored-Infrared Imagery, Jasper County, SC prepared by Resource+Land Consultants dated April 12, 2023.
- j. NPDES Permit: Cherry Pointe Water Reclamation Facility NPDES Permit #SCR10E649 package, provided by Resource+Land Consultants.

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.



RLC Project No.:	21-257.1
Figure No.:	8
Prepared By:	MG
Sketch Date:	5/28/2024
Map Scale :	1 inch = 500 feet

Cherry Point WRF

Jasper County, South Carolina

Aquatic Resource GPS Delineation Exhibit

Prepared For: Black & Veatch Corporation

RLC
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