



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT  
69A HAGOOD AVENUE  
CHARLESTON, SOUTH CAROLINA 29408

CESAC-RDE

15 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),<sup>1</sup> SAC-2023-00705, MFR 1 of 1.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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).
  - i. Jurisdictional Wetland 1 - 0.03 acre jurisdictional wetland
  - ii. Non-Jurisdictional Wetland – 2.02 acres of non-jurisdictional wetland
  - iii. Four non-jurisdictional Ditches – totaling 3,952 linear feet

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: 119.45 acres
- b. Center Coordinates of Review Area: Latitude: 34.2744 , Longitude: - 79.7065
- c. Nearest City: Florence
- d. County: Florence
- e. State: South Carolina

The review area consists of 119.45 acres of undeveloped land northeast of the City of Florence, Florence County, South Carolina. One jurisdictional wetland totaling 0.03 acre and one non-jurisdictional wetland totaling 2.02

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acre are located on site. Additionally, there are 3,952 linear feet of non-jurisdictional ditches on site. The remainder of the site consists of uplands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Great Pee Dee River.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The offsite tributary flows northeast into Back Swamp, which flows east into the Great Pee Dee River. The offsite tributary is approximately 4.5 river miles from the Great Pee Dee River.
6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> 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

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<sup>6</sup> 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.

<sup>7</sup> 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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- 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): The onsite jurisdictional wetland labeled “Jurisdictional Wetland 1” totals 0.03 acre and was determined to be jurisdictional based on a review of the topographic map, NWIs, NHD, hillshade, and information submitted by the agent. The topographic map, NHD, and hillshade depict this wetland as being located adjacent to an unnamed tributary of Back Swamp, which is depicted on the topographic map and NHD as a blue line. The NWIs depict this wetland as a palustrine forested wetland (PFO1Fb). This jurisdictional wetland continues offsite and intersects the boundary of the off site tributary of Back Swamp.

## 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”).<sup>8</sup> 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.

Four non-jurisdictional ditches are present within the review area:

### Upland excavated ditches

Name of feature(s)	Size (in linear feet)	Rapanos Guidance
Non-Jurisdictional Ditch 591 LF	591 linear feet	Onsite Non-Jurisdictional Ditch 591 LF was constructed in dry land and drains only dryland.

<sup>8</sup> 51 FR 41217, November 13, 1986.

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		Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
Non-Jurisdictional Ditch 640 LF	640 linear feet	Onsite Non-Jurisdictional Ditch 640 LF was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
Non-Jurisdictional Ditch 2381 LF	2,381 linear feet	Onsite Non-Jurisdictional Ditch 2381 LF was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
Non-Jurisdictional Ditch 340 LF	340 linear feet	Onsite Non-Jurisdictional Ditch 340 LF was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>

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- 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). One isolated wetland totaling 2.02 acres is located within the review area. This wetland is depicted on the NHD as an isolated palustrine forested wetland with no other potential waters nearby. The NWIs do not depict any potential tributaries or other linear features near the non-jurisdictional wetland. Based on a review of the data sources as well as information submitted by the agent, this on-site wetland was determined to be surrounded by uplands with no potential waters of the US nearby.
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. Aquatic Resources Delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including data sheets, associated maps, and sketch for the Williamson Dargan Tract provided by The Brigman Company on May 17, 2023.
  - b. Aerial Imagery: Google Earth aerial dated October 1, 2022; 2020 SCDNR Aerial SC\_2020\_NIR (Map Service)

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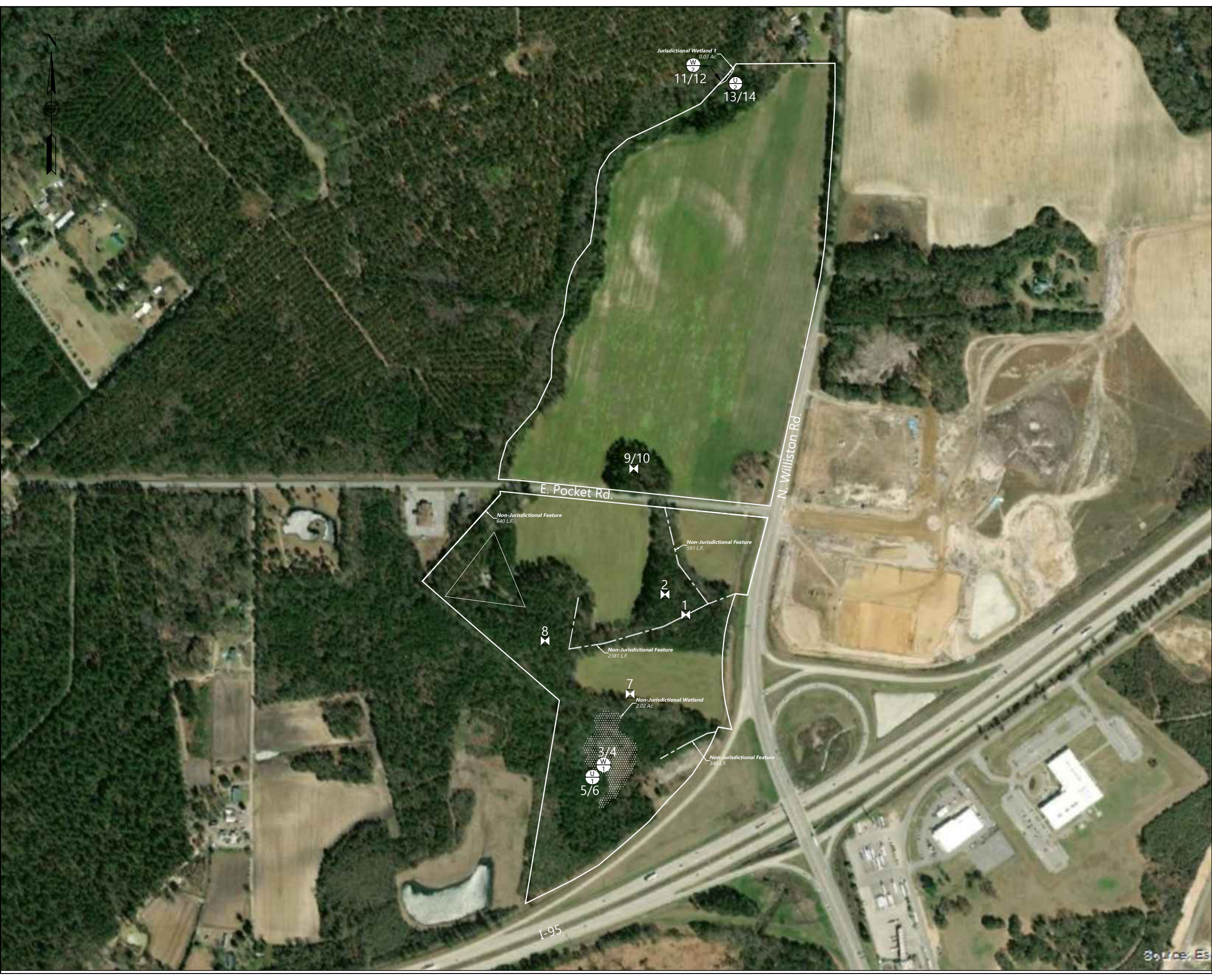
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- c. National Wetland Inventory (NWI): NWI depicts the jurisdictional wetland as a palustrine forested wetland adjacent to an offsite tributary. The remainder of the site is mapped uplands.
- d. USGS Topographic Map: 7.5 Minute – Florence East Quad: The topographic map depicts this site as predominately forested uplands. Two symbols that typically represent potential wetlands are depicted on the southern portion of the tract, and the offsite tributary is depicted as a blue line.
- e. USDA NRCS Soil Survey: The soil survey depicts the non-jurisdictional wetland area as Rains Sandy Loam, which is a hydric soil. The jurisdictional wetland and offsite tributary are depicted as Wagram Sand, which is a non-hydric soil. The remainder of the site is mapped Lynchburg, Goldsboro, Lakeland, and Lucy sand.

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

Williamson-Dargan Property

Florence County, South Carolina  
Tax Map Number 00202-01-003 & 037

<b>Area Summary:</b>	
Jurisdictional Wetlands	0.03
Non-Jurisdictional Wetlands	2.02
Non-Jurisdictional Feature (Ditch)	3952 L.F.
<u>Uplands</u>	117.40
Total	119.45

- 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 the 1987 Wetland Delineation Manual in conjunction with the Atlantic and Gulf Coastal Plain Region Supplement. Prior to any land disturbing activities, a final jurisdictional determination should be obtained from the US Army Corps of Engineers.
  2. Boundary information taken from Florence County GIS/Tax Parcel information.
  3. Onsite inspection was conducted on 9-20-22.

**Legend**

**Line Legend**

Boundary	
Adjacent Boundary	
Right of Way	
Jurisdictional Ditch	
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	

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