



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

CESAC-RDE

July 26, 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-2024-00350, MFR 1 of 1

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. SUMMARY OF CONCLUSIONS.

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.

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- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).
 - The 0.52-acre review area was determined to be void of aquatic resources by review of desktop resources and information submitted by the agent. The USGS topographic survey information, located in the Turbeville quad, depicts the project area as uplands with no wetland symbology or blue line features. Additionally, NWI maps do not depict wetlands or tributaries within the review area. Soil survey information indicates the review area is predominately mapped as Goldsboro-Noboco complex (non-hydric), with a lesser portion of the review area mapped as Rains-Coxville-Lynchburg complex (hydric). Aerial imagery depicts the site as a combination of forested and cleared areas. LiDAR indicates the review area is higher in elevation than the area to the north, and similar in elevation to areas located to the east, west, and south. Also visible on LiDAR is a non-aquatic linear feature. Photographs taken by the agent depict the feature as vegetated and lacking an ordinary high water mark. The wetland determination data sheets obtained by the agent lacks all three parameters of a wetland, as outlined in the Corps' 1987 Delineation Manual. Due to the consistency in the depiction of uplands in desktop resources and information submitted by the agent, the project area described in this form was determined to consist entirely of uplands.

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: 0.52-acre
 - b. Center Coordinates of Review Area: 33.93003°, - 80.059709°
 - c. City: Lynchburg
 - d. County: Sumter
 - e. State: South Carolina
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁵ N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: N/A
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
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

⁵ 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.

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 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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”).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. 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. 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

⁸ 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). 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. Office Determination: July 26, 2024
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including upland data sheets, on-site photographs, and associated maps, for SC-017 Fullard Site, provided by Terracon, in the submittal dated March 14, 2024.
- c. National Wetland Inventory (NWI): “2021 Aerial View / USFWS NWI / USGS NHD Map”, prepared by the agent, dated February 23, 2024.
- d. USDA NRCS Soil Survey: “2021 Aerial View / USDA NRCS Soils Map”, prepared by the agent, dated December 19, 2024.
- e. USGS Topographic Map: “Turbeville, SC-USGS Topographic Map”, prepared by the agent, dated February 19, 2024.
- f. Aerial Imagery: “1999 Infrared Aerial” and “2006 Infrared Aerial” both prepared by the agent, both dated February 19, 2024; and, “Photo Log Legend”, prepared by the agent, dated February 27, 2024.

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- g. LiDAR: USGS 3D Elevation Program (3DEP) Map Service. "LiDAR SAC-2024-00350", prepared by the Corps, dated July 26, 2024.
- h. Photographs: "Photos 1 – 11", prepared by the agent, dated February 21, 2024. "Non-Aquatic Resource Photo", prepared by the agent, dated April 24, 2024.

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.

The features depicted on this drawing were flagged and located with a Trimble Geo7x GPS with GNSS receiver in the field by Terracon Consultants on 02/21/2024. Each flagging point was at sub-meter accuracy.

Total Non-aquatic Resource (Ditch): ~25 Linear Feet
Total Uplands: ~0.52 Acres
Total Site Acreage: ~0.52 Acres



Legend

- Boundary Corners
- Approximate Site Boundary
- ▲ Upland Data Point
- Non-aquatic Resource (Ditch)

Boundary Corners Line Table

Id	Latitude	Longitude
1	33.928902	-80.06056
2	33.928923	-80.060628
3	33.929868	-80.060302
4	33.929924	-80.060188
5	33.929827	-80.059847
6	33.929839	-80.059818
7	33.929839	-80.059819
8	33.929872	-80.059805
9	33.929888	-80.059868
10	33.929944	-80.059846
11	33.929963	-80.059911
12	33.930218	-80.059799
13	33.930127	-80.05948
14	33.929874	-80.05959
15	33.929892	-80.059661
16	33.929836	-80.05968
17	33.929853	-80.059743
18	33.929806	-80.059763
19	33.929766	-80.059827
20	33.929862	-80.060182
21	33.929832	-80.06024

Esri, HERE, Garmin, (c) OpenStreetMap contributors, Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community



0 50 100 200 Feet

Project No.

EN237411A

PM:

JTM

Drawn By:

JTM

Date:

4/24/2024



1800 Reynolds Avenue N.Charleston, SC 29405
Phone: 843.884.1234 Fax: 843.884.9234

Depiction of Aquatic Resources Map

SC-017 Fullard
Backwoods Rd
Lynchburg, Sumter County, South Carolina

EXHIBIT NO.

A