



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

CESAC-RD

[June 7, 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-2023-00620 (Phase 2) 1 of 1²

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
NJW 1	0.15 AC	No	N/A
NJW 2	0.31 AC	No	N/A
NJW 3	0.57 AC	No	N/A
NJW 4	0.51 AC	No	N/A
NJW 5	2.87 AC	No	N/A
NJW 6	0.39 AC	No	N/A
NJW 9	1.79 AC	No	N/A
NJW 10	1.13 AC	No	N/A
NJW 11	1.28 AC	No	N/A
NJW 13	1.11 AC	No	N/A
NJW 14	0.40 AC	No	N/A
NJW 15	1.79 AC	No	N/A
NJW 16	0.64 AC	No	N/A

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NJW 17	4.47 AC	No	N/A
JW 1	1.74 AC	Yes	Section 404
JW 2	2.40 AC	Yes	Section 404
JW 3	1.29 AC	Yes	Section 404
JW 4	0.45 AC	Yes	Section 404
JW 5	6.22 AC	Yes	Section 404
Tributary 1	2366 L.F.	Yes	Section 404

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: 586.43 acres
- b. Center Coordinates of the review area: Latitude: 33.6545°, Longitude -

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79.9308°

- c. Nearest City: Kingstree
- d. County: Williamsburg
- e. State: South Carolina

Timberlands dominate the approximately 586.43-acre project area in various stages of growth / management. Portions of the site are unforested but would likely be forested in plantation pines at some point in its lifecycle. The review area is a subset of a much larger parcel that had a delineation concurrence issued on March 10, 2023 (SAC-2023-00222). The area is dominated by forestry and agricultural activities with sparsely interspersed residential dwellings.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Black River
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: All jurisdictional features within the review area are connected to the downstream TNW, The Black River, through a combination of non-jurisdictional features and jurisdictional tributaries. jurisdictional features (Benetts Swamp).
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

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.

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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): Within the review is a single jurisdictional tributary:

Tributary 1 that totals 2,366 linear feet.

This feature has clearly defined, man altered signatures with indications of perennial flow. An open channel with clearly defined bed and banks is visible on available aerial and LiDAR imagery. The feature bisects the review area, flowing south / southwest, discharging into, Bennett Swamp, Dickey Swamp, Laws Branch, which eventually discharges into the Black River (TNW).

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

JW1 – 1.74 ac in size and continues offsite as part of a larger wetland system that continues east. The continuance of JW1 directly abuts Mill Branch, which continues east, discharging in the Benetts Swamp, eventually discharges into the Black River (TNW).

JW2 – 2.40 ac in size and continues offsite to the east before turning south. JW2 is a component of a larger, offsite wetland system that directly abuts Benetts Swamp which eventually discharges into the Black River (TNW).

JW3 – 1.29 ac in size and abuts the onsite tributary, which discharges into Benetts Swamp, which eventually discharges into the Black River (TNW).

JW4 – 0.45 ac in size and is connected via non-jurisdictional continuous surface connection to the onsite tributary, which discharges into Benetts Swamp, which eventually discharges into the Black River (TNW).

JW5 - 6.22 ac in size and is connected via non-jurisdictional continuous surface connection to the onsite tributary, which discharges into Benetts Swamp, which eventually discharges into the Black River (TNW).

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.

The review area contains several upland excavated ditches primarily located along unimproved road systems or associated with surface drainage for forestry activities. These features are excavated in uplands, draining only uplands, and do not 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
- 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

⁸ 51 FR 41217, November 13, 1986.

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).

Non-Jurisdictional Wetlands (NJW 1- 17) The project area contains 17 non-jurisdictional wetlands totaling 25.37 acres. These wetlands were assessed and determined to be non-jurisdictional with no continuous surface connection to any jurisdictional waters. Wetlands 1-17 are typical of Coastal Plain Wetlands that are depressional in geomorphic position relative to the surrounding areas. These depressional wetlands exhibited hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Corps’ Wetland Delineation Manual and the Atlantic and Gulf Coastal Plain Regional Supplement. All water located within or draining toward these wetlands have no discernible or traceable outfall or connection to any Waters of the US (WOUS). Additionally, the wetlands were found to be surrounded by forested uplands which further disrupts possible connections to any WOUS.

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 3, 2024.
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation submittal for the Ingka Investments Forest Assets, LLC provided by the Brigman Company in the submittal dated May 08, 2023.
- c. Aerial Imagery: ESRI base layer 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>

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- e. USDA NRCS Soil Survey: Williamsburg County Soil Survey / USDA-NCSS SSURGO and STATSGO digital soil survey.
 - f. USGS topographic maps: 7.5 Minute – Workman Quad: Quad depicts mixed forested, agricultural, and interspersed residential areas.
 - g. National Wetland Inventory (NWI): Williamsburg Count NWI data.
<https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0>
 - h. National Hydrography Dataset (NHD): NHD identifies offsite tributary, Negro Field Swamp/Raccoon Run, as a tributary with a flow regime of perennial. None of the onsite upland excavated ditches are depicted on the NHD map.
<https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer>
10. OTHER SUPPORTING INFORMATION. A delineation concurrence was issued for a larger review area under SAC-2023-00222 dated March 10, 2023.
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.