



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
1949 INDUSTRIAL PARK ROAD, ROOM 140
CONWAY, SOUTH CAROLINA 29526

CESAC-RDE

June 13, 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-2024-00691 (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.

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

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. (JD or Non-JD)	Section 404/Section 10
PA (Non-Jurisdictional Feature (Pond))	0.29 AC.	Non-JD	N/A
PB (Non-Jurisdictional Feature (Pond))	0.31 AC.	Non-JD	N/A
PC (Non-Jurisdictional Feature) (Pond))	0.36 AC.	Non-JD	N/A
PD (Non-Jurisdictional Feature (Pond))	0.25 AC.	Non-JD	N/A
Non-Aquatic Feature(s) (Ditch)	49,314.4 L.F.	Non-JD	N/A
WA 1-29 (Non-Jurisdictional Wetland)	8.1 AC.	Non-JD	N/A

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. 651, 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))

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

- f. EPA Memorandum dated March 12, 2025, titled “MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE PROPER IMPLEMENTATION OF “CONTINUOUS SURFACE CONNECTION” UNDER THE DEFINITION OF “WATERS OF THE UNITED STATES” UNDER THE CLEAN WATER ACT

3. REVIEW AREA.

- a. Project Area Size: 547.9 Acres
- b. Center Coordinates of Review Area: 34.2308°N, -79.4997°W
- c. Nearest City: Florence
- d. County: Marion
- e. State: South Carolina

The 547.9-acre area of review is comprised entirely of active row crop agricultural fields with the exception of a 39-acre pine silviculture stand in the northeastern corner of the tract. The tract is located within the Cordesville/Chowan marine terrace, placing it within a relatively flat geomorphic position with few wetland/tributary reaches. The site has experienced significant agricultural modification including 49,314 linear feet (9.34 miles) of property line/access road ditching and the creation of 4 upland excavated stock ponds. Approximately 8.1 acres of the pine silviculture area meet the three criterion set forth by the 1987 USACE Wetland Delineation manual, however this wetland area lacks any continual surface connection to a non-wetland waters of the US (WOUS) rendering it non-jurisdictional.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **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

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.

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

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 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.

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.

⁸ 51 FR 41217, November 13, 1986.

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

- a. Ponds PA, PB, PC, and PD of 0.29, 0.31, 0.36, and 0.25 acres respectively were determined to be upland excavated ponds constructed as part of previous land use including pasture grazing. As stated in the Preamble to the November 13, 1986, Regulations found on page 41217 (Federal Register vol. 51 No. 219) "Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." are generally not considered waters of the U.S.
- 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.
 - a. Non-Jurisdictional Feature (Ditches) totaling 49,314.4 linear feet were determined to have been dug wholly in uplands, only draining uplands, and not carrying relatively permanent flow are located throughout the site, created as part of agricultural activities.
- 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

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

- a. WA 1-29 of approximately 8.1 acres, is located within the forested, northeastern portion of the site. The wetland meets the parameters of a wetland as outlined in the 1987 manual however it was found to be non-jurisdictional due to its hydrologic separation, not having a continuous surface connection to any non-wetland 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. AJD Submittal, or on behalf of the requestor: Wetland Determination package including upland datasheets and associated maps provided by Pilot Environmental Inc. in the submittal dated June 6, 2024.
 - b. South Carolina Revenue and Fiscal Affairs Office: Statewide Aerial Imagery 2023 (Map Service)
 - c. Lidar: 3DEP Digital Elevation Model (DEM)
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
 - d. Lidar: United States Geological Survey, 2024: 2022 Lidar DEM; Savannah Pee Dee, SC, <https://www.fisheries.noaa.gov/inport/item/65959>
 - e. USDA NRCS Soil Survey: Cantey loam, Persanti fine sandy loam, and Smithboro silt loam. SSURGO database. The site is majority well drained silty and sandy loams.
 - f. National Wetland Inventory (NWI): NWI
<https://fwspubliicservices.wim.usgs.gov/wetlandsmapsevice/rest/services/Wetlands/MapServer/0>
 - g. U.S. Geological Survey map(s): 7.5 Minute Index/ Marion and Pee Dee Quads / 1:240000; USGS topographic survey information depicts the area within the project boundary as majority cleared land with small pockets of forested land.
 - h. *Antecedent Precipitation Tool (APT) Version 2.0*: ERDC/TN WRAP-23-2. Vicksburg, MS: US Army Engineer Research and Development Center. Antecedent Precipitation Tool (APT) data for typical year determination was

CESAC-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2024-00691

calculated based on field collection data denoted on the originally included wetland delineation data forms. Output from the APT indicated "Normal Conditions" at the time of data collection by the agent. The APT tabulates data from weather stations in the vicinity and calculates field conditions using a combination of historical and recent observations.

10. OTHER SUPPORTING INFORMATION. SAC-1991-23678 f.k.a 47-1991-898 containing a portion of the current review area indicated no wetlands were present.
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 LOCATIONS OF FEATURES SHOWN ON THIS MAP ARE PRELIMINARY. THEY HAVE NOT BEEN VERIFIED BY THE USACE AND/OR THE NCDEQ-DWR. THIS EXHIBIT INCLUDES GPS LOCATIONS OF DELINEATED FEATURES.

Drawing 5

Satellite Imagery from ESRI
and Pilot GPS Data
Scale: 1" = 900'
Date: 06.06.24



SAC-2024-00691
547.9 Acre Tract
Brick Bat Solar Northern Area
Marion County, South Carolina

June 11, 2025