



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

CESAC-RD

[11 MAR 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-2021-01025]

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. 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/ Linear Feet	Waters of the US (WOUS)	Section 404/ Section 10
Non-JD Wetland 1	0.05 acre	No	N/A
Non-JD Wetland 2	0.24 acre	No	N/A
JD Wetland 1	0.75 acre	Yes	Section 404
JD Wetland 2	1.04 acres	Yes	Section 404
JD Wetland 3	0.08 acre	Yes	Section 404
JD Pond 1	0.67 acres	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: 42.31 acre
- b. Center Coordinates of Review Area: Lat. 33.7946 °, Long. -79.0433 °.
- c. City: Conway
- d. County: Horry County
- e. State: South Carolina

The project site is mostly wooded with the exception of a few structures on the property and open grounds associated with the residence and storage activities. The site is found within a rolling area with high sandy hillsides and depressional lowlands, as well as a small drainageway on the far east. The site contains several wetlands including two isolated, non-jurisdictional wetlands that lack connectivity to a tributary or any other

adjacent wetlands with connectivity to a WOUS. The other wetlands have direct connectivity to a perennial tributary that connects to the Waccamaw River. The wetlands contain hydric soils and contain well developed plant communities with primary and secondary indicators of wetland hydrology. Even though the majority of the wetlands are mapped as upland sands, the wetlands according to the agent they contain strata representative of Lynn Haven soils. All uplands are high and sandy with well drained Centenary and Kenansville Sands and a well-developed upland plant community indicative of sandy communities of the coastal plain. In addition to the wetlands, there is an old pond that was constructed out of wetlands greater than 30 years ago.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Waccamaw River]⁵
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
 - JD Wetland 1 (0.75 acres) was determined to have a continuous surface connection to an offsite unnamed tributary south of the project boundary. JD Wetland 1 flows through the onsite impoundment (JD Pond 1) which is connected via culvert to JD Wetland 3. JD Wetland 3 continues offsite and abuts an unnamed tributary that discharges directly in the Waccamaw River, a named TNW.
 - JD Wetland 2 (1.04 acres) abuts an offsite tributary along the eastern project boundary. The unnamed tributary flows directly into the Waccamaw River.
 - JD Pond 1 (0.67 acres) was excavated within onsite wetlands. JD Pond 1 was determined to have a continuous surface connection to JD Wetland 3 via a culvert. JD wetland 3 continuous offsite and directly abuts an offsite tributary that discharges directly into the Waccamaw River.

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. 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 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): The review area contains 1 jurisdictional impoundment, JD Pond 1. The impoundment was determined to have been excavated from within a water of the US.
 - e. Tributaries (a)(5): [N/A.]
 - f. The territorial seas (a)(6): [N/A]

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.

- g. Adjacent wetlands (a)(7): The review area contains 3 jurisdictional wetlands totaling 1.87 acres. The wetlands were determined to have a continues surface connection to offsite tributaries that discharge directly into the Waccamaw River, a named 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. [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 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

⁸ 51 FR 41217, November 13, 1986.

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 two (2) non-jurisdictional wetlands (Non-JD Wetland 1 & 2) totaling 0.29 acres. These separate, closed boundary depressional wetlands exhibited hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Wetland Delineation Manual. All water located within or draining toward these wetlands had no discernible or traceable outfall or connection to any WOUS. The wetlands in the project area were found to be completely surrounded by forested uplands. The topographic location of these wetlands is such that water in these wetlands is retained and eventually percolates through the soil to groundwater only, at an unknown depth, providing little if any stormwater attenuation. Because of the lack of discernible continuous surface connection and topography grades these two (2) wetlands were determined to be isolated, non-jurisdictional wetlands.

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 Evaluation: February 2, 2024
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets and map of onsite WOUS provided by the Southern Palmetto Environmental in the submittal dated May 24, 2023.
- c. U.S. Geological Survey map(s): 7.5 Minute Index/ Conway Quad; USGS topographic survey information depicts a forested area void of wetland symbology with a purple open water impoundment feature present onsite. Immediately offsite along the eastern border is an unnamed dashed blue line.
- d. USDA Natural Resources Conservation Service Soil Survey: NRCS / Soil Survey Geographic Database (SSURGO), Map service dated March 31, 2021, updated April 26, 2021; Soil survey information depicts the boundary as the partially hydric soil Centenary fine sand, the hydric soil Lynn Haven sand, and the non-hydric soil Kenansville fine sand.
- e. Wetlands Raster REST Map Service dated December 6, 2021, updated July 14, 2023; NWIS map the majority of the project boundary as uplands. Wetlands

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onsite are depicted as PFO4B and PFO1/4B. The onsite impoundment is depicted as an open water feature.

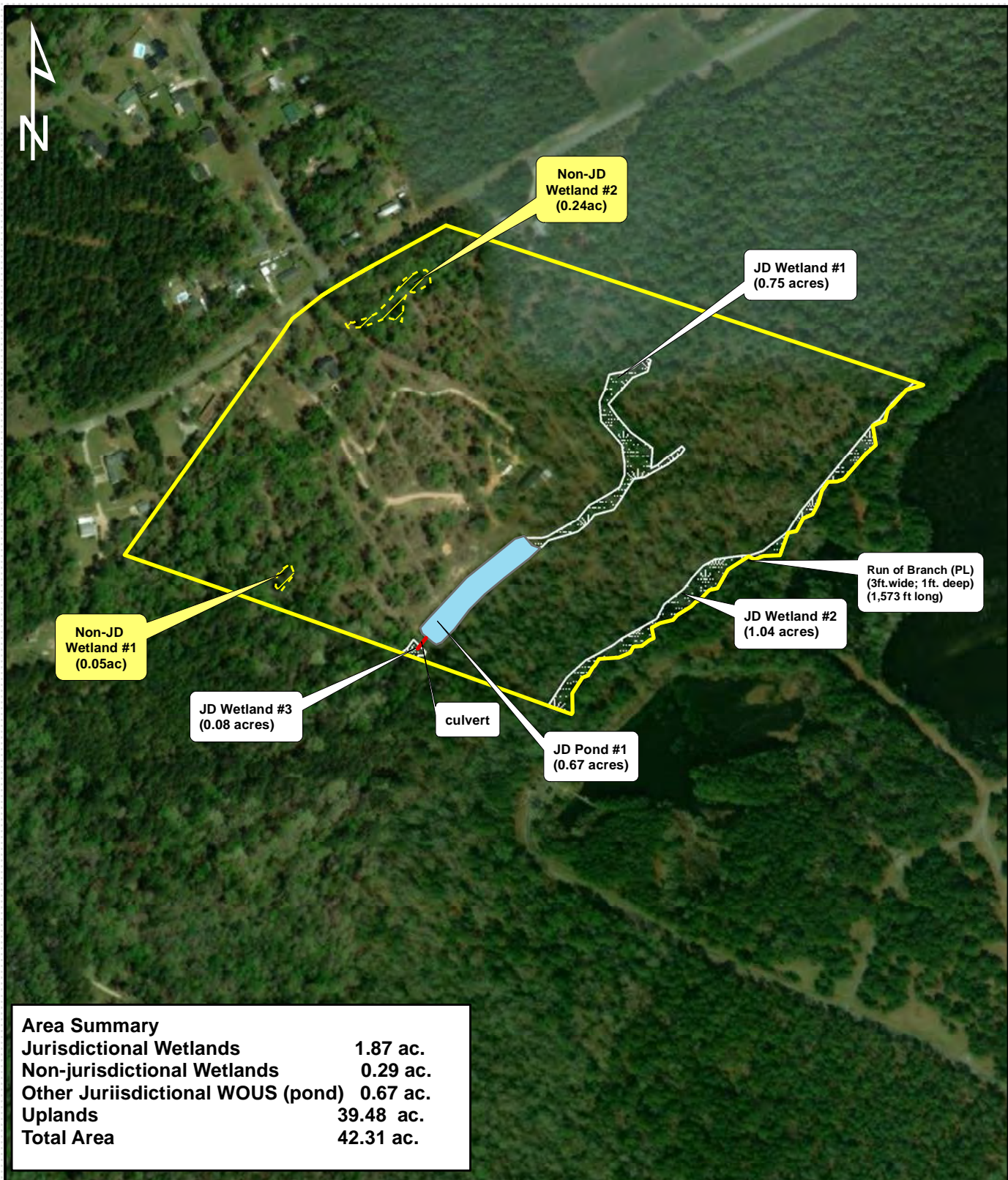
f. National Hydrography Dataset (NHD): NHD depicts blue line features (Perennial Stream/River) offsite along the eastern and southern project boundary. These blue line features flow directly into the Waccamaw River.

g. Horry County Hillshade

h. Photographs: SCDNR 2020 Aerial and site photos submitted by the agent dated May 28, 2021.

10. OTHER SUPPORTING INFORMATION. [Delineation Concurrence issued under SAC-2021-01025 letter dated October 21, 2021.]


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.



Disclaimer: Potential wetland/non-wetland areas depicted here have not been verified by the U.S. Army Corps of Engineers. Areas depicted as potential wetlands were derived from interpretation of available remote sensing information and an onsite investigation. Prior to any land disturbing activities, a final letter of jurisdictional determination should be obtained from the U.S. Army Corps of Engineers.

Wetland Determination

Steven Dunn Tract (42.31+/- ac)
 TMS#: 150-00-06-007; 132
 Horry County, South Carolina
 May 23, 2023

Feet

 0 370