



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

CESAC-RDS

March 27, 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-2022-01604] [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.

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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.

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F.)	Waters of the U.S. (yes or no)	Section 404/Section 10
Jurisdictional Wetland 1	0.30 AC.	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)
- e. [2008 Rapanos guidance](#)

3. REVIEW AREA.

- A. Project Area Size: 5.29 acres
- B. Center Coordinates of the Project Site (in decimal degrees) Latitude: 33.0013
Longitude: -80.1198
- C. Nearest City: Ladson
- D. County: Berkeley
- E. State: South Carolina

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
 - A. Goose Creek and The Cooper River
 - B. Determination: This determination was based off the remote data resources listed in Section 9 of this memorandum. Furthermore, Navigable limits of Goose Creek and the Cooper River are documented in the Corps' Navigability Study of 1977, the Cooper River Area Report No. 04.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Jurisdictional Wetland 1: The review area is located on a flat landform that gently slopes south draining into a palustrine forested wetland system (Jurisdictional Wetland 1), that is positioned within a natural depression on the landform. The hydrology source for this wetland is mainly provided from precipitation and surface water runoff but is subjected to a seasonal high water table. The USDA/NRCS soil map unit name for the wetland of interest is Meggett Loam: a hydric rated soil. This wetland is geomorphically positioned to accumulate majority of the relatively flat landscapes runoff and is part of a larger wetland system that extends onto the adjacent parcel, outside of the review area. This wetland system physically abuts and drains into a discreet ditch that is approximately 250 linear feet. This ditch functions as a continuous surface connection by discharging the wetland indirectly and directly into a culvert that merges into a larger stream order ditch system for approximately 1,750 linear feet, that discharges directly into the relatively permanent waters of Ancrum Swamp. From Ancrum Swamp, the water continues through the tributaries of Ancrum Swamp downstream into Bluehouse Swamp, then directly down into Goose Creek Reservoir, through the tidally influenced waters of Goose Creek, and finally discharging into the Cooper River, a traditional navigable water.

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.

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

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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):

Aquatic Resource Name	Resource Type	Reason the AR is jurisdictional
Jurisdictional Wetland 1	Wetland	The 5.29 acres review area primarily consists of an upland community dominated by <i>Cynodon dactylon</i> (a common upland grass found on disturbed and cultivated lands) and is maintained by frequent lawncare services. The review area is located on a flat landform that gently slopes south towards a palustrine forested wetland system, which is positioned within a natural depression on the landform.

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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		<p>The hydrology source is mainly from precipitation and surface water runoff, but the wetland area is subjected to a high seasonal water table. Review of the submitted data sheets and additional information included in this review reveal this feature contains all three parameters that define a wetland as outlined in the 1987 Corps of Engineers Wetland Delineation Manual and Atlantic and Gulf Coastal Plain Regional Supplement (Version 2.0). This wetland is a portion of a larger wetland system that extends outside of the review area and onto the abutting parcel directly to the east. Through the review of historic aerial imagery, USGS map services (i.e., LiDAR, NHD, and Hillshade), and other sources listed in section 9 of the memorandum, it appears this wetland was originally part of the requisite waters of Ancrum Swamp, a branch of riparian forested wetland area. The review area was fragmented by the construction of I-26 in the early 60s, however a continuous surface connection to the Ancrum Swamp has always been maintained. Presently, after review of current aerial imagery this wetland physically abuts a discrete ditch (approximately 250 linear feet) on the eastern portion of the wetland area (portion outside of the review area), that serves as a continuous surface connection that drains and discharges into a down gradient culvert system, and through approximately 1,750 linear feet of continuous surface connection, directly discharges into the requisite waters of Ancrum Swamp. This connection provides evidence of surface flow between this Jurisdictional Wetland 1 and to the relatively permanent waters of Ancrum Swamp.</p>
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8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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- 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 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.

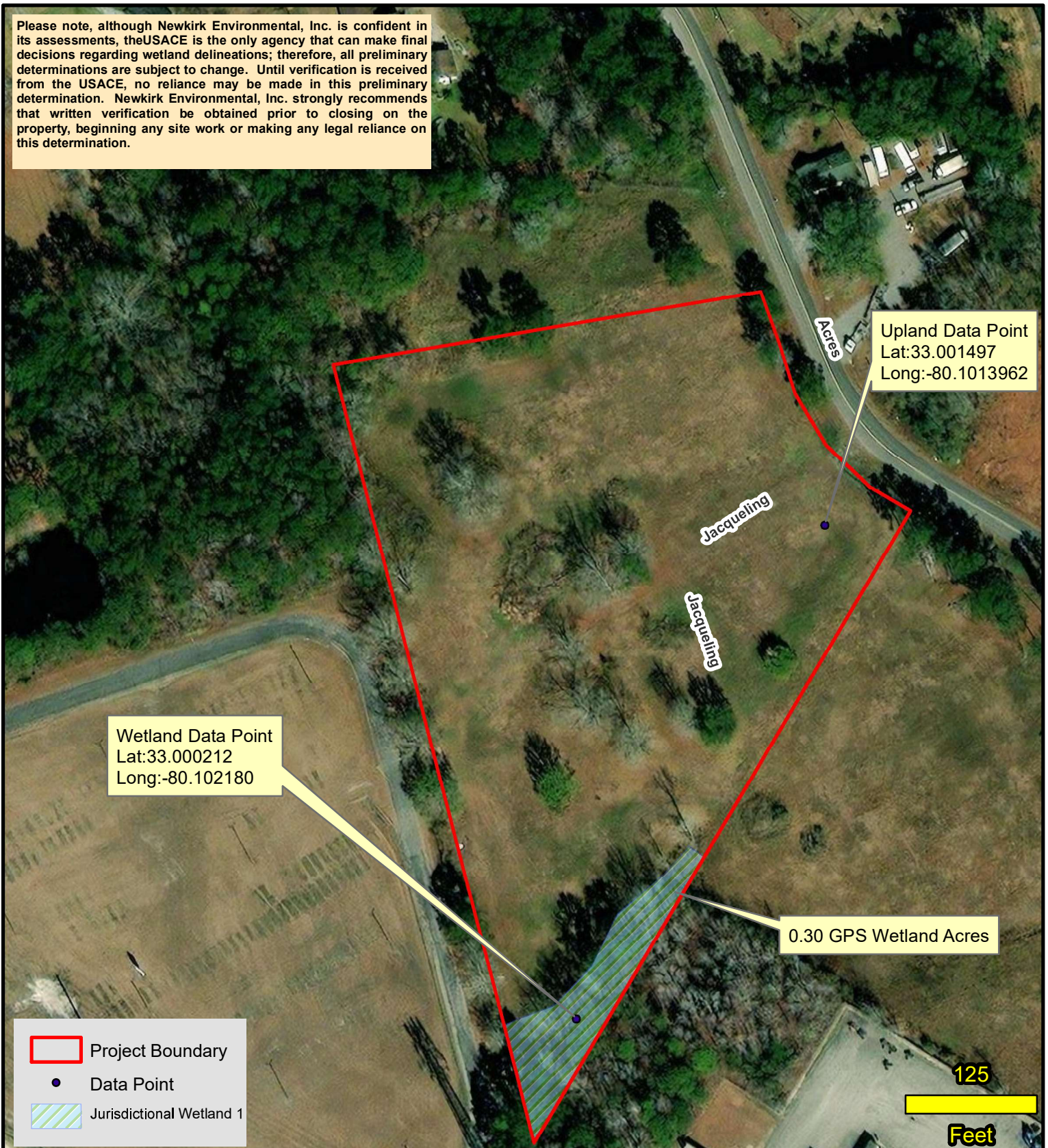
⁸ 51 FR 41217, November 13, 1986.

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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: March 18, 2024. Field Determination. Date: N/A.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including wetland determination forms, associated data maps, and aquatic resource map titled "Data Point and Photo Location Map" dated October 2022, prepared by Newkirk Environmental, Inc.
 - c. Aerial Imagery Map Services: "Regulatory Review" images sourced from Google Earth, Microsoft Bing Maps, Connectexplorer, and Google Maps, prepared by the Corps' dated March 19, 2024
 - d. Site Photographs: "Photos" provided by Newkirk Environmental, Inc. dated October 2022
 - e. National Wetland Inventory Map: "NWI Map" provided by Newkirk Environmental, Inc. dated October 2022
 - f. Natural Resource Conservation Survey: "Soils Map" prepared by Newkirk Environmental, Inc. dated October 2022
 - g. U.S. Geological Survey Map: "USGS Quad Map" prepared by Newkirk Environmental, Inc. dated October 2022.
 - h. USGS 3D Elevation Program (3DEP) Map Service – Hillshade, LiDAR, and flow-path maps prepared by the Corps' dated March 19, 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.

Please note, although Newkirk Environmental, Inc. is confident in its assessments, theUSACE is the only agency that can make final decisions regarding wetland delineations; therefore, all preliminary determinations are subject to change. Until verification is received from the USACE, no reliance may be made in this preliminary determination. Newkirk Environmental, Inc. strongly recommends that written verification be obtained prior to closing on the property, beginning any site work or making any legal reliance on this determination.



Data Point and Photo Location Map

Project #: 01-5230a Date: October 2022

Created by: LAB



Acres Drive Tract 2
Berkeley County, South Carolina

