



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

CESAC-RD

12 March 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),<sup>1</sup> [SAC-2023-00491] [MFR # 1 of 1]<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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
Jurisdictional Wetland A	0.2-acre	Yes	Section 404
Non-Jurisdictional Feature A	1,412.6 Linear Feet / 0.26-acre	No	N/A
Non-Jurisdictional Wetland A	0.1-acre	No	N/A
Non-Jurisdictional Wetland B	0.02-acre	No	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. \_\_, 143 S. Ct. 1322 (2023)

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3. REVIEW AREA.

- a. Project Area Size: 29 acres
- b. Center Coordinates of the Review Area: 33.2804, -80.5232
- c. Nearest City: Harleyville
- d. County: Dorchester
- e. State: South Carolina

The review area mainly consists of agricultural fields with a few acres of forested area. No previous jurisdictional determinations have been issued within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Edisto River: Section 10 waterbody. Navigable limits of the Edisto River are documented in the Corps' Navigability Study of 1997, Edisto River Area Report No. 3.<sup>6</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Jurisdictional Wetland A: Jurisdictional Wetland A is connected via Non-Jurisdictional Feature A, which flows to the north into an unnamed perennial tributary which drains to the north into Four Hole Swamp. Four Hole Swamp drains to the east and then south, where it connects to the Edisto River. The Edisto River becomes tidally influenced as it approaches the Atlantic Ocean.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> N/A.

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<sup>6</sup> 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.

<sup>7</sup> 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.

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): The review area contains one (1) jurisdictional wetland; Jurisdictional Wetland A, totaling 0.2-acre.
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").<sup>8</sup> 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

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<sup>8</sup> 51 FR 41217, November 13, 1986.

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.

Non-Jurisdictional Feature A: Non-Jurisdictional Feature A is a 1412.6-linear foot, 0.26-acre, drainage ditch that is depicted as an orange line (i.e., canal ditch) on USGS NHD and uplands on NWI. According to NRCS soils data, Non-Jurisdictional Feature A was cut from soils with minor hydric components, including Nocobo loamy sand (2% hydric rating) and Goldsboro loamy sand (2% hydric rating). A small portion of the feature was cut from Rains sandy loam (98% hydric rating). Therefore, the feature was determined to be predominately cut from uplands. A site visit was conducted by Corps staff on May 24, 2023. The Corps observed accumulated leaf litter and woody debris within the bed, and no standing or flowing water was present. The Corps determined the feature does not carry a relatively permanent flow of water, and is therefore, non-jurisdictional.

- 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).

Non-Jurisdictional Wetland A: Non-Jurisdictional Wetland A is a 0.1-acre wetland that does not have a continuous surface connection to a TNW. This depressional wetland 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 this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). Non-Jurisdictional Wetland A is depicted as uplands on NWI and USGS topographic maps. USGS NHD does not depict any flow lines near Non-Jurisdictional Wetland A. According to NRCS soils data, Non-Jurisdictional Wetland A is mapped as Goldsboro loamy sand (2% hydric rating). Non-Jurisdictional Wetland A is depicted as low in elevation on available LiDAR. Based on a field visit conducted by Corps staff on May 24, 2023, Non-Jurisdictional Wetland A did not have a continuous surface connection to any features that would provide a connection to a TNW downstream. A man-made berm, which is visible on LiDAR, disrupts any potential continuous surface connection to Non-Jurisdictional Feature A, and therefore, disrupts and continuous surface connection downstream to a TNW.

Non-Jurisdictional Wetland B: Non-Jurisdictional Wetland B is a 0.02-acre wetland that does not have a continuous surface connection to a TNW. This depressional wetland 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 this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). Non-Jurisdictional Wetland B is depicted as uplands on USGS topographic maps and NWI. USGS NHD does not have a flow line near the location of Non-Jurisdictional Wetland B. According to NRCS soils data, Non-Jurisdictional Wetland B is mapped as Rains sandy loam (98% hydric rating). A field visit was conducted by Corps staff on May 24, 2023, and no features were observed that would provide a continuous surface connection to Non-Jurisdictional Wetland B; the wetland was surrounded entirely by forested uplands and was not located near any other aquatic resources.

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. Field visit conducted by the Corps on May 24, 2023. A photo log depicting Non-Jurisdictional Feature A was obtained by the Corps during the field visit.

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- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets for the review area, provided by Newkirk Environmental, Inc., dated April 2023. Aquatic resource map dated November 11, 2023.
- c. USGS Topographic maps: 7.5 minute – Wadboo Swamp Quad. “Quad map”, prepared by agent, dated April 3, 2023, depicts the review area as uplands.
- d. USFWS NWI Map Service: “NWI map”, prepared by agent, dated April 3, 2023, depicts the review area as uplands.
- e. National Hydrographic Dataset (NHD): “NHD Map (Small Scale)”, prepared by the Corps, dated February 5, 2024, depicts one (1) linear feature, a canal ditch, within the review area, and the continuous surface connection off-site to Four Hole Swamp. “NHD Map (Large Scale)”, prepared by the Corps, dated February 27, 2024, depicts the flow path from Four Hole Swamp to the Edisto River, a TNW.
- f. Soil Survey: USDA-NCSS SSURGO and STATSGO Digital Soil Survey. “NRCS Soils Map”, prepared by the agent, dated April 3, 2023. The site is mapped on the soil survey as Rains sandy loam (98% hydric rating), Goldsboro loamy sand (2% hydric rating), and Noboco loamy sand (2% hydric rating).
- g. LiDAR: USGS 3D Elevation Program (3DEP) Bare Earth DEM Dynamic Service. “DEM and Hillshade map”, prepared by the Corps, dated May 24, 2023.
- h. Aerial Imagery: 2020 SCDNR IR Aerial Imagery (Map Service). “2020 SCDNR IR Aerial Imagery”, prepared by the Corps, dated May 24, 2023.

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.