



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

CESAC-RD

19 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),¹ [SAC-2023-00686, 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

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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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.

- 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. Wetland W1A, jurisdictional, 0.025 acre, Section 404
 - ii. Wetland W1B, jurisdictional, 0.005 acre, Section 404
 - iii. Wetland W1C, jurisdictional, 0.006 acre, Section 404
 - iv. Wetland W1D, jurisdictional, 0.005 acre, Section 404
 - v. Wetland W1E, jurisdictional, 0.003 acre, Section 404
 - vi. Wetland W4, jurisdictional, 0.004 acre, Section 404
 - vii. Stream S1, jurisdictional, 0.763 acre, 1,972 LF, Section 404
 - viii. Stream S2, jurisdictional, 0.002 acre, 42 LF, Section 404
 - ix. Stream S3, jurisdictional, 0.042 acre, 266 LF, Section 404
 - x. Wetland W2, non-jurisdictional, 0.554 acre
 - xi. Wetland W3, non-jurisdictional, 0.071 acre
 - xii. Wetland W5, non-jurisdictional, 0.06

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).

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- 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:
- b. Center Coordinates of the review area: 8.58 acres
Latitude: 34.6161°, Longitude -82.4771°
- c. Nearest City: Williamston
- d. County: Anderson
- e. State: South Carolina

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

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

Stream S1 is a section of Big Creek. Big Creek flows south/southeast for approximately 7 miles to its confluence with the Saluda River (TNW).

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 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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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): (See attached "Waters of the U.S. Delineation Map – Saratoga Springs Greenway Site" for reference).
 - i. Stream S1, 0.763 acre, 1,972 LF. Stream S1 is a section of Big Creek. Big Creek flows south/southeast for approximately 7 miles to its confluence with the Saluda River.
 - ii. Stream S2, 0.002 acre, 42 LF. Stream S2 flows south to its confluence with Stream S1 (Big Creek).
 - iii. Stream S3, 0.042 acre, 266 LF. Stream S3 flows south to its confluence with Stream S1 (Big Creek).
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): (See attached "Waters of the U.S. Delineation Map – Saratoga Springs Greenway Site" for reference).

Wetland W1A, jurisdictional, 0.025 acre, Section 404

- i. Wetland W1B, 0.005 acre, adjacent to jurisdictional tributary.
- ii. Wetland W1C, 0.006 acre, adjacent to jurisdictional tributary.
- iii. Wetland W1D, 0.005 acre, adjacent to jurisdictional tributary.
- iv. Wetland W1E, 0.003 acre, adjacent to jurisdictional tributary.
- v. Wetland W4, 0.004 acre, adjacent to jurisdictional tributary.

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.
- 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

⁸ 51 FR 41217, November 13, 1986.

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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).

The review area contains three non-adjacent wetlands (Wetland W2, Wetland W3, and Wetland W5) that lack a continuous surface connection to jurisdictional waters of the U.S. Wetland W2 is 0.554 acre. Wetland W3 is 0.071 acre. Wetland W5 is 0.060 acre. Each of these wetlands is located at the base of a hillslope. Overland sheet-flow is likely the cause of hydrology in these wetland areas.

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: Site Visit Determination.
Date: December 12, 2023.
- b. Aquatic resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets and map of onsite waters provided by ECS Southeast, LLP dated May 15, 2023.
- c. Aerial imagery provided by agent titled “Waters of the U.S. Delineation Map – Saratoga Springs Greenway Site” and dated May 08, 2023.
- d. USDA NRCS Soil Survey Map provided by agent titled “USDA-NRCS Soil Survey Map – Saratoga Springs Greenway Site” and dated August 27, 2021.
- e. LiDAR imagery provided by agent titled “NOAA LiDAR Elevation Map – Saratoga Springs Greenway Site” and dated March 27, 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

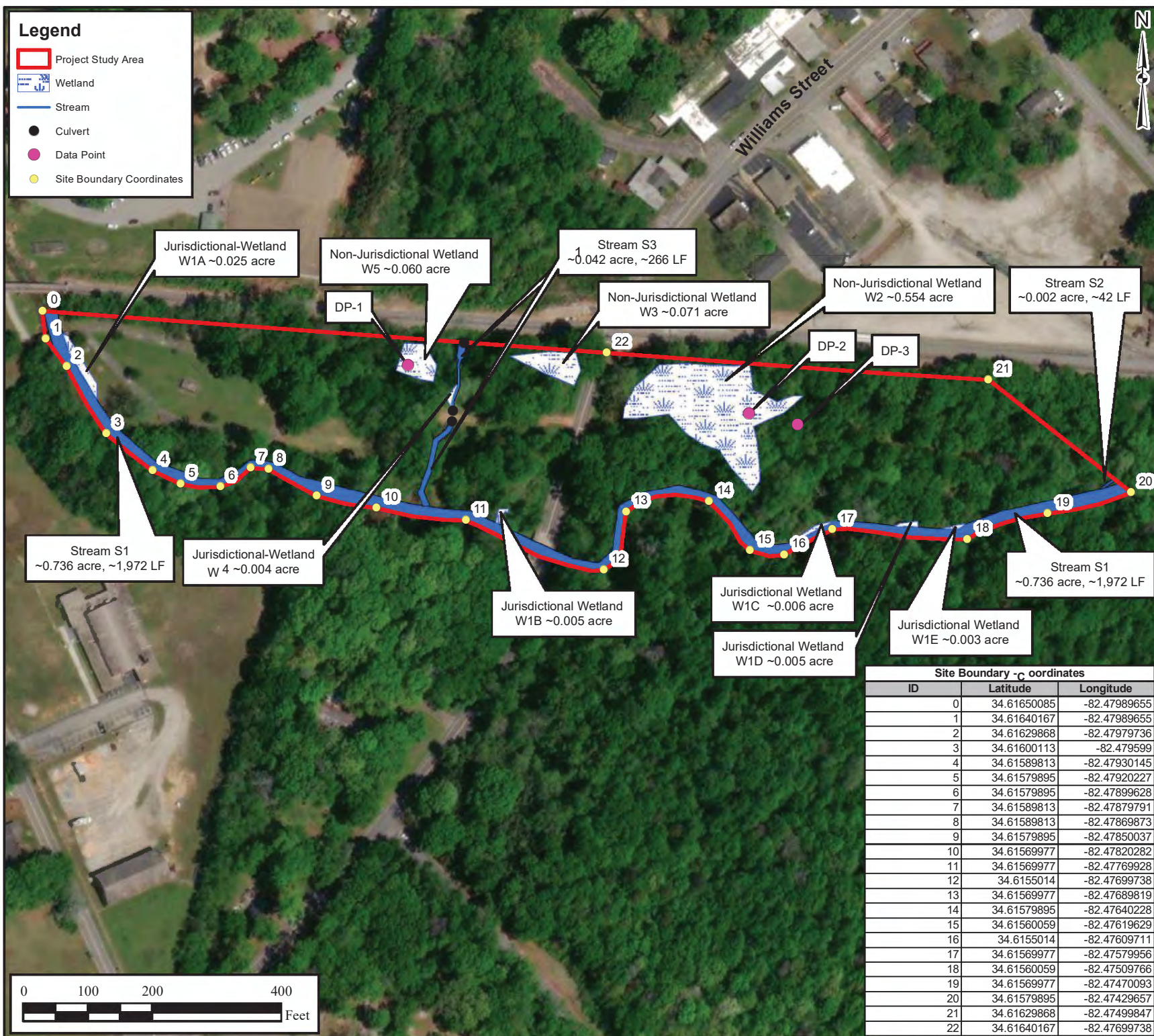
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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Legend

- Project Study Area
- Wetland
- Stream
- Culvert
- Data Point
- Site Boundary Coordinates



Client:



Project:

SARATOGA SPRINGS
GREENWAY SITE

WILLIAMS STREET,
WILLIAMSTON,
ANDERSON COUNTY,
SOUTH CAROLINA

Title:

**WATERS
OF THE U.S.
DELINEATION MAP**

NOTES:

1. POTENTIALLY JURISDICTIONAL WATERS OF THE US WERE DELINEATED BY ECS ON MARCH 31, 2023.

2. FINDINGS DEPICTED ON THIS MAP HAVE NOT BEEN VERIFIED BY THE USACE AND/OR SCDHEC. THE DELINEATION FINDINGS ARE SUBJECT TO CHANGE BASED ON AGENCY VERIFICATION.

3. LENGTH(S) & ACREAGE(S) DEPICTED ON THIS MAP ARE APPROXIMATE. THIS MAP SHOULD BE USED FOR PRELIMINARY PLANNING PURPOSES.

Drawn By:

ZJW

Scale:

1" = 200'

Approved By:

PMS

Date:

05/08/2023

ECS Project No.

49: 19884

FIGURE 7