



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

CESAC-RDS

14 May 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-2024-00178, (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).

Name of Aquatic Resource	Acres (A.C.)/Linear Feet (L.F.)	Waters of the U.S. (WOUS)	Section 404/Section 10
Tidal Wetland (Critical Area)	0.26 A.C.	Yes	Section 404/10
Jurisdictional Wetland A	0.11 A.C.	Yes	Section 404
Non-Jurisdictional Wetland B	0.12 A.C.	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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

- a. Project Area Size: 2.28 acres
- b. Center Coordinates of the review area: Latitude: 32.8506° Longitude: -79.8518°
- c. Nearest City: Mount Pleasant
- d. County: Charleston
- e. State: South Carolina

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is Foster Creek.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
 - a. The onsite TNW / critical area flows west and north directly into Foster Creek, a TNW, which discharges into the Wando River, a TNW.
 - b. Jurisdictional Wetland A abuts TNW / critical area to the west. The onsite TNW / critical area flows west and north directly into Foster Creek, a TNW.
 - c. Non-Jurisdictional Wetland B connects to Jurisdictional Wetland A via a discrete linear feature that does not constitute a sufficient continuous surface connection (CSC) per the requirements included in the 12 March 2024 HQ / EPA memo. The non-CSC feature continues south to Jurisdictional Wetland A. Jurisdictional Wetland A abuts TNW / critical area to the west. The onsite TNW / critical area flows west and north directly into Foster Creek, a TNW.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸
 - a. The review area contains a single Section 10 jurisdictional wetland area denoted as Critical Area for a total of 0.26 acre which is a TNW due to the ebb and flow of the tide. The TNW / critical area is part of a larger wetland

⁶ 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.

⁷ 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.

⁸ 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.

complex that continues offsite to the west and then north that connects to Foster Creek, a TNW. The wetland areas exhibited wetland indicators of hydrophytic vegetation, wetland hydrology, and hydric soils. Review of the information included in this review reveal these features 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)

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): The review area contains a 0.26 acre portion of tidal wetlands that coincides with SCDES Critical Area. This feature is subject to the ebb and flow of the tide.
 - 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 a single jurisdictional wetland area denoted as Jurisdictional Wetland A for a total of 0.11 acre. Jurisdictional Wetland A abuts an onsite TNW / critical area to the west. The TNW flows west and north directly into Foster Creek, a TNW. The wetland areas exhibited wetland indicators of hydrophytic vegetation, wetland hydrology, and hydric soils. Review of the submitted data sheets and additional information included in this review reveal these features 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).

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”).⁹ 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 or enter rationale/discussion here.]
- 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

⁹ 51 FR 41217, November 13, 1986.

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

- a. Non-Jurisdictional Wetland B (0.12 acre) is located in the northeastern portion of the review area and does not meet the continuous surface connection requirement to a requisite water body. The only connection to a requisite water is via a non-relatively permanent conveyance feature.
 - b. The site includes a discrete linear feature connecting Wetland A and Wetland B. This feature was constructed out of uplands and does not contain relatively permanent flow.
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: May 7, 2025.
 - 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 "Wetland Exhibit – Forsythe Road Tract Approximately 2.28-Acre TMS# 556-00-00-446 Mt. Pleasant, Charleston County, South Carolina" dated April 16, 2025, prepared by Red Bay Environmental.
 - c. Photographic Log: Provided by Red Bay Environmental with the wetland delineation dated December 15, 2023.
 - d. Aerial Imagery Map: "Wetland Exhibit – Forsythe Road Tract Approximately 2.28-Acre TMS# 556-00-00-446 Mt. Pleasant, Charleston County, South Carolina" dated April 16, 2025, prepared by Red Bay Environmental.
 - e. National Wetland Inventory Map: "USFWS National Wetland Inventory Map Forsythe Road Tract Mount Pleasant, Charleston County, SC" dated May 8, 2025, prepared by Red Bay Environmental.
 - f. Natural Resource Conservation Survey: "USDA Soil Map Exhibit Forsythe Road Tract Mount Pleasant, Charleston County, SC" dated May 8, 2025, prepared by Red Bay Environmental.

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- g. U.S. Geological Survey Map: "USGS Quadrangle Map Exhibit Forsythe Road Tract Mount Pleasant, Charleston County, SC" dated May 8, 2025, prepared by Red Bay Environmental.
- h. USGS 3D Elevation Program (3DEP) Map Service – Hillshade and LiDAR prepared by the Corps' dated April 23, 2025.

10. OTHER SUPPORTING INFORMATION. HQ/EPA memo dated 12 March 2025.

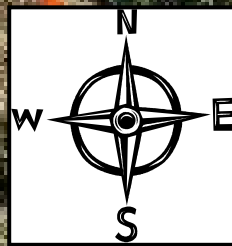
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Map Provided by Charleston County GIS

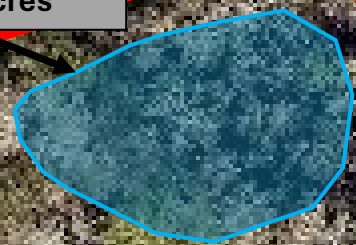
Property Boundary ———

Approx. Wetland Boundaries ———

Critical Area ———



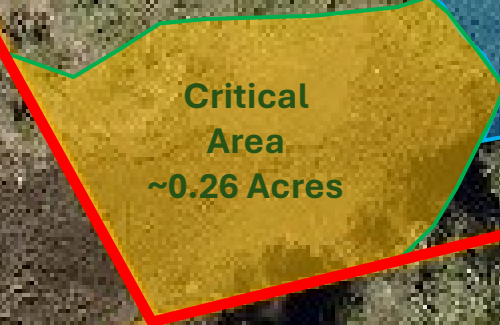
**Non-jurisdictional
Wetland B
~0.12 Acres**



5560000457

560000450

**Jurisdictional
Wetland A
~0.11 Acres**



**Critical
Area
~0.26 Acres**

Provided to USACE
April 16, 2025

Wetland Exhibit – Forsythe Road Tract
Approximately 2.28-Acre TMS# 556-00-00-446
Mt. Pleasant, Charleston County, South Carolina

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