



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

CESAC-RD

18 October 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-2019-01051, (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 (AC.)/Linear Feet (L.F)	Waters of the US (WOUS)	Section 404/Section 10
Isolated, non-jurisdictional Wetland	0.79	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)

3. REVIEW AREA.

- a. Project Area Size: 156.99 acres
- b. Center Coordinates of the review area: Latitude: 33.5952°, Longitude - 79.0141°
- c. Nearest City: Garden City
- d. County: Horry
- e. State: South Carolina

The 156.99-acre project area is an abandoned Golf course. Review of historical archived aerial photographs revealed that construction of the golf course began

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1983. Review of Corps records indicate there has been one previous Approved Jurisdictional Determinations (AJDs) for the review area documented under SAC-2019-01051 dated November 21, 2019. The previous AJD determined the site to contain 0.78 acre of non-jurisdictional wetlands. In addition, the project area was previously determined to contain upland excavated ornamental ponds. The project area is surrounded by public roadways and residential developments.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A. The 0.79-acre aquatic resource (wetland) onsite does not flow into a TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: N/A
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

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.

- 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): N/A

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.

The review area contains six (6) upland excavated ornamental ponds depicted as Non-Jurisdictional Upland Excavated Ponds (NJD Pond) on the associated wetland sketch. Some of the ponds are interconnected and drain offsite while others are self-contained. Based on a review of historic aerial photography and USGS topo maps these ponds were determined to have been excavated out of uplands and are therefore determined to be non-jurisdictional.

These ponds are Preamble waters (51 FR 41217) Reference page 16 of 59: https://archives.federalregister.gov/issue_slice/1986/11/13/41202-41260.pdf

Preamble waters (51 FR 41217), in part, are: *Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons are Preamble waters* (51 FR 41217).

- 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.

⁸ 51 FR 41217, November 13, 1986.

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The review area contains upland excavated ditches totaling approximately +/- 1,600 linear feet. This upland excavated ditch is located adjacent to a raised, paved golf cart pathway within the review area. This feature is identified as Upland Excavated Ditch on the associated wetland sketch. This feature was determined to have been *excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water*. Previous AJD determined this are to be uplands

- 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 (Isolated, Non-Jurisdictional Wetland) The project area contains one isolated, non-jurisdictional wetland totaling 0.79 acre. The wetland was assessed and determined to be isolated, non-jurisdictional with no continuous surface connection to any jurisdictional waters. 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 has no discernible or traceable outfall or connection to any Waters of the US (WOUS). Additionally, the wetland was found to be surrounded by uplands (Golf course

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and adjacent offsite development) which further disrupts possible connections to any WOUS. The topographic map depicts this wetland as forested uplands. No blue line features or other potential WOUS are depicted on the topographic map near the wetland. Aerial photographs depict this wetland as forested, and review of LiDAR data revealed that no linear drainage features within proximity or within the boundary of the wetlands. The NWI depicts the wetlands as uplands. The isolated wetland has been previously determined to be isolated, non-jurisdictional on the previous AJD (SAC-2019-01051) dated November 21, 2019, with a site visit by a Corps representative that occurred on October 18, 2019. On the 2019, site visit it was noted by the Corps representative that the wetland is surrounded on all sides by uplands that disrupt any hydrologic connection between the wetland and any other WOUS. The entire perimeter of the wetland was observed in the field during the site visit conducted on 10/18/2019.

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: October 1, 2024.
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation submittal for the Indian Wells Tract provided by the Brigman Company in the submittal dated August 14, 2024.
- c. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NIR
(Map Service)
- d. LIDAR: 3DEP Digital Elevation Model (DEM)
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
- e. USDA NRCS Soil Survey: Yemassee, Yonges, Meggett, Ogeechee, Echaw, and Hobcaw. SSURGO database.
- f. USGS topographic maps: 7.5 Minute – Brookgreen Quad (Source Date: 1973):
The USGS topographic survey information within Brookgreen Quad depicts the review area as vegetated uplands. A portion of a dashed blue line symbol is depicted originating in the upper western corner of the project area. A site visit conducted on 10/18/19 revealed that this feature does not exist on site.

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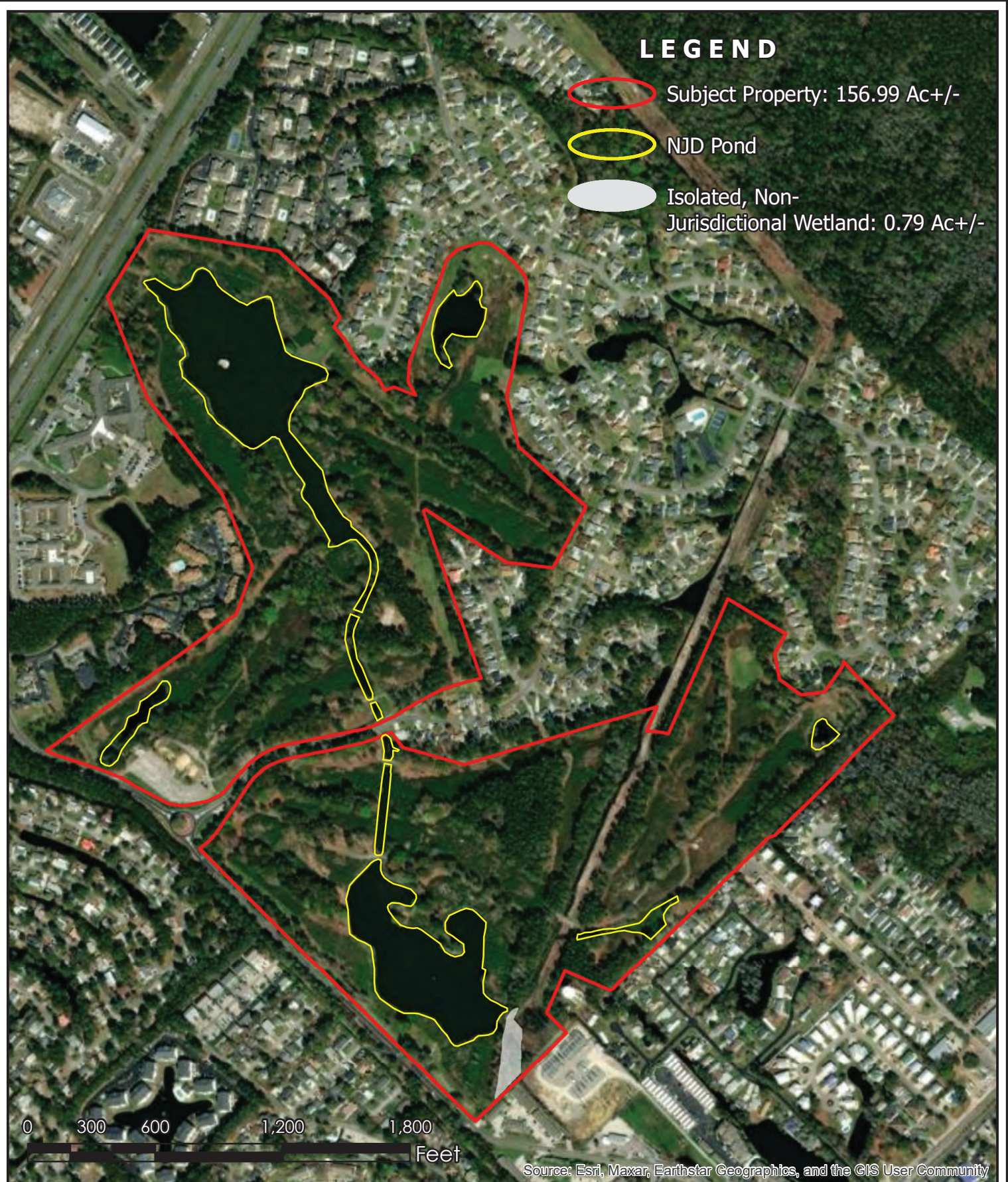
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- g. National Wetland Inventory (NWI): PUBHx; NWIs depict the majority of the project area as being comprised of uplands. Non-jurisdictional ponds on site are depicted as Paulustrine Unconsolidated Bottom, Permanently flooded, and Excavated.

<https://fwspublicservices.wim.usgs.gov/wetlandsmapping/rest/services/Wetlands/MapServer/0>

10. OTHER SUPPORTING INFORMATION. Previous AJD documented under SAC-2019-01051 dated November 21, 2019, with a site visit that occurred on October 18, 2019.

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.



TBC
THE BRIGMAN CO.

Approved Jurisdictional Determination Exhibit

Indian Wells Tract
PIN# 462-00-00-1025, 462-00-00-1026, & 462-00-00-0340
Garden City, Horry County, SC
August 14, 2024



1" = 600'