



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

CESAC-RD

02 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-2024-00420, (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 U.S. (JD or Non-JD) | Section 404/Section 10 |
|---|--------------------------------|-----------------------------------|------------------------|
| Non-wetland Waters Stream 1 (Abner Creek) | 3,289 LF (1.51 acres) | JD | Section 404 |
| Non-wetland Waters Stream 2 | 214 LF (0.029 acres) | JD | Section 404 |
| Non-wetland Waters Stream 3 | 1,061 LF (0.15 acres) | JD | Section 404 |
| Non-wetland Waters Stream 4 | 681 LF (0.06 acres) | JD | Section 404 |
| Non-wetland Waters Stream 5 | 60 LF (0.003) | JD | Section 404 |
| Wetland Area A | 0.98 acres | JD | Section 404 |
| Wetland Area B | 0.27 acres | Non-JD | 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).

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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: 75.35 acres
- b. Center Coordinates of the review area: Latitude: 34.8798 °, Longitude -82.1686 °
- c. Nearest City: Duncan
- d. County: Spartanburg
- e. State: South Carolina

The review area consists of an approximate 75 acre property that is predominantly an undeveloped forested site. Aquatic resources on the tract include five tributaries and two wetland areas. Abner Creek is a perennial stream that runs through the middle of the tract. The other tributaries on the site flow into Abner Creek. Wetland areas A and B are located in the Abner Creek flood plain. Wetland Area A is not adjacent (not directly abutting) but has a continuous surface connection with Abner Creek via a discrete feature. Wetland area B is not adjacent (not directly abutting) and did not have a continuous surface connection by any identifiable discrete feature.

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

- A. Nearest downstream TNW, Territorial sea, or interstate water: The Enoree River is a TNW located in the upstate and piedmont of South Carolina. The Enoree provides numerous recreational opportunities for kayaking, canoeing, and tubing. "Go Paddle SC" is a website that provides detailed kayaking information such as put in and take out locations, white water rapids information, duration/length of trip, etc. The Enoree River provides interstate commerce due to the recreational opportunities it provides.

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

Non-wetland waters/streams 2,3,4 & 5 are first order streams that flow into Non-wetland water/stream 1 (Abner Creek). Abner Creek flows off-site for approximately 4.25 miles and enters the Enoree River (TNW).

Wetland A is located in the Abner Creek floodplain. It is not directly abutting but has a continuous surface connection to Abner Creek by a discrete feature. During the Corps' site visit, there was a rain event and the Corps observed water flowing from the wetland through the discrete conveyance and into to Abner Creek. The discrete conveyance is a swale in the landscape providing a continuous surface connection to the perennial tributary.

Wetland B is located in the Abner Creek floodplain. It is not directly abutting and does not have a continuous surface connection with Abner Creek/Non-wetland waters 1.

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.

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b. Interstate Waters (a)(2): N/A

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5):

The site contains four perennial tributaries (Non-wetland waters 1,2,3, & 4) and one intermittent tributary (Non-wetland waters 5). Non-wetland waters 1 (Abner Creek) is a named blue line stream depicted on the USGS topo map and is at least a 3rd order stream. Non-wetland waters 2 and 3 are also perennial streams depicted as blue line features on the USGS topo map. Non-wetland waters 4 is a 1st order perennial tributary that originates slightly off-site and is mostly contained to the site under review. All of the perennial tributaries had clearly defined bed and bank, OHWM, and flowing water in the channels.

Non-wetland Waters 5 is an intermittent tributary. This tributary originates on-site, is 60 linear feet in length and has a drainage area of approximately 8 acres. The feature had OHWM and standing water at the headcut (jurisdictional upstream limit), but the other portions of the channel were dry and therefore determined to be intermittent.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

Wetland Area A is located in the Non-wetland Waters 1/Abner Creek floodplain. It is not directly abutting Abner Creek, however it does have a continuous surface connection via a discrete conveyance (swale in the topography of the landscape). This observation was made by the Corps during a June 4, 2024 site visit.

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. N/A

⁸ 51 FR 41217, November 13, 1986.

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- 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).

Wetland Area B is a 0.27 acre forested wetland located in the flood plain of Non-wetland Waters 1/Abner Creek. It is not adjacent (directly abutting). There is approximately 100 feet of uplands separating Wetland Area B from Abner Creek. There was no observed discrete feature providing a continuous surface connection to Abner Creek or other jurisdictional water.

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.

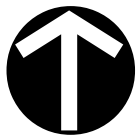
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- a. Review Performed for Site Evaluation:
Office (Desk) Determination. Date: 5-20-24 and 7-5-24
Field Determination. Date: 6-4-24
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Approved Jurisdictional Determination Request package including wetland determination data sheets, associated data maps, and aquatic resource map titled "Waters Delineation Map", dated 4-4-24, and provided by Civil & Environmental Consultants, Inc.
- c. Aerial Imagery: "Environmental Data Review Map" provided by Civil & Environmental Consultants, dated 4-4-24.
- d. Photographs: Site photos provided by Civil & Environmental Consultants, dated 2-28-24.
- e. LIDAR: 3DEP Digital Elevation Model (DEM) prepared by Corp and obtained from National Reg Viewer, dated 5-20-24.
- f. Hillshade Map prepared by Corps and obtained from National Reg Viewer, dated 5-20-24.
- g. National Wetland Inventory Map: "Environmental Data Review Map" provided by Civil & Environmental Consultants, dated 4-4-24.
- h. Natural Resource Conservation Survey: "Environmental Data Review Map" provided by Civil & Environmental Consultants, dated 4-4-24.
- i. U.S. Geological Survey Map: "Site Location Map", provided by Civil & Environmental Consultants, dated 4-4-24.

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.



NORTH

REFERENCE AND NOTES

1.ESRI WORLD IMAGERY / ARCGIS MAP SERVICE:
http://goto.arcgisonline.com/maps/World_Imagery,
ACCESSED 9/18/2024.

SUBMITTAL & REVISION RECORD

| NO | DATE | DESCRIPTION |
|----|------|-------------|
| -- | -- | -- |

Tract Acreage: 75.35 Acres

Upland Acreage: 74.1 Acres

Waters of the US Acreage: 1.25 Acres

Jurisdictional Non-Wetland Waters Stream 1 (Abner Creek): Perennial - 3289 LF / 1.51 Acres

Jurisdictional Non-Wetland Waters Stream 2: Perennial - 214 LF / 0.029 Acres

Jurisdictional Non-Wetland Waters Stream 3: Perennial - 1061 LF / 0.15 Acres

Jurisdictional Non-Wetland Waters Stream 4: Perennial - 681 LF / 0.06 Acres

Jurisdictional Non-Wetland Waters Stream 5: Intermittent - 60 LF / 0.003 Acres

Jurisdictional Wetland Area A: 0.98 Acres

Non-Jurisdictional Wetland Area B: 0.27 Acres

Jurisdictional Non-Wetland Waters Stream 1 (Abner Creek):
Perennial - 3289 LF / 1.51 Acres

Jurisdictional Non-Wetland Waters Stream 2:
Perennial - 214 LF / 0.029 Acres

SDP1

SDP2

SDP3

SDP4

Jurisdictional Non-Wetland Waters Stream 3:
Perennial - 1061 LF / 0.15 Acres

Jurisdictional Non-Wetland Waters Stream 4:
Perennial - 681 LF / 0.06 Acres

Jurisdictional Non-Wetland Waters Stream 5:
Intermittent - 60 LF / 0.003 Acres

WTP-1

UTP-1

WTP-2

UTP-2

Jurisdictional Wetland Area A: 0.98 Acres

Non-Jurisdictional Wetland Area B: 0.27 Acres

LEGEND

- Area of Interest (AOI)
- Upland Area (74.1 Acres)
- Wetland (1.25 Acres)
- Intermittent Stream (60 Linear Feet)
- Perennial Stream (5,245 Linear Feet)
- Soil Data Points
- Stream Data Points

SCALE IN FEET

0 500 1,000



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KRELL TRACT SUBDIVISION
MAYFIELD ROAD
DUNCAN, SOUTH CAROLINA

WATERS DELINEATION MAP

| | | | | | | |
|-----------|-----------|-------------|---------|--------------|---------|------------|
| DRAWN BY: | KKA | CHECKED BY: | TJE | APPROVED BY: | LM | FIGURE NO: |
| DATE: | 9/18/2024 | SCALE: | 1"=500' | PROJECT NO: | 337-360 | |

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*Hand Signature on file