



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

CESAC-RD

30 SEPT 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-2023-01340,²

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.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2023-01340

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/ Linear Feet	Waters of the US (WOUS)	Section 404/ Section 10
JD Wetland 1	4.94 acres	Yes	404
JD Wetland 2	1.07 acres	Yes	404
JD Wetland 3	0.51 acres	Yes	404
JD Wetland 4	3.78 acres	Yes	404
JD Wetland 5	2.55 acres	Yes	404
JD Wetland 6	2.11 acres	Yes	404
JD Wetland 7	1.08 acres	Yes	404
JD Wetland 8	0.81 acres	Yes	404
JD Wetland 9	2.55 acres	Yes	404
Non-JD Wetland 9	0.14 acres	No	404
Non-JD Wetland 10	0.07 acres	No	404
Non-JD Wetland 11	1.88 acres	No	404
Non-JD Wetland 12	1.73 acres	No	404
Non-JD Wetland 13	0.45 acres	No	404
Non-JD Wetland 14	0.04 acres	No	404
Non- JD Wetland 15	1.20 acres	No	404
Non-JD Wetland 16	0.06 acres	No	404
Non-JD Wetland 17	0.05 acres	No	404

2. REFERENCES.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2023-01340

- 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.

- Project Area Size: 125.03 acre
- Center Coordinates of Review Area: Lat. 33.8308 °, Long. -79.7285 °.
- City: Longs
- County: Horry County
- State: South Carolina

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

- The Atlantic Intracoastal Waterway (AIWW) and Waccamaw River

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

- JD Wetland 1, 4, 5 are contiguous offsite to the south and abut offsite drainage features that cross under Carolina Bays Parkway and discharge directly into the AIWW. The offsite features are man altered feature providing drainage for adjacent wetlands. The feature is depicted as M-18 on Horry County Main Drainage Canal Study and discharges directly into the AIWW. M stands for Main Canal (Ditch or Channel) and is the principal channel which conducts the drainage water from the watershed to the outlet.
- JD Wetland 2 and 3 are a part of the same wetland system that is contiguous to Wetland 1 and continuous offsite to the south and abuts an offsite drainage feature that crosses under Carolina Bays Parkway and discharges directly into the AIWW.
- JD Wetland 6 and 7 are a contiguous wetland separated by a dirt roadway. They abut an onsite roadside ditch that intersects with JD Wetland 4 and continues offsite and abuts an offsite drainage feature that

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2023-01340

cross under Carolina Bays Park Way and discharges directly into the AIWW.

- JD Wetland 8 abuts an offsite drainage feature to the north. The wetland was determined to be contiguous, directly abutting by review of aerial photos, soil survey information, and previous determinations. The offsite feature is a man altered feature providing drainage for adjacent wetlands. The feature is depicted as M-20 on Horry County Main Drainage Canal Study and discharges directly into the Waccamaw River. Additionally, the feature is a solid blue line on topographic map indicating a tributary with perennial flow.
- JD Wetland 9 directly abuts an onsite ditch that continues offsite to the south under Carolina Bays Park Way that discharges into a stormwater pond that flows directly into the AIWW. This feature is man altered feature providing drainage for adjacent wetlands the Tributary is depicted as M-17 on Horry County Main Drainage Canal Study and discharges directly into the AIWW.

These flow paths have been previously established under determinations SAC-2008-1856-3JH, SAC-2014-00462, and SAC-2019-00505.

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

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.

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):
- f. The territorial seas (a)(6): [N/A.]
- g. Adjacent wetlands (a)(7): JD Wetlands 1, 2, 3, 4, 5, 6, 7, and 9 were determined to be adjacent to the offsite TNW the AIWW. JD Wetland 8 was determined to be adjacent to the offsite TNW the Waccamaw River.

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]
- 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.]
 - Present onsite are several upland excavated roadside ditches and swales. These ditches were determined to have been excavated wholly in uplands, draining only uplands, and do not carry a relative permanent flow of water.

⁸ 51 FR 41217, November 13, 1986.

CESAC-RD

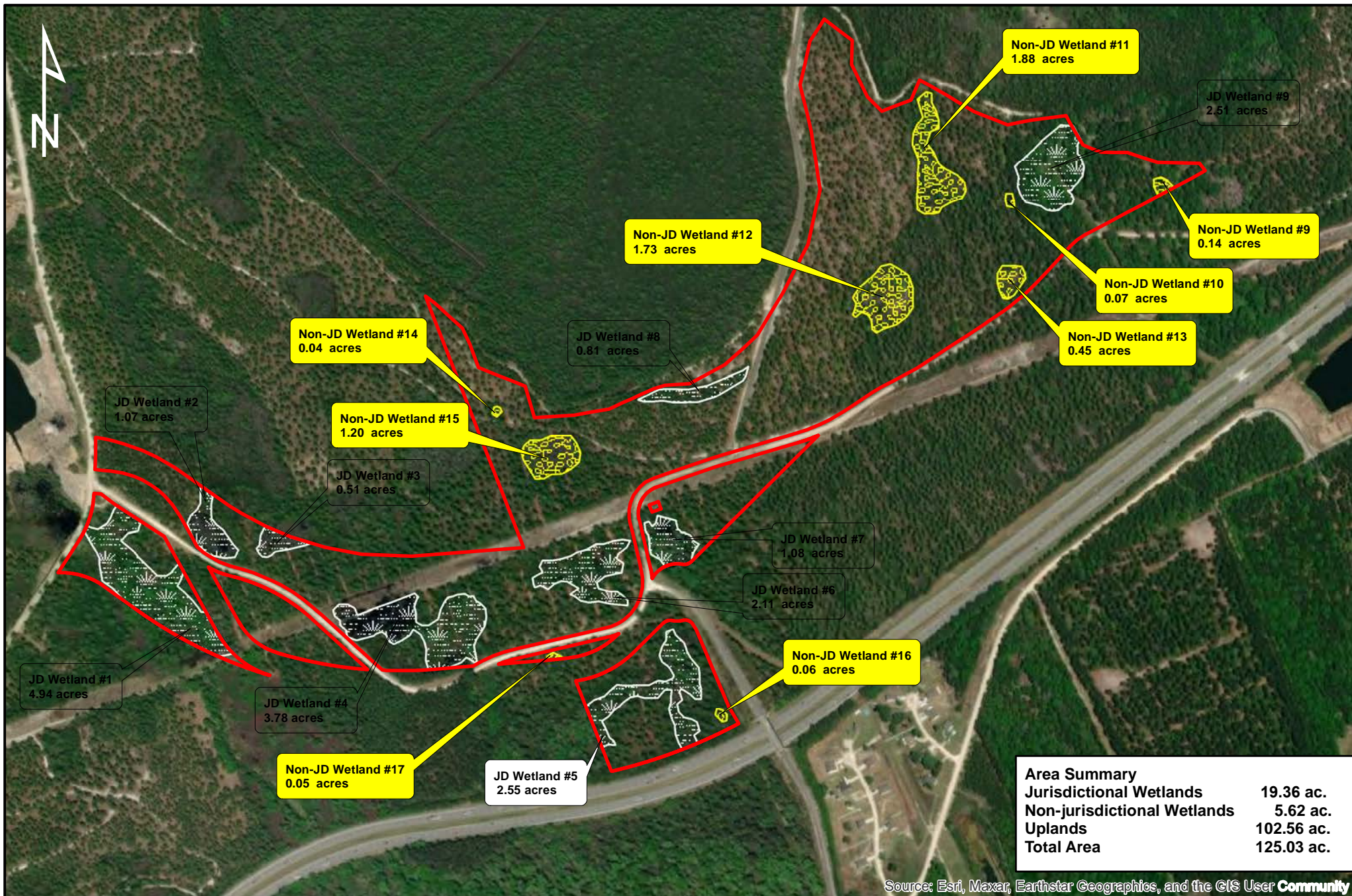
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2023-01340

- 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).
 - The review area contains nine (9) non-jurisdictional wetlands totaling 5.62 acres. These separate, closed boundary depressional wetlands exhibited hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Wetland Delineation Manual. All water located within or draining toward these wetlands had no discernible or traceable outfall or connection to any WOUS. The topographic location of these wetlands is such that water in these wetlands is retained and eventually percolates through the soil to groundwater only, at an unknown depth, providing little if any stormwater attenuation. Additionally, these wetlands were determined to be isolated under 3 separate JD determinations (SAC-2008-1856-3JH, SAC-2014-00462, and SAC-2019-00505) all of which were coordinated with the EPA and USACE HQ.
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.

CESAC-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAC-2023-01340

- a. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets and map of onsite WOUS for provided by the Southern Palmetto Environmental dated October 17, 2023
 - b. U.S. Geological Survey map(s): 7.5 Minute Index/ Wampee Quad; USGS topographic survey information depicts the project area as both forested uplands and wetlands.
 - c. USDA Natural Resources Conservation Service Soil Survey: NRCS / Soil Survey Geographic Database (SSURGO), Map service dated March 31, 2021, updated April 26, 2021; Soil survey information depicts the project boundary as Bladen, Hobcaw, Leon, Echaw, Rimini, Lynn Haven, Centenary, Johnston, and Ogeechee. Of these soils, Hobcaw, Leon, Lynn Haven, Johnston and Ogeechee are listed on the National Hydric Soils List.
 - d. Wetlands Raster REST Map Service dated December 6, 2021, updated July 14, 2023; NWI depicts the project area as Upland planted pines (U42P), Forested Wetlands (PFO1/4B, PFO4B, PSS1C, PSS1B, PFO1C, PSS1/3B) and partially drained/ditch forested wetlands (PFO4Bd, PFO4Ad, PFO1Cd, & PSS3/4Bd)
 - e. Photographs: SCDNR 2020 Aerial and I site photos submitted by the agent, USC Historical Aerial Viewer (1939-1983).
 - f. 3DEP Digital Elevation Model (DEM) and 3DEP Hillshade.
10. OTHER SUPPORTING INFORMATION: Horry County Main Drainage Canal Study and Previous determinations, SAC-2008-1856-3JH letter dated March 10, 2009, SAC-2014-004962 letter dated July 1, 2014. And SAC-2019-00505 letter dated June 4, 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.



Wetland Determination

Sandridge Tract Parcel C (125.03 +/- ac)
 PIN#: 34800000036; 34813040001
 35803030001, 35802020004
 Horry County, South Carolina
 October 4, 2023

Disclaimer: Potential wetland/non-wetland areas depicted here have not been verified by the U.S. Army Corps of Engineers. Areas depicted as potential wetlands were derived from interpretation of available remote sensing information and an onsite investigation. Prior to any land disturbing activities, a final letter of jurisdictional determination should be obtained from the U.S. Army Corps of Engineers.

