



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

CESAC-RD

[September 17, 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-2024-00869

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 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.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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
NJD Wetland A	0.047 AC	No	N/A
NJD Wetland B	0.36 AC	No	N/A
NJD Pond	2.22 AC	No	N/A
JD Wetland C	0.24 AC	Yes	404
JD Wetland D	1.61 AC	Yes	404
Tributary E	1222 L.F.	Yes	404
Tributary F	325 L.F.	Yes	

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: 49.48 acres
- b. Center Coordinates of Review Area: Lat: 33.0663 Long: -80.0330
- c. Nearest City: Goose Creek - Hanahan
- d. County: Berkeley
- 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. Cooper River⁵
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Resources onsite continue toward the west into Cantehill Swamp, Sophia Swamp, Black River, and eventually into the Cooper River, a 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]
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

⁵ 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.

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): Tributary F (325.39 linear feet) flows into Tributary E (1221.56 linear feet), where they both flow offsite toward the west towards Cantehill Swamp, Sophia Swamp, Black River, and eventually into the Cooper River, a TNW. Additionally, these two relatively permeant waters provide the continuous surface connection (CSC) for jurisdictional wetlands onsite.
- f. The territorial seas (a)(6): [N/A]
- g. Adjacent wetlands (a)(7):

Jurisdictional wetland C abuts the OWHM of Tributary E, which serves as the CSC connecting the wetland to the downstream TNW, The Cooper River.

Jurisdictional wetland D is bisected by the OWHM of Tributary E and Tributary F. Tributary E serves as the CSC connecting the wetland to the downstream TNW, The Cooper 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.

The review area contains a single upland excavated pond (2.22 AC) depicted as NJD Pond on the associated map. Due to its construction in uplands, this pond is considered a Preamble water (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: Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or

⁸ 51 FR 41217, November 13, 1986.

excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States. (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.

The review area contains several upland excavated ditches totaling approximately +/- 1430 linear feet.. These features are identified as Non-Aquatic Resource (Linear) on the associated map labeled “Ditch Resource Map”. These features were determined to have been *excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water*.

- 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).

NJD Wetlands (Wetlands A & B) The project area contains two isolated non-jurisdictional wetlands totaling 0.407 acres. These wetlands were assessed and determined to be isolated non-jurisdictional with no continuous surface

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connection to any jurisdictional waters. These depressional wetlands 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 these wetlands have no discernible or traceable outfall or connection to any Waters of the US (WOUS). Additionally, the wetlands were found to be surrounded by forested uplands which further disrupts possible connections to any WOUS. The topographic map depicts these wetlands as forested uplands. No blue line features or other potential WOUS are depicted on the topographic map near Wetlands A & B. Aerials photographs depict these wetlands as forested, and review of LiDAR data revealed that no linear drainage features within proximity or within the boundary of the wetlands.

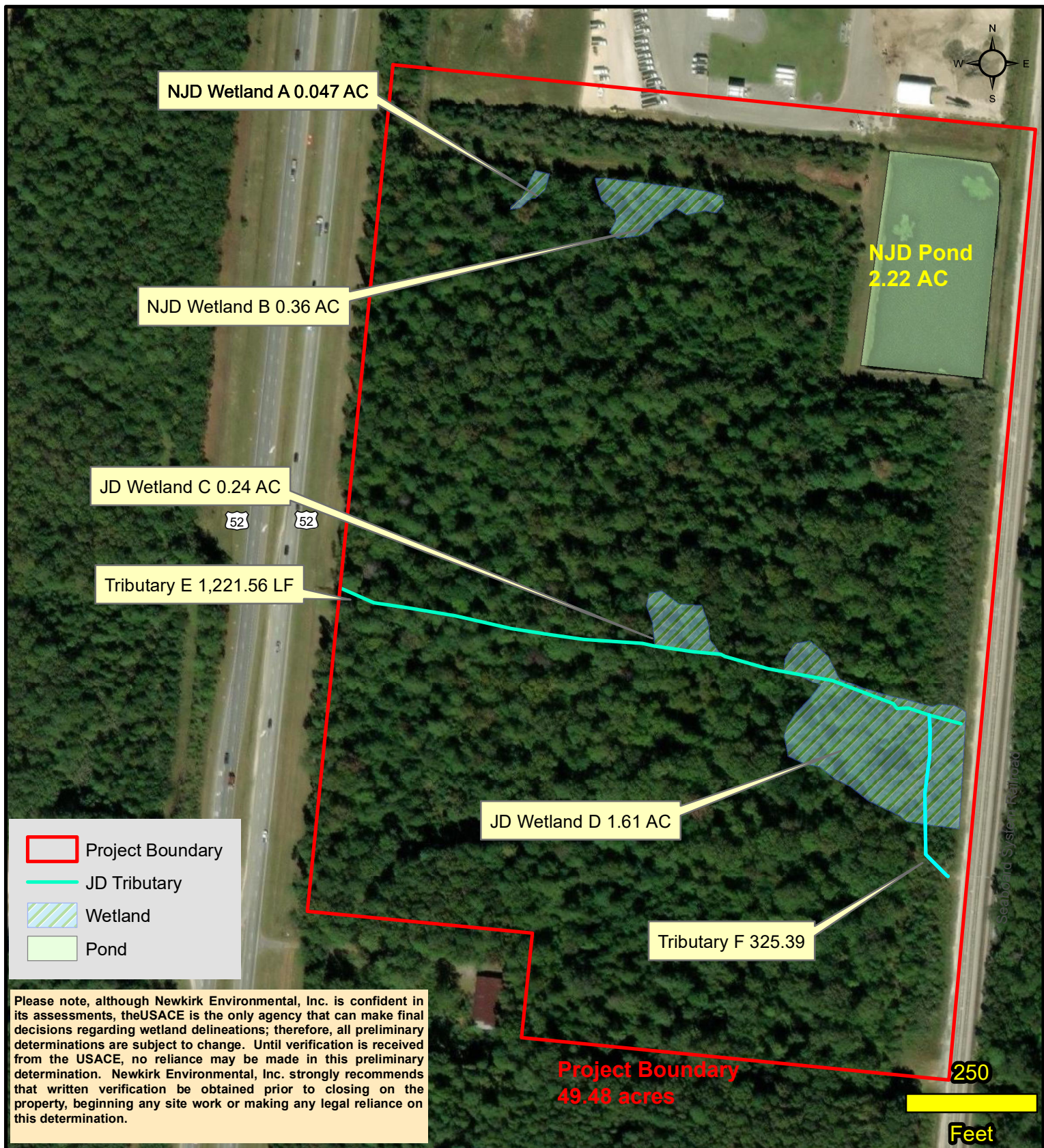
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Review Performed for Site Evaluation: Office (Desk) Determination.
Date: August 28, 2024.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation submittal for Walt Martin provided by Newkirk Environmental Inc. in the submittal dated May 8, 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: Duplin, Wahee, Meggett soils. SSURGO database.
 - f. USGS topographic maps: 7.5 Minute – Mount Holly Quad: Quad depicts upland forested areas and unforested areas as well as solid blue line linear feature.
 - g. National Wetland Inventory (NWI): NWI depicts only the symbology of R5UBH associated with the tributary onsite
 - h. National Hydrography Dataset (NHD): NHD identifies unnamed perennial features onsite.

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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.



Please note, although Newkirk Environmental, Inc. is confident in its assessments, theUSACE is the only agency that can make final decisions regarding wetland delineations; therefore, all preliminary determinations are subject to change. Until verification is received from the USACE, no reliance may be made in this preliminary determination. Newkirk Environmental, Inc. strongly recommends that written verification be obtained prior to closing on the property, beginning any site work or making any legal reliance on this determination.

Depiction Map
Project #: 01-5360a Date: May 2024
Created by: LAB
 Newkirk ENVIRONMENTAL INC.

E F Sanders Tract
Berkeley County, South Carolina
August 28, 2024