**DEPARTMENT OF THE ARMY**
**U.S. ARMY CORPS OF ENGINEERS, NORFOLK DISTRICT**
**803 FRONT STREET**
**NORFOLK, VIRGNIA 23501**

CENAO-WRR-E August 14, 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] NAO-2024-00280 MFR 1 of 1.

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 Virginia due to litigation.

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[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.

1. SUMMARY OF CONCLUSIONS.

   a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area). The 14.6 acres undeveloped forested land is an upland site.

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).

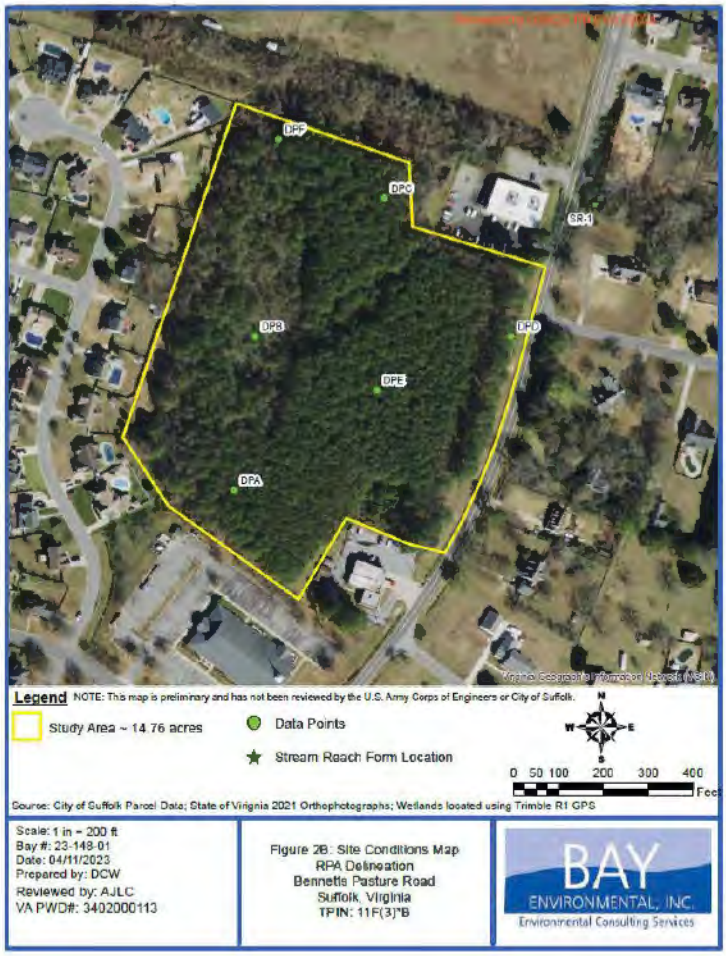
   c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

   d. *Sackett v. EPA*, 598 U.S. _, 143 S. Ct. 1322 (2023)

   e. 2008 Rapanos guidance

   f. U.S. Army Corps of Engineers' (USACE) Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain (USACE 2010).

3. REVIEW AREA. The review area is 14.6 acres and in located on Pasture Road (Tax parcel number: 11F-3-B) in Suffolk, Virginia (36.838178, -76.506876). No previous JDs for this site. The map entitled "Figure 2B: Site Conditions Map RPA Delineation Bennetts Pasture Road," prepared by Bay Environmental, Inc, dated April 11, 2023, and Corps date stamped as received on January 23, 2024 depicts the review area.




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

   N/A

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

   N/A

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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.[6]

   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

   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

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[5] 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.

[6] 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.

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").[7] 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*.

[7] 51 FR 41217, November 13, 1986.

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).

N/A

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. Office review, August 12, 2024

b. ESRI Online USA Topo Maps USGS Chuckatuck Topographic Quadrangle, accessed by agent, April 11, 2023

c. Web Soil Survey, United States Department of Agriculture – Natural Resources Conservation Service (USDA-NRCS), accessed by Corps PM, August 12, 2024

d. USGS National Map 3D Elevation Program (3DEP). August 2, 2024. Accessed by Corps PM, August 12, 2024

e. USFWS National Wetlands Inventory, accessed by Corps PM, August 12, 2024

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.

Received by USACE PB 01/23/2024

**Legend**

Study Area ~ 14.76 acres

N
W E
S

0 250 500 1,000 1,500 2,000

Feet

Source: City of Suffolk Parcel Data; ESRI Online USA Topo Maps USGS ChuckatuckTopographic Quadrangle.

Scale: 1 in = 1,000 ft
Bay #: 23-148-01
Date: 04/11/2023
Prepared by: DCW

Figure 1: Topographic Vicinity Map
Wetland & RPA Delineation
Bennetts Pasture Road
Suffolk, Virginia
TPIN: 11F(3)*B

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**Legend** NOTE: This map is preliminary and has not been reviewed by the U.S. Army Corps of Engineers or City of Suffolk.

Study Area ~ 14.76 acres

Data Points

Stream Reach Form Location

N W E S

0 50 100 200 300 400 Feet

Source: City of Suffolk Parcel Data; State of Virignia 2021 Orthophotographs; Wetlands located using Trimble R1 GPS

Scale: 1 in = 200 ft
Bay #: 23-148-01
Date: 04/11/2023
Prepared by: DCW
Reviewed by: AJLC
VA PWD#: 3402000113

Figure 2B: Site Conditions Map
RPA Delineation
Bennetts Pasture Road
Suffolk, Virginia
TPIN: 11F(3)*B

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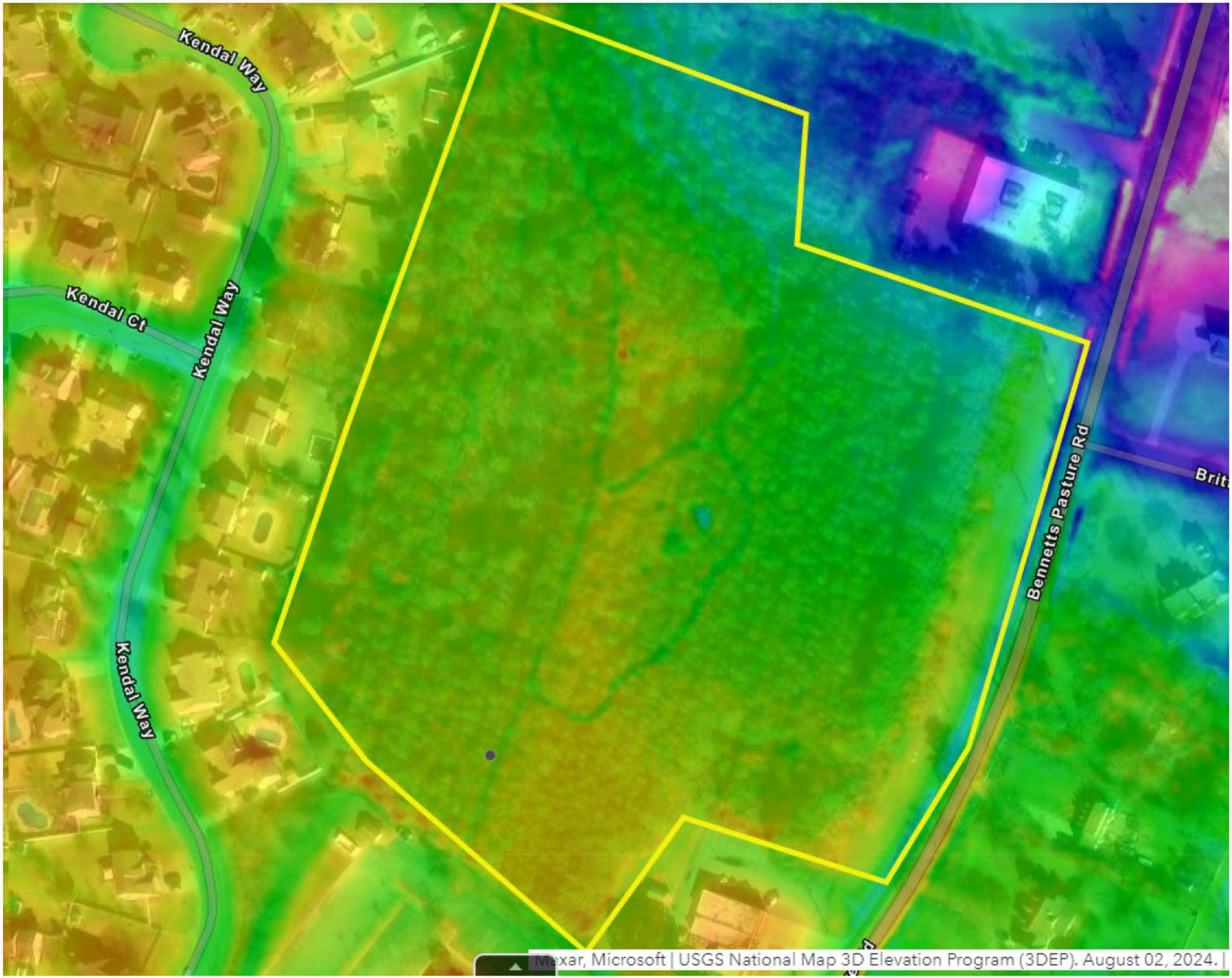
Environmental Consulting Services


Kendal Way
Kendal Ct
Kendal Way
Kendal Way
Bennetts Pasture Rd
Maxar, Microsoft | USGS National Map 3D Elevation Program (3DEP). August 02, 2024.

U.S. Fish and Wildlife Service

# National Wetlands Inventory

## NAO-2024-00280 - NWI

August 12, 2024

**Wetlands**

- Estuarine and Marine Deepwater
- Estuarine and Marine Wetland
- Freshwater Emergent Wetland
- Freshwater Forested/Shrub Wetland
- Freshwater Pond
- Lake
- Other
- Riverine

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.