



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

CESAC-RD

10 April 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-1998-37806, (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
(Wetland "F") Jurisdictional Wetland	81.04 AC	yes	Section 404
(Wetland "D") Jurisdictional Wetland	1.70 AC.	yes	Section 404
(Wetland "E") Non-Jurisdictional Wetland	0.66 AC	no	N/A
(Wetland "C") Non-Jurisdictional Wetland	4.24 AC	no	N/A
(Wetland "B") Non-Jurisdictional Wetland	2.34 AC	no	N/A
(Wetland "A") Non-Jurisdictional Wetland	4.98 AC	no	N/A

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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: 520.12 acres
- b. Center Coordinates of the review area: Latitude: 33.662°, Longitude - 78.988°
- c. Nearest City: Myrtle Beach
- d. County: Horry
- e. State: South Carolina

Much of the 520-acre project area is comprised of timberlands with the southeast corner of the site containing approximately 88 acres of commercial development circa 2012. There has been three (3) previous Approved Jurisdictional Determinations (AJDs) for the project area documented under SAC-1998-37805-3H dated September 16, 2008, SAC-1998-37806-3JH dated December 3, 2013, and SAC-1998-37806 dated November 20, 2018. The three previous AJDs determined the site to contain 82.74 acres of jurisdictional wetlands and 12.22 acres of non-jurisdictional wetlands. In addition, the project area was previously determined to contain upland excavated ditches and two 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. Atlantic Intracoastal Waterway (AIWW): Section 10 waterbody subject to ebb & Flood of the tide.⁶

⁶ 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.

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

Jurisdictional Wetland “F” is 81.04 acres in size and is adjacent to a non-jurisdictional ditch that flows northeast to its confluence with an offsite tributary named Raccoon Run. Raccoon Run flows north to the TNW, AIWW.

Jurisdictional Wetland “D” is 0.30 acre in size and is adjacent to a non-jurisdictional ditch that flows northeast to its confluence with an offsite tributary named Raccoon Run. Raccoon Run flows north to the TNW, AIWW.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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.

- 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): The review area contains two (2) jurisdictional wetlands; Wetlands D & F totaling 82.74 acres. Wetlands D & F are non-tidal wetlands that were determined to have a continuous surface connection to an offsite jurisdictional water. Wetlands D & F are directly adjacent to onsite upland excavated ditches that drain directly to an offsite tributary (Raccoon Run) that flows directly into the AIWW.

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”).⁹ 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 two (2) upland excavated ornamental ponds depicted as Non-Jurisdictional Upland Excavated Pond on the associated wetland plat and Non-Aquatic Resource (Pond) on the associated wetland sketch. 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.

The review area contains several upland excavated ditches totaling approximately +/- 20,000 linear feet. Most of these ditches are located adjacent to an unimproved road system within the project area. These features are

⁹ 51 FR 41217, November 13, 1986.

identified as Non-Aquatic Resource (Linear) on the associated wetland sketch. 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).

Non-Jurisdictional Wetlands (Wetlands A-C & E) The project area contains four isolated non-jurisdictional wetlands totaling 12.22 acres. These wetlands were assessed and determined to be isolated non-jurisdictional with no continuous surface 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-C & E. Aerials photographs depict these wetlands as forested, and review of LiDAR data

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revealed that no linear drainage features within proximity or within the boundary of the wetlands. The NWI depicts the wetlands as uplands. Wetlands A-C & E have been previously determined to be isolated, non-jurisdictional on the previous AJDs dated September 16, 2008, December 3, 2013, and November 20, 2018.

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: March 12, 2024.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation submittal for the MEP J Land Tract provided by the Brigman Company in the submittal dated November 13, 2023.
 - 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, Meggett, Bladen, Wahee, Ogeechee, Yauhannah, and Eulonia. SSURGO database.
 - f. USGS topographic maps: 7.5 Minute – Myrtle Beach Quad: Quad depicts upland forested areas, and wetland forested areas within the project area boundary as well as solid blue line linear feature for the offsite tributary named Raccoon Run. USA Topo Map
 - g. National Wetland Inventory (NWI): NWI depicts the delineated boundaries of the Jurisdictional Wetlands D & F as forested wetlands. Non-jurisdictional wetlands A-C & E, the locations of the upland excavated ponds and ditches are depicted as uplands on the NWI map.
<https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0>
 - h. National Hydrography Dataset (NHD): NHD identifies offsite tributary (Negro Field Swamp/Raccoon Run) as a tributary with a flow regime of perennial. None of the onsite upland excavated ditches are depicted on the NHD map.
<https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer>

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10. OTHER SUPPORTING INFORMATION. Previous AJDs documented under SAC-1998-37805-3H dated September 16, 2008, SAC-1998-37806-3JH dated December 3, 2013, and SAC-1998-37806 dated November 20, 2018.

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.

