



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

CESAC-RD

[21 March 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-2022-01121] [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).

Site Number	Estimated amount of aquatic resource in review area (acreage and linear feet, if applicable)	Type of aquatic resource (i.e., JD wetland, JD Tributary, non-JD wetland, etc.)	Geographic authority to which the aquatic resource "may be" subject (i.e., Section 404 or Section 10/404)
Jurisdictional (Non-tidal) Wetland 1- W1	0.45-acre	Jurisdictional Wetland	Section 404
Jurisdictional (Tidal) Wetland 2- CA1	0.49-acre	Jurisdictional Wetland	Section 10/404
Jurisdictional Tributary- T1	209 LF	Jurisdictional Tributary	Section 404
Non-jurisdictional Ditch- D1	793 LF	Non-Jurisdictional Feature	N/A
Non-jurisdictional Ditch- D2	521 LF	Non-Jurisdictional Feature	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).
- 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: 11.82 acres
- b. Center Coordinates of the project site: Latitude: 32.4047°, Longitude: -80.7309°

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- c. Nearest City: Beaufort
- d. County: Beaufort
- e. State: South Carolina
- f. Other jurisdictional determinations: Yes. SAC-2017-01659

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

Name of nearest downstream TNW, Territorial Sea, or interstate water: Beaufort River, which is a TNW. Navigable limits of the Beaufort River are documented in the Charleston District Navigation Study Report (Coosawhatchie River Area Report No. 01), apart of the Corps' Navigability Study of 1977

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

Aquatic Resource Name	Resource Type	Flowpath
Jurisdictional (Non-tidal) Wetland 1- W1	Jurisdictional Wetland	Jurisdictional (Non-tidal) Wetland 1- W1 is adjacent to Wetland 2- CA1. Waters from Wetland 1- W1 would flow into Wetland 2- CA1 which flows to the Beaufort River (see flowpath below).
Jurisdictional (Tidal) Wetland 2- CA1	Jurisdictional Wetland	Jurisdictional (Tidal) Wetland 2- CA1 is subject to the ebb and flow of the tide of Battery Creek. The waters from Wetland 2 would flow into Battery Creek, an a(5) water. Battery Creek flows into Beaufort River, an a(1) water.
Jurisdictional Tributary- T1	Jurisdictional Tributary	Jurisdictional Tributary T1 flows within Wetland 1- W1 and leads into Wetland 2- CA1 which flows to the Beaufort River (see flowpath above)

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

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

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Aquatic Resource Name	Resource Type	Reason the AR is jurisdictional
Jurisdictional (Tidal) Wetland 2- CA1	Jurisdictional Wetland	Wetland 2- CA1 is a wetland that is adjacent to or abutting a TNW or tributary with relatively permanent flow and is influenced by tidal ebb and flow. The wetland was determined to meet the three parameters of the 1987 Corps of Engineers Wetland Delineation Manual.

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):

Aquatic Resource Name	Resource Type	Reason the AR is jurisdictional
Jurisdictional Tributary- T1	Jurisdictional Tributary	Tributary- T1 is a tributary with relatively permanent flow leading to a TNW. The tributary contained well defined bed and bank, assorted substrate, an Ordinary High Water Mark (OHWM), and standing/flowing water.

329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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

g. Adjacent wetlands (a)(7):

Aquatic Resource Name	Resource Type	Reason the AR is jurisdictional
Jurisdictional (Non-tidal) Wetland 1- W1	Wetland	Wetland 1- W1 is a wetland that is adjacent to or abutting a TNW or tributary with relatively permanent flow. The wetland was determined to meet the three parameters of the 1987 Corps of Engineers Wetland Delineation Manual.
Jurisdictional (Tidal) Wetland 2- CA1	Wetland	Wetland 2- CA1 is a wetland that is adjacent to or abutting a TNW or tributary with relatively permanent flow and is influenced by tidal ebb and flow. The wetland was determined to meet the three parameters of the 1987 Corps of Engineers Wetland Delineation Manual.

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.
- b. . 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.

Aquatic Resource Name	Resource Type	Reason the AR is not jurisdictional
Non-jurisdictional Ditch- D1	Non-jurisdictional feature	Ditch- D1 is a linear feature with an approximate length of 793 linear feet that was determined to have been excavated wholly in and draining only dry land, does not have a relatively permanent flow, and lacks evidence of an OHWM.
Non-jurisdictional Ditch- D2	Non-jurisdictional feature	Ditch- D2 is a linear feature with an approximate length of 521 linear feet that was determined to have been excavated wholly in and draining only dry land, does

⁸ 51 FR 41217, November 13, 1986.

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		not have a relatively permanent flow, and lacks evidence of an OHWM.
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- 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).
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 (desktop) Determination. Date: November 21, 2023
 - b. Aquatic Resources Delineation submitted by, or on behalf of, the requestor: “Potential Waters of the U.S. Map” dated July 12, 2022 provided by ECS Southeast, LLC.

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- c. Photographs: Photos provided by ECS Southeast, LLC submitted as part of the JD request dated July 28, 2022.
- d. Aerial Imagery titled “National Wetlands Inventory Map” submitted as part of the JD request dated July 28, 2022.
- e. National Wetland Inventory Map titled “National Wetlands Inventory Map” submitted as part of the JD request dated July 28, 2022.
- f. “USGS Topographic Map” submitted as part of the JD request dated July 28, 2022.
- g. “USDA-NRCS Soil Survey Map of Beaufort/Jasper Counties” submitted as part of the JD request dated July 28, 2022.
- h. Wetland Determination Data Forms submitted as part of the JD request dated July 28, 2022.
- i. National Hydrography Dataset prepared by the Corps May 22, 2023.
- j. FEMA National Flood Hazard Map prepared by the Corps May 22, 2023.
- k. NRCS SSURGO Map Service prepared by the Corps May 22, 2023.
- l. USGS 3D Elevation Program (3DEP) Map Service (LiDAR) prepared by the Corps May 22, 2023.

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.



Client:



Project:

BATTERY CREEK
TRACT

OAK VIEW DRIVE
BEAUFORT,
BEAUFORT COUNTY,
SOUTH CAROLINA

Title:

POTENTIAL WATERS
OF THE U.S. MAP

NOTES:
1. POTENTIALLY JURISDICTIONAL
WATERS OF THE US WERE
DELINEATED BY ECS ON JUNE 16
& JULY 11, 2022.

2. FEATURES DEPICTED ON THIS
MAP HAVE NOT BEEN VERIFIED BY
THE USACE AND/OR SCDHEC. THE
DELINEATION FINDINGS ARE
SUBJECT TO CHANGE BASED ON
AGENCY VERIFICATION.

3. THIS MAP SHOULD BE USED
FOR PRELIMINARY PLANNING
PURPOSES.

Drawn By:

LPJ

Scale:

1" = 300'

Approved By:

PMS

Date:

07/12/2022

ECS Project No.

49:17340-A

FIGURE 7