



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

CESAC-RDS

4 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-2023-00807] [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 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).
 - i. Non-Jurisdictional Feature #1: Non-Jurisdictional Feature #1 is an approximately 0.20-acre stormwater pond, constructed out of uplands. The stormwater pond was authorized by SCDHEC on March 10, 2005 under the Stormwater Permit No. 10-05-01-019. According to 51 FR 41250, November 13, 1986 “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 CFR 123.11)(m) which also meets the criteria of this definition) are not waters of the United States. Non-Jurisdictional Feature #1 is not a water of the United States and is not subject to regulations under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

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. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

3. REVIEW AREA.

- a. Project Area Size: 0.48-acre
- b. Center Coordinates of the review area: Latitude: 32.7357°, Longitude: -80.0573°
- c. Nearest City: John’s Island
- d. County: Charleston
- e. State: South Carolina

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The review area is located within an undeveloped parcel, consisting of forested uplands and one (1) stormwater pond. The stormwater pond is part of a larger review associated with a NWP 39 for a commercial development.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁵
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
6. SECTION 10 JURISDICTIONAL WATERS⁵: 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

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.

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- 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

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.

The review area contains one (1) stormwater pond, totaling approximately 0.20-acre.

The stormwater pond was authorized by SCDHEC on March 10, 2005 under the Stormwater Permit No. 10-05-01-019. According to 51 FR 41250, November 13, 1986 “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 CFR 123.11)(m) which also meets the criteria of this definition) are not waters of the United States.

⁷ 51 FR 41217, November 13, 1986.

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- 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).
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. Review Performed for Site Evaluation: Office (Desk) Determination, March 26, 2024
 - b. Map submitted by or on behalf of the applicant/consultant: “Figure 7. AERIAL WITH BOUNDARY COORDINATES AND FEATURES 0.48 ACRE PORTION OF MAYBANK LANDING”, January 25, 2024
 - c. Wetland Delineation Data Sheets: Prepared and submitted by or on behalf of the applicant/consultant. This office concurs with data sheets/delineation report.
 - d. Site Photos: Taken by agent on January 1, 2024 and included in the JD request package.

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- e. USGS Topographic maps: 7.5 Minute - Legareville Quad: Quad depicts the review area as forested uplands. No symbols that typically represent potential waters of the US are depicted on the USGS topographic maps.
- f. USFWS National Wetland Inventory (NWI) Map Service: NWI depicts the review area as uplands with one freshwater pond. <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=1eb5aab71973402fbd879cbb7bd3595>
- g. National Hydrographic Dataset (NHD): NHD does not depict any linear features within the review area.
<https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer>
- h. USDA NRCS Soil Survey: Soil survey depicts the following soil types: Leon fine sand (0 to 2 percent slope). This layer displays soil map units derived from the SSURGO database. <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=045a6ccb74954698892c0cc5106beee5>
- i. USGS 3D Elevation Program (3DEP) Map Service: <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=8ba4619c2e60467a909a1bc31e3a06cc>
- j. Aerial Imagery: 2020 SCDNR IR Aerial _2020_NIR (Map Service)
https://tiles.arcgis.com/tiles/RvqSyw3dil7dTKo5/arcgis/rest/services/SC_2020_NIR/MapServer

10. OTHER SUPPORTING INFORMATION. N/A

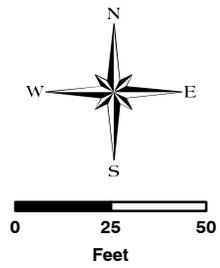
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Map No.	Latitude	Longitude
1	32.73601601	-80.0573456
2	32.73595193	-80.05717677
3	32.73582517	-80.05713456
4	32.73580305	-80.05693529
5	32.73551127	-80.05750122
6	32.73581384	-80.05772611

LEGEND

 0.48± ACRE PORTION OF MAYBANK LANDING

 NON-JURISDICTIONAL FEATURE



COE JURISDICTIONAL DETERMINATION INFORMATION	
PROJECT NAME:	0.48± ACRE PORTION OF MAYBANK LANDING
APPLICANT:	TBLB, LLC P.O. BOX 248 MOUNT PLEASANT, SC 29465
COUNTY:	CHARLESTON COUNTY
STATE:	SOUTH CAROLINA
DATE:	JANUARY 18, 2024

NOTES:

AERIAL PHOTOGRAPH WAS ACQUIRED FROM THE SOUTH CAROLINA REVENUE AND FISCAL AFFAIRS OFFICE WITH FLIGHT DATES OF JANUARY THROUGH MARCH 2020.

PROPERTY BOUNDARY ESTIMATED FROM THE CHARLESTON COUNTY GIS WEBSITE.

UPLAND/WETLAND LIMITS HAVE NOT BEEN REVIEWED BY ANY REGULATORY AGENCY AND ARE SUBJECT TO CHANGE.

**FIGURE 7. AERIAL WITH BOUNDARY COORDINATES AND FEATURES
0.48± ACRE PORTION OF MAYBANK LANDING**

DRAWN BY	DATE
T.S.	1/25/24
REVIEWED BY	DATE
S.R.	1/25/24
REVISED	DATE



J:\SOUTH CAROLINA\2021\SC-2\TDS\345210-SW PORTION OF MAYBANK\GIS\2024\AJD_REQUEST\FIGURES\FIGURE_7_AERIAL_WITH_FEATURES_AND_COORDINATES.MXD