



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

CESAC-RD

[26 APR 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-2023-01350]

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/ Linear Feet	Waters of the US (WOUS)	Section 404/ Section 10
Non-Jurisdictional Wetland 1	0.22 acre	No	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 Size: 4.87 acre
- b. Center Coordinates of Review Area: Lat. 33.6416 °, Long. -79.0318 °.
- c. City: Myrtle Beach
- d. County: Horry
- e. State: South Carolina

The project area is a partially developed forested residential lot. A portion of the project area adjacent to Highway 707 is graded and developed with a residential homesite. The southern project boundary abuts Grand Oaks Boulevard. The western boundary abuts a residential subdivision.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A.]⁵
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [N/A]
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]
 - b. Interstate Waters (a)(2): [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.

- 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”).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. [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

⁸ 51 FR 41217, November 13, 1986.

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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).
 - The review area contains one non-jurisdictional wetlands (Non-jurisdictional Wetland 1) totaling 0.22 acre. This separate, closed boundary depressional wetland exhibits hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Wetland Delineation Manual. All water located within or draining toward the wetland has no discernible or traceable outfall or connection to any WOUS. The wetland in the project area was found to be completely surrounded by forested uplands. The topographic location of the wetland is such that water is retained and eventually percolates through the soil to groundwater only, at an unknown depth, providing little if any stormwater attenuation. Because of the lack of discernible continuous surface connection to a WOUS and topography grades this wetland was determined to be an isolated, non-jurisdictional wetland.

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 Evaluation: April 3, 2024
- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets and map of onsite WOUS for provided by the Brigman Company in the submittal dated October 16, 2023.
- c. U.S. Geological Survey map(s): 7.5 Minute Index/ Bucksville Quad; USGS topographic survey information depicts a forested upland area void of wetland symbology.
- d. USDA Natural Resources Conservation Service Soil Survey: NRCS / Soil Survey Geographic Database (SSURGO), Map service dated March 31, 2021, updated

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April 26, 2021; Soil survey information depicts the boundary has the hydric soil Bladen fine sandy loam and Ogeechee loamy fine and.

- e. Wetlands Raster REST Map Service dated December 6, 2021, updated July 14, 2023; NWIs map the entire project boundary as uplands.
- f. DEP Digital Elevation Model (DEM) and 3DEP Horry County Hillshade.

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.



Wetland Delineation/Determination

Lucille Myers Tract

Horry County, South Carolina
Tax Map Number 190-00-02-054

Area Summary:	
Non-Jurisdictional Wetland	0.22
Jurisdictional Wetlands	0.00
Critical Area/Section 10	0.00
Uplands	4.65
Total	4.87

- Notes**
1. Potential wetland/non-wetland areas depicted here on have not been verified by the US Army Corps of Engineers. Areas depicted as wetlands were identified using a combination of available remote sensing and onsite investigation. Prior to any land disturbing activities, or land transactions a final jurisdictional determination should be obtained from the US Army Corps of Engineers.
 2. Boundary information taken from Horry County GIS/Tax Parcel information.
 3. Onsite inspection was conducted on 10-6-23.

Legend	
Line Legend	
Boundary	
Adjacent Boundary	
Right of Way	
Jurisdictional Tributary	
Non-Jurisdictional Feature	
Dirt Road	
Bulkhead	

Hatch Legend	
Jurisdictional Wetland	
Non-Jurisdictional Wetland	
Critical Area/Section 10	

Symbol Legend	
Data Point	
Photo Point	
Property Corner	

Prepared For	Clint Richardson
Job #	TBD
Date	10-6-23

