



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

CESAC-RDE

February 15, 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-2023-00517, 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 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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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).

The 62.64-acre review area contains one water of the United States, which totals 2,003.5 linear feet. According to the aeriels, the review area is partially developed land and partially forested uplands. The site also contains four non-jurisdictional ditches totaling 4,308.1 linear feet and two non-jurisdictional ponds totaling 0.56 acre.

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: 62.64 acres.
- b. Center Coordinates of the review area: Latitude: 33.7793°N, Longitude - 78.9830°W
- c. Nearest City: City of Conway
- d. County: Horry
- e. State: South Carolina

The 62.64-acre review area is a partially forested, partially developed site located immediately adjacent to US Highway 501. Based on the delineation submitted by the applicant, one jurisdictional water of the US along with four non-jurisdictional ditches

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and two non-jurisdictional ponds are present on site. The remainder of the site consists of uplands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁵ The nearest TNW to which the aquatic resource is connected is the Waccamaw River, a Section 10 waterbody.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The onsite Jurisdictional Tributary flows northwest into an unnamed tributary of the Waccamaw River, which flows west into the Waccamaw River, a TNW.
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

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.

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): The onsite Jurisdictional Tributary, which totals 2,003.5 linear feet, was determined to be jurisdictional based on a review of the NWIs, NHD, aerials, hillshade, and information submitted by the agent. The NWIs map this tributary as R4SBCx, and the NHD depicts this tributary as a “canal/ditch”. The aerials and hillshade depict this jurisdictional tributary as a man-altered canal that continues northwest into an unnamed tributary of the Waccamaw River, a TNW. This onsite jurisdictional tributary was determined to have perennial flow based on information submitted by the agent and based on an ORM review of previous nearby determinations.
- 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.

Two non-jurisdictional ponds are present in the review area. Both of these ponds are mapped PUBHx on the NWIs and are depicted on the aerials and

⁸ 51 FR 41217, November 13, 1986.

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topographic map as being located within uplands. These two ponds were excavated out of uplands for the purpose of stormwater retention and, therefore, were determined to be non-jurisdictional.

Additionally, four non-jurisdictional ditches are present within the review area:

Upland excavated ditches

Name of feature(s)	Size (in linear feet)	Rapanos Guidance
Non-Jurisdictional Ditch 1	1442.4 linear feet	Onsite Non-Jurisdictional Ditch 1 was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
Non-Jurisdictional Ditch 2	667.9 linear feet	Onsite Non-Jurisdictional Ditch 2 was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
Non-Jurisdictional Ditch 3	681.5 linear feet	Onsite Non-Jurisdictional Ditch 3 was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>

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Non-Jurisdictional Ditch 4	1516.3 linear feet	Onsite Non-Jurisdictional Ditch 4 was constructed in dry land and drains only dryland. Therefore, the onsite ditch was determined to be <i>excavated wholly in and draining only dry lands and do not carry a relative permanent flow of water.</i>
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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). 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.

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- a. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets and maps for the Highway 501 Commercial Site provided by ECS Southeast, LLC, in the submittal received on April 17, 2023.
- b. USGS 3D Elevation Program (3DEP) Bare Earth Digital Elevation Model (DEM) Hillshade
- c. USDA NRCS Soil Survey: Leon Fine Sand and Lynn Haven Sand. SSURGO database.
- d. USGS topographic maps: 7.5 Minute – Nixonville Quad: Quad depicts the review area as forested and developed uplands. No symbols representing WOUS are depicted.
- e. National Wetland Inventory (NWI): NWIs depict the majority of the site as uplands with a portion of the forested area mapped wetlands (PFO4C). Two of the non-jurisdictional ditches are mapped riverine (R4SBCx) and the two non-jurisdictional ponds are mapped PUBHx. Additionally, the onsite jurisdictional tributary is mapped R4SBCx. A data form taken by the agent in the area mapped wetlands found that this area does not have hydric soils nor indicators of hydrology.
<https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0>
- f. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NIR (Map Service). The aerials depict the northern portion of the site as undeveloped, forested land and the southern portion of the site as developed land.

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:

**501 CONWAY
COMMERCIAL SITE**

**HWY 501 COMMERCIAL
HORRY COUNTY,
CONWAY,
SOUTH CAROLINA**

Title:

**SAC-2023-00517
AJD MAP**

NOTES:
1. POTENTIAL WATERS OF THE US WERE OBSERVED BY ECS ON MARCH 9, 2023.

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

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

Drawn By:

KMC

Scale:

1" = 500'

Approved By:

WBF

Date:

2/13/2024

ECS Project No.

49: 19359

FIGURE 7