



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

CESAC-RD

[3 JUNE 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-2023-00729] [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
Non-Jurisdictional Wetland 1	0.293-acre	No	N/A
Non-Jurisdictional Feature Stormwater Pond 1	0.17-acre	No	N/A
Non-Jurisdictional Feature Stormwater Pond 2	0.13-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: 3.61 acres
- b. Center Coordinates of the Review Area: 32.8216, -80.0695
- c. Nearest City: West Ashley
- d. County: Charleston
- e. State: South Carolina

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The 3.61 acres review area consists of a forested parcel, containing a commercial development, two (2) stormwater ponds, and one (1) wetland. No previous Approved Jurisdictional Determinations have been issued for the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A.
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.

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.

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.

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- 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): 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”).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. 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 two (2) non-jurisdictional ponds, Non-Jurisdictional Feature Stormwater Pond 1 (0.17-acre) and Non-Jurisdictional Stormwater Pond 2 (0.13-acre), totaling 0.3-acre. Both ponds were constructed in uplands. Non-Jurisdictional Feature Stormwater Pond 1 was authorized by the South Carolina Department of Health and Environmental Control (SCDHEC) under Stormwater

⁹ 51 FR 41217, November 13, 1986.

Permit No. 10-03-11-02, dated October 24, 2005; Non-Jurisdictional Feature Stormwater Pond 2 was authorized by SCDHEC under Stormwater Permit No. 10-05-08-15, dated July 22, 2005. Pursuant to 40 CFR 120.2, "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act" are not waters of the United States. Therefore, Non-Jurisdictional Feature Stormwater Pond 1 and Non-Jurisdictional Feature Stormwater Pond 2 are not subject to regulations under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

- 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 Wetland 1: Non-Jurisdictional Wetland 1 is an approximately 0.293-acre freshwater forested wetland with no continuous surface connection to a downstream TNW. This depressional wetland 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 this wetland had no discernible or traceable outfall or connection to any Waters of the US (WOUS). LiDAR imagery indicates Non-Jurisdictional Wetland 1 is a depressional area, lower in elevation and completely surrounded by uplands. According to NRCS soils data, Non-Jurisdictional Wetland 1 is mapped as Yonges loamy fine sand (hydric). USGS topographic maps and NWI depict the area as uplands and do not depict any flow lines near the wetland that could provide a continuous surface connection downstream to a TNW. A field visit was

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conducted by the Corps on October 17, 2023, and no features were observed that would connect Non-Jurisdictional Wetland 1 to a downstream TNW.

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. Field visit conducted by the Corps on October 17, 2023.
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including data sheets for the review area, provided by Red Bay Environmental, dated May 2023. Aquatic resource map dated January 25, 2024.
 - c. USGS Topographic maps: 7.5 minute – Johns Island Quad. “PORTION OF USGS QUANDRANGLE LOCATION MAP PROVIDED BY SCDNR” and “TOPO MAP PROVIDED BY USGS”, prepared by agent, dated May 2023.
 - d. USFWS NWI Map Service: “Shelby Ray Court CRVC Tract”, prepared by the agent, dated May 2023.
 - e. Soil Survey: USDA-NCSS SSURGO and STATSGO Digital Soil Survey. “USDA SOIL SURVEY OF CHARLESTON COUNTY PROVIDED BY USDA.GOV”, prepared by the agent, dated May 2023. The site is mapped on the soil survey as Yonges loamy fine sand (hydric).
 - f. LiDAR: USGS 3D Elevation Program (3DEP) Bare Earth Dynamic Service. “DEM and Hillshade for Shelby Ray Court”, prepared by the Corps, dated October 16, 2023.
 - g. Aerial Imagery: 2020 SCDNR IR Aerial Imagery (Map Service). “SCDNR Imagery”, prepared by the Corps, dated May 13, 2024.
10. OTHER SUPPORTING INFORMATION. SCDHEC Stormwater Permits No. 10-03-11-02, dated October 24, 2005; and 10-05-08-15, dated July 22, 2005.
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.



Non-Jurisdictional
Feature Stormwater
Pond 1 ~ 0.17-acre

Stormwater Permit
No. 10-03-11-02

Non-Jurisdictional
Wetland 1 (0.293-
acre)

Non-Jurisdictional
Feature Stormwater
Pond 2 ~ 0.13-acre

Stormwater Permit
No.10-05-08-15

Upland

Total Site Acreage: 3.61 Ac
Total Wetland Acreage: 0.293 Ac

January 25, 2024

Wetlands Depiction – Shelby Ray Court CVRC Tract
TMS # 306-00-00-135
Approximately 3.61 Acres
West Ashley, Charleston County, South Carolina

LEGEND

Site Boundary ————

Approx. Wetland Boundary



Red Bay Environmental