



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
1949 INDUSTRIAL PARK ROAD, ROOM 140
CONWAY, SOUTH CAROLINA 29526

SAC
CESAC-RDE

26 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-2023-01254 (ESRH North Tract), 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 review area does not contain any waters of the United States and/or a navigable water of the United States. The review area consists of forested uplands and upland agricultural fields. There are several drainage ditches that bisect the agricultural fields and forested area (See attached map). The onsite ditches were determined to be excavated out of uplands and drain only uplands. The ditches were previously determined to be non-jurisdictional on June 4, 2019 (SAC-2019-00405). A site visit was conducted for the previous determination on March 29, 2019. Based on evidence submitted by the consultant and the previous determination (SAC-2019-00405), the non-jurisdictional ditches were determined be man-made and only flow in direct response to stormwater runoff from the surrounding uplands.

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: 31.2 acres.
- b. Center Coordinates of the review area: Latitude: 33.714°N, Longitude - 78.974°W
- c. Nearest City: Myrtle Beach
- d. County: Horry
- e. State: South Carolina

The review area consists of 31.2 acres of uplands located on property identified as tax map sequence (TMS#) 171-00-01-005, north of and adjacent to Forestbrook Road.

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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: The review area was determined to be void of any aquatic resources.
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
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): 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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- 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.

Name of feature(s)	Size (in linear feet)	Rapanos Guidance
Upland ditches (drainage for upland agricultural fields and forested uplands)	+/- 3,500 If total	Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA. These features were excavated for the sole purpose of draining uplands.

- 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

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. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation package including upland data sheets and delineation map for the ESRH North Tract provided by The Brigman Company. Wetland delineation package was submitted on October 2, 2023. Delineation map is titled “Approved Jurisdictional Determination Exhibit / ESRH North Tract / Portion of TMS# 171-00-01-005 / Myrtle Beach, Horry County, South Carolina” and dated October 2, 2023.
 - b. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NIR (Map Service), National Regulatory Viewer – South Atlantic Division
 - c. LIDAR: 3DEP Digital Elevation Model (DEM)
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
 - d. USDA NRCS Soil Survey: Bladen (hydric) SSURGO database

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- e. USGS topographic maps: 7.5 Minute Index / 1:24000 – Socastee: Quad depicts the site as uplands.
- f. National Wetland Inventory (NWI): NWI depicts the review area as uplands
<https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0>
- g. Previous JDs addressing the same (or portions of the same) review area: SAC-2019-00405, Letter dated June 4, 2019.
- h. Photographs: Photos provided by The Brigman Company dated October 2, 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.

State Plane NAD83 (US Feet)

FID	Latitude	Longitude
0	33.71542	-78.976266
1	33.716933	-78.973219
2	33.716641	-78.972359
3	33.716383	-78.972055
4	33.716289	-78.972238
5	33.715933	-78.972585
6	33.715811	-78.972502
7	33.715861	-78.97224
8	33.715653	-78.972108
9	33.715711	-78.971912
10	33.714317	-78.971222
11	33.714422	-78.971003
12	33.714336	-78.970933
13	33.712659	-78.974294



TBC
THE BRIGMAN CO.

Approved Jurisdictional Determination Exhibit
ESRH North Tract
Portion of TMS# 171-00-01-005
Myrtle Beach, Horry County, South Carolina
October 2, 2023



1" = 300'