



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

CESAC-RD

March 3, 2025

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-2024-00687 (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).

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F)	Waters of the US (WOUS)	Section 404/ Section 10
Wetland A	7.42 AC	No	N/A
Wetland B	0.14 AC	No	N/A
Wetland C	0.04 AC	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: 18.7 acres
- b. Center Coordinates of Review Area: Lat: 32.7191 Long: -80.0806
- c. Nearest City: John's Island
- d. County: Charleston County
- e. State: South Carolina

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

Bohicket Creek is a TNW (tidally influenced) located approximately 0.41 miles southeast of the review area. However, there is not sufficient evidence to affirm a continuous surface connection (CSC) to this feature.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

Based on the delineation map provided with the submittal, LiDAR imagery, Charleston County Stormwater maps provided by the county at the Corps request, and Google Street View, the only discernable flowpath would be into the stormwater system along Maybank Highway. The flowpath would continue southeast through a series of culverts, covered stormwater ditches, and exposed stormwater ditches adjacent to Maybank Highway, eventually discharging into Bohicket Creek approximately 3200 feet due southeast. However, based guidance established with EPA-Army memo NWP-2023-00602, this office concludes there is not sufficient evidence to affirm a continuous surface connection (CSC) to the downstream TNW because a ***subsurface flow through the city's storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection.***

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

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.

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): 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. 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

⁷ 51 FR 41217, November 13, 1986.

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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).

Wetlands A-C were determined to be non-jurisdictional due to the lack of CSC to a downstream tributary or TNW. Non-Jurisdictional Wetlands A-C are wetland features with a long (approximately 3200 feet) and weak connection to the nearest requisite water, Bohicket Creek, and does not constitute a CSC. Non-Jurisdictional Wetlands A-C are not abutting or contiguous with a TNW or an RPW and do not have a continuous surface connection to a TNW/RPW. Due to the extended length of multiple stormwater system conveyances and lack of flowing water onsite as indicated in resources presented by the agent and available by remote sensing data, and consistent with the direction in EPA-Army memo NWP-2023-00602, it was determined that Non-Jurisdictional wetlands A-B do not meet the physical connection requirement to constitute a CSC.

- 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 (desktop) Determination.
Date: December 30, 2024
- b. Map submitted by or on behalf of, the applicant/consultant: “FIGURE 7 / WETLAND DELINEATION MAP / ANGEL OAK SITE / BOHICKET ROAD / JOHNS ISLAND, CHARLESTON COUNTY / SOUTH CAROLINA”, map dated October 24, 2024.

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- c. Wetland Delineation Data Sheets: Prepared and submitted by or on behalf of the applicant/consultant. This office concurs with the data sheets/delineation report.
- d. Site Photographs: Photos provided by D&D W.E.S.T., submitted as part of the JD request dated June 2, 2024.
- e. USGS Topographic map: 7.5 Minute – Legareville: Quad depicts the review area as partially forested / partially unforested. 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 upland with one freshwater forested/shrub wetland. <https://arcportal-ucop-corps.usace.army.mil/s0portal/home/item.html?id=1eb5aab71973402fadb879cbb7bd3595>
- 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: Seabrook fine sandy loam, and Stono fine sandy loam. 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: ESRI base layer imagery, 2020 SCDNR IR Aerial_2020_NIR (Map Service)
https://tiles.arcgis.com/tiles/RvqSyw3diI7dTKo5/arcgis/rest/services/SC_2020_NIR/MapServer

10. OTHER SUPPORTING INFORMATION.

MEMORANDUM ON NWP-2023-00602, U.S. Environmental Protection Agency and U.S. Department of the Army (March 19, 2024)

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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.

This is not a survey. All locations are approximate. This wetland delineation was completed by D&D WEST. The aquatic resource locations were recorded with the Trimble Geo7x GPS device. Coordination with the U.S. Army Corps of Engineers and the South Carolina Department of Health and Environmental Control (DHEC) is recommended.



FIGURE 7 WETLAND DELINEATION MAP

Angel Oak Site
Bohicket Road
Johns Island, Charleston County
South Carolina

SOURCE

Site Reconnaissance
October 6, 2023

SCDNR
Latest Imagery



1 : 4,800

Date: 10/24/2023

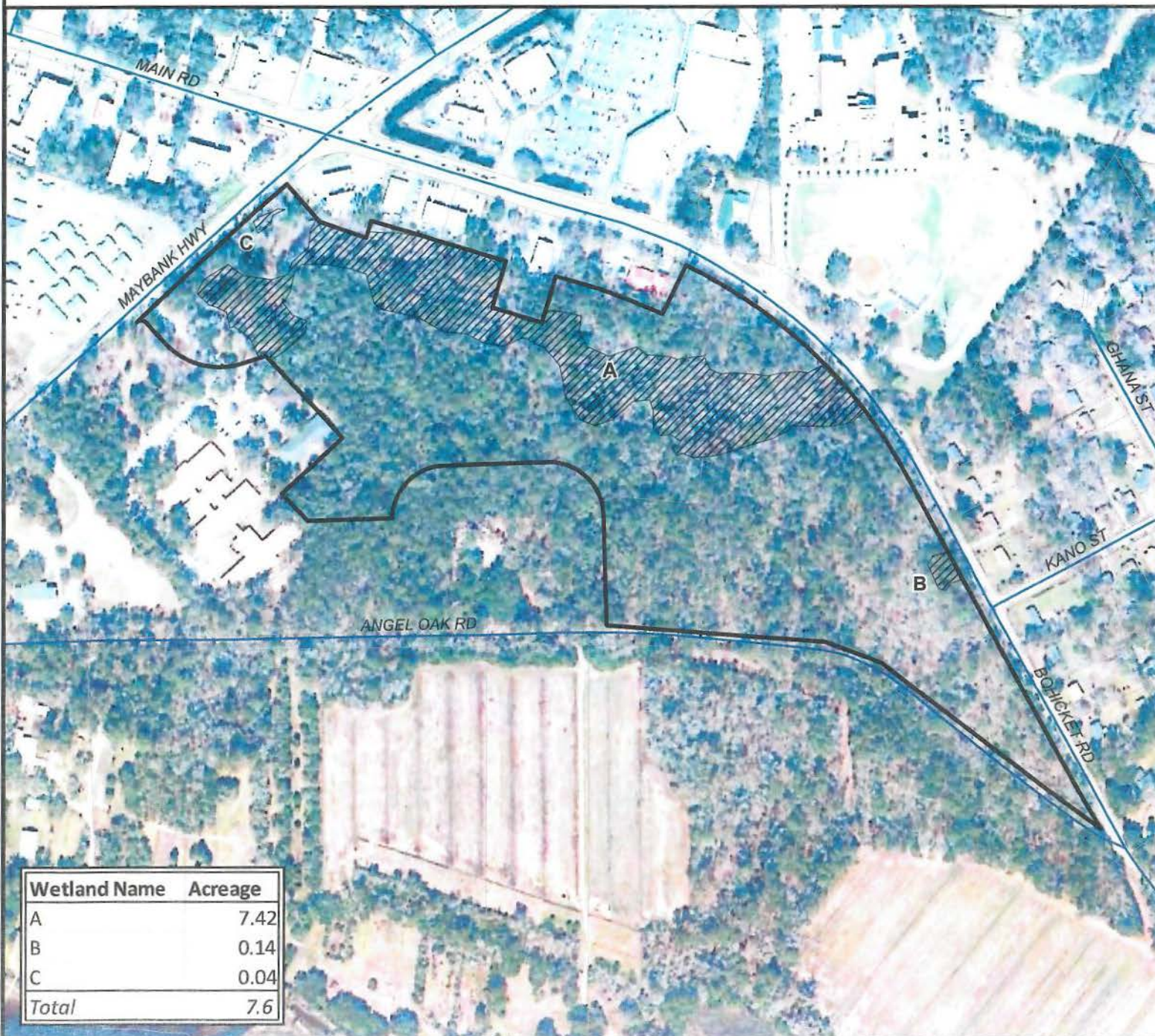
Prepared By: DFH

LEGEND

-  Site Boundary
-  Wetland
-  Charleston County Streets
-  Charleston County Parcels

Site: 18.7 acres
Upland: 11.1 acres
Wetland: 7.6 acres

0 165 330 660 Feet



Wetland Name	Acreage
A	7.42
B	0.14
C	0.04
Total	7.6