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

CESAC-RD 1 November 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023),[1] SAC-2019-01213, 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.

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).

        i. 15-acre borrow pit, non-jurisdictional

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. 651 (2023)

3. REVIEW AREA.

    a. Project Area Size: 15 acres
    b. Center Coordinates of the review area: Latitude: 32.2109 °, Longitude -81.0859 °
    c. Nearest City: Hardeeville
    d. County: Jasper County
    e. State: South Carolina
    f. Survey plat entitled "Riverport Phase 3 Borrow Pit 1" dated May 27, 2019, prepared by Thomas & Hutton Engineering Co.
    g. AJD SAC-2019-01213, form 1 of 1, issued September 30, 2019, under Rapanos determined the 15-acre borrow pit was non-jurisdictional. The AJD specifically states "The pond was excavated from the uplands for the purpose of borrow material/mining. The pond consists of open water and does not meet the three factors described in the federal wetland definition."

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[6] N/A

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

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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.

    a. TNWs (a)(1): N/A

    b. Interstate Waters (a)(2): N/A

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[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.

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. 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

[9] 51 FR 41217, November 13, 1986.

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 15-acre review area consist of a 15-acre borrow pit constructed in the uplands. Small portions of the 15-acre borrow pit contain vegetation and therefore may meet the three factors described in the federal wetland definition. However, the borrow pit is non-tidal and does not have a continuous surface connection to a downstream requisite water. The borrow pit was constructed at a high point in the landscape and is surrounded by uplands. Furthermore, there is not a discrete feature from the borrow pit that provides a continuous surface connection downstream.

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 of remote resources October 24, 2024.

b. LIDAR: 3DEP Digital Elevation Model (DEM) prepared by the Corps during October 24, 2024 office evaluation. https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer

c. USDA NRCS Soil Survey (USDA NRCS, Esri) prepared by the Corps during October 24, 2024 office evaluation.

d. USGS topographic map prepared by the Corps during October 24, 2024 office evaluation.

e. World Imagery arial from February 13, 2024 prepared by the Corps during October 24, 2024 office evaluation.

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.

PARCEL 12
TMS # 031-00-00-015

PARCEL 13
TMS # 031-00-00-016

APPROXIMATE FLOOD HAZARD LINE

ZONE B

ZONE C

ZONE AE

N: 138,030.11
E: 1,973,392.86
LAT:32°12'45"
LON:81°05'10"

N: 138,212.48
E: 1,973,407.41
LAT:32°12'47"
LON:81°05'09"

N 04°33'01" E
182.85'

PROJECT LIMIT

BORROW PIT 1
15± ACRES

CSX RAILROAD 100' R/W (INACTIVE)

OLD BALEY RD.

EARTH ROAD (TYPICAL)

PORTION OF RIVERPORT PHASE 2
PORTION OF PARCEL 12

BALEY SPUR

UNITED STATES OF AMERICA
NATIONAL WILDLIFE REFUGE

PROJECT LIMIT

N: 136,734.20
E: 1,973,592.41
LAT:32°12'33"
LON:81°05'07"

S 36°46'37" W
94.86'

N: 136,658.22
E: 1,973,535.62
LAT:32°12'32"
LON:81°05'08"

PARCEL 13
TMS # 031-00-00-016

GRID NORTH
NAD-83

LEGEND

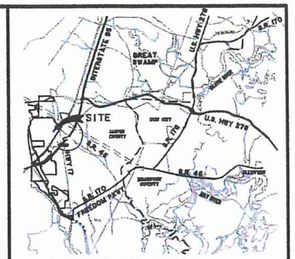
- WETLANDS
- UPLAND CUT BORROW PIT
- D= DITCHES
- EARTH ROAD

NOTES

1. TAX MAP NO.: 031-00-00-016.
2. ACCORDING TO F.I.R.M. MAP NO. 45013Z, PANEL 0175B, REVISED 9-29-86, THE PROPERTY SHOWN ON THIS PLAT IS LOCATED IN FLOOD HAZARD ZONE AE & ZONE B & C.
3. COORDINATES AND DIRECTIONS SHOWN ON THIS SURVEY ARE BASED ON SOUTH CAROLINA STATE PLANE COORDINATE SYSTEM (NAD83). DISTANCES SHOWN ARE GROUND DISTANCES, NOT GRID DISTANCES.
4. A TITLE SEARCH WAS NOT PERFORMED BY THOMAS & HUTTON ENGINEERING COMPANY AT THE TIME OF THIS SURVEY.
5. THE PROPERTY PLATTED HEREON IS SUBJECT TO ALL EASEMENTS AND RESTRICTIONS OF RECORD.
6. WETLANDS SHOWN DELINEATED BY SLIGH ENVIRONMENTAL CONSULTANTS, INC.
7. BORROW PIT DERIVED FROM AERIAL PHOTOGRAPHY AND NOT VERIFIED IN THE FIELD BY THOMAS & HUTTON

WETLANDS

THE WETLANDS SHOWN HEREON WERE LOCATED USING GPS TECHNOLOGY. THIS IS AN ACCURATE REPRESENTATION OF THE DELINEATED AND FLAGGED LINES AND MEETS OR EXCEEDS THE ALLOWABLE POSITIONAL TOLERANCE BY THE NATIONAL MAP ACCURACY STANDARDS. THESE WETLANDS ARE UNDER THE JURISDICTION AND PERMITTING AUTHORITY OF THE U.S. ARMY CORPS OF ENGINEERS AND/OR S.C. OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT.



VICINITY MAP not to scale

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO.
No. C00285
CERTIFICATE OF AUTHORIZATION

SOUTH CAROLINA
PROFESSIONAL
No. 26957
7-25-19
ROBERT K. MORGAN, III
LAND SURVEYOR

JURISDICTIONAL WETLANDS AND MONUMENTS SHOWN ON THIS SURVEY WERE LOCATED USING A SOKKIA SET530R TOTAL STATION AND GPS TECHNOLOGY. THE PURPOSE OF THIS SURVEY IS FOR THE DEPICTION OF JURISDICTIONAL WETLAND AREAS ONLY AND IT DOES NOT REPRESENT A BOUNDARY SURVEY OF THE PROPERTY AND IS NOT SUITABLE FOR CONVEYANCE OF PROPERTY.

ROBERT K. MORGAN, III
SOUTH CAROLINA PROFESSIONAL LAND SURVEYOR
LICENSE NO. 26957

WETLAND EXHIBIT

RIVERPORT PHASE 3 BORROW PIT 1

CITY OF HARDEEVILLE
JASPER COUNTY, SOUTH CAROLINA

prepared for
SLF, III HARDEEVILLE, LLC

No.	Revision	By	Date

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100 0 100 200
1 INCH = 100 FEET

plat	drawn	reviewed	field	crew
05-27-19	LPO	RKM	AUGUST,2014	BJ/BB

job 24968.0001

SHEET 1 OF 1