



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

CESAC-RD

30 October 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-2012-00576,²

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/ Linear Feet	Waters of the US (WOUS)	Section 404/ Section 10
Non-Jurisdictional Wetland	0.32 acre	No	N/A
Jurisdictional Wetland	0.08 acre	Yes	Section 404
Jurisdictional Tributary	0.03 acre/395 LF	Yes	Section 404
Tidal Critical Area Wetlands	9.44 acres	Yes	Section 404 and Section 10
Section 10 Tidal Waters	1.28 acres	Yes	Section 404 and Section 10

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: 18.99 acres
- b. Center Coordinates of Review Area: Lat. 33.4413 °, Long. -79.1210 °.
- c. City: Pawleys Island
- d. County: Georgetown County

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e. State: South Carolina

The project site is bordered to the west by U.S. Highway 17, to the east by Pawleys Island Creek, a tidal waterbody, and bordered to the north and south by commercial development and single-family residences. Along the northern property boundary, a bulkhead separates the project site and adjacent properties, resulting in a notable topographic break. The site contains one single family residence and is predominantly undeveloped. A portion of the site located adjacent to the waterfront was recently cleared of vegetation. Two previous determinations have been issued on this site. The first was an approved Jurisdictional Determination issued on August 16, 2012, supported by a site visit conducted on June 27, 2012, and the second was a delineation concurrence which was verified on April 05, 2024, and supported by a desk top review, to include review of site photos, wetland data sheets, topographic maps, soils maps, and National Wetlands Inventory Maps.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Pawleys Island Creek
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
 - The onsite tributary continues offsite to the east and flows directly into tidal wetlands and waters associated with Pawleys Island Creek, a tidal waterbody and named TNW, with a direct connection to the Atlantic Ocean.
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

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.

The site contains 9.44 acres of salt marsh and 1.28 acres of open waters that are subject to the ebb and flow of the tide, consisting of wetlands and waters associated with Pawleys Island Creek, a tidal waterbody, with a direct connection to the Atlantic Ocean.

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):

- The site contains 9.44 acres of salt marsh and 1.28 acres of open waters that are subject to the ebb and flow of the tide, consisting of tidal wetlands and waters associated with Pawleys Island Creek, a tidal waterbody and named TNW, with a direct connection to the Atlantic Ocean.

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 on-site tributary was observed flowing during the site visit on September 26, 2024, and during site visit on June 27, 2012. The tributary had an obvious bed and bank free of debris, with a firm sandy bottom, and continuous ordinary high-water mark. The tributary contained iron oxidizing bacteria which indicates a ground water connection that supports perennial flow.

f. The territorial seas (a)(6): [N/A.]

- g. Adjacent wetlands (a)(7):
- e. The review area contains one jurisdictional wetland totaling 0.08 acres. This wetland exhibited hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Wetland Delineation Manual and directly abuts the onsite tributary which flows directly into Pawleys Island Creek, a TNW. This tributary provides the requisite continuous surface connection for this 0.08 acre wetland to be jurisdictional (*Sackett v. EPA*, 598 U.S. , 143 S. Ct. 1322 (2023)).

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. [N/A.]
 - One upland excavated non-jurisdictional ditch is located onsite. This ditch was determined to have been excavated wholly in uplands, draining uplands only, and to not carry a relative permanent flow of water.
- 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]

⁸ 51 FR 41217, November 13, 1986.

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- 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).
 - The review area contains one non-jurisdictional wetland totaling 0.32 acres. This closed boundary depressional wetlands exhibited hydric soils, hydrophytic vegetation, and indicators of hydrology, which satisfied the criteria set forth in the 1987 Wetland Delineation Manual. All water located within or draining toward these wetlands had no discernible or traceable outfall or connection to any WOUS. Under previous JDs the wetlands were determined to be jurisdictional via significant nexus determination. The wetlands were determined to be adjacent to a RPW via a non-jurisdictional ditch. Under the *Sackett* Decision, the Court concluded that the significant nexus standard was inconsistent with the Court’s interpretation of the Clean Water Act (CWA) and was therefore unusable in this review. Based on a site visit conducted on September 26, 2024, the wetland lacks a continuous surface connection to the upland excavated ditch and is separated by naturally occurring uplands. The topographic location of these wetlands is such that water in these wetlands is retained and eventually percolates through the soil to groundwater only, at an unknown depth, providing little if any stormwater attenuation. Because of the lack of discernible continuous surface connection to a WOUS and topography grades of the surrounding uplands, this wetland is determined to be isolated and non-jurisdictional.
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 Evaluation: September 26, 2024
 - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Wetland delineation package submitted by the Brigman Company on January

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25, 2024 and supplemental information including data sheets and a map of onsite WOUS provided by the The Brigman Company dated March 31, 2024 and October 8, 2024, respectively.

- c. U.S. Geological Survey map(s): 7.5 Minute Index/ Magnolia Beach Quad; USGS topographic survey information depicts both cleared and forested uplands adjacent to an area with wetland symbology present in the area of delineated tidal wetlands and open waters onsite.
 - d. USDA Natural Resources Conservation Service Soil Survey: NRCS / Soil Survey Geographic Database (SSURGO), Map service dated 8-29-23; Soil survey information depicts the delineated tidal areas as Bohicket soils which is a very poorly drained 100% hydric silty clay loam, and the inland areas are depicts as Chipley fine sand. Chipley fine sand consist predominantly of non-hydric Chipley moist sands that are somewhat poorly drained and contains inclusions of Johnston and Leon sands which are poorly drained hydric soils.
 - e. Wetlands Raster REST Map Service dated December 6, 2021, updated July 14, 2023; NWIS map the majority of the inland project area as uplands. One wetland area is depicted in the center of the site on site, mapped as partially ditched/draind freshwater forested/scrub shrub wetlands (PFO4Bd). Tidal wetlands and open waters on site are mapped as E1UBLx (Estuarine and Marin Deep Water) and E2EM1N (Estuarine and Marine Wetland).
 - f. Photographs: ESRI base layer imagery for Corps National Reg Viewer (NRV), aerial site photos submitted by the agent and site photos taken by the Corps during a site visit conducted on September 26, 2024, incorporated here by reference.
 - g. 3DEP Digital Elevation Model (DEM) and 3DEP Hillshade.
10. OTHER SUPPORTING INFORMATION: Two previous wetland determinations. The first was an approved Jurisdictional Determination issued on August 16, 2012, supported by a site visit conducted on June 27, 2012, and the second was a delineation concurrence which was verified on April 05, 2024, and supported by a desk top review, to include review of site photos, wetland data sheets, topographic maps, soils maps, and National Wetlands Inventory Maps.
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

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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



TBC
THE BRIGMAN CO.

Approved Jurisdictional Determination Exhibit

Tanner Property
TMS# 04-0158-060-00-00
Pawleys Island, Georgetown County, SC
October 8, 2024



1" = 300'