



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

25 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-2024-00497 (Coastal Education Foundation), 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).

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 and cleared uplands. There is one drainage ditch that bisects the property between the forested and upland areas. Based on evidence submitted by the consultant and reviewing the best available information, the onsite ditch was determined to be excavated out of uplands and drains only 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: 2.0 acres.
- b. Center Coordinates of the review area: Latitude: 33.7625°N, Longitude - 78.8507°W
- c. Nearest City: Myrtle Beach
- d. County: Horry
- e. State: South Carolina

The review area consists of 2.0 acres of uplands located on property identified as property identification number (PIN#) 395-09-01-0001 (portion of), north of and adjacent to Villa Mar Drive.

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.

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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
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): 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.

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 ditch (drainage for onsite uplands)	+/- 450 lf 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. This feature was 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
- 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

⁷ 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).
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 Coastal Education Foundation provided by The Brigman Company. Wetland delineation package was submitted on April 26, 2024. Delineation map is titled “Wetland Delineation/Determination / Coastal Education Foundation / Horry County, South Carolina / PIN# 395-09-01-0001 (Portion of)” and dated March 21, 2024.
 - 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: Lynn Haven (hydric) and Leon (hydric) - Soil Survey Geographic Database (SSURGO), Map service dated April 4, 2019, updated March 4, 2020.
 - e. USGS topographic maps: 7.5 Minute Index / 1:24000 – Hand: Quad depicts the site as uplands.

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f. National Wetland Inventory (NWI): NWI depicts the review area as uplands <https://fwspublicservices.wim.usgs.gov/wetlandsmapservice/rest/services/Wetlands/MapServer/0> - According to the data sheets and photos submitted by the consultant, the soil within the site displayed greater than 30% uncoated sand grains within the upper 6". In addition, no other indicators of hydrology were observed by the consultant.

g. Photographs: Photos provided by The Brigman Company dated March 20, 2024.

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.



FID	Lat	Long
0	33.761612	-78.851009
1	33.761916	-78.849877
2	33.762341	-78.85004
3	33.762473	-78.850464
4	33.762598	-78.850544
5	33.762642	-78.850641
6	33.762625	-78.850927
7	33.762762	-78.851014
8	33.762802	-78.851106
9	33.762762	-78.851113
10	33.762691	-78.851269
11	33.762621	-78.85107
12	33.762481	-78.85085
13	33.762264	-78.850888
14	33.762176	-78.850955
15	33.762036	-78.851034
16	33.761639	-78.851019

Non-Aquatic Resource
Ditch

Wetland Delineation/Determination

Coastal Education Foundation

Horry County, South Carolina

PIN#: 395-09-01-0001 (Portion of)

Area Summary:

Jurisdictional Wetland	0.00
Non-Jurisdictional Wetland	0.00
Jurisdictional Tributary	0.00
Uplands	2.00
Total	2.00

Notes

1. Potential wetland/non-wetland areas depicted here on have not been verified by the US Army Corps of Engineers. Areas depicted as wetlands were identified using a combination of available remote sensing and onsite investigation. Prior to any land disturbing activities, or land transactions a final jurisdictional determination should be obtained from the US Army Corps of Engineers.

2. Boundary information taken from Horry County GIS/Tax Parcel information.

3. Onsite inspection was conducted on 3/20/24.

Legend

Line Legend

Boundary	
Adjacent Boundary	
Right of Way	
Jurisdictional Tributary	
Non-Jurisdictional Feature	
Dirt Road	
Bulkhead	

Hatch Legend

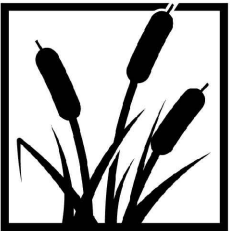
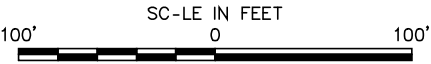
Jurisdictional Wetland	
Critical Area/Section 10	
Non-Jurisdictional Wetland	

Symbol Legend

Data Point	
Photo Point	
Property Corner	

Prepared For	Sky Property Investments, LLC
Job #	02487-24076
Date	3/21/24

Graphic Scale



TBC
THE BRIGMAN CO.