



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
1519 TAYLOR STREET
COLUMBIA, SOUTH CAROLINA, 29201

CESAC-RD

21 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 SAJ-2024-01677-AMS

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
Tributary 1	0.07 AC./ 794 L.F.	Yes	Section 404
Jurisdictional Ditch 1	0.53 AC./1,156 L.F.	Yes	Section 404

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: 1,050.35 acres
- b. Center Coordinates of Review Area: 33.681529 / -78.928713
- c. Nearest City: Myrtle Beach
- d. County: Horry County

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e. State: South Carolina

The project area is the boundary of the Myrtle Beach International Airport Runway. The airport and runway have in existence since the 1940's. The 1,050 Acre project area is void of any forested areas. The site is comprised of runway, tarmac, and plane taxiing areas.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Midway Swash (TNW) out falling into the Atlantic Ocean⁵
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The jurisdictional ditch and tributary 1 outfall directly into Midway Swash (TNW) that outfalls directly into 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 [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

⁵ 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.

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.

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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. TNWs are not located within the project area.
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): [N/A]
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): Tributary 1 flows directly to the offsite TN, (Midway Swash). Jurisdictional Ditch flows directly into the offsite TNW (Midway Swash. Both features have been visited over the years and water has been observed flowing year-round in both features on previous site visits. A site visit was not performed due to security measures within and around the airport. Site photos provided by the agent revealed both tributaries with bank full depth of flowing water. Aerial photos depict defined channels with water. USGS topographic maps depict the tributaries as solid blue line features which typically represent tributaries with a flow regime of perennial. See site photos 2,3,4 and 11 located in the file.
- 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”).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.

⁸ 51 FR 41217, November 13, 1986.

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The review area contains several upland excavated ditches totaling approximately +/- 57,776 linear feet. These features are located adjacent to the runway and taxiways within the airport and transport stormwater for the airport's impervious surfaces. These features are identified as "Non-Jurisdictional Ditch" on the associated map wetland map. These features were determined to have been *excavated wholly in and draining only dry lands and do 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]
 - 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. Review Performed for Site Evaluation: Office (Desk) Determination.
Date: October 18, 2024. A site visit was not performed buy the Corps due to security measures within and around the airport.

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- b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland delineation submittal for Horry County by the Brigman Company in the submittal dated October 3, 2024.
- c. Aerial Imagery: 2020 SCDNR IR Aerial & 2020 SCDNR Aerial SC_2020_NIR (Map Service)
- d. LIDAR: 3DEP Digital Elevation Model (DEM)
<https://elevation.nationalmap.gov/arcgis/rest/services/3DEPElevation/ImageServer>
- e. USDA NRCS Soil Survey: Yauhannah, and Yonges at locations of aquatic features. SSURGO database.
- f. USGS topographic maps: 7.5 Minute – Myrtle Beach Quad: Quad depicts upland developed airport with Tributary 1 and Jurisdictional Ditch as solid blue line features.
- g. National Wetland Inventory (NWI): NWI depicts the review as uplands
- h. NHD identifies all ditches and other linear features (Tributary 1 & Jurisdictional Ditch) as canals.

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.



Wetland Delineation of

MYR Runway Improvements

Horry County, South Carolina
portions of TMS# 180-00-02-009, 285, 131, 132,
186-00-01-316 & 317

Area Summary:

Jurisdictional Wetland	0.00
Tributary	0.07
Jurisdictional Ditch	0.53
Non-Jurisdictional Ditch	57,776 Linear Feet
Uplands	1,049.75
Total	1,050.35

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 urisdictional 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 9-11-24.

Legend

Line Legend

Boundary	
Adjacent Boundary	
Right of Way	
Tributary	
Non-Jurisdictional Stormwater Ditches	
Jurisdictional Ditch	
Bulkhead	

Hatch Legend

Jurisdictional Wetland	
Pond	
Tributary	

Symbol Legend

Data Point	
Photo Point	
Property Corner	

Prepared For	DRG Engineering
Job #	02162-24263
Date	10-15-24

Graphic Scale

