



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
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THE SHELBY BUILDING
VESTAVIA HILLS, AL 35216

CESAM-RD-N

23 May 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 SAM-2021-1298-AGK; MFR #1 of #1²

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

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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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 Alabama 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. W-1/W-2; non-jurisdictional wetland without a continuous surface connection to a traditional navigable water, interstate water, territorial sea, or relatively permanent tributary or impoundment.
 - ii. S-1; non-relatively permanent water that is not connected to a TNW; non-jurisdictional.
 - iii. W-3/W-4; jurisdictional wetland that is adjacent to a relatively permanent tributary.
 - iv. S-2; relatively permanent water; jurisdictional.
 - v. S-3; relatively permanent water; jurisdictional.
 - vi. W-5/W-6; non-jurisdictional wetland without a continuous surface connection to a traditional navigable water, interstate water, territorial sea, or relatively permanent tributary or impoundment.
 - vii. W-7/W-8; jurisdictional wetland that abuts a relatively permanent impounded tributary.
 - viii. PND; relatively permanent impounded tributary.
 - ix. W-9; jurisdictional wetland that abuts a relatively permanent impounded tributary.
 - x. W-10; jurisdictional wetland that abuts a relatively permanent tributary.
 - xi. S-4; relatively permanent water; jurisdictional.

2. REFERENCES.

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- 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. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “pre-2015 regulatory regime.”
 - d. 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)
 - e. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
 - f. 2003 SWANCC guidance
 - g. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. “Memorandum to Re-evaluate Jurisdiction for NWP-2003-60436” (December 18, 2023).
3. REVIEW AREA. The review area for this AJD is within a 65.7-acre tract of right-of-way along U.S. Highway 84 in Evergreen, Conecuh County, Alabama, beginning at latitude 31.421773 North and longitude 87.049653 West and ending at latitude 31.418933 North and longitude 87.006995 West. The attached figures depict the review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which the aquatic resources are located is the Conecuh River south of Brewton, AL. The Conecuh River is on the Mobile District’s Section 10 list and is a large tributary to Escambia River, which flows into the Gulf of Mexico.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

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.

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Non-jurisdictional aquatic resources:

S-1 begins on the western end of W-2 and flows west then reaches a culvert and flows north underneath US Hwy. 84 and continues to flow north about 50 feet until it dissipates in an open area (see site photos); therefore, S-1 is a non-relatively permanent water (RPW) that is not connected to a traditionally navigable (TNW).

W-1/W-2 and W-5/W-6 do not flow to a TNW, interstate water or territorial seas.

Jurisdictional aquatic resources:

S-2 is a RPW that begins immediately north of Hwy. 84 and flows east towards S-3. S-2 appeared to once flow into S-3, but the channel of S-2 dissipates within a regularly mowed powerline easement, just east of S-3.

S-3 drains wetland W-4 located immediately south of Hwy. 84 and begins at a stormwater culvert immediately north of Hwy. 84. S-3 flows north 36 feet, then east underneath a dirt road approximately 120 feet, then northeast approximately 60 feet before it flows outside of the review area. S-3 continues northeast for 0.74 mile before flowing into an unnamed tributary, which then flows north 0.22 mile until it reaches Hunter Creek. Hunter Creek flows east approximately 1 mile until it reaches Murder Creek. Murder Creek flows approximately 31 miles south to the Conecuh River, which is on the Mobile District's Section 10 waters list and is therefore a TNW.

S-4 is a RPW located immediately north of Hwy. 84 and flows east for approximately 0.25 mile, then north approximately 1 mile where it connects to Murder Creek, which flows approximately 31 miles south to the Conecuh River, which is a TNW.

W-3/W-4 is part of a large wetland that extends outside of the review area; W-3/W-4 is an adjacent wetland to unnamed tributary (RPW) that flows approximately 0.5 mile north to connect to Hunter Creek, which flows approximately 1 mile into Murder Creek, which flows approximately 31 miles to the Conecuh River, a TNW.

PND is an impounded tributary and relatively permanent water that flows approximately 1 mile northeast to reach Murder Creek, then into Conecuh River, which is a TNW.

W-7/W-8 is a wetland that abuts an impounded tributary (PND; see flow path above.)

W-9 is a wetland that abuts an impounded tributary (RPW) outside of the review area that flows south for about 0.6 mile and connects to Autrey Creek, which flows approximately 2.75 miles to Murder Creek, which flows approximately 31 miles to

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the Conecuh River, a TNW.

W-10 is a wetland that abuts S-4 (RPW; see flow path above for S-4.)

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): PND is a 0.64-acre impounded RPW tributary within the review area and is a relatively permanent water located at 31.418434, -87.024038. PND was determined to be an impounded tributary because the USGS topographic maps depict a dotted blue line stream on the downstream

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

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.

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side of the dam and is depicted on USGS quad maps as early as the Belleville, AL 1971 Quad map.

e. Tributaries (a)(5):

S-2, is a 219 linear foot RPW located at 31.421017, -87.040327. There was water in the channel and base flow present at the time of the site visit, and although the channel was between 1.5-2.5 feet wide, there was a defined bed and bank with lack of vegetation within the channel. Results of the Antecedent Precipitation Tool showed site conditions as normal at the time of the Corps site visit on April 19, 2024. Additionally, there was no documented rainfall in the seven days prior to the site visit, per the APT.

S-3, is a 78 linear foot RPW located at 31.421017, -87.040327. There was water in the channel and base flow present at the time of the site visit, and although the channel was between 3-5 feet wide, there was a defined bed and bank with lack of vegetation within the channel. Results of the Antecedent Precipitation Tool showed site conditions as normal at the time of the Corps site visit on April 19, 2024. Additionally, there was no documented rainfall in the seven days prior to the site visit, per the APT.

S-4 is a 77 linear foot RPW within the review area located at 31.418949, 31.418949 immediately north of Hwy. 84. S-4 is mapped as intermittent by the NHD; during the Corps' site visit, S-4 contained water and with base flow present and a defined bed and bank. There was also lack of vegetation in the stream bed.

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

g. Adjacent wetlands (a)(7):

W-3/W-4 is a 1.79-acre wetland located at 31.420888, -87.039648 that extends outside of the review area; W-3/W-4 has a continuous surface connection with an unnamed tributary (RPW) outside of the review area because it extends laterally to be adjacent to the RPW. Based on a review of aerial photography, LiDAR data, and a site visit, W-3 and W-4 appear to be one wetland bisected by Hwy. 84, with similar wetland hydrology and vegetation. A culvert is present under Hwy. 84 that maintains a hydrologic connection between this bisected wetland.

W-7/W-8 is a 0.91-acre emergent wetland that is partially inundated located at 31.418445, -87.02403. W-7/8 has a continuous surface connection to an impounded RPW (PND) because it extends laterally to abut PND. Based on a

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review of aerial photography, LiDAR data, and a site visit, W-7 and W-8 appear to be one wetland bisected by Hwy. 84, with similar wetland hydrology and vegetation. A culvert is present under Hwy. 84 that maintains a hydrologic connection between this bisected wetland.

W-9 is a 0.16-acre wetland located at 31.41825, -87.018938 that has a continuous surface connection to an impounded tributary (RPW) to the south outside of the review area because W-9 extends laterally to abut the impoundment.

W-10 is a 1.43-acre forested wetland located at 31.41857, -87.01409 that has a continuous surface connection to S-4 (RPW) because it extends laterally to abut S-4 (RPW).

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

⁹ 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).

S-1 is a 330 linear foot drainage feature/non-relatively permanent water (non-RPW) located at 31.421718, - 87.047604. Although there was water in the channel and flow present at the time of the site visit, and the results of the Antecedent Precipitation Tool showed site conditions as normal at the time of the Corps site visit on April 19, 2024, S-1 does not have a defined bed and bank, and it dissipates about 50 feet north of Hwy. 84. The soils where S-1 dissipates are also non-hydric.

W-1/W-2 and W-5/W-6 do not have continuous surface connection to a TNW, interstate water, territorial sea, or relatively permanent tributary or impoundment.

W-1/W-2 is a 1.02-acre concave scrub-shrub wetland located at 31.42208, - 87.04612. Based on a review of aerial photography, LiDAR data, and a site visit on April 19, 2024, W-1 was separated from other aquatic resources by a non-culverted, earthen access road constructed on the western side of the wetland, and there is no CSC to an RPW. It is surrounded by uplands. Additionally, W-1 and W-2 appear to be one wetland bisected by Hwy. 84, with similar wetland hydrology. Therefore, W-1/W-2 is not jurisdictional based on a lack of a continuous surface connection to a requisite water.

W-5/W-6 is a 0.42-acre depression, partially forested/inundated wetland located at 31.419689, - 87.03637. Based on a review of aerial photography, LiDAR data, and a site visit, W-5/W-6 does not have a CSC to a RPW. The linear ditch feature shown on the DEM imagery was not present in the field (site photos and DEM imagery attached). W-5/W-6 is surrounded by uplands. Additionally, W-5 and W-6 appear to be one wetland bisected by Hwy. 84, with similar wetland

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hydrology and vegetation. A culvert is present under Hwy. 84 that maintains a hydrologic connection between this bisected wetland. Therefore, W-5/W-6 is not jurisdictional based on a lack of a continuous surface connection to a requisite water.

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. Site visit was conducted with a Mobile District project manager and the consultant on April 19, 2024. In office evaluation using desktop resources was completed on May 6, 2024.

b. Consultant's wetland delineation forms dated September 23, 2021.

c. Antecedent Precipitation Tool accessed May 2, 2024.

d. National Regulatory Viewer – aerial imagery map layer, USGS topographic map layer, USDA-NRCS Web Soil Survey map layer, National Hydrography Dataset (NHD), and Digital Elevation Model map layer; accessed May 6, 2024.

e. Google Earth Pro aerial photography dated June 2006, March 2019, November 2023.

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.