



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
600 VESTAVIA PARKWAY, SUITE 203
VESTAVIA HILLS, ALABAMA 35216

CESAM-RD-N

March 31, 2025

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-2023-0725-JDC, 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 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 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. Strip Pit Pond 1 – 6.7 acres in size in review area, abandoned surface mine pit constructed in uplands, non-jurisdictional
 - ii. Strip Pit Pond 2, 3.2 acres in size in review area, abandoned surface mine pit constructed in uplands, 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, 143 S. Ct. 1322 (2023)
- e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))
- f. 2003 SWANNC Guidance

3. REVIEW AREA. The review area is a 110-acre parcel in Cleveland, Blount County, Alabama and is centered at latitude 33.978496, longitude -86.556171.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Locust Fork approximately 3 miles west of

the review area at river mile 93; however, the Locust Fork becomes Section 10 approximately 70 miles downstream in Jefferson County just upstream of river mile 22. The Locust Fork is on the Mobile District's list of Section 10 waters. Section 10 waters are a subset of TNWs.⁶

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

Strip Pit Pond 1 and Strip Pit Pond 2 do not flow to a TNW, interstate water or territorial seas because they are completely surrounded by uplands with no outlet.

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.

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.

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- 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
- 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

⁹ 51 FR 41217, November 13, 1986.

- 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*.

Strip Pit Pond 1 is approximately 6.7 acres in size within the review area and was created in uplands during pre-SMCRA surface coal mining activities at the site. Strip Pit Pond 1 continues west outside of the review area and ends at a high wall with no outlet or drainage feature coming out of the pond.

Strip Pit Pond 2 is approximately 3.2 acres in size within the review area and was created in uplands during pre-SMCRA surface coal mining activities at the site. Strip Pit Pond 2 continues east outside of the review area and ends in a depressional area with no outlet or drainage feature coming out of the pond.

Based on a review of Google Earth imagery from 1998, 2010, 2012, 2017, and 2023, Strip Pit Pond 1 and Strip Pit Pond 2 both appear to contain water over multiple months, indicating they are both relatively permanent waters.

Pursuant to the preamble to the Final 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the U.S. See preamble 328.3 Definitions (e), which states the Corps generally does not consider the following water to be waters of the U.S.: “Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).” The operation is abandoned; therefore, further evaluation is required to determine if the abandoned pits are waters of the U.S. Strip Pit Pond 1 and Strip Pit Pond 2 do not meet any of the jurisdictional categories of waters of the U.S., do not meet the criteria to be generally non-jurisdictional under the pre-2015 post-Sackett regime and the preamble to the 1986 regulations; therefore, the ponds will be reviewed pursuant to paragraph (a)(3) of 33 CFR 328.3 or “other” waters under the pre-2015 regulations. The ponds do not support a link to interstate or foreign commerce. They are not known to support interstate or foreign commerce or known to be used by interstate or foreign travelers for recreation or other purposes. The ponds do not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, or used for industrial purposes by industries in interstate commerce. For all of these reasons, Strip Pit Pond 1 and Strip Pit Pond 2 do not meet the definition of

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waters of the U.S. as defined by 33 CFR Part 328.3(a) and are not jurisdictional under the Clean Water Act.

- 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. USACE National Regulatory Viewer accessed March 31, 2025 – Lidar Maps, CESAM Section 10 mapper
- b. LaBella Report, "Waters of the United States Survey", dated August 18, 2023 (with the exception of references to the Navigable Waters Protection Rule as it was vacated by the Courts August 30, 2021)
- c. USGS topoview, <https://ngmdb.usgs.gov/topoview/>, accessed March 31, 2025

- 10. OTHER SUPPORTING INFORMATION.

- a. EPA and Army joint memo "Memorandum on Evaluating Jurisdiction for LRL-2023-00466", February 7, 2024.
- b. A review of the 1958 Cleveland, Alabama USGS quad map shows the location where the highwalls and resulting ponds are located appears to have been on a ridgetop. The area outside of the highwalls to the south slopes in a southerly direction. There does not appear to have been any stream channels or wetlands in the location of the highwall and pits before the mining was conducted. These ponds do meet the definition of an (a)(1) TNW, (a)(2) interstate water, (a)(4), impoundment of waters otherwise defined as waters of the U.S., (a)(5) tributary (the ponds have no outlet, (a)(6) adjacent wetland or (a)(7) territorial seas; therefore, it was reviewed under paragraph (a)(3) of the 1986 definition of waters of the U.S.

- 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

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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.