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U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
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Special Projects Branch
Mobile District, Regulatory Division

December 18, 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-2024-00072-JEF, (MFR #1 of #1)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

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.

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 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, Jurisdictional (0.018 ac)
 - ii. W-2, Jurisdictional (0.454 ac)
 - iii. W-3, Jurisdictional (0.088 ac)
 - iv. W-4A Non-Jurisdictional (0.212 ac)
 - v. W-4B Non-Jurisdictional (0.103 ac)
 - vi. W-4C Non-Jurisdictional (0.016 ac)
 - vii. W-4D Non-Jurisdictional (0.064 ac)
 - viii. W-4E Non-Jurisdictional (0.125 ac)
 - ix. W-4F Non-Jurisdictional (0.072 ac)
 - x. W-4G Non-Jurisdictional (0.120 ac)

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. The review area is a 120-acre parcel owned by the City of Gulf Shores located south of Coastal Gateway Boulevard, west of the Foley Beach Expressway, and North of the Craft Farms Golf Club. The site is in Sections 24 and 28 of Township 8 South, Range 4 East with center coordinates of 30.320541 North and 87.668824 West. Uplands found within the boundary of the survey area consisted of fallow fields and immature mixed pine and hardwood forested areas. The shrub and herbaceous layers of the forested upland and wetland areas consisted of mostly invasive Chinese privet and Chinese popcorn trees with a few interspersed loblolly pines. The shrub and herbaceous layers within the forested upland and wetlands were also dominated by the above species. Some blackberry was noted in the woody vine stratum. The non-forested areas consist of various pasture grasses.

Several wetlands are located in the review and are generally described here. W-1 is an herbaceous wetland while, W-2, and W-3 are likely part of a more pervasive wetland complex that extends throughout the neighboring parcels and are likely connected to each other. According to the National Regulatory Viewer 3DEP 2-ft contour maps and 3DEP DEM layer W-1, W-2, and W-3 are a part of the same wetland with a transition from forested (W-2 and W-3) to herbaceous (W-1). They appear to share the same characteristics of hydrology, soil composition, and vegetation.

Wetland W-4A through W-4G are a series of similar wetlands that are emergent in nature located along ditches dug throughout the parcel. The consultant broke these into separate features due to changes in elevation and road crossings between the wetlands on the property. These dirt road crossings feature concrete culverts that connect the wetlands on either side. These wetlands share similar hydrology, soil texture, and vegetation and are the same wetland with some intermittent breaks in-between each of the wetland segments.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Gulf Intracoastal Waterway (GIWW) which is located approximately 2.18 miles south of the review area. The GIWW is subject to the ebb and flow of the tides and is also on the Mobile District's list of Section 10 waters. Section 10 waters are a subset of TNWs.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

Wetland W-1 abuts a culvert that transmits flow under Oak Road East as shown in the site photos (photo 7,8, and 15) to a relatively permanent tributary south of the road. This tributary flows through multiple culverts and ponds located in the golf course, continues south onto Gulf Shores International Airport until it flows in a culvert under E27th Street and into the GIWW for total distance of approximately 2.8 miles.

W-2 and W-3 are part of a larger wetland that connected to W-1 that extends outside of the review area to abut the culvert described in the paragraph above and follows the flow path described above as desktop review of remote data suggest these are all the same wetland fringing the review area.

Wetland W-4 (W4-A through W4-G) leaves the review area along the southern property boundary and continues in a conveyance a distance of 1865 feet to an unnamed relatively permanent tributary which flows through a culvert under Augusta Drive (see photo 5-6 in "Mapped Photo Log") and flows southeast to 1 mile to Cotton Creek, which flows 1.2 miles to the GIWW.

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 administrative record that shows, the lateral limits of jurisdiction for each aquatic

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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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
- g. Adjacent wetlands (a)(7):

Name	Lat	long	Acres
W-1	30.311991	-87.674533	0.018
W-2	30.312352	-87.671898	0.454
W-3	30.316723	-87.670582	0.088

Wetlands W-1, W-2, and W-3 are fringing parts of a larger wetland that is pervasive throughout the neighboring parcel to the subject parcel. These wetlands total 0.56 acres of wetland. W-1 is an emergent wetland along Oak Road East within a roadside ditch that abuts a culvert (see photo 4 in “Mapped Photo Log”) that conveys water from the north side of Oak Road East to the south side of Oak Road East into an unnamed relatively permanent tributary. The culvert is estimated to be 60 feet long, and the tributary begins at the culvert outlet. Although this relatively permanent tributary is outside of the review area it was observed to have an ordinary high-water mark, wrack lines within the stream bed and outside of the banks (indicating high water flows), missing vegetation, crayfish burrows, defined bed and banks, and iron oxidizing bacteria (See Photos 1 - 3 in “Mapped Photo Log”), which indicate the tributary exhibits flow more than seasonally. W-1 has a continuous surface connection to the unnamed relatively permanent tributary on the south side of Oak Road East because the wetland extends to the culvert, which provides a relatively short (60 feet) connection directly to a relatively permanent tributary. Culverts are typically built under

roads to help maintain hydrologic connection from an aquatic resource on one side of the road to the other to support the structural integrity of the road by preventing flooding, overtopping, undercutting, and erosion from the aquatic resource. Without the culvert, the flow of water from the wetland could result in the road being degraded or washed away. In this case, the culvert provides evidence that sufficient levels of flow occur between the wetland and tributary during storm events, bank full periods, and/or ordinary high flows to warrant the need for the culvert. The 60-foot length of the physical connection from W-1 to the relatively permanent tributary is relatively short. Considering all of these factors together, the culvert directly connects W-1 to the unnamed relatively permanent tributary, which serves as the physical connection that meets the continuous surface connection requirement for W-1 and it is therefore a jurisdictional wetland.

W-2 extends outside of the review area as it is part of a larger wetland system on the adjacent parcel. Also associated with W-2 is W-3 which also appears to be part of this larger wetland system on the adjacent parcel. W-1, W-2, and W-3 could be considered to be one wetland as they share similar hydrology and vegetation and although a small portion of W-2 and W-3 is located within the review area, the extent of this wetland goes beyond the review area boundary and it part of one large wetland system on the neighboring parcel to the west and southwest of the review area. W-2 and W-3 extend to W-1 although W-1 it is not being considered part of W-2 and W-3 as they have two different habitat types. W-1 is herbaceous, and W-2 and W-3 are forested. W-2 and W-3 boundaries extend outside the review area with an unimpaired connection to W-1 at the 60-foot-long culvert on Oak Road East. Flow goes through the culvert directly into the relatively permanent tributary described in the paragraph above. W-2 and W-3 have a continuous surface connection to the unnamed relatively permanent tributary on the south side of Oak Road East because the wetlands extend to the culvert, which provides a relatively short (60 feet) connection directly to a relatively permanent tributary. Culverts are typically built under roads to help maintain hydrologic connection from an aquatic resource on one side of the road to the other to support the structural integrity of the road by preventing flooding, overtopping, undercutting, and erosion from the aquatic resource. Without the culvert, the flow of water from the wetland could result in the road being degraded or washed away. In this case, the culvert provides evidence that sufficient levels of flow occur between the wetland and tributary during storm events, bank full periods, and/or ordinary high flows to warrant the need for the culvert. The 60-foot length of the physical connection from the wetlands to the relatively permanent tributary is relatively short. Considering all of these factors together, the culvert directly connects W-2 and W-3 to the unnamed relatively

permanent tributary, which serves as the physical connection that meets the continuous surface connection requirement for W-2 and W-3 and therefore they are jurisdictional wetlands.

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
- 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

⁸ 51 FR 41217, November 13, 1986.

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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Name	Lat	long	Acres
W-4A	30.317234	-87.668495	0.212
W-4B	30.318448	-87.667933	0.103
W-4C	30.318802	-87.668764	0.016
W-4D	30.319529	-87.666432	0.064
W-4E	30.319562	-87.668500	0.125
W-4F	30.320469	-87.668903	0.072
W-4G	30.321391	-87.669427	0.120

Wetland W-4A through W-4G are a series of similar wetlands that are emergent in nature located along ditches dug throughout the parcel. The consultant broke these into separate features due to changes in elevation and road crossings between the wetlands on the property. These dirt road crossings feature concrete culverts that connect the wetlands on either side. These wetlands share similar hydrology, soil texture, and vegetation and are the same wetland with some intermittent breaks in-between each of the wetland segments. Wetland-4A through Wetland 4G are discussed as one wetland W4 for the remainder of this section. Wetland W-4 is an emergent wetland that follows the contours of a series of ditches dug in uplands in the subject parcel. The flow from W-4 flows to the south outside of the review area. At this point the PM no longer had access to observe the site conditions on the property to the south and cannot verify the wetland extent off the property. Desktop data does not suggest that a relatively permanent water exists on the southern parcel as the topographic quadrangle maps do not indicate streams present nor does the National Hydrography Dataset (NHD) indicate the presence of a stream; however, the National Regulatory Viewer's 3DEP Digital Elevation Model layer suggests that there is a linear feature, similar to how Wetland W-4 appears within the review area, extending from the southern boundary of the review area to the southeast a distance of approximately 875 feet, where according to historical Google Earth imagery dating back to 1992, it meets an area that was a road traversing north to south. Desktop resources do not indicate that that the historic road or an associated ditch are relatively permanent based on the lack of a mapped tributary on the USGS topo map and NHD map. The flowpath extends approximately 990 feet south where it converges with a relatively permanent tributary on the west side of Augusta Drive (See photos 5 and 6 in Mapped Photo Log). The total distance from W-4 to the unnamed relatively permanent tributary

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at Augusta Drive is approximately 1,865 linear feet. Based on the relatively long distance from W-4 to the relatively permanent tributary at Augusta Drive and the lack of strong flowpath indicators observed on desktop resources, there is not a continuous surface connection from W-4 to the relatively permanent tributary; therefore, W-4 is not 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 visit conducted by Corps Project Manager February 15, 2024 and September 17, 2024. Desktop review of delineation conducted February 14, 2024.
- b. Revised wetland delineation from Volkert Inc. December 2023.
- c. Review of LIDAR and DEM imagery from National Regulatory Viewer accessed February 14, 2024.

10. OTHER SUPPORTING INFORMATION. Joint Policy Memorandum on SWG-2023-00284, June 25, 2024.

Joint Policy Memorandum on NWK-2024-00392, November 21, 2024.

Joint Policy Memorandum on NWO-2003-60436, December 19, 2023.

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.