



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
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MOBILE, AL 36628-0001

South Mississippi Branch
Regulatory Division

May 28, 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-2024-00092-KPJ, Lamar County Industrial Site, Purvis, Mississippi (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.

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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 Mississippi 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).

Waters Name	Location	Water Size	Type of Aquatic Resource	Geographic Authority
S-1	31.1740° N, 89.4106° W	676 feet	A5. Tributary - WOTUS	Section 404
S-2	31.1739° N, 89.4070° W	876 feet	A5. Tributary - WOTUS	Section 404
W-1	31.1743° N, 89.4106° W	0.47 acres	A7. AJD WETLAND- WOTUS	Section 404
W-2	31.1739° N, 89.4069° W	2.60 acres	A7. AJD WETLAND- WOTUS	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)
- e. 2008 Rapanos Guidance
- f. *Lewis v. United States, et al.*, No. 23-30387, (5th Cir. 2023)

3. REVIEW AREA. The approximately 52-acre site is located at the end of Mangum Drive within the Lamar County Industrial Park, 0.14 miles east of Old U.S. Highway 11; within Section 33, Township 3 North, Range 14 West; approximate center coordinates are Latitude 31.1735° North and Longitude 89.4097° West; in Purvis, Lamar County, Mississippi. The site is located within an industrial park with a Lowe's Flatbed Distribution center immediately west and Lamar County Emergency Center and forested land immediately south of the site. To the north of the site is a mix of undeveloped forested land and a large homestead/agricultural use parcel. A rail line follows the eastern boundary of the parcel with a mix of predominately forested land and some agricultural land extending approximately 0.75 east of the rail line. A rail spur bisects the parcel from east to west with the terminus at the Lowe's Distribution center.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Black Creek is the nearest TNW. The unnamed RPW tributaries (S-1 and S-2) are approximately 2.6 miles from Black Creek where it is not yet a TNW (approximately mile mark 100 of Black Creek). The straight-line distance between the unnamed RPW tributaries on site to where Black Creek is listed as a TNW (approximately mile mark 29 of Black Creek) is approximately 42.2 miles southeast from the project site. The Black Creek is on the Mobile District's Section 10 Waters list and is therefore a TNW.]⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. W1 and W2 abut unnamed RPW tributaries S1 and S2, respectively, which flow north/northwest to the edge of the property. Beyond the northern property boundary, S1 and S2 tributaries connect to another unnamed RPW tributary that flows to the northwest approximately 2.6 miles and converges with Black Creek south of the 100-mile mark of Black Creek. Black Creek flows southeasterly for approximately 71 miles where at approximately mile marker 29, Black Creek becomes a Section 10 Water.
6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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.

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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): N/A
 - e. Tributaries (a)(5): The North Carolina Division of Water Quality – Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.11 (NC Method) was used to assist with determination of flow regime.

S-1 is a RPW 676 linear feet in length with seasonal or intermittent flow. S-1 is a moderately sinuous stream, approximately 16 – 18 inches in width, and has a sandy bottom. There was clear, slow flowing water present and the last precipitation (0.15 inches) was recorded by the Hattiesburg, MS weather station 48-hours prior to the site visit. There was very slight scouring along some edges of the stream and trees/vegetation along the bank, while some areas showed no scouring. Little to no leaf litter was present in the stream, however there was plenty on the outside edges of the stream along with the presence of algal mats. There is little elevation change and no downcutting by the small stream. There are two drainage ditches that contribute water

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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to S-1. One ditch is from an offsite retention pond; the other is from the south side of the rail line.

S-2 is a RPW 876 linear feet in length with year-round or perennial flow. This RPW is inundated within the tupelo-gum swamp. There was standing water in the swamp and the last precipitation (0.15 inches) was recorded by the Hattiesburg, MS weather station 48-hours prior to the site visit. The trees have adapted to the surrounding conditions with buttressed bases. The APT drought index shows that there was a moderate drought at the time of the site visit. It appeared that the water was slightly lower (4 to 6 inches) than usual based on the markings/rings on the trunks of the trees, however, there was at least approximately 12 inches or more of water in most places.

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

g. Adjacent wetlands (a)(7):

W-1 is a 0.47 acre wetland that has a continuous surface connection to S-1 a jurisdictional tributary because it abuts S-1.

W-2 is a 2.60 acre wetland that has a continuous surface connection to S-2, a jurisdictional tributary because it abuts S-2.

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

⁹ 51 FR 41217, November 13, 1986.

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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. Site visit, April 5, 2024
 - b. Office evaluation, February 21, 2024, and April 16, 2024.
 - c. USACE Antecedent Precipitation Tool (APT), results of wetland delineation date, June 22, 2023, show that site was within normal conditions. APT results for the date of the site visit, April 5, 2024, show that the site was within normal conditions.
 - d. Corps LiDAR, Hillshade, and DEM data from NRV.
 - e. Wetland Delineation report prepared by Wetland Consulting Services, Inc on June 26, 2024.

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10. OTHER SUPPORTING INFORMATION. Historical Google Earth imagery shows that in approximately 1985 the site was predominantly forested with a small, approximately 4.5-acre area that had been cleared. Imagery from 2004 shows that the forested area is somewhat similar, however the forest has become denser. The 4.5-acre area that was cleared has been re-planted with pine trees. Google Earth imagery shows that sometime between 2007 and 2010, that the Lowes distribution center was built west of the review area, the rail spur was installed, and that most of the 52-acre site had been cleared. The flowpath map in Appendix A shows three other possible tributaries on site. However, they are no longer present. It is possible they were destroyed or altered during the land clearing. The only part of the site that appears to be untouched by this clearing activity is the location of S-2 and W-2, a Tupelo-gum Cypress swamp.

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.