



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
109 ST JOSEPH STREET
MOBILE, ALABAMA, 36602

CESAM-RD-A

24 July 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-2024-00215-MDJ; 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. Wetland A: Non-jurisdictional wetland without a continuous surface connection to a jurisdictional water.
 - ii. Other Water A (OWA): Non-jurisdictional pre-amble artificial lake or pond dug solely in uplands, without a continuous surface connection to a jurisdictional water.

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 comprised of an estimated 30.0 acres inside the campus of the AM/NS Calvert, an industrial facility, near the confluence of the Tombigbee and Alabama Rivers. The facility's construction was originally applied for by ThyssenKrupp Steel and Stainless and a permit issued on October 12, 2007, under the Department of the Army (DA) project number SAM-2007-00635-DMY. The permit authorized a total of 1,169 linear feet of stream impacts and impacts to 51.7 acres of jurisdictional wetlands.

This permit authorized the previous impacts inside the 30-acre review area. The review area appears to have historically been composed of dry ground during the initial permit review and construction. However, the depressional nature of the review area, impacts associated with previous construction, as well as the lack of

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appropriate drainage has led to hydric conditions developing as well as low-level ponding.

The approximate center point is located at Latitude: 31.140724°, Longitude: -87.997763°; Calvert, Mobile County, Alabama.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED⁶.

The nearest TNW is the Tombigbee River, approximately 1.61 miles away from the review area, which is on the Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs. See attached mapping.

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

Wetland A is an approximately 7-acre palustrine forested wetland which appears depressional in nature. Its hydrology appears to primarily be precipitation based. When enough head is built in Wetland A, it appears to drain downslope to the southwest via overland / surface sheet flow through uplands for approximately 50 feet until terminating in a wetland ditch. This wetland ditch drains downslope, to the south and east, and terminates approximately 0.5-miles away where the wetland ditch becomes a relatively permanent tributary. The relatively permanent tributary flows another 0.20-miles before terminating in a storm water feature. The stormwater feature drains via an unnamed RPW tributary stream for approximately 1.4-mile and terminates in a large wetland complex immediately adjacent to the Tombigbee River.

OWA is an approximately 0.597-acre artificial pond lacking both inflow and outflow and therefore does not have a flow path to a TNW, interstate water or territorial seas.

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): 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

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.

⁹ 51 FR 41217, November 13, 1986.

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the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

OWA is a 0.597-acre artificially excavated pond created in uplands, surrounded in its entirety by uplands, and exhibits no inflow or outflow. This pond was likely created as a settling basin. According to the preamble to the 1986 regulations, the agencies generally do not consider artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing to be waters of the U.S. Therefore, OWA is not jurisdictional.

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

Wetland A is an approximately 7-acre non-tidal palustrine forested wetland that lacks a continuous surface connection to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water. Therefore, the 7-acre wetland is not jurisdictional. Wetland A is depressional in nature and only appears to drain when enough head is built to drain to the south and west, via overland sheetflow, to a wetland ditch outside of the review area approximately 50 to 60-feet away from Wetland A. The wetland ditch extends parallel to Second Street for approximately 1,200 feet where it turns northeast, parallel to 3rd Avenue, for approximately 225 feet. Here, flow continues through a 60-foot-long culvert, then flows another 300 feet before meeting a second 60-foot-long culvert. Exiting the second culvert, flow continues downslope for approximately 165 feet until meeting a third 60-foot-long culvert. Flow exits the third 60-foot-long culvert and continues for approximately 135 feet until meeting another culvert and flow is directed under 3rd Avenue, through a fourth 120-foot-long culvert. When the flow daylights under 3rd Avenue, the feature becomes a relatively permanent tributary ditch. Field observations of this feature include ordinary high-water marks (OHWM) such as scour and lack of vegetation indicating this feature is a relatively permeant tributary ditch. Additionally, review of the USGS topographic mapping shows this feature appears to have been a blue-line-stream prior to site disturbance. The total distance from Wetland A to the relatively permanent tributary ditch south of 3rd Avenue is approximately 0.5 miles.

Due to the tenuous nature of the flowpath from Wetland A to the relatively permanent tributary including overland sheetflow through uplands (which is not a discrete flowpath), a multitude of ditches and culverts along the flowpath before reaching the relatively permanent tributary, and the distance of 0.5 miles – Wetland A does not have a continuous surface connection to a requisite water and thus 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. On 22 May 2024, a site visit was conducted as evidenced in the photolog included in the administrative record. The flagged wetland line appeared miss a portion of wetlands uniting the two previously delineated wetlands. Additional wetlands not mentioned in the original delineation, draining to the northeast and then southeast, were identified. See Attached Photo Log.
 - b. Office Evaluations were conducted periodically from April 2024 to August 2024 via inspection of mapping layer accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey topographical mapping, the National Hydrological Dataset, 3DEP Elevation

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Modeling, 3DEP Hillshade Modeling, Nation Oceanographic and Atmospheric (NOAA) LiDAR data, Google Earth Pro historic aerial imagery, national Resource Conservation Service (NRCS) soil mapping, and the U.S. Fish and Wildlife Service (USFWS) Nation Wetland Inventory (NWI) Mapping.

- c. "ArcelorMittal / Nippon Steel Corps (AM/NS) – Calvert; Steel Drive, Calvert Alabama, 36513; Slab Processing Area – 30 AC" dated December 2023, prepared by Evan Reid of Volkert, Inc. (SAM-2024-00215-MDJ).

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.