



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

CESAM RD-N

12 SEPTEMBER 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-2024-00218-MH9 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 this state 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. Stream 2, relatively permanent water (RPW); jurisdictional.
 - ii. Stream 3, non-relatively permanent (non-RPW); non-jurisdictional.
 - iii. Stream 5, non-RPW; 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. ___, 143 S. Ct. 1322 (2023)
- e. 2003 SWANCC guidance

3. REVIEW AREA. The review area for this AJD is limited to the features identified as Stream 2, Stream 3 and Stream 5 and is situated within a 60-acre forested parcel centered at approximately Latitude 33.51948, Longitude -86.65035 in Irondale, Jefferson County, Alabama. 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 resource is connected is the Cahaba River, which is located approximately 0.10 linear miles southeast of the review area. The Cahaba River is on the Mobile District's Section 10 waterway list.

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

Stream 2 flows southwest for approximately 566 linear feet (LF), before exiting the review area, then re-enters the review area and flows southwest approximately 648 LF and converges with Stream 10 (not part of AJD review area) along Grants Mill Road. Stream 10 flows through a culvert under Grants Mill Road. Stream 10 turns south at the culverts egress and flows south along Grant's Mill Road for approximately 0.45 mile, then drains into the Cahaba River.

Stream 3 flows approximately 383 LF in the review area before exiting the review area and converges with Stream 2 outside of the review area and follows the flow path for Stream 2 above.

Stream 5 directs flow west for 76 LF across the southwest portion of the project site to Stream 4 (not part of AJD review area). Stream 4 flows southeast for approximately 421 LF before exiting the review area at the southern boundary and continues and additional 528 LF and discharges to the Cahaba River.

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 resource, including how that limit was determined, and incorporate relevant

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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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):

Stream 2 is a relatively permanent tributary that flows approximately 1,214 linear feet in the review area. The upper reach of Stream 2 flows 566 LF in a southwesterly direction, then exits the review area and becomes a second order stream outside of the review area where Stream 3 converges with it. Stream 2 then re-enters the review area and flows 648 LF before converging with Stream 10 (not included in this AJD). The upper 136 linear feet of Stream 2 was identified as a nonRPW by the consultant; however, as the majority of the tributary reach is relatively permanent (>430 LF), the entire reach is identified as a relatively permanent tributary. Stream 2 appears to exhibit flow at least seasonally based on the observation of a headcut at the termination of a nonRPW section of Stream 2 made by the consultant during their jurisdictional determination site visit. Stream 2 originates at Latitude 33.520904 and Longitude -86.651935.

- 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”).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

⁸ 51 FR 41217, November 13, 1986.

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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).

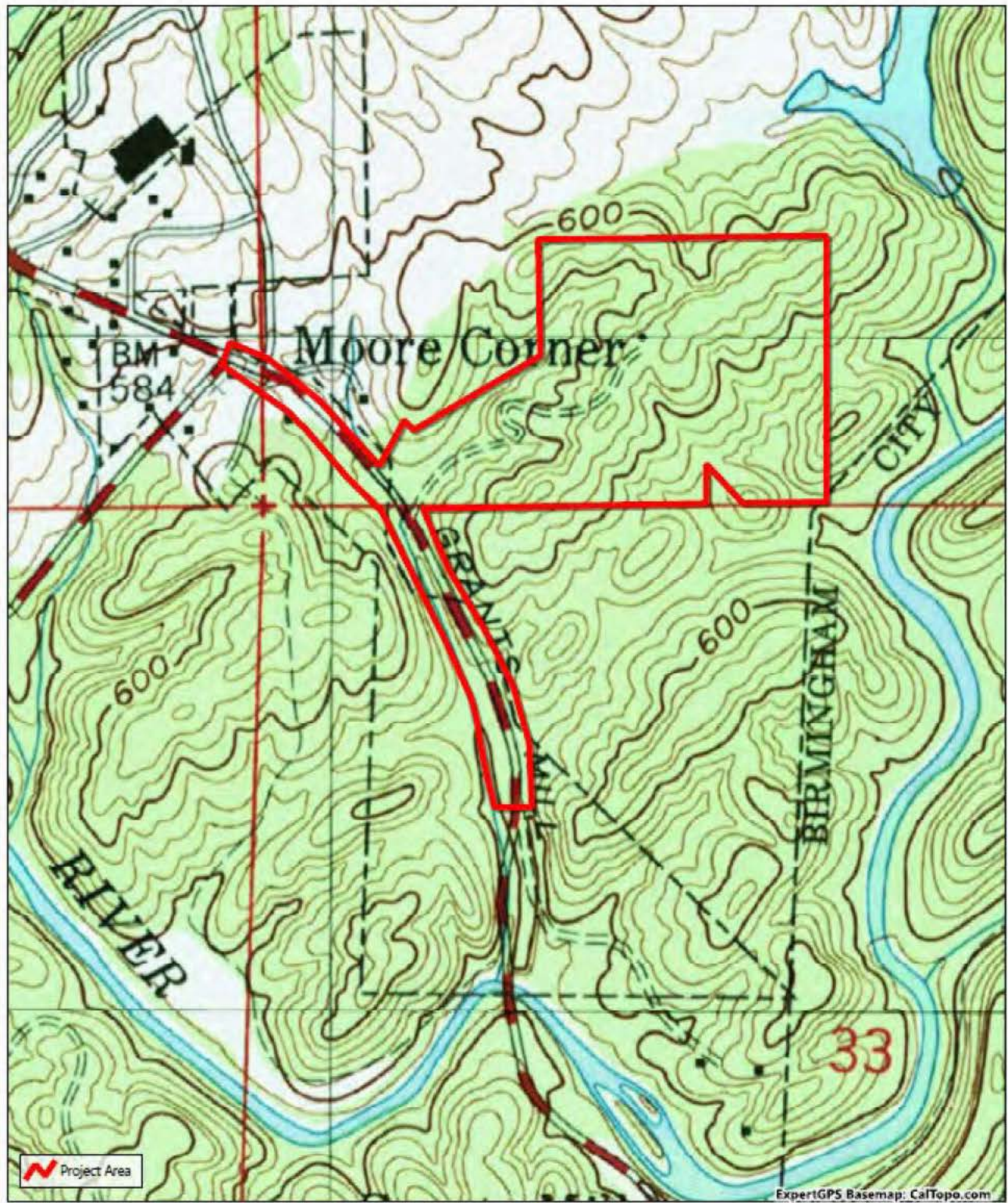
Stream 3 is a non-RPW. Based on the information provided in the delineation report including photographic documentation, the channel lacked sinuosity of along thalweg, in-channel structure and evidence of alluvial deposition. This feature only flows in response to rainfall events and does not have continuous flow at least seasonally. Stream 3 is approximately 383 LF and centered at Latitude 33.519385, Longitude -86.652166.

Stream 5 is a non-RPW. Based on the information provided in the delineation report, Stream 5 flows down-slope toward a valley and exhibits weak sinuosity along the thalweg. This feature only flows in response to rainfall events and does not have continuous flow at least seasonally. Stream 5 is approximately 383 LF and centered at Latitude 33.518855, -86.647947.

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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. In office evaluation using desktop resources was completed on September 4, 2024.
 - a. Figures 1, 4, 5, 6; Appendix A Site Photographs; Appendix B Wetland Delineation Report. Pre-Construction Notification, Shoal Creek Environmental LLC, June 6, 2024.
 - b. National Regulatory Viewer – aerial imagery; USGS Topographic map, 3-D Hillshade, National Wetlands Inventory, Web Soil Survey and National Hydrologic Data layers; accessed June 11, 2023 and September 4, 2024.
 - c. EPA Waters Viewer – National Hydrologic Data, accessed June 11, 2023 and September 4, 2024.
 - d. USGS The National Map – National Hydrologic Data, accessed June 11, 2023 and September 4, 2024.
 - e. Google Earth Pro – aerial imagery, accessed June 11, 2023 and September 4, 2024.
10. OTHER SUPPORTING INFORMATION. Joint Policy Memorandum on MVS-2023-00288, February 16, 2024.
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.



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Scale: 1 : 7500.

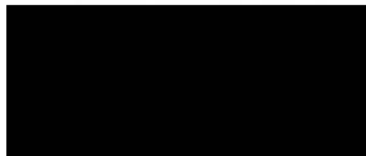
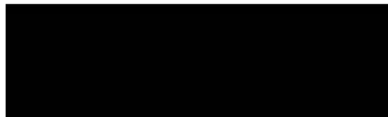
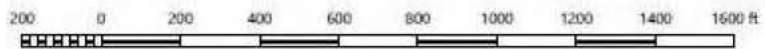


Figure 2.
Topographic Map



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Scale: 1 : 5000.



Figure 6.

Jurisdictional Determination Map