



**D 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

16 August 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-2024-00272-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

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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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. Ephemeral 1; non-relatively permanent water; non-jurisdictional.
 - ii. Ephemeral 2; non-relatively permanent water; 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. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “pre-2015 regulatory regime.”
- d. 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)
- e. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- f. 2003 SWANCC guidance

3. REVIEW AREA. The review area for this AJD is limited to the features identified as Ephemeral 1 and Ephemeral 2 and is situated within a 56-acre tract of land located at the Vulcan Materials Company Glencoe Mine south of Main Street East in Glencoe, Etowah County, Alabama, at Latitude 33.939600, Longitude -85.927100. 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 Ephemeral 1 and Ephemeral 2 are connected is the Coosa River. The Coosa River is on the Mobile District’s Section 10

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list. Additionally, the Coosa River converges with the Tallapoosa River to form the headwaters of the Alabama River.⁶

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

After precipitation events, Ephemeral 1 directs flow east beyond the eastern boundary of the review area for 0.2 mile before joining Ephemeral 2 to form a second order tributary.

After precipitation events, Ephemeral 2 directs flow southeast beyond the eastern boundary of the review area for 0.22 mile before joining Ephemeral 1 to form a second order tributary.

The second order tributary continues flowing southeast for 0.7 mile before entering a culvert inlet in the southbound right of way (ROW) of U.S. Highway 431. The tributary is piped under the highway for 0.02 mile and exits the culvert in the northbound ROW of U.S. Highway 431. The tributary continues flowing east for 0.03 mile before it turns south, flows for 0.08 mile, converges with another stream, and enters a culvert inlet in the southbound ROW of an unnamed road. The tributary is piped for 0.01 mile, exits the culvert, and flows 0.02 mile into another culvert in the ROW of a Louisville and Nashville (L&N) rail line. The tributary is piped under the rail line for 0.02 mile, exits the culvert and flows 0.18 mile northeast before draining into another tributary, which flows 1.8 miles northwest into Little Cove Creek. Little Cove Creek flows 4.8 miles north into Big Cove Creek, and Big Cove Creek flows 1.2 miles north into the Coosa River.

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

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

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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 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

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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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).

Ephemeral 1 is a non-relatively permanent water. No flow was observed during the field visit. Based on the results of the Antecedent Precipitation Tool, precipitation was normal during the field visit, although the APT indicates the area was experiencing mild drought. Based on observed stream characteristics, including a lack of soil-based evidence of a high water table, weak sinuosity along the thalweg, rooted upland plants in the streambed, and leaf litter in the channel, this feature only flows in response to rainfall events and does not have continuous flow at least seasonally. Ephemeral 1 is 349 feet long and centered at latitude 33.9370, longitude -85.9260.

Ephemeral 2 is a non-relatively permanent water. No flow was observed during the field visit. Based on the results of the Antecedent Precipitation Tool, precipitation was normal during the field visit, although the APT indicates the area was experiencing mild drought. Based on the observed stream characteristics, including a lack of soil-based evidence of a high water table,

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weak sinuosity along the thalweg, rooted upland plants in the streambed, and leaf litter in the channel, this feature only flows in response to rainfall events and does not have continuous flow at least seasonally. Ephemeral 2 is 131 feet long and centered at latitude 33.9387, longitude -85.9259.

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 was conducted with a Mobile District project manager and the consultant on June 12, 2024. In office evaluation using desktop resources was completed on August 6, 2024.
 - b. Consultant's delineation report dated March 12, 2024, and revised delineation maps submitted on June 17, 2024.
 - c. Antecedent Precipitation Tool accessed June 28, 2024.
 - d. National Regulatory Viewer – aerial imagery map layer, USGS topographic map layer, USDA-NRCS Web Soil Survey map layer, and Digital Elevation Model map layer; accessed July 1, 2024, and August 6, 2024.
 - e. USGS National Map at <https://apps.nationalmap.gov/viewer/>. Accessed on July 1, 2024, and August 6, 2024.
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.



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Drawing Symbols

— Site Boundary



3/06/2024

Figure 1
Site Location Map



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Drawing Symbols

- Boundary
- Ephemeral Stream
- Data Point

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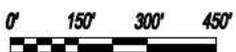
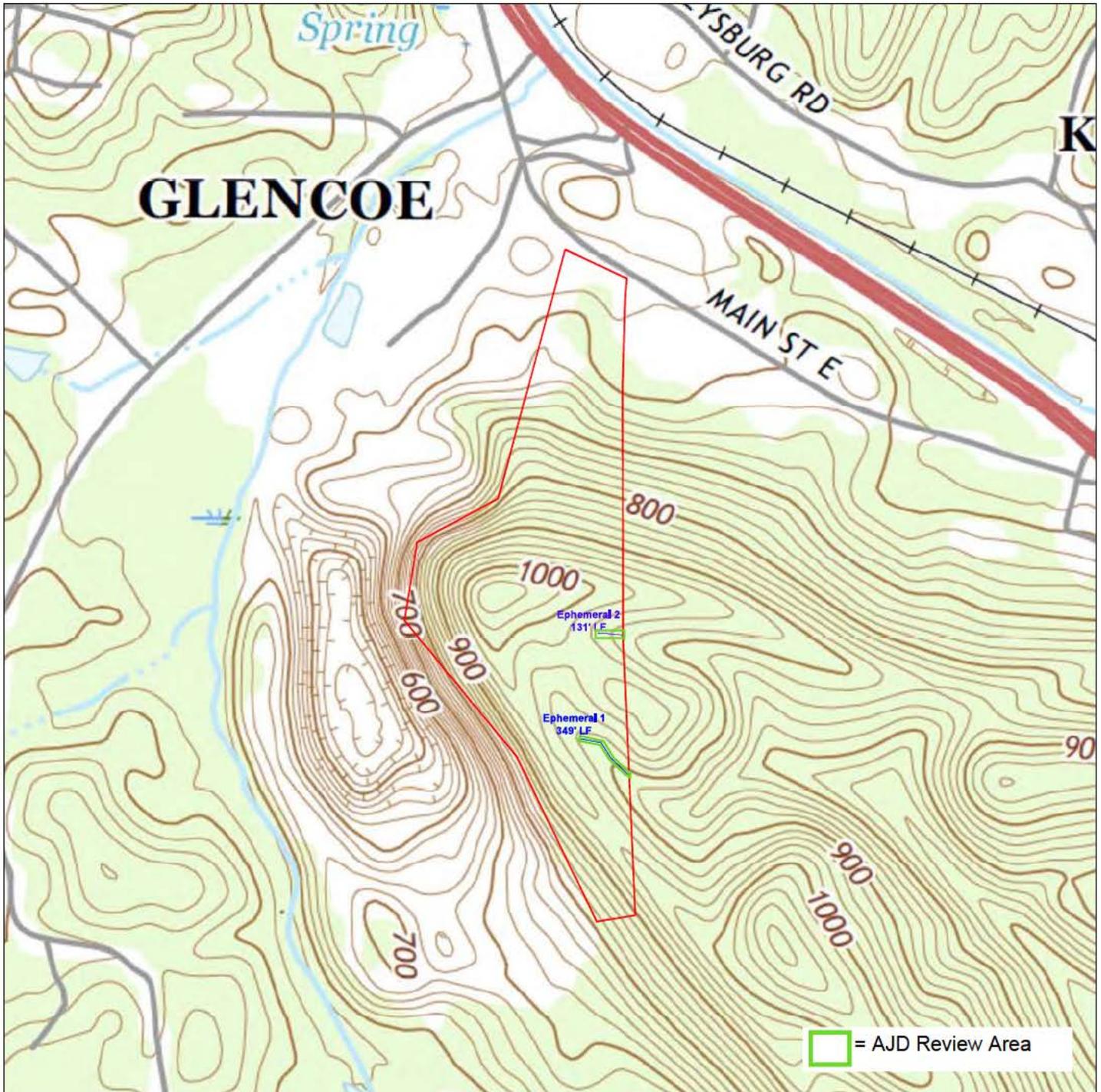


Figure 2
Aerial with Delineation



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Drawing Symbols

- Boundary
- Ephemeral Stream

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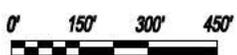


Figure 3
USGS Topo with Delineation