



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

22 November 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime  
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023),<sup>1</sup>  
SAM-2024-00422-JDC; MFR #1 of #1<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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. ES-1; non-relatively permanent water; non-jurisdictional.
  - ii. ES-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. 651 (2023)
  - f. 2003 SWANCC guidance
3. REVIEW AREA. The review area for this AJD is limited to the features identified as ES-1 and ES-2 and is situated within a 21.75-acre tract of land northwest of Sterilite Drive in Pinson, Jefferson County, Alabama, at Latitude 33.638563, Longitude -86.740011. The attached figure depicts 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 ES-1 and ES-2 are connected is Locust Fork. Locust Fork is on the Mobile District’s Section 10 list. Additionally, Locust Fork

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converges with the Mulberry Fork to form the headwaters of the Black Warrior River.<sup>6</sup>

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

After precipitation events, first order tributary ES-1 directs flow southwest across the southern portion of the project site before joining first order tributary ES-2 to form a second order tributary (Memorandum on MVS-2023-00288) near the southern boundary of the project site.

After precipitation events, first order tributary ES-2 directs flow southwest across the southern portion of the project site before joining first order tributary ES-1 to form a second order tributary (Memorandum on MVS-2023-00288) near the southern boundary of the project site.

The second order tributary is not in the AJD review area.

The second order tributary flows southwest for 0.01 mile before entering a stormwater system under an industrial development. The second order tributary is piped under the industrial development for 0.24 mile before emerging at the southern edge of the industrial development. The second order tributary then flows through a retention pond for 0.03 mile before converging with a first order tributary in the right of way (ROW) of Sterilite Drive. The second order tributary continues flowing south for 0.69 mile before it turns east, continues flowing for 0.23 miles, then empties into Barton Branch. Barton Branch meanders south-southwest for 1.41 miles before flowing into Fivemile Creek. Fivemile Creek flows west-northwest for 36.3 miles before flowing into Locust Fork. Locust Fork flows for 5 miles before becoming a Section 10 water. Locust Fork, as a Section 10 water, continues flowing southwest for an additional 22.5 miles before converging with Mulberry Fork to form the headwaters of the Black Warrior River.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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").<sup>9</sup> Include size of the aquatic resource or feature within

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<sup>8</sup> 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.

<sup>9</sup> 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. 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 non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

ES-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, and rooted upland plants in the streambed, this feature only flows in response to rainfall events and does not have continuous flow at least seasonally. ES-1 is 672.56 feet long and centered at Latitude 33.638717, Longitude -86.740268.

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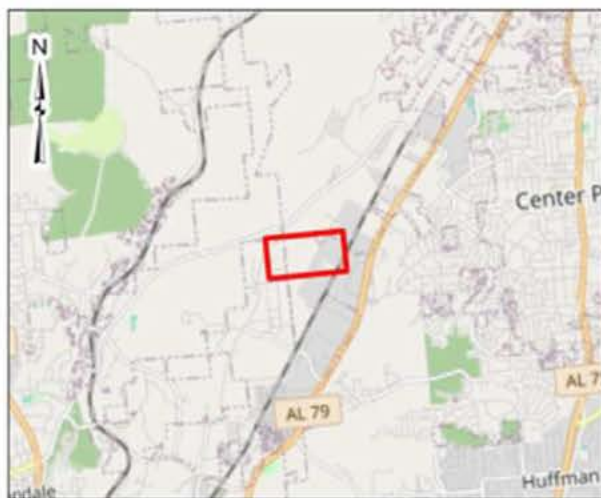
ES-2 is a non-relatively permanent water. No flow was observed during the field visit. Based on the results of the Antecedent Precipitation Tool, precipitation was normal during the field visit, although the APT indicates the area was experiencing mild drought. Based on observed stream characteristics, including a lack of soil-based evidence of a high water table, weak sinuosity along the thalweg, and rooted upland plants in the streambed, this feature only flows in response to rainfall events and does not have continuous flow at least seasonally. ES-2 is 679.05 feet long and centered at Latitude 33.638679, Longitude -86.740110.

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 applicant's authorized agent on August 9, 2024. In office evaluation using desktop resources was completed on November 14, 2024.
  - b. Consultant's delineation report dated February 23, 2024, and revised delineation map submitted on August 13, 2024.
  - c. Antecedent Precipitation Tool accessed March 21, 2024, and September 4, 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 October 16, 2024, and November 14, 2024.
  - e. USGS National Map at <https://apps.nationalmap.gov/viewer/>. Accessed on November 14, 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.



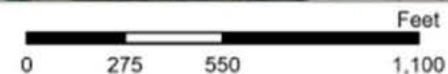


Feature	Length (LF)
ES-1	672.56
ES-2	679.05



### Legend

- Site Boundary
- JD Review Area
- Tributary
- Data Point
- Culvert



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Project No.: [REDACTED]  
 Date: Aug 2024  
 Drawn By: [REDACTED]  
 Reviewed By: [REDACTED]



### Aquatic Resource Map

[REDACTED]  
 Birmingham, Jefferson County, Alabama

### Exhibit

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