



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

CESAM-RD-N

October 3, 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-2024-00511-AKG; 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 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).

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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- i. S-001 - non-jurisdictional; non-relatively permanent water
- ii. S-004 - non-jurisdictional; non-relatively permanent water
- iii. S-008 - non-jurisdictional; non-relatively permanent water
- iv. D-001 - non-jurisdictional ditch excavated in uplands, draining only uplands, with less than a relatively permanent flow of water.
- v. D-003 - non-jurisdictional ditch excavated in uplands, draining only uplands, with less than a relatively permanent flow of 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)
- e. 2003 SWANCC guidance

- 3. REVIEW AREA. The review area for this AJD is limited to the features identified as S-001, S-004, S-008, D-001, and D-003, which are part of an 8.39-acre right-of-way (ROW) area along McAshan Drive, McCalla, Jefferson County, Alabama. The center of the ROW is latitude 33.318997, longitude -87.041255, and is in the Five Mile Creek-Valley Creek 12-digit hydrologic unit code (HUC 031601120102). The figure below depicts the extent of the ROW. No Jurisdictional Determination will be completed for the remaining aquatic resources in the ROW.

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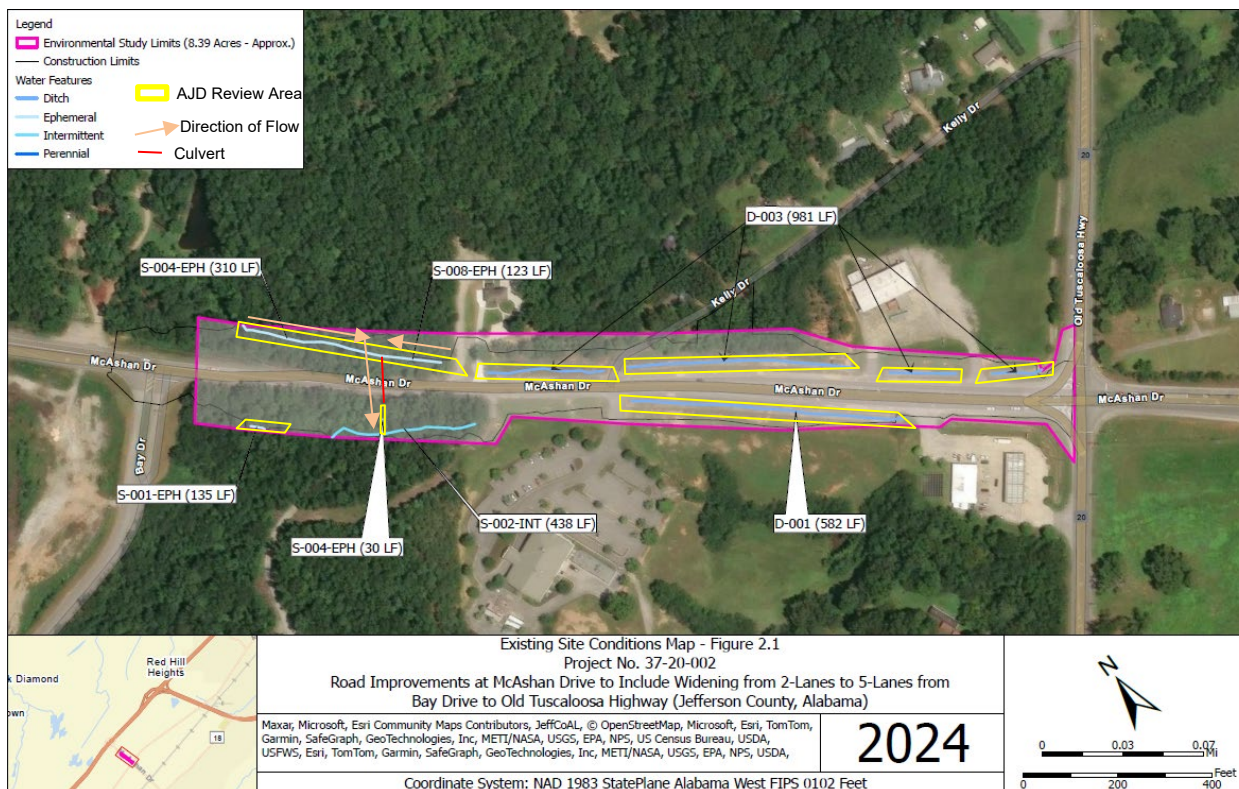


Figure 1. Review Area

- NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The aquatic resources are connected to the Black Warrior River, a TNW. The Black Warrior River is on the Mobile District's Section 10 waters list and is therefore a TNW. Section 10 waters are a subset of TNWs.⁶
- FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

S-001 (non-RPW) appears to originate from a culvert west of McAshan Drive, receives flow from rainfall events, and flows southeast into S-002 outside of the review area, which eventually flows into Five Mile Creek, Valley Creek, then into the Black Warrior River, a TNW.

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.

S-004 (non-RPW) appears to originate from a wooded area northeast of McAshan Drive, receives flow from rainfall events, and flows southeast to a culvert (also same culvert that S-008 flows into) under McAshan Drive, then flows east to reach S-002. S-002 continues offsite into an intermittent stream that flows south and eventually flows into Five Mile Creek, Valley Creek, then into the Black Warrior River, a TNW.

S-008 (non-RPW) appears to originate on the down slope of an access driveway northeast of McAshan Drive, receives flow from rainfall events, then flows north to a culvert, then east to S4 (non-RPW), which then flows into S-002. S-002 continues offsite into an intermittent stream that flows south and eventually flows into Five Mile Creek, Valley Creek, then into the Black Warrior River, a TNW. (See Figure 2 in Section 10 for flow details.)

D-001 is a roadside ditch that begins on the southwestern side of McAshan Drive and was created during road construction. D-001 flows southeast adjacent to McAshan Drive for almost 600 feet then continues outside of the review area in a southerly direction before turning southwest and flowing into an intermittent stream that flows south and eventually flows into Five Mile Creek, Valley Creek, then into the Black Warrior River, a TNW.

D-003 is a roadside ditch that begins southeast of S-008 on the northeastern side of McAshan Drive and was created during road construction. D-003 flows southeast for almost 1,000 feet then flows outside of the review area into an intermittent stream that flows south and eventually flows into Five Mile Creek, Valley Creek, then into the Black Warrior River, a TNW.

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
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

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 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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 be non-jurisdictional under the CWA based on the criteria listed in the guidance.

D-001 is a concrete-lined roadside drainage ditch that is 582 feet long within the review area. D-001 is centrally located at 33.318349°, -87.040487°. This ditch was dug in uplands during historic roadway construction, drains only uplands, contains non-hydric soils, and carries less than a relatively permanent flow of water. For these reasons, D-001 is not jurisdictional.

D-003 is a concrete-lined roadside drainage ditch that is 981 feet long within the review area. Ditch 3 is centrally located at 33.318594°, -87.040275°. This ditch was dug in uplands during historic roadway construction, it drains only uplands, contains non-hydric soils, and carries less than a relatively permanent flow of water based on lack of baseflow within the concrete-lined ditch. For these reasons, D-003 is not jurisdictional.

⁹ 51 FR 41217, November 13, 1986.

- 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).

S-001 is a 135-foot-long by 3-foot wide non-RPW centered at 33.323776°, -87.047124°. The consultant documented stream characteristics and flow regime using the North Carolina Methodology form (score of 11 indicating ephemeral). S-001 only flows in response to precipitation events throughout its length. Because S-001 exhibits non-RPW flow, it is not a jurisdictional water of the U.S.

S-004 is a 310-foot-long by 2.5-foot wide non-RPW centered at 33.323776°, -87.047124°. The consultant documented stream characteristics and flow regime using the North Carolina Methodology form (score of 16.75 indicating ephemeral). S-004 only flows in response to precipitation events throughout its length. Because S-004 exhibits non-RPW flow, it is not a jurisdictional water of the U.S.

S-008 is a 123-foot-long by 2-foot wide non-RPW centered at 33.323776°, -87.047124°. The consultant documented stream characteristics and flow regime using the North Carolina Methodology form (score of 18 indicating ephemeral). S-008 only flows in response to precipitation events throughout its length. Because S-008 exhibits non-RPW flow, it is not a jurisdictional water of the U.S.

- 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.

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- a. Office evaluation using desktop resources was completed in September 2024.
- b. On-site evaluation completed July 19, 2024.
- c. Delineation report provided by the agent, AECOM.; dated August 2024.
- d. National Regulatory Viewer – USGS Topo map, Digital Elevation Model, Hillshade, National Hydrography Dataset, USFWS Wetlands Mapper, and aerial imagery; accessed August 2024.
- e. Google Earth Pro – Historic Aerials dated June 2006, September 2010, December 2013, February 2015, April 2018, May 2021, and May 2023.

10. OTHER SUPPORTING INFORMATION.

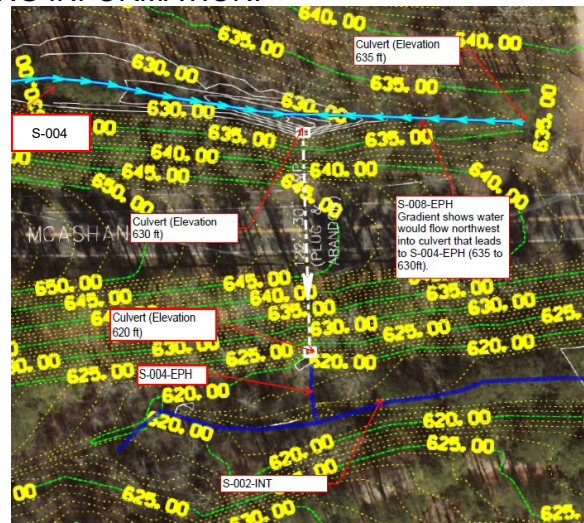


Figure 2. Flow path of S4 and S8.

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.

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Jefferson County Commission		File Number: SAM-2024-00511-AKG	Date: October 3, 2024
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL WITHOUT PREJUDICE	C	
	PERMIT DENIAL WITH PREJUDICE	D	
X	APPROVED JURISDICTIONAL DETERMINATION	E	
	PRELIMINARY JURISDICTIONAL DETERMINATION	F	

SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable

You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial

You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.
- **RECONSIDERATION:** You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable

You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision you may contact:
Lacey M. Leaptrott
Senior Project Manager, North Branch
U.S. Army Corps of Engineers, Mobile District
600 Vestavia Parkway, Suite 203
The Shelby Building
Vestavia Hills, AL 35216
lacey.m.leaptrott@usace.army.mil
251-490-5106

If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:
Krista Sabin
Regulatory Review Officer
South Atlantic Division
60 Forsyth St SW, Floor M9
Atlanta, Georgia 30303-8801
Krista.D.Sabin@usace.army.mil
904-314-9631

SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.

Date:

Email address of appellant and/or agent:

Telephone number: