



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

20 March 2025

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-2024-00562-CMS; 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. ID1; waste treatment system; non-jurisdictional ditch.
 - ii. ID2; waste treatment system; non-jurisdictional ditch.
 - iii. RSD1; non-jurisdictional ditch.
 - iv. RSD2; non-jurisdictional ditch.
 - v. RSD3; non-relatively permanent water; non-jurisdictional.
 - vi. RSD4; non-jurisdictional ditch.
 - vii. W1; non-jurisdictional wetland.
 - viii. D1; non-jurisdictional ditch.

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. 651, 143 S. Ct. 1322 (2023)
- e. 2003 SWANCC guidance

3. REVIEW AREA. The review area for this AJD is limited to the 8 features identified as ID1, ID2, RSD1, RSD2, RSD3, RSD4, W1, and D1 and is situated within a 105-acre project site on the Argos USA, LLC, Roberta Plant north of Highway 25 in Calera,

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Shelby County, Alabama, near Latitude 33.099171, Longitude -86.798711. The attached figures depict the review areas outlined in orange.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which ID1, ID2, RSD2, RSD3, and RSD4 are connected is the Cahaba River. The Cahaba River is on the Mobile District's Section 10 list.

RSD1, D1, and W1 are not connected to a TNW, interstate water, or territorial sea.⁶

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

After precipitation events, RSD2 directs flow south into a forested wetland outside of the review area. The wetland south of the review area physically abuts an unnamed RPW. The unnamed RPW flows west through a culvert along a Southern Railroad rail line and continues flowing west along the southern and southwestern boundary of the Roberta Plant for 0.97 mile before draining into Dry Creek. Dry Creek flows west-northwest for 2.3 miles before flowing into Spring Creek. Spring Creek continues flowing west for 0.35 mile before draining into Shoal Creek. Shoal Creek meanders southwest for 11.34 miles before converging with Mahan Creek to form the headwaters of the Little Cahaba River. The Little Cahaba River flows west-southwest for 16.7 miles before draining into the Cahaba River.

After precipitation events, RSD3 directs flow south across the eastern half of the Roberta Plant. RSD3 enters the review area by flowing southwest across the eastern boundary of the review area then exits the review area by flowing south across the southern boundary of the review area. After crossing the southern boundary of the review area, RSD3 turns west, flows through a culvert along a Southern Railroad rail line, and drains into the previously described unnamed RPW south of the review area. The unnamed RPW flows into the Cahaba River as described above.

ID1 and ID2 direct industrial discharge and wastewater from on-site facilities westward into a large settling pond in the southwest quadrant of the Roberta Plant. The settling pond discharges into the previously described unnamed RPW that flows along the southern and southwestern boundary of the Roberta Plant for 0.97 mile

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.

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before draining into Dry Creek. The unnamed RPW flows into the Cahaba River as described above.

After precipitation events, RSD4 directs flow north into ID1. ID1 directs stormwater, wastewater, and industrial discharge into a settling pond that then discharges into the previously described unnamed RPW south of the Roberta Plant. The unnamed RPW flows into the Cahaba River as described above.

RSD1, D1, and W1 are not connected to a TNW, interstate water, or territorial sea.

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 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

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.

- 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.

D1 is a 260-foot-long ditch centered at Latitude 33.098027, Longitude -86.798998. No flow was observed during the field visit on October 4, 2024. Based on the results of the Antecedent Precipitation Tool (APT), precipitation was normal during the October 4, 2024, field visit. The APT also indicates the area was experiencing a moderate drought during the field visit on October 4, 2024. Based on a review of historic aerial photography, D1 was excavated east of the former settling pond (now forested wetland W1) between 1958 and 1959. After precipitation events, D1 directs flow west into W1. D1 was excavated wholly in uplands, drains only uplands, and does not carry a relatively permanent flow of water; therefore, D1 is not a tributary. In accordance with the *Rapanos* guidance, D1 is non-jurisdictional.

RSD1 is a 278-foot-long ditch centered at Latitude 33.097384, Longitude -86.800784. No flow was observed during the field visit on October 4, 2024. Based on the results of the APT, precipitation was normal during the October 4, 2024, field visit. The APT also indicates the area was experiencing a moderate drought during the field visit on October 4, 2024. Based on a review of historic aerial photography, RSD1 was excavated alongside the Southern Railroad rail line between 1940 and 1954. After precipitation, RSD1 directs flow north towards the former settling pond that is now forested wetland W1. RSD1 was excavated

⁹ 51 FR 41217, November 13, 1986.

wholly in uplands, drains only uplands, and does not carry a relatively permanent flow of water; therefore, RSD1 is not a tributary. In accordance with the *Rapanos* guidance, RSD1 is non-jurisdictional.

RSD2 is a 417-foot-long ditch centered at Latitude 33.097186, Longitude -86.800896. No flow was observed during the field visit on October 4, 2024. Based on the results of the APT, precipitation was normal during the October 4, 2024, field visit. The APT also indicates the area was experiencing a moderate drought during the field visit on October 4, 2024. Based on a review of historic aerial photography, RSD2 was excavated alongside the rail line between 1940 and 1954. RSD2 was excavated wholly in uplands, drains only uplands, and does not carry a relatively permanent flow of water; therefore, RSD2 is not a tributary. In accordance with the *Rapanos* guidance, RSD2 is non-jurisdictional.

RSD4 is a 407-foot-long ditch centered at Latitude 33.099556, Longitude -86.799957. No flow was observed during the field visit on October 4, 2024. Based on the results of the APT, precipitation was normal during the October 4, 2024, field visit. The APT also indicates the area was experiencing a moderate drought during the field visit on October 4, 2024. Based on a review of historic aerial photography, RSD4 was excavated alongside the Southern Railroad rail line between 1959 and 1967. RSD4 was excavated wholly in uplands, drains only uplands, and does not carry a relatively permanent flow of water; therefore, RSD4 is not a tributary. In accordance with the *Rapanos* guidance, RSD4 is non-jurisdictional.

- 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.

ID1 is a 474-foot-long ditch centered at Latitude 33.101110, Longitude -86.800001. ID1 carries industrial discharge and wastewater from facilities on the east side of the plant to "Pond 005", a large sedimentation basin in the southwest portion of the plant outside the review area that is permitted under NPDES Permit Number AL0024252. As a result, flow was observed during the field visit on October 4, 2024. Based on a review of historic aerial photography, ID1 was constructed between 1959 and 1967. Because ID1 carries runoff from RSD4, wastewater, and industrial discharge into a NPDES-permitted sedimentation basin for treatment, ID1 is functioning as an excluded waste treatment system designed to meet the requirements of the Clean Water Act. ID1 is not a water of the United States.

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ID2 is a 620-foot-long ditch centered at Latitude 33.102327, Longitude -86.800315. ID2 carries industrial discharge and wastewater from facilities on the west side of the plant to "Pond 005", a large sedimentation basin in the southwest portion of the plant that is permitted under NPDES Permit Number AL0024252. As a result, flow was observed during the field visit on October 4, 2024. Based on a review of historic aerial photography, ID2 was constructed between 1958 and 1959. Because ID2 directs industrial discharge and wastewater into a NPDES-permitted sedimentation basin for treatment, ID2 is functioning as an excluded waste treatment system designed to meet the requirements of the Clean Water Act. ID2 is not a water of the United States.

- 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).

RSD3 is a non-relatively permanent water. According to supplemental information provided by the environmental consultant, no flow was observed during the consultant's field visit on October 17, 2024. Based on the results of the APT, precipitation was normal during the consultant's field visit on October 17, 2024; however, the APT also indicates the area was experiencing a moderate drought during the consultant's field visit on October 17, 2024. Based on a review of historic aerial photography, RSD3 flowed southwest into the former settling pond that is now W1 until it was rerouted to flow south along an added segment of rail line between 1959 and 1967. Based on review of the narrative description and photographic evidence of observed stream characteristics, including a lack of soil-based evidence of a high water table, weak sinuosity along the thalweg, and leaf litter in the channel, RSD3 only flows in response to rainfall events and

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does not have continuous flow at least seasonally. RSD3 is 656 feet long and centered at Latitude 33.098653, Longitude -86.797655.

W1 is a 1.34-acre seasonally inundated forested wetland centered at 33.098163, -86.799971. Based on a review of historic aerial photography, a settling pond was constructed in this location prior to 1950 and abandoned between 1997 and 2005. The footprint of the abandoned settling pond exhibits wetland hydrology, hydrophytic vegetation, and hydric soil; therefore, the former settling pond was determined to be a depressional wetland. Wetland hydrology indicators observed by the Corps project manager included inundation visible on aerial imagery, saturation visible on aerial imagery, moss trim lines, sparsely vegetated concave surface, geomorphic position, and FAC-neutral vegetation; hydrophytic vegetation observed by the Corps project manager included American Sycamore, Common Persimmon, Eastern Cottonwood, and Boxelder Maple; and hydric soil indicators observed by the Corps project manager included depleted matrix. Based on the results of the APT, precipitation was normal during the October 4, 2024, field visit. The APT also indicates the area was experiencing a moderate drought during the field visit on October 4, 2024.

W1 does not physically abut an RPW, TNW, territorial seas, impoundment, or interstate water. After precipitation, non-RPW D1 directs flow west into W1, non-RPW RDS1 directs flow north into W1, and runoff from uplands flow south into W1; however, W1 is bounded on the west by a rail line embankment that is approximately 14 feet above the surface elevation of the wetland. W1 does not appear to be functioning together with any other wetlands. No seepage demonstrating movement of water through or beneath the barrier was observed on the western side of the rail line embankment. Although 3DEP LiDAR map layers indicate level ground immediately west of the rail line, that portion of the site has since been quarried. For these reasons, W1 does not have a continuous surface connection to a TNW, territorial seas, interstate water, RPW, or jurisdictional impoundment; therefore, W1 is non-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. A field visit was conducted with Mobile District project manager and the applicant's authorized agent on October 4, 2024. An in-office evaluation using desktop resources was completed on January 28, 2025.
 - b. Consultant's delineation report dated July 12, 2024, and revised delineation maps submitted on October 25, 2024, and December 18, 2024.

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- c. Antecedent Precipitation Tool accessed December 20, 2024, and January 28, 2025.
- 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 January 28, 2025.
- e. USGS National Map at <https://apps.nationalmap.gov/viewer/>. Accessed on January 28, 2025.
- f. Alabama Maps Aerial Photography Index (Air Photo Archive) at <https://alabamamaps.ua.edu/aerials/Counties/Shelby/Shelby.html>. Accessed on October 3, 2024, December 20, 2024, and January 28, 2025.

10. OTHER SUPPORTING INFORMATION.

- a. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers “Memorandum on NWS-2023-923”.
- b. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers “Memorandum to Re-evaluate Jurisdiction for SAS-2001-13740”.
- 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. “Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning Proper Implementation of ‘Continuous Surface Connection’ Under the Definition of ‘Waters of the United States’ Under the Clean Water Act”, March 12, 2025.

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.



