



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

CESAM-RD-N

February 24, 2025

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),¹ SAM-2024-00623-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. Drainage Feature 1 (DF-1) - jurisdictional; relatively permanent water
- ii. Drainage Feature 2 (DF-2) – non-jurisdictional; non-relatively permanent water
- iii. Drainage Feature 3 (DF-3) - jurisdictional; relatively permanent water
- iv. Drainage Feature 4 (DF-4) - jurisdictional; relatively permanent water
- v. Drainage Feature 4 (DF-4) - jurisdictional; relatively permanent water
- vi. Stream 1 (S-1) - jurisdictional; relatively permanent water
- vii. Stream 2 (S-2) - jurisdictional; relatively permanent water
- viii. Wetland 1 (W-1) – non-jurisdictional; non-adjacent wetland
- ix. Wetland 2 (W-2) – non-jurisdictional; non-adjacent wetland

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(2023)

- 3. REVIEW AREA. The review area for this AJD is a 56-acre area located in a 2-mile-long new right-of-way (ROW) of varying width (180-320 feet wide) north and south of Alabama Highway 150 in Bessemer, Jefferson County, Alabama. The study area is located at latitude 33.3801° North and longitude 86.9369° West in Sections 14, 15, and 22, Township 19 South, Range 4 West.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Cahaba River⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

DF-2, DF-3, and DF-4 flow east into DF-1, then DF-1 flows south into Little Shades Creek, then Shades Creek, which eventually reaches the Cahaba River, a TNW.

DF-5 flows east then south into Little Shades Creek, then Shades Creek, which eventually reaches the Cahaba River, a TNW.

S-1 flows east into Little Shades Creek, then Shades Creek, which eventually reaches the Cahaba River, a TNW.

S-2 flows east into Shades Creek, which eventually reaches the Cahaba River, a TNW.

W-1 sheet flows south into a culvert under an access road, which drains to S-1 and follows that path described above.

W-2 is a depressional area surrounded by uplands and does not flow to a TNW, interstate water or territorial seas.

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

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

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):

DF-1 is an approximately 685 linear foot relocated blue-line stream that runs parallel along Lakeshore Drive and is a 2nd order stream, as DF-2, DF-3, and DF-4 each flow into DF-1. During the site visit on 1/30/2025, USACE personnel observed water within portions of the channel, with some areas flowing. The Antecedent Precipitation Tool showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. Additionally, hydric soils were found within the channel. For these reasons, DF-1 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

DF-3 is an approximately 290 linear foot first order stream that had base flow in most areas, defined bed and banks, and hydric soils within the channel during the site visit on 1/30/2025. Additionally, the APT showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. For these reasons, DF-3 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

DF-4 is an approximately 400 linear foot first order stream that had base flow in some areas, defined bed and banks, and hydric soils within the channel during the site visit on 1/30/2025. USACE also completed a North Carolina Stream identification worksheet in the field, and DF-4 received a score of 24, which indicates intermittent (seasonal) flow regime. Additionally, the APT showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. For these reasons, DF-4 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

DF-5 is an approximately 500 linear foot first order stream that had base flow in most areas, defined bed and banks, and hydric soils within the channel during the site visit on

1/30/2025. DF-5 originates from a wetland adjacent to Highway 150 outside of the review area. Additionally, the APT showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. For these reasons, DF-5 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

S-1 is an approximately 250 linear foot stream in the review area. During the site visit, base flow was observed as well as defined bed and banks. Additionally, the APT showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. For these reasons, S-1 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

S-2 is an approximately 187 linear foot stream in the review area. During the site visit, base flow was observed as well as defined bed and banks. Additionally, the APT showed that conditions were drier than normal on the date of the site visit, and no rainfall had occurred within 48 hours of the site visit. For these reasons, S-1 is a jurisdictional relatively permanent water (RPW) that experiences flow at least seasonally based on field observations.

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. 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

⁹ 51 FR 41217, November 13, 1986.

- 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).

DF-2 is an approximately 165 linear foot drainage feature that had some water in the channel; however, it did not have defined bed and banks or hydric soils within the channel. Although the APT showed that conditions were drier than normal on the date of the site visit and no rainfall had occurred within 48 hours of the site visit, the lack of a defined bed and banks, lack of hydric soils, and lack of baseflow gave evidence that this drainage feature is not a relatively permanent water (RPW) and therefore is not jurisdictional.

W-1 (0.66 acre) is a forested wetland area that slopes toward the south. Uplands are present between the wetland boundary and a culvert under an unnamed access road. There are approximately 100 feet between the wetland boundary and the culvert, and there is no defined channel that conveys flow from the wetland to the culvert. Any flow appears to occur via overland sheetflow to the culvert, which discharges on the south side of the road into an erosional feature that flows into S-1. The uplands between the wetland boundary and the culvert sever any continuous surface connection. For these reasons, W-1 does not have a continuous surface connection to a TNW, territorial seas, interstate water, RPW or jurisdictional impoundment and is not jurisdictional.

W-2 (0.18 acre) is a depressional wetland that is surrounded by uplands. There is no channel flowing into or out of W-2. W-2 does not have a continuous surface connection to a TNW, territorial seas, interstate water, RPW or jurisdictional impoundment and is therefore not 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. Office evaluation using desktop resources was completed in February 2025.

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- b. On-site evaluation completed January 30, 2025.
- c. Delineation report provided by the agent, BioResources, LLC.; dated June 27, 2024.
- d. National Regulatory Viewer – USGS Topo map, Digital Elevation Model, Hillshade, National Hydrography Dataset, USFWS Wetlands Mapper, and aerial imagery; accessed February 2025.

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.