

DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT 109 ST JOSEPH STREET MOBILE, ALABAMA 36602

CESAM-RD-A

March 19, 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-2024-01013-MDJ, 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 iurisdiction.

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.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

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).

Name	Lat.	Long.	Area/Length	Туре	Geo. Auth.
Wetland 1 (W1)	31.131752	-87.993763	0.239	WOTUS, adj wetland	Sec. 404
Wetland 2 (W2)	31.134199	-87.992877	0.427	non-WOTUS, non-adj wetland	None
Wetland 3 (W3)	31.134157	-87.991494	0.030	WOTUS, adj wetland	Sec. 404
Wetland 4 (W4)	31.136031	-87.992483	1.833	non-WOTUS, non-adj wetland	None
Wetland 5 (W5)	31.136271	-87.993750	0.245	non-WOTUS, non-adj wetland	None
Wetland 6 (W6) / Wetland 7 (W7)	31.137147	-87.995516	0.054	non-WOTUS, non-adj wetland	None
Wetland 8 (W8) / Wetland 13 (W13)	31.134676	-87.996709	3.480	non-WOTUS, non-adj wetland	None
Wetland 9 (W9)	31.135416	-87.997816	0.470	non-WOTUS, non-adj wetland	None
Wetland 10 (W10)	31.135950	-87.998088	0.030	non-WOTUS, non-adj wetland	None
Wetland 11 (W11) / Wetland 12 (W12)	31.134909	-87.998780	0.265	WOTUS, adj wetland	Sec. 404
Ditch 1 (D1)	31.136023	-87.994885	1779	WOTUS, tributary	Sec. 404

2. REFERENCES.

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

- 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 is comprised of an estimated 115.0 acres inside the campus of the AM/NS Calvert, an industrial facility, near the confluence of the Tombigbee and Alabama Rivers. The approximate center point for the review area is located at Latitude: 31.133570 North, Longitude 87.995368 West; Section 24, Township 2 North, Range 1 East; Calvert, Baldwin County, Alabama.

The facility's construction was originally applied for by ThyssenKrump Steel and Stainless and a permit issued on October 12, 2007, under the Department of the Army (DA) project number SAM-2007-00635-DMY. The permit authorized a total of 1,169 linear feet of stream impacts and impacts to 51.7 acres of jurisdictional wetlands. This permit authorized the previous impacts inside the review area (utility substation). Portions of the review area, specifically portions of W1 not inside the review area, are currently protected from development via a restrictive covenant associated with the original permit's mitigation plan.

 NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶

The nearest TNW is the Tombigbee River, approximately 1.8 miles to the east of the most eastern review area boundary, which is on the Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs. See attached mapping.

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.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

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

<u>Wetland 1 (W1)</u>: W1 is part of a larger offsite wetland complex which connects to an unnamed relatively permanent tributary (RPT) associated with Dabney Creek (RPT). Dabney Creek connects to Tombigbee River – a TNW.

Wetland 2 (W2): W2 is a depressional feature prevented from draining to the south or east via an existing and maintained silviculture road. Flow leaves the feature to the north via overland sheet flow towards W4 as evidenced in the attached photolog. Once flow reaches W4, it follows the flow path described below.

Wetland 3 (W3): W3 is part of a larger offsite wetland complex which connects to an unnamed RPT associated with Dabney Creek (RPT). Dabney Creek connects to Tombigbee River – a TNW.

Wetland 4 (W4): W4 is a micro-depressional feature where, when enough head is built, flow generally moves to the east where ponding occurs before exiting through an under-road culvert. Once flow moves through the under-road culvert, it ponds again and continues to the east, via overland sheet flow, to an unnamed tributary of Tombigbee River – a TNW.

Wetland 5 (W5): W5 is a micro-depressional feature where flow leaves the feature to the east via overland sheet flow towards W4 and as evidenced in the attached photolog. Once flow reaches W4, it follows the flow path described above.

<u>Wetland 6 (W6) & Wetland (W7):</u> W7 is a linear vegetated wetland swale which connects downslope to W6, another linear vegetated wetland swale feature, that directly connects to Ditch 1 (D1) drainage feature. D1 drains to a nearby stormwater pond outside of the review area, which drains directly into the unnamed tributary to Tombigbee River (RPT).

Wetland 8 (W8) & Wetland 13 (W13): W8 appears to drain to the south, towards Dabney Creek, through an at grade culvert under a maintained dirt road to W13. Flow from W13 continues to the south where it flows under the road via a second culvert. Flow continues southwest briefly via overland sheet flow though an upland and eventually into an offsite ephemeral drainage feature to the west. The ephemeral feature continues to west until meeting a third silviculture road where it loses any recognizable bed and bank features. From the road, flow continues west as overland sheet flow through an upland. It is assumed that best and bank features are lost here due to topographic relief. Overland Sheet flow continues through an upland until reaching wetlands immediately adjacent to Dabney Creek – a RPT.

CESAM-RD-A SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of Sackett v. EPA, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

Wetland 9 (W9): W9 appears to be depressional in nature with two potential flow paths leaving the feature. The first flow path is to the southwest of W9 through a linear wetland feature connecting to W11. However, flow cannot occur between W9 and W11 due to an upland berm between the features. The second path is via overland sheet flow over a remanent silviculture access road separating W8 and W9. Once enough head has built and W9 drains over the road and follows the same flow path mentioned above for W8 & W13. W9 appears to be depressional in nature with the only potentially viable flow path occurring via overland sheet-flow to W8.

Wetland 10 (W10): W10 is a linear wetland swale feature which lacks an apparent drainage path. It presumably drains, via overload flow, downslope to W11 where flow continues to Dabney Creek and a TNW as described below.

<u>Wetlands 11 (W11) / Wetland 12 (W12):</u> Water flows from these features to the south via a contiguous offsite wetland complex which connects to the head waters of Dabney Creek, a RPT, which flows into the Tombigbee River – a TNW.

Ditch 1 (D1): D1 is a man-made feature, approximately 1779 linear feet in length, created to drain the utility substation on the northern perimeter of the review area. It is primarily fed via belowground drains and culverts beginning inside the utility substation's footprint. Flow moves through the review area and terminates in a stormwater detention area outside of the review area. The stormwater storage area drains into an unnamed RPT of the Tombigbee River and terminating in the Tombigbee 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

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.

CESAM-RD-A SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

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):

Ditch 1 (D1): D1 is an approximately 1779-linear feet drainage feature dug in uplands which drains both wetlands (W6 & W7) and uplands. D1 has both bed and bank, an ordinary highwater mark (OHWM) as well as exhibits at least seasonally relatively permanent flow (RPW). D1 was holding water, as evidenced in the attached photolog, 48-hours after precipitation. The Antecedent Precipitation Tool (APT) showed wetter than average precipitation for the area, however precipitation levels were not exceeding levels experienced during summer peak-precipitation periods. There were no signs of leaf litter nor debris in the bed of D1, suggesting flow is at least seasonally relatively permanent. For these reasons, the District considers D1 to be a relatively permanent tributary.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):

Wetland 1 (W1): W1 is approximately 0.239 acre in area within the review area, extends outside of the review area, and is a part of a larger contiguous wetland which continues downslope and abuts Dabney Creek. Dabney Creek is a relatively permanent tributary (RPT) to the Tombigbee River, a TNW. W1 is jurisdictional because it has a continuous surface connection to Dabney Creek, a RPT, because it abuts Dabney Creek.

CESAM-RD-A SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of Sackett v. EPA, 598 U.S. 651 (2023), SAM-2024-01013-MDJ

Wetland 3 (W3): W3 is approximately 0.030 acre in area. W3 extends outside of the review area and is part of a larger contiguous wetland which continues downslope and abuts an unnamed relatively permanent tributary to the Tombigbee River. W3 is jurisdictional because it has a continuous surface connection to a RPT because it abuts the RPT.

Wetland 11 (W11) / Wetland 12 (W12): W11 (0.077 acre) is a wetland which drains to the south, via an at-grade culvert, under a former silviculture access road to W12. Since W11 and W12 are sharing a water table and hydrology via an at-grade culvert, they are acting as 'one wetland'. W12 (0.188 acre) extends outside of the review area and continues downslope and abuts Dabney Creek (RPT) which is a relatively permanent tributary to Tombigbee River (TNW). Therefore, W11/W12 (0.265 acre) is jurisdictional due to a continuous surface connection to a RPT.

- 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.
 - 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

⁹ 51 FR 41217, November 13, 1986.

- 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).

Wetland 2 (W2): W2, approximately 0.427 acre in area, is a depressional palustrine forested feature surrounded by uplands. W2 is bounded by an existing silviculture road to the south, which does not have a culvert to allow for drainage to flow south. As evidenced in the attached photolog, there is no channel flowing into or out of W2. W2 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W2 is not jurisdictional.

Wetland 4 (W4): W4 is an approximately 1.833 acres palustrine forested wetland feature that is depressional in nature and surrounded by uplands. As evidenced in the attached photolog, there is no channel flowing into or out of W4. W4 is a W4 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W4 is not jurisdictional.

Wetland 5 (W5): W5 is a micro-depressional feature, approximately 0.245 acre in area, where flow leaves the feature to the east via overland sheet flow towards W4 and as evidenced in the attached photolog. There is no channel flowing into or out of W5 that would provide a discrete continuous surface connection. W5 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W5 is not jurisdictional.

Wetland 6 (W6) / Wetland (W7): W7 (0.005 acre) is a linear vegetated wetland swale which connects to W6 (0.049 acre), another linear vegetated wetland swale feature downslope. These two wetlands are connected by a culvert running under an improved road and are sharing hydrology and a common water

table. Therefore, they are acting as 'one wetland'. As evidence in the attached photolog (Image 5 & 6), the features do not maintain a continuous surface connection to D1 (a RPW), due to a road obstructing flow. Flow can only continue via overland sheet flow through an upland to D1. For the aforementioned reasons, W6/W7 (0.054) lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W6/W7 are not jurisdictional.

Wetland 8 (W8)/ Wetland 13 (W13): W8 (3.090 acres) and W13 (0.390 acre) are functioning as one wetland due to sharing a common hydrology via an atgrade culvert connecting the two features. As evidenced in the attached photolog (Images 24-31), flow under a silviculture road via an at-grade culvert where it connects to an offsite ephemeral feature (approximately 318-linear feet) to the west via overland sheet flow (Image 24 & 25). The off-site ephemeral feature loses any recognizable bed and bank features. As evidenced in the attached photolog, overland sheet flow continues through an upland downslope. Overland sheetflow does not provide a discrete, continuous surface connection to a requisite water; therefore, W8/W13 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water and is not jurisdictional.

Wetland 9 (W9): W9 (0.470-acre) appears to be depressional in nature, containing both palustrine emergent (utility corridor) and forested ecosystems. There was no evidence of seepage under the road between W8 and W9. The two wetlands (W8 and W9) are likely not sharing a common water table due to the compact nature of the highly impacted soils present. Therefore, they are likely not acting as 'one wetland' (See cross-section Mapping in the attached Appendix). Additionally, there is an upland berm separating W9 from W11 and the features are not sharing hydrology - thus they are not acting as 'one wetland'. There is no channel flowing into or out of W9. W9 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W9 is not jurisdictional.

Wetland 10 (W10): W10 (0.030 acre) is a linear vegetated wetland swale. There is no channel flowing into or out of W10 and it is surrounded by uplands and a road without a culvert. W10 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W10 is 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. A site visit and field inspection were conducted on 12 December 2024 as evidenced in the photo log present in the administrative record.
- b. Office Evaluations were conducted periodically from November 2024 to January 2025 via inspection of mapping layer accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey topographical mapping, the National Hydrological Dataset, 3DEP Elevation Modeling, 3DEP Hillshade Modeling, Nation Oceanographic and Atmospheric (NOAA) LiDAR data, Google Earth Pro historic aerial imagery, National Resource Conservation Service (NRCS) soil mapping, and the U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory (NWI) Mapping.
- c. Applicant provided wetland delineation report entitled "Wetland Delineation Report: ArcelorMittal / Nippon Steel Corps (AM/NS) – Calvert; Steel Drive, Calvert Alabama, 36513 115 Acre Parcel". Provided by Thompson Engineering, dated 11 November 2024, and prepared by Evan Reid.
- 10. OTHER SUPPORTING INFORMATION.
 - a. "Memorandum to Reevaluate Jurisdiction for NWO-2003-60436"
- 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.

Department of the Army // SAM-2024-01013-MDJ // Appendix





VOLKI	0 350 700 Feet Feet Feet Note: This map is not intended for construction. N	Figu NOE Vationwide F Calvert, F	re 3: Wetlar Acrelori S Manufacto Permit 39 & A Mobile Cou Project Num	nd & Streams Mittal Calver uring Facility Approved JD nty, Alabama ber: 1202621
 Data Point 	ENGINEERS	TOTAL	7.07	1779
Presumed Non- Jurisdictional Wetlands	NOT OFFICIAL UNTIL FINAL VERIFICATION IS RECEIVED FROM THE U.S. ARMY CORPS OF	EC1	0.390 N/A	1779
Presumed Jurisdictional Wetlands	WETLAND AND STREAM BOUNDARIES ARE	W12	0.188	N/A
Ephemeral Channel		W11	0.077	N/A
Project Area 115 AC		W10	0.030	N/A
Legend		W9	0.470	N/A
A DATE OF A DECEMBER OF A D	State of the second sec	W8	3.090	N/A
		W7	0.005	N/A
AND REAL PROPERTY AND	The second	W6	0.049	N/A
		W5	0.245	N/A