



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

CESAM-RD-N

June 5, 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-2024-170-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.

CESAM-RD-N

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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 Mississippi due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. S1 is a non-relatively permanent stream and is non-jurisdictional.
- b. S2 is a relatively permanent stream and is jurisdictional.
- c. S3 is a relatively permanent stream and is 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. 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. USEPA and OASACW Memorandum on MVS-2023-00288

3. REVIEW AREA. The review area is approximately 2.15 acres that follows the length of a stream channel and buffer from its entry into the review area on Willie Moore Road and along a total length of approximately 3,112 linear feet through the Haven Acres subdivision until its convergence with an unnamed tributary to Coonewah Creek at the western boundary of the review area. The review area is centered at latitude 34.217313, longitude -88.756102 in Tupelo, Lee County, Mississippi.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which S1 is connected is Town Creek. Town Creek is on the Mobile District's Section 10 waters list. Section 10 waters are a subset of TNWs.⁶

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.

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

S1/S3 flows through the review area in a westerly direction for an approximate total distance of 3,112 linear feet. It exits the western boundary of the review area and converges with an unnamed tributary (UT) to Coonewah Creek. The UT to Coonewah Creek flows approximately 1 mile to Coonewah Creek. Coonewah Creek flows approximately 9.5 miles to Town Creek, a TNW, upstream of mile marker 13.

S2 flows approximately 40 feet in the review area into S3 and follows the path described above.

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

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.

- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): Stream S2 is a first order relatively permanent tributary that originates outside of the review area north of Mitchell Road. Stream S2 has a 0.2-acre drainage area and exhibits defined bed and banks as evidenced through review of aerial photography and Lidar. Stream S2 is approximately 40 linear feet long within the review area and is located at latitude 34.217313, longitude -88.756102.

Stream S3 is a second order relatively permanent tributary that flows approximately 1,019 linear feet from the beginning of the reach (where S2 flows into it to form a second order stream reach) downstream to its confluence with the unnamed tributary to Coonewah Creek outside of the review area. Stream S3 is incised, exhibited baseflow, and exhibits scour marks and wrack lines. Stream S3 is centered at latitude 34.217177, longitude -88.757712.

- 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

⁹ 51 FR 41217, November 13, 1986.

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).

Stream S1 (2,093 linear feet) is a first order stream that enters the review area at latitude 34.218039, longitude -88.750764 along the west side of Willie Moore Road and continues through a residential neighborhood for approximately 1,738 linear feet as a non-relatively permanent tributary and changes flow regime at a head cut where it exhibits relatively permanent flow for approximately 355 linear feet before becoming a second order tributary. The non-RPW portion of S1 (depicted as S1 upper in the Delineation Map) had a lot of pine needles in the channel, lack of baseflow, is above the water table, and had a discontinuous ordinary high water mark in several different locations. S1 changes to a relatively permanent water at a headcut where the channel intercepts groundwater and has a well-defined channel with evidence of scour, wrack lines, deeply incised stream channel, and baseflow. Along the reach of S1, 1,738 linear feet of the channel had non-relatively permanent flow characteristics and 355 linear feet had relatively permanent flow characteristics; therefore, Stream S1 is classified as a non-relatively permanent tributary as the non-RPW characteristics best characterize the entire tributary reach.

CESAM-RD-N

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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. USACE project manager site visit February 29, 2024
 - b. Stream Stats, June 4, 2024
 - c. Google Earth, June 4, 2024
 - d. National Regulatory Viewer - Lidar, USGS topo, aerial – accessed June 4, 2024
 - e. Headwaters February 29, 2024 AJD Request
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.

Legend

- RPW 2nd order
- RPW 1st order
- Non-RPW



S3: 1019 lf

S2: 40 lf

S1 lower: 355 lf

S1 upper: 1738 lf

Review area is outlined in gray and is centered at 34.217313, -88.756102

Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft



SAM-2024-00170-CMS
Figure 1
Delineation Map

0 0.04 0.07 0.14



mi

Map Center: 88.754279°W 34.217429°N

Map Created by: Courtney Shea

Date: 6/4/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere