



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
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MOBILE, AL 36628-0001

CESAM-RD-SP

01 August 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-2025-00265-EAH, 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.

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).

Water Name	Latitude	Longitude	Waters Size	Type of Aquatic Resource	Geographic Authority
W1	30.62284	-87.687768	0.45 acre	Non-JD Wetland	None
W2	30.620393	-87.690783	0.89 acre	Non-JD Wetland	None
W3	30.62218	-87.682991	0.38 acre	A7 Adjacent Wetland	Section 404
W4	30.620583	-87.683393	1.4 acre	A7 Adjacent Wetland	Section 404
W5	30.618727	-87.681725	0.41 acre	A7 Adjacent Wetland	Section 404
L1	30.620134	-87.682028	10.6 acre	A4 Impoundment	Section 404
L2	30.621842	-87.681696	8.79 acre	A4 Impoundment	Section 404
D1	30.622249	-87.687993	382 linear feet	Non-JD Ditch	None
D2	30.619931	-87.689624	992 linear feet	Non-JD Ditch	None

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. Mobile District's Section 10 waters list
- 3. REVIEW AREA. The review area encompasses 110 acres of primarily agriculturally developed property near Mill Creek; Central coordinates: 30.621284, -87.684777; Loxley, Baldwin County, Alabama
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Blackwater River is the nearest TNW to which the on-site

aquatic resources are connected. Blackwater River is on the Mobile District's Section 10 waters list and is therefore a TNW.⁶

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

A flow path from L1, W3, L2, W4, and W5 can be observed flowing south off-site, to Mill Creek, a relatively permanent water (RPW) and tributary of Blackwater River. Review of aerial imagery and the National Hydrography Dataset (NHD) found that Mill Creek flows south from the review area for approximately 3 miles before reaching a non-navigable portion of Blackwater River. Blackwater River continues to flow south, remaining non-navigable for approximately 19.5 river miles before becoming Section 10 (TNW) 6 miles before its confluence with the Blackwater River. The potential flowpath for the non-RPW features D1 and D2, is a swale that runs south from D1 and perpendicular to D2. The swale continues south off-site under CR 64, where it diverges into a depressional area and southeast under CR 71. From under CR 71, the swale feature extends 0.33-mile to another depressional feature, then continues for 0.32-mile where it intersects with Mill Creek.

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

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.

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):

The on-site resources L1 (10.6 acres) and L2 (8.79 acres), located on the eastern side of the review area, are impoundments of Mill Creek, a tributary of Blackwater River. The impoundments were created sometime between 1966 and 1974, as observed in historic aerial imagery. More specifically, the historic imagery obtained from the University of Alabama Air Photo Archives, dated 1966, shows the forested undisturbed tributaries of Mill Creek. Subsequent imagery dated 1974 and 1997 shows the impoundment features. Further, USGS topographic maps dated 1920 and 1943 indicate the area of L1 and L2 as blue-line streams. A later USGS topographic map from 1980 shows the impoundments. The 8.79-acre feature L2, is a portion of a larger waterbody which extends outside of the review area to the north, with a total footprint of about 34 acres. L1 and L2 are bisected by a berm but are hydrologically connected by both an outlet structure and a spillway. Waters from L1 can be observed in historic aerial imagery and Google Earth Pro Street view, flowing south off site to the RPW Mill Creek. The EPA WATERS GeoViewer 2.0 web app identifies the waters associated with L1 and L2 as part of Mill Creek and a perennial stream with a distance of 0.881 Km, from just north of L2 through L1 to CR 64. The watershed report for Mill Creek from EPA, which includes L1 and L2, indicates the catchment associated with Mill Creek, has an area of 8.39 km², an estimated mean annual flow volume of 8.34 cfs and velocity of 0.84 fps. Considering the above, L1 and L2 are considered jurisdictional (a)(4) impoundments.

- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

The features W3 (0.38 acre) and W4 (1.4 acres) are primarily lacustrine fringe wetlands, that physically abut the (a)(4) impoundments L1 and L2. The feature W4 borders L1 and extends north from the western edge of the waterbody to encompass the impoundment spillway where it intersects with W3. W3 continues north where it borders the western edge of L2. The wetland feature W5 (0.41 acre) is located just south of L1, and physically abuts the waters flowing from L1 to Mill Creek. As each of these wetland resources physically abut waters associated with the jurisdictional impoundments L1 and L2, they are considered jurisdictional (a)(7) adjacent wetlands.

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.
- 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

⁹ 51 FR 41217, November 13, 1986.

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).

Features W1 (0.45 acre) and W2 (0.89 acre) do not abut an RPW, TNW, territorial sea, interstate tributary or jurisdictional impoundment. Imagery obtained from the University of Alabama Air Photo Archives, dated 1949, 1955, 1960, and 1966, indicates that W1 and W2 are non-tidal, depressional wetlands that were historically not connected to any nearby RPWs. Imagery further indicates that D1 (382 linear feet) and D2 (992 linear feet) are man-made drainage features that were excavated from uplands sometime between 1955 and 1966. It is suspected that these features were constructed for irrigation purposes or to drain the depressional features W1 and W2. Evidence that the features D1 and D2 were man-made includes the uniform width of the channels, lack of sinuosity, and evidence of side cast material adjacent to the channels in the historic aerial imagery from 1966 and later. Utilizing DEMs, it appears that D1 runs north to south from W1 for 382-linear-feet, then continues off-site to a swale, where flow is discontinuous. The swale is surrounded by recreational development and appears to be regularly maintained. D2 is located entirely within W2 and is oriented east-to-west. The feature appears to travel east from W2 for about 870-linear-feet, where it intersects with an off-site swale, oriented south toward County Road 64. Although USGS Digital Elevation Models (DEMs) indicate discrete, indirect connectivity to the nearby Mill Creek, recent imagery from Google Earth Pro (2004, 2008, 2010, 2012, 2016) do not provide consistent evidence of relatively permanent flow from these features, making them non-RPWs and non-jurisdictional. It is expected that some extent of the wetland characteristics from W1 and W2 extend outside of the review area; however, aerial imagery and other desktop resources do not indicate that those wetlands are contiguously connected to any nearby RPWs. Considering the March 12, 2025, EPA and the Army Joint Memorandum to the Field, and findings described above, it was determined that the features W1 and W2 are non-adjacent depressional wetlands that do not physically abut an RPW, TNW, territorial sea, interstate tributary or jurisdictional impoundment, and therefore are 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. Desktop evaluation: 04/22 – 04/30/2025; 06/26/2025
 - b. USACE National Regulatory Viewer – Digital Elevation Models (DEMs), Accessed: 04/23/2025, 05/22/2025, 08/01/2025
 - c. EPA WATERS GeoViewer 2.0 web app, Accessed: 06/26/2025
 - d. Google Earth Pro aerial and street view imagery, Accessed 06/25-26/2025 (2004, 2008, 2010, 2012, 2016, 2024)
 - e. Baldwin County Parcel Viewer – Bird's Eye Imagery (2008, 2013, 2023), Accessed: 04/22 - 04/30/2025
 - f. USGS TopoView, Accessed 05/22/2025 (1920 – Robertsdale, AL – 1:62500; 1943 - Robertsdale, AL – 1:62500; 1980 - Robertsdale, AL – 1:24000)
 - g. USGS StreamStats web app, Accessed 06/26/2025. Mill Creek watershed report
 - h. University of Alabama Air Photo Archives, Accessed 04/22/2025 (1949, 1955, 1960, 1966, 1974, 1997)
10. OTHER SUPPORTING INFORMATION. “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 the 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.