

ADMINISTRATIVE APPEAL DECISION
Mr. Craig Bounds, Sunstates Development, LLC
Approved Jurisdictional Determination
Mobile District
SAM-2006-01649-MFM

Division Engineer: Brigadier General Daniel Hibner, South Atlantic Division¹

Review Officer: Swade Hammond, South Atlantic Division

Appellant/Applicant: Mr. Craig Bounds, Sunstates Development, LLC

Regulatory Authority: Section 404 of the Clean Water Act (33 USC § 1344 et seq)

Date Acceptable Request for Appeal Received: October 9, 2024

Date of Appeal [Meeting or Conference]: January 31, 2025

Summary of Appeal Decision: Mr. Craig Bounds of Sunstates Development, LLC. (Appellant), is appealing the Approved Jurisdictional Determination, completed by the Mobile District (District), and dated September 9, 2024. The Appellant submitted 7 reasons for appeal, asserting that the decision did not appropriately follow the pre-2015 regulatory regime, post-*Sackett*, was arbitrary, and contradicted legal precedents resulting in a violation of regulations and guidelines. The Appellant also asserted that the District did not appropriately demonstrate that flows are seasonal, utilized inappropriate tools, and that the aquatic resources in question only flow in response to precipitation.² For the reasons detailed in this document, the Appellant's Reasons for Appeal 1-7 are found to have merit. This action is remanded to the District for reconsideration consistent with the discussion below.

Background Information: The review area is located on the south side of Mallet Road in Section 11, Township 7 South, Range 9 West, at Latitude 30.4560 North and Longitude 88.8583 West, in Jackson County, Mississippi. On October 31, 2008, Mobile District issued a permit for commercial and residential development.³ Mr. Bounds received extensions for his authorization between 2008 and 2020. The permit expired in 2020, and the office received the Appellant's request for jurisdictional determination (JD) on May 2, 2024, via email. The JD request form was signed by Mr. Craig Bounds

¹ Pursuant to 33 C.F.R 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. Signature authority can, and has, been delegated to the Chief of Operations and Regulatory Division for Approved Jurisdictional Determinations with merit. While the review officer served to assist in reaching and documenting the Division Engineers decision, the Chief of Operations and Regulatory Division retains the final Corps decision-making authority for the Approved Jurisdictional Determination.

² Appellant's Request for Appeal Letter Dated October 9, 2024.

³ AR027

and dated April 30, 2024. The review area contained approximately 22.42 acres of wetlands, three borrow pits, and two ditches.⁴ The District visited the site on June 5, 2024, and finalized an Approved Jurisdictional Determination (AJD) on September 9, 2024. In the AJD, the District determined that U.S. Army Corps of Engineers (Corps) has jurisdiction over an unnamed Ditch (D1), Wetland 1 (W1), Lateral Ditch 1 (LD1), LD2, and LD3. The basis for the determination was that D1 is a tributary to Cypress Creek and W1 was adjacent to D1; therefore, they are Waters of the United States (WOTUS). LD1, LD2 and LD3 are located within W1 and were determined to be WOTUS. All other aquatic resources not mentioned here and found in the Administrative Record (AR) at Bates 008 and 009, were determined non-jurisdictional.

The Appellant submitted a Request for Appeal (RFA) to the South Atlantic Division (SAD) on October 9, 2024. The SAD determined the request was complete and accepted the appeal on November 4, 2024.

Information Received and its Use During the Appeal

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form, which is September 9, 2024. New information on the appeal is not permissible; however, to assist the Division Engineer in deciding on the appeal, the Review Officer (RO) may allow parties to interpret, clarify, or explain issues and information already contained in the AR. These interpretations, clarifications, and/or explanations do not become part of the AR because the District Engineer did not consider them in making the AJD decision. Consistent with Corps regulations, the Division Engineer may use the interpretations, clarifications, and/or explanations in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review, and its disposition, is as follows:

1. RFA sent by the appellant, Mr. Craig Bounds, of Sunstates Development, LLC., received by the South Atlantic Division on October 9, 2024.
2. Notice from the South Atlantic Division to the Appellant accepting the request for appeal and stating that the request met the required criteria for an administrative appeal, sent by letter dated November 4, 2024.
3. The AR, a copy of which the District provided to the South Atlantic Division and the Appellant on November 19, 2024.
4. An informal appeal meeting, in accordance with 33 C.F.R § 331.7 on January 31, 2025. The purpose of the meeting was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. Topics discussed at the appeal meeting are summarized in the document titled "2025.02.05-Sunstates_Development_Appeal_SAM-2006-01649_MFR_FINAL." A draft of this document was provided to the appeal meeting attendees on February 6, 2025, and finalized on February 14, 2025.

⁴ AR066

5. The Appellant provided two emails that were not found in the AR. In response to this question from the Review Officer, the District conducted the following actions:
 - a. Email dated June 3, 2024, was incorporated into the AR as Bates 139-a.
 - b. The District claimed the second email dated April 24, 2024, was previously addressed in a memorandum for record that followed a meeting and was dated December 13, 2024. The District did not update the record with the email dated April 24, 2024.
6. The Appellant noted that a draft AJD that was circulated internally was absent from the AR, and asked if they could obtain the draft AJD. In response to the Review Officer's question about the draft AJD, the District in both a memo and during the appeal meeting, indicated that they were following Standard Operating Procedures which precludes them from keeping this draft in the final AR.⁵
7. In an email from the Appellant dated February 11, 2025, Mr. Bounds provided copies of court decisions. Agency actions, such as approved jurisdictional determinations, are governed by the regulations in effect at the time actions are completed, and any applicable caselaw. The pre-2015 regime consistent with *Sackett* is currently the operative definition in Mississippi.
8. The Appellant provided his view of the AR with points of clarification in an email dated February 14, 2025. This information was used and considered, where applicable, while making this decision.

Waters of the United States: Waters of the United States are those waters that are subject to Corps jurisdiction under Section 404 of the Clean Water Act. The final "Revised Definition of 'Waters of the United States'" rule was published in the Federal Register on January 18, 2023, and took effect on March 20, 2023 (2023 rule). In light of the May 25, 2023, decision in *Sackett v. EPA*, (*Sackett*) the 2023 rule was amended by the conforming rule, which took effect on September 8, 2023. However, due to litigation, the 2023 rule, as amended, is not currently operative in certain states and for certain parties due to litigation. Where the 2023 rule, as amended, is not operative, the pre-2015 regulatory regime⁶ is in effect. Under both regimes, the U.S. Environmental Protection Agency and the Department of the Army (the agencies) are interpreting "waters of the United States" consistent with the Supreme Court's decision in *Sackett*.⁷ The subject Approved Jurisdictional Determination appeal is located in Mississippi, which, as of the date the District's decision, is one of the states where the pre-2015 regulatory regime is in effect.⁸

⁵ 2025.02.05-Sunstates_Development_Appeal_SAM-2006-01649_MFR_FINAL

⁶ The "pre-2015 regulatory regime" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and long standing practice, as informed by applicable guidance, training, and experience.

⁷ Coordination Process Update: Joint Coordination Memoranda to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency; corrected version, April 30, 2024; https://www.epa.gov/system/files/documents/2024-04/ApprovedJurisdictionalDeterminationcoordinationupdatereport_april2024.pdf

⁸ *Operative Definition of "Waters of the United States"* [jpg map image]; Environmental Protection Agency, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

The U.S. Environmental Protection Agency, in discussing the effects of *Sackett*, points out that although the 2023 rule was not directly in front of the court, it did consider the jurisdictional standards set forth in the rule:

In *Sackett*, the Court “conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing, or continuously flowing bodies of water “forming geographic[al] features” that are described in ordinary parlance as “streams, oceans, rivers and lakes.”’” *Id.* At 1336 (quoting *Rapanos*, 547 U.S. at 739).” The Court also “agree[d] with [the plurality’s] formulation of when wetlands are part of ‘waters of the United States,’” *id.* At 1340-41: “when wetlands have ‘a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.”’” *Id.* At 1344 (citing *Rapanos*, 547 U.S. at 742, 755). The Court concluded that the significant nexus standard is inconsistent with the Clean Water Act.⁹

Evaluation of the Appellant’s Reasons for Appeal, Findings, and Instructions to the District Engineer

REASONS FOR APPEAL 1 and 2: The Appellant objects to the District’s determination regarding an un-named tributary and adjacent wetland. Specifically, the appellant holds the position that the District Engineer did not follow the Supreme Court’s guidance found in *Sackett v. EPA* and failed to meet the relatively permanent standard of standing or continuously flowing bodies of water described as streams, oceans, rivers, and lakes. Thus, the un-named tributary identified in the request as Ditch 1 (D1) and adjacent Wetland 1 (W1) do not meet this standard, resulting in the District acting contrary to and in excess of the Clean Water Act’s authority. The appellant also claims that the District was arbitrary in its decision, did not provide sufficient evidence, contradicted legal precedent and violated regulations and guidelines.

FINDING: This reason for appeal does have merit.

DISCUSSION: The appellant asserts that the district applied the Supreme Court’s decision in *Sackett v. EPA* and *Rapanos v. United States* incorrectly. Specifically, the appellant believes the District acted contrary to, and in excess of, its authority to regulate waters of the United States and referenced 33 U.S.C §§ 1344(a), 1362(7), (12). The District’s AJD dated September 9, 2024, asserted jurisdiction over the unnamed tributary (D1) and Wetland 1 (W1), on the basis that D1 meets the relatively permanent standard, W1 shares an abutting connection with D1 and thus, they are both waters of the United States. Consequently, LD1, LD2, and LD3 were also determined to be waters of the United States, as they are located within W1 and connect to D1.

⁹ Ibid

Identifying relatively permanent waters must be done in accordance with the pre-2015 regulatory regime, consistent with *Sackett*. Relevant regulations and guidance include the 1986 regulations¹⁰, the *Rapanos* guidance¹¹, and implementation guidance following the *Sackett* decision¹². While the 1986 regulations identify tributaries as a category of waters, the 1986 regulations do not provide a definition for tributaries. The *Rapanos* guidance indicates that the agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent, where the tributaries typically flow year-round or have continuous flow, at least seasonally (e.g., typically three months). The *Rapanos* guidance also describes tributaries as “natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water”¹³ and states that a non-navigable tributary of a traditional navigable water consists of flow into a traditional navigable water either directly or indirectly by means of other tributaries.¹⁴ The *Rapanos* guidance further states that “relatively permanent waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have a continuous flow at least seasonally.”¹⁵

In its “Memorandum for Record, Subject: U.S. Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAM-2006-01649-MFM¹⁶, the District described D1 as a ditch, consisting of a tributary with a reach of 915 Linear Feet (LF). The district also stated that the ditch was constructed in wetlands and that it drains Wetland 1 (W1).

The District stated that “the ‘North Carolina Division of Water Quality Identification Methods for the Origins of Intermittent and Perennial Streams v. 4.11’ was utilized to identify the flow regime of D1”¹⁷. Hereinafter referred to as the NC methodology, the appellant included the NC methodology with the RFA as attachment A. During the appeal meeting, the District stated that this was not the only information used when making the decision on the status of D1 and associated connection with W1.¹⁸ Under Section 7(e) of the AJD, the District indicated that the Antecedent Precipitation Tool (APT) showed approximately 0.3 inches of precipitation two days prior to the site visit. The site visit occurred on June 5, 2024, and the District documented that standing water was present along most of the ditch.¹⁹

¹⁰ Federal Register / Vol. 51, No 219 / Thursday, November 13, 1986 / Rules and Regulations; p. 41250.

¹¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*, December 2, 2008; p.1. (*Rapanos* guidance).

¹² Presentation, “Updates for Tribes and States on “Waters of the United States”:
https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

¹³ *Rapanos* Guidance; p. 6, footnote 24.

¹⁴ *Rapanos* Guidance; p.6-7.

¹⁵ *Rapanos* Guidance; p.7

¹⁶ AR007

¹⁷ AR012

¹⁸ 2025.02.05-Sunstates_Development_Appeal_SAM-2006-01649_MFR_FINAL

¹⁹ Ibid

While the NC methodology appears to evaluate stream morphology, hydrology, and biology, it fails to provide standalone proof that D1 is at least seasonal, as per the *Rapanos* guidance. The lack of evidence demonstrating at least the seasonality of flows in the record was recognized by the District during the meeting and although the District completed a site visit, documented rainfall shortly before and identified standing water in D1, the AJD in Section 7(e) does not discuss a range or period of time suggesting seasonal flow and/or standing water. The District asserted that D1 is an RPW solely based on the application of the NC methodology and the site visit completed on June 5, 2024, according to the AJD MFR.²⁰

It is also important when assessing flow regimes and applying the RPW standard, that Districts determine relevant reach and establish stream order.²¹ Based on the RO's review of the record, the only reference to "reach" can be found in an email where the appellant is questioning the source of hydrology. While the final AJD document identifies D1 and the unnamed tributary north of Mallet Road as an RPW, a map completed by the District portrays D1 as an unnamed tributary and the feature north of Mallet Road as a Continuous Surface Connection (CSC).²² While the NC Methodology asks if a tributary is a second or greater order channel, and the District determined "no", the District did not identify the order of the reach as per current regulatory requirements. The AR does not provide a clear distinction between CSC or tributary assessments relative to the RPW standard. A CSC is specific to wetland adjacency as found in the current guidance, post *Sackett*.²³ RPW determinations are based on an evaluation of the flow regime within the relevant reach.

As mentioned above, the Pre-2015 Regulatory regime directs Districts to assert jurisdiction over RPWs, i.e., those waters that typically flow year round or have continuous flow or standing water at least seasonally.²⁴ Because the District's determination did not properly identify reach and failed to sufficiently support that the unnamed tributary (D1) flows in a "seasonal and predictable manner"²⁵, reasons for appeal 1 and 2 have merit.

ACTION: Reasons for appeal 1 and 2 are remanded to the Mobile District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the district must re-evaluate whether D1 has a continuous flow at least seasonally, and provide sufficient evidence for a period of time there is continuous flow sufficient to meet the RPW definition. While the APT was used to evaluate precipitation data surrounding the site visit the AJD, according to the record, only considers standing water in the ditch at the time of the site visit. The Mobile District

²⁰ AR012

²¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, December 2, 2008; p.6 n.24. (*Rapanos* guidance).

²² AR186

²³ Ibid

²⁴ Presentation, "Updates for Tribes and States on "Waters of the United States": https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

²⁵ Ibid

must also properly identify in its AJD the flow regime of the relevant reach, identifying the stream order, as described in the Rapanos Guidance²⁶ and in accordance with current regulatory guidance and practices.

REASONS FOR APPEAL 3, 4, 5, 6, AND 7: The Appellant believes that all aquatic resources onsite are ephemeral and not relatively permanent. The appellant also believes the AJD failed to give adequate consideration of site specific evidence provided by the Appellant and designated Agent. The appellant claims that Section 5 of the AJD neglects to identify the sole source of hydrology in the area as being from precipitation and stormwater systems of Interstate 10. The appellant stated that the District was aware D1 is a man-made ditch, rather than a natural stream and that the only reliance on the RPW determination was the District's use of the North Carolina Division of Water Quality-Methodology for Identification of Intermittent and Perennial Streams and their Origins v. 4.11, in addition to the Antecedent Precipitation Tool (APT). It is also the appellant's claim that the District applied the North Carolina tool incorrectly.

The appellant provided photos for consideration and those were not incorporated or discussed in the AJD. The appellant stated that D2 was identified as a non-RPW, sharing the same characteristics of D1. Lastly, Section 7 of the AJD explains that W1 abuts both a culvert and D1 and thus, W1 is jurisdictional. The appellant provided memorandums for record (SPK-2022-00545 and MVK-2023-482). These memos are previously completed AJD's that evaluated sites with ditches and ephemeral tributaries, respectively. These Districts found, in their case specific evaluation, that resources in these determinations were not jurisdictional. However, the District did not address them in the AJD or in the AR. The Appellant believes that storm water systems do not provide a Continuous Surface Connection (CSC) and provided a Policy Memorandum (NWP-2023-602). The appellant claims that because the tributaries are not RPWs and do not have a CSC, D1 and W1 are not WOTUS.

FINDING: This reason for appeal does have merit.

DISCUSSION: The Appellant asserts that the District failed to recognize the source of hydrology for D1 and other aquatic resources onsite, and that D1 was not a natural stream but rather, a man-made ditch. Specifically, the Appellant states that "the artificial nature of ditches – engineered to manage water flow and typically lacking ecological function – makes them unsuitable for assessment under this methodology. The purpose of man-made ditches is to manage stormwater runoff, and they are typically constructed to drain water away from an area rather than support an aquatic ecosystem."²⁷ Current guidance and practices for establishing jurisdiction specifically state that "tributaries can

²⁶ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, December 2, 2008; p.6 n.24. (Rapanos guidance).

²⁷ Appellant's Request for Appeal Letter Dated October 9, 2024.

also include ditches and canals”.²⁸ Additionally the pre-2015 regime, *Post-Sackett*, indicates that ditches can be jurisdictional waters of the United States. Generally non-jurisdictional features consist of “ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry relatively permanent flow of water.”²⁹ This means that if ditches have relatively permanent flow, were constructed in or through other aquatic resources, or drain other aquatic resources, they are jurisdictional.

The Appellant claims that the source of hydrology is from stormwater treatment systems and precipitation, and that the District failed to recognize that D1 only flows in response to rain.³⁰ It is common for infrastructure related projects to be built in, around and/or be part of aquatic resources in a watershed. As mentioned in the previous paragraph, man-made ditches (including roadside ditches) can be jurisdictional. There is no statute, regulation, executive order, or policy under the pre-2015 regulatory regime that speaks to the source of hydrology being relevant in evaluating the regulatory status of a ditch. However, the District must adequately demonstrate the relatively permanent status, as discussed above in Reasons for Appeal 1 and 2 above.

In the RFA, the Appellant stated that the District did not give adequate consideration to site information provided by the Appellant and Agent, applied the North Carolina Methodology incorrectly, and failed to incorporate and discuss photos provided by the Appellant and his Agent. This also includes two previous AJD decisions for SPK-2022-00545 and MVK-2023-482. In the appeal meeting, the District stated that there was no discussion or MFR on record specific to information provided by the Appellant.³¹ They also stated that they viewed the APT, but provided no additional analysis or review of the site photos provided by the Appellant. While the Districts are encouraged to consider information provided by the Appellant, it is ultimately the District’s decision whether to utilize the Appellant’s provided information in their determination. However, in Regulatory Guidance Letter (RGL 16-01) Questions and Answers it states that “districts should ensure the documentation used to support the AJD addresses any objections from the AJD requestor and/or consultants, when applicable. If the requestor submits materials with which the districts do not agree or do not concur (e.g. wetland delineation report), the districts should clearly document the reasons for reaching a contrary conclusion.”³² This does not appear to have been done for the aforementioned photos and documentation provided by the Appellant. However, because AJD decisions are specific to the facts and site conditions of each individual request, previous AJD decisions that are not directly related to the AJD currently in review are of limited utility.

In a follow-up question to the application of the NC methodology, the RO asked the District if it could explain the part of the tool that states that non-natural/artificial ditches

²⁸ Presentation, “Updates for Tribes and States on “Waters of the United States”:
https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

²⁹ Ibid

³⁰ Appellant’s Request for Appeal Letter Dated October 9, 2024.

³¹ 2025.02.05-Sunstates_Development_Appeal_SAM-2006-01649_MFR_FINAL

³² USACE Questions and Answers for RGL 16-01, Question Number 8

are not rated. The District claimed they could not find that in the methodology, that the North Carolina Division of Water Quality-Methodology for Identification of Intermittent and Perennial Streams and their Origins v. 4.11 was not the only tool utilized, and that the District is aware a site visit should not be completed until 48 hours after rainfall. On the stream identification form dated June 7, 2024, “1^a Continuity of channel bed and bank” does indicate that artificial ditches are not rated.³³ Based on the AR and information provided during the appeal meeting, the applicability of the tool at the time of the site visit and in a constructed ditch must be considered. The District should evaluate if the tool is applicable to ditches as a whole, or if scores are only affected in part. Should an evaluation of the tool’s applicability change the scores, the determination of the stream may change. While this was not the only justification utilized for determining whether the waterbody contained seasonal flow, it appears in the AR that this tool was a primary factor the District relied on in determining the ditch met the RPW standard.

The Appellant provided a Policy Memorandum, NWP-2023-602, as part of their reason for appeal and stated that the memo “indicated a municipal storm sewer system could not complete a continuous surface connection”.³⁴ On July 12, 2024, the District responded to an email from the Appellant surrounding this claim. The District stated that there were key differences between this request and NWP-2023-602.³⁵ The District provided, in the same email, Policy Memorandum SWG-2023-00284. The District explained that the memo clarifies “relatively short” culverts and ditches can serve as a CSC.³⁶ This statement by the District is accurate and applicable through previous guidance and current regulatory practices. The publicly available training discusses CSC and states that “wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe or culvert (per pre-2015 case law, *see United States v. Cundiff* (2009), and prior EPA practice).”³⁷ However, the District needs to determine if a CSC is appropriate for this site or if the ditch itself meets the definition of a tributary and carries relatively permanent flow.

ACTION: These Reasons for Appeal are remanded to the Mobile District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District should consider the applicability of the NC methodology, re-evaluate D1 to determine whether it meets the RPW standard, and re-evaluate the status of W1 accordingly, if necessary. Additionally, the District should consider and appropriately document information provided by the Appellant as indicated in the RGL 16-01 QAs.

³³ AR318

³⁴ Ibid

³⁵ AR228

³⁶ Ibid

³⁷ Presentation, “Updates for Tribes and States on “Waters of the United States”:
https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

Conclusion: After reviewing and evaluating the Appellant's reasons for appeal, the District's Administrative Record, and recommendation of the Review Officer, and for the reasons stated above, I find that this appeal has merit, as detailed in reasons for appeal 1 thru 7, above. Therefore, the Approved Jurisdictional Determination decision is being remanded to the Mobile District Engineer for further analysis and documentation in accordance with 33 C.F.R § 331.10(b). The District Engineer's decision made pursuant to this remand becomes the final Corps decision. This concludes the Administrative Appeals Process.

FOR THE COMMANDER:



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JOHN D. FERGUSON, P.E
Chief, Operations and Regulatory Division