



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
P.O. BOX 2288
MOBILE, AL 36628-0001

South Mississippi Branch

September 9, 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-2006-01649-MFM, (MFR 1 of 1)²

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.

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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 Mississippi 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).

Waters Name	Location	Water Size	Type of Aquatic Resource	Geographic Authority
W1	30.4566 N, 88.8610 W	11.3 acres	A7.AJD WETLAND-WOTUS	Section 404
W2	30.4562 N, 88.8579 W	10.3 acres	A7.NON-WOTUS WETLAND.NEGATIVE	None
W3	30.4549 N, 88.8554 W	0.16 acres	A7.NON-WOTUS WETLAND.NEGATIVE	None
W4	30.4555 N, 88.8542 W	0.66 acres	A7.NON-WOTUS WETLAND.NEGATIVE	None
D1	30.4565 N, 88.8597 W	915 linear feet	A5. Tributary-WOTUS	Section 404
D2	30.4567 N, 88.8576 W	422 linear feet	NON-WOTUS-STREAM.NEGATIVE-A5	None
LD1	30.4571 N, 88.8603 W	214 linear feet	A7.AJD WETLAND-WOTUS	Section 404
LD2	30.4567 N, 88.8601 W	188 linear feet	A7.AJD WETLAND-WOTUS	Section 404
LD3	30.4561 N, 88.8600 W	188 linear feet	A7.AJD WETLAND-WOTUS	Section 404
LD4	30.4569 N, 88.8596 W	100 linear feet	NON-WOTUS-STREAM.NEGATIVE-A5	None
LD5	30.4564 N, 88.8595 W	84 linear feet	NON-WOTUS-STREAM.NEGATIVE-A5	None
LD6	30.4558 N, 88.8596 W	130 linear feet	NON-WOTUS-STREAM.NEGATIVE-A5	None
LD7	30.4553 N, 88.8590 W	124 linear feet	NON-WOTUS-STREAM.NEGATIVE-A5	None

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LD8	30.4555 N, 88.8586 W	76 linear feet	NON-WOTUS- STREAM.NEGATIVE- A5	None
LD9	30.4568 N, 88.8578 W	72 linear feet	A7.NON-WOTUS WETLAND.NEGATIVE	None
LD10	30.4567 N, 88.571 W	421 linear feet	A7.NON-WOTUS WETLAND.NEGATIVE	None
RD1	30.4572 N, 88.8574 W	209 linear feet	NON-WOTUS- STREAM.NEGATIVE- A5	None
RD2	30.4573 N, 88.8542 W	146 linear feet	NON-JD- RAPANOS.GUIDE- DITCH	None
E1	30.4570 N, 88.8565 W	133 linear feet	NON-WOTUS Erosional Feature	None
P1	30.4554 N, 88.8614 W	3.29 acres	NON-WOTUS Intrastate lake or pond that is not a tributary to a water in paragraphs a1-a4	None
P2	30.4564 N, 88.8552 W	5.96 acres	NON-WOTUS Intrastate lake or pond that is not a tributary to a water in paragraphs a1-a4	None
P3	30.4552 N, 88.8543 W	0.45 acres	NON-WOTUS Intrastate lake or pond that is not a tributary to a water in paragraphs a1-a4	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)

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- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
 - e. 2008 Rapanos Guidance
 - f. *Lewis v. United States, et al.*, No. 23-30387, (5th Cir. 2023)
3. REVIEW AREA. The approximately 61.4-acre site is located on the south side of Mallett Road (also shown as Cook Road on some maps) and bounded by Interstate 10 at the southern boundary of the property; within Section 11, Township 7 South, Range 9 West; approximate center coordinates are Latitude 30.4560° North and Longitude 88.8583° West; in St. Martin, Jackson County, Mississippi. The parcel has been cleared of most trees and is relatively flat with local relief of less than approximately 10 feet. A standard permit was issued on October 15, 2008, for the fill of 15.68 acres of wetlands to construct a commercial and residential development. This permitting action included an Approved Jurisdictional Determination that was concluded on April 2, 2008. Permit modifications (for construction windows) were issued in 2013, 2018, and 2020. The project was not constructed; however, vegetative clearing in wetlands occurred.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The *Tchoutacabouffa River*, a TNW, is approximately 2.3 miles west/northwest of the project site. The *Tchoutacabouffa 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. W1 abuts a culvert and ditch (D1) which is entirely dug in wetlands and exhibits at least seasonal relatively permanent flow (RPW). D1 flows north through the wetland towards Mallett Road. At Mallett Road, a culvert is installed within the wetland area of W1. Waters from W1 and D1 drain to the culvert. The 119-foot-long culvert goes outside of the review area under Mallett Road and exits on the north side of the road as an unnamed RPW tributary, which is approximately 0.33 miles in length, and flows north/northwest to *Cypress Creek*. From the intersection of this RPW, *Cypress Creek*, flows westerly approximately 2.6 miles to the *Tchoutacabouffa River* that is a TNW.

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.

W2 abuts a culvert, a roadside ditch (RD1) parallel to Mallet Road, and a wetland ditch (D2), that was dug completely in wetlands and exhibits non relatively permanent flow. At Mallet Road, RD1 and D2 converge near the mouth of the concrete culvert that runs beneath Mallet Road. Waters from W2, RD1, and D2 drain into the culvert which takes flow outside of the review area to the north approximately 114 linear feet underneath Mallet Road and discharges on the north side of Mallet Road as an unnamed RPW tributary. The flow from the tributary is severed offsite at a nearby apartment complex; therefore, W2 and D2 do not flow to a TNW, interstate water or territorial seas.

W3 receives water from a culvert located along the southern boundary of the site. This wetland abuts the southwest corner of P2 (described in 8.e). During heavy rain events and storms, water exits P2 via an erosional rill (E1) measuring approximately 133 linear feet at the northwest corner of the pond. The rill runs northwesterly through the upland and into W2. Waters from W2, drain into the culvert which takes flow outside of the review area to the north approximately 114 linear feet underneath Mallet Road and discharges on the north side of Mallet Road as an unnamed RPW tributary. The flow from the tributary is severed offsite at a nearby apartment complex; therefore, W3, P2 and E1 do not flow to a TNW, interstate water or territorial seas.

W4 abuts P3 (described in 8.e). P3 does not have discharge or have an outlet. W4 is surrounded by uplands and P3. W4 and P3 are depressions and do not drain out and therefore, do 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

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.

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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): D1 is a ditch that is completely dug in wetlands and drains Wetland 1 (W1). D1 is approximately 915 linear feet and flows from south to north. Water enters the site from three culverts along the southern border of the site boundary and Interstate 10. 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. The score of D1 was 22.75. According to the worksheet a stream is at least intermittent if the score is ≥ 19 or perennial if ≥ 30 . During a site visit on June 5, 2024, standing water was observed along most of the ditch (>90%). The Antecedent Precipitation Tool (APT) report indicated that there was approximately 0.3 inches of precipitation on the two days prior to the site visit. APT results indicated there were "normal conditions". The Drought Index indicated an incipient drought. As indicated in Section 5, D1 continues north outside of the review area and into a RPW on the north side of Mallet Road, which drains to *Cypress Creek*, a tributary to the *Tchoutacabouffa River*. For these reasons, the District determined D1 has relatively permanent flow at least seasonally and is therefore jurisdictional as an RPW tributary.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland 1 (W1) is an 11.3 acre wetland which contains a jurisdictional relatively permanent ditch (D1), described in "e" above. The boundary of W1 extends laterally to abut a culvert at Mallet Road and D1 (D1

was created in W1), a relatively permanent tributary; therefore, W1 is jurisdictional because it has a continuous surface connection to a culvert and D1 a relatively permanent tributary.

There are a total of six lateral ditches that intersect D1. Lateral ditches, LD1, LD2, and LD3 are dug completely in wetlands and intersect D1 on the western side of D1. Therefore, these three lateral ditches are jurisdictional because they are located within W1, which has a continuous surface connection to a RPW. Lateral ditches, LD4, LD5, and LD6 are discussed below in 8.f.

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.

E1 is an erosional feature that is 133 feet in length. It formed in uplands along the edge of P2 from runoff during storm events. The feature only exhibits flow during and after storm events. E1 does flow to W2. However, E1 does not have relatively permanent flow, lacks an ordinary high water mark, and is not a tributary, therefore E1 is not jurisdictional.

Roadside ditch, RD2, located in the northeastern corner of the review area is a ditch that is excavated wholly in and draining only uplands and therefore it is not jurisdictional. The ditch does not carry a relatively permanent flow of water and is full of sediment. What little water flows through the culvert and ditch flows offsite east of the property boundary.

- 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.

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- 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.

P1, P2, and P3 are water filled depressions that do not appear on USGS 1:24,000 Ocean Springs, MS topographic maps until the 1978 photorevised edition. These pits were excavated in dry land for the purpose of obtaining fill material for the construction of Interstate 10. P1 measures 3.29 acres and contains water year-round. P1 appears to discharge via overland sheet flow into the abutting W1 during infrequent heavier rain events. P2 measures 5.96 acres and contains water year-round. P3 measures 0.45 acres and contains water year-round. The preamble to the 1986 regulations indicates the agencies generally do not consider these waters as jurisdictional: “Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.” Because P1, P2, and P3 are abandoned and do not meet the criteria to be non-jurisdictional under the pre-2015 regime and the preamble to the 1986 regulations, they are being evaluated as a potential (a)(3) other water. P1, P2, and P3 are isolated ponds that do not have a tributary flowing into or out of them. P1, P2, and P3 do not support a link to interstate or foreign commerce, they are not known to be used by interstate or foreign travelers for recreation or other purposes, they do not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and are not known to be used for industrial purposes by industries in interstate commerce. For these reasons, P1, P2, and P3 are not waters of the U.S.

- 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

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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Lateral ditches, LD4, LD5, and LD6 are partially dug in uplands and intersect D1 on the eastern side of D1. LD7 is a lateral ditch partially dug in uplands that connects to W1. All of these ditches lack relatively permanent flow, ordinary high water marks, and are non-RPWs, thus they are not jurisdictional.

Wetland 2 (W2) is a 10.3 acre wetland that does not have a CSC to a jurisdictional water. W2 abuts a culvert, RD1, and Ditch 2 (D2), that was dug completely in wetlands and exhibits non relatively permanent flow. At Mallet Road, the single, concrete culvert abuts W2 and D2. Waters from W2 and D2 drain into the culvert which takes flow outside of the review area to the north approximately 114 linear feet underneath Mallet Road and discharges on the north side of Mallet Road as a RPW unnamed tributary. This tributary flows north/northwest approximately 434 linear feet near the eastern boundary of an apartment complex where it continues northward, on the east side of the apartments. During typical rain events, the water pools in a wooded, small depressional area east of the tributary. Ultimately this water either percolates or discharges via overland sheet flow. The grounds of the apartment complex are higher in elevation compared to the tributary and adjacent property. During heavy rain events, water overflows the tributary westward into a grassy depression located on the apartment grounds. Water from the depression exits through a culvert that is approximately 12 to 18 inches above grade of the depression and flows west via an approximately 160 linear feet culvert that is underneath the parking lot. Water exits the culvert into a manmade drainage area westward for approximately 162 linear feet to the western edge of the apartment property. Water exits the drainage area as overland sheet flow. There is no discrete connection to an RPW due to the construction of the apartment complex, which is situated at a higher elevation than the unnamed tributary, therefore creating areas of sheetflow and areas that don't discharge into a discrete conveyance such as a culvert unless the area receives significant rainfall, W2 does not have a continuous surface connection to an RPW and is therefore not jurisdictional.

Ditch 2 (D2) measures approximately 422 linear feet and is completely dug in wetlands and drains wetlands. D2 does not exhibit relatively permanent flow (non-RPW). Water enters the site from three culverts on the south side of the site between the site and Interstate 10. For consistency, 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 D2 as it was completed for D1. The score of D2 was 7.75. According to the worksheet a stream is at least intermittent if the score is ≥ 19 or perennial if ≥ 30 . The APT for

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the site visit, June 5, 2024, indicated that there was approximately 0.3 inches of precipitation on the two days prior to the site visit. APT results indicated there were “normal conditions”, although the Drought Index indicated an incipient drought (2024-05). D2 has a poorly developed channel in which little or no bed and bank can be distinguished for more than 90% of its length. A channel is observed approximately along the beginning 10 feet of the ditch. For these reasons, the District determined that D2 is a non-RPW that only carries flow in response to rainfall events and is therefore not jurisdictional.

There are two non-RPW lateral ditches, LD9 and LD10, that intersect D2. LD9 and LD10 are dug completely in W2. Both ditches are nearly indistinguishable from the wetland as they have filled in with wetland vegetation, lack relatively permanent flow, or ordinary high water marks. As stated previously, W2 does not have a continuous surface connection to an RPW and is therefore not jurisdictional.

Lateral ditch, LD8, is partially dug in uplands and in W2. It does not have a distinguishable bed, relatively permanent flow, nor ordinary high water mark. LD8 is a non-RPW and is not jurisdictional.

Wetland 3 (W3) measures 0.16 acre and does not have a continuous surface connection to a jurisdictional water. The wetland receives water from a culvert located along the southern boundary of the site. This wetland abuts P2, a pond described in 8.e, near the southwest corner of the pond. During heavy rain events, water exits P2 via an erosional rill measuring approximately 133 linear feet at the northwest corner of the pond. The rill runs northwesterly through the upland and W2 to the single, concrete culvert goes under Mallett Road where the flow enters an RPW (as described for W2 above). CSC is severed offsite at the apartment complex.

Wetland 4 (W4) measures 0.66 acre and does not have a continuous surface connection to a jurisdictional water. The wetland abuts P3, a pond described in 8.e. W4 is surrounded by uplands and P3. There is no continuous surface connection to a requisite water and therefore W4 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. Field visit on June 5, 2024.
 - b. Office evaluations May 28, and June 24, 2024.

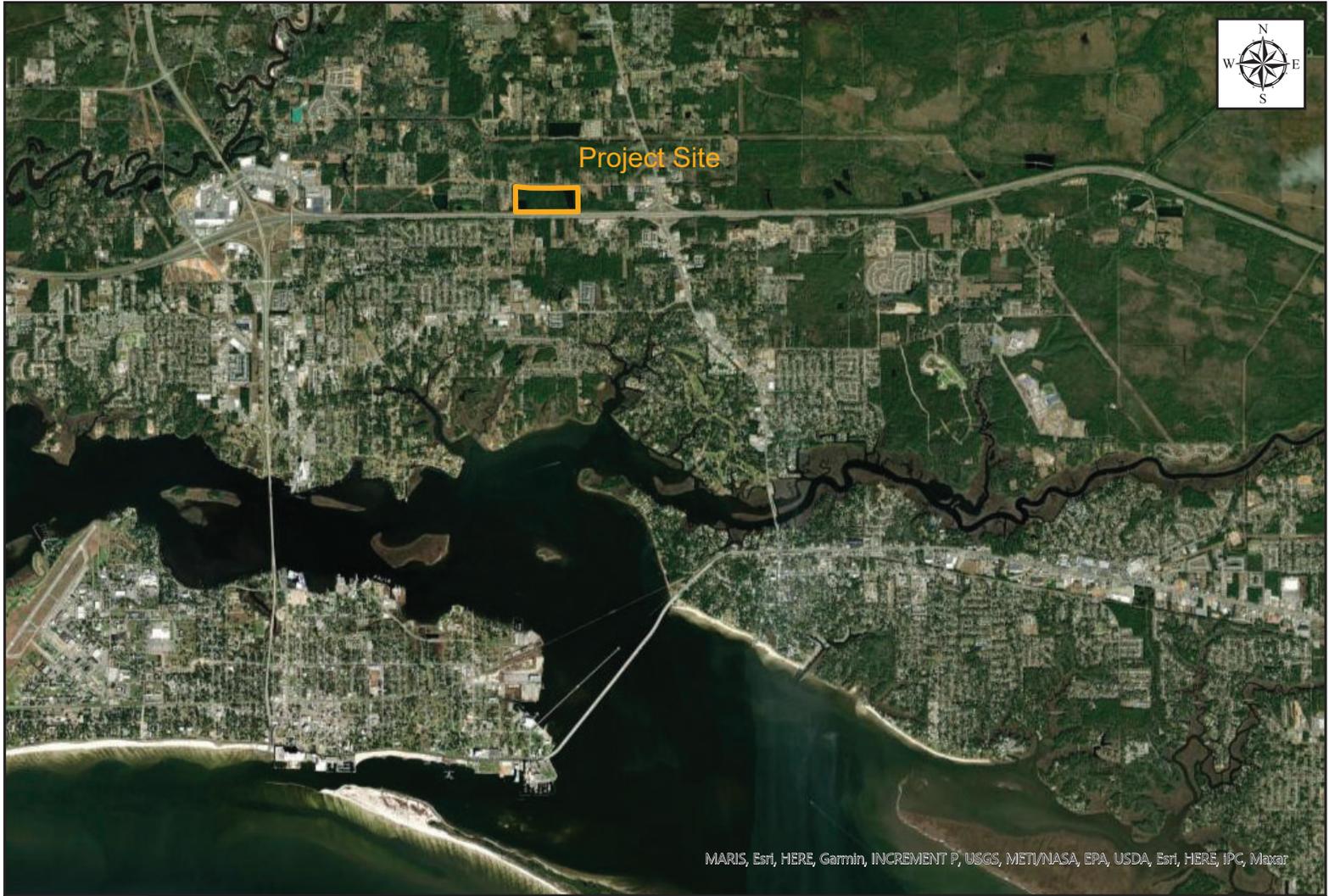
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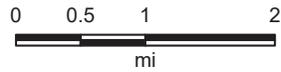
- c. USACE Antecedent Precipitation Tool (APT). The APT report indicated that there was more than 3.5 inches of precipitation on April 13, 2024, the day before the delineation was started by the agent on April 14, 2024. No precipitation is shown for the following days of the delineation, April 15 and 16, 2024. The APT report shows wetter than normal conditions for April 14, normal conditions for April 15, and normal conditions for April 16. The Drought Index indicated a mild drought for this time period. Results of the APT for May 5, 2024, indicated that there was approximately 0.3 inches of precipitation on the two days prior to the USACE site visit. The APT report indicated that there were “normal conditions” on the day of the site visit. The Drought Index indicated an incipient drought.
- d. LIDAR, Hillshade, and DEM data from NRV.
- e. NC Division of Water Quality. 2010. Methodology for Identification of Intermittent and Perennial Streams and their Origins, Version 4.11. North Carolina Department of Natural Resources, Division of Water Quality. Raleigh, NC.

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.



SAM-2006-01649-MFM



Map Center: 88.842522°W 30.427657°N

Date: 8/6/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

SAM-2006-01649

Legend

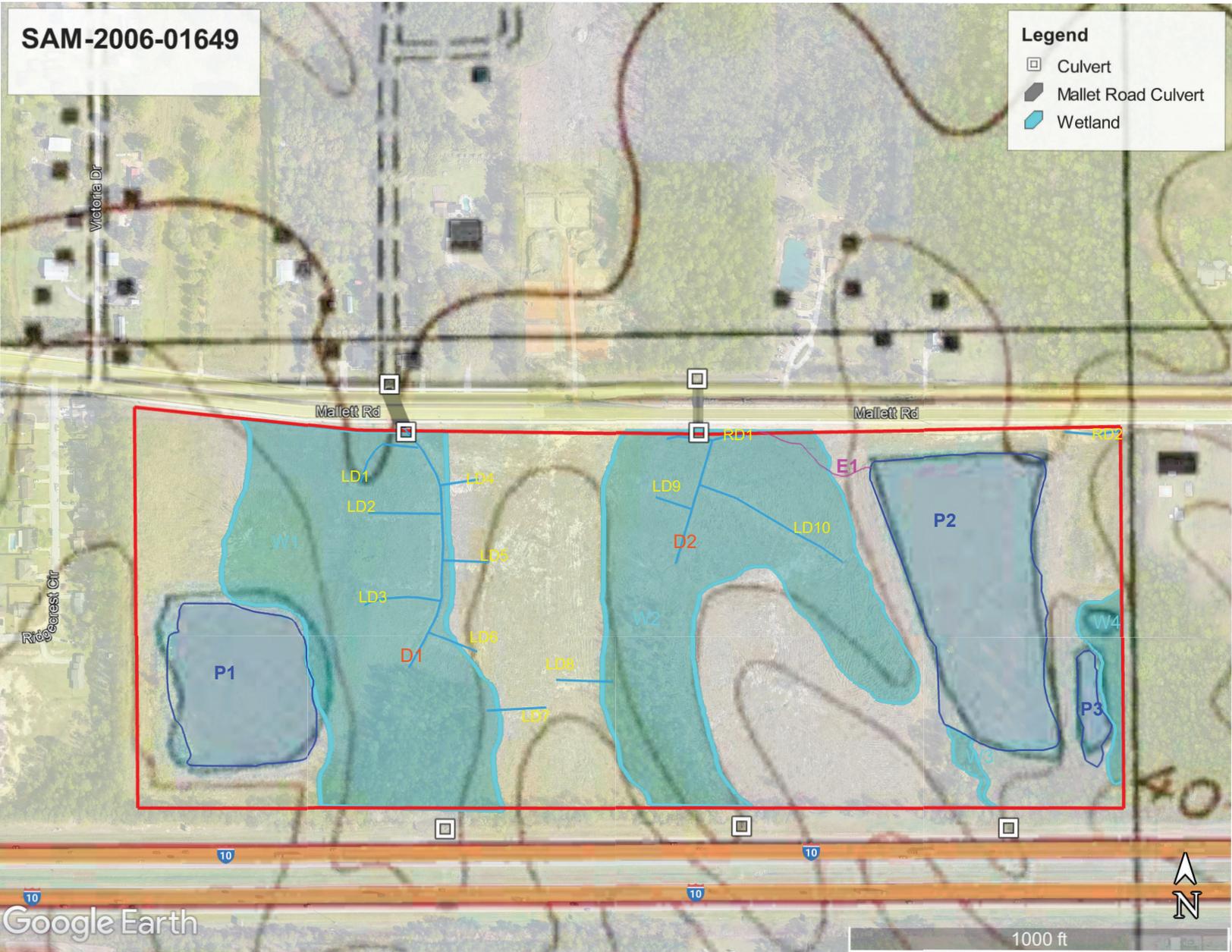
-  Culvert
-  Mallet Road Culvert
-  Wetland



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Legend

- ☐ Culvert
- ▣ Mallet Road Culvert
- Wetland



Google Earth

1000 ft