



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

CESAM-RD-A

March 4, 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-2022-01238-JEB; 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.

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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 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).
 - i. **Riparian Wetlands Bordering Malbis Lake**, 0.01-acre wetland bordering a man-made pond (Malbis Lake). The wetland does not have a continuous surface connection to a jurisdictional water and is therefore not a water of the United States.
 - ii. **Malbis Lake**, a 0.06-acre portion of a larger pond that was excavated in the early 1900's. This pond is not a jurisdictional water of the U.S.

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 (2023)
- e. 2023 SWANCC Guidance

3. REVIEW AREA. The review area is a small portion of an approximately 8-acre man-made lake (Malbis Lake), specifically a 0.07-acre area that includes 0.06 acre of the lake and a 0.01 acre wetland. The applicant owns two contiguous parcels of land totaling approximately 4.73 acres that includes the review area, approximately 0.07 acre, including an open water area and a small fringe of emergent wetlands along the NE shoreline of Malbis Lake. This wetland area features soils, hydrology and vegetation consistent with the 1986 Wetland Delineation Manual. A majority of the lake is on an adjacent 21.5-acre parcel owned by Infirmity Health System, Inc.; however, an approximately 2,900 square foot area of the lake is present on the AJD requestor's property. The wetland and lake are located along the south side of US Highway 90 west of State Highway 181 in Daphne, Baldwin County, Alabama. Coordinates are 30.654962, -87.856144.

According to the agent's December 13, 2022 Approved Jurisdictional Determination Request, Malbis Lake was excavated by members of the Greek community that established Malbis Plantation in the early 1900s and includes man-made islands created as representations of the Greeks Isles. The lake was excavated within an area that may have included the headwater springs of D'Olive Creek or a potentially isolated Grady Pond. The 1953 USGS topographic Stapleton quad map depicts Malbis Lake as a closed depression as indicated by the circle with interior hatch marks. A 1938 aerial photograph depicts the lake but any potential connection to other waters is unclear.

In May 2005, the U.S. Army Corps of Engineers, Mobile District issued a Nationwide Permit verification letter authorizing the discharge of fill material into "0.46-acres of jurisdictional streamside wetlands and waters of the U.S. associated with an unnamed ephemeral stream drainage tributary to D'Olive Creek" on the property located directly north of the review area across Highway 90 (SAM-2005-00462). The activity on this property was construction of a commercial facility (big box stores, car dealerships, parking lots and associated appurtenances). This permit authorized the ephemeral stream channel (non-relatively permanent stream) and associated wetlands to be filled in order to construct the development. The original path of the ephemeral stream is observed in Figure 6 of the AJD figures. The hydrology source for the ephemeral stream was from runoff from Highway 90 as well as Malbis Lake. Associated with the commercial development was the construction of three stormwater ponds (SR Pond 1, SR Pond 2, and SR Pond 3) as part of the development's stormwater collection system to collect stormwater runoff from Hwy 90, the new commercial development, and any flow previously associated with the ephemeral stream. Construction on the commercial development appeared to have begun in 2006 based on a review of Google Earth aeriels. The ponds appear in the 2008 Google Earth aeriels although construction on the commercial development is ongoing. By 2010, construction appears to be complete with the exception of some minor work remaining at one of the car dealerships.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Mobile Bay (4.6 miles away) is the closest TNW to Malbis Lake and the wetland. Mobile Bay is on the Mobile District's Section 10 waters list and is therefore a TNW.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. The *potential* flowpath from Malbis Lake and the riparian wetland begins at an approximately 240-foot-long culvert from Malbis Lake extending outside of the review area under Highway 90 through a series of stormwater ponds, culverts, and ditches to D'Olive Creek, which flows approximately 3.5 miles to Mobile Bay, 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 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

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.

- e. Tributaries (a)(5): N/A
- 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.

The preamble waters are:

- i. Artificially irrigated areas which would revert to upland if the irrigation ceased.
Neither Malbis Lake nor the riparian wetlands are artificially irrigated; therefore, they do not meet the requirements of this preamble water.
- ii. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- iii. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- iv. Water filled 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.

Items ii, iii and iv require the aquatic resource to have been created in dry land. The District cannot definitively conclude that Malbis Lake was created in dry land as it was created in the early 1900's, and the earliest aerial image readily available is from 1938 (Figure 21) and depicts the pond. A 1921 U.S. Army Corps of Engineers tactical map obtained from topoview (Figure 20) does not depict Malbis lake or any stream features in the current location. While this map depicts larger tributaries and waters, it may not accurately depict smaller features, so the District is hesitant to rely on this single historical map to definitively determine Malbis Lake was created in dry land.

⁹ 51 FR 41217, November 13, 1986.

- 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.

The features in the *Rapanos* guidance that are considered “generally not jurisdictional” are swales and erosional features and ditches created in uplands, draining only uplands with less than a relatively permanent flow of water. None of these types of features are present within the review area.

- 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, there are no features in the review area that meet the waste treatment exclusion.

- 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, there are no features in the review area that were determined to be prior converted cropland.

- 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*.

Malbis Lake does not have a nexus to interstate or foreign commerce (as evaluated in 8f). Malbis Lake is not considered an “isolated water” in accordance with *SWANCC* because it has a culvert that periodically discharges when water in the pond reaches the invert elevation of the culvert.

- 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).

Evaluation of Malbis Lake as a potential (a)(1) water: Malbis Lake is not an (a)(1) water, which encompasses all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. These waters have historically been referred to as traditional navigable waters. Malbis Lake and its associated fringe wetland are not subject to the ebb and flow of the tide, are not on the District's Section 10 waters list, and have not been determined to be a TNW in a stand-alone TNW determination. Therefore, Malbis Lake and the fringe wetland do not meet the criteria to be an (a)(1) water.

Evaluation of Malbis Lake as a potential (a)(2) water: Malbis Lake and the fringe wetland are not an (a)(2) interstate water as they do not cross state boundaries. Therefore, Malbis Lake and the fringe wetland do not meet the criteria to be an (a)(2) water.

Evaluation of Malbis Lake as a potential (a)(3) "other" water: The pre-2015 regulations state that (a)(3) waters are "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;"

Under the pre-2015 regulatory regime consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories (EPA and Army Updates for Tribes and States on "Waters of the United States", November 15, 2023).

The USEPA and OASACW Memorandum on Evaluating Jurisdiction for LRL-2023-00466, February 16, 2024 states, “A pond that does not meet the criteria to be generally non-jurisdictional under the pre-2015 regime and the preamble to the 1986 regulations and that does not meet the criteria to be evaluated under one of the other jurisdictional categories should be evaluated as a paragraph (a)(3) “other water” under the pre-2015 regulations.” As indicated in a-d above, Malbis Lake does not meet the criteria to be generally non-jurisdictional under the pre-2015 regime and preamble to the 1986 regulations. Furthermore, Malbis Lake was evaluated and determined to not meet the criteria of one of the other jurisdictional categories of waters of the U.S. as documented in this section. Therefore, in accordance with the referenced memo, Malbis Lake should be evaluated as a potential paragraph (a)(3) “other water” under the pre-2015 regulations.

Malbis Lake does not support a link to interstate or foreign commerce. Malbis Lake is not known to support interstate or foreign commerce. Malbis Lake is not known to be used by interstate or foreign travelers for recreation or other purposes. Malbis Lake does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce or used for industrial purposes by industries in interstate commerce. For these reasons, Malbis Lake does not meet the definition an (a)(3) “other water” as defined by the pre-2015 regime.

Evaluation of Malbis Lake as potential (a)(4) impoundment: Under the pre-2015 regime, waters of the U.S. include impoundments of waters otherwise identified as waters of the U.S. In order to assess whether an impoundment is jurisdictional, documentation must either demonstrate that the impoundment was created from waters of the U.S. or that it meets the definition of another jurisdictional water. The 0.06-acre portion of the pond identified as Malbis Lake within the review area appears to be relatively permanent as it holds water year-round based on a review of historical Google Earth photos. The administrative record from the 2005 project (File #SAM-2005-00462) contains notes that refer to Malbis Lake (although outside of the review area at that time) as an impoundment and indicates a dam is present south of Highway 90. The field notes from the 2005 file state, “before barriers were emplaced blocking flow, there was a continuous historical hydrological connection along the tributary to Mobile Bay.” The notes also indicate that one of the barriers was the dam at the impoundment south of Highway 90. After considering the 2005 notes and the Administrative Appeal Decision for Willard Simmons, the District does not disagree that Malbis Lake is an impoundment, as flow is restricted due to the excavation that was completed to create the feature and placement of a culvert and headwall on the downgradient end of the pond at Highway 90. Water staining was observed on the headwall at the top elevation of the culvert,

indicating when water levels are high enough the water backs up due to the relatively small size of the culvert until it eventually drains. Furthermore, the invert elevation of the culvert is at least three inches above the bottom elevation of Malbis Lake at the culvert inlet, which contributes to impounding water. Lastly, there are areas in Malbis Lake that are deeper than others, likely due to how it was excavated, and hold water during drier times of the year, which contributes to water being impounded in the lake. According to the landowner's agent, this pond was excavated in the early 1900s, most likely for aesthetic purposes. During site visits conducted by Regulatory personnel, what appeared to be remnant spoil material was observed along the banks of the lake (mounds of material along the top of bank which now have trees growing in them), which appears to substantiate the assertion that the pond was excavated. The 1953 USGS Stapleton Quad depicts Malbis Lake as a depressional area as evidenced by the hachured lines around the lake (Figure 22). The earliest image available (that the District could locate) for this area is from 1938, which depicts Malbis Lake and a two-lane road abutting it to the north, which is now identified as Highway 90. It is difficult to discern in the 1938 aerial whether there was a culvert under Highway 90 connecting the pond to any other waters to the north of Highway 90 due to the lack of clarity of the photograph and presence of canopy vegetation. In order to make the determination that Malbis lake is an impoundment of jurisdictional waters, we must demonstrate that the resource was created from waters of the U.S. The District cannot definitively conclude that Malbis Lake was created from a water of the United States when it was created. The earliest aerial photography available to the District was from 1938, which depicts Malbis Lake as already constructed. Earlier aerial photography, from which to infer the site conditions existing prior to lake construction, were not identified. The NRCS soil survey map indicates the pond was created in Irvington loam (IrB) 2 to 5 percent slopes, which are non-hydric soils, so we cannot assume the lake was created in wetlands as the definition of wetlands requires the presence of hydric soils. The USGS 1953 quadrangle depicts Malbis Lake as a depression. The USGS definition of a depression is a "sunken part of the earth's surface, especially a low-lying area surrounded by high ground. Depressions often have no natural outlet for surface drainage (such as an interior basin or a karstic sinkhole) (Jackson 1997)." There is no evidence of a stream channel flowing into Malbis Lake based on a review of desktop resources, including the 1953 USGS quadrangle, which makes it difficult to conclude that a stream was impounded. Further, there was an ephemeral stream identified by Corps personnel on the property to the north of Highway 90 in 2005. That stream was identified by the Corps project manager as having an ephemeral, or non-relatively permanent, flow regime, which is not considered a water of the U.S. under the current regulatory regime. Based on the lack of evidence of a jurisdictional water of the U.S. entering or exiting Malbis Lake, the District cannot

conclude that a jurisdictional water of the U.S. existed within the footprint of Malbis Lake prior to its construction. Based on an assessment of the available information presented above, there is insufficient historic evidence to determine that Malbis Lake was an impoundment of waters otherwise identified as “waters of the United States” when the lake was made. Therefore, Malbis Lake is not jurisdictional as an (a)(4) impoundment.

Evaluation of Malbis Lake as a potential (a)(5) tributary: Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that carry relatively permanent flow directly or indirectly into a TNW. The agencies will assert jurisdiction over non-navigable relatively permanent tributaries of TNWs where the tributaries typically flow year-round or have continuous flow at least seasonally. The 2005 field notes (File #SAM-2005-00462) identify an ephemeral stream on the property north of Highway 90 and indicates that Malbis Lake was once part of the tributary network to D'Olive Creek, which discharges into Mobile Bay. However, the 2005 file lacks any documentation or references to historical maps or photos to indicate Malbis Lake was originally part of the ephemeral stream before the lake was created. As indicated in the previous paragraph, the District's current review could not locate any maps or aerial photography to provide evidence that Malbis Lake was once the beginning of an unnamed stream to D'Olive Creek before the pond was created. Currently, there is a culvert and associated headwall directing water from Malbis Lake under Highway 90 to a linear detention pond (SR Pond 1) on the adjacent commercial development north of Highway 90. It is likely the small size of this culvert from Malbis Lake to SR Pond 1 serves to temporarily impede water flow during times of heavy rainfall or during times when it is wetter than normal based on the observation of water staining on the headwall almost to the top elevation of the culvert. During several site visits, the culvert (approximately 240 linear feet long) from Malbis Lake north into SR Pond 1 exhibited a trickle of water and evidence of drift deposits on the south side of the culvert. Water in SR Pond 1 is contributed from stormwater runoff from multiple paved surfaces within the adjacent commercial development, Highway 90, and from Malbis Lake when the water level reaches the culvert invert elevation. Several drop inlets were observed in the parking lot behind the commercial development that direct runoff into SR Pond 1 from roadside swales and paved parking areas. SR Pond 1 is thick with vegetation and does not appear to hold water for long periods of time based on the amount of vegetation in the feature and lack of surface water observed in aerial photographs and during multiple site visits. Based on this information SR Pond 1 appears to be non-relatively permanent. SR Pond 1 is centered at 30.656440, -87.856154 and is depicted on the attached maps.

An approximately 40-foot-long culvert connects SR Pond 1 with SR Pond 2, another stormwater pond constructed as part of the commercial development. Based on a review of aerial photography and field observations, SR Pond 2 does not appear to be a relatively permanent water as the historical photos dating back to 2008 depict it as dry over multiple occurrences. There is a culvert in the northwestern corner of the pond that serves as the outlet from the pond. The culvert sits several feet above the bottom elevation of the pond (due to lack of access, an exact measurement could not be ascertained), indicating the pond must fill with a certain amount of water before discharging. The culvert extends from SR Pond 2 approximately 540 feet to the north to connect to SR Pond 3. This culvert section also appears to have an open grassed swale on top of it, running the length of the culvert. Any contribution to the open swale is likely the result of stormwater runoff from multiple paved surfaces within adjacent shopping complexes. Multiple drop inlets were observed behind the commercial development that direct surface runoff to SR Pond 2. These areas represent over 11 acres of paved, impervious surface that flows into this pond. SR Pond 2 is centered at 30.657494, -87.856747 and is depicted on the attached maps.

Stormwater Pond SR3 is the last detention pond in the series of ponds collecting rainfall runoff from surrounding development. SR Pond 3 appears to be approximately 12 feet deep and would likely intercept ground water or stream base flow if present, but does not appear to contain standing water for much of the year (based upon historical Google Earth imagery). According to information provided by the applicant's agent on December 16, 2023, SR Pond 3 has three components:

1. Outlet control structure - This concrete structure serves to collect and discharge storm water from the pond into the connected 72-inch concrete culvert. The overflow weir indicated in the face of the structure begins to discharge ponded storm water when the pond level reaches elevation 172.75 feet. As pond levels rise the weir length increases to allow greater storm water discharges.
2. Corrugated Metal Pipe (CMP) -This perforated half-round 48-inch diameter CMP stand pipe with lid is surrounded by #57 stone. This component serves to discharge ponded storm water from around elevation 163.50 and above.
3. Water Quality Watermann (Turkey Foot)-This storm water discharge component is detailed in "OCS H-7 ORIFICE END CAP DETAIL". This component serves to preserve or enhance water quality by extending length of time storm water is discharged into D'Olive Creek. Discharge from this component is regulated by an orifice at the discharge end located inside the concrete control structure. When the pond level recedes so that the concrete

weir and CMP stand pipe no longer discharge, the Turkey Foot component provides a slow, continuous discharge until the pond level drops below elevation 163.5 feet.

Eight or more drop inlets were observed by Corps personnel that direct stormwater runoff into SR Pond 3 from the surrounding development. An additional large (48-inch) culvert in the northeastern corner of Pond SR 3 contributes stormwater runoff from stormwater drain inlets observed on properties surrounding the pond. These areas represent over 22-acres of paved, impervious surface that flows into this pond. SR Pond 3 is centered at 30.659481, -87.856977 and is depicted on the attached maps.

Culverts from SR Pond 3 extend underground approximately 1,000 feet under Hendrick Boulevard, parking areas, and car dealerships, then daylight to an approximately 140-foot-long concrete flume south of I-10. Water is then directed from the flume to an approximately 724-foot-long culvert under I-10 and Woodrow Lane before discharging into the unnamed relatively permanent tributary to D'Olive Creek north of Woodrow Lane. All associated flow from SR Pond 3 through this culvert system appears to be precipitation driven in direct response to rainfall events and from water from SR Pond 3. Water present at the discharge point in the unnamed tributary on the north side of Woodrow Lane appears to be the result of a downstream beaver dam constructed across a section of the unnamed tributary to D'Olive Creek, backing water up into the culvert. The discharge point into the unnamed tributary to D'Olive Creek is located at 30.663870, -87.858079.

The total distance from the invert of the culvert at Malbis Lake to the discharge point in the unnamed tributary to D'Olive Creek north of Woodrow Lane is approximately 3,755 feet (based on the District's estimate using desktop mapping resources) through culverts, stormwater ponds, and a concrete flume.

Jurisdictional tributaries (under the pre-2015 post-*Sackett* regulatory regime) are waterbodies that carry relatively permanent flow directly or indirectly to a TNW. While Malbis Lake itself appears to be relatively permanent as evidenced by inundation on multiple aerial images spanning multiple years (Google Earth images 2008-2023 located in the administrative record), it is not a relatively permanent tributary contributing relatively permanent flow downstream. The stream on the site north of Highway 90 (which received flow from Malbis Lake and runoff from Highway 90) was observed in 2005 by the District to be ephemeral (a non-relatively permanent stream), indicating the flow from Malbis Lake to the ephemeral stream was also non-relatively permanent. Although that ephemeral stream has since been filled, Ponds SR1, SR2, and SR3 appear to

serve, in part, to collect and convey water previously conveyed by the ephemeral stream. Both SR1 and SR2 appear to be non-relatively permanent based on a lack of observation of hydrology during site visits and historic aerial imagery, presence of vegetation in the ponds, and lack of an ordinary high water mark in the ponds. The non-relatively permanent aspect of the receiving ponds, SR1 and SR2, indicates the flow from Malbis Lake is also non-relatively permanent.

When the water in Malbis Lake reaches the invert elevation of the culvert inlet, water flows under Highway 90 through the series of stormwater ponds, culverts, and flumes. Ponds SR1 and SR2 lack an ordinary high water mark. Pond SR3 has an ordinary high water mark and appears to hold water for longer periods of time than Ponds SR1 and SR2, likely because of the amount of runoff contributed to the pond from Ponds SR1 and SR2 and from at least 22 acres of impervious surfaces from the surrounding development directed to Pond SR 3. The original path from the Malbis Lake culvert inlet to the unnamed relatively permanent tributary north of Woodrow Lane has been severed by the filling of the ephemeral stream channel during construction of the development north of Highway 90 and re-routed through non-relatively permanent stormwater ponds, culverts, and ditches such that a connection from Malbis Lake to a downstream TNW (Mobile Bay) is tenuous. Because Malbis Lake does not contribute relatively permanent flow directly or indirectly to a downstream TNW, Malbis Lake is not an (a)(5) jurisdictional tributary.

0.01 acre Wetland: “Adjacent” is defined as “having a continuous surface connection” to a requisite water (TNW, interstate water, territorial seas, relatively permanent tributary, or relatively permanent impoundment), consistent with *Sackett* and the *Rapanos* plurality. The 0.01-acre non-tidal wetland in the review area was delineated by the agent between the top of the Malbis Lake bank and the open water portion of the lake. The wetland abuts Malbis Lake, which was determined to not be a water of the U.S. in the preceding paragraphs. Flow from this wetland goes to the open water of Malbis Lake into the 240-foot-long culvert under Highway 90, to an upland-dug stormwater pond (Pond SR1) approximately 580 feet long, to a 40-foot-long culvert into an upland-dug stormwater pond (Pond SR2) approximately 1.32 acres in size, into an approximately 566-foot-long culvert to upland-dug SR Pond 3, into an approximately 1,000-foot-long culvert into a 140-foot-long concrete flume, into an approximately 724-foot-long culvert under I-10 and Woodrow Lane where it discharges to a relatively permanent unnamed tributary to D’Olive Creek, for a total distance of approximately 3,755 linear feet from the wetland in the review area through upland-dug stormwater ponds, culverts and a concrete flume. District personnel observed multiple stormwater inlets and culverts in the parking areas behind the

buildings on the commercial development north of Highway 90. The inlets and culverts direct stormwater runoff from the over 40-acre development, which includes primarily impervious surfaces, into the stormwater ponds SR 1, SR 2 and SR 3. The agent's supplemental information in the December 16, 2023 letter indicate in Pond SR3 a gravel bed called a Water Quality Watermann was installed "that allows water to continuously infiltrate the bottom of the pond where it is directed to a pipe that runs generally north and empties directly into the D'Olive Creek channel on the north side of Woodrow Lane." Ponds SR1, SR 2 and SR 3 are part of a stormwater sewer collection system associated with the commercial development north of Highway 90 based on observations of culverts and stormwater inlets made by District personnel during multiple site visits that direct flow from the development to the ponds, as well as the information provided in the agent's December 16, 2023 letter. Subsurface flow through an underground storm sewer system does not qualify as a continuous surface connection (USEPA and OASACW *Memorandum on NWP-2023-602*, March 19, 2024). The closest requisite water to the Malbis Lake wetland is the unnamed tributary to D'Olive Creek (referred to as D'Olive Creek by the agent) north of Woodrow Lane approximately 3,755 linear feet from the wetland through culverts, stormwater ponds and a concrete flume. Due to the relatively long distance to the closest requisite water and the fact that an underground storm sewer cannot qualify as a continuous surface connection, the 0.01-acre wetland in the review area is not a jurisdictional water of the U.S. because there is not a continuous surface connection to a TNW, territorial seas, interstate water, relatively permanent tributary or jurisdictional impoundment.

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. Site visit January 4, 2023. Site visit October 25, 2023. Site visit November 29, 2023. Site visit December 13, 2023. Site visit May 17, 2024. Multiple in office evaluations using desktop resources have been completed since December 2022.
 - b. Wetland Resources December 13, 2022 Approved Jurisdictional Determination Request.
 - c. Wetland Resources December 16, 2023 Supplement to Willard Simmons AJD Request
 - d. Figures 1-26 prepared by Corps PM to evaluate aquatic resources.

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- e. Google Earth Pro-multiple historical aerial photographs and associated topographic map overlays dated February 1997 through June 2023.
- f. National Regulatory viewer-USGS Hillshade topographic map accessed 11/29/23, 3D Digital elevation model accessed 11/30/23.
- g. Historical aerial photographs (alabamamaps.ua.edu)-Alabama 1938 - 1974 accessed November 14, 2023 and January 2025
- h. Topoview – historic maps accessed January 2025
- i. EPA and Army Updates for Tribes and States on “Waters of the United States”, November 15, 2023 (https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf)
- j. File from Corps project #SAM-2005-00462.
- k. “Administrative Appeal Decision, Willard Simmons, Approved Jurisdictional Determination, Mobile District, SAM-2022, 01238-JEB” (December 11, 2024)

10. OTHER SUPPORTING INFORMATION.

*Field notes from a former Corps inspector made in March 2005, prior to the filling and relocation of the original stream channel north of Highway 90, indicate “Flows are now ephemeral, being dependent largely upon storm events when sheet flow from adjacent catchment slopes enters the stream channel.” In 2005 ephemeral streams were considered jurisdictional; however, under the current pre-2015 post-*Sackett* regime, non-relatively permanent tributaries (ephemeral streams) are not jurisdictional waters of the U.S.

*On May 16, 2005, the Mobile District issued Nationwide Permit 39 authorization (SAM-2005-00462-S) “To discharge fill material into 0.46-acres of jurisdictional streamside wetlands and waters of the U.S. associated with an unnamed ephemeral stream drainage tributary to D’Olive Creek”. “In order to compensate for the unavoidable loss of low-quality ephemeral stream channel and streamside wetlands the USACE required the applicant to purchase 0.91 wetland mitigation credits”. Permit drawings refer to the connection between Malbis Lake and SR Pond 1 as an “existing ditch”. This permit effectively allowed for the filling of the original ephemeral stream channel from its previous location and routing the water into a series of underground culverts and stormwater treatment ponds located west of the original channel.

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*The agent's JD request submittal refers to the area from Malbis Lake to Woodrow Lane as being the original D'Olive Creek channel. The District disagrees with this assessment after reviewing the USGS topographic map, which depicts an unnamed tributary and several topographic draws converging to form D'Olive Creek at approximate latitude 30.667441, -87.863442. Based on District personnel best professional judgement, named perennial tributaries rarely begin at the very headwaters of a system, but rather form after several smaller tributaries converge to form a larger, perennial stream due to a larger drainage area at that location. See Figures 23 and 24 of the attachments.

* The District issued an AJD for this review area to Mr. Willard Simmons on February 6, 2024, which concluded the Corps does not have Clean Water Act jurisdiction over the 0.01-acre wetland and 0.06-acre pond identified in the review area. Mr. Willard's consultant, Wetland Resources Environmental Consulting, submitted an appeal of the District's AJD to South Atlantic Division (SAD) on March 7, 2024. After taking into consideration information contained in the administrative record and an informal appeal meeting and site visit on May 17, 2024 with Appellant, the Appellant's representatives, SAD Review Officer, and representatives from the District, SAD issued an "Administrative Appeal Decision" on December 11, 2024, which remanded the action to the District for reconsideration consistent with the discussion in the appeal decision document. After considering and in response to the findings, discussions, and conclusions in the appeal decision document, the District has completed this updated AJD.

a. USEPA and OASACW *Memorandum on NWP-2023-602*, March 19, 2024

b. USEPA and OASACW *Memorandum on Evaluating Jurisdiction for LRL-2023-00466*, February 16, 2024

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.