



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

CESAM-RD-N

8 May 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-2023-01103-JDC; 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

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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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 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. W-C; non-jurisdictional wetland without a continuous surface connection to a traditional navigable water, interstate water, territorial sea, or relatively permanent tributary or impoundment.
 - ii. ES-1; non-relatively permanent water; non-jurisdictional.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the "pre-2015 regulatory regime."
- d. 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)
- e. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- f. 2003 SWANCC guidance
- g. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Memorandum to Re-evaluate Jurisdiction for NWP-2003-60436" (December 18, 2023).

3. REVIEW AREA. The review area for this AJD is limited to the two features identified as W-C and ES-1 and is situated within an 8.5-acre tract of land located in the

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northwest corner of the U.S. Highway 278 and Donauer Drive Southwest intersection in Cullman, Cullman County, Alabama, at Latitude 34.17145, Longitude -86.87098. The attached figures depict the review area. The other aquatic resources within the project boundary will be documented on a preliminary jurisdictional determination.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which ES-1 is connected is Sipsey Fork. Sipsey Fork is on the Mobile District's Section 10 list and is a large tributary to Mulberry Fork, which converges with Locust Fork to form the headwaters of the Black Warrior River. W-C is not connected to a TNW, interstate water, or the territorial seas.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

ES-1 directs flow southward to a culvert inlet in the westbound right of way (ROW) of U.S. Highway 278 along the southern boundary of the review area. ES-1 exits the culvert outlet in the eastbound ROW of U.S. Highway 278 and travels 0.13 miles west along the highway until it enters a culvert inlet east of the U.S. Interstate 65 (I-65) Exit 308 northbound off-ramp. ES-1 exits a culvert outlet west of the I-65 Exit 308 southbound on-ramp and flows 0.02 miles before emptying into York Branch. York Branch meanders 1.7 miles before draining into Ryan Creek. Ryan Creek meanders southwest for 12 miles before entering the limits of Alabama Power Company's Lewis Smith Lake. Within Lewis Smith Lake, Ryan Creek meanders 18.15 miles southwest until it flows into Sipsey Fork above the Lewis Smith Dam. Sipsey Fork flows south for 0.85 miles, passes through the dam, and continues flowing southwest for 2.56 miles until it becomes a Section 10 water as it falls below the normal pool elevation of the Corps' Bankhead Lake.

W-C is not connected to a TNW, interstate water, or the territorial seas.

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.

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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
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): N/A
 - g. Adjacent wetlands (a)(7): 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.

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8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁹ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

⁹ 51 FR 41217, November 13, 1986.

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ES-1 is a 205 linear foot stream that is a non-relatively permanent water. Although two short segments of ES-1 (at the headwaters of the stream exiting the upstream wetland and at the southern edge of the review area south of W-C) had characteristics of relatively permanent flow including base flow, sediment sorting, soil-based evidence of a high water table, and a lack of leaf litter and fibrous roots in the streambed, the majority of the tributary had characteristics of non-relatively permanent flow such as a lack of baseflow, weak sinuosity along the thalweg, rooted upland plants in the streambed, leaf litter in the channel, and a lack of soil-based evidence of a high water table. Based on the results of the Antecedent Precipitation Tool, site conditions were normal at the time of the Corps site visit on February 1, 2024; as a result, it appears that most of the feature only flows in response to rainfall events. ES-1 is centered at 34.170677, -86.871431.

W-C is a 0.65-acre concave scrub-shrub wetland centered at 34.171612, -86.871541. Based on a review of historic aerial photography and LiDAR data, W-C was separated from other on-site aquatic resources by a non-culverted, earthen access road constructed on the eastern side of the wetland between 1971 and 1997.

Based on the results of the Antecedent Precipitation Tool, site conditions were normal at the time of the Corps site visit. Vegetation along the ordinary high water mark on all sides of W-C were laid down towards the middle of the wetland, indicating that surface water flows into W-C from areas north, east, south, and west of the wetland. No discrete features like pipes or culverts connect W-C to other on-site aquatic resources. No seepage demonstrating movement of water through or beneath the barrier was observed on the eastern side of the road embankment. Based on site photographs provided by the consultant within 48 hours of a precipitation event, runoff from the access road appeared to flow west into W-C and east into other wetlands. There was no evidence of surface flow from W-C crossing the access road and entering the nearby forested wetland. W-C has a different hydric soil indicator than the nearest wetland (F6 – Redox Dark Surface in W-C as opposed to F3 – Depleted Matrix in the wetland on the east side of the earthen road crossing). The sapling species observed in W-C (Black Willow, Loblolly Pine, Sweetgum, and Chinese Privet) are present as mature trees in the nearest forested wetland; therefore, the tree saplings in W-C are likely the result of nearby seed sources. There is also some overlap in the herb stratum, however, W-C has a more diverse assortment of species and a higher percentage of total ground cover in the herb stratum (125% total cover in W-C opposed to 45% total cover in the nearest forested wetland). Lastly, based on the Wetland Rapid Assessment Procedure (WRAP)

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forms submitted by the consultant, the functional value of W-C is 0.75. The WRAP score of the nearest on-site wetland is 0.65.

Based on the slope and topography of the site, in addition to the stream characteristics of ES-1 observed during the Corps' site visit, shallow subsurface water appears to be flowing south towards ES-1 and not towards the nearest on-site wetland. The consultant provided a Wetland Determination Data Form for the area downslope and south of W-C near the westbound ROW of U.S. Highway 278. The sampled area was saturated but did not appear to be a wetland.

W-C is surrounded by uplands, has no observed flow out of the wetland, does not physically abut an RPW, and has no discrete feature providing a continuous surface connection to a jurisdictional water. Moreover, W-C does not appear to be functioning together with other on-site wetlands. Therefore, W-C is non-jurisdictional.

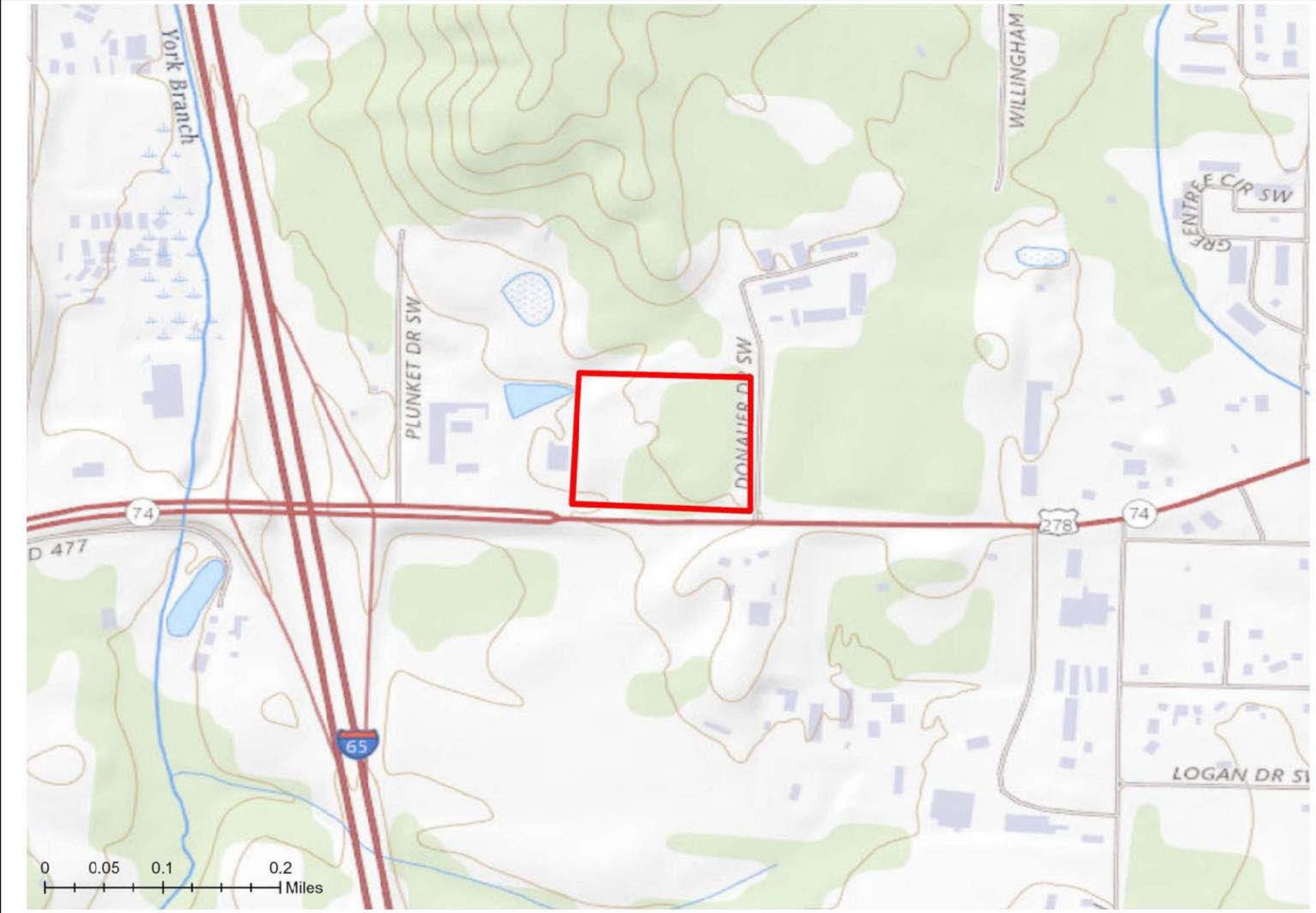
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Site visit was conducted with a Mobile District project manager and the consultant on February 1, 2024. In office evaluation using desktop resources was completed on March 14, 2024.
 - b. Consultant's delineation report dated November 21, 2023.
 - c. Antecedent Precipitation Tool accessed February 8, 2024.
 - d. National Regulatory Viewer – aerial imagery map layer, USGS topographic map layer, USDA-NRCS Web Soil Survey map layer, and Digital Elevation Model map layer; accessed February 25, 2024.
 - e. University of Alabama Air Photo Archive – historic aerial photographs dated 1950, 1964, and 1971; accessed February 9, 2024.
 - f. Google Earth Pro aerial photography dated March 1997, June 2006, September 2010, June 2012, November 2013, and April 2023.

10. OTHER SUPPORTING INFORMATION N/A

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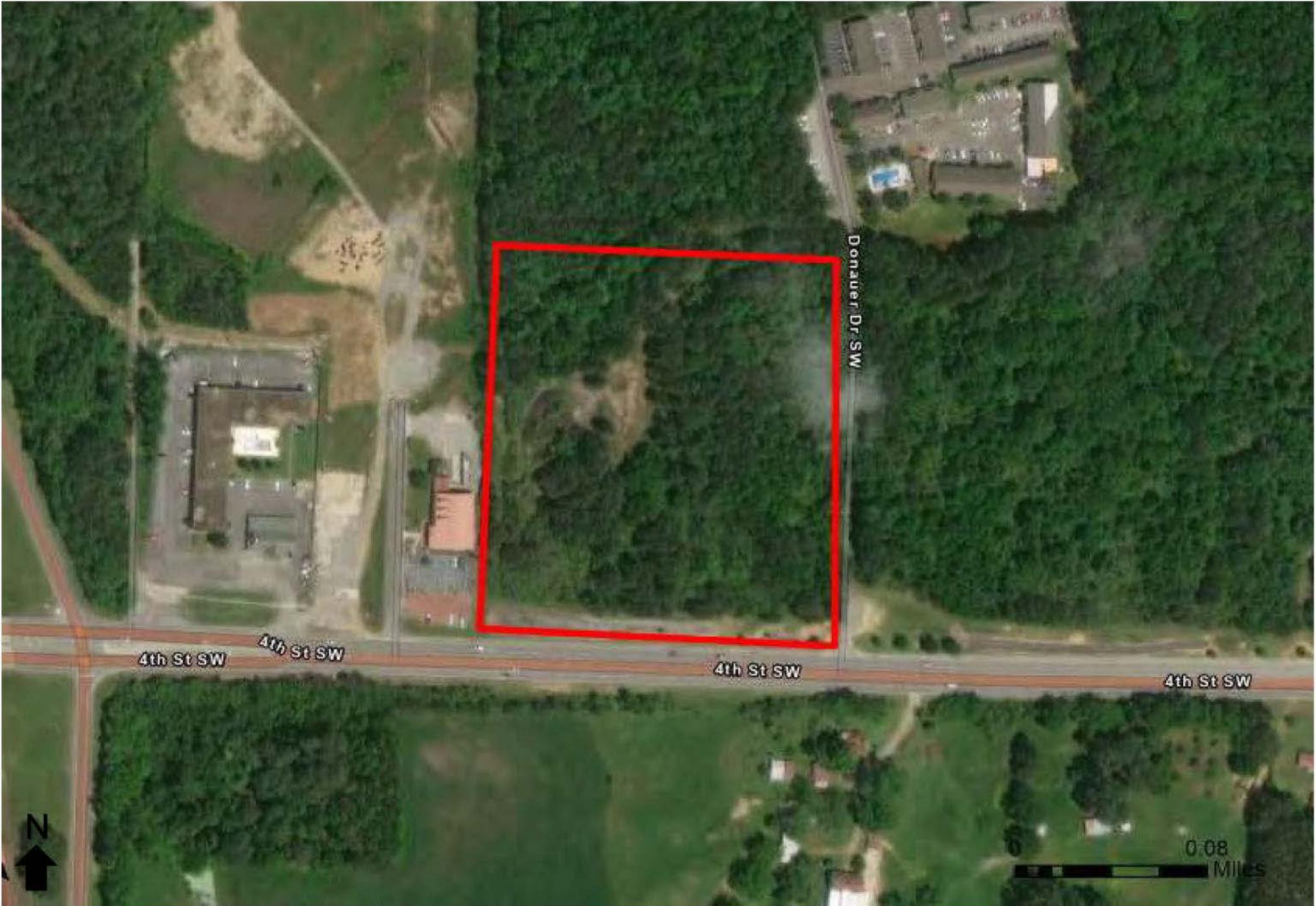
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Project Manager:	Project No:
Drawn By:	Scale: *As shown
Checked By:	File Name:
Approved By:	Date:



Topographic Vicinity Map
 U.S. Highway 278
 Cullman, Cullman County, Alabama



Project Manager: [Redacted]
Drawn By: [Redacted]
Checked By: [Redacted]
Approved By: [Redacted]

Project No [Redacted]
Scale: As shown
File Name: [Redacted]
Date: [Redacted]



Aerial Map
[Redacted]
Highway 278
Cullman, Cullman County, Alabama

EXHIBIT
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- Wetland
- Ephemeral Stream
- Intermittent Stream
- Data Point
- AJD Review Area



Project Manager: [REDACTED]	Project No. [REDACTED]
Drawn By: [REDACTED]	Scale: As shown
Checked By: [REDACTED]	File Name: [REDACTED]
Approved By: [REDACTED]	Date: [REDACTED]



Aquatic Resources Map

Highway 278
Cullman, Cullman County, Alabama

EXHIBIT
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