



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

CESAM-RD-N

April 3, 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-2023-0746-SNR; 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

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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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. Wetland A – non-jurisdictional wetland without a continuous surface connection to a relatively permanent tributary.
 - ii. Wetland B – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - iii. Wetland D – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - iv. Wetland E – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - v. Wetland F – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - vi. Wetland G – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - vii. Wetland H – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - viii. Wetland I – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - ix. Wetland J – jurisdictional wetland with a continuous surface connection to a relatively permanent tributary.
 - x. Stream 1-I – jurisdictional tributary; relatively permanent water (RPW).
 - xi. Stream 3-E – non-jurisdictional tributary due to lack of relatively permanent flow of water

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- xii. Stream 4-I – jurisdictional tributary; relatively permanent water (RPW).
- xiii. Stream 5-E – non-jurisdictional tributary due to lack of relatively permanent flow of water.
- xiv. Stream 7-I – jurisdictional tributary; relatively permanent tributary (RPW).
- xv. Stream 8-E – non-jurisdictional tributary due to lack of relatively permanent flow of water
- xvi. Stream 9-I – jurisdictional tributary; relatively permanent tributary (RPW).

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. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is a 43.77-acre parcel located in Chelsea, Shelby County, Alabama. The center of the review area is Latitude 33.3886, Longitude - 86.6199 and is located in the Lower Coosa 8-digit hydrologic unit code (HUC 03150107) and Middle Coosa 8-digit hydrologic unit code (HUC 03150106). The attached figures depict the 43.77-acre review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which the jurisdictional aquatic resources are connected is the Coosa River. The Coosa River is on the Mobile District's Section 10 list and is also an interstate water originating before crossing the Alabama state line. Wetland A and Stream 8-E are not connected to a TNW, interstate water or territorial seas.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

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

Stream 1-I flows south within the property boundaries for 1,052 linear feet before flowing into a culvert beneath Bear Creek Road and continuing to meander southwest for 4,338 linear feet to Poplar Branch; Poplar Branch meanders approximately 2.88 miles before converging with North Fork Yellowleaf Creek; North Fork Yellowleaf Creek meanders approximately 8.78 miles before converging with Yellowleaf Creek; Yellowleaf Creek meanders approximately 19.26 miles before converging with the Coosa River southeast of the review area in Wilsonville, Shelby County, Alabama.

Wetland B abuts Stream 1-I; therefore, having a continuous surface connection with 1-I. 1-I then eventually flows into the Coosa River as described above.

Wetland D abuts Stream 1-I; therefore, having a continuous surface connection with 1-I. 1-I then eventually flows into the Coosa River as described above.

Stream 4-I flows south within the property boundaries for 927 linear feet before flowing into a culvert beneath Bear Creek Road and continuing to meander southwest for 4,338 linear feet to Poplar Branch; Poplar Branch meanders approximately 2.88 miles before converging with North Fork Yellowleaf Creek; North Fork Yellowleaf Creek meanders approximately 8.78 miles before converging with Yellowleaf Creek; Yellowleaf Creek meanders approximately 19.26 miles before converging with the Coosa River southeast of the review area in Wilsonville, Shelby County, Alabama.

Wetland E abuts Stream 4-I; therefore, having a continuous surface connection with 4-I. 4-I then eventually flows into the Coosa River as described above.

Wetland F abuts Stream 4-I; therefore, having a continuous surface connection with 4-I. 4-I then eventually flows into the Coosa River as described above.

Stream 3-E flows for 778 linear feet before converging with Stream 1-I, then flows into the Coosa River as described above. 3-E lacks a relatively permanent flow of water.

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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Stream 5-E flows for 196 linear feet before converging with Stream 4-I, then flows into the Coosa River as described above. 5-E lacks relatively permanent flow of water.

Stream 7-I flows for 703 linear feet before flowing subsurface for approximately 15 to 20 linear feet, then resurfaces and flows into a culvert beneath Bear Creek Road and continuing to meander southwest for 1,308 linear feet to Poplar Branch; Poplar Branch meanders approximately 2.88 miles before converging with North Fork Yellowleaf Creek; North Fork Yellowleaf Creek meanders approximately 8.78 miles before converging with Yellowleaf Creek; Yellowleaf Creek meanders approximately 19.26 miles before converging with the Coosa River southeast of the review area in Wilsonville, Shelby County, Alabama.

Wetland G abuts Stream 7-I; therefore, having a continuous surface connection with 7-I. 7-I then eventually flows into the Coosa River as described above.

Wetland H abuts Stream 7-I; therefore, having a continuous surface connection with 7-I. 7-I then eventually flows into the Coosa River as described above.

Stream 9-I flows for 553 linear feet before flowing subsurface for approximately 75 to 80 linear feet, then resurfaces and flows into a culvert beneath Bear Creek Road and continuing to meander southwest for 1,708 linear feet to Poplar Branch; Poplar Branch meanders approximately 2.88 miles before converging with North Fork Yellowleaf Creek; North Fork Yellowleaf Creek meanders approximately 8.78 miles before converging with Yellowleaf Creek; Yellowleaf Creek meanders approximately 19.26 miles before converging with the Coosa River southeast of the review area in Wilsonville, Shelby County, Alabama.

Wetland I abuts Stream 9-I; therefore, having a continuous surface connection with 9-I. 9-I then eventually flows into the Coosa River as described above.

Wetland J abuts Stream 9-I; therefore, having a continuous surface connection with 9-I. 9-I then eventually flows into the Coosa River as described above.

Stream 8-E and Wetland A are not connected to a TNW, interstate water or the territorial seas.

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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):

Stream 1-I is an RPW that enters the property along the northern boundary of the review area and flows approximately 1,052 linear feet before exiting the southern boundary of the review area and continuing in a southwest direction. Stream 1-I is located at 33.3910, -86.6175. 1-I exhibits a width at the ordinary high water

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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mark (OHWM) of approximately 2-4 feet within the review area. The *North Carolina Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.4.11* was used by the consultant and verified by the Corps to assist with flow regime determination. The resulting score was 27.5, indicating intermittent flow regime, or a relatively permanent water. 1-I is depicted on the attached Figures and identified as '1-I'.

Stream 4-I is an RPW that enters the property in the northwest portion of the review area and flows approximately 927 linear feet before exiting the southern boundary of the review area and continuing in a southwest direction. Stream 4-I is located at 33.3886, -86.6196. 4-I exhibits a width at the OHWM of approximately 4 feet within the review area. The *North Carolina Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.4.11* was used by the consultant and verified by the Corps to assist with flow regime determination. The resulting score was 21.75, indicating intermittent flow regime, or a relatively permanent water. 4-I is depicted on the attached Figures and identified as '4-I'.

Stream 7-I is an RPW that enters the property in the northwest area of the review portion and flows approximately 703 linear feet before exiting the southern boundary of the review area and continuing in a southwest direction. Within the review area, approximately 15 to 20 linear feet of Stream 7-I flows subsurface, during which the tributary loses its bed and bank and OHWM. Both before and after this subsurface section of flow, Stream 7-I flows above ground with visible bed and bank and OHWM. Stream 7-I is located at 33.3871, -86.6209. For all portions that flow above the ground surface, Stream 7-I exhibits a width at the OHWM of 3 feet within the review area. The *North Carolina Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.4.11* was used by the consultant and verified by the Corps to assist with flow regime determination. The resulting score was 24.50, indicating intermittent flow regime, or a relatively permanent water. 7-I is depicted on the attached Figures and identified as '7-I'.

Stream 9-I is an RPW that begins on the property in the northwest portion of the review area and flows approximately 553 linear feet before exiting the southern boundary of the review area and continuing in a southwest direction. Water was observed in the channel during the Corps' site visit. Within the review area, approximately 75 to 80 linear feet of Stream 9-I flows subsurface, while a visible ordinary high water mark remains visible on the surface (vegetation absence, wrack lines, absence of leaf litter). Both before and after the subsurface section of flow, Stream 9-I flows above ground with visible bed and bank and OHWM. Stream 9-I is located at 33.3867, -86.6219. For all portions that flow above the

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ground surface, Stream 9-I exhibits a width at the OHWM of 3 feet within the review area. The *North Carolina Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.4.11* was used by the consultant and verified by the Corps to assist with flow regime determination. The resulting score was 29.25, indicating intermittent flow regime, or a relatively permanent water. 9-I is depicted on the attached Figures and identified as '9-I'.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

Wetland B is a 0.01-acre forested wetland that abuts Stream 1-I, meaning the wetland extends laterally to the bank of 1-I having a continuous connection to 1-I, an RPW. Wetland B is centered at 33.3915, -86.6175. Wetland B is depicted on the attached figures and identified as 'B'. The extent of Wetland B was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland D is a 0.229-acre forested wetland that is adjacent to Stream 1-I, meaning the wetland extends laterally to the bank of 1-I having a continuous connection to 1-I, an RPW. Wetland D is centered at 33.3900, -86.6174. Wetland D is depicted on the attached figures and identified as 'D'. The extent of Wetland D was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland E is a 0.225-acre forested wetland that abuts Stream 4-I, meaning the wetland extends laterally to the bank of 4-I having a continuous connection to 4-I, an RPW. Wetland E is centered at 33.3886, -86.6195. Wetland E is depicted on the attached figures and identified as 'E'. The extent of Wetland E was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland F is a 0.04-acre forested wetland that abuts Stream 4-I, meaning the wetland extends laterally to the bank of 4-I having a continuous connection to 4-I, an RPW. Wetland F is centered at 33.3895, -86.6202. Wetland F is depicted on the attached figures and identified as 'F'. The extent of Wetland F was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers*

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Manual as well as the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0).

Wetland G is a 0.197-acre forested wetland that abuts Stream 7-I, meaning the wetland extends laterally to the bank of 7-I having a continuous connection to 7-I, an RPW. Wetland G is centered at 33.3871, -86.6209. Wetland G is depicted on the attached figures and identified as 'G'. The extent of Wetland G was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland H is a 0.013-acre forested wetland that abuts Stream 7-I, meaning the wetland extends laterally to the bank of 7-I having a continuous connection to 7-I, an RPW. Wetland H is centered at 33.3874, -86.6218. Wetland H is depicted on the attached figures and identified as 'H'. The extent of Wetland H was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland I is a 0.100-acre forested wetland that abuts Stream 9-I, meaning the wetland extends laterally to the bank of 9-I having a continuous connection to 9-I, an RPW. Wetland I is centered at 33.3866, -86.6218. Wetland I is depicted on the attached figures and identified as 'I'. The extent of Wetland F was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

Wetland J is a 0.078-acre forested wetland that abuts Stream 9-I, meaning the wetland extends laterally to the bank of 9-I having a continuous connection to 9-I, an RPW. Wetland J is centered at 33.3860, -86.6213. Wetland J is depicted on the attached figures and identified as 'J'. The extent of Wetland F was delineated pursuant to the *Field Guide for Wetland Delineation, 1987 Corps of Engineers Manual* as well as the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region: (Version 2.0)*.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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- 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).

3-E: 778 linear foot (0.018 acre) ephemeral stream, located at 33.3917,

⁹ 51 FR 41217, November 13, 1986.

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-86.6190; 3-E was determined to be non-jurisdictional based on review of on-site photographs and descriptions provided by the Agent that provided evidence that the tributary is a non-relatively permanent water; the stream does not meet the relatively permanent standard; the feature only contains flow in direct response to precipitation and does not exhibit an ordinary high-water mark; the feature does not have a well-defined channel and the aquatic bed is always above the water table.

5-E: 196 linear foot (0.005 acre) ephemeral stream, located at 33.3898, -86.6205; 5-E was determined to be non-jurisdictional based on review of on-site photographs and descriptions provided by the Agent that provided evidence that the tributary is a non-relatively permanent water; the stream does not meet the relatively permanent standard; the feature only contains flow in direct response to precipitation and does not exhibit an ordinary high-water mark; the feature does not have a well-defined channel and the aquatic bed is always above the water table.

8-E: 218 linear foot (0.005 acre) ephemeral stream, located at 33.3876, -86.6223; 8-E was determined to be non-jurisdictional based on review of on-site photographs and descriptions provided by the Agent that provided evidence that the tributary is a non-relatively permanent water; the stream does not meet the relatively permanent standard; the feature only contains flow in direct response to precipitation and does not exhibit an ordinary high-water mark; the feature does not have a well-defined channel and the aquatic bed is always above the water table.

Wetland A is a 0.067-acre forested wetland with no flow into or out of the wetland and no discrete feature providing a continuous surface connection from the wetland to an RPW, TNW, interstate water, territorial seas, or impoundment of a jurisdictional water. Wetland A is centered at 33.3907, -86.6168.

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. In office evaluation using desktop resources was completed on December 6, 2023. Site Visit conducted on February 1, 2024 with USACE Project Manager [REDACTED] USACE Team Lead [REDACTED] and [REDACTED] representative [REDACTED]
 - b. Figures 01-03 Site Location Map, Aerial Photography Map, and Project Topographic Map; Submitted by [REDACTED]

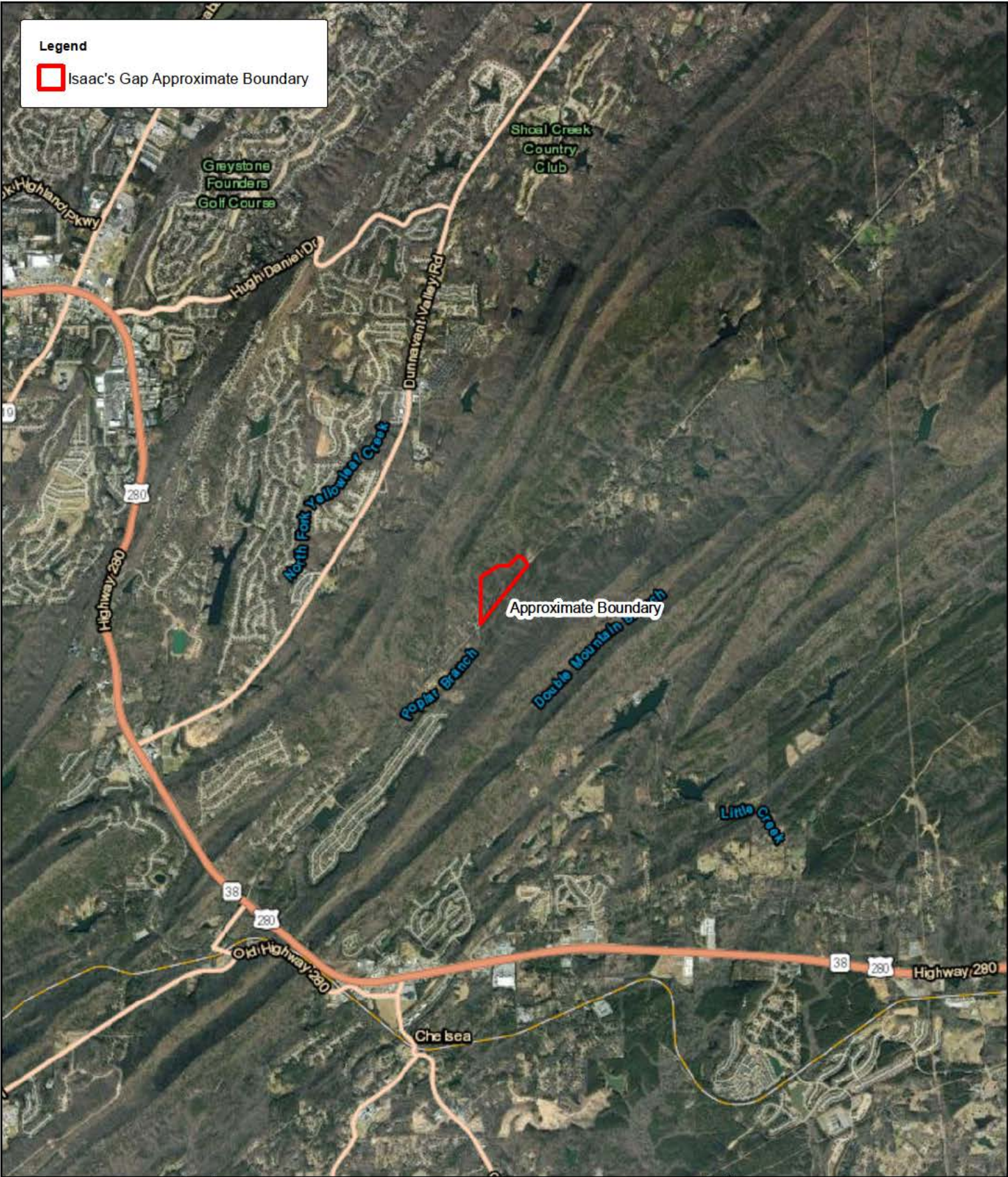
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- c. Figure 04 NRCS Soil Web Survey, Soil Map.
<https://websoilsurvey.nrcs.usda.gov/app/>. Submitted by [REDACTED]
[REDACTED] accessed in August 2021.
- d. Figures 06A-06B Aquatic Resources Location Aerial Maps; Submitted by [REDACTED]
[REDACTED]
- e. On-site photographs submitted by [REDACTED] taken July 21, 2022
- f. [REDACTED] JD request submitted with Nationwide Permit Application dated September 18, 2023.

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.



Isaac's Gap
Shelby County, Alabama

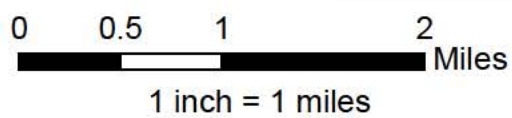


Figure 01
Site Location
Map

Date Created:
June 2022

