



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 18, 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-2023-1145-CMS, 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 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 | Latitude | Longitude | Waters Size | Type Of Aquatic Resource | Geographic Authority |
|--------------------|-----------------|------------------|--------------------|-----------------------------------|-----------------------------|
| E001 | 33.6479 | -88.3101 | 540 FEET | NON-WOTUS-TRIB.NEGATIVE-A5 | None |
| E002 | 33.64951 | -88.31477 | 1600 FEET | NON-JD - RAPANOS.GUIDE - DITCH | None |
| E003 | 33.65069 | -88.31854 | 193 FEET | NON-WOTUS-TRIB.NEGATIVE-A5 | None |
| E004 | 33.64574 | -88.3173 | 936 FEET | NON-JD - RAPANOS.GUIDE - DITCH | None |
| P001 | 33.64634 | -88.3183 | .25 ACRES | NON-JD - PREAMBLE - ART.LAKE.POND | None |
| P002 | 33.65004 | -88.318 | 1.87 ACRES | NON-JD - PREAMBLE - ART.LAKE.POND | None |
| S001 | 33.6479 | -88.3101 | 532 FEET | A5.TRIB-404 | Section 404 |
| S002 | 33.65146 | -88.31843 | 1119 FEET | A5.TRIB-404 | Section 404 |
| W001 | 33.64803 | -88.31448 | .02 ACRES | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| W002 | 33.64643 | -88.31507 | .01 ACRES | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| W003 | 33.64638 | -88.31816 | .01 ACRES | NON-JD – PREAMBLE ART LAKE POND | None |
| W004 | 33.65044 | -88.3178 | .02 ACRES | NON-JD – PREAMBLE ART LAKE POND | 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)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- e. November 15, 2023 presentation "Updates for Tribes and States on 'Waters of the United States'" by USEPA and Department of the Army (<https://www.epa.gov/wotus/2023-rule-revised-definition-waters-united-states-training-presentations>)
- f. Revised Definition of "Waters of the United States", Federal Register Vol. 88, No. 11, January 18, 2023

3. REVIEW AREA. The review area encompasses approximately 120 acres of land, which is comprised of a former TVA combustion turbine site that was dismantled in 2007, an adjacent area that is a TVA substation currently in operation, and some undeveloped acreage. The review area is located in New Caledonia, Lowndes County, Mississippi and is centered at latitude 33.6473359, longitude -88.3140115.

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 aquatic resources are connected is Luxapallila Creek. Luxapallila Creek is on Mobile District's Section 10 waters list. Section 10 waters are a subset of TNWs. ⁶ Luxapallila Creek is located approximately 6 direct miles south of the review area.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES 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.

S002 is a relatively permanent water that flows from the western property boundary a distance of approximately 2 miles to Howard Creek. Howard Creek then flows approximately 5 miles to Luxapallila Creek, a TNW.

E002 flows into P002 and W004 is adjacent to P002 and within the ordinary high water mark (OHWM) of P002. P002 has a discharge pipe under Caldwell Road that takes flow into a small riprap lined catchment before discharging to S002 (RPW) outside of the review area, which flows approximately 2 miles to Howard Creek. From that point Howard Creek flows approximately 5 miles to Luxapallila Creek, a TNW.

E003 flows for approximately 193 feet into S002 (RPW) outside of the review area. S002 flows approximately 2 miles to Howard Creek. From that point Howard Creek flows approximately 5 miles to Luxapallila Creek, a TNW.

E001 (nonRPW) flows into S001 (RPW) in the review area. S001 flows into a culvert under Seed Tick Road and continues approximately 1,800 linear feet to Cooper Creek, which then flows approximately 5 miles to Yellow Creek, which flows approximately 1.6 miles to Luxapallila Creek, a TNW.

E004 flows into P001 and W003 is below the OHWM of P001. An outfall pipe was not observed in P001, but approximately 150 north of P001 there appears to be a storm sewer inlet where during times of high flow water from P001 could enter and the storm sewer appears to discharge on the west side of Caldwell Road into a small riprap lined catchment which would discharge water offsite to S002 which flows approximately 2 miles to Howard Creek. Howard Creek then flows approximately 5 miles to Luxapallila Creek, a TNW.

W001 and W002 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 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.

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): **S001** is a relatively permanent water that exhibits perennial flow. This determination was made based on the presence of baseflow during mild drought conditions (February 29, 2024), iron oxidizing bacteria, hydric soil indicators observed in soil sample taken at the base of the bank, well defined bed and banks. S001 flows into a culvert under Seed Tick Road and continues approximately 1,800 linear feet to Cooper Creek, which then flows approximately 5 miles to Yellow Creek, which flows approximately 1.6 miles to Luxapallila Creek, a TNW.

S002 is a relatively permanent water that exhibits perennial flow. This determination was made based on the presence of baseflow during mild drought conditions (February 29, 2024), well defined bed and banks, fish observed in pools (April 2023). S002 flows from the western property boundary a distance of approximately 2 miles to Howard Creek. Howard Creek then flows approximately 5 miles to Luxapallila Creek, a TNW.

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.

P001 is a 0.25-acre pond that was dug in uplands when the TVA facility was constructed to collect stormwater runoff, which could also be defined as a settling basin to allow for solids to settle out before discharging into downstream waters. In accordance with the preamble to the 1986 regulations, 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 are generally not jurisdictional. Because P001 was built in uplands and is a settling pond it is not a water of the U.S. **W003** is a 0.01-acre emergent wetland that formed within the confines of P001. In accordance with the preamble to the Revised Definition of “Waters of the United States” (Federal Register Vol. 88, No. 11, January 18, 2023, page 3105), the agencies, “find that wetlands that develop entirely within the confines of an excluded feature are not jurisdictional. This interpretation is consistent with the agencies’ longstanding approach to this issue and with the agencies’ rationale for excluding these features.” Since W003 developed within the confines of non-jurisdictional P001, W003 is not jurisdictional.

P002 is a 1.87-acre pond that was dug in uplands when the TVA facility was constructed to collect stormwater runoff, which could also be defined as a settling basin to allow for solids to settle out before discharging into downstream waters. In accordance with the preamble to the 1986 regulations, 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 are generally not jurisdictional. Because P002 was built in uplands and is a settling pond it is not a water of the U.S. **W004** is a 0.02-acre emergent wetland that formed within the confines of P002. In accordance with the preamble to the Revised Definition of “Waters of the United States” (Federal Register Vol. 88, No. 11, January 18, 2023, page 3105), the agencies, “find that wetlands that develop entirely within the confines of an excluded feature are not jurisdictional. This interpretation is consistent with the agencies’ longstanding approach to this issue and with the agencies’ rationale for excluding these features.” Since W004 developed within the confines of non-jurisdictional P002, W004 is not jurisdictional.

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.

E002 is a 1,600 linear foot ditch dug in uplands, draining only uplands, with less than a relatively permanent flow of water. E002 appears to have been constructed when the TVA facility was built to direct stormwater runoff to P002. It is a relatively straight feature with uniform width and riprap lining portions of the channel. E002 sits above the water table and only flows in response to precipitation events. In accordance with the 2008 *Rapanos* guidance, ditches dug in uplands, draining only uplands with less than a relatively permanent flow of water are not jurisdictional waters of the U.S.

E004 is a 936-foot-long ditch dug in uplands, draining only uplands, with less than a relatively permanent flow of water. E004 appears to have been constructed when the TVA facility was built to direct stormwater runoff to P001. It is a relatively straight feature with uniform width and riprap lining the majority of the channel. E002 sits above the water table and only flows in response to precipitation events. The start of the channel holds water (as evidenced in photos from the Feb. 29, 2024 site visit) but it appears to sit lower in elevation than the downgradient portion of the ditch, so the water sits in a bowl. The remainder of the channel was dry during the Corps’ site visit in February 2024. There were quite a bit of pine needles in the channel indicating lack of regular or sustained flow. In accordance with the 2008 *Rapanos* guidance, ditches dug in uplands, draining only uplands with less than a relatively permanent flow of water are not jurisdictional waters of the U.S.

- 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).

E001 is a 540-foot-long non-relatively permanent water (non-RPW). E001 sits above the water table and only flows in response to rainfall events. E001 exhibited weak bed and banks, leaf litter in the channel, lack of sediment sorting, and lack of hydric soil indicators at the toe of bank. Because E001 is a non-RPW it is not a jurisdictional water.

E003 is a 193-foot-long non-relatively permanent water (non-RPW). E003 sits above the water table and only flows in response to rainfall events. E003 exhibited weak bed and banks, leaf litter in the channel, upland vegetation growing in the channel, lack of sediment sorting, and lack of hydric soil indicators at the toe of bank. Because E003 is a non-RPW it is not a jurisdictional water.

W001 is a 0.02-acre emergent wetland that formed in a ditch that appears to have been created when the TVA facility was constructed. W001 exhibited wetland hydrology, hydrophytic vegetation, and hydric soil indicators. W001 is surrounded by uplands and does not have a continuous surface connection to a TNW, RPW, territorial seas, interstate water or impoundment of a jurisdictional water.

W002 is a 0.01-acre emergent wetland that formed in a ditch that appears to have been created when the TVA facility was constructed. W002 exhibited wetland hydrology, hydrophytic vegetation, and hydric soil indicators. W002 is surrounded by uplands and does not have a continuous surface connection to a TNW, RPW, territorial seas, interstate water or impoundment of a jurisdictional water.

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. Corps project manager’s site visit February 29, 2024.

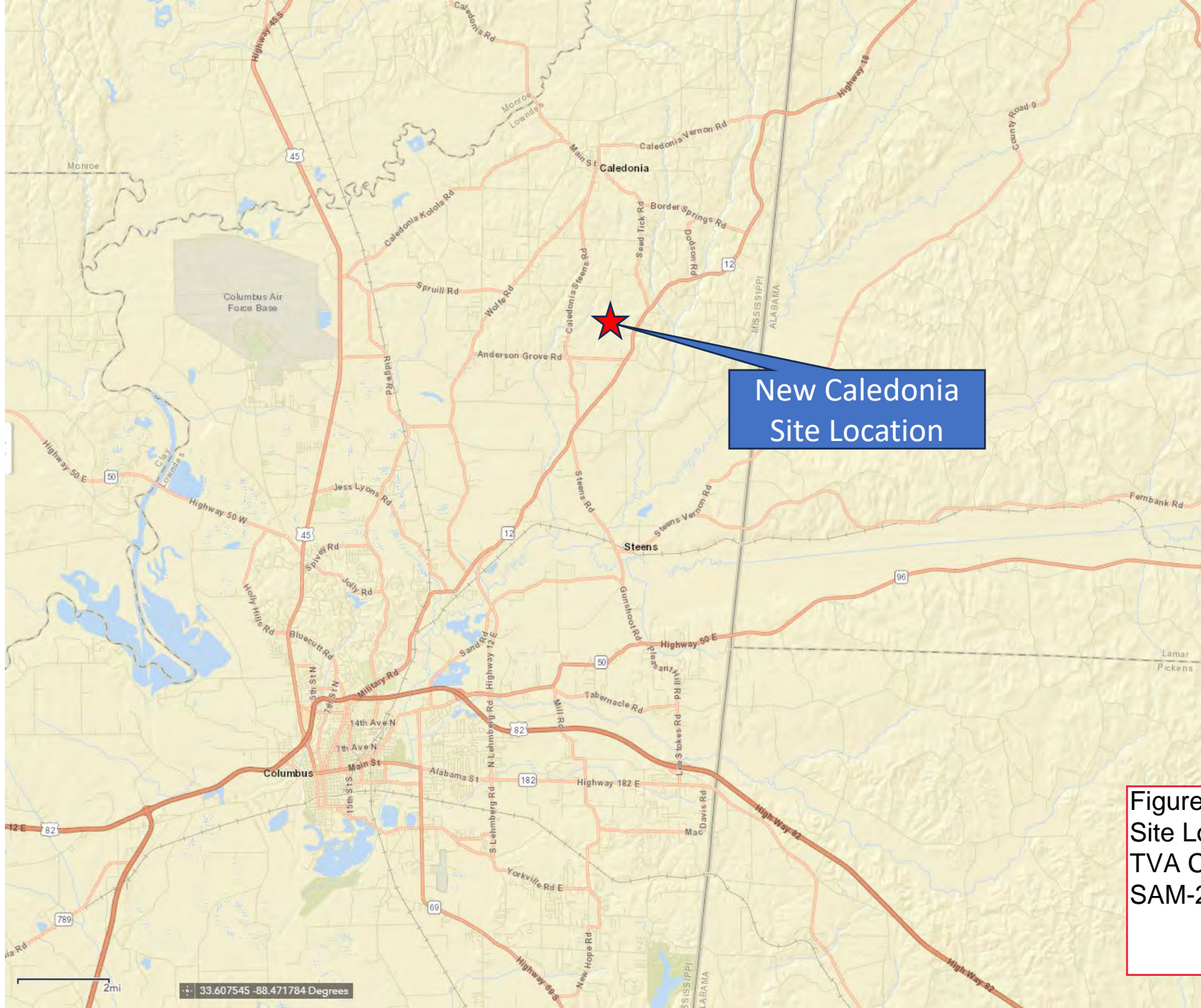
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- b. TVA's JD request dated December 8, 2023 and updated delineation figure and aquatic resource table received March 12, 2024.
- c. Antecedent Precipitation Tool
- d. USACE National Regulatory Viewer (NRV) accessed April 2, 4, 9 and 10, 2024.
- e. Google Earth Pro accessed April 2, 4, 9 and 10, 2024.
- f. Shape files obtained from TVA – project boundary, streams, wetlands, ponds

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.



New Caledonia
Site Location

Figure 1
Site Locator
TVA Caledonia site
SAM-2023-1145-CMS

2mi

33.607545 -88.471784 Degrees

Proposed TVA New Caledonia Site

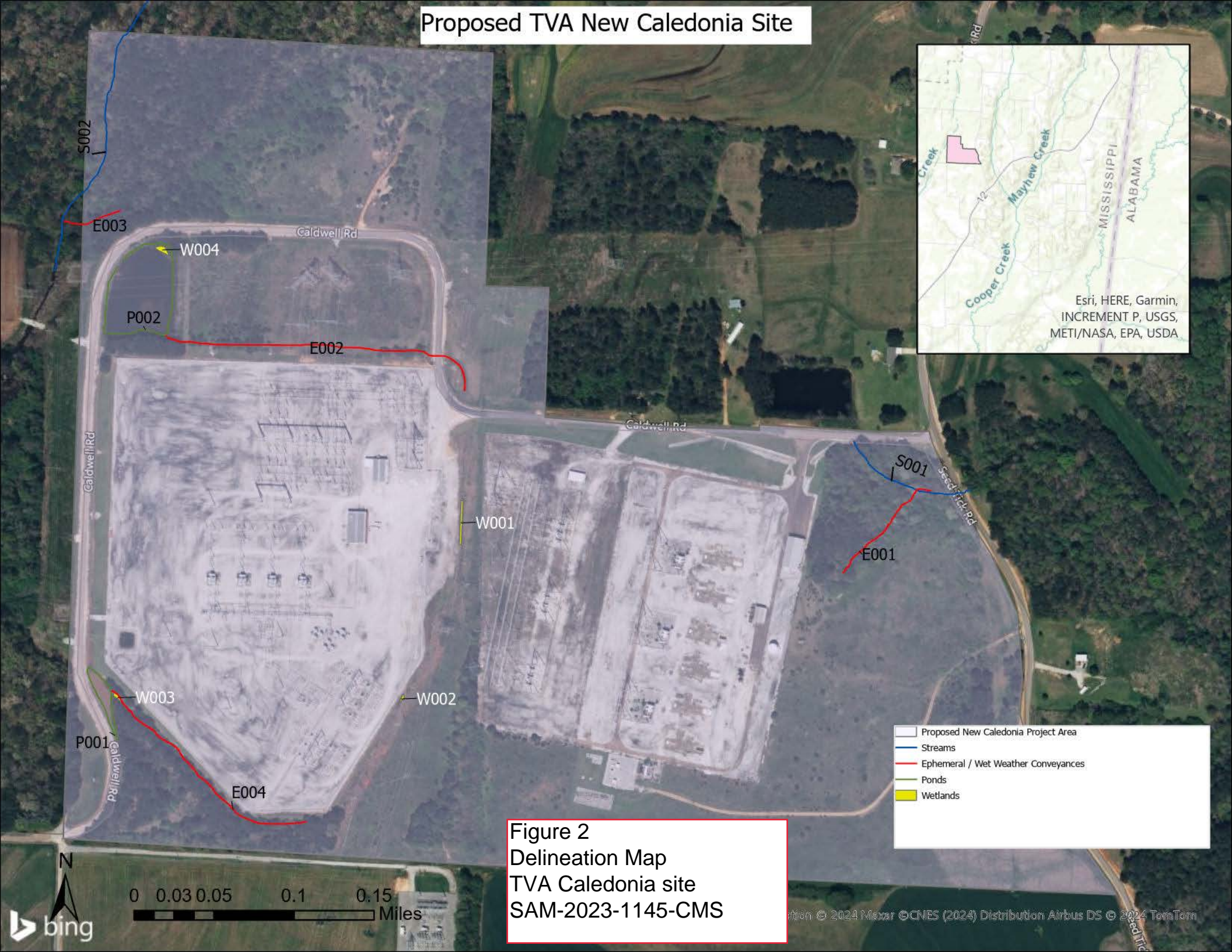


Figure 2
Delineation Map
TVA Caledonia site
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