



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
109 ST JOSEPH STREET
MOBILE, ALABAMA 36602

CESAM-RD-A

06 March 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-2024-00143-MDJ, 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable 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. **Man-made Pond 1 (PND-1):** Non-WOTUS, non-jurisdictional, intrastate man-made pond, approximately 0.441 acre in size.
 - ii. **Man-made Pond 2 (PND-2):** Non-WOTUS, man-made pond, approximately 0.063 acre in size. PND-2 is a non-jurisdictional preamble artificial lake or pond dug solely in uplands.
 - iii. **Man-made Pond 3 (PND-3):** Non-WOTUS, man-made pond, approximately 0.067 acre in size. PND-3 is a non-jurisdictional preamble artificial lake or pond dug solely in uplands.
 - iv. **Wetland 1 (W-1):** Non-jurisdictional wetland approximately 0.038 acre in area, which lacks a continuous surface connection to a jurisdictional water.
 - v. **Wetland 2 (W-2):** Non-jurisdictional wetland approximately 0.01 acre in area, which lacks a continuous surface connection to a jurisdictional water.
 - vi. **Man-made Ditch (D-1):** A non-jurisdictional ditch excavated in uplands and draining uplands which does not carry a relatively permanent flow of water and is approximately 1,438 linear feet long.

Name	Latitude	Longitude	Area	Type	Geo. Auth.
PND-1	30.363267	-87.677928	0.441	non-WOTUS intrastate pond	None
PND-2	30.362776	-87.677853	0.063	Non-JD Preamble Water	None
PND-3	30.362749	-87.677192	0.067	Non-JD Preamble Water	None
W-1	30.362109	-87.679119	0.038	non-WOTUS, non-adj wetland	None
W-2	30.362786	-87.676825	0.010	non-WOTUS, non-adj wetland	None
D-1	30.362888	-87.677799	1,438 linear feet	Non-JD Rapanos Guide Ditch	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. 651 (2023)
3. REVIEW AREA. The Review area consists of approximately 30 acres located on South Juniper Street east of South McKenzie Street; whose approximate center point is located at Latitude 30.364123, Longitude -87.676927; within Section 9, of Township 8 South, Range 4 East; in Foley, Baldwin County, Alabama. The review area is bound by the new South Juniper Street Extension to the north and west, the Collinwood subdivision to the south, and agricultural fields to the east.

The review area is comprised of two parcels, parcel Identification numbers (PIN) 2608 and 231972, totaling approximately 30 acres. PIN 2608 is more northerly and totals 17 acres, while PIN 231972 is more southerly and totals approximately 13 acres. PND-1 is situated on PIN 2608 while all other resources are located on PIN 231972. The site appears to have been used for agricultural purposes and planted in row crops until 2014 and left fallow until present time.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW, interstate water, or territorial sea is Bon Secour River which is approximately 1.88 miles to the south and west of the review area which becomes a Section 10 Water at approximately river mile 4.5. Bon Secour River is on the Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs. See attached mapping.⁶
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.

Man-made Pond 1 (PND-1): PND-1 lacks both inflow and outflow and therefore does not have a flow path to a TNW, interstate water, or territorial sea.

Man-made Pond 2 and 3 (PND-2, PND-3): As evidenced in the attached Appendix (photolog), both PND-2 and PND-3 lack both inflow and outflow and therefore do not have a flow path to a TNW, interstate water, or territorial sea. Both man-made ponds are separated from D-1 by a large upland earthen berm lacking any evidence of seepage or hydrological connection. See cross-section in attached Appendix.

Wetland 1 (W-1): As evidenced in the attached Appendix (photolog), W-1 is a depressional feature which lacks both inflow and outflow and therefore does not have a flow path to a TNW, interstate water, or territorial sea. W-1 is separated from D-1 by a large upland earthen berm lacking any evidence of seepage or hydrological connection. See cross-section in attached Appendix.

Wetland 2 (W-2): As evidenced in the attached Appendix (photolog), W-2 is a depressional feature which lacks both inflow and outflow and therefore does not have a flow path to a TNW, interstate water, or territorial sea.

Ditch (D-1): As evidenced in the attached Appendix, D-1 is an upland ditch which does not carry a relatively permanent flow of water. Any flow from D-1 presumably flows to the west and then south, through a series of ditch and swale features which also do not carry a relatively permanent flow of water. The flow terminates in the Bon Secour River.

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

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.

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

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.

Man-made Pond 2 (PND-2): PND-2 is an artificially excavated pond created in uplands, surrounded in its entirety by uplands, and exhibits no inflow or outflow. This pond was likely created for agricultural / livestock purposes or as a settling basin. PND-2 is approximately 0.063 acre in area. According to the preamble to the 1986 regulations, the agencies generally do not consider 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,

⁹ 51 FR 41217, November 13, 1986.

settling basins, or rice growing to be waters of the U.S. Therefore, PND-2 is not jurisdictional.

Man-made Pond 3 (PND-3): PND-3 is an artificially excavated pond created in uplands, surrounded in its entirety by uplands, and exhibits no inflow or outflow. This pond was likely created for agricultural / livestock purposes or as a settling basin. PND-3 is approximately 0.067 acre. According to the preamble to the 1986 regulations, the agencies generally do not consider 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 to be waters of the U.S. Therefore, PND-2 is not jurisdictional.

- 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.

D-1 – is located along the parcel line between the two parcels in question – parcel 2608 to the north and parcel 231972 to the south. D-1 is a ditch that was excavated wholly in and draining only uplands with less than a relatively permanent flow of water and therefore it is not jurisdictional. The ditch does not carry a relatively permanent flow of water and is full of leaf litter and debris with no sign of flow.

- 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.

Man-made Pond 1 (PND-1): PND-1 is small 0.441-acre man-made pond dug in a natural depressional area. It was created in Grady soils, which are rated hydric by the NRCS; therefore, the Corps cannot assume they were created in uplands; therefore, it does not meet a potential preamble water. There is no evidence of discharge from PND-1 nor evidence of flow to nor from PND-1. PND-1 appears to be primarily precipitation fed and acts as a stormwater feature for the immediate surrounding area due to geomorphic positioning. PND-1 does not support a link to interstate or foreign commerce. PND-1 is not known to support interstate or foreign commerce or known to be used by interstate or foreign travelers for recreation or other purposes. Additionally, PND-1 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 all of these reasons, PND-1 does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a) and is not jurisdictional under the Clean Water Act.

- 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).

Wetland 1 (W-1): W-1 is an approximately 0.038-acre non-tidal palustrine depressional wetland that is completely surrounded by uplands. There is no channel flowing into or out of W-1. For these reasons, W-1 lacks a continuous surface connection to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W-1 is not jurisdictional.

Wetland 2 (W-2): W-2 is an approximately 0.01-acre non-tidal palustrine depressional wetland that is completely surrounded by uplands. There is no channel flowing into or out of W-2. For these reasons, W-2 lacks a continuous surface connection to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, W-2 is not jurisdictional.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-00143-MDJ

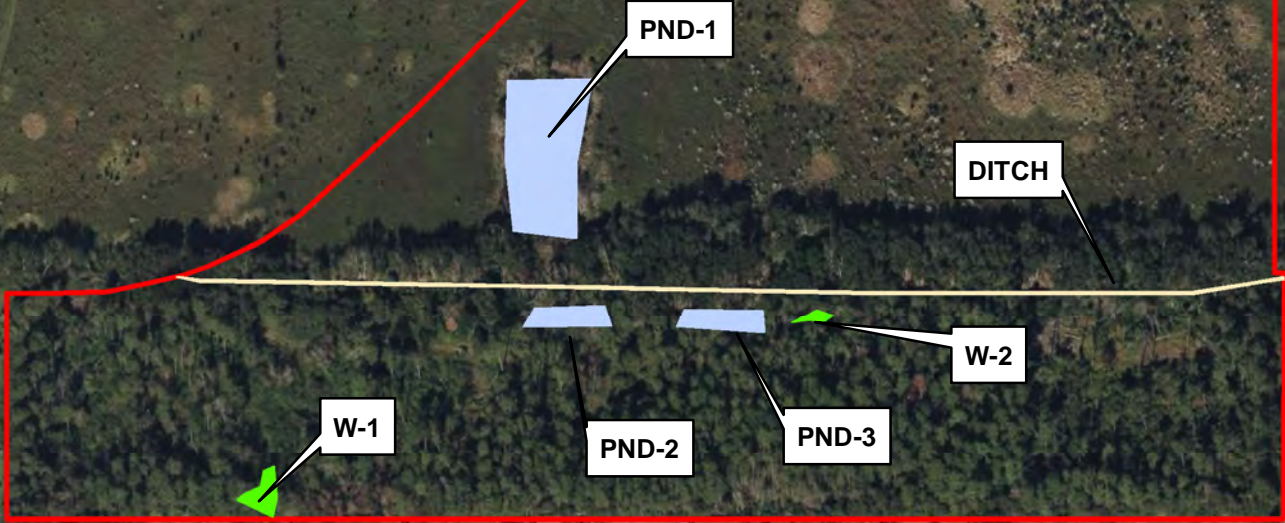
- a. On 18 June 2024, a site visit was conducted as evidenced in the photolog included in the administrative record. A second site visit was conducted on 26 June 2024. See Attached Photo Log.
- b. Applicant provided wetland delineation report entitled "*Wetland Delineation Report: Riviera & Woerner Tracts (30 Acres) Juniper Street, Foley Alabama 36535 Parcel ID: 2608 & 231972*" Dated January 2024.
- c. Office Evaluations were conducted periodically from February 2024 to October 2024 via inspection of mapping layer accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey topographical mapping, the National Hydrological Dataset, 3DEP Elevation Modeling, 3DEP Hillshade Modeling, Nation Oceanographic and Atmospheric (NOAA) LiDAR data, Google Earth Pro historic aerial imagery, national Resource Conservation Service (NRCS) soil mapping, and the U.S. Fish and Wildlife Service (USFWS) Nation Wetland Inventory (NWI) Mapping.

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.

ID	AC
W-1	0.038
W-2	0.010
Wetland Total: 0.048	
PND-1	0.441
PND-2	0.063
PND-3	0.067
Pond Total: 0.571	
Ditch	0.13 AC
	1,438 LF

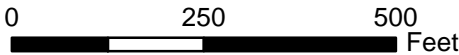
ALL FEATURES ASSUMED TO BE NON-JURISDICTIONAL OR ISOLATED



Legend

- Riviera and Woerner Tracts (30 AC)
- Ditch
- Pond
- Wetland

WETLAND BOUNDARIES ARE NOT OFFICIAL UNTIL FINAL VERIFICATION IS RECEIVED BY THE U.S. ARMY CORPS OF ENGINEERS





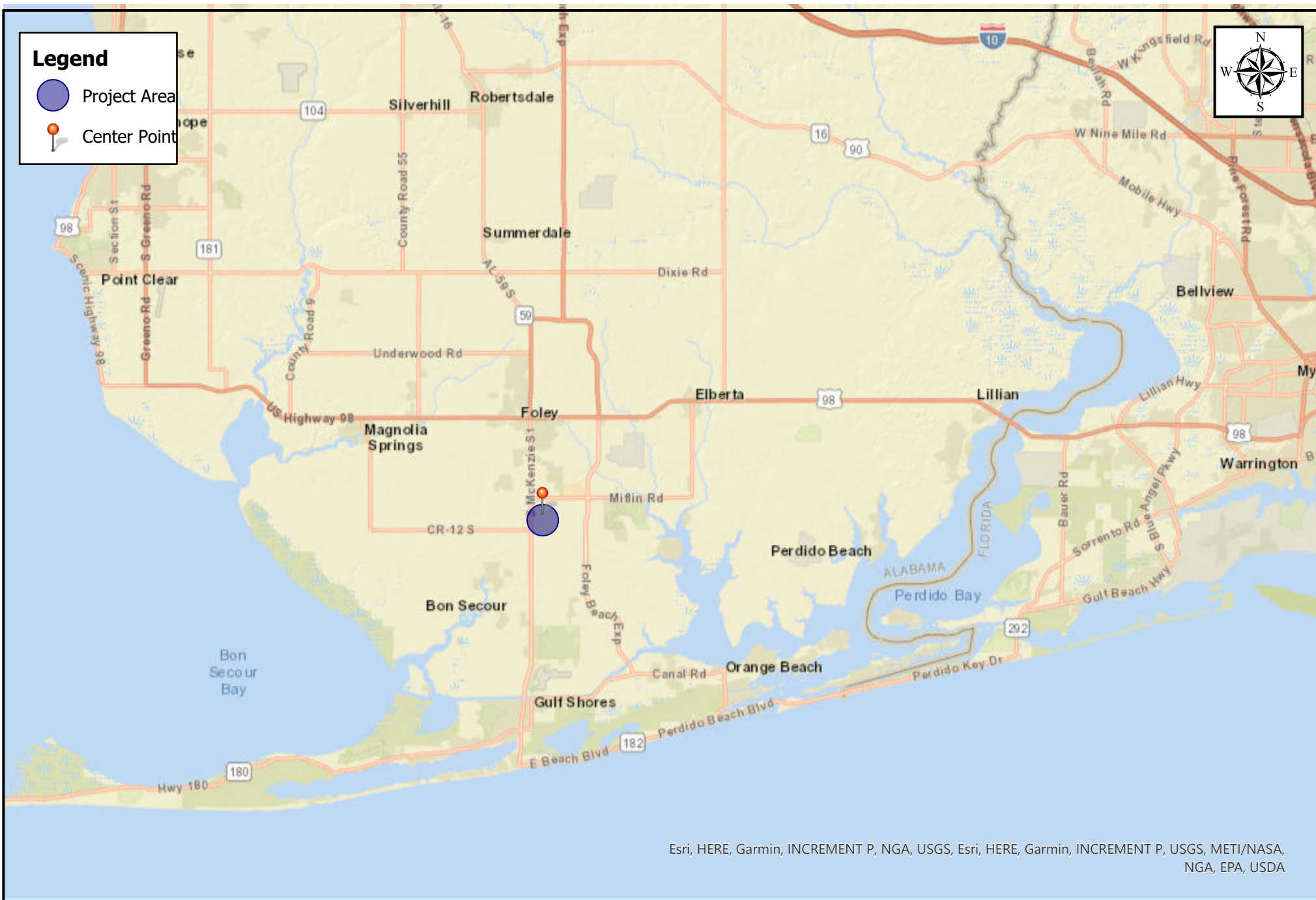
1" = 250'

Note: This map is not intended for construction.

Figure 6: Wetland & Stream ID
Wetland Delineation & Biological Assessment
UPC Development
Riviera & Woerner Tracts
Foley, Baldwin County, AL
Proj No.: 1201775

Legend

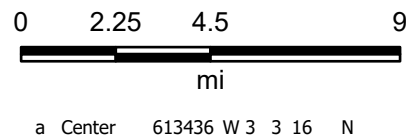
-  Project Area
-  Center Point



Esri, HERE, Garmin, INCREMENT P, NGA, USGS, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, NGA, EPA, USDA



Department of the Army //
SAM-2024-00143-MDJ // Proximity
Mapping



Map Created by: M. Derek Jacobs
Date: 10/22/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere