



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT  
POST OFFICE BOX 2288  
MOBILE, ALABAMA 36628

CESAM-RD-A

07 JUL 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),<sup>1</sup>  
SAM-2024-00144-LHL, MFR 1 of 1<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-00144-LHL

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. D1 – located at 30.456178, -87.664354, is a relatively permanent, jurisdictional drain.
  - ii. Wetland 1- located at 30.456118, -87.66418, is an adjacent wetland that is jurisdictional.
  - iii. Wetland 2 – located 30.451283, -87.665385, is a non-adjacent wetland that is non-jurisdictional.
  - iv. Wetland 3 – located at 30.451203, -87.659748, is a non-adjacent wetland that is non-jurisdictional.
  - v. D2 – located at 30.451662, -87.655267, is a non-relatively permanent, non-jurisdictional upland drain.
  - vi. Wetland 4 – located at 30.451176, -87.655363, is a non-adjacent wetland that is 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. 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, 143 S. Ct. 1322 (2023)

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-00144-LHL

3. REVIEW AREA. The review area is a rectangular shaped parcel of property that is approximately 223 acres in size and is bounded by County Road 28 to the north, Foley Beach Express to the south and Baldwin Beach Express to the west. The parcel is undeveloped farmland that is located in a farming community. Specifically, the site is located at 30.455296, -87.662113, within Section 10, Township 7 South, Range 4 East, Foley, Baldwin County, Alabama.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

Overall, the parcel is located approximately 6 miles to the northwest of Wolf Bay. Wolf Bay is on the Mobile District's Section 10 waters list and is therefore a TNW.

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

Water from the resources located on the subject parcel flow approximately 2 miles to the southeast to enter Sandy Creek. From there, flow takes a southerly direction and travels approximately 5 miles to Wolf Bay.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> 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

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<sup>6</sup> 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.

<sup>7</sup> 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.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-00144-LHL

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):

D1 is a relatively permanent, jurisdictional tributary that is approximately 4,382 linear feet in length. It enters the site through a culvert from the northwest and exits the site to the south through a culvert under Foley Beach Expressway.

According to the consultant, D1 contained hydric soils and had an ordinary high water (OHW) mark during the consultant's field work February 21-24, 2022. The tributary also contained water at the time the consultant performed the investigation. Preliminary review of the information provided by the web-based water budget interactive modeling program revealed that, for the month of February 2022, there was no deficit or unmet atmospheric demand for moisture which was reflective of the fact there was no change in soil moisture from the end of January to February of 2022. This data supports the observation that the consultant made regarding water in the tributary during their inspection in February of 2022. Furthermore, results from the Antecedent Precipitation Tool (APT) reveal that at the time of the consultant's site visit, which was conducted during the wet season, the area was experiencing drier than normal conditions and the area was in a moderate drought. The observation of water in the channel while the area was experiencing a drought and drier than normal conditions further supports the determination that the feature has relatively permanent flow regime.

Upon inspection by USACE on March 28, 2024, it was noted that the tributary featured bed and banks and did not exhibit all the criteria that was needed to constitute an upland drain, i.e. excavated wholly in uplands, draining only uplands, with less than a relatively permanent flow of water. D1 was created in a wetland, drains wetlands, and exhibits a relatively permanent flow of water.

Review of the APT tool at the time of USACE's inspection, indicated that, according to the Palmer Drought Severity Index (PDSI), the area was having moderate drought conditions even though the 30-day rolling total of rainfall was nine inches above the 30-year normal range at the date of USACE's inspection. This data explains the lack of water in the drain at the time of USACE's inspection.

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

g. Adjacent wetlands (a)(7):

Wetland 1, which is approximately 2 acres in size, is an adjacent wetland that is jurisdictional. This wetland feature is located on both sides of D1, a relatively permanent jurisdictional tributary, and consists of poorly drained sandy loam that exhibited a high-water table with a thick dark surface. Hydrology present consisted of drift deposits, oxidized rhizospheres along living roots and algal mats with the presence of Chinese Tallow (*Triadica sebifera*), Swamp Maple (*Acer rubrum*), and Black Willow (*Salix nigra*). Wetland 1 abuts D1, a relatively permanent tributary, and therefore has a continuous surface connection to D1 making it jurisdictional.

## 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").<sup>8</sup> 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

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<sup>8</sup> 51 FR 41217, November 13, 1986.

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).

Wetland 2, which is approximately 1 acre in size, is non-adjacent, non-jurisdictional wetland that features a sandy soil that contains dark redox, thick dark surface, inundation visible on aerial imagery, a thick muck surface, and hydrotropic vegetation. This area is surrounded by uplands and does not have a continuous surface connection to a TNW, territorial seas, interstate water, relatively permanent tributary or jurisdictional impoundment; therefore, Wetland 2 is not jurisdictional.

Wetland 3, which is approximately 0.26 acre in size, is a non-adjacent, non-jurisdictional wetland that features a poorly drained sandy loam that consists of coated grains, a thick dark surface, saturation, algal mats, inundation visible on aerial imagery, and hydrotropic species such as Chinese Tallow (*Triadica sebifera*). This area is surrounded by uplands and does not have a continuous surface connection to a TNW, territorial seas, interstate water, relatively permanent tributary or jurisdictional impoundment; therefore, Wetland 3 is not jurisdictional.

D2 is a non-relatively permanent tributary. This feature does not exhibit continuous bed or banks and lacks hydrophytic vegetation and an OHW mark. Because D2 exhibits non-relatively permanent flow it is not jurisdictional.

CESAM-RD-A

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023), SAM-2024-00144-LHL

Wetland 4, which is approximately 1.2 acre in size, is a non-adjacent, non-jurisdictional wetland that features a sandy soil that has a dark redox, thick dark surface, water marks, and hydrotropic vegetation. This area is located immediately adjacent to D2, a non-relatively permanent, non-jurisdictional tributary; therefore, Wetland 4 does not have a continuous surface connection to a TNW, territorial seas, interstate water, relatively permanent tributary or jurisdictional impoundment and 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.

a. USACE site visit March 28, 2024

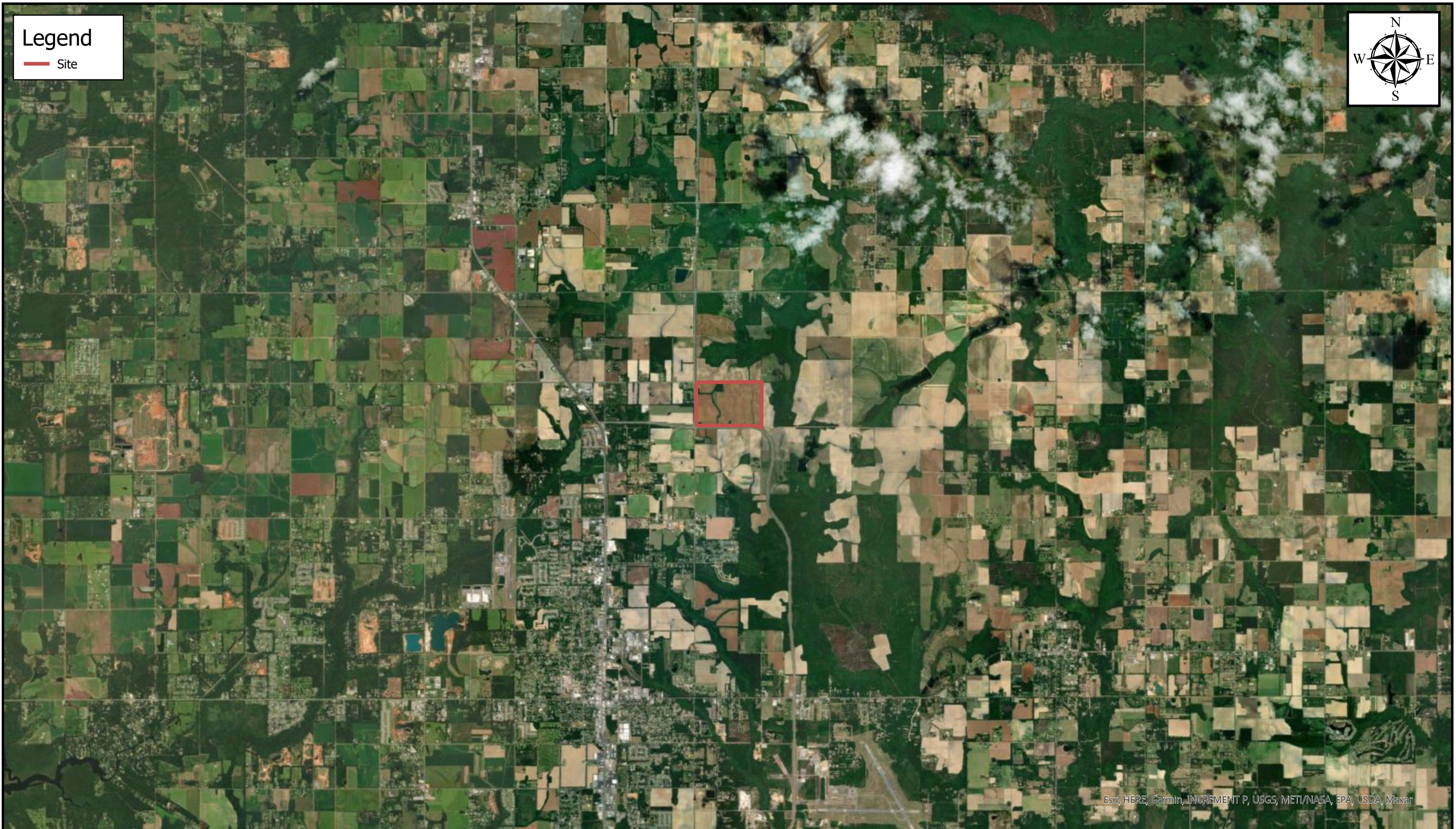
b. National Regulatory Viewer – USGS Hill Shade topographic map accessed on 3/28/2024, 3D Digital elevation model accessed on 3/28/2024, LiDar accessed on 6/26/2025.

10. OTHER SUPPORTING INFORMATION.

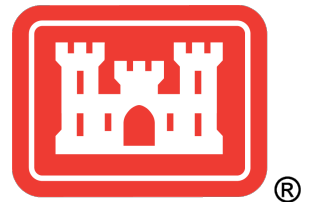
“Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of ‘Continuous Surface Connection’ Under the Definition of ‘Waters of the United States’ Under the Clean Water Act”, March 12, 2025.

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.

**Legend**  
— Site

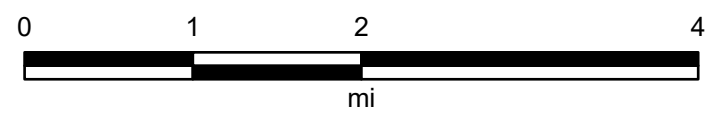


Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA, Maxar



**SAM-2024-00144-LHL**

Aerial Photograph



Map Center: 87.660151°W 30.45244°N

Map Created by: Leslie Lott

Date: 3/28/2024

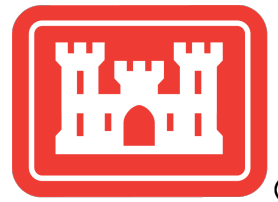
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere

**Legend**

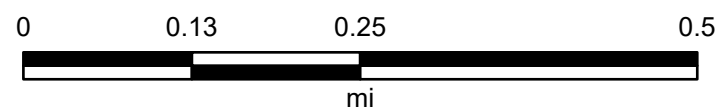
- Culvert
- Site
- Drains
- Wetlands



Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft



**SAM-2024-00144-LHL**  
Resource Map



Map Center: 87.659213°W 30.453788°N

Map Created by: Leslie Hiles Lott

Date: 6/26/2025

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere