



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

13 December 2024

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-2024-00305-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 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. Pond 1; non-jurisdictional pond.
 - ii. Pond 2; non-jurisdictional pond.

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. 651 (2023)
- f. 2003 SWANCC guidance

3. REVIEW AREA. The review area for this AJD is limited to the features identified as Pond 1 and Pond 2 and is situated within a 24.2-acre tract of land south of Poplar Springs Road and west of Busby Road in unincorporated Walker County, Alabama, at Latitude 33.979263, Longitude -87.444474. The attached figures depict the review area.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

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CONNECTED. N/A. Pond 1 and Pond 2 are not connected to a TNW, interstate water, or territorial sea.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A. Pond 1 and Pond 2 are not connected to a TNW, interstate water, or the 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. 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

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.

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.

- 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. 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*.

⁹ 51 FR 41217, November 13, 1986.

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Pond 1 is a 3.45-acre pond on the property that was created from historic, pre-SMCRA coal mining operations. Pond 1 is located at latitude 33.977890, longitude -87.444967. During the previous mining activities at the site, coal was excavated from an upland area, and the area was left unreclaimed which resulted in the formation of a pond at the base of the highwall that is inundated year-round. The pond is surrounded by uplands. There were no streams flowing into or out of the pond.

Pond 2 is a 0.21-acre pond on the property that was created from historic, pre-SMCRA coal mining operations. Pond 2 is located at latitude 33.978053, longitude -87.444850. During the previous mining activities at the site, coal was excavated from an upland area, and the area was left unreclaimed which resulted in the formation of a pond at the base of the highwall that is inundated year-round. The pond is surrounded by uplands. There were no streams flowing into or out of the pond.

Pursuant to the preamble to the Final 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the US. See preamble 328.3 Definitions (e), which states the Corps generally does not consider the following water to be waters of the U.S. : "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a))." The operation is abandoned; therefore, further evaluation is required to determine if the abandoned pits are waters of the U.S. Pond 1 and Pond 2 do not meet any of the jurisdictional categories of waters of the U.S., nor do they meet the criteria to be generally non-jurisdictional under the pre-2015 regime and the preamble to the 1986 regulations; therefore, the ponds will be reviewed pursuant to paragraph (a)(3) of 33 CFR 328.3 or "other" waters under the pre-2015 regulations (Memorandum on Evaluating Jurisdiction for LRL-2023-00466, February 7, 2024). Pond 1 and Pond 2 do not support a link to interstate or foreign commerce. They are not known to support interstate or foreign commerce or known to be used by interstate or foreign travelers for recreation or other purposes. Additionally, Pond 1 and Pond 2 do 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, Pond 1 and Pond 2 do not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a) and are 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

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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). N/A.

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 October 24, 2024.
- b. Applicant's delineation report dated June 5, 2024, and additional information and maps submitted on July 25, 2024.
- c. Antecedent Precipitation Tool accessed October 24, 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 October 24, 2024.
- e. USGS National Map at <https://apps.nationalmap.gov/viewer/>. Accessed on October 24, 2024.

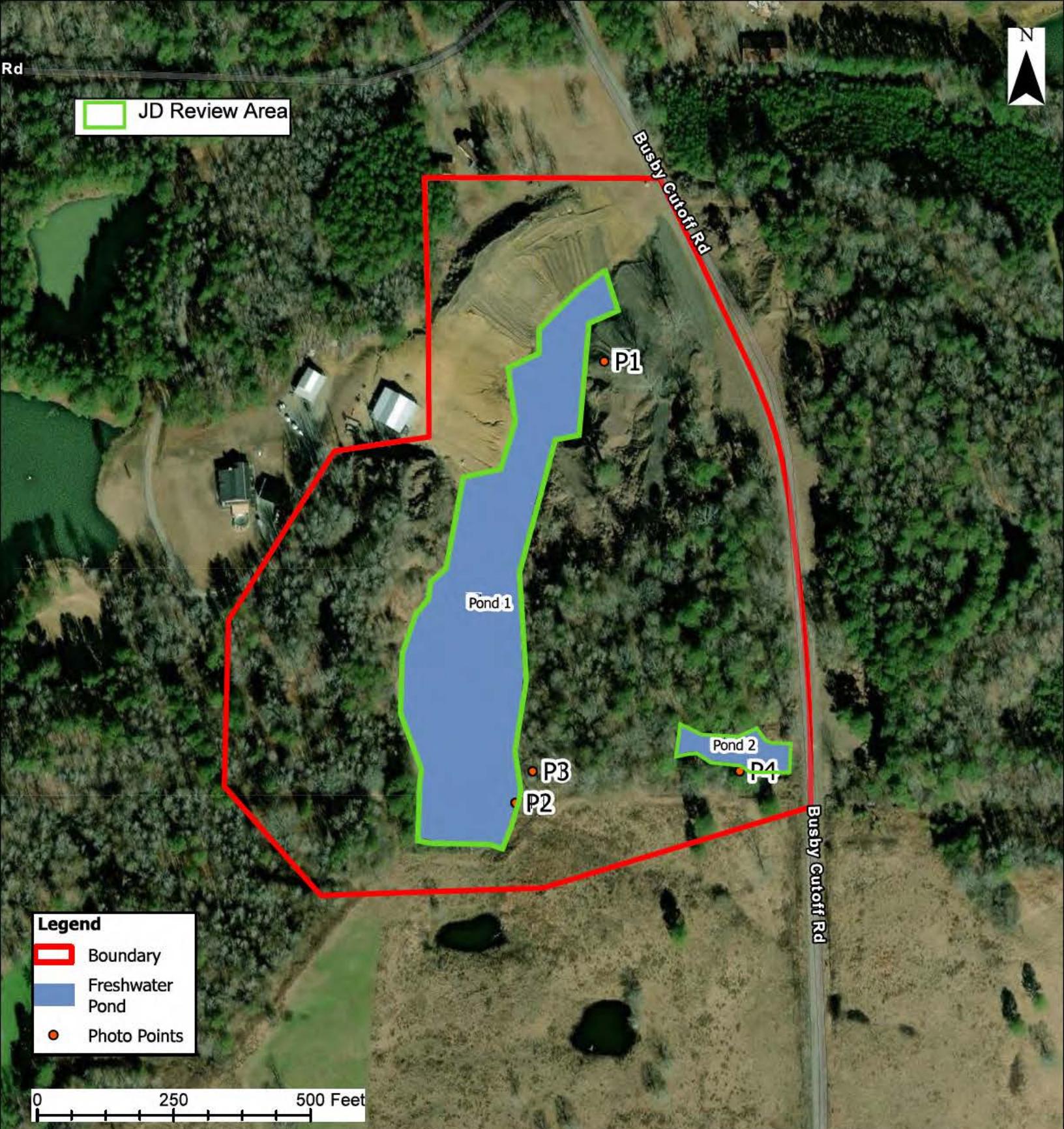
10. OTHER SUPPORTING INFORMATION

- a. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Memorandum on Evaluating Jurisdiction for LRL-2023-00466" (February 7, 2024).
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.

Rd



JD Review Area



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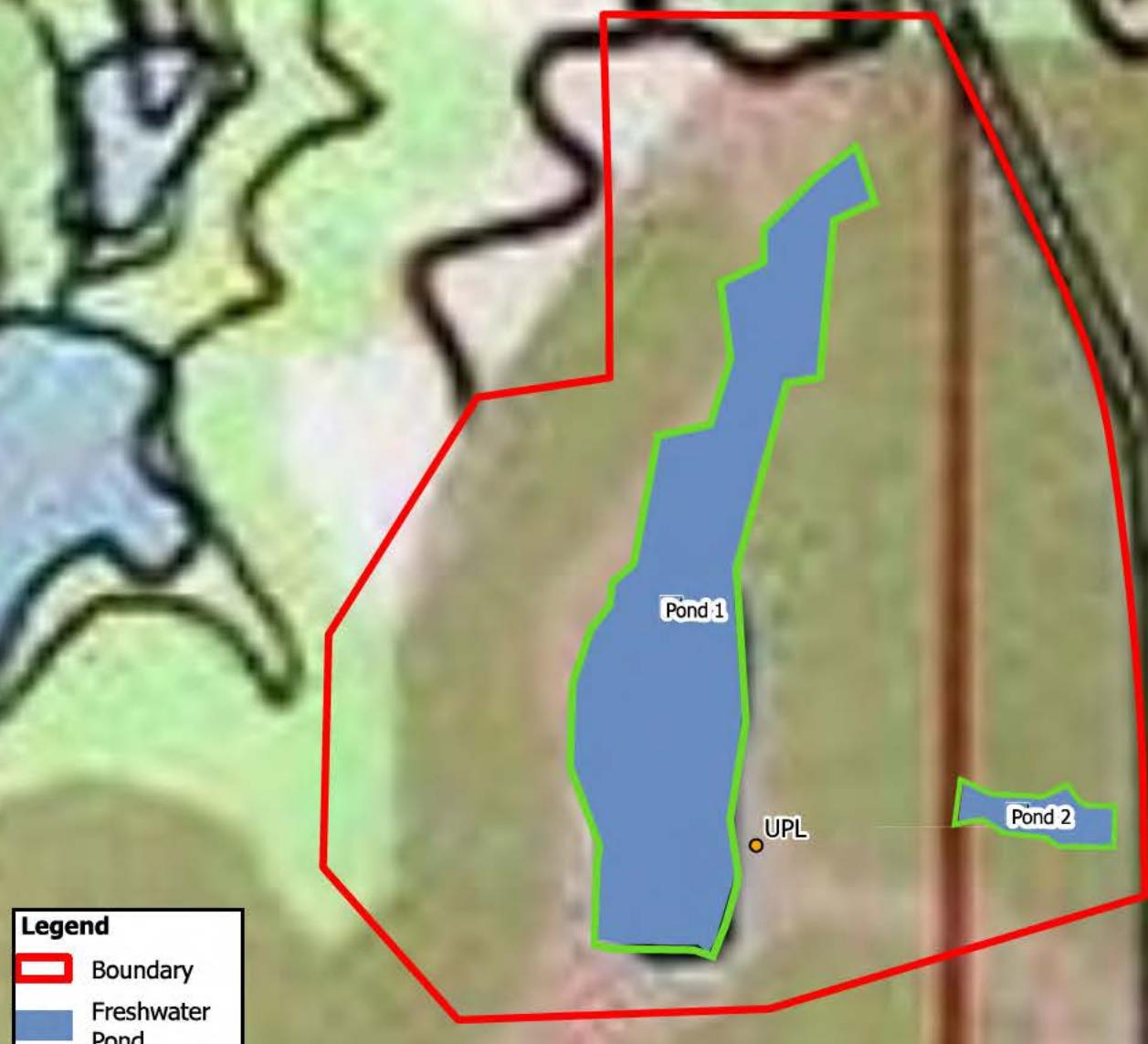
TITLE

Appendix - Photo Map

Nauvoo, Walker County, Alabama



JD Review Area



Legend

- Boundary
- Freshwater Pond
- Upland Point

0 250 500 Feet

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Figure 10 - Site Delineation Topo Overview

Nauvoo, Walker County, Alabama