



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

CESAM-RD

17 October 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),<sup>1</sup> SAM-2024-00595-MDJ, 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.

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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 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 (MMP1): Non-WOTUS, non-jurisdictional, intrastate man-made pond, approximately 1.15 acres in size, which could not be used by interstate or foreign travelers for recreation or other purposes; fish or shellfish could not be taken and sold in interstate or foreign commerce; or could be used for industrial purposes by industries in interstate commerce; and is not a tributary to a water in paragraphs (a)(1)-(a)(4) of 33 CFR 328.3
  - ii. Wetland 1 (W1): Non-jurisdictional wetland, approximately 30-square feet in area, which lacks a continuous surface connection to a jurisdictional water.

## 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 4.5 acres located east of Sherwood Highland Road, whose approximate center point is located at Latitude 30.428530, Longitude -87.834087; within Section 24, Township 7 South, Range 2 East; in Fairhope, Baldwin County, Alabama.

The review area is comprised of an estimated 4.5-acre portion of a larger approximately 33.4-acre lot (Baldwin County PIN 65596). The review area was part of a 2014 jurisdictional determination request (SAM-2014-00654-LET) issued 04

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February 2015 and included with the parcel immediately north (PIN 65600) of the parcel in question.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED<sup>6</sup>.

The nearest TNW is Fish River, approximately 0.25 miles east of the review area. Fish River is on the Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs. See attached mapping.

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

**Man-made Pond 1 (MMP1):** An upland berm separates MMP1 from downstream waters. The applicant indicated the presence of an approximately 6-8" PVC pipe through the upland berm (overflow discharge pipe), which the applicant stated was clogged and/or no discharge from the pond occurred. Additionally, there is no evidence of seepage through the upland berm. The potential discharge portion of the overflow discharge pipe (ODP) was noted in the photolog, but the corresponding intake was not located during the last site visit. There is no evidence of flow and/or water having been discharged from ODP in recent history as it was difficult to locate, was not obvious, and had several years of leaf litter accumulated on top of the discharge point. This leaf litter was removed for the purposes of the photolog. While natural dislodging of the overflow discharge pipe may occur naturally, more probable is the continued accumulation of whatever material is creating the clog. MMP1 is primarily precipitation fed with evaporation being the only loss of hydrology. Immediately east of the review area are wetlands which abut Turkey Branch. Any potential flow from MMP1 to the east outside of the review area would occur via ground water discharge to the wetlands adjacent to Turkey Branch for approximately 450 feet before reaching Turkey Branch. Flow continues through Turkey Branch for another approximately 750 feet before reaching Fish River. Turkey Branch is a relatively permanent tributary of Fish River, a TNW.

**Wetland 1 (W1):** W1 is located inside of MMP1, but above the ordinary high-water mark of MMP1, and any potential outflow or discharge from Wetland 1 is severed by the dike/berm immediately abutting W1 to the east. The upland berm shows no

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<sup>6</sup> 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.

evidence of seepage. As mentioned above, the applicant noted the presence of an ODP which appears to have been clogged for a significant amount of time. The upland berm appears to not be subjected to overtopping by MMP1. The potential discharge portion of the overflow discharge pipe (ODP) was noted in the photolog, but the corresponding intake was not located during the last site visit. There is no evidence of flow and/or water having been discharged from ODP in recent history as it was difficult to locate, was not obvious, and had several years of leaf litter accumulated on top of the discharge point. This leaf litter was removed for the purposes of the photolog. While natural dislodging of the overflow discharge pipe may occur naturally, more probable is the continued accumulation of whatever material is creating the clog. Flow through offsite wetlands moves downslope to the east for approximately 450 feet before reaching Turkey Branch. Flow continues through Turkey Branch for another approximately 750 feet before reaching Fish River. Turkey Branch is a relatively permanent tributary of Fish River, a TNW.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</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 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.

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<sup>7</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>8</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.

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- 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”).<sup>9</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 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

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<sup>9</sup> 51 FR 41217, November 13, 1986.

- 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*.

**MMP1** is an approximately 1.15-acre man-made pond which does not appear on the 1:24,000 Magnolia Springs, AL topographic map; however, MMP1 was excavated primarily in dryland sometime after 1974, however the most easternly portion of the pond appears to have been excavated in a minimal amount of wetlands as indicated on the USDA-NRCS soil survey mapping as well as historic aerial imagery of the area in 1974. The excavated wetlands were part of a wetland system immediately adjacent to and abutting Turkey Branch – a relatively permanent tributary of the TNW Fish River.

Side cast from the excavation of MMP1 appears to have been used to build a berm on the most easternly portion of MMP1 which acts as an impoundment. The impoundment appears to be composed of highly compacted material due to the lack of seepage on the eastern side and appears to be on a perched water table (see elevation profile in appendix). MMP1 appears to be primarily fed by precipitation, evaporation is the only means of hydrological loss, and holds water year-round. Water from MMP1 does not appear to share a water table with the wetlands immediately to the east due to a nearly 6-foot elevational change; MMP1 does not share hydrology through the upland berm as no evidence of seepage through the berm was noted; and MMP1 does not appear to discharge to the wetlands immediately to the east.

The applicant indicated that a 6 – 8” PVC overflow discharge pipe (ODP) was present in the berm. Upon the site visit, no intake was able to be located for ODP, however the presumed outflow for the ODP was found despite being well hidden by several years of leaf litter. It appears to be clogged and lacks discharge as evidenced in the attached Appendix (Photo 7). While it is plausible that MMP1’s ODP will unclog naturally, it is more probably that the ODP will accumulate more material which caused the clog rather than unclogging naturally.

The preamble to the 1986 regulations indicates the agencies generally do not consider “(a)rtificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons” as jurisdictional. Since the water in question (MMP1) does not meet the criteria to be non-jurisdictional under the preamble to the 1986

regulations because a small portion was excavated in a wetland, it is being evaluated as potential (a)(3) other water. Additionally, it is not being considered as an impoundment of a jurisdictional water (potential (a)(4) water) because the majority of MMP1 was excavated in uplands and because there is no evidence that the pond discharges into the off-site wetlands adjacent to Turkey Branch. MMP1 is an isolated pond that does not have a tributary flowing into or out of it; does not support a link to interstate or foreign commerce; is not known to be used by interstate or foreign travelers for recreation or other purpose; does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce; and is not known to be used for industrial purposes by industries in interstate commerce. For these reasons, MMP1 is not a water of the U.S.

- 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).

**W1** is an approximately 30-square-foot (0.00069-acre) fringe non-tidal herbaceous wetland which is situated between the eastern boundary of MMP1 and the upland berm to the east. W1 appears to have formed due to the impoundment created by the berm. The upland berm separates W1 from the wetlands adjacent to Turkey Branch east of the review area. W1 lacks a continuous surface connection to a downstream jurisdictional water because it is separated by an upland berm which shows no evidence of seepage or overtopping into the wetlands adjacent to Turkey Branch. A potential overflow discharge pipe (ODP) was observed in the berm despite being difficult to locate and several years of leaf litter accumulated on top of and in front of the ODP; however, there was no evidence of flow from the potential outflow ODP to the wetland abutting Turkey Branch. The outflow pipe is approximately 6-8" in diameter. No intake for the potential outflow pipe was observed. These barriers (berm and clogged pipe) prevent W1 from having a continuous surface connection to a requisite water.

There is no evidence of water overtopping the dike/berm nor seeping from the dike/berm. Any discharge from W1 to a jurisdictional water is prevented by approximately 6-feet of elevation change across the eastern upland berm and thus W1 is approximately 6-feet higher in elevation above the wetland east of the berm – therefore, W1 appears to be fed by a perched water table and not hydrologically connected to the wetlands adjacent to Turkey Branch. There is no seepage nor an active hydrological connection from W1 to the wetland east of

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the berm. Additionally, the vegetative community is significantly different. The wetland east of the berm is composed of mature bottomland hardwood species with dense canopy cover while W1 is a fringe wetland dominated by herbaceous monocots. The two water bodies are not sharing a common water table as the water for W1 is approximately 5-foot or more above soil surface of the wetland abutting Turkey Creek. There is more than 5-feet of elevation change from the visible water table of MMP1 and the presumed water table, below soil surface, of the wetlands abutting Turkey Branch. Therefore, W1 should not be considered as one wetland with the wetland east of the berm per memorandum NWO-2003-60436. For these reasons, W1 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. A pre-application was performed on 28 February 2024, and a site-inspection was performed on 7 August 2024 as evidenced in the photolog included in the administrative record.
  - b. Office evaluation were conducted periodically from August 2024 to September 2024 via review of the administrative record associated with the site as well as via inspection of mapping layers 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 as evidenced in the Appendix associated with this MFR.
  - c. "Wetland Delineation, Harrod's Farm Property, Portions of PINs (65596 & 65600), Fairhope, Baldwin County, Alabama" dated June 24, 2024, prepared by Gena Todia of Wetland Resources Environmental Consulting.

10. OTHER SUPPORTING INFORMATION.

- a. "Memorandum to Reevaluate Jurisdiction for NWO-2003-60436"

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

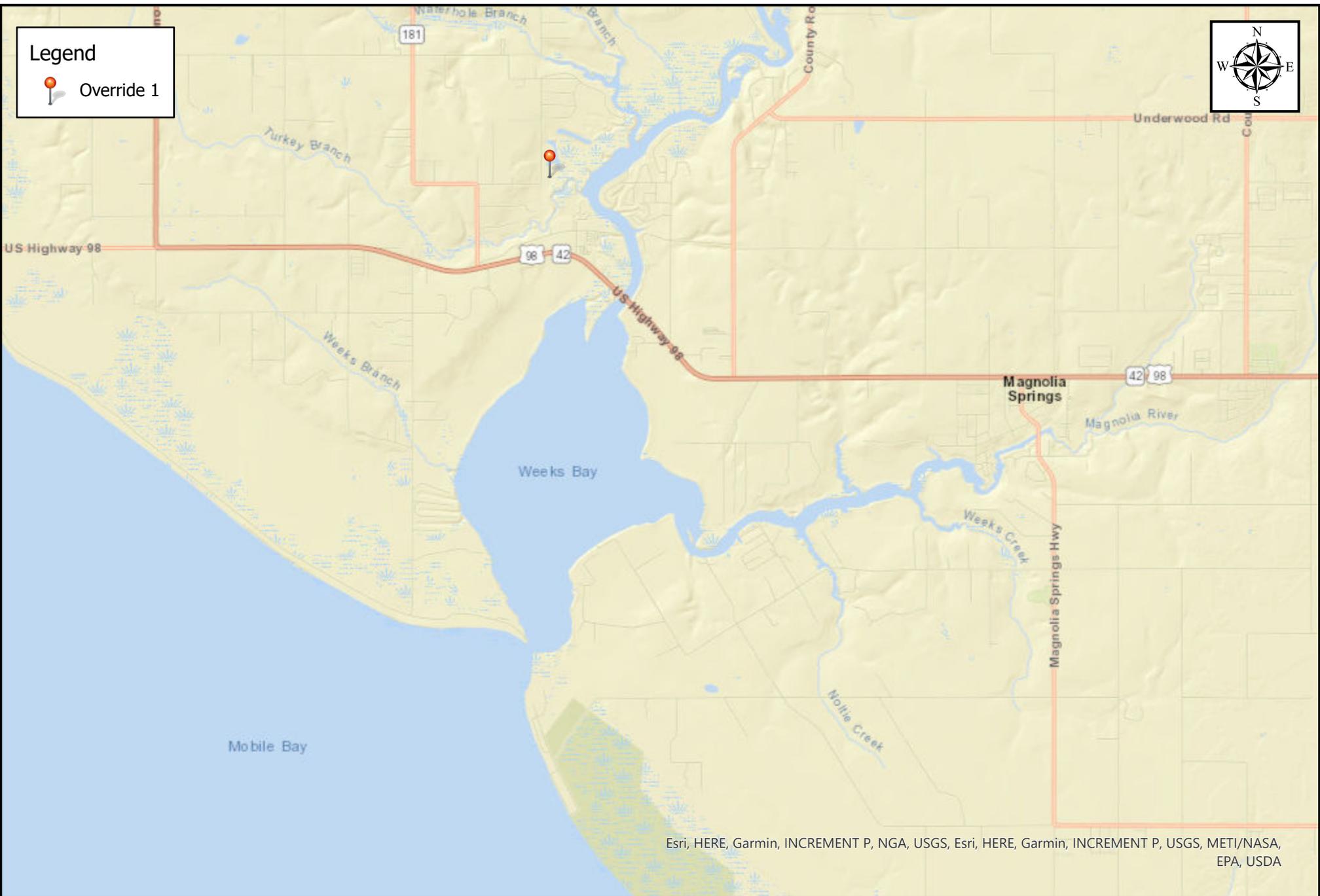
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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Legend

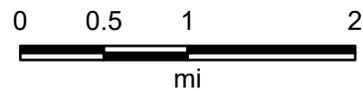
 Override 1



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



**Department of the Army //  
SAM-2024-00595-MDJ // Proximity  
Mapping**



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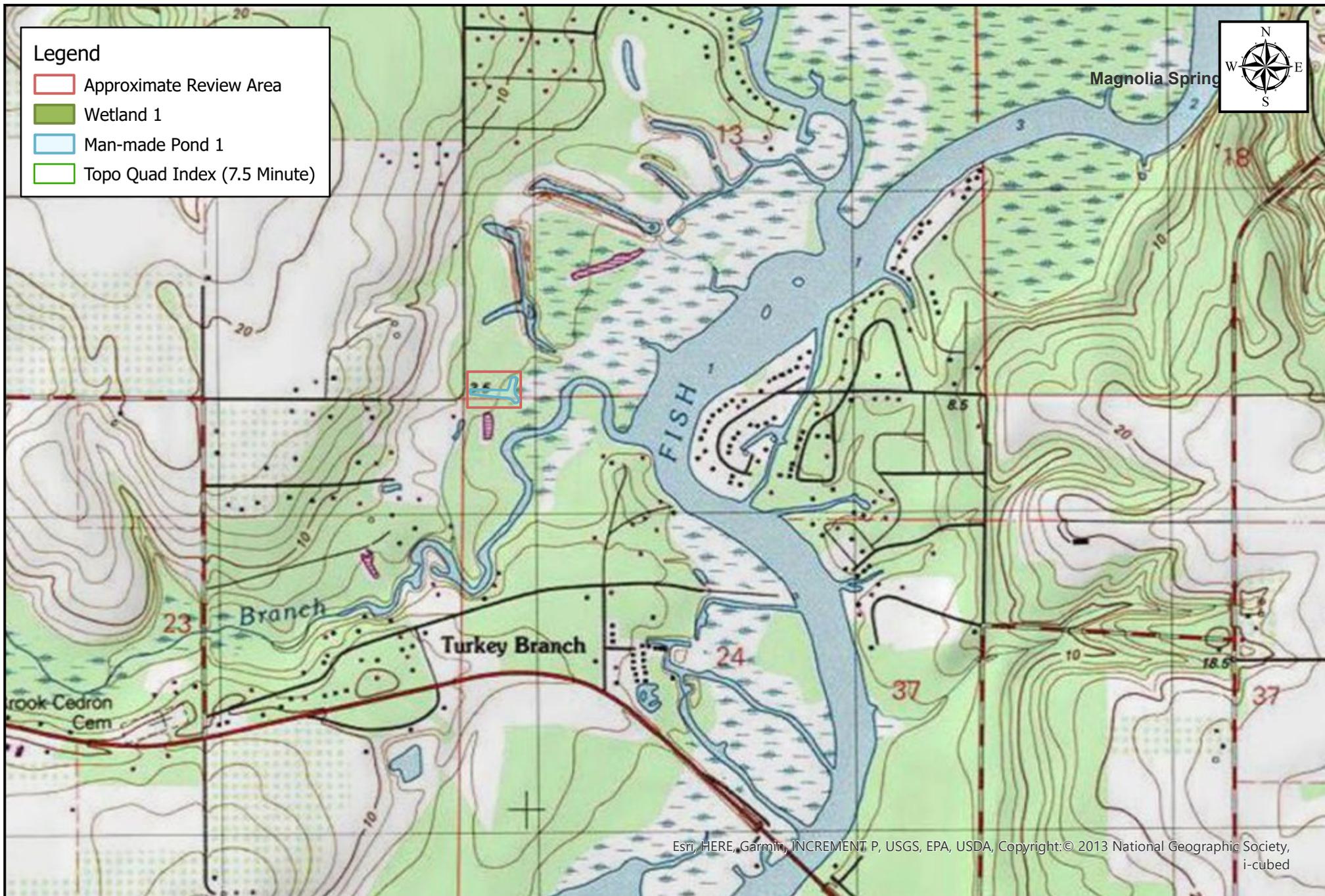
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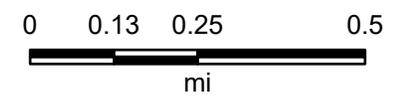
- Approximate Review Area
- Wetland 1
- Man-made Pond 1
- Topo Quad Index (7.5 Minute)



Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Copyright: © 2013 National Geographic Society, i-cubed



Department of the Army //  
SAM-2024-00595-MDJ // USGS Mapping



Map Center: 87.828729°W 30.426913°N

Map Created by: M. Derek Jacobs

Date: 9/17/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere