



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
600 VESTAVIA PARKWAY SUITE 203
VESTAVIA HILLS, ALABAMA 35216

CESAM-RD-N

November 21, 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-2024-00847-SNR; 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 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. UDD1 – non-jurisdictional drainage ditch excavated in uplands, draining only uplands, with less than a relatively permanent flow of 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)
- e. 2003 SWANCC guidance

3. REVIEW AREA. The review area is limited to the feature identified as 'UDD1', which is part of a 11.8-acre parcel located south of Tuscaloosa Avenue in Gadsden, Etowah County, Alabama. The center of the review area is Latitude 34.023247, Longitude -86.016061 and is located in the Middle Coosa watershed 8-digit hydrologic unit code (HUC 03150106). The attached figures depict the parcel and the review area within that parcel. There are other aquatic resources on the 11.8-acre parcel which are not being evaluated as part of this AJD.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A, the aquatic resource is not connected to a TNW, interstate water or territorial seas.⁶

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

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

UDD1 is a partially concrete/rip-rap lined ditch, created in association with a previously constructed residential subdivision, that flows south/southwest within the property boundaries for 635 linear feet before flowing into a series of underground stormwater drainage pipes and is not connected 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. 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

(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.

- 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. 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.

UDD1 is a drainage ditch that is partially lined with concrete and partially lined with rip-rap and is approximately 635 feet long within the review area. UDD1 is centrally located at Latitude 34.023247, Longitude -86.016061. This ditch was dug in uplands in association with a previously constructed residential development, drains only uplands, contains non-hydric soils, and carries less than a relatively permanent flow of water based on lack of baseflow within the concrete and rip-rap lined ditch. For these reasons, UDD1 is not jurisdictional.

- 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

⁹ 51 FR 41217, November 13, 1986.

- 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).
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. Office evaluation using desktop resources was completed in October and November 2024.
- b. Delineation report provided by the Agent, Spectrum Environmental, Inc., dated September 2024.
- c. National Regulatory Viewer – USGS Topo map, Digital Elevation Model, Hillshade, National Hydrology Dataset, USFWS Wetlands Mapp, and aerial imagery; accessed October and November 2024
- d. Antecedent Precipitation Tool provided by the Agent, Spectrum Environmental, Inc.
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.

- Project Boundary
- Permit Boundary
- Intermittent
- Ephemeral
- Pipe
- Upland Data Point
- Upland Drainage Ditch

SAM-2024-00847-SNR
Aerial Photograph of Entire City of
Gadsden, Agricola Drainage
Improvements Project Boundary



TITLE
Figure 8b — Site Delineation Overview - Aerial Pre-Construction Notification CDG, Inc. Agricola Drainage Improvements Gadsden, Etowah County, AL



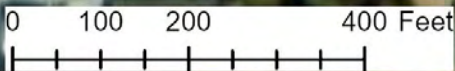
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LP	1997
Checked By:	Date:
BS	09/09/2024
Project Mgr.:	Project #:
CB	1997-045-34 / PR00000847

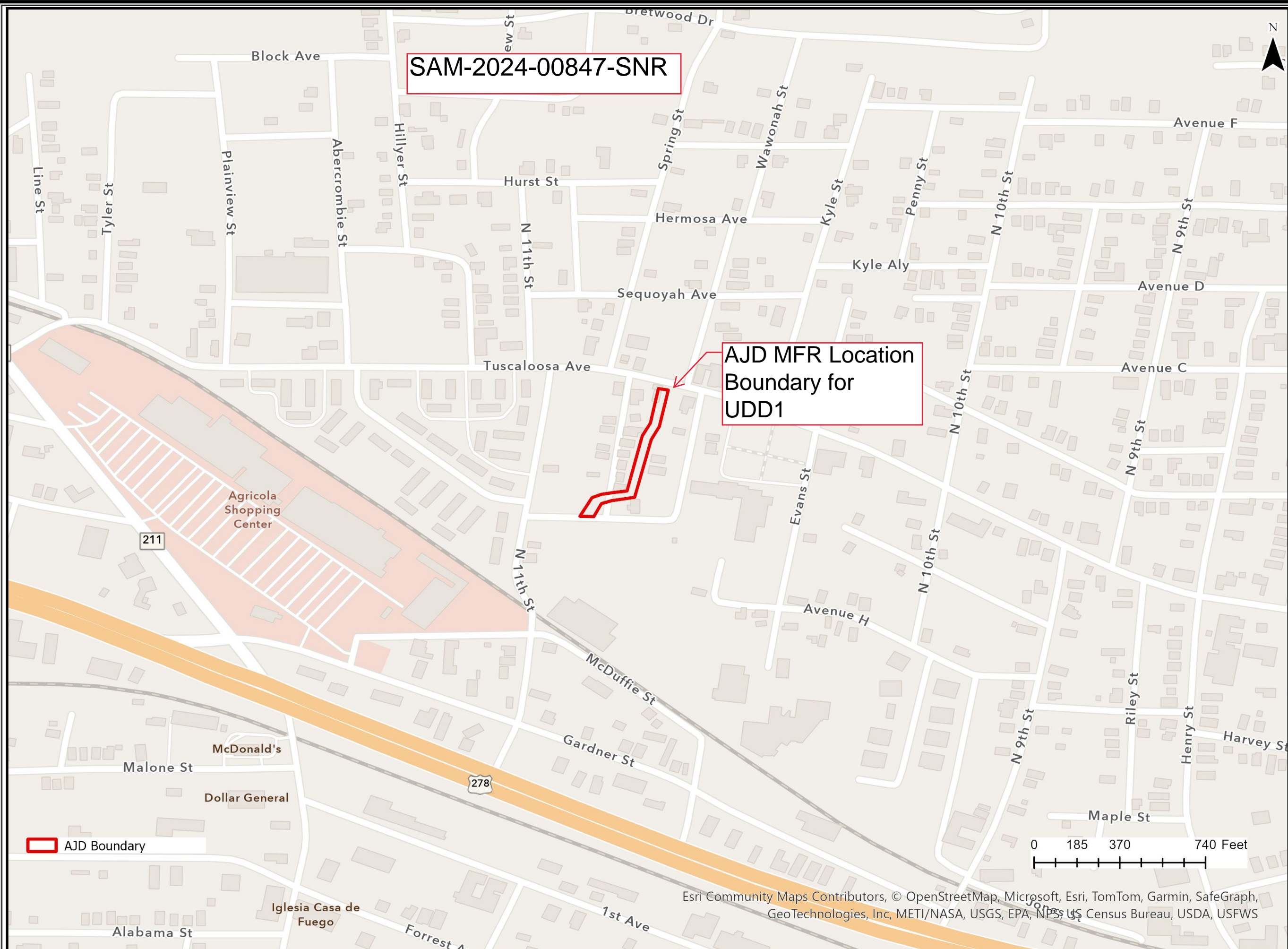
Source:
Image courtesy of ESRI.

DATE	REVISION NOTE	BY

Orange polygon represents UDD1, which is the only aquatic resource that is included in this AJD MFR.

The remaining aquatic resources within the project boundary are not included in this AJD MFR.





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AJD MFR Location
Boundary for
UDD1

TITLE

Figure 1 — Site Location Map
Approved Jurisdictional
Determination
SAM-2024-00847-SNR
CDG, Inc.
Agricola Drainage Improvements
Gadsden, Etowah County, AL

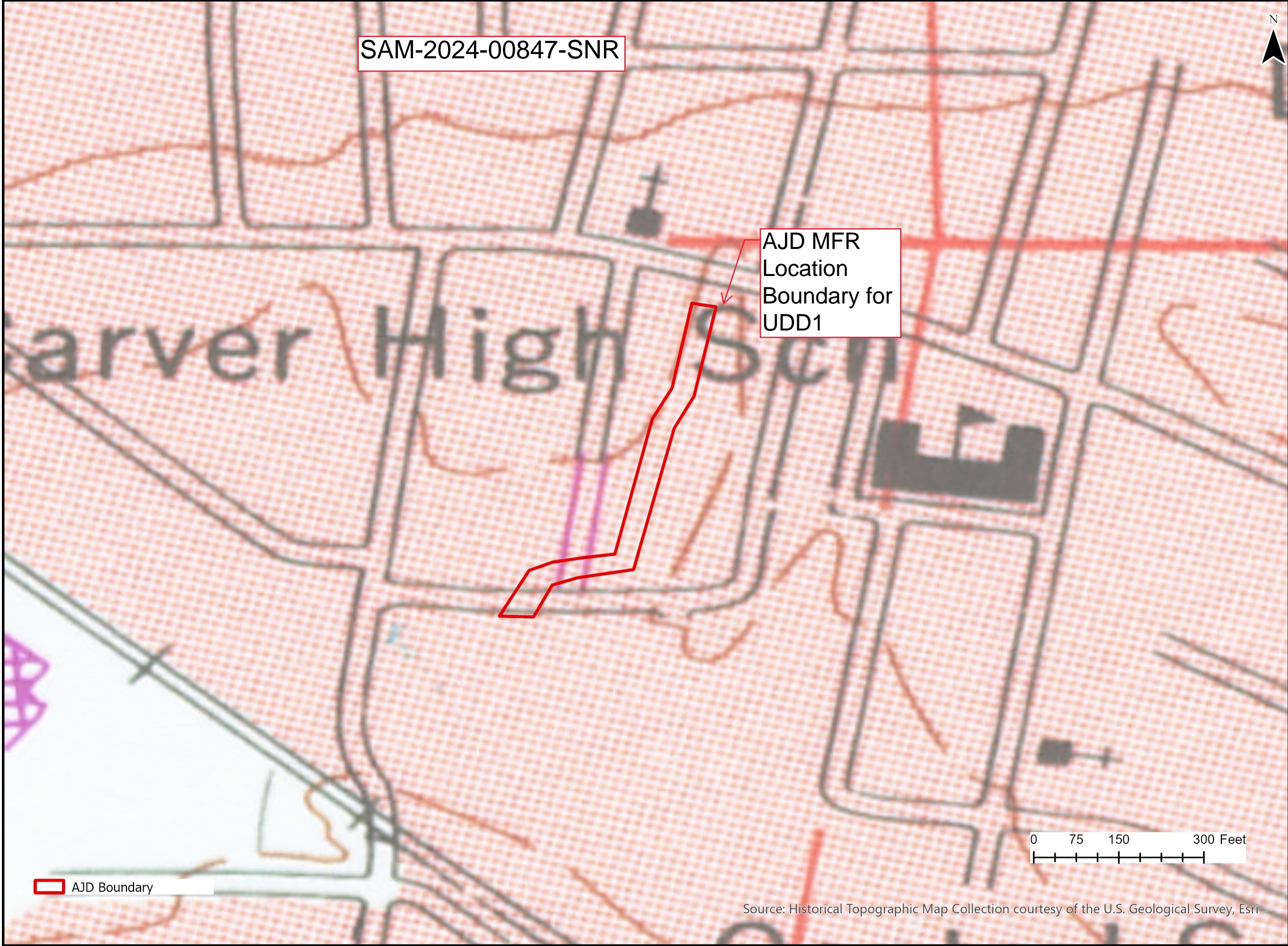


Drawn By:	Client #:
LP	1997
Checked By:	Date:
BS	09/30/2024
Project Mgr.:	Project #:
CB	1997-045-33 PR00000847

Source:

Image courtesy of ESRI and USGS
Gadsden West, Alabama 7.5 minute
quadrangle.

DATE	REVISION NOTE	BY



SAM-2024-00847-SNR

AJD MFR
Location
Boundary for
UDD1



TITLE
Figure 2 — Site Topographic Map Approved Jurisdictional Determination SAM-2024-00847-SNR CDG, Inc. Agricola Drainage Improvements Gadsden, Etowah County, AL



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BS	09/30/2024
Project Mgr.:	Project #:
CB	1997-045-33 PR00000847

Source:

Image courtesy of ESRI and USGS
Gadsden West, Alabama 7.5 minute
quadrangle.


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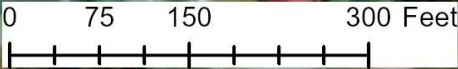
Source: Historical Topographic Map Collection courtesy of the U.S. Geological Survey, Esri



SAM-2024-00847-SNR

AJD MFR
Location
Boundary for
UDD1

 AJD Boundary



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TITLE
Figure 3 — Site Aerial Map Approved Jurisdictional Determination SAM-2024-00847-SNR CDG, Inc. Agricola Drainage Improvements Gadsden, Etowah County, AL



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CB	1997-045-33 PR00000847

Source:
Image courtesy of ESRI.

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