



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, MEMPHIS DISTRICT  
167 NORTH MAIN STREET ROOM B-202  
MEMPHIS, TN 38103

CEMVM-R

6 June 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> MVM-2024-027

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Mississippi due to litigation.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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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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. EPH-1, (34.962306, -89.841039), non-jurisdictional
  - ii. EPH-2, (34.963251, -89.840035), non-jurisdictional
  - iii. PER-1, (34.962347, -89.839700), jurisdictional
  - iv. PER-2, (34.962994, -89.840016), jurisdictional
  - v. PER-3, (34.962890, -89.840124), jurisdictional
  - vi. Wetland-1, (34.962821, -89.840080), jurisdictional
  - vii. Wetland-2, (34.962869, -89.839651), jurisdictional
  - viii. Wetland-3, (34.964660, -89.839416), non-jurisdictional
  - ix. Wetland-4, (34.964130, -89.840162), non-jurisdictional
  - x. Pond-1, (34.964726, -89.839450), 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. \_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area covers approximately 12-acre project site located at 8484 Goodman Road, Olive Branch, MS 38654. Approximate coordinates of the site are 34.962869°N, -89.839651°W.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Coldwater River is the nearest Traditional Navigable Water (TNW), it is listed under the Vicksburg District's Navigable River list.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The subject resources flow into a part of the same reach (but offsite) as PER-1 approximately 215ft in length and then into a detention basin. (Impacts to the lower end of PER-1 for the construction of the detention basin were authorized under Section 404 Permit MVK-2018-812). The basin (that is approximately 1 acre in size) then has an outlet that leads by culvert 0.03 miles to Goodman Road, then another culvert takes it under Goodman Road for 0.06 miles, finally another culvert leads under a parking lot for 0.08 miles to Camp Creek for a total of 0.17 miles. Camp Creek flows into the Coldwater River approximately 13 miles downstream of the subject property.
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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.
  - a. TNWs (a)(1): N/A
  - b. Interstate Waters (a)(2): N/A

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<sup>5</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>6</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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- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5):

PER-1, (34.962347, -89.839700), is identified by the agent as a relatively permanent (perennial) stream. The Section of stream located on the property in review is approximately 623ft in length.

PER-2, (34.962994, -89.840016), is identified by the agent as a relatively permanent (perennial) stream and is approximately 33ft in length. PER-2 flows into PER-3 for approximately 60 feet before flowing into PER-1.

PER-3, (34.962890, -89.840124), is identified by the agent as a relatively permanent (perennial) stream and is approximately 84ft in length. PER-3 flows into PER-1 within the subject property.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):

Wetland-1, (34.962821, -89.840080), is approximately 0.04ac in size. Wetland-1 directly abuts and flows directly into PER-3.

Wetland-2, (34.962869, -89.839651), is approximately 0.55ac in size. Wetland-2 is connected to PER-1 through channel EPH-2, which is an approximately 1.5ft wide, 112ft long swale through uplands.

## 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>7</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.

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<sup>7</sup> 51 FR 41217, November 13, 1986.

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Pond-1, (34.964726, -89.839450), is approximately 0.14ac in size. The pond was constructed in dry land for farming purposes and is therefore not jurisdictional. The attached map shows the limits of the pond within the project site. The determination was completed during a site visit on 05/15/2024.

- 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.

EPH-2, (34.963251, -89.840035), is a swale that is approximately 1.5ft in width and 112ft in length. EPH-2 is discernible on the ground but lacks clear indicators of an ordinary high-water mark. EPH-2 connects Wetland-2 with relatively permanent water PER-1.

- 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*. 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).

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EPH-1, (34.962306, -89.841039), is an approximately 259ft non-relatively permanent (ephemeral) channel. The flow path is shown on the attached map.

Wetland-3, (34.964660, -89.839416), is approximately 0.07ac in size. This wetland formed from the perimeter of Pond-1. The attached map shows the limits of the wetland within the project site. Any hydrologic connection that may have existed in the past has been severed by work across the road at some point in time. Because there is no physical connection from the wetland to a relatively permanent water, this feature is not jurisdictional. The determination was confirmed during a site visit done on 05/15/2024.

Wetland-4, (34.964130, -89.840162), is approximately 3.73ac in size. This wetland formed in a low field next to Goodman Road. The attached map shows the limits of the wetland within the project site. Any hydrologic connection that may have existed in the past has been severed by work across the road at some point in time. There are no existing culverts or road ditches to connect the wetland. Because there is no continuous surface connection from the wetland to a relatively permanent water, this feature is not jurisdictional. The determination was confirmed during a site visit done on 05/15/2024, during which the Corps reviewed the area surrounding the subject wetland and confirmed that no physical connections to downstream waters were present. It was also confirmed that there is not a ditch that severs the wetland even though pictures seem to indicate otherwise.

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. Maps, plans, plots or plat submitted by or on behalf of the AJD requestor: Grow Environmental Solutions
  - b. Photos submitted by or on behalf of the AJD requestor: Grow Environmental Solutions
  - c. Google Earth various dates.
  - d. U.S. Geological Survey Map: 1:24,000 Olive Branch, Desoto County, MS

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- e. National Regulatory Viewer Imagery including: (3DEP-Digital Elevation Model, and 3DEP-Hillshade) accessed 05/20/2024
- f. Site Visit conducted on May 15, 2024

10. OTHER SUPPORTING INFORMATION.

- a. Section 404 Permit MVK-2018-812

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 LOCATION

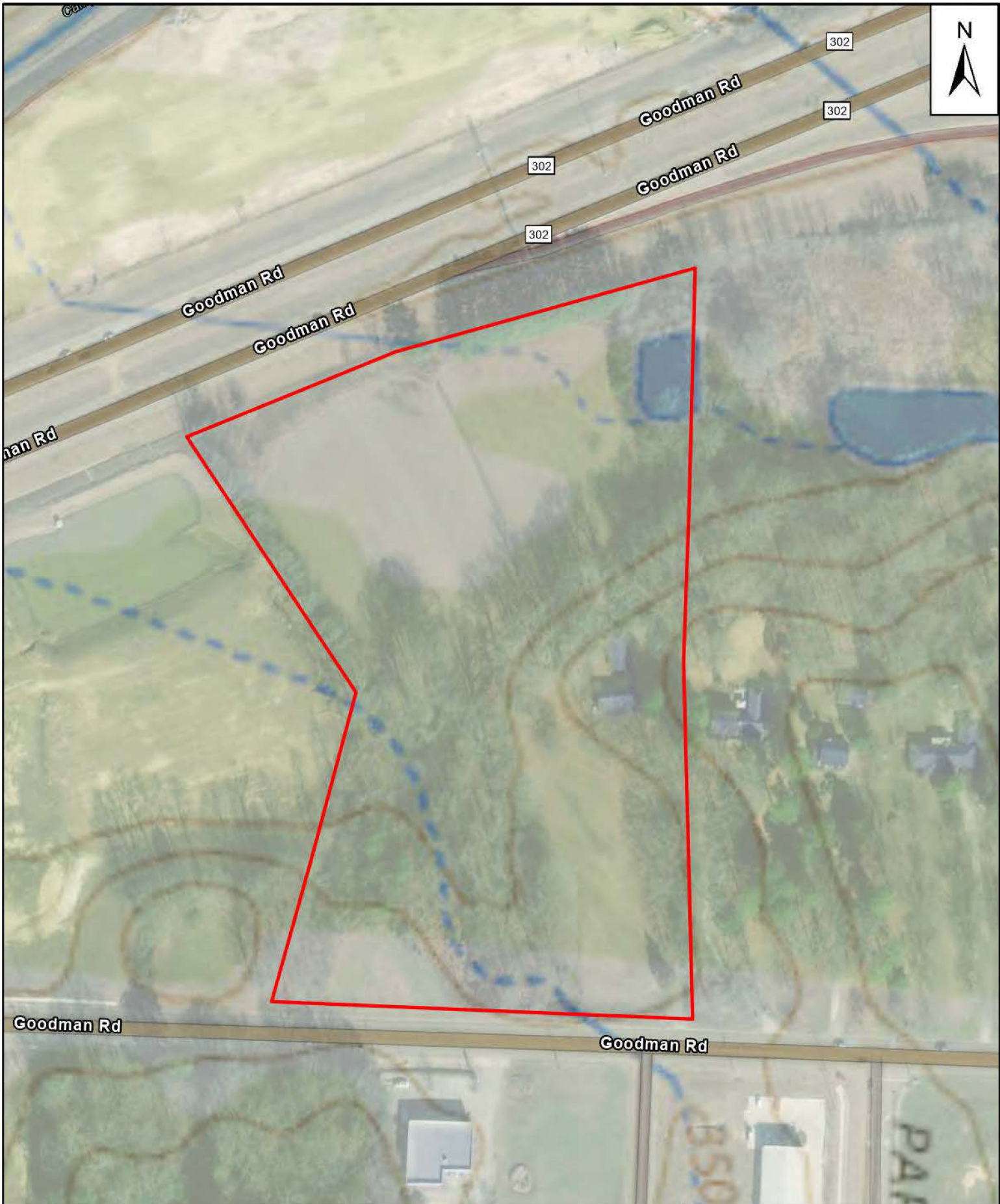


Coordinate System: NAD 1983  
State Plane Tennessee Feet

SITE LOCATION MAP  
8484 GOODMAN ROAD  
DESOTO COUNTY, MISSISSIPPI  
SEPTEMBER 27, 2023







**LEGEND**

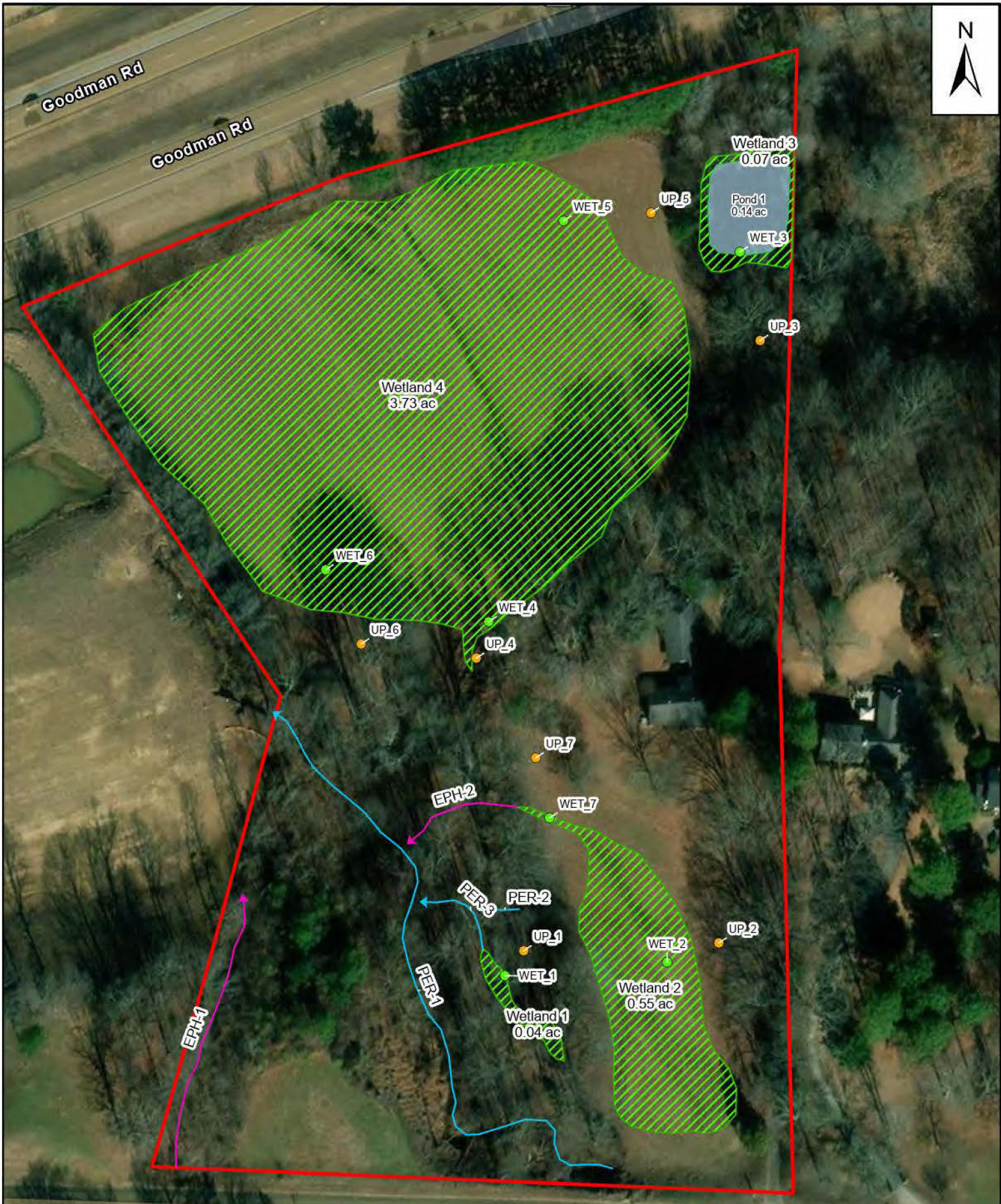
 PROJECT BOUNDARY



Coordinate System: NAD 1983  
State Plane Tennessee Feet

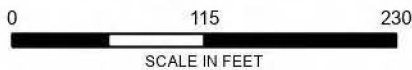
SITE VICINITY MAP  
8484 GOODMAN ROAD  
DESOTO COUNTY, MISSISSIPPI  
SEPTEMBER 27, 2023





**LEGEND**

- EPHEMERAL
- PERENNIAL
- UPLAND POINT
- WETLAND POINT
- WETLAND
- POND
- PROJECT BOUNDARY



Coordinate System: NAD 1983  
State Plane Tennessee Feet

JURISDICTIONAL DETERMINATION MAP  
8484 GOODMAN ROAD  
DESOTO COUNTY, MISSISSIPPI  
SEPTEMBER 27, 2023

