



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT  
701 SAN MARCO BOULEVARD  
JACKSONVILLE, FLORIDA, 32207-8175

SAJ-2024-02667

27 October 2025

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> SAJ-2024-02667, 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 Florida 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. Wetland A: 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)
- e. Memorandum To Re-Evaluate Jurisdiction For NWO-2003-060436
- f. 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).

3. REVIEW AREA. The review area is approximately 2.72 acres in size and is located on 41<sup>st</sup> Avenue NE in Section 10, Township 48 South, Range 27 East, Jacksonville, Collier County, Florida. The state tax parcel ID is 38610000006. The review area is immediately to the left of Immokalee Road.

Latitude: 26.307464

Longitude: -81.597940

- a. Wetland Delineation Information: Wetland data sheets were completed on January 14, 2022, by applicant's agent.

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- b. Site Visit: No site visit. Desktop JD review.
  - c. Site Description: The review area is bordered by 41<sup>st</sup> Avenue NE to the north, an upland island to the west, Immokalee Road to the east, and 39<sup>th</sup> Avenue NE to the south. The review area is comprised of a forested palustrine wetland.
  - d. Site Lidar: A review of Lidar indicated the presence of lower areas that were consistent with the delineated wetland boundaries. In addition, Lidar indicated the presence of a swale between 41<sup>st</sup> Avenue NE and the wetlands onsite.
  - e. Aerial Imagery: A review of aerial imagery indicated a transition of vegetation type consistent with the delineated wetland boundaries.
  - f. Wetland Vegetative Community: A review of the wetland data sheets identified the following Tree Stratum: *Taxodium distichum* (OBL, 40% ABS Cover), *Pinus elliottii* (FACU, 25% ABS Cover), *Melaleuca quinquenervia* (FAC, 10% ABS Cover), *Schinus terebinthifolia* (FAC, 5% ABS Cover), *Sabal palmetto* (FAC, 5% ABS Cover). Sapling/Shrub Stratum: *Myrsine cubana* (FAC, 5% Cover), *Sabal Palmetto* (FAC, 3% Cover). Herb Stratum: *Blechnum serrulatum* (FACW, 30% Cover), *Urena lobata* (FAC, 5% Cover). Woody Vine Stratum: None. Notes: Cypress knees 15 inches.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Gulf of America, which is 18 miles to the west from the review area. A continuous surface connection does not exist between the wetland within the review area and the closest TNW.
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A, The closest relatively permanent waterway is a canal approximately 1 mile to the west of the review area. Another canal is located a little over 1 mile to the east of the review area. A roadside swale abuts the wetland within the review area; however, this swale does not have wetland features or an ordinary highwater mark that extend to either canal. Therefore, the wetland is physically separated from the canal by uplands and lacks a continuous surface connection to the canal.
  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

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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.

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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 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): 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>8</sup> Include size of the aquatic resource or feature within

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<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.

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

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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*. 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).

The wetland located within the review area extends offsite to the north, east, and west. Due to the predominantly developed/residential landscape surrounding the review area, there is not a continuous surface connection from the wetland to a jurisdictional water, consistent with *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*, dated March 12, 2025. Photographs, aerial

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imagery, and LiDAR elevation data confirm that the wetland does not physically abut the nearest canal to the west or the canal to the east as there are upland areas, developed land, and culverts without an ordinary highwater mark between the review area the nearby canals. Therefore, the subject wetland does not meet the (a)(1)-(a)(6) categories of waters of the United States. For a wetland to be an (a)(7) adjacent wetland, it must directly abut an (a)(1)-(a)(6) jurisdictional water. Wetland adjacency cannot be provided by a continuous surface connection to a jurisdictional water via a discrete feature (such as a pipe, ditch or swale). In this case, the subject wetland relies on a discrete feature for a continuous surface water connection. Specifically, the subject wetland abuts a roadside swale. The roadside swale extends outside the review area to both the east and the west. However, according to street view on Google Earth and LiDAR imaging, this roadside swale does not contain an ordinary highwater mark or wetland characteristics that extend entirely to the nearby canals. This is shown in Figures below.

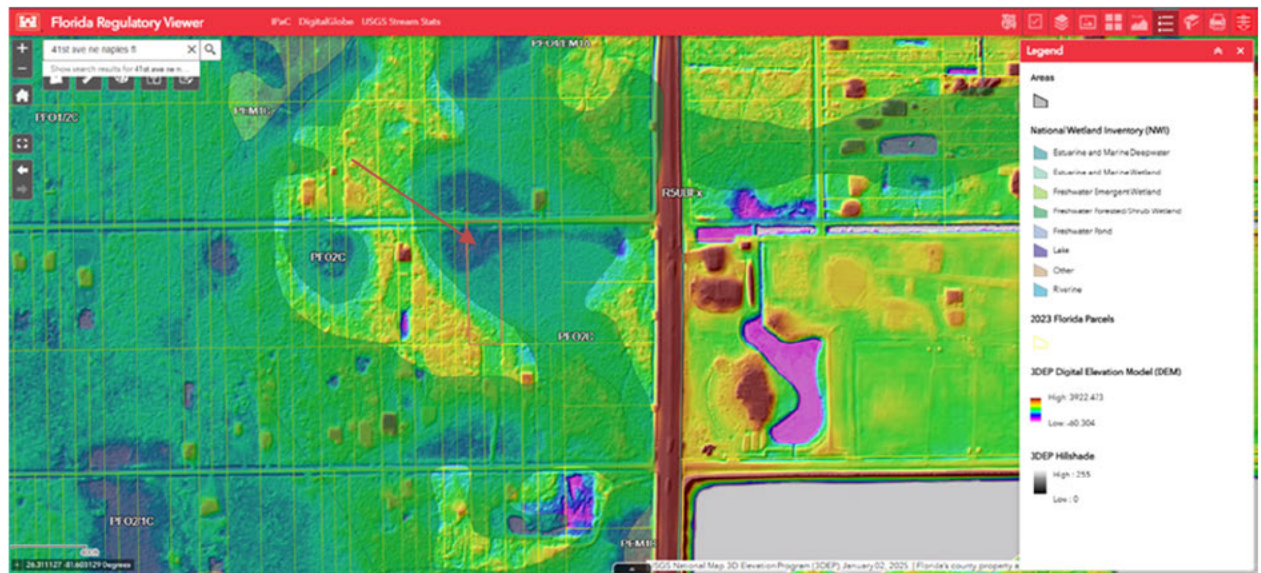


Figure 1 LiDAR Imagery

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Figure 2 Looking east along the road at the project site. Arrow identifies road side swale the extends from the review area to the east and west.

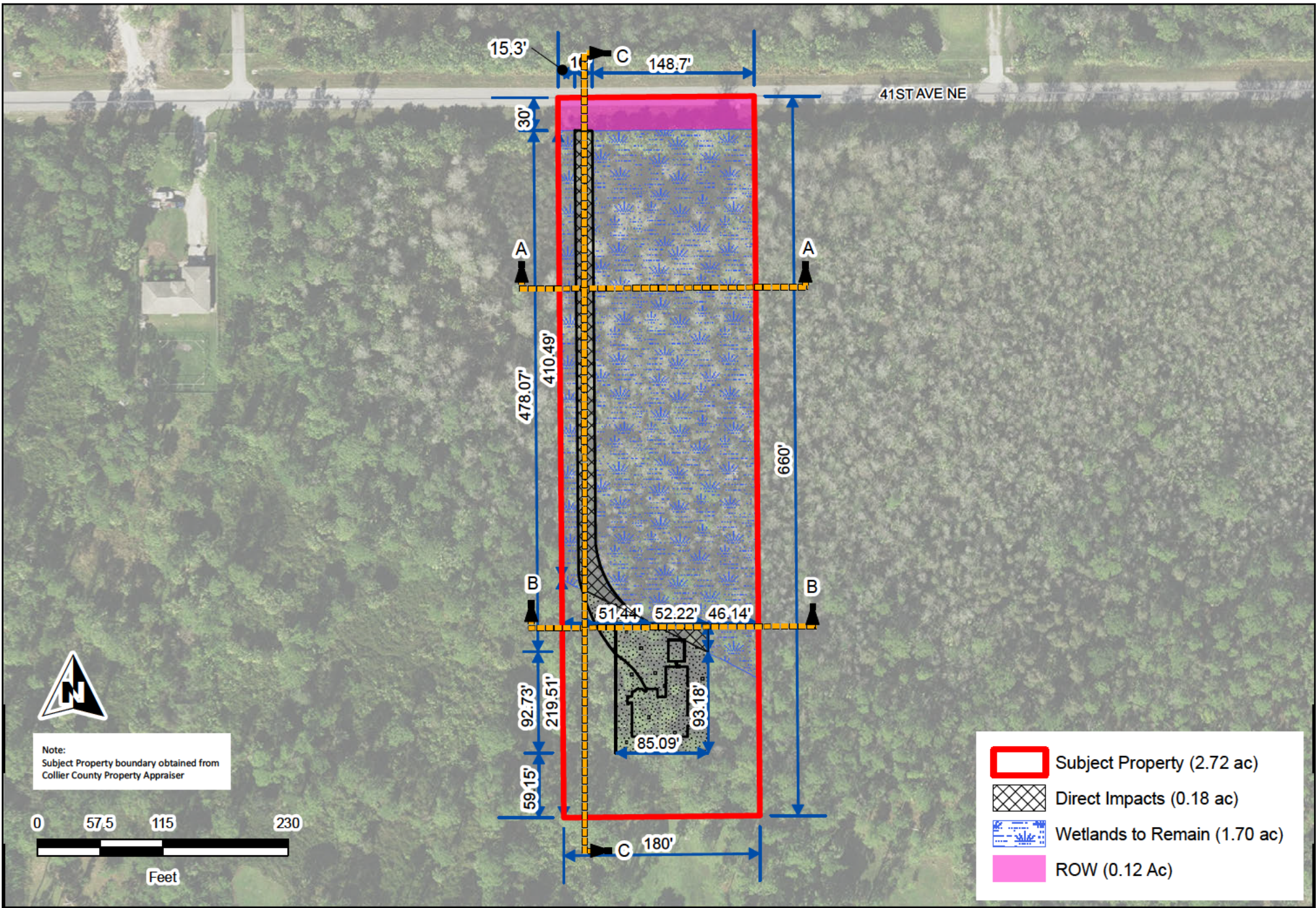


Figure 3 Looking west along the road at the project site. Arrow identifies road side swale the extends from the review area to the east and west.

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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.
  - Aquatic Resources delineation submitted by the consultant on behalf of the applicant: Attachment O, dated January 22 2024
  - Wetland field data sheets prepared by the consultant on behalf of the applicant: Attachment A, and C, dated January 14 2022
  - Photographs: Provided by consultant.
  - Aerial Imagery: Attachment H, dated December 26 2023
  - LIDAR: USACE, Figure 1 Lidar Imagery
  - NRCS Soils Map: Attachment M, December 26 2023
  - USFWS NWI maps: Attachment J, dated September 21 2023
  - USGS topographic maps: Attachment N "USGS Quad Map", December 26 2023
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 \_\_\_\_\_

Map Type  
Aerial Map

Date  
01/22/24