



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, VICKSBURG DISTRICT
4155 EAST CLAY STREET
VICKSBURG, MISSISSIPPI 39183

CEMVK-RD

May 1, 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),¹ MVK-2021-628

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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)

Waters_Name	Measurement	Amount	Units	Status
MVK-2021-628 Wetland 4 PFO	Area	0.228315	Acres	Jurisdictional
MVK-2021-628 Wetland 1 PEM	Area	0.221436	Acres	Non-Jurisdictional
MVK-2021-628 Wetland 2 PSS	Area	1.966583	Acres	Non-Jurisdictional
MVK-2021-628 Wetland 3 PSS	Area	0.312942	Acres	Non-Jurisdictional
MVK-2021-628 Open Water 1	Area	0.349472	Acres	Non-Jurisdictional
MVK-2021-628 Wetland 5 PEM	Area	4.811951	Acres	Non-Jurisdictional
MVK-2021-628 Wetland 6 PFO	Area	0.145231	Acres	Non-Jurisdictional
MVK-2021-628 Other Waters 1 RPW	Length	2474.723	Feet	Jurisdictional
MVK-2021-628 Other Waters 2 RPW	Length	806.7792	Feet	Jurisdictional
MVK-2021-628 Other Waters 3 NRPW	Length	1744.991	Feet	Non-Jurisdictional
MVK-2021-628 Other Waters 4 NRPW	Length	73.53505	Feet	Non-Jurisdictional
MVK-2021-628 Other Waters 5 NRPW	Length	424.2212	Feet	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).

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- 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. Review area is comprised of 201 acres located near The City of Canton in Madison County, Mississippi, (90.0998288°W 32.6062315°N). The site is part of the larger Madison County Economic Development Authority MegaSite. This parcel consists of approximately 200 acres of land that has been previously cleared. Historically the site consisted of forested upland/wetland habitat, with the primary habitat being upland. There have been three previous Jurisdictional Determinations issued encompassing all or part of the subject site currently under review. The original AJD (MVK-2014-639) was issued on March 29, 2021, covering approximately 875 acres of the original boundaries of the Megasite. Additional parcels were acquired by MCEDA and incorporated into the Megasite. As a result, an AJD was issued covering approximately 152 acres in the eastern portions of the Megasite on August 30, 2021 (MVK-2021-628), and a preliminary jurisdictional determination (PJD) was issued covering approximately 61 acres of the northwest portions of the site on August 2, 2022 (MVK-2022-413).
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Nearest downstream Section 10 TNW is the Big Black River.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: The aquatic features onsite drain offsite to the north, via two unnamed tributaries (MVK-2021-628 Other Waters 1 and 2). The aquatic features in the NW portion of the site drain via MVK-2021-628 Other Waters 2 for 5.19 kilometers before converging with Bear Creek. The aquatic features in the SE portion of the site drain offsite to the North via MVK-2021-648 Other Waters 1 for 5.49 kilometers before converging with Bear Creek. From there the water continues down Bear Creek for 21.6 kilometers before converging with the Big Black River. It then flows down the Big Black River for 231 kilometers before reaching the upper limit of Section 10 jurisdiction of the Big Black River.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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.
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):
 - b. Interstate Waters (a)(2):
 - c. Other Waters (a)(3):
 - d. Impoundments (a)(4):
 - e. Tributaries (a)(5): MVK-2021-628 Other Waters 1 is a 2474' Intermittent Tributary/RPW that meets the Relatively Permanent Standard. MVK-2021-628 Other Waters 2 is a 806' Intermittent Tributary/RPW that meets the Relatively Permanent Standard.
 - f. The territorial seas (a)(6):

⁵ 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.

- g. Adjacent wetlands (a)(7): MVK-2021-628 Wetland 4, is a 0.228-acre forested wetland that is directly abutting a Jurisdictional RPW (MVK-2021-628 Other Waters 1)

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”).⁶ 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.
- 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.
- 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.
- 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.
- 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 or enter rationale/discussion here.]
- 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

⁶ 51 FR 41217, November 13, 1986.

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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). MVK-2021-628 Open Water 1 is an isolated open water feature with no continuous surface connection to any jurisdictional RPW and as such is non-jurisdictional. MVK-2021-628 Other Waters 3, 4, and 5 are each ephemeral/Non-RPW features that do not satisfy the Relatively Permanent Standard and as such are non-jurisdictional. MVK-2021-628 Wetlands 1 and 2 are separate Aquatic Resources within a single wetland complex, Wetlands 5 and 6 are separate Aquatic Resources within a single wetland complex and Wetland 3 is an individual wetland. Wetlands 1,2,3,5, and 6 have no continuous surface connection to any jurisdictional RPW and as such are non-jurisdictional. Wetlands 1,2,3,5, and 6 drain via overland sheetflow when conditions allow (enough precipitation falls to “fill up” the wetlands).

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 determination based on consultant delineation, (Headwaters Inc).
 - b. Site determination/visit (Regulatory Personnel)
 - c. Previous Jurisdictional Determinations (mentioned above in Section 3)
 - d. GIS Data (Locally created GIS Database consisting of multiple years of AJD's/PJD's)
 - e. Aerial Photos (Multiple years)
 - f. NHD (National Hydrography Dataset)
 - g. LiDAR (Light imaging, detection, and ranging)
 - h. NWI (National Wetland Inventory)
 - i. ORM Data (OMBIL Regulatory Module)
 - j. Google Earth Pro (multiple years of aerial photos)
 - k. USGS Quadrangle Maps

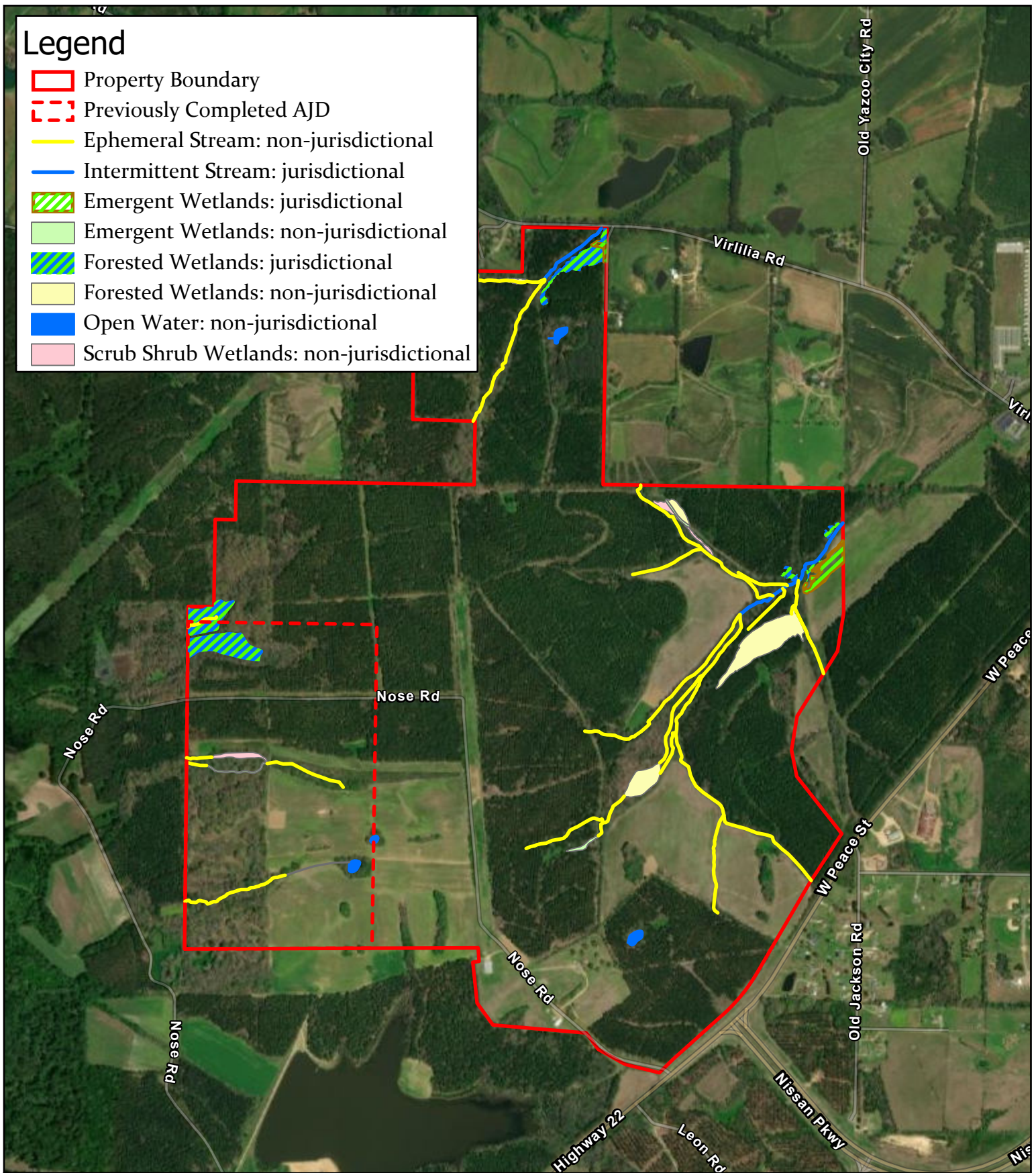
10. OTHER SUPPORTING INFORMATION.

Wetlands 1 and Wetland 2 are part of a single wetland complex which contains two (2) separate Aquatic Resources (AR's). Similarly, Wetland 5 and Wetland 6 are also part of a single wetland complex comprised of two (2) separate AR's. Each wetland complex is being assessed independently as one wetland for jurisdictional purposes, yet, are described as separate AR's for potential impacts and mitigation purposes as they are separate and distinct wetland types as classified in the Wetlands and Deepwater Habitat Classification within the Cowardin Classification System. The drainage features along the northern portion of Wetland 5 and Wetland 6 complex that are visible on the available Lidar and elevation datasets are no longer present today. Since the applicant has a valid AJD (issued August 30, 2021) which identifies the subject drainage features associated with Wetland 5 and Wetland 6 complex as non-jurisdictional, they have been filled and graded according to site development plans. This in turn eliminated any potential Continuous Surface Connection (CSC) to a requisite water (RPW) and thus rendered the Wetland 5 and Wetland 6 complex non-jurisdictional.

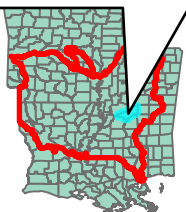
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Legend

- Property Boundary
- Previously Completed AJD
- Ephemeral Stream: non-jurisdictional
- Intermittent Stream: jurisdictional
- Emergent Wetlands: jurisdictional
- Emergent Wetlands: non-jurisdictional
- Forested Wetlands: jurisdictional
- Forested Wetlands: non-jurisdictional
- Open Water: non-jurisdictional
- Scrub Shrub Wetlands: non-jurisdictional



Madison County, MS



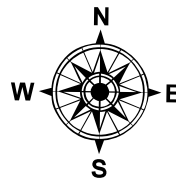
**US Army Corps
of Engineers®**

MVK-2014-639

Panther Creek
Mega Site

Approved
Jurisdictional Determination

Enclosure 1



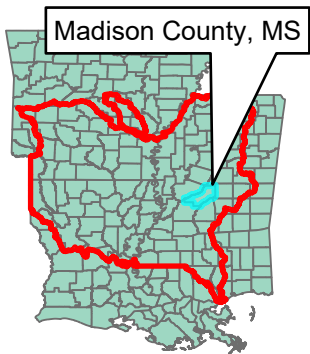
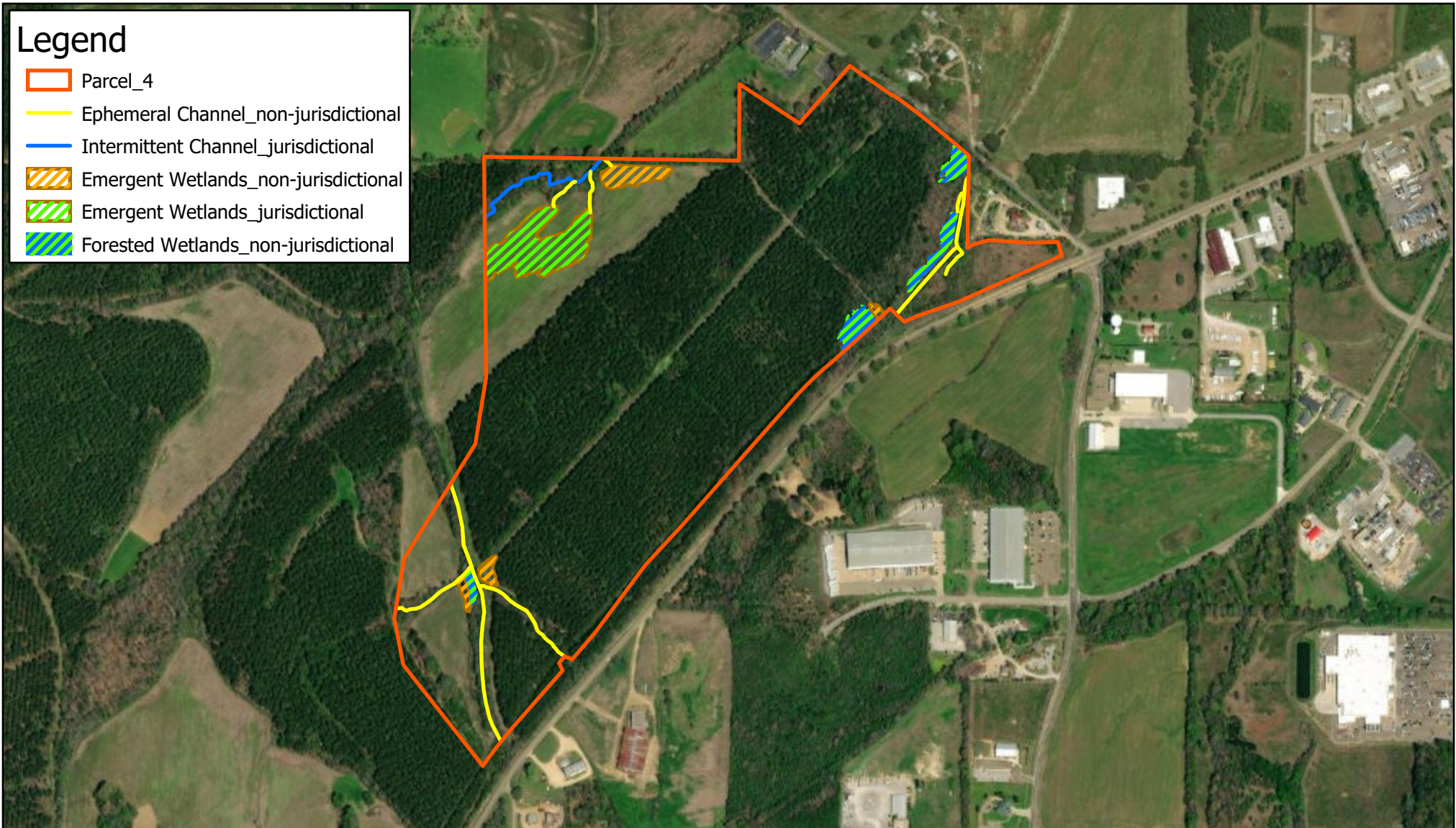
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US Feet

Project Location



Legend

- Parcel_4
- Ephemeral Channel_non-jurisdictional
- Intermittent Channel_jurisdictional
- Emergent Wetlands_non-jurisdictional
- Emergent Wetlands_jurisdictional
- Forested Wetlands_non-jurisdictional



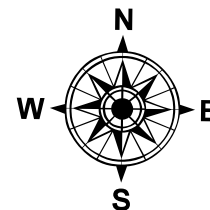
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MVK-2021-628

Madison County Megasite
Parcel 4

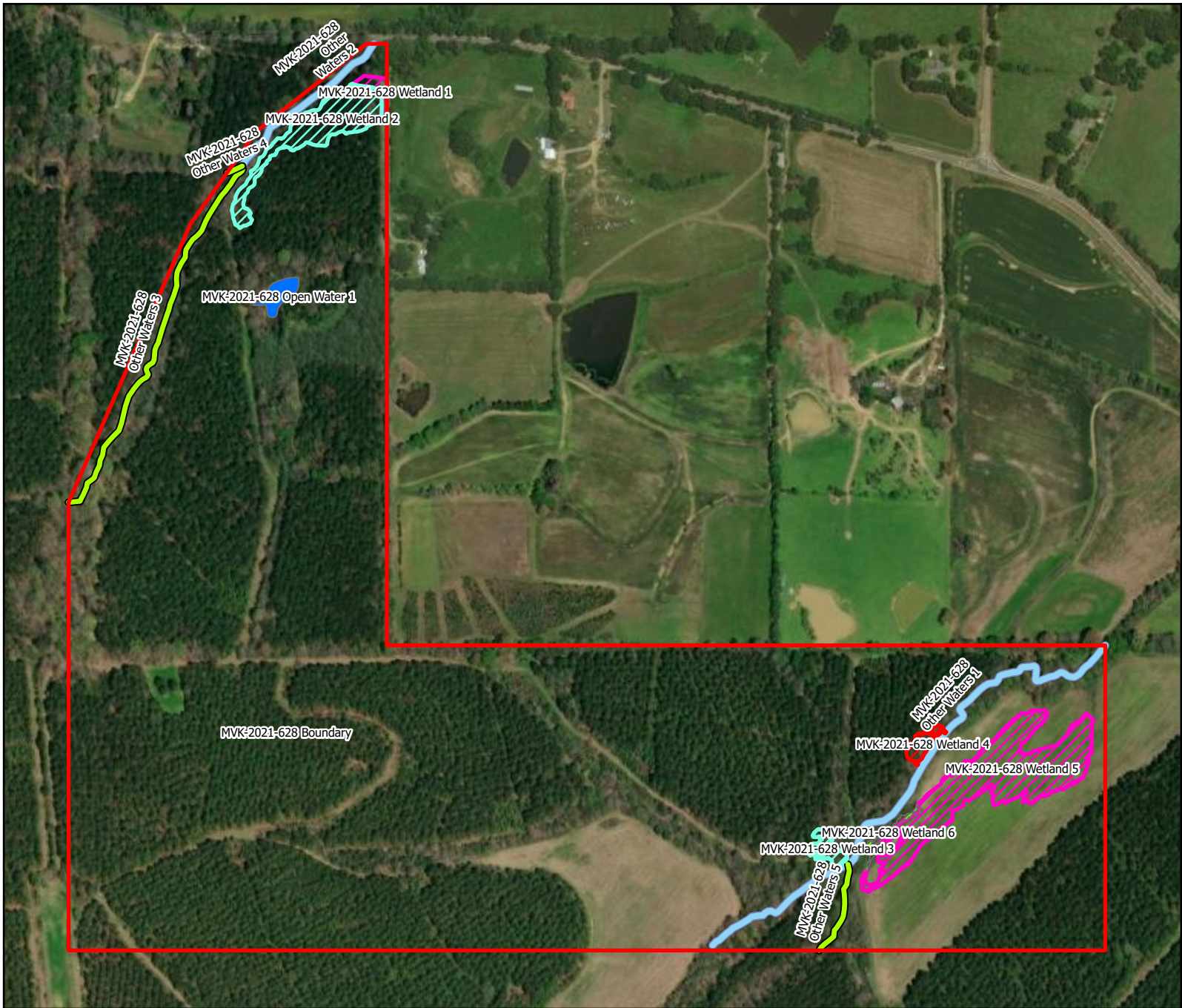
Approved
Jurisdictional Determination

Enclosure 1



0 360 720
US Feet





Legend

- Property Boundary
- Non-Jurisdictional Open Water (0.35 Acre)
- Non-Jurisdictional Emergent Wetland (5.03 Acres)
- Jurisdictional Forested Wetland (0.23 Acre)
- Non-Jurisdictional Forested Wetland (0.14 Acre)
- Non-Jurisdictional Scrub-Shrub Wetland (2.27 Acres)
- Non-Jurisdictional Ephemeral/Non-RPW (2242.7')
- Jurisdictional Intermittent/RPW (3281.5')

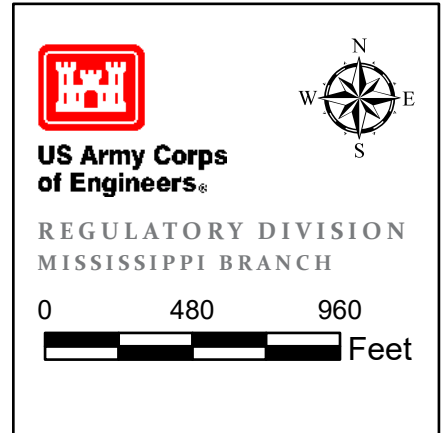
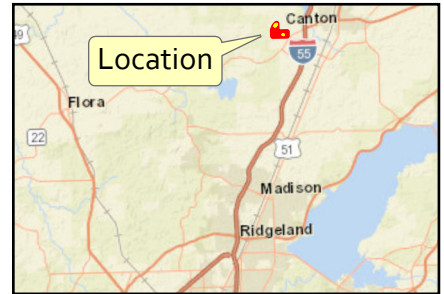
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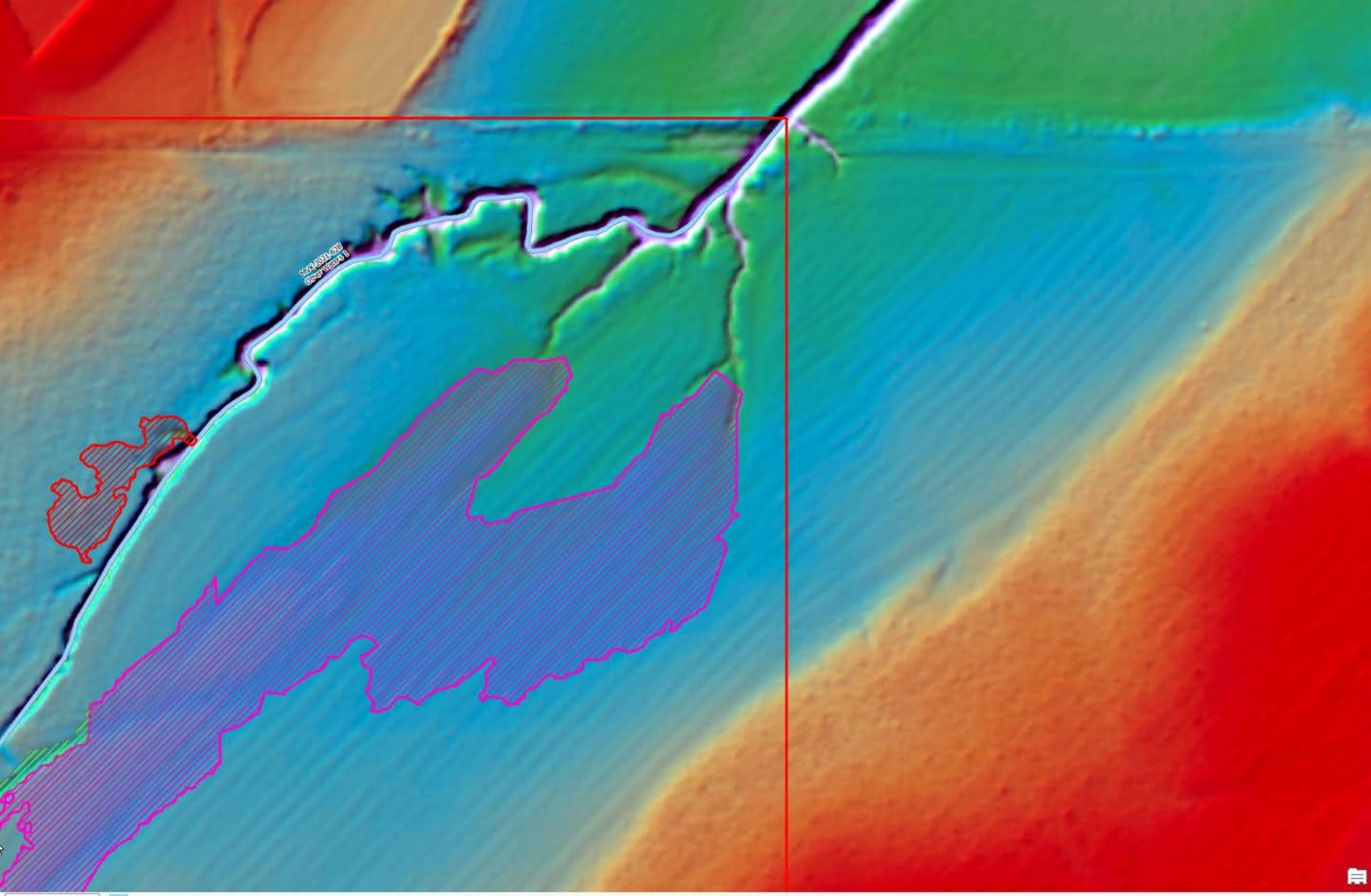


09 APRIL 2024
MVK-2021-628

Madison County Economic
Development Authority
Megaside Data Center Property
Madison County, MS

Approved
Jurisdictional Determination
Jeremy Stokes





2/4/24

MK 2021.628
Other Waters 1

