



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT  
P.O. BOX 2288  
MOBILE, AL36628-0001

CESAM-RD-M

March 31, 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> SAM-2022-00392-MJF, Sanders Environmental, LLC, Applewhite Subdivision Phase 2 (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 Mississippi 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).

Waters Name	Waters Size	Type Of Aquatic Resource	Geographic Authority
S-1	832 LF	A5. Tributary - WOTUS	Section 404
S-2	669 LF	A5. Tributary - WOTUS	Section 404
S-3	469 LF	NON-JD – RAPANOS GUIDE – SWALE.EROSION	None
W-1	13.48 acres	A7-AJD.WETL-WOTUS	Section 404
W-2	0.05	A7-AJD.WETL-WOTUS	Section 404
W-3	0.92 acre	NON-WOTUS-AJD. WETL NEGATIVE-A3	None
W-4	1.46 acres	A7-AJD.WETL-WOTUS	Section 404
P-1	1.38	NON-WOTUS-Preamble Waters	None

## 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. 2008 Rapanos Guidance

- f. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))
3. REVIEW AREA. The site is located along Belle Fontaine Road; within Section 6, Township 8S, Range 7W; Latitude 30.380111 N and Longitude -88.717124 W; HUC-03170009 – Mississippi Coastal; in Ocean Springs, Jackson County, Mississippi. The site is approximately 31 acres in size and composed of two separate tracts that are separated by a 20-acre tract owned by Randall Cooperation which is Applewhite Subdivision Phase 1 (SAM-2018-00944-JRO). The review area is mostly open and maintained with mowing equipment. This area has had several uses over the past 30 years including having a freshwater shrimp pond in which the previous owner attempted to raise freshwater shrimp. In addition, the property has had cattle and horses. According to the agent, most of the property was altered by ditching, clearing, and filling between 1968 and the mid 1980's. However, in 2016 the heirs of Mr. Applewhite cleared portions of the property, filled in ponds, and cleared out the ditches. The northern tract of this project is approximately 16.68 acres in size and is an open field which has been maintained by mowing equipment. A dredged ditch/wetland area with spoil berm parallels the eastern property line, along with residential homes just beyond the ditch. A residential subdivision is currently being constructed and borders the property to the north, Belle Fontaine Road is the western border, and Applewhite Subdivision Phase 1 property borders the south. The southern tract is approximately 13.83 acres in size which is located north of Mary Mahoney Drive and east of Belle Fontaine Road. Residential homes are located to the west, south and east. Applewhite Subdivision Phase 1 property borders to the north. The southern tract is the old homestead of the original Applewhite homestead until Hurricane Katrina destroyed the home. There is an open water pond and relatively permanent stream located within the southern tract.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Pascagoula Bay, which is approximately 3.25 miles west of the site boundary. Pascagoula Bay is on the Mobile District's Section 10 Waters list and is therefore a TNW.<sup>6</sup>

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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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. W-1 continues off-site and into the Applewhite Phase 1 property, which abuts the unnamed RPW tributary S-1, which flows from the center of the southern property tract to the southeast corner of the subject site. W-2 and W-4 also abut the unnamed RPW tributary S-1. S-1 then continues under Mary Mahoney Drive and flows at distance of approximately 800 feet into Graveline Bay which flows approximately 3 miles and into the Pascagoula Bay, a TNW. The flow from the eastern portion of W-1 also continues to the east through two (2) breaks in the dredge spoil berm and flows into an unnamed RPW tributary which flows further northeast and into Graveline Bay which flows into the Pascagoula Bay.

W-3 is surrounded by uplands and does not flow to a TNW, interstate water or territorial seas.

P-1 (manmade pond 1.38 acres in size) is surrounded by uplands and does not flow to a TNW, interstate water or territorial seas..

S-2 is an unnamed RPW tributary, which flows south within the center of the northern tract and outside the review area. S-2 enters S-1 within the off-site Applewhite Phase 1 property. S-1 flows 800 feet south to Graveline Bay, which flows into the Pascagoula Bay.

S-3 is an unnamed non-RPW tributary (manmade swale), which flows south within the western portion of W-1 and outside the review area. S-3 enters S-1 within the off-site Applewhite Phase 1 property. S-1 flows 800 feet south to Graveline Bay, which flows into the Pascagoula Bay.

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

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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.

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):

S-1 is a RPW 832 linear feet in length within the review area. The entire reach continues north within Applewhite Subdivision Phase 1 approximately 530 linear feet and under Mary Mahoney Drive to the south for approximately 800 linear feet and empties into Graveline Bay, which is connected to Pascagoula Bay. S-1 has bed and banks, an ordinary high water mark (OHWM), and had surface water during all three (3) site visits; therefore, it was determined that S-1 is a relatively permanent tributary with at least seasonal flow.

S-2 is a manmade RPW 669 linear feet in length and constructed in wetlands. It conveys hydrology from the surrounding wetlands and exhibits flow at least seasonally. S-2 has a bed and bank, an OHWM, and had surface water during the site visit on February 25, 2025. S-2 was not observed during the other two (2) site visits. The majority of historical Google Earth images dating back to 2010 depict surface water within the reach. The entire reach continues south outside of the review area and into the Applewhite Phase 1 property for approximately 600 linear and flows into S-1, which flows approximately 1632 linear feet through the southern review area and outside the review area, and empties into Graveline Bay, which is connected to Pascagoula Bay. Based on site observations and

review of desktop resources as described above, S-2 is a relatively permanent tributary that exhibits flow at least seasonally.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): W-1 is a wetland 13.48 acres in size within the northern tract of the review area. W-1 is currently divided into two wetland areas due to the construction the manmade ditch S-2 and the dredge spoil upland areas on each side of S-2. These two wetlands have the same plant communities, and the topography of these wetlands is very flat. It had rained the two days prior to the site visit on February 25, 20225, and there was still surface water throughout the two wetland areas indicating saturation and a subsurface connection. Therefore, while W-1 is divided, these wetlands are functioning as one wetland.

There are multiple continuous surface connections associated with W-1. First, the wetland delineation map associated with SAM-2018-00944-JRO depicts the western portion of W-1 extends off-site to the south approximately 200 linear feet and directly abuts the unnamed RPW S-1, meaning the wetland extends laterally to touch the bank of S-1. Second, the wetland delineation map associated with SAM-2018-00944-JRO depicts the eastern portion of W-1 extends off-site to the south and immediately abuts the unnamed RPW S-2. Third, W-1 extends off-site along the northern tract's eastern property line through two (2) breaks in the upland berm. The first break is northwest of Olde Magnolia Drive cul-de-sac. W-1 extends east through the break in the berm and then extends immediately south approximately 450 linear feet before abutting an off-site unnamed RPW. This off-site unnamed RPW conveys hydrology from the surrounding uplands and wetlands and exhibits flow at least seasonally. The RPW has a bed and bank, an OHWM, and had flowing surface water during the site visit on February 25, 2025. The second break is in the southeastern corner of W-1. The wetland extends east through the break approximately 40 linear feet before abutting the same off-site unnamed RPW. The extension of the wetlands off-site, which directly abuts three (3) unnamed RPWs provides a continuous surface connection between W-1 and the unnamed RPWs. Therefore, W-1 is an adjacent wetland because it does have continuous surface connection to a TNW, interstate water, relatively permanent impoundment, RPW, or territorial seas.

W-2 is a wetland 0.05-acre in size within the southern tract and directly abuts the unnamed RPW S-1, meaning the wetland extends laterally to touch the bank of S-1. Therefore, W-2 is an adjacent wetland because it does have continuous surface connection to a TNW, interstate water, relatively permanent impoundment, RPW, or territorial seas.

W-4 is a wetland 1.46-acre in size within the southern tract and directly abuts the unnamed RPW S-1, meaning the wetland extends laterally to touch the bank of S-1. Therefore, W-4 is an adjacent wetland because it does have continuous surface connection to a TNW, interstate water, relatively permanent impoundment, RPW, or territorial seas.

## 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.

P-1 is a manmade pond 1.38 acres in size. The pond was constructed in uplands for aesthetic reasons and is surrounded by uplands with no outlet. In accordance with the preamble to the 1986 regulations, the following waters are generally not considered waters of the U.S.: Artificial 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 such P-1 is not jurisdictional.

- 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.

S-3 is a manmade non-RPW swale feature 469 linear feet in length within the review area that was constructed in wetlands with flow only during storm events. S-3 conveys over flow of hydrology from the surrounding wetlands but does not exhibit flow at least seasonally. The feature lacks baseflow, has discontinuous bed and bank structure, and is very well vegetated throughout the reach. The entire reach continues off-site and into the Applewhite Phase 1 property approximately 450 linear feet before intersecting with a swale and S-1. While there were 3 small pools of surface water within S-3 during the site visit on February 25, 2025, this only accounts for less than 5% of the entire reach. According to the National Water Prediction Service, it rained the 2 days prior this site visit. The only periods of time this stream reach has flow is immediately after rain events. There is no evidence of an OHWM anywhere within S-3. The swale is characterized by low volume, infrequent, or short duration flow. The swale appears to have been created to drain the western portion of W-1. However, this

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

entire area is extremely flat. Most surface water is retained within W-1 and does not immediately flow to S-3. Due to the shallow nature of the swale, along with historical disturbance, sedimentation, and compaction from equipment, S-3 lacks wetland indicators. S-3 is considered a non-relatively permanent tributary because it lacks a bed and bank, lacks baseflow, and OHWM. Although S-3 drains a wetland, it does not have relatively permanent flow and is therefore 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 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).

W-3 is a wetland depression 0.92 acre in size near the southwest corner of the southern tract. The wetland is surrounded by uplands and does not directly abut any other aquatic resources. This wetland is not an adjacent wetland because it does not have a continuous surface connection to a TNW, interstate water, relatively permanent impoundment, RPW, or territorial seas.

- 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.



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- a. Sanders Environmental, LLC's Approved Jurisdictional Determination Request for the Applewhite Subdivision Phase 2, dated September 18, 2023
- b. D.R. Sanders and Associates, Inc.'s Wetland Delineation Report for Applewhite 30.51 acres dated September 23, 2020
- c. Sanders Environmental, LLC's Wetland Delineation Report for Applewhite Subdivision Project Phase 1 (SAM-2018-00944-JRO) dated February 17, 2020
- d. Corps LiDAR Elevations and Hillshade, NHD Map, Topographic Map, and the Section 10 Waters Map accessed using the National Regulatory Viewer, along with the
- e. NOAA National Water Prediction Service: <https://water.noaa.gov/>
- f. Google Earth Pro Aerial Imagery and Street View Photographs
- g. Corps site visit photographs November 28, 2023; September 6, 2024; and February 25, 2025.
- h. NC Division of Water Quality –Methodology for Identification of Intermittent and Perennial Streams and Their Origins v. 4.11 was used to help identify the stream (S-1)

#### 10. OTHER SUPPORTING INFORMATION.

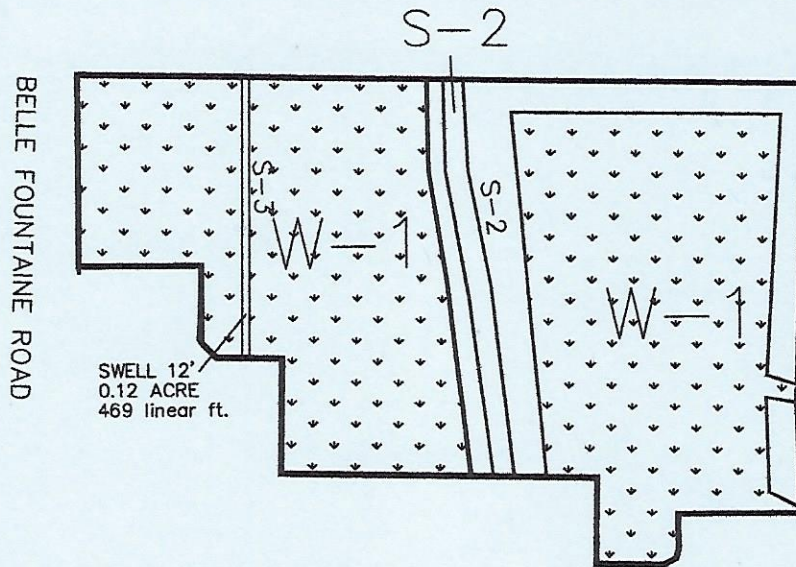
- a. Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436, December 19, 2023 (Section 7g Wetland W-1)
- b. Memorandum to Re-Evaluate Jurisdiction for NWP-2007-428, February 26, 2008 (Section 7g Wetland W-1)
- c. Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of 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.

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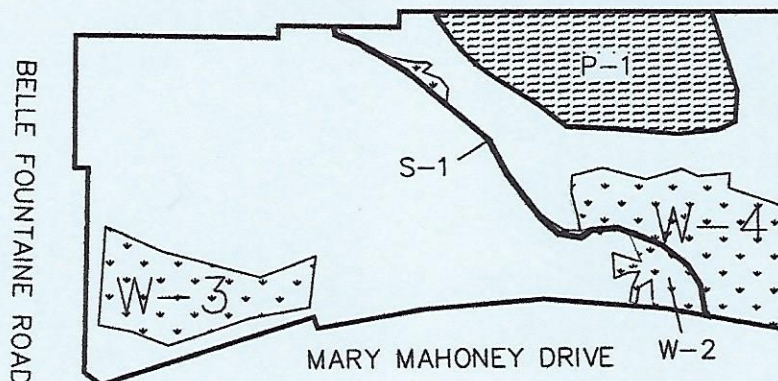
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAM-2022-00392-MJF


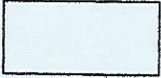
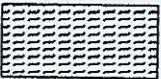

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

ROGER APPLEWHITE  
WETLAND DELINEATION, JACKSON COUNTY, MS



WETLAND W-1 - 13.48 ACRES (7.10 + 6.38)  
DITCH (S2) - 669 LINEAR FT.  
WETLAND W-2 - 0.23 ACRE  
WETLAND W-3 - 0.92 ACRE  
WETLAND W-4 - 1.87 ACRES



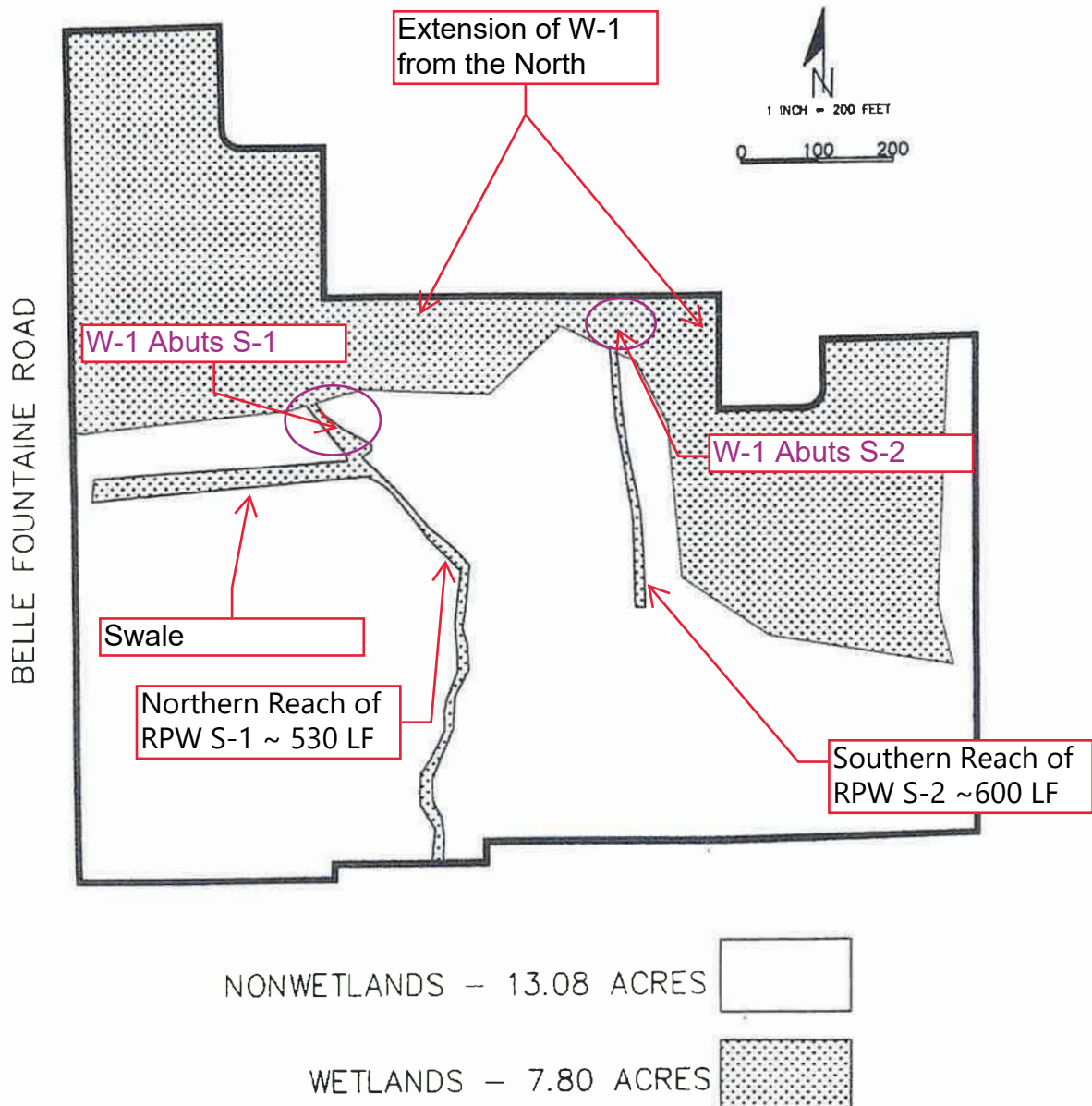
WETLAND - 16.83 ACRES   
NONWETLAND - 12.86 ACRES   
OTHER WATERS (P-1) - 1.38 ACRE   
STREAM (S-1) - 832 LINEAR FEET  
8 FT WIDE 

**SANDERS ENVIRONMENTAL, LLC**

19032 Old Port Gibson Road, Utica, Mississippi 39175

**Outside of Review Area, Phase 1 (SAM-2018-00944-JRO)**

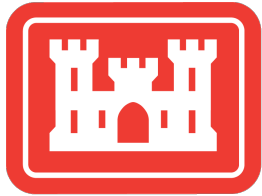
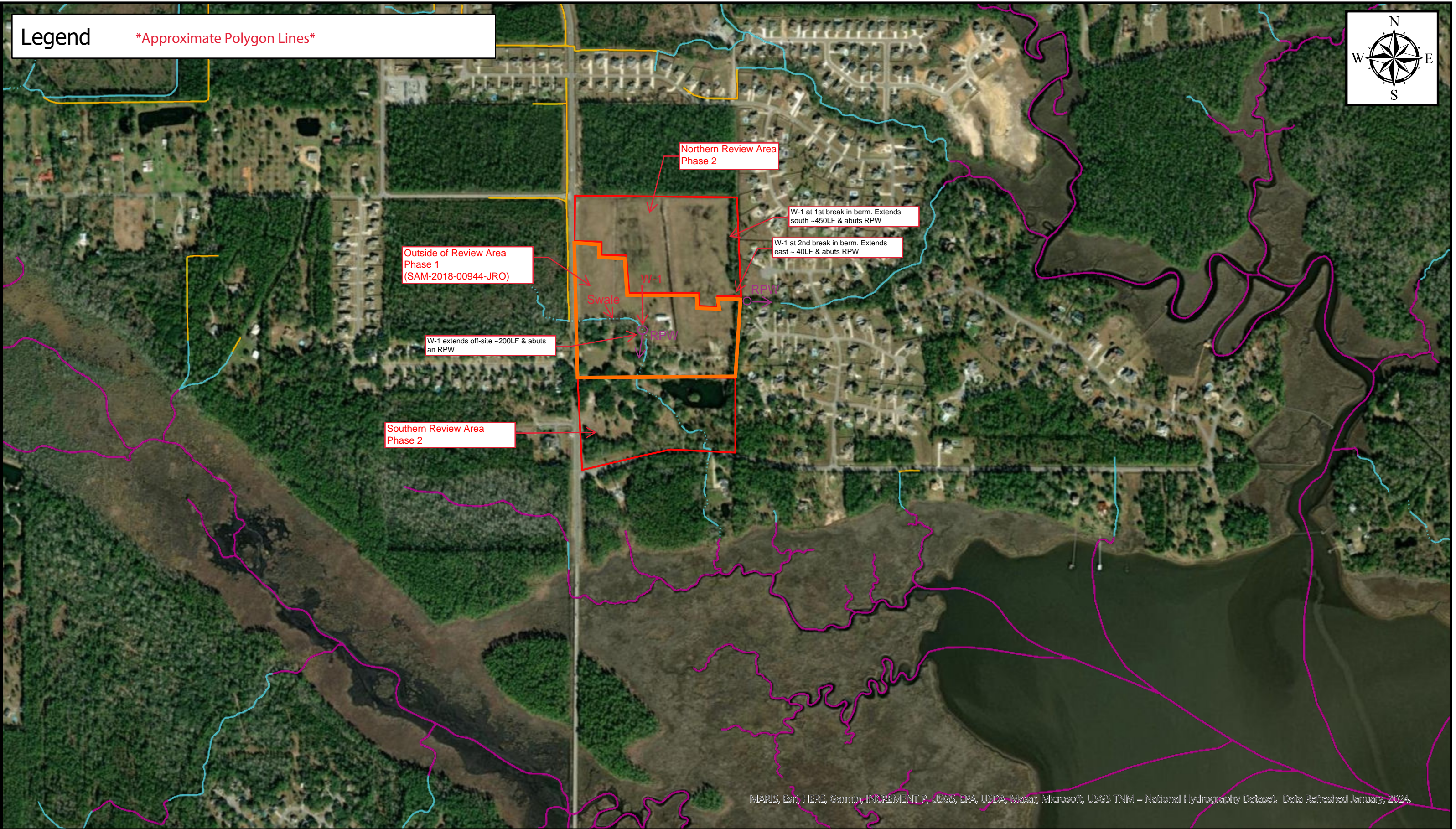
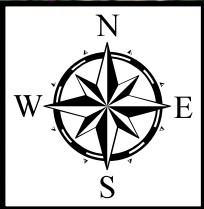
APPLEWHITE SUBDIVISION PROPERTY  
JACKSON COUNTY, MISSISSIPPI 1/20/20



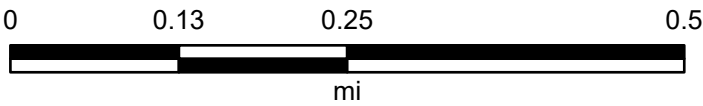


Legend

\*Approximate Polygon Lines\*



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Map Center: 88.715785°W 30.376715°N

Map Created by: Chris Pickering

Date: 2/13/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere