



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

CESAM-RD-N

October 28, 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> SAM-2022-00484-SNR; 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable 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. Highwall Pit 1 – non-jurisdictional feature

## 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)

3. REVIEW AREA. The review area is limited to the feature identified as Highwall Pit 1, which is part of a 15-acre parcel in Moody, St. Clair County, Alabama. The center of the review area is Latitude 33.616178, Longitude -86.510839 and is located in the Cahaba River Watershed 8-digit hydrologic unit code (HUC 03150202). The attached figures depict the 15-acre parcel and the review area within that parcel. There are no other aquatic resources on the 15-acre parcel.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to the aquatic resource is the Cahaba River. The Cahaba River is on the Mobile District's Section 10 waters list.<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

Highwall Pit 1 does not have a flowpath to a TNW, interstate water, or territorial sea. There are no streams flowing into or out of the pond that would allow a flowpath to a TNW, interstate water, or territorial sea.

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
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

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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.

- 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>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. 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*.

The pond on the property was created from historic, pre-SMCRA coal mining operations. The center of the 0.75-acre feature is located at latitude 33.616178

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

and longitude -86.510839. During the previous mining activities at the site, coal was excavated from an upland area, and the area was left unreclaimed which resulted in the formation of a pond at the base of the highwall that is inundated year-round. During the Corps project manager's site visit on February 15, 2024, non-hydric soils were observed surrounding the pond as depicted in the attached figures. Additionally, the water table at the location is three or four feet below the surface of the ground. There were no streams flowing into or out of the pond.

Pursuant to the preamble to the Final 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the U.S. See preamble 328.3 Definitions (e), which states the Corps generally does not consider the following water to be waters of the U.S. : "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters on the United States (see 33 CFR 328.3(a))." The operation is abandoned; therefore, further evaluation is required to determine if the abandoned pit is a water of the U.S. The pond does not meet any of the jurisdictional categories of waters of the U.S., does not meet the criteria to be generally non-jurisdictional under the pre-2015 regime and the preamble to the 1986 regulations; therefore, the pond will be reviewed pursuant to paragraph (a)(3) of 33 CFR 328.3 or "other" waters under the pre-2015 regulations (Memorandum on Evaluating Jurisdiction for LRL-2023-00466, February 7, 2024). The pond does not support a link to interstate or foreign commerce. It is not known to support interstate or foreign commerce or known to be used by interstate or foreign travelers for recreation or other purposes. The pond does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, or used for industrial purposes by industries in interstate commerce. For all of these reasons, the pond does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a) and is not jurisdictional under the Clear Water Act.

- 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).
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.

CESAM-RD-N

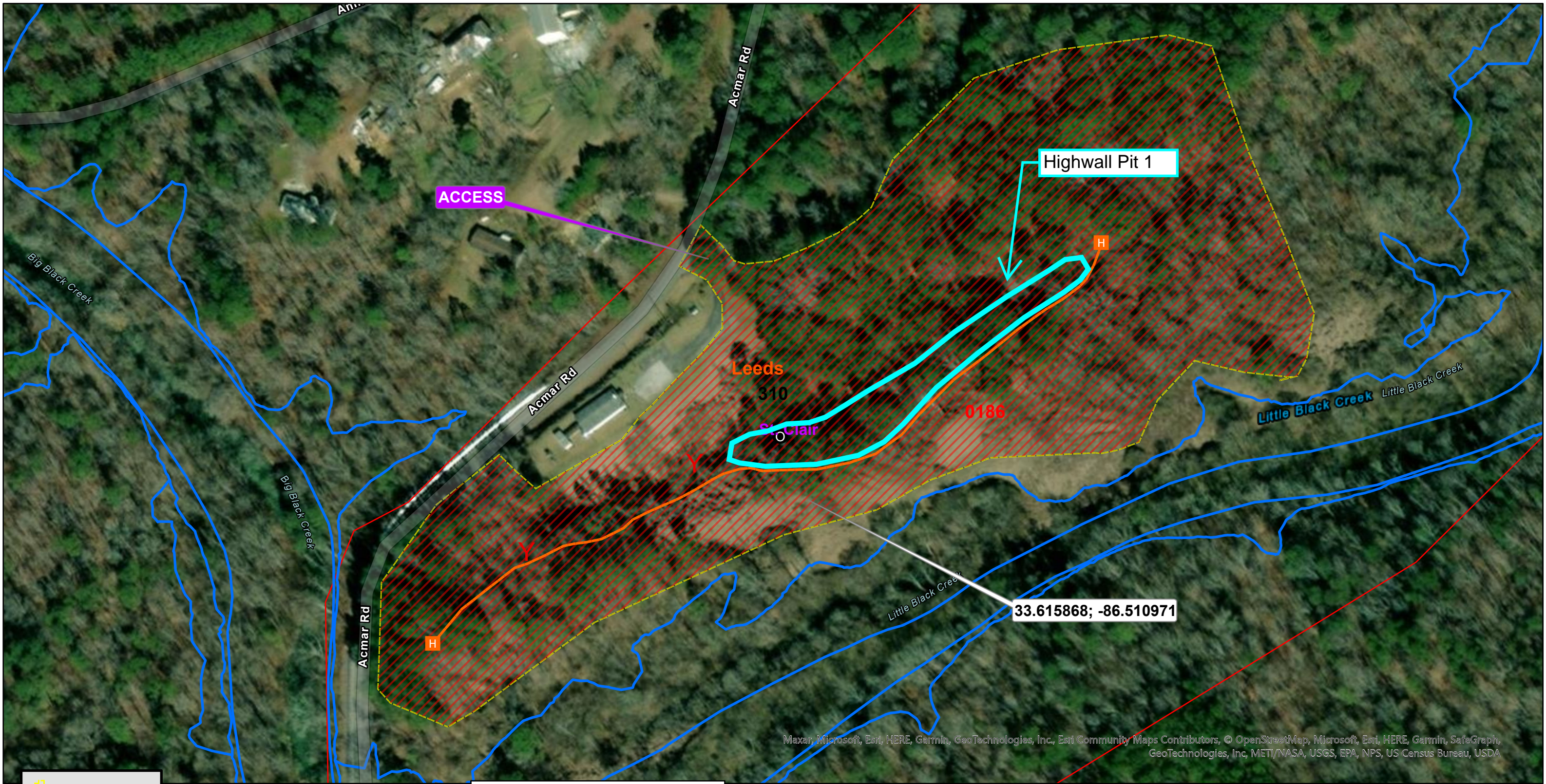
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAM-2022-00484-SNR

- a. In office evaluation using desktop resources was completed on June 20, 2024. Site visit conducted on February 15, 2024, with USACE Project Managers Samantha Rhoades and Bryan Moatts, and Alabama Department of Labor representatives Jeffrey Butler and John Byrd.
- b. Figures 1-3, Aerial Photography Map, Topographic Map, and Aquatic Resource Location Map; Submitted by Alabama Department of Labor.
- c. Figure 4, NRCS Soil Web Survey, Soil Map.  
<https://websoilsurvey.nrcs.usda.gov/app/>. Accessed in October 2024.
- d. Figure 5, NWI Map. <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>. Accessed in October 2024.
- e. Memorandum of Evaluating Jurisdiction for LRL-2023-00466, February 7, 2024.

10. OTHER SUPPORTING INFORMATION.

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.





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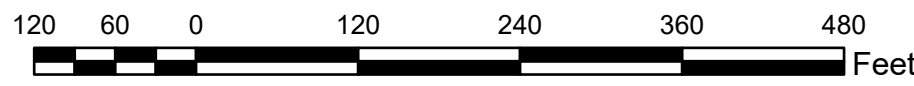
- Project Sites
- PAD Areas
- Planning Units
- Other-Impoundments
- Portals
- Dangerous Highwall
- Spoil Area
- Wetlands
- Flood Limits
- AHC Landmarks
- AHC Roads and Trails
- AHC Areas

**FIGURE 1**  
**SAM-2022-00484-SNR**

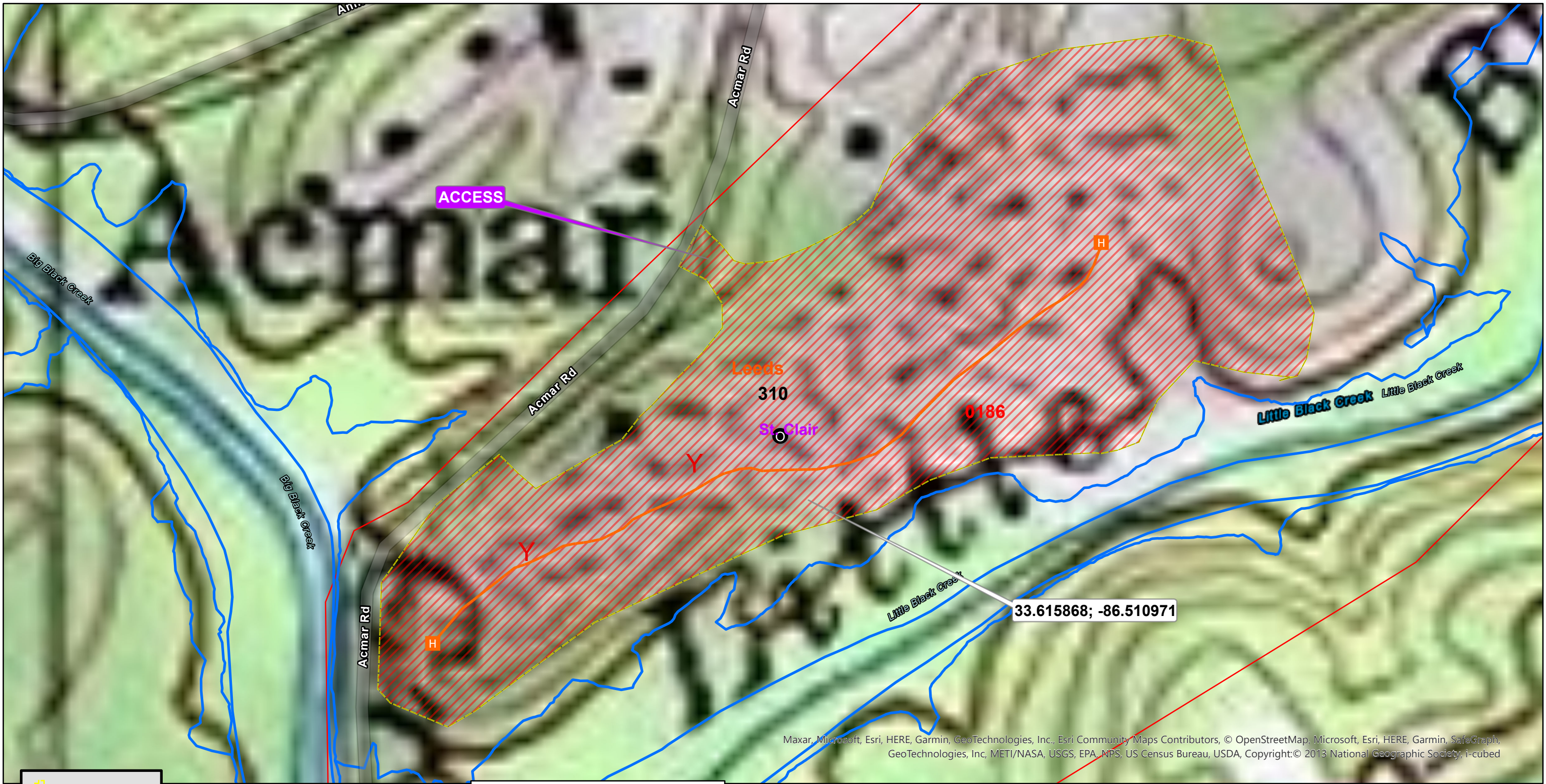


NOTES: THE PROJECT AREA CONSISTS OF APPROXIMATELY 15 ACRES. THERE ARE 100 YR FLOOD LIMITS AS CLASSIFIED BY FEMA ON OR NEAR THE SITE. THERE ARE NO WETLANDS AS CLASSIFIED BY THE U.S. FISH AND WILDLIFE NATIONAL WETLANDS INVENTORY ON OR NEAR THE SITE. THERE ARE NO HISTORIC FEATURES AS DESIGNATED BY THE ALABAMA HISTORICAL COMMISSION (AHC) ON OR NEAR THE SITE.

**ALABAMA DEPARTMENT OF LABOR**  
**ABANDONED MINE LAND RECLAMATION PROGRAM**  
**NEW LIFE CHURCH AML PROJECT**







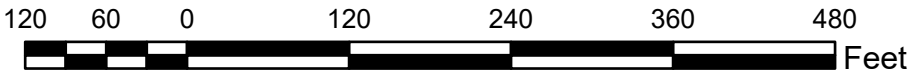
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- Spoil Area
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- AHC Roads and Trails
- AHC Areas

**FIGURE 2**  
**SAM-2022-00484-SNR**

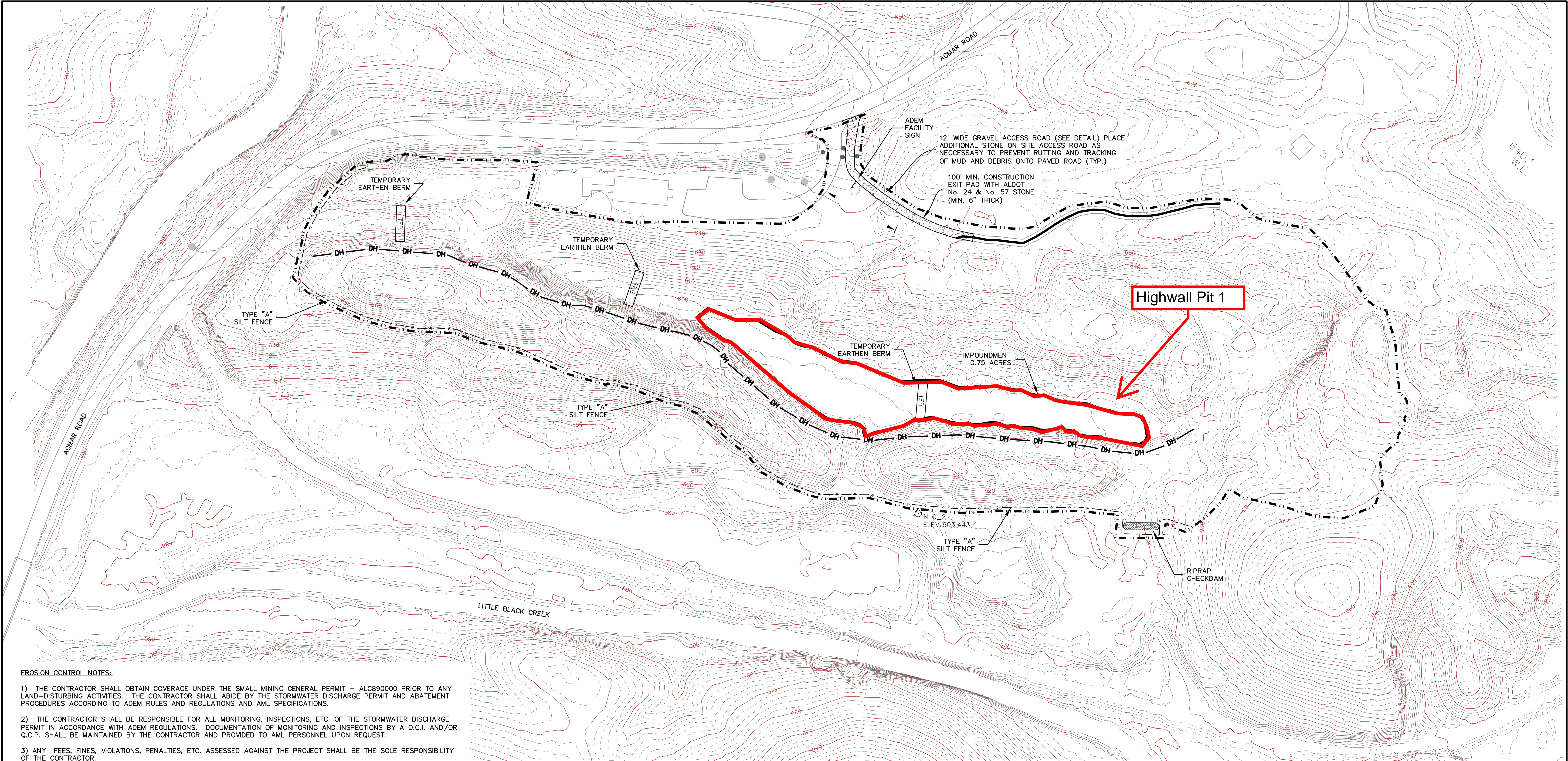


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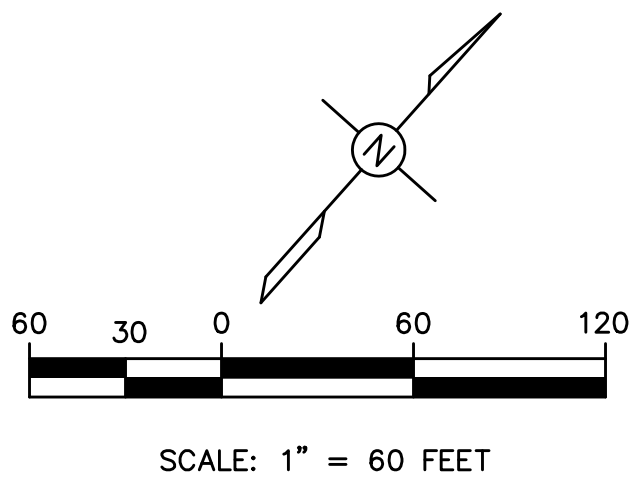




**EROSION CONTROL NOTES:**

- 1) THE CONTRACTOR SHALL OBTAIN COVERAGE UNDER THE SMALL MINING GENERAL PERMIT – ALG890000 PRIOR TO ANY LAND-DISTURBING ACTIVITIES. THE CONTRACTOR SHALL ABIDE BY THE STORMWATER DISCHARGE PERMIT AND ABATEMENT PROCEDURES ACCORDING TO ADEM RULES AND REGULATIONS AND AML SPECIFICATIONS.
- 2) THE CONTRACTOR SHALL BE RESPONSIBLE FOR ALL MONITORING, INSPECTIONS, ETC. OF THE STORMWATER DISCHARGE PERMIT IN ACCORDANCE WITH ADEM REGULATIONS. DOCUMENTATION OF MONITORING AND INSPECTIONS BY A Q.C.I. AND/OR Q.C.P. SHALL BE MAINTAINED BY THE CONTRACTOR AND PROVIDED TO AML PERSONNEL UPON REQUEST.
- 3) ANY FEES, FINES, VIOLATIONS, PENALTIES, ETC. ASSESSED AGAINST THE PROJECT SHALL BE THE SOLE RESPONSIBILITY OF THE CONTRACTOR.
- 4) TWO RAIN GAUGES AND THE STORMWATER DISCHARGE PERMIT FACILITY SIGN SHALL BE INSTALLED ON THE PROJECT SITE AT A LOCATION SHOWN ON THE PLANS OR APPROVED BY THE PROJECT MONITOR. RAIN GAUGES AND SIGN SHALL BE PROPERLY MAINTAINED AT ALL TIMES.
- 5) PRIOR TO ANY CLEARING OR CONSTRUCTION ACTIVITIES, ALL INITIAL PHASE EROSION & SEDIMENT CONTROL DEVICES SHALL BE INSTALLED AND FUNCTIONING PROPERLY.
- 6) ALL EROSION & SEDIMENT CONTROL DEVICES, INCLUDING BUT NOT LIMITED TO STAKED HAYBALES, TYPES A AND B SILT FENCES, SEDIMENT CONTROL LOGS, AND RIPRAP CHECKDAMS SHALL BE INSTALLED ACCORDING TO THE ALABAMA HANDBOOK FOR EROSION CONTROL, SEDIMENT CONTROL AND STORMWATER MANAGEMENT ON CONSTRUCTION SITES AND URBAN AREAS, CURRENT EDITION. THESE EROSION CONTROL DEVICES SHALL BE MAINTAINED AND/OR REPLACED DURING CONSTRUCTION ACTIVITIES AS NEEDED TO PREVENT ANY SEDIMENT FROM LEAVING THE SITE. ADDITIONAL EROSION CONTROL DEVICES SHALL BE INSTALLED IF THE ORIGINAL LOCATION(S) OF THESE ITEMS HAVE BECOME INEFFECTIVE OR CANNOT BE PROPERLY MAINTAINED.
- 7) ONCE ALL SEDIMENT CONTROL DEVICES ARE INSTALLED AND FUNCTIONING PROPERLY, THE CONTRACTOR MAY BEGIN CLEARING THE SITE OF TREES AND VEGETATION AS FLAGGED AND AS DIRECTED BY THE PROJECT MONITOR.
- 8) ALL EROSION CONTROL DEVICES SHALL BE PROPERLY MAINTAINED DURING CONSTRUCTION AND UNTIL ALL DISTURBED AREAS HAVE BEEN PERMANENTLY STABILIZED. MAINTENANCE OF ALL EROSION CONTROL DEVICES SHALL BE THE SOLE RESPONSIBILITY OF CONTRACTOR.
- 9) ALL SILT FENCES SHALL BE CLEANED OUT PERIODICALLY AND MAINTAINED IN WORKING ORDER DURING CONSTRUCTION ACTIVITIES AS NEEDED TO PREVENT ANY SEDIMENT FROM LEAVING THE SITE. IF SILT FENCES CANNOT BE PROPERLY MAINTAINED OR BECOME DAMAGED OR OTHERWISE RENDERED INEFFECTIVE, THEY SHALL BE REPLACED TO PREVENT OFFSITE SEDIMENTATION.
- 10) A SEDIMENT RETENTION TRAP SHALL BE EXCAVATED IN FRONT OF ALL RIPRAP CHECKDAMS (SEE DETAILS) AND SHALL BE CLEANED OUT PERIODICALLY, WHEN INSTRUCTED TO DO SO BY THE PROJECT MONITOR AND PRIOR TO SEEDING OPERATIONS.
- 11) CONTRACTOR SHALL REVEGEATE ALL DISTURBED AREAS ACCORDING TO THE PROJECT SPECIFICATIONS AS SOON AS POSSIBLE.

**atlantic**  
2223 Drake Avenue SW, Suite 200  
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**FIGURE 3**  
**SAM-2022-04484-SNR**

**LEGEND**

- PROJECT LIMITS  
SILT FENCE (TYPE "A")  
ADEM FACILITY SIGN  
RIPRAP CHECKDAM  
CONSTRUCTION EXIT PAD  
TEMP. EARTHEN BERM W/ ROCK CORE  
EXISTING CONTOURS (2')  
EXISTING CONTOURS (10')

**SPECIAL NOTE:**  
THE CONTRACTOR SHALL BE RESPONSIBLE FOR NOTIFYING THE PROJECT MONITOR IF ANY ARTIFACTS OR ARCHAEOLOGICAL FEATURES ARE ENCOUNTERED DURING PROJECT ACTIVITIES. WORK SHALL CEASE AND THE ALABAMA HISTORICAL OFFICE NOTIFIED IMMEDIATELY. ARTIFACTS ARE OBJECTS MADE, USED OR MODIFIED BY HUMANS. THEY INCLUDE, BUT ARE NOT EXCLUDED TO ARROWHEADS, BROKEN PIECES OF POTTERY OR GLASS, STONE IMPLEMENTS, METAL FASTENERS OR TOOLS, ETC. ARCHAEOLOGICAL FEATURES ARE STAINS IN THE SOIL THAT INDICATE DISTURBANCE BY HUMAN ACTIVITY. SOME EXAMPLES ARE POST HOLES, BUILDING FOUNDATIONS, TRASH PITS AND EVEN HUMAN BURIALS.

	ALABAMA DEPARTMENT OF LABOR ABANDONED MINE LAND RECLAMATION PROGRAM		
	SCALE: 1" = 60'	REVISED:	DRAWN BY: J H B
	DATE: 02-05-2024		DESIGN BY: L J K
	EROSION CONTROL PLAN — INITIAL		
	NEW LIFE CHURCH		SHEET NO. 4 OF 17