



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
109 ST JOSEPH STREET
MOBILE, ALABAMA, 36602

CE-SAM-RD-A

May 09, 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 SAM-2022-01001 MFR #1 of #1²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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 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. Wetland 1: Non-Jurisdictional wetland without a continuous surface connection to a jurisdictional water.
 - ii. Wetland 2: Jurisdictional wetland with a continuous surface connection to a jurisdictional RPW ditch; Section 404

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)
- e. *United States v. Cundiff*, 555 F.3d 200 (6th Cir.), cert. denied, 130 S. Ct. 74 (2009)
- f. Mobile District's Section 10 waters list.

3. REVIEW AREA.

The review area is comprised of an estimated 20.5 acres parcel primarily composed of farmland (livestock) near Turkey Creek. While the majority of land has remained clear for more than half a century, the depression wetland feature on-site (Wetland 1) has been cleared and filled. A future road system has been excavated in an oval shape around the parcel to approximately 10" in depth. A storm water pond has been constructed in uplands along the southeastern portion of the property. The

parcel in question is situated at an approximate midpoint between Turkey Creek and Baker Creek. The northern portion of the property drains towards Turkey Creek, while the southern portion of the property generally drains toward Baker Creek. However, Wetland 2 appears to primarily drain to the north to Turkey Creek. The approximate center point is at Latitude 30.601637, Longitude -88.289338; Dawes, Mobile County, Alabama.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶

The nearest TNW is the Escatawpa River which is on the Mobile District's Section 10 waters list. Section 10 waters are a subset of TNWs.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Wetland 1 is a PFO which appears depressional in nature. It appears to be fed by both precipitation as well as runoff from the west. When enough head is built in the depressional feature, it appears to drain downslope to the east via surface sheet flow through uplands more than 60-feet wide only detectable via LiDAR data for approximately 330 feet to an offsite wetland system, which connects to a TNW as described below.

Wetland 2 is a 0.2-acre PFO in the southeastern corner of the property, which is part of a larger wetland outside of the review area. Wetland 2 extends to the north and east for approximately 0.31 miles, where it crosses under McLeod Rd via an approximately 30-foot culvert to connect to an RPW ditch that flows approximately 0.38 miles and connects downslope to an RPW - Turkey Creek. Flow from Turkey Creek (~7 miles) heads west to connect to a RPW, Big Creek, and then flows approximately 13.5 miles to the Escatawpa River (RPW & TNW).

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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

⁶ 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.

⁷ 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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸

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): Wetland 2 (approximately 0.2 acre onsite) is part of a larger one wetland that extends onto the southeastern corner of the review area. Wetland 2 extends outside of the review area northeast to McLeod Road where it extends into a culvert under the road and continues flow into an RPW ditch north of the road, which flows into Turkey Creek, an RPW. The culvert under McLeod Road provides a continuous surface connection from Wetland 2 (which includes the 0.2-acre portion in the review area) to the RPW ditch on the north side of McLeod Road.

⁸ 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.

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”).⁹ 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*.

⁹ 51 FR 41217, November 13, 1986.

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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).

Wetland 1 (approximately 1.3 acres) is a palustrine forested wetland which is depressional in nature without a continuous surface connection to a RPW, TNW, territorial sea, interstate tributary, or jurisdictional impoundment. Wetland 1 is surrounded by uplands; however, water appears to occasionally flow via overland sheetflow through uplands in an easterly direction to Wetland 2. This sheetflow is not discrete. Because Wetland 1 does not have a continuous surface connection to an RPW, TNW, territorial seas, interstate water, or jurisdictional impoundment, it is not jurisdictional. Additionally, wetlands cannot be jurisdictional based on adjacency to another wetland.

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. A field visit was conducted on March 13, 2024 as evidenced in the photolog included in the administrative record. Office evaluations were conducted periodically from December 2023 to April 2024 via inspection of mapping layers accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey topographical mapping, the National Hydrological Dataset, 3DEP Elevation Modeling, 3 DEP Hillshade Modeling, National Oceanographic and Atmospheric Administration (NOAA) LiDAR data, City of Mobile infrared mapping, Google Earth Pro historic aerial imagery, National Resource Conservation Service (NRCS) soil mapping, and the U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory mapping.
- b. "No Permit Required Request, James Lyon (Mobile County, Alabama)" dated October 3, 2022, prepared by Barry A. Vittor and Associates, Inc. (SAM-2022-01001).

10. OTHER SUPPORTING INFORMATION.

N/A

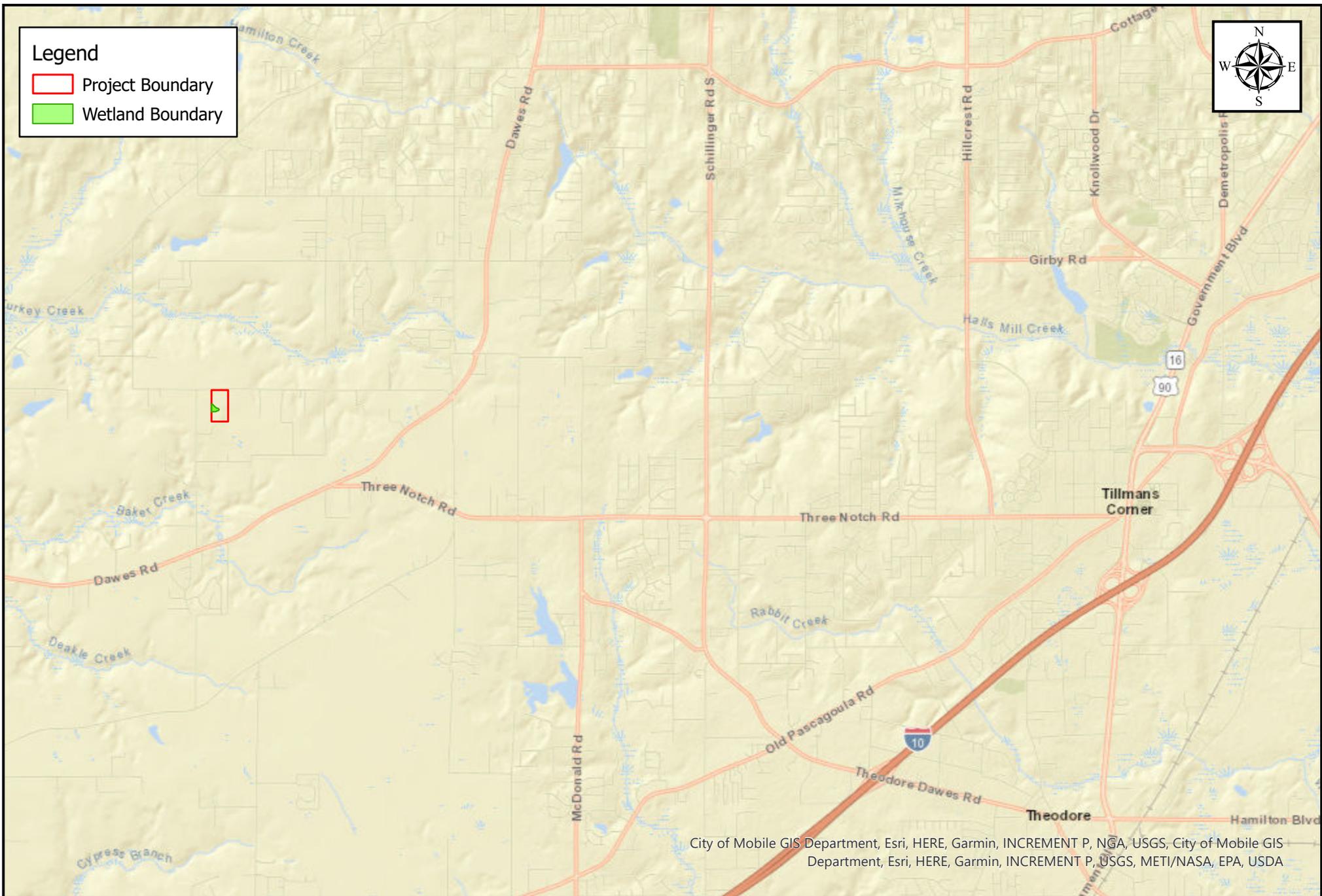
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11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance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

Legend

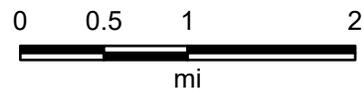
-  Project Boundary
-  Wetland Boundary



City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, NGA, USGS, City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA



Department of the Army //
SAM-2022-01001



Map Center: 88.230946°W 30.596441°N

Map Created by: M. Derek Jacobs

Date: 4/24/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere



Coordinate System: GCS WGS 1984
Upper Left Corner: 88.291442°W 30.604738°N
Lower Right Corner: 88.287077°W 30.599288°N
Service Layer Credits: World Imagery: Maxar, Microsoft



Review Area Overview

-  Review Area
-  Photo Points

Map generated on 4/24/2024 by the National Regulatory Viewer

Legend

-  Project Boundary
-  Wetland Boundary



Soil is native and exposed from excavation (i.e., not fill material; see photo log)



Wetland 1

Wetland 2

City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft, Esri, HERE, Garmin, IPC



Department of the Army // SAM-2022-01001 // Wetland Mapping

0 0.04 0.07 0.14



mi

Map Center: 88.287588°W 30.60165°N

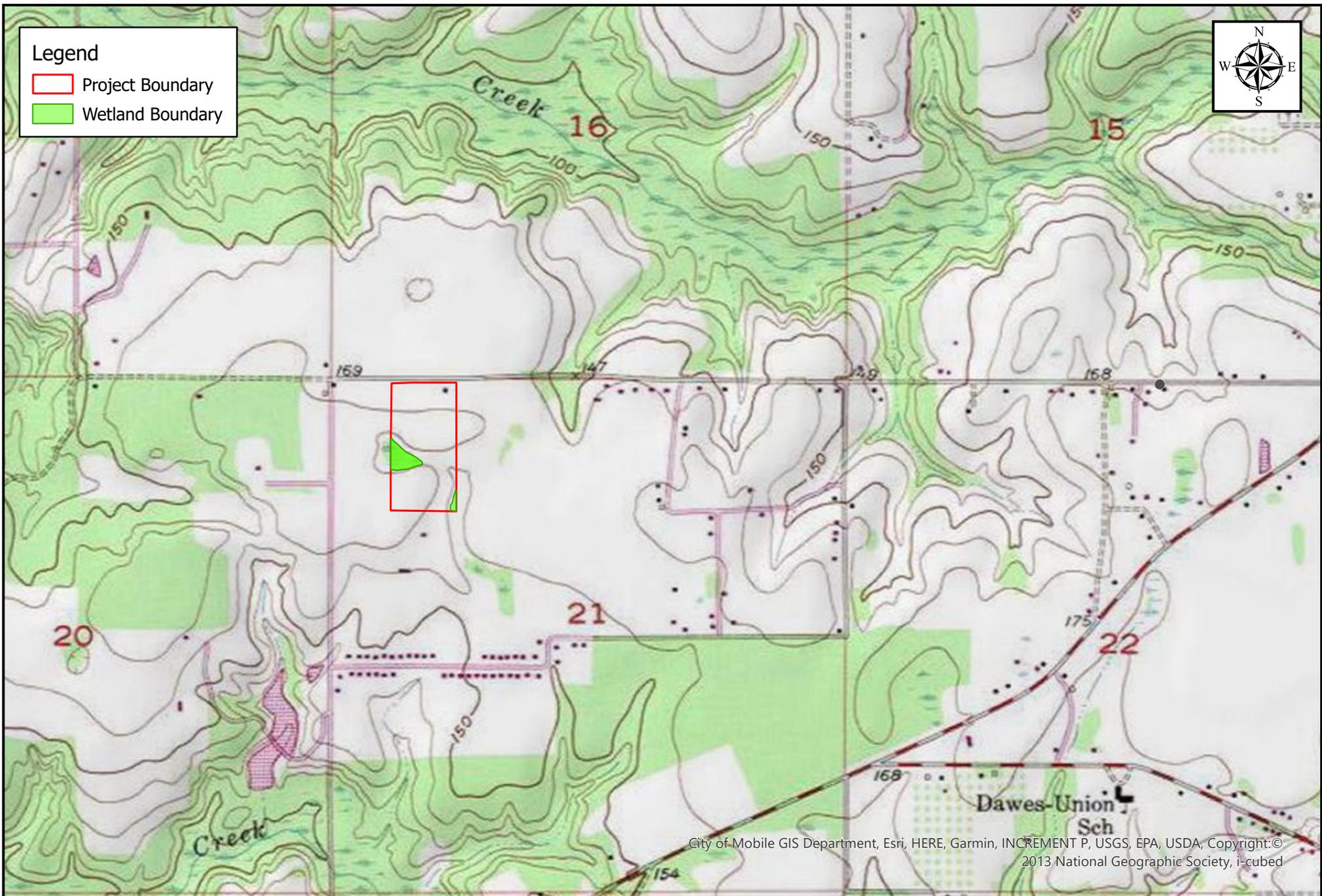
Map Created by: PM NAME

Date: 4/30/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

Legend

-  Project Boundary
-  Wetland Boundary



City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Copyright:© 2013 National Geographic Society, i-cubed



Department of the Army //
SAM-2022-01001 // USGS Mapping



Map Center: 88.28146°W 30.601503°N

Map Created by: M. Derek Jacobs

Date: 4/30/2024

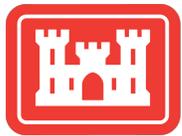
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

Legend

-  Freshwater Forested/Shrub Wetland
-  Freshwater Pond
-  Project Boundary
-  Wetland Boundary



City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community



Department of the Army //SAM-2022-01001 // NWI Mapping

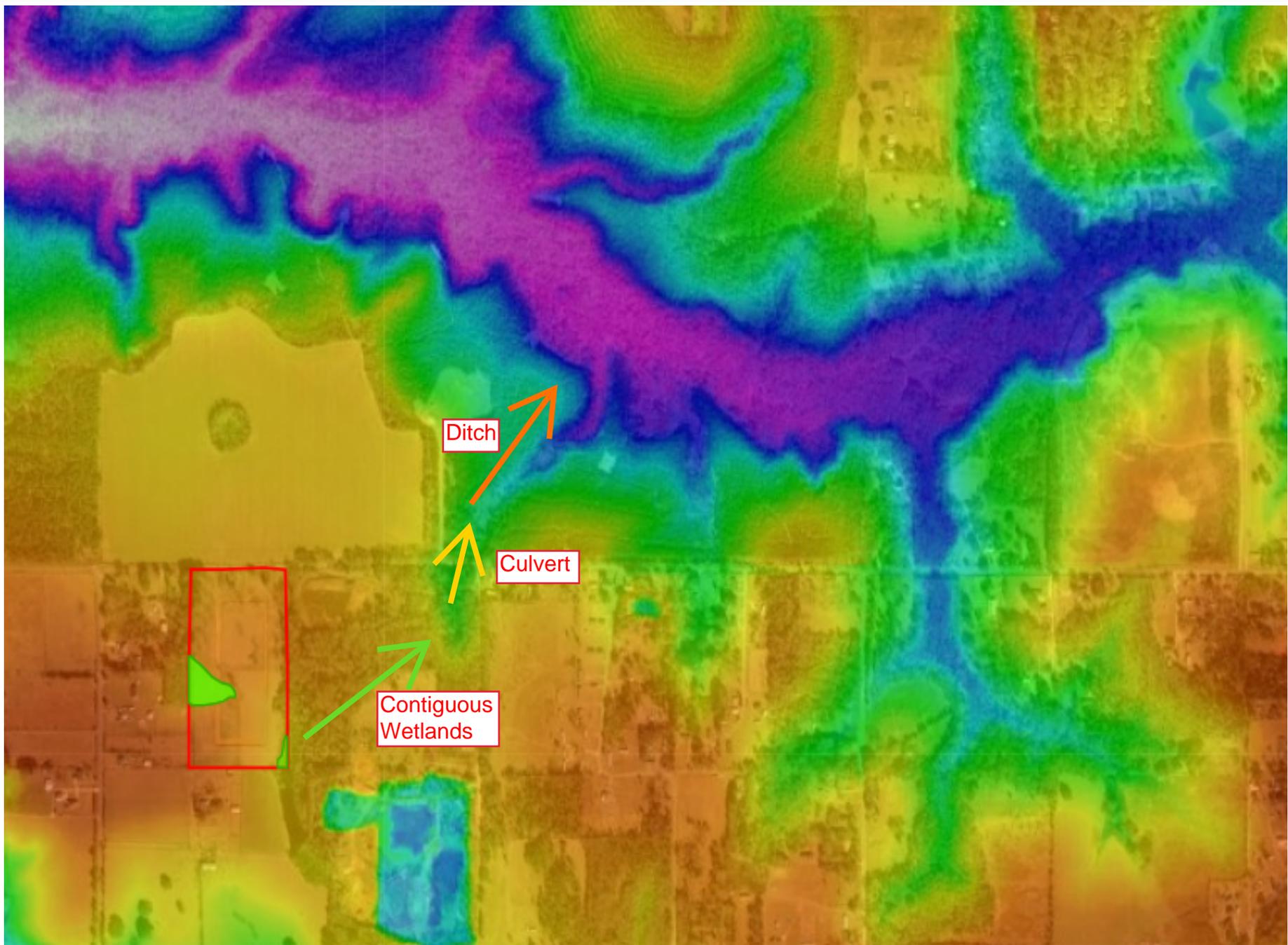


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Map Created by: M. Derek Jacobs

Date: 4/24/2024

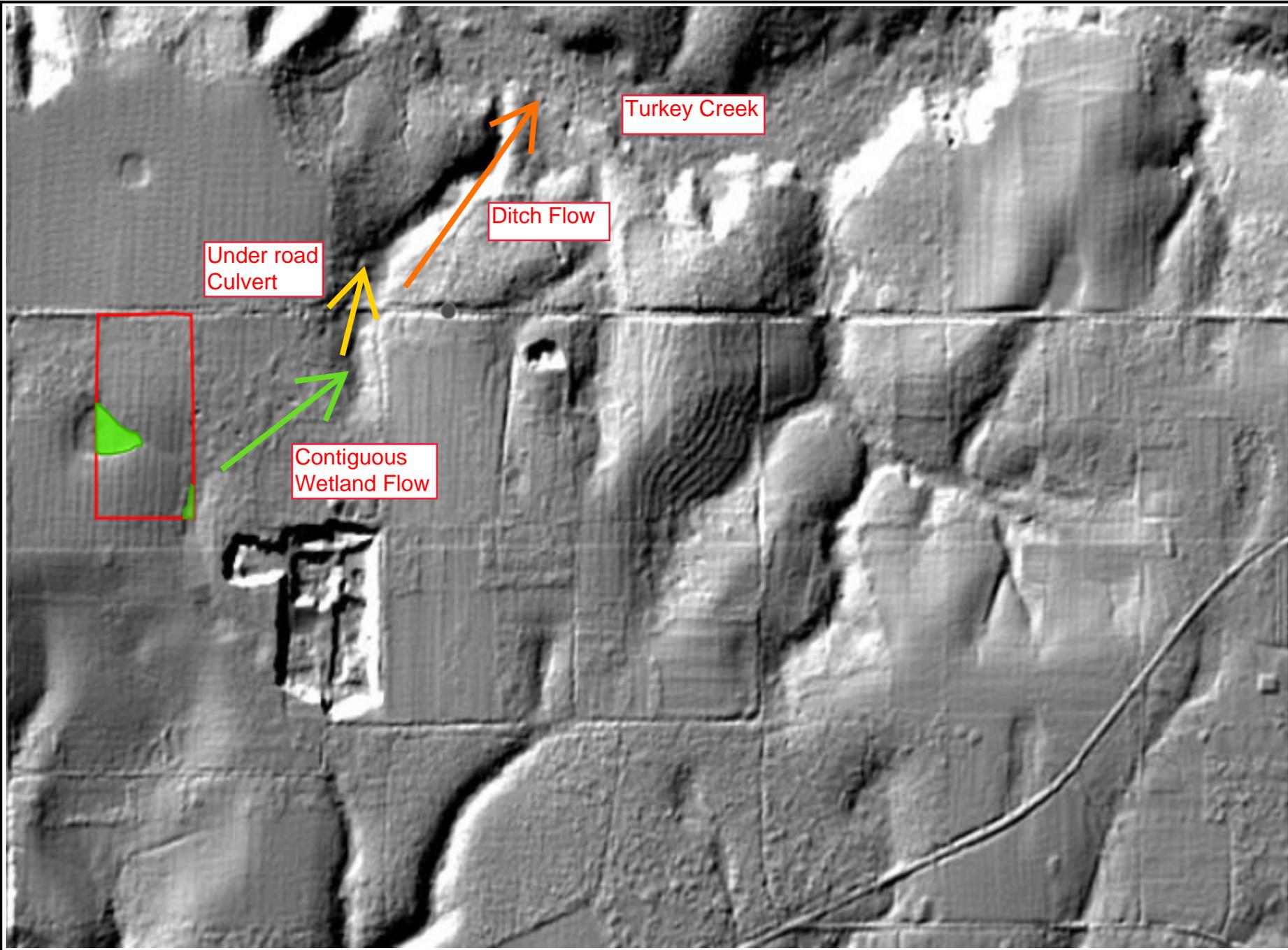
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Department of the Army //
SAM-2022-01001 // 3DEP
Elevation Modeling

3 DEP Elevation Modeling

Map Created by: M. Derek Jacobs
Date: 3/12/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary
Sphere

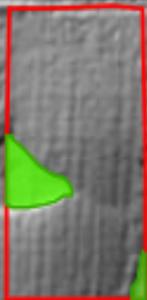


Under road
Culvert

Ditch Flow

Turkey Creek

Contiguous
Wetland Flow



0 0.04 0.07 0.14



mi

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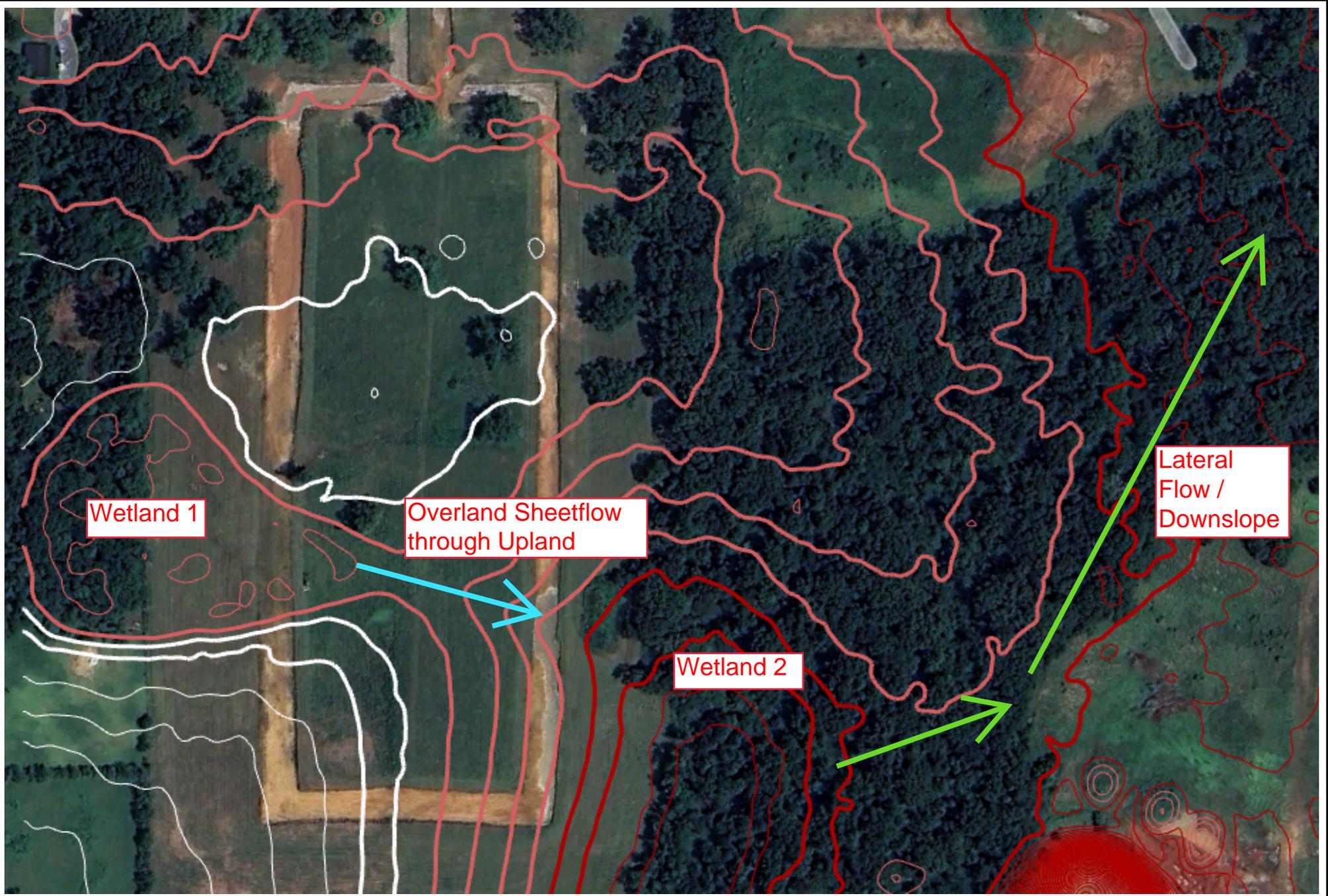
Map Created by: M. Derek Jacobs

Date: 4/30/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere



Department of the Army //
SAM-2022-1001 // Hill Shade Mapping



Wetland 1

Overland Sheetflow through Upland

Wetland 2

Lateral Flow / Downslope



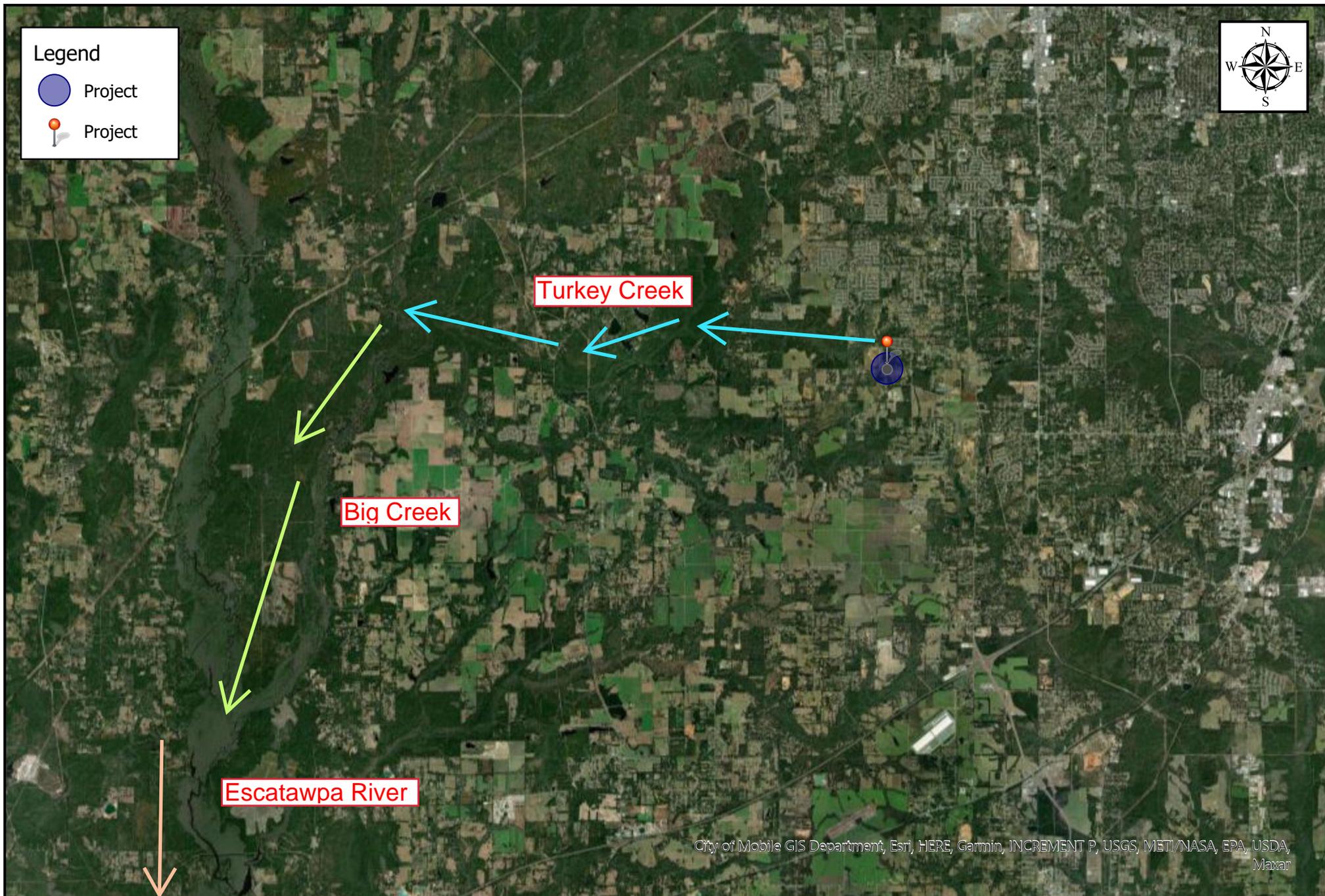
Department of the Army //
SAM-2022-01001 // NOAA LiDAR

NOAA LiDAR Data 1-
foot contours

Map Created by: M. Derek Jacobs
Date: 4/30/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary
Sphere

Legend

-  Project
-  Project



Turkey Creek

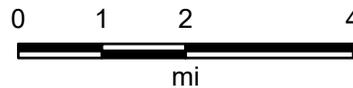
Big Creek

Escatawpa River

City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA, Maxar



Department of the Army //
SAM-2022-01001 // Flow Explanation



Map Center: 88.323006°W 30.584452°N

Map Created by: M. Derek Jacobs

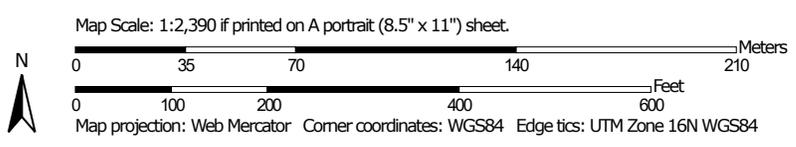
Date: 4/30/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

Soil Map—Mobile County, Alabama
(SAM-2022-01001)



Soil Map may not be valid at this scale.



MAP LEGEND

Area of Interest (AOI)

 Area of Interest (AOI)

Soils

 Soil Map Unit Polygons

 Soil Map Unit Lines

 Soil Map Unit Points

Special Point Features



Blowout



Borrow Pit



Clay Spot



Closed Depression



Gravel Pit



Gravelly Spot



Landfill



Lava Flow



Marsh or swamp



Mine or Quarry



Miscellaneous Water



Perennial Water



Rock Outcrop



Saline Spot



Sandy Spot



Severely Eroded Spot



Sinkhole



Slide or Slip



Sodic Spot



Spoil Area



Stony Spot



Very Stony Spot



Wet Spot



Other



Special Line Features

Water Features



Streams and Canals

Transportation



Rails



Interstate Highways



US Routes



Major Roads



Local Roads

Background



Aerial Photography

MAP INFORMATION

The soil surveys that comprise your AOI were mapped at 1:24,000.

Warning: Soil Map may not be valid at this scale.

Enlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement. The maps do not show the small areas of contrasting soils that could have been shown at a more detailed scale.

Please rely on the bar scale on each map sheet for map measurements.

Source of Map: Natural Resources Conservation Service

Web Soil Survey URL:

Coordinate System: Web Mercator (EPSG:3857)

Maps from the Web Soil Survey are based on the Web Mercator projection, which preserves direction and shape but distorts distance and area. A projection that preserves area, such as the Albers equal-area conic projection, should be used if more accurate calculations of distance or area are required.

This product is generated from the USDA-NRCS certified data as of the version date(s) listed below.

Soil Survey Area: Mobile County, Alabama

Survey Area Data: Version 17, Sep 12, 2023

Soil map units are labeled (as space allows) for map scales 1:50,000 or larger.

Date(s) aerial images were photographed: Jan 3, 2021—Jan 5, 2021

The orthophoto or other base map on which the soil lines were compiled and digitized probably differs from the background imagery displayed on these maps. As a result, some minor shifting of map unit boundaries may be evident.

Map Unit Legend

Map Unit Symbol	Map Unit Name	Acres in AOI	Percent of AOI
BaA	Bama fine sandy loam, 0 to 2 percent slopes	11.1	43.7%
LuA	Lucedale sandy loam, 0 to 2 percent slopes	0.8	3.0%
MaA	Malbis fine sandy loam, 0 to 2 percent slopes	6.1	24.1%
MaB	Malbis fine sandy loam, 2 to 5 percent slopes	7.4	29.2%
Totals for Area of Interest		25.4	100.0%