



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
P.O. BOX 2288
MOBILE, ALABAMA 36628-0001

South Mississippi Branch

22 May 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 1322 (2023),¹ SAM-2023-00311, Oak Capital - Old Fort Bayou Multi-Use Site, Ocean Springs, Mississippi (MFR 1 of 1)²

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

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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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. 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	Location	Water Size	Type of Aquatic Resource	Geographic Authority
W-1	30.456277, -88.791578	57 acres	A7. NON-WOTUS WETLAND.NEGATIVE	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. U.S. 651 (2023)
- e. Mobile District’s Section 10 waters list

3. REVIEW AREA. The approximately 65.68-acre review area is located on Old Fort Bayou Road approximately 0.50 mile west of the intersection with Eglin Road. The southeastern area of the site is bisected by Old Fort Bayou Road. Approximately 63.78 acres of the parcel are on the north side of Old Fort Bayou Road with the approximately 1.9 remaining acres located in a triangular parcel on the south side of the road; within Section 9, Township 7 South, Range 8 West; approximate center coordinates are Latitude 30.456420° North and Longitude 88.791442° West; in Ocean Springs, Jackson County, Mississippi. The site is bounded by Interstate 10 to the northwest, a commercial/residential site and Interstate 10 to the north, a forested, undeveloped area measuring approximately 34 acres to the east, predominantly forested, undeveloped land mixed with single family homes on large

lots to the south, and a mix of single family homes on large lots, a powerline right-of-way, and forested land measuring approximately 14 acres to the west. Fifty-seven (57) acres of the parcel is pine savannah wetland.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is *Old Fort Bayou*. W-1 is approximately 2 miles from *Old Fort Bayou*. *Old Fort Bayou* is on the Mobile District's Section 10 waters list and is therefore a TNW.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Wetland 1 contains three shallow ditches (D-1, D-2, and D-3). Approximately 538 feet of W-1 abuts a roadside ditch on the north side of Old Fort Bayou Road (northside ditch) along the southeastern extent of the property boundary. This northside ditch has two culverts that carry flow under Old Fort Bayou Road to the south side of the road. Water flows from the subject site into the northside ditch and exits offsite through the culverts. Culvert 1 is located within the northside ditch at the subject parcel's southeast corner. Culvert 1 allows water to flow diagonally underneath Old Fort Bayou Road approximately 48 feet, northwest to southeast to the south side of Old Fort Bayou Road where water exits from Culvert 1 and continues southeast in a County-maintained ditch approximately 350 feet in length and then to an apparent Bayhead Drain or Bottomland Hardwood wetland system referred to herein as Wetland South. Culvert 2 is located in the same northside ditch approximately 720 feet southwest of Culvert 1 and is close to the southwestern boundary of the parcel. Culvert 2 allows water to flow offsite nearly perpendicular underneath Old Fort Bayou Road approximately 30 feet, north to south. On the south side of Old Fort Bayou Road, water exits from Culvert 2 and continues within a manmade ditch for approximately 180 feet and into Wetland South. Wetland South extends to the southeast and then back to the southwest following a dendritic pattern for approximately 1.85 miles until abutting an unnamed tributary of *Bayou Talla*. This tributary flows southwesterly for approximately 0.25 mile until it empties into the headwaters of *Bayou Talla*. *Bayou Talla* flows 1.2 miles south into *Old Fort Bayou*, a TNW.

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.

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 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): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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.

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.

- 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*. 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-1 is an approximately 57-acre wetland which includes three shallow ditches (D-1, D-2, and D-3). The southeastern border of the review area is bisected by Old Fort Bayou Road. W-1 extends to a roadside ditch (Roadside Ditch - North), which is parallel to the north side of the Old Fort Bayou Road and extends the

⁹ 51 FR 41217, November 13, 1986.

length of the southeastern review boundary. A soil sample taken at the toe of the Roadside Ditch - North revealed hydric soil indicators, and is thus part of W-1. Based on the wetland delineation, approximately 538 feet of W-1 abuts Roadside Ditch - North. Two culverts in the northside ditch convey water offsite south-southeast from the review area under the road and discharge on the south side of the road into two ditches located on the southwest and southeast side of the 1.9 acre non-wetland parcel, and eventually into Wetland South. Specifically, the Culvert 1 outfall and associated 350-foot Southeast Ditch are offsite and east of the 1.9 acre parcel that is part of the subject site. The Culvert 2 outfall, and the associated 180-foot Southwest Ditch are offsite and southwest of the 1.9 acre parcel that is part of the review area. Following the February 20, 2025, site visit, USACE determined that the 1.9 acre parcel did not include any wetlands due to the lack of hydrology indicators. The lack of indicators may be due to the slightly higher elevation of the parcel in addition to a lower water table presumably caused by the adjacent ditches located offsite, at the east and west of this parcel. Although historic USGS topographic maps show Wetland South terminating at or near the south side of Old Fort Bayou Road, the areas directly surrounding Old Fort Bayou Rd near the review area appear to have been heavily modified over the last half-century through clearing, ditching, and construction/maintenance of Old Fort Bayou Rd. The road itself has been present on its current alignment since at least the 1950s and earlier. As shown in LiDAR – 3DEP and Hillshade Maps in Appendix A, there is a minor ridge or slightly elevated area along the south side of Old Fort Bayou Rd which, along with the ditches south of the road, appears to separate W-1 from Wetland South. As noted above, the two manmade ditches on the south side of Old Fort Bayou Rd assist with stormwater drainage from W-1 via D-1 and D-2 through Culverts 1 and 2 under Old Fort Bayou Rd and eventually to Wetland South approximately 300 ft to the south. The USACE was unable to obtain access to areas outside of the review area; however, photos provided by the applicant show that areas approximately 300 feet south of the Southeast Ditch on the south side of Old Fort Bayou Rd contain wetland vegetation and evidence of wetland hydrology indicative of a Bayhead Drain or Bottomland Hardwood wetland system.

Consideration was given to joint-decision memos NWO-2003-60436 and LRB-2021-01386 in reference to a divided wetland functioning as a single wetland. Based on similar elevations, soils, and vegetation, W-1 appears to extend offsite to the east and west. The east side of the review area is flanked by a dirt road measuring approximately 30-ft wide, with no apparent culverts providing direct hydrologic connection between W-1 and potential wetland areas to the east. The presence of any shallow sub-surface connection across the dirt road is uncertain, as this area is offsite and was not accessed during USACE site visits. This wetland likely extends east for a few hundred feet, is bounded on the north by an apparent upland area, and drains into the same Southeast Ditch as W-1 via

another culvert on the east side of the dirt road and is thus likely to be non-adjacent, similar to W-1. At the west side of the review area, W-1 appears to border additional undeveloped pine savannah wetlands to the west, but the extent of this wetland is unclear as it is bounded by a power line easement, I-10, and multiple residential developments further west. The north side of the review area abuts I-10 and likewise there is no apparent offsite continuation of W-1 to the north, due to the extent of heavily modified and developed area along the I-10 corridor. As noted above, historic USGS topos show the northern tip of Wetland South extending to or near the south side of Old Fort Bayou Rd. The Southeast Ditch is apparent in many of these topos, indicating this has been a consistently maintained roadway drainage feature for several decades, providing drainage from W-1 and the surrounding area to Wetland South approximately 300 feet to the south of Old Fort Bayou Rd. W-1 on the north side of Old Fort Bayou is a Pine Savannah wetland and Wetland South approximately 300-ft south of Old Fort Bayou Road is a Bayhead Drain or Bottomland Hardwood wetland. Pine Savannah and Bayhead Drain wetlands are typically found in conjunction with one another, as Bayhead Drains occur in response to slow drainage through the flat topography of the coastal Pine Savannah and flatwoods landscape. As discussed above, Old Fort Bayou Road appears to follow the top of a slightly elevated ridge in this area. The positioning of the road coincides with a transition area from an area of higher elevation to lower towards Eglin Road to the southeast and eventually *Bayou Talla* and *Old Fort Bayou* to the south/southwest. The north side of the road displays little topographic relief within the pine savannah wetland W-1, yet the area south of the road and east and west of the 1.9 acre site coinciding with the culvert exits are located in transitions into narrow topographic drains associated with Wetland South. Prior to the extensive filling and disturbances associated with the clearing/logging in the area and the construction of Old Fort Bayou Rd and associated stormwater drainage systems, W-1 and Wetland South may have abutted one another and functioned as a single wetland system. However, given the extent of uplands and heavily disturbed/ditched areas between W-1 and Wetland South, the two wetland areas are not considered a divided wetland functioning as a single wetland. Therefore, W-1 is not part of a divided wetland which abuts a relatively permanent water or TNW and is thus not considered an A-7 adjacent wetland and is not jurisdictional because it does not have a continuous surface connection to (i.e. directly abut) a relatively permanent water, traditionally navigable water, territorial seas, interstate water or jurisdictional impoundment.

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.

SAM-RD-S-M

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- a. Field visit(s) on April 26, 2024, May 21, 2024, October 11, 2024, and February 20, 2025.
- b. Office evaluations conducted on April 3, 2024, April 29, 2024, June 27, 2024, December 5, 2024, March 3, 2025, March 12, 2025, and May 5, 2025.
- c. USACE Antecedent Precipitation Tool (APT), results of April 26, 2024, show normal conditions for the site visit. The monthly data of from the APT Tool-Merged Stations Converted to Inches indicates that no precipitation was recorded the fourteen days prior to the site visit. The drought index indicated on the APT was mild drought conditions. The May 21, 2024, APT results for that day indicated wetter than normal conditions and the drought index showed mild drought. Data from the APT Tool-Merged Stations Converted to Inches indicated that there was approximately 1.50 inches of precipitation recorded on May 17, 2024, and 0.01 inch of precipitation recorded on May 18, 2024. No precipitation was recorded on the two days (May 19-20) prior to the site visit. USACE was unable to reach the southwestern portion of the site due to the overgrown vegetation and inundated site conditions. The October 11, 2024, APT results for that day indicated normal conditions during the wet season and the drought index showed mild drought. The APT Tool-Merged Stations Converted to Inches showed that no precipitation was recorded four days prior to the October site visit. A final site visit occurred on February 20, 2025. USACE and the applicant met on site to primarily observe conditions on the 1.9-acre parcel south of Old Fort Bayou Road that was not included in the previous site visits. The APT results for the final site visit indicated normal conditions during the wet season and the drought index showed mild drought. The APT Tool-Merged Stations Converted to Inches indicated that no precipitation was recorded prior to the site visit; however, the applicant stated rain occurred within 48-hours of the site visit and USACE concurred with the statement. Although there was a mild drought at the time of the February 20, 2025 visit, during which no hydrology indicators were observed within the 1.9 acre area, the site visit occurred during the wet season under normal antecedent rainfall conditions, following a recent rainfall event, indicating that normal circumstances were likely present at the time of the site visit and this portion of the review area is indeed non-wetland.
- d. LIDAR, Hillshade, and DEM data from NRV.
- e. Ocean Springs, MS topographic maps accessed online from U.S.G.S. topoView. 1954, 1978, 1992, 2024. 1:24000.
- f. USDA NRCS online soil survey information.

SAM-RD-S-M

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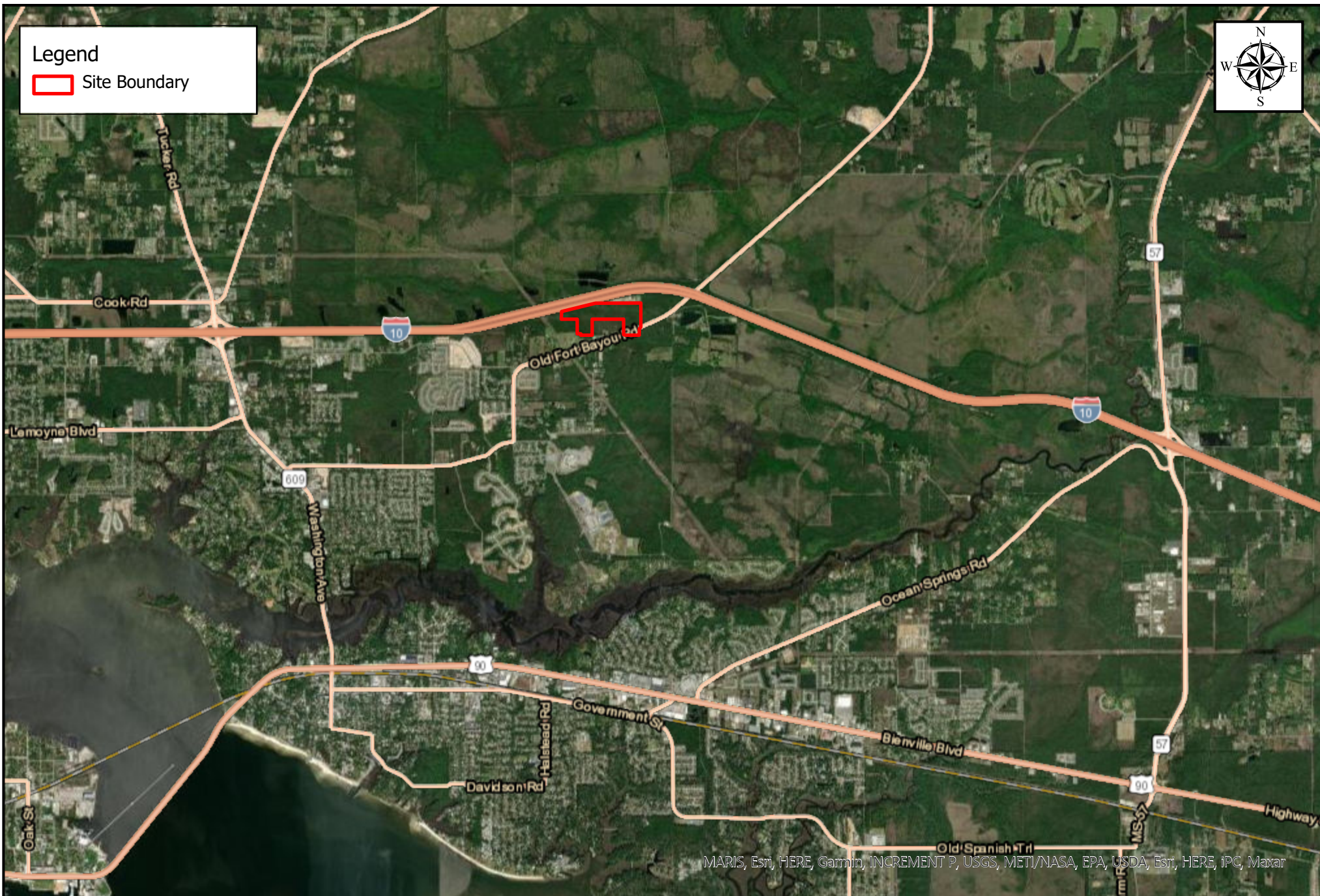
- g. Single frame aerial photos accessed online from U.S.G.S. EarthExplorer. Dates of photos: April 7, 1952 (pre-Interstate 10) and February 24, 1976 (post-Interstate 10).

10. OTHER SUPPORTING INFORMATION.

“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.

- 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
Site Boundary



MARIS, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA, Esri, HERE, iPG, Maxar



SAM-2023-00311-PAH
Proximity Map



Map Center: 88.784019°W 30.440628°N

Map Created by: Karen P. Jordan

Date: 12/26/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary
Sphere

Legend

- D-3
- D-1
- D-2
- Wetland (W-1)
- Project Site



SAM-2023-00311
Site Overview - Aerial

0 260 520 1,040
Feet

Map Center: 88.791753°W 30.4562°N

Karen P. Jordan

Date: 5/21/2025

Coordinate System: GCS WGS 1984
Datum: WGS 1984