



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

North Branch
Regulatory Division

March 04, 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-2023-00343-BAM MFR 1 of 1.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Mississippi due to litigation.

1. SUMMARY OF CONCLUSIONS.

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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- 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).

Water ID	Latitude	Longitude	Class	Acres	LF	Geographic Authority
S1	34.353783	-88.844236	R2	0.42	1,141	Section 404
S2	34.352801	-88.844379	R4	0.07	800	Section 404
S3	34.353221	-88.842384	R6	0.006	140	Non-Jurisdictional
S4	34.352797	-88.841309	R6	0.02	235	Non-Jurisdictional
S5	34.350932	-88.841654	R6	0.03	456	Non-Jurisdictional
Wet A	34.351424	-88.842388	PFO1/PEM	4.57		Non-Jurisdictional
Wet B	34.354168	-88.842885	PFO1	0.67		Non-Jurisdictional

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- 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)

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3. REVIEW AREA. 22.5 acres, latitude 34.651560, and longitude -88.842636 at the center of the review area, Sherman, Pontotoc County, Mississippi. See included maps depicting the boundary of the review area.

All aquatic resources were previously reviewed under a PJD in June 2023. However, due to the resolution of *Sackett*, the applicant requested an AJD on the aquatic resources within the review area.

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

The nearest TNW is Town Creek, which is the S1 stream listed above, and it is recorded in the Corps database as a Section 10 waterway beginning 7 miles downstream from the review area. Additionally, it flows to the Tennessee-Tombigbee Water Way, a Section 10 constructed commerce waterway, 24 linear miles east of the review area.

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

S2 flows approximately 800 feet in the review area to Town Creek (S1) , which becomes a Section 10 water 7 miles downstream from the review area, then flows 42.2 miles downstream to the Tennessee-Tombigbee Waterway. See Attached Flow Connection Map

6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A

⁵ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as “navigable in law” even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁶ 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.

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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):

S1 is a named relatively permanent water, with flow year-round as a perennial stream. It flows 1,141 linear feet from the north-west corner, through the upper middle and then exits on the east side of the review area. It is recorded as Town Creek on topography maps and is seen carrying water on aerial maps as far back as 1996(Google Earth).

S2 is an unnamed relatively permanent water, with seasonal flow. Using a Dutch Augur to dig sample pits, hydric soils were found within the bed and bank. It flows 800 feet from west to east across the middle of the project and connects to Town Creek on the eastern boundary of the project area.

- f. The territorial seas (a)(6): N/A.
- g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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- 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”).⁷ 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).

Wet A (4.57 ac.), Wet B (0.67 ac.), non-RPW S3 (0.006 ac.), non-RPW S4 (0.02 ac.) and non-RPW S5 (0.03 ac.) are located centrally to the project area. Wet A and Wet B and are separated physically from RPWs or TNWs by uplands, thereby lacking a

⁷ 51 FR 41217, November 13, 1986.

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continuous surface connection to an RPW or TNW. S3, S4 and S5 do not exhibit standing or flowing water at least seasonally and is therefore a non-jurisdictional non-RPW.

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. The USACE staff conducted a site visit on January 29, 2024.
- b. Data used to make determinations included on-site inspection of soils, hydrology and vegetation utilizing the 1987 USACE Wetland Delineation manual, USGS topographic maps, and recent aerials, and review of the applicant's wetland data sheets.
- c. Figure 1 – Site Location Map. April 03, 2023
- d. Figure 2 – Site TOPO Map. April 03, 2023
- e. Figure 4 – Site LiDAR Map, April 03, 2023
- f. Figure 5 – NWI Map, April 03, 2023
- g. Figure 8a Site Delineation Overview, April 03, 2023

10. OTHER SUPPORTING INFORMATION. N/A

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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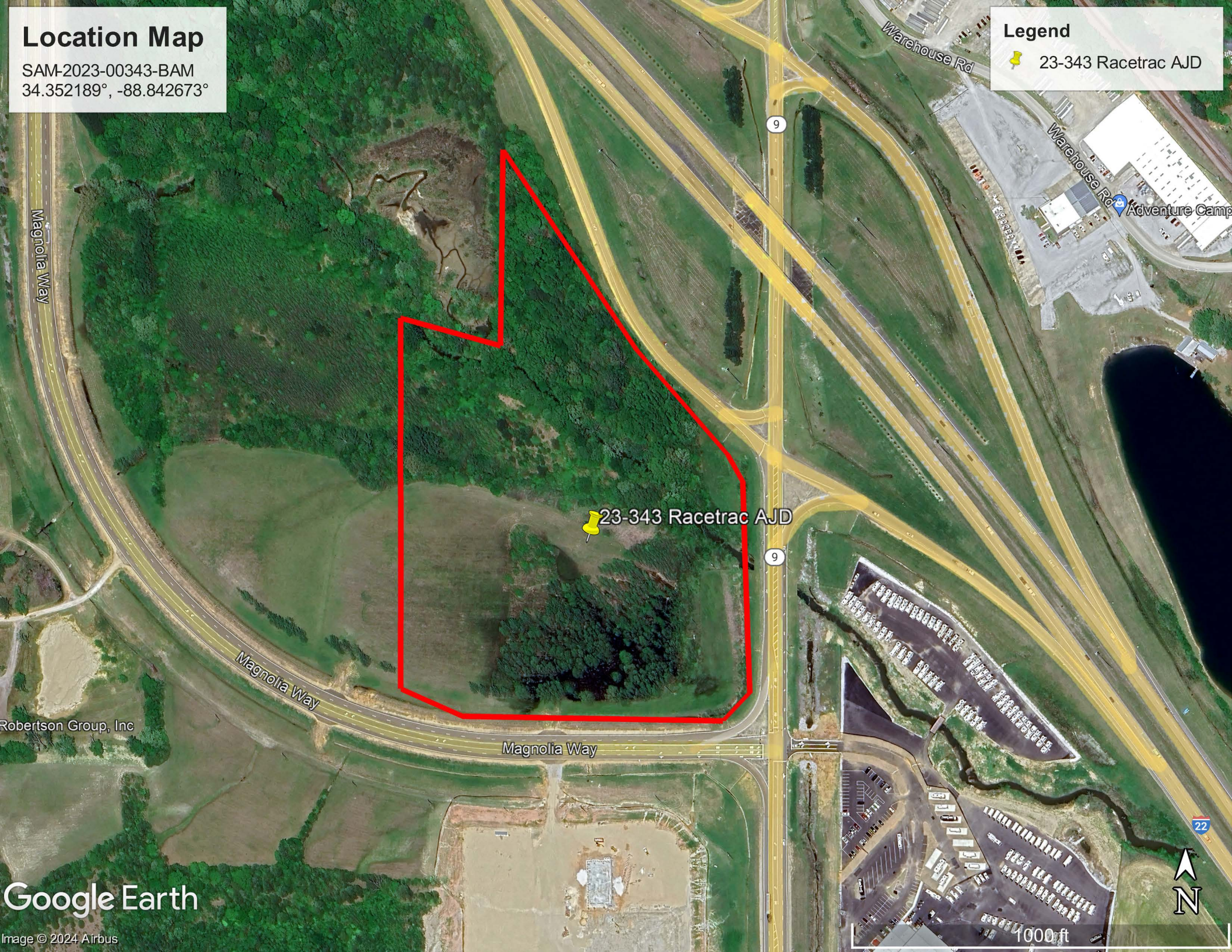
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Location Map

SAM-2023-00343-BAM
34.352189°, -88.842673°

Legend

 23-343 Racetrac AJD



Robertson Group, Inc

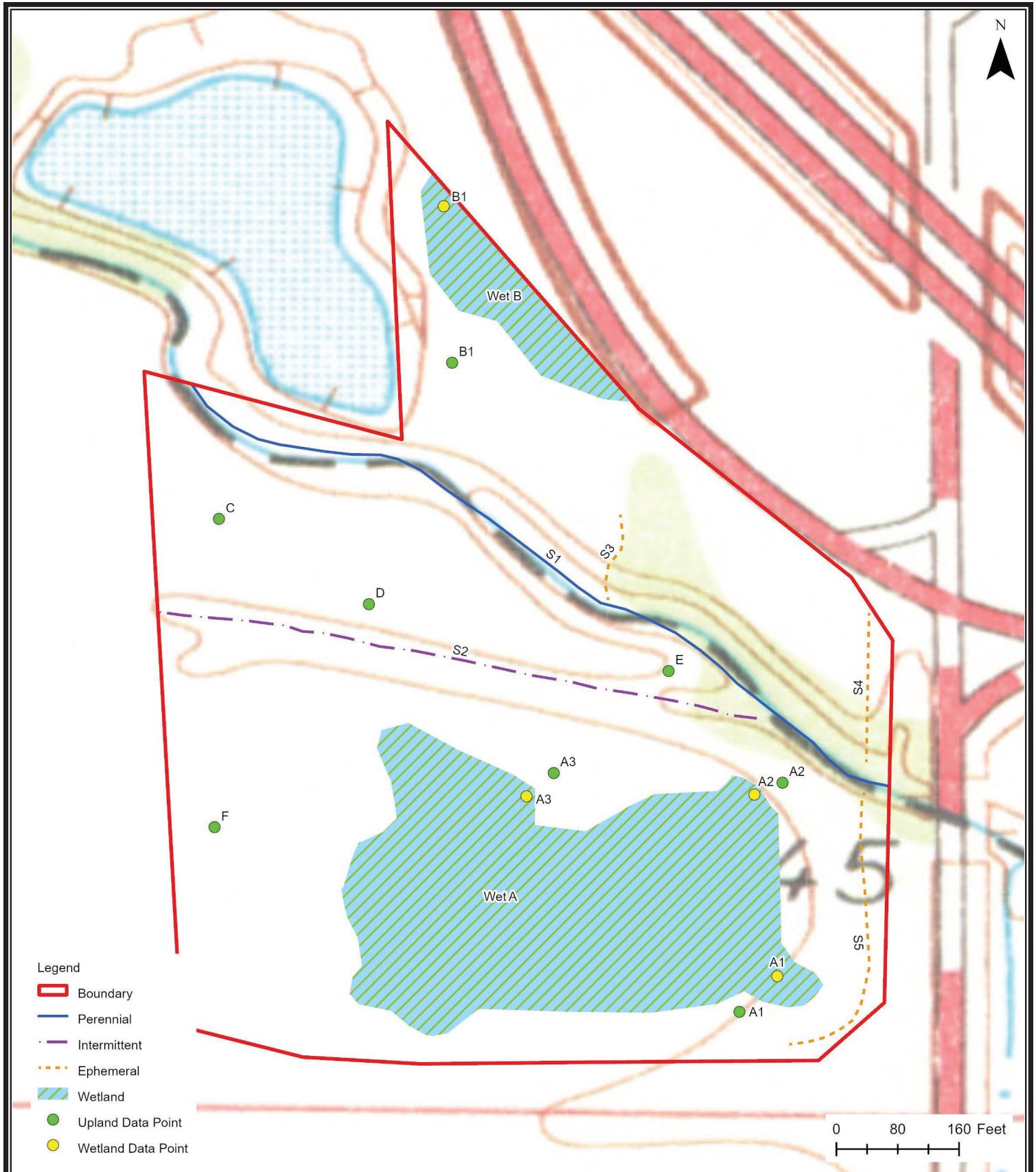
Google Earth

Image © 2024 Airbus

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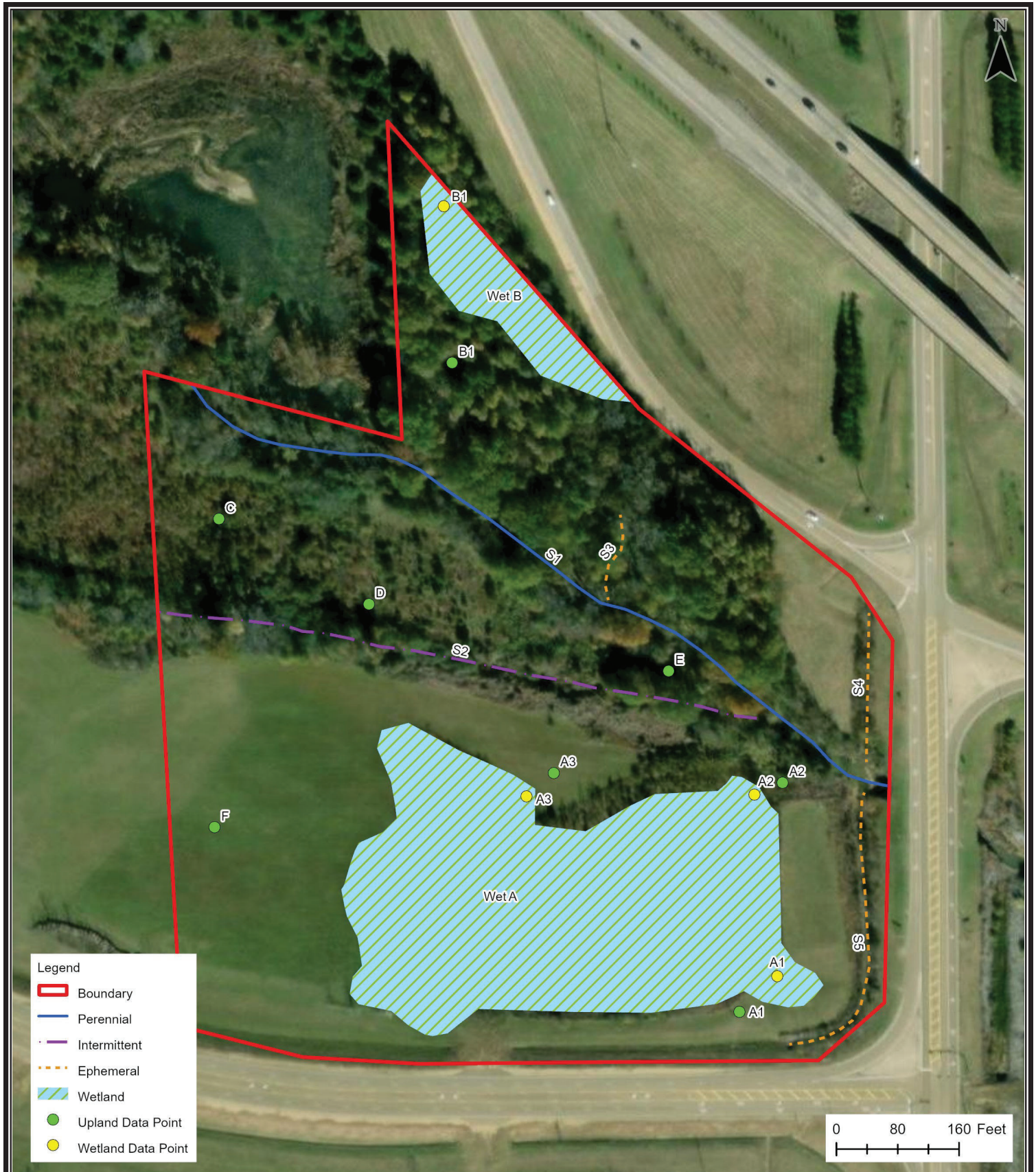


1000 ft



Source: Image courtesy of ESRI and USGS. USGS Sherman, Mississippi 7.5 minute quadrangle.

				Drawn By:	Client #:			TITLE Figure 1a — Site Delineation Overview Approved Jurisdictional Determination RaceTrac Petroleum Magnolia Way Property Sherman, Pontotoc County, Mississippi	
				Checked By:	Date:				
				Project Mgr.:	Project #:				
NO.	DATE	REVISION NOTE	BY	BS	3314-009-32				



Legend	
	Boundary
	Perennial
	Intermittent
	Ephemeral
	Wetland
	Upland Data Point
	Wetland Data Point

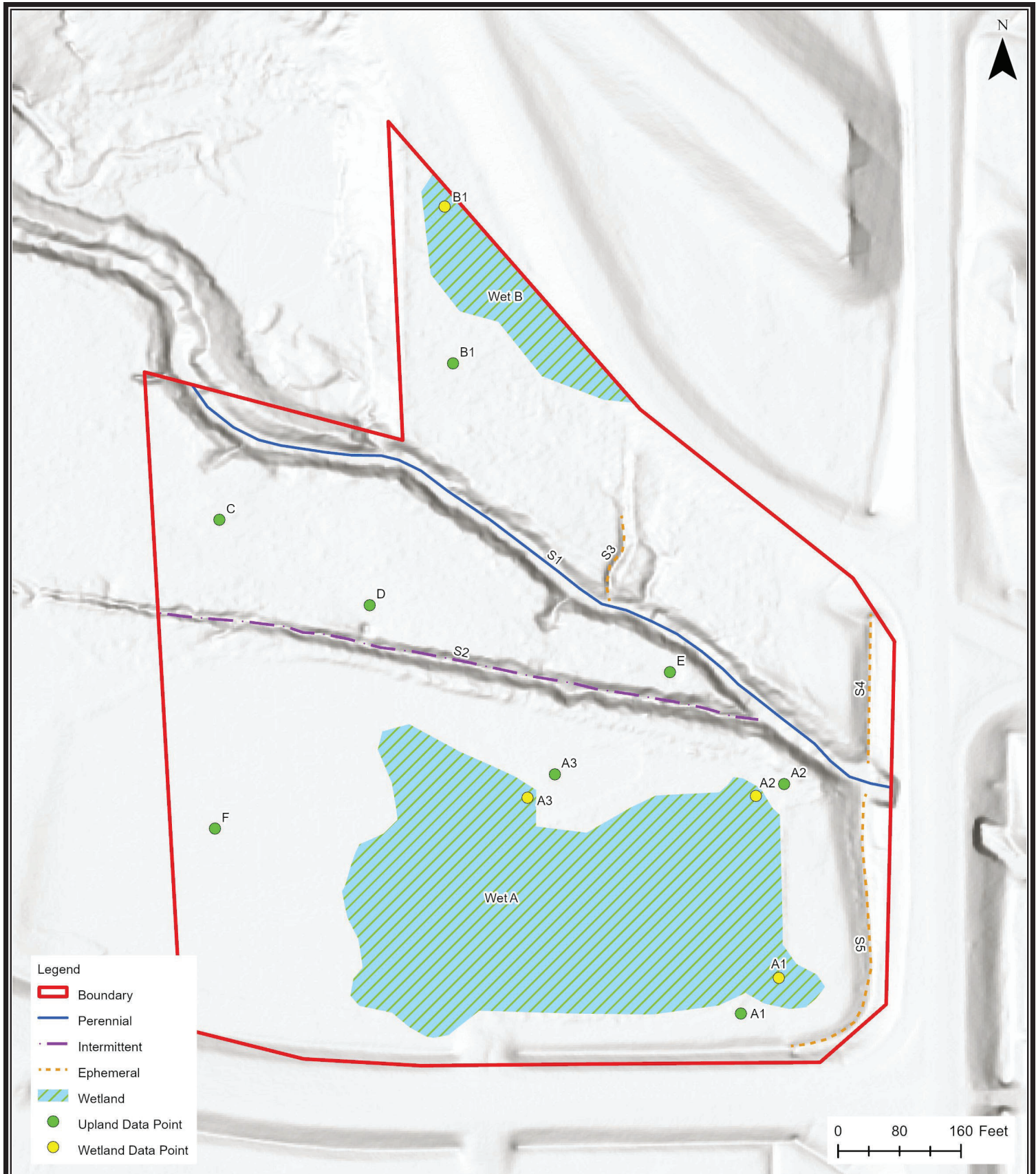
Source: Image courtesy of ESRI.

NO.	DATE	REVISION NOTE	BY

Drawn By:	Client #:
KK	3314
Checked By:	Date:
CB	12/11/2023
Project Mgr.:	Project #:
BS	3314-009-32



TITLE
<p>Figure 1b — Site Delineation Overview Approved Jurisdictional Determination RaceTrac Petroleum Magnolia Way Property Sherman, Pontotoc County, Mississippi</p>



Source: Image courtesy of ESRI and USGS.

NO.	DATE	REVISION NOTE	BY

Drawn By:	Client #:
KK	3314
Checked By:	Date:
CB	12/11/2023
Project Mgr.:	Project #:
BS	3314-009-32



TITLE
Figure 1c — Site Delineation Overview Approved Jurisdictional Determination RaceTrac Petroleum Magnolia Way Property Sherman, Pontotoc County, Mississippi