



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

Special Projects Branch
Mobile District, Regulatory Division

September 26, 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-2023-00987-STB 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

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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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 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 - jurisdictional, accounting for 6.60 acres of the 8.15 acres parcel.
 - ii. Aquatic Feature A – jurisdictional ditch, relatively permanent tributary (RPT); along the southeastern portion of the subject parcel.

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)

3. REVIEW AREA. The review area is an 8.15 parcel on the corner of Kooiman Road and Todd Acres Drive in Theodore, Mobile County, Alabama. The geographic coordinates for the center of the property are 30.57365 North and 88.153450 West. The Mobile County parcel number is R023307263000005.000, Section 26, Township 5 South, Range 2 West.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The aquatic resources are connected to a **TNW**, Interstate Water, or Territorial Sea.⁶ The nearest TNW is Dog River (Rattlesnake Bayou) which is listed

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

as a Section 10 Water according to the Mobile District's list of Section 10 Waters. Rattlesnake Bayou, a tributary to Dog River, is located 0.8 linear miles to the northeast of the subject area.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The USACE Project Manager (PM) has identified discrete flow paths within and connected to **Wetland 1** from the site to Rattlesnake Bayou to the north:

Wetland 1 is a forested wetland representing 6.60 acres of the subject parcel. This wetland continues outside of the review area to the northeast parallel to a railroad track. The wetland extends to and abuts Rattlesnake Bayou (TNW) approximately 3,600 linear feet to the northeast of the review area.

Aquatic Feature A is a perimeter wetland ditch that surrounds the southeastern parcel boundary. This feature represents approximately 400 linear feet of the subject parcel perimeter, with the ditch extending an additional 500 linear feet to the northeast towards the offsite wetland and Rattlesnake Bayou. Aquatic Feature A is located near a topographical divide between watersheds, with a gentle slope towards Rattlesnake Bayou approximately 4,500 linear feet to the northeast from the southernmost origin of the feature.

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

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.

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.

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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):

Aquatic Feature A is a relatively permanent ditch located along the south and eastern boundaries of the subject parcel, representing approximately 400 linear feet of perimeter ditches immediately surrounding the parcel. This feature extends offsite for an additional 500 linear feet, towards the northern wetlands and Rattlesnake Bayou (TNW). At the time of the Corps’ site visit on December 12, 2023, the ditch was characterized by the presence of maintained (mowed) emergent wetland vegetation along the shallow banks and was fully inundated with approximately 16 inches of standing water. Of note, this feature hosts a different vegetative assemblage than the adjacent wetland (Wetland 1), which is a pine overstory dominated wetland. A review of historical aerial imagery indicates that the ditch feature is consistently saturated regardless of rainfall frequency or drought conditions. This feature is representative of the high water table of the site. Along the southern portions of the site, culverts connecting the parcel to a southern wetland are sediment choked, indicating sediment laden surface flow. There was no remarkable flow, debris deposits, or other features indicating swift channel velocities. Based on topographical position, this feature is within proximity to a topographical divide between watersheds, and the site has a shallow slope towards the north (to Rattlesnake Bayou). Aquatic Feature A is a relatively permanent ditch feature that conveys water from Wetland 1 and surrounding area towards a TNW.

- f. The territorial seas (a)(6): N/A

Adjacent wetlands (a)(7): **Wetland 1** is a 6.60-acre forested wetland with a continuous surface connection to Aquatic Feature A (Relatively Permanent Tributary; RPT); Wetland 1 Aquatic Feature A, establishing the continuous surface connection between the RPT and Wetland 1. Wetland 1 maintains the three key wetland parameters (hydric soils, hydrology, and hydrophytic vegetation), and exhibits prominent hydrological features.

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*. N/A

⁹ 51 FR 41217, November 13, 1986.

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- 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.
 - a. Aerial imagery analysis and supplemental desktop review of site conditions conducted on March 14, 2024 (Reference attached Figures 1 and 2);
 - b. Wetland delineation and data forms from Ephriam Environmental, LLC, conducted on January 22, 2024 (Agent Site Photos and Delineation, Figure 3, Figure Set 7, Dataset 1);
 - c. Topographic imagery analysis, developed on March 28, 2024 (Figure 4);
 - d. Review of LIDAR and DEM Imagery from National Regulatory Viewer (NRV), accessed March 14, 2024 (Figures 5 and 6);
 - e. Field visit conducted December 12, 2023. Desktop review of delineation conducted December 13, 2023 (USACE Site Photos, Figure Set 8);
 - f. Antecedent Precipitation Tool results for Agent and USACE site visits, accessed and generated on March 28, 2024 (Figures 9 and 10);
 - g. National Wetlands Inventory imagery from the NRV, accessed March 14, 2024 (Supplemental Figure 1);
 - h. Federal Emergency Management Agency (FEMA) Flood Hazard imagery from the NRV, accessed March 14, 2024 (Supplemental Figure 2);
 - i. National Hydrography Dataset (NHD) imagery from the NRV, accessed March 14, 2024 (Supplemental Figure 3); and
 - j. United States Department of Agriculture – Natural Resources Conservation Service (USDA-NRCS) Web Soil Survey report for Kooiman Road SAM-2023-00987-STB, accessed and generated on April 4, 2024 (Dataset 2).

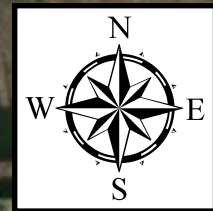
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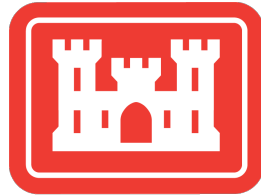
10. OTHER SUPPORTING INFORMATION. The USACE PM makes reference to site file SAM-2007-01282-MBM. This file identifies the original impact to the site resulting in the currently observed fill within the subject parcel. In June 2007, the former site owner identified as Mr. Charles Baumhauer, initiated parcel development for the purpose of a concrete batching plant. According to the available administrative records, the site owner entered into a Tolling Agreement with the USACE following a now expired 2007 AJD.
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

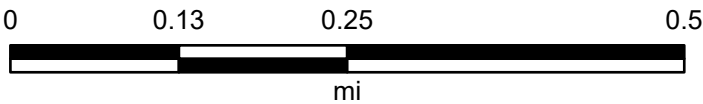


City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft



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Figure 1. SAM-2023-00987-STB // Kooiman Road AJD // Vicinity Map (1 of 2) // Department of the Army

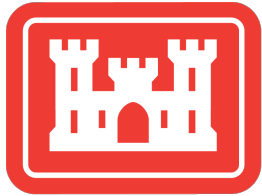
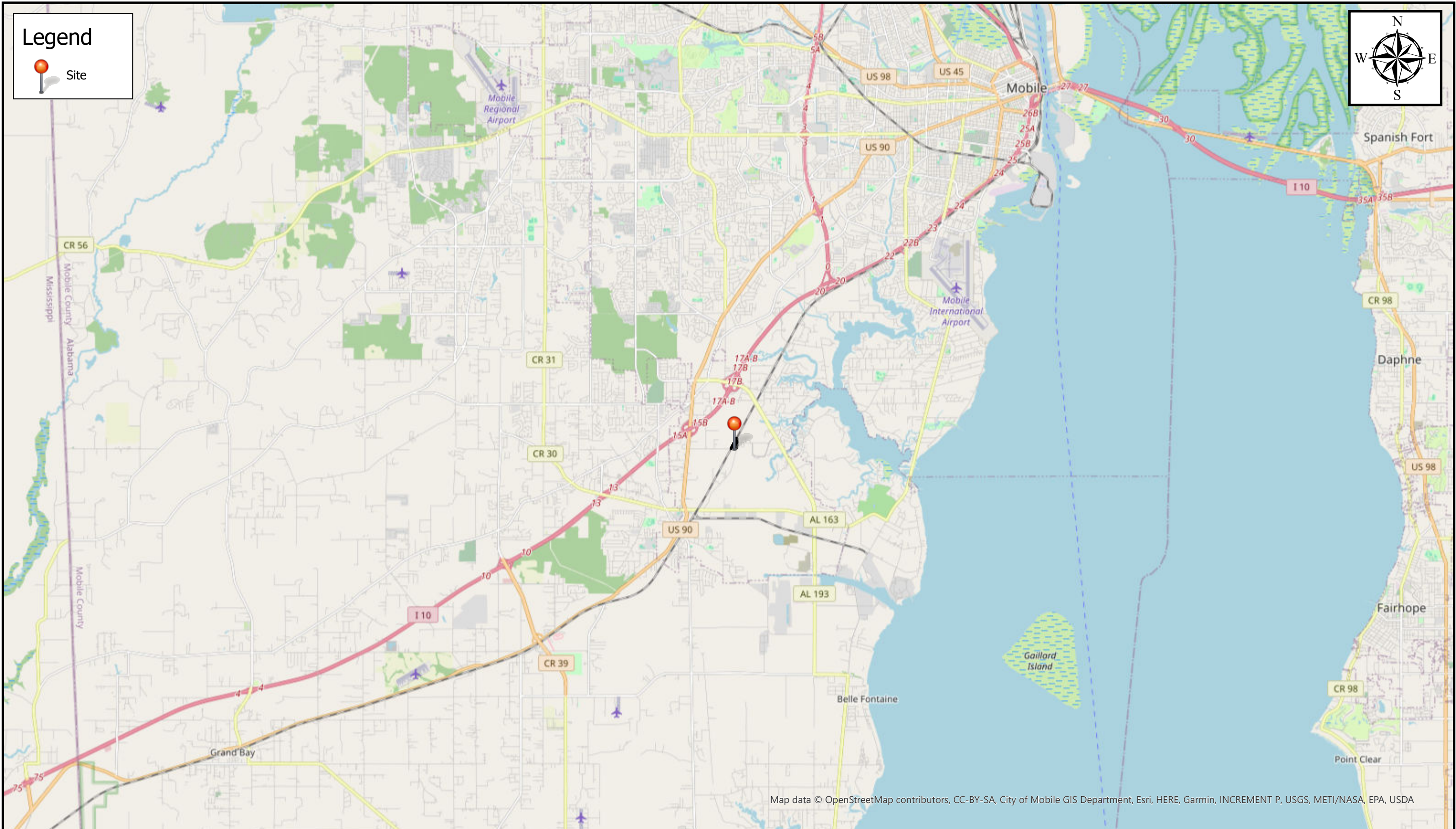


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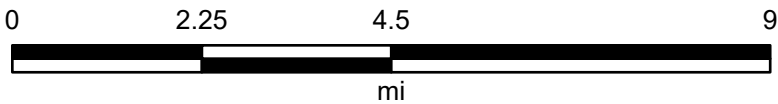
Map Created by: Samuel T. Barber, Project Manager

Date: 3/14/2024

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



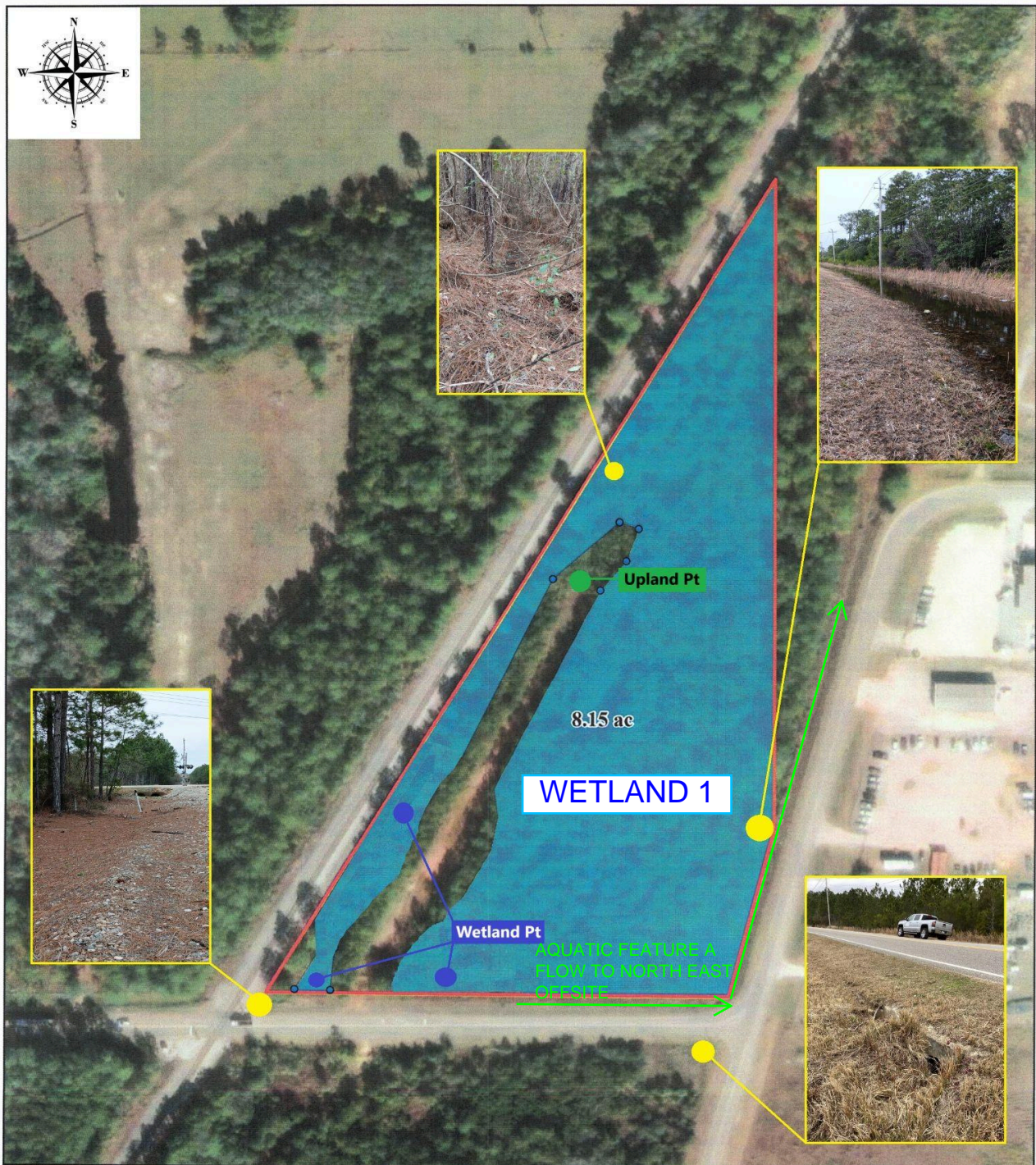
**Figure 2. SAM-2023-00987-STB // Kooiman Road AJD //
Vicinity Map (2 of 2) // Department of the Army**



Map Center: 88.155778°W 30.584895°N

Map Created by: Samuel T. Barber, Project Manager
Date: 3/14/2024

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



Kooiman Road Wetland Map
S26-T5S-R2W
Mobile County, Alabama



EPHRIAM
ENVIRONMENTAL LLC.
CONSULTING - ECOASSESSMENTS - PERMITTING

- Ephemeral Conveyance (ditch)
 - Kooiman Rd Property
 - Wetlands (~6.60 Acres)
 - Wetland Flags
- Note: See Photolog for Site Points**

Figure 3. Conveyance Features and Ditch
Note: Revised to show aquatic features

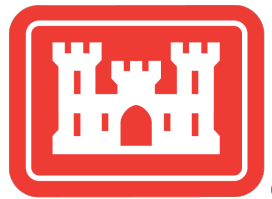
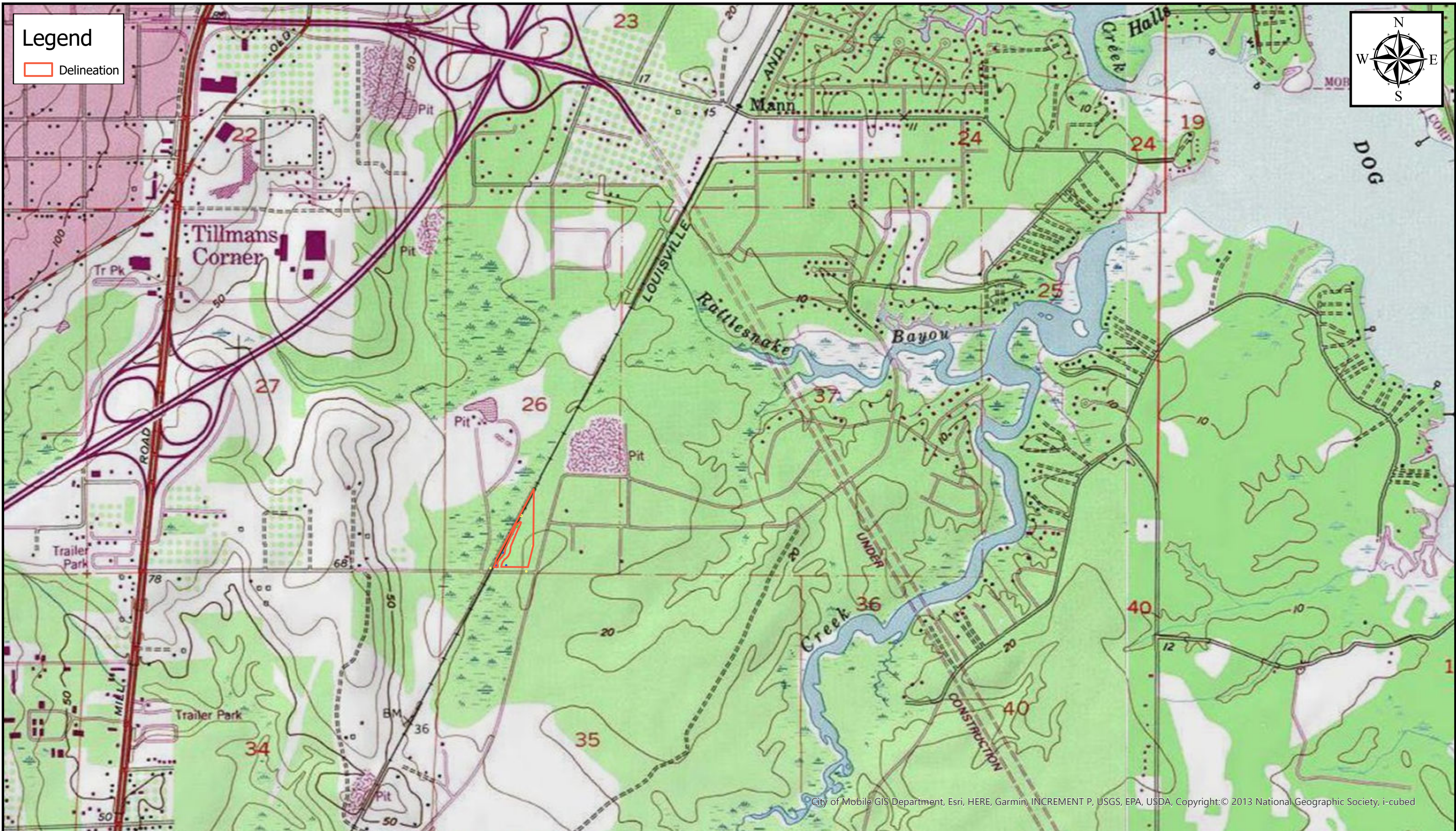
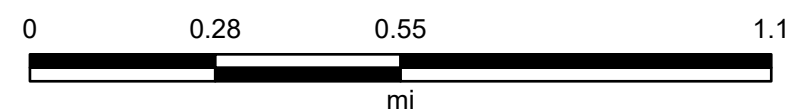


Figure 4. SAM-2023-00987-STB // Delineation on USGS Topo // Department of the Army



Map Center: 88.14356°W 30.580662°N

Map Created by: Samuel T. Barber, Project Manager

Date: 3/28/2024

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

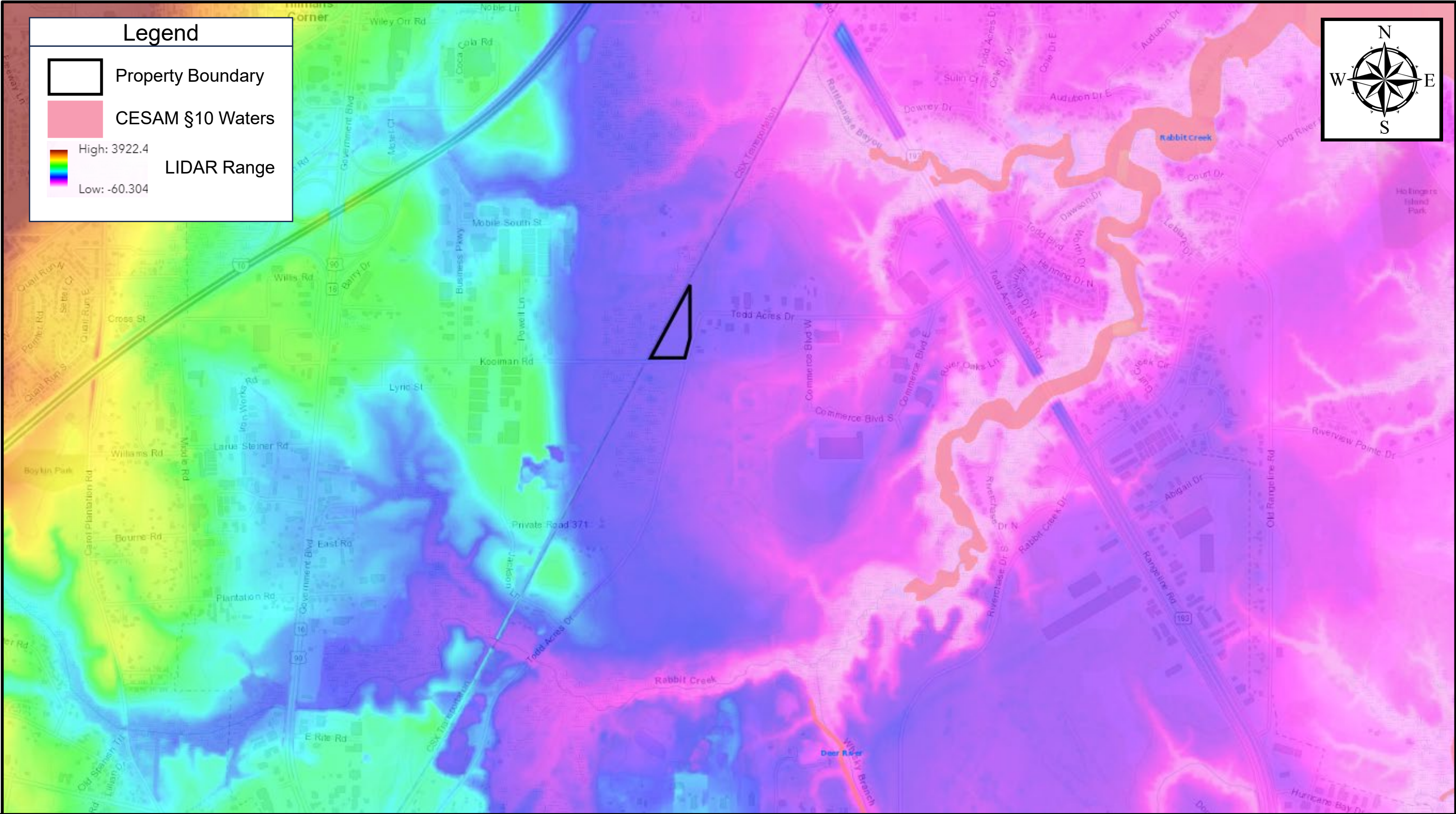
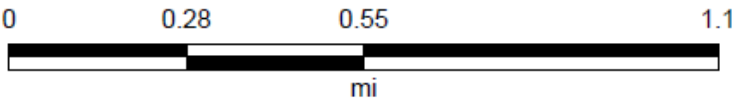


Figure 5. SAM-2023-00987-STB // Kooiman Road AJD // 3DEP DEM Imagery Assessment



Map Center: 88.152619°W 30.577413°N

Map Created by: Samuel T. Barber, Project Manager
Date: 3/14/2024

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

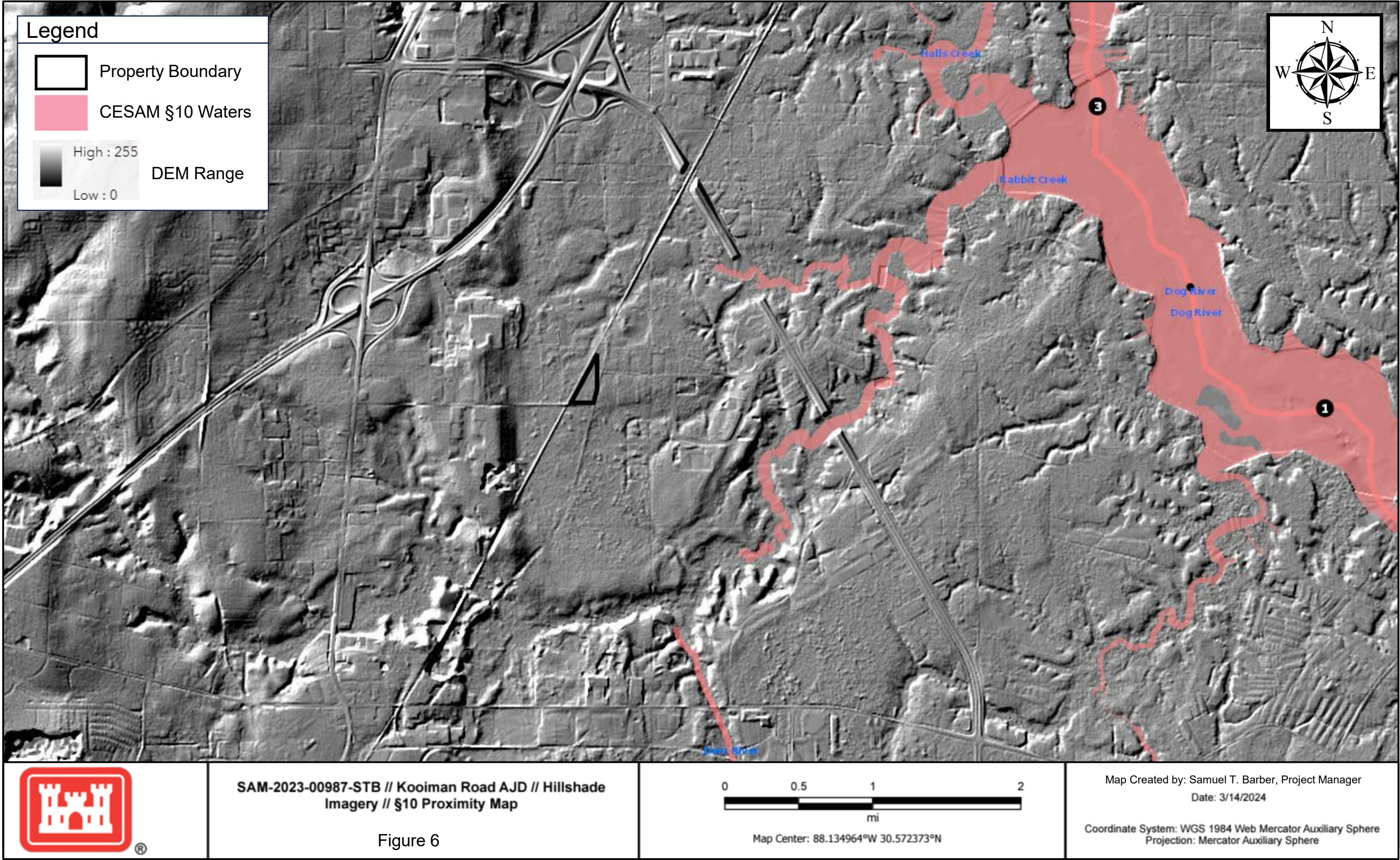


Figure 6