



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

South Mississippi Branch

13 January 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 (2023),¹
SAM-2023-01083-KPJ, Statewide Investment Property, Shieldsboro Subdivision Phase
2, Bay St. Louis, MS (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

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.

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.

- 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
P1 retention/detention pond	30.3049 N, 89.3531 W	0.45 acre	non-jurisdictional preamble water	None
P2 retention/detention pond	30.3033 N, 89.3502 W	0.18 acre	non-jurisdictional preamble water	None
P3 retention/detention pond	30.3033 N, 89.3491 W	0.21 acre	non-jurisdictional preamble water	None
W1 Wetland	30.3033 N, 89.3482 W	7.72 acre	NON-WOTUS Wetland Negative A7	None
D1 Ditch	30.3029 N, 89.3477 W	~ 610 linear feet	NON-WOTUS Tributary NON-RPW A5	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. 651 (2023)
- e. Mobile District's Section 10 waters list.

3. REVIEW AREA. The 26.1-acre site is located between Old Spanish Trail, St. Charles Street, and Central Avenue (and CSX rail line); within Section 44, Township 8 South, Range 14 West; approximate center coordinates are Latitude 30.303254° North and Longitude 89.348475° West; in Bay St. Louis, Hancock County, Mississippi. Approximately 70% of the site has been cleared for Phase I development of the Shieldsboro Subdivision. There are three man-made retention/detention ponds created in uplands for drainage (P1, P2, and P3). The site is located in a residential area with single family homes and residential roads surrounding the site in all directions. There is a 7.72-acre wetland (W1) located in a topographic depression near the southern border of the site. The wetland is bisected by a man-made ditch (D1). The southern border is bounded by a railroad line atop a berm that is approximately 4 to 6 feet higher in elevation, separated by a parallel ditch. A road ditch and Central Avenue are south of and parallel to the railroad line.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Mississippi Sound, a TNW, is approximately 3.604 feet (0.68 miles) southeast of the project site. The Mississippi Sound 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. D1, a non-RPW ditch that extends southeast approximately 610 linear feet on site and intersects a non-RPW railroad ditch at the site boundary/offsite that is parallel to the railroad line. D1 bisects approximately 390 feet of W1. Water from W1 would flow along the final approximately 220 feet of D1 to the intersection with the non-RPW railroad ditch. From the intersection of D1 and the railroad ditch, water flows through the railroad ditch for 263 feet north/northeast to two hanging culverts that are approximately 2.5 feet above grade of the non-RPW railroad ditch. Water must fill this non-RPW ditch and rise approximately 2.5 feet to discharge through the two hanging culverts that extend approximately 70 feet southeast underneath the railroad line to a non-RPW road ditch on the south side of the railroad line and parallel to Central Avenue. This non-RPW Central Avenue road ditch has a culvert located south of the first, 70-foot-long culvert from the railroad ditch. The Central Avenue road culvert extends 60 feet south under Central Avenue to a RPW canal parallel to Ballard Court. The RPW canal flows parallel to Ballard Court, southward for approximately 1,778 feet, through an approximately 68-foot culvert underneath Third Street, then south to southwest

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.

approximately 1,826 feet to an outfall located on Bay St. Louis Beach on the Mississippi Sound (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 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

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.

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.

P1, P2, and P3 are settling basins created in uplands during land clearing and development for purposes of collecting stormwater runoff. P3 was created post-Hurricane Katrina, approximately in the summer of 2007 during the land clearing and the development of Phase I of the Shieldsboro Subdivision. P2 appears to have been created in approximately 2010 when roads and houses appeared in the subdivision. The clearing of the land prompted the development of P3, however the increased stormwater runoff due to an increase in impervious surfaces from the housing and roads prompted the development of P2 and the creation of a man-made ditch (D1) connected to P3. Phase II of the Shieldsboro Subdivision prompted the development of P1 between 2019 and 2023 due to land clearing. In accordance with the preamble to the 1986 regulations, the agencies generally do not consider the waters as jurisdictional: “Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Therefore, these three settling basins, P1, P2, and P3 are not jurisdictional waters of the U.S.

- 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

⁹ 51 FR 41217, November 13, 1986.

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).

D1 is an onsite ditch, a non-RPW tributary, approximately 610 linear feet in length. D1 is connected to P3 (described in 8.a) by an approximately 60-foot culvert. The ditch begins in uplands at P3, flows southeast and bisects approximately 390-feet of W1, and flows to the edge of the site boundary/offsite and intersects at 90 degrees with a non-RPW railroad ditch. Although the APT for the week prior and leading up to the day of the site visit, January 22, 2024, indicated that conditions were wetter than usual, there was no flowing water in D1. The ditch exhibited several inches of standing water which was attributed to intersecting with the water table. A high amount of leaf litter, sediment on leaves and vegetation in the channel was observed. D1 lacked debris lines, alluvial deposits, or channel structure. The intersection of D1 and the non-RPW railroad ditch does not show any alluvial deposits from D1, nor debris lines or piles. D1 exhibits less than a relatively permanent flow of water and is therefore not a jurisdictional water of the U.S.

W1 is a non-tidal, forested/shrub wetland measuring 7.62 acres located in a topographic low and is bisected by D1, a non-RPW tributary evaluated previously. Specifically, drainage of W1 is topographically driven from higher elevations towards this wetland near the southeast boundary of the site. The southeastern edge of the wetland is bounded by uplands, followed by a non-RPW railroad ditch. D1 bisects W1 for most of its length. The flowpath from W1 to the nearest relatively permanent water is such that water from W1 would flow out along the final 220 feet of D1 onsite to the site boundary/offsite intersection with the the non-RPW railroad ditch. Approximately 263 feet north/northeast of this intersection of D1 and the non-RPW railroad ditch there are two hanging

culverts that are approximately 2.5 feet above grade of the non-RPW railroad ditch. The railroad ditch is approximately 10 feet wide and five feet deep. Water must fill this non-RPW ditch and rise approximately 2.5 feet to discharge through the two hanging culverts to flow through the approximately 70-foot-long culverts under the railroad to the Central Avenue non-RPW roadside ditch and then into a 60-foot culvert that flows south under Central Avenue to the RPW canal leading to the TNW approximately 0.70 miles downstream. The distance between W1 and the requisite downstream water is approximately 613 feet through non-RPW connections (220-feet through D-1, 263-feet through the railroad ditch to two hanging culverts, 70 feet through the hanging culverts to a roadside ditch, and 60 feet through a road culvert) to a RPW canal. The length of the non-RPW connections is exacerbated by the fact that water in the second non-RPW connection (railroad ditch) must rise approximately 2.5 feet to discharge into the third non-RPW connection. Together, the length of non-RPW connections and the hanging culverts impairs the continuous surface connection to a downstream requisite water.

In addition, there are four culverts in uplands, between the railroad ditch and W-1 spaced out northeast to southwest along the edge of the parcel. Upland culvert 1 is approximately 180 feet southwest of the intersection of D1 and the railroad ditch. Waters from W1 would need to rise and flow via sheet flow over uplands to reach the elevation of the inverted culverts to discharge into the non-RPW railroad ditch. The water in W1 would need to rise approximately 6 inches to reach the intake of upland culvert 1. The outflow of upland culvert 1 is at grade with the non-RPW railroad ditch. Approximately 2-3 inches of water was observed in the railroad ditch southwest of the intersection with D1. At this junction, the water was stained with iron oxidizing bacteria, vegetation was observed growing in the culvert and ditch, and neither ditch nor culvert displayed any recent flow of water (debris lines or piles). Upland culverts 2, 3, and 4 are approximately 300 to more than 550 feet northeast of the intersection of D1 and the railroad ditch. Waters from W1 would need to sheetflow over uplands and rise approximately 18 inches or more to reach the inverted elevations of these upland culverts to discharge into the non-RPW railroad ditch. The outflow of upland culverts 2, 3, and 4 are approximately 3 feet above grade of the non-RPW railroad ditch. The area where these three culverts joined the non-RPW railroad ditch were dry, sandy, and included vegetation.

The APT indicated wetter than normal conditions one week prior to the Corps' site visit through the day of the site visit. However, there were no indicators of water flow. The location of the intakes of the upland culverts, were covered in leaves, dry, showed no water stains nor sediment deposition. In total, the four culverts begin in uplands, are set higher than seasonal high waters, and do not

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allow for a continuous surface connection to a downstream water. Water would only discharge under abnormal circumstances.

Based on the field observations and site conditions described above, and in light of recent joint memos, NWK-2024-00392 and NWK-2022-00809, it is determined that W1 does not have a continuous surface connection to a downstream jurisdictional water, thus, it is not jurisdictional.

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. Site Visit; January 22, 2024; MFR Photolog added to AR January 30, 2024.
 - b. Office evaluation; January 8, and 23-30, 2024.
 - c. USACE Antecedent Precipitation Tool (APT), results of April 9, 2024, show normal conditions for the wetland delineation date. Results of the APT for January 16, 2024, indicate wetter than normal conditions approximately one week prior to the site visit, results for January 21, 2024 (day before site visit) indicate wetter than normal conditions, and results for January 22, 2024, (day of site visit) show wetter than normal conditions.
 - d. LIDAR, Hillshade, and DEM data from NRV.
10. OTHER SUPPORTING INFORMATION. Historical imagery from Google Earth shows that the site and surrounding area were heavily impacted by Hurricane Katrina in 2005. Most of the trees in the southeastern part of the project site were felled during the hurricane. Clean up of the site and surrounding area appeared to begin sometime in 2007. The upland retention/detention ponds appear during this time through approximately 2010 as substantial clearing/leveling/cleanup occurred in the area. D1, a non-RPW drainage ditch appears sometime between 2008 and 2010.

Consideration was given to joint-decision memos NWK-2024-00392 and NWK-2022-00809 in reference to the distance, type of connections, and flow from W1 to the canal (RPW) south of Central Avenue. Non-RPW ditches and culverts are features that can serve as all or part of a continuous surface connection to a requisite water. Whether singularly or together, these types of features can provide an unimpaired, continuous surface connection to a jurisdictional water.

The specifics of the connection from W1 to the requisite water is stated in 8.f.

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Consideration of the factors together, weak to no indicators of flow frequency and duration for D1, the railroad ditch, and road ditch (all non-RPW ditches), length of the non-RPW connections, in addition to the size of the non-RPW railroad ditch and that water within this ditch must rise approximately 2.5 feet to reach the two hanging culverts before flowing southward to a non-RPW roadside ditch, into a culvert and south to a RPW canal, indicates that, consistent with *Sackett*, these non-permanent waters and culverts do not meet the continuous surface connection requirement for the wetland (W1).

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.



Copyright:© 2013 National Geographic Society, i-cubed

Base Map: ESRI USA Topo Map
Source: USGS, NGS & i-cubed
Map Date: June 29, 2021



0 0.5 1 1.5 2
Miles

PROJECT LOCATION MAP



ECOLOGICAL
ASSET
MANAGEMENT, LLC

Wetland Delineation for +/- 26.1 ac Area for Shieldsboro Subdivision

Location: Bay St. Louis, MS
Portion of Section 44;
Township-8-South; Range-14-West
County: Hancock County, MS

Figure 1: Project Location of the +/- 26.1-acre Shieldsboro Subdivision Phase 2 project area; Bay St. Louis, Hancock County, MS.

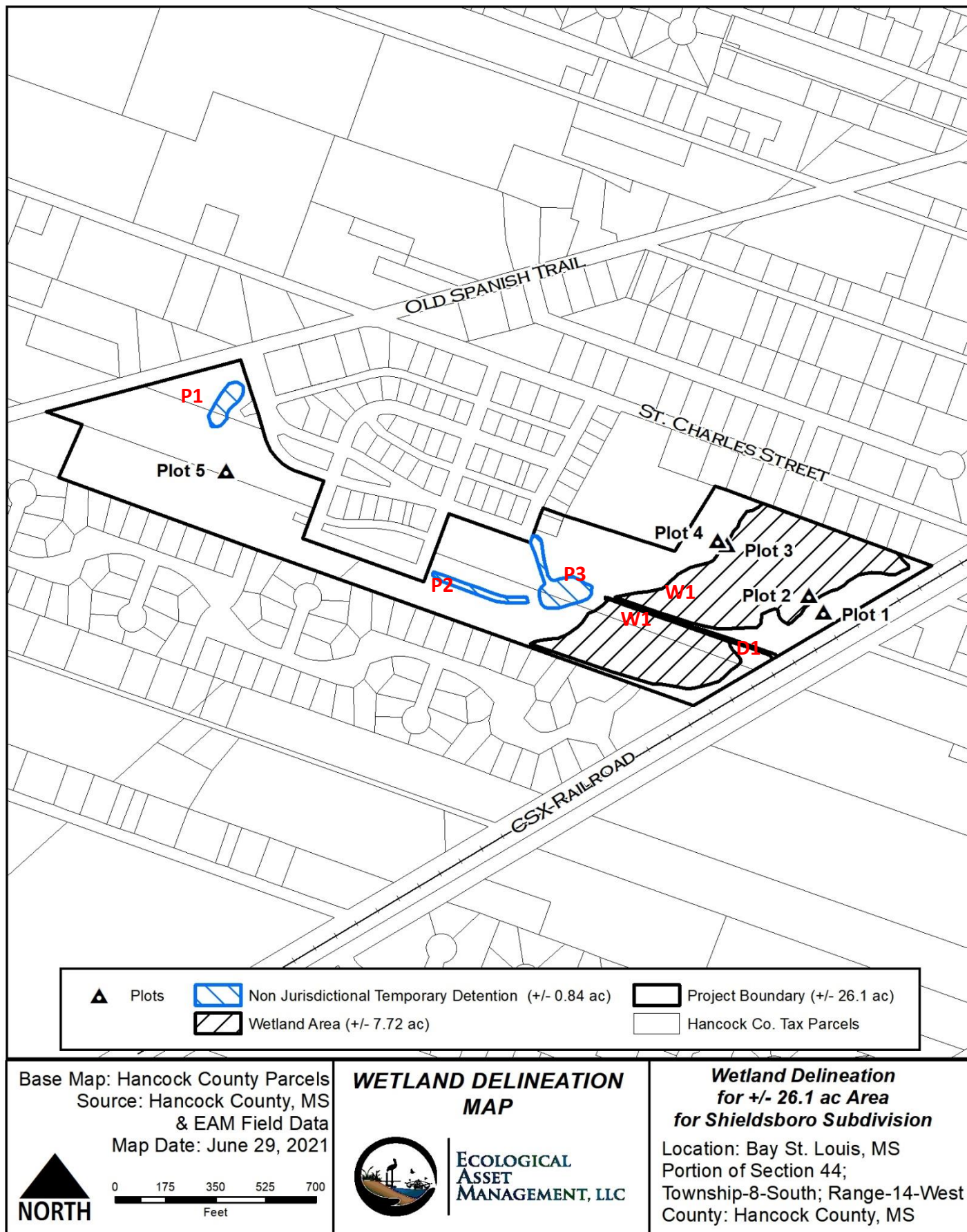


Figure 2: Wetland Delineation Map of the +/- 26.1-acre Shieldsboro Subdivision Phase 2 project area; Bay St. Louis, Hancock County, MS



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|----------------------------|--|--------------------------------|
| Plots | Non Jurisdictional Temporary Detention (+/- 0.84 ac) | Project Boundary (+/- 26.1 ac) |
| Wetland Area (+/- 7.72 ac) | Hancock Co. Tax Parcels | |

Base Map: 2017 High Res Imagery
Source: Hancock Co., MS, MARIS &
EAM Field Data
Map Date: June 29, 2021



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WETLAND DELINEATION MAP



ECOLOGICAL
ASSET
MANAGEMENT, LLC

Wetland Delineation for +/- 26.1 ac Area for Shieldsboro Subdivision

Location: Bay St. Louis, MS
Portion of Section 44;
Township-8-South; Range-14-West
County: Hancock County, MS



- | | | |
|----------------------------|--|--------------------------------|
| ▲ Plots | Non Jurisdictional Temporary Detention (+/- 0.84 ac) | Project Boundary (+/- 26.1 ac) |
| Wetland Area (+/- 7.72 ac) | Hancock Co. Tax Parcels | |

Base Map: USA Topo Map
Source: Hancock Co., MS, ESRI & EAM Field Data
Map Date: June 29, 2021



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WETLAND DELINEATION MAP



ECOLOGICAL
ASSET
MANAGEMENT, LLC

Wetland Delineation for +/- 26.1 ac Area for Shieldsboro Subdivision

Location: Bay St. Louis, MS
Portion of Section 44;
Township-8-South; Range-14-West
County: Hancock County, MS