



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

CESAM-RD-A

18 June 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-2024-00196-LHL, 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 jurisdictional determination 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 Alabama due to litigation.

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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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**, a 0.028-acre wetland located on an undeveloped parcel on the Fort Morgan Peninsula, Baldwin County, Alabama. This wetland does not have a continuous surface connection to a jurisdictional water and is therefore not a water of the United States.
 - ii. **Wetland 2**, a 0.001-acre wetland located on an undeveloped parcel on the Fort Morgan Peninsula, Baldwin County, Alabama. This wetland does not have a continuous surface connection to a jurisdictional water and is therefore not a water of the United States.

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. Mobile District's Section 10 Waters List

3. REVIEW AREA. The review area is comprised of a 0.14-acre undeveloped residential lot located on the Fort Morgan Peninsula and is part of a residential lot that will be filled to provide parking for a single-family home. The 0.029-acre wetland area features soils, hydrology, and vegetation consistent with the 1986 Wetland Delineation Manual. Specifically, the review area is centered at latitude 30.235571, longitude -87.879181 and is located at 8415 Zeanah Road, Baldwin County, Alabama.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A, the wetlands are not connected to a TNW, interstate water or territorial seas. However, the closest TNW consist of Bon Secour Bay (0.23 mile to the north), Gulf of Mexico (0.5 mile to the south), and Gator Lake (3 miles to the east).⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
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
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

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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- 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

- 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

⁷ 51 FR 41217, November 13, 1986.

- 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).

Wetlands present are non-tidal wetlands that do not have a continuous surface connection to Bon Secour Bay to the north, the Gulf of Mexico to the south, or Gator Lake to the east. Initial review conducted before the site visit consisted of reviewing the EPA Waters GeoViewer 2.0 to determine the drainage path of the wetland system to the nearest TNW. Through this review, it was determined that this wetland system should drain, under natural conditions, to the west toward Gator Lake. Likewise, under the *Memorandum to Re-evaluate Jurisdiction for NWP-2007-428*, it was determined before the site visit was conducted, that this wetland system, if intact, is part of a wetland system that spans eastward toward Gator Lake.

Upon inspection on 13 Mar 2024, it was noted that the wetlands located on the subject parcel are part of a dune and swale system consisting of a series of linear wetland features running east to west along the Fort Morgan peninsula. Both wetland 1 and wetland 2 consisted predominantly of cattails (*Typha latifolia*) located in what was observed to be a drainage swale. A fringe of saw palmetto (*Serenoa repens*) was identified to the north and south of each wetland feature. No standing water was located in wetland 1 and wetland 2 during the pedestrian survey. The investigation, initially, was conducted through a pedestrian survey, to the east of wetland 1 and then to the west of wetland 2 to determine if a physical continuous surface connection was present. Upon inspection it was noted that there were no ditches present within the vicinity of the subject parcel, and drainage runs to the east along the linear wetland feature, crossing underneath Beach Club Trail through a culvert. At this point, the drainage is not consistent, being interrupted by developments and roadways transecting the peninsula. The physical connection to the wetland system (wetland 1) is severed approximately 0.2 mile to the east. Drainage to the west is interrupted by Gulfway Street, located approximately 0.05 mile from the subject site. There is no culvert or ditch present to keep the physical continuous connection to the wetland system (wetland 2) to the west. The drainage is not consistent, being interrupted by developments and roadways transecting the peninsula. Since the system runs for miles, both to the east and west, and since USACE does not have trespass authority, the property owner gave USACE permission to perform the AJD

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inspection on their property. Therefore, during the time of the inspection, breaks or erosional features were not immediately observed on the subject site.

According to the FEMA FIRMette map, flood zones AE are located along the shores of both Bon Secour Bay, approximately 0.2 miles to the north, and along the shoreline of the Gulf of Mexico, approximately 0.5 mile to the south. Furthermore, the FIRMette Map shows that the site is in Zone X and has a 0.2% annual chance of flooding. Likewise, the EPA's Waters Geoviewer shows that the drainage basin for this site begins to the west and is supposed to flow 3 miles to the east, to Gator Lake. Cahaba Beach Road, 0.2 mile to the east, severs this physical drainage connection to Gator Lake.

Even though both wetland 1 and wetland 2 exhibit soils, hydrology, and vegetation consistent with the 1986 Wetland Delineation Manual and Atlantic Gulf Coastal Plain Regional Supplement, it lacks a physical continuous surface connection to a RPW, TNW, territorial sea, interstate water or impoundment of a jurisdictional water. Therefore, wetland 1 and wetland 2, which includes the section proposed for construction, are 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.

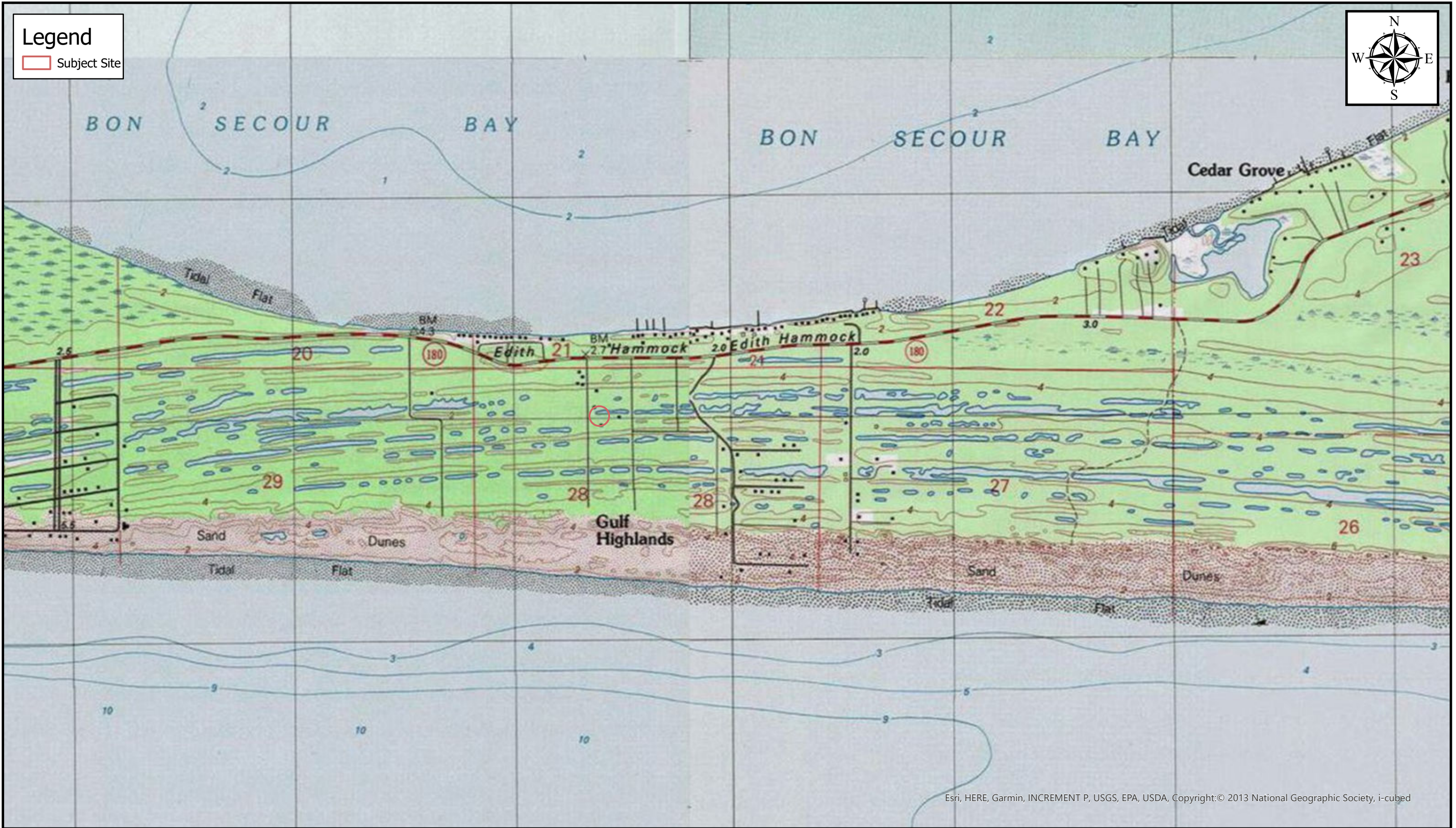
- a. Site visit 3/13/2024.
- b. National Regulatory viewer-USGS Hillshade topographic map accessed on 3/14/2024, 3D Digital elevation model accessed on 3/14/2024.
- c. Google Earth Pro-multiple historical aerial photographs and associated topographic map overlays dated January 1992 through December 2022.

10. OTHER SUPPORTING INFORMATION. N/A

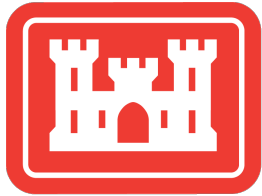
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

Legend

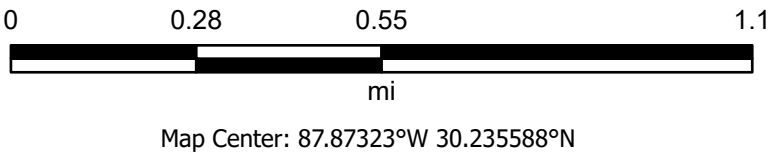
 Subject Site



Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Copyright:© 2013 National Geographic Society, i-cubed



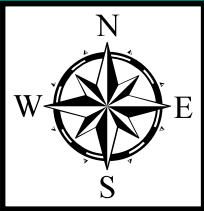
SAM-2024-00196-LHL
Topographic Map View



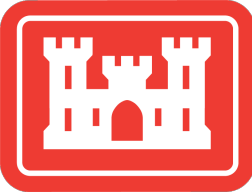
Map Created by: Leslie Lott
Date: 3/18/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere

Legend

- Subject Parcel
- Estuarine and Marine Deepwater
- Estuarine and Marine Wetland
- Freshwater Emergent Wetland
- Freshwater Forested/Shrub Wetland
- Freshwater Pond

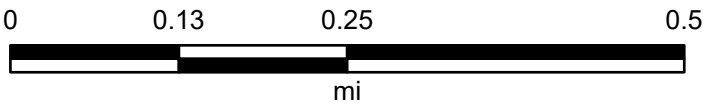


Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft



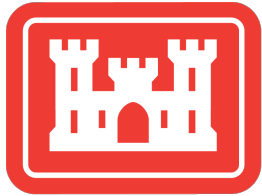
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SAM-2024-00196-LHL
National Wetland Inventory Map



Map Center: 87.870777°W 30.235884°N

Map Created by: Leslie Lott
Date: 3/14/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



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Approximate AJD Boundary

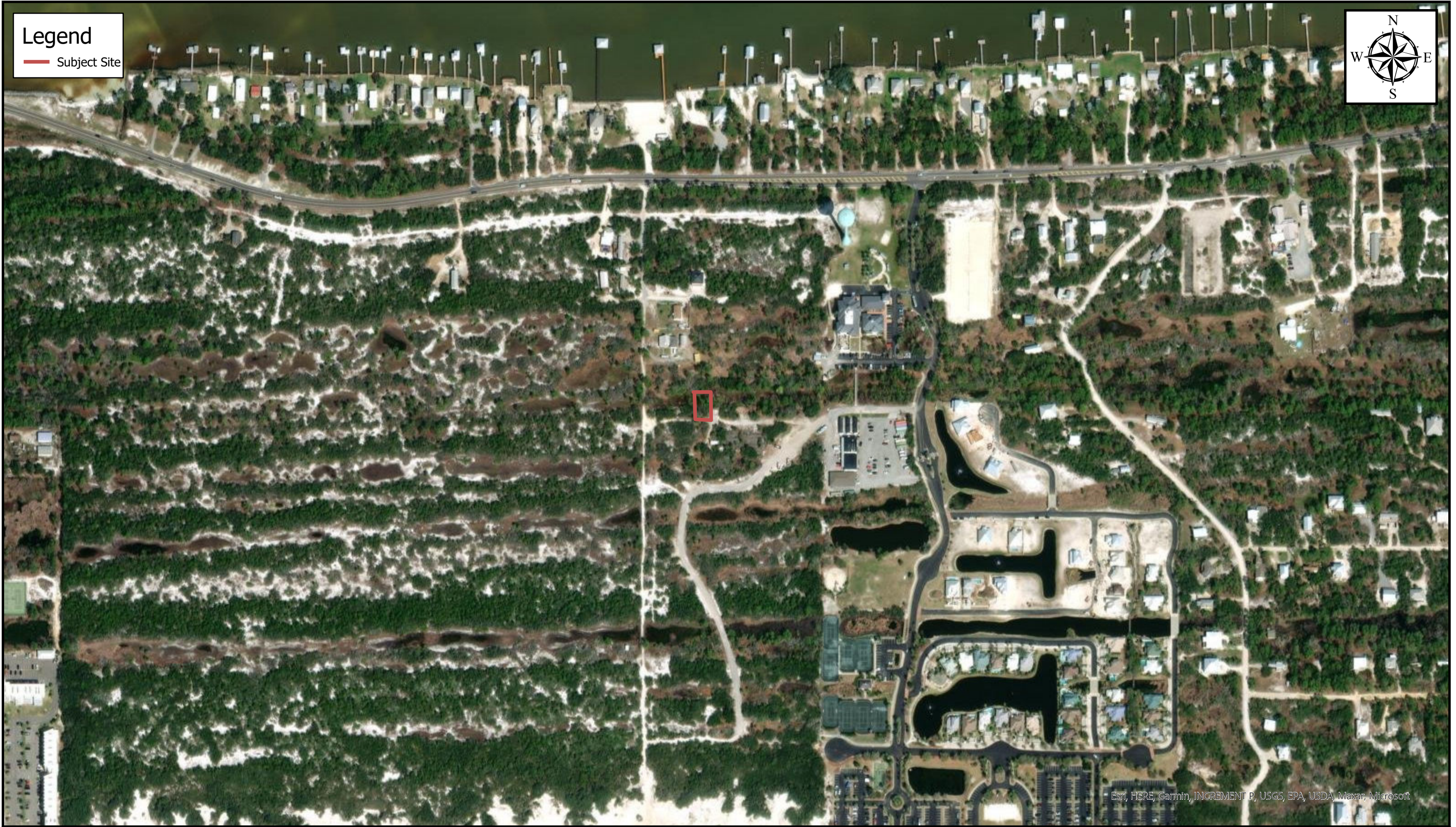
0 0.01 0.01 0.03
mi

Map Center: 87.87921°W 30.23556°N

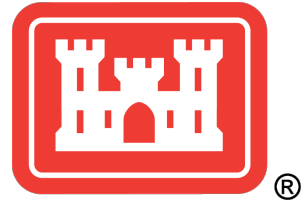
Map Created by: Leslie Lott

Date: 3/18/2024

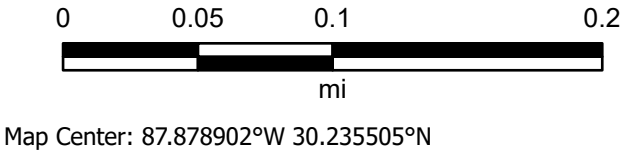
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Projection: Mercator Auxiliary Sphere



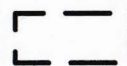
Legend
— Subject Site



SAM-2024-00196-LHL
Site Overview Map



Map Created by: Leslie Lott
Date: 3/14/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



Area Subject to wetland
delineation
0.140± AC



Corps/ADEM
Wetlands Identified by WSI
0.029± AC

Wetland line extends
beyond parcel boundary

Approximate
Parcel Boundary
per Baldwin County
GIS Data

Wetland line extends
beyond parcel boundary

Corps/ADEM Wetland Line
Identified by
Wetland Sciences, Inc.
March 2020

ZEANAH ROAD

NOTE: THIS IS NOT A SURVEY. THIS SKETCH SHOULD BE
CONSIDERED APPROXIMATE UNLESS VERIFIED BY A SURVEY
OR OTHER MEANS.

WETLAND

SCIENCES
INCORPORATED

ENVIRONMENTAL CONSULTANTS

3308 GULF BEACH HIGHWAY
PENSACOLA, FLORIDA 32507
TEL: 850.453.4700
CRAIG@WETLANDSCIENCES.COM

PROJECT NAME: LOT 138 ZEANAH ROAD

WETLAND SKETCH

PROJECT NO.: 2020-149

DRAWN BY: AJN

DATE: 03/09/2020

SHEET: 1



SCALE: 1" = 40 Feet

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Mr. John Werner		File Number: SAM-2024-00196-LHL	Date: 05/31/2024
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL WITHOUT PREJUDICE	C	
	PERMIT DENIAL WITH PREJUDICE	D	
X	APPROVED JURISDICTIONAL DETERMINATION	E	
	PRELIMINARY JURISDICTIONAL DETERMINATION	F	

SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/> or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable

You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial

You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.
- **RECONSIDERATION:** You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable

You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision you may contact:

C. Dianne Jordan
U.S. Army Corps of Engineers
CESAM-RD-A
Post Office Box 2288
Mobile, Alabama 36628-0001
Cynthia.D.Jordan@usace.army.mil
251-510-1162

If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:

Krista Sabin
Regulatory Review Officer
South Atlantic Division
60 Forsyth St SW, Floor M9
Atlanta, Georgia 30303-8803
Krista.D.Sabin@usace.army.mil
904-314-9631

SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.

Date:

Email address of appellant and/or agent:

Telephone number: