



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

CESAM-RD-A

30 July 2025

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-2024-00340-MDJ, 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 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

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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in the state of 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).

Name	Lat.	Long.	Area/Length	Type	Geo. Auth.
Ditch 3 (D-3)	31.109290	-87.466342	447.90 l.f.	Non-WOTUS, non-RPW trib.	None
Ditch 9 (D-9)	31.107147	-87.478840	1,219.27 l.f.	Non-JD Rapanos Ditch	None
Ditch 10 (D-10)	31.107850	-87.477551	72.61 l.f.	Non-JD Rapanos Ditch	None
Ditch 11 (D-11)	31.102907	-87.464864	215.47 l.f.	Non-WOTUS, non-RPW trib.	None
Wetland 3 (W-3)	31.108219	-87.465832	2.28 acres	Non-WOTUS, non-adj wetland	None
Wetland 4 (W-4)	31.106908	-87.463536	0.80 acre	Non-WOTUS, non-adj wetland	None
Wetland 5 (W-5)	31.103658	-87.465001	3.81 acres	Non-WOTUS, non-adj wetland	None
Wetland 7 (W-7)	31.100046	-87.468189	1.53 acres	Non-WOTUS, non-adj wetland	None
Wetland 8 (W-8)	31.100257	-87.477406	6.23 acres	Non-WOTUS, non-adj wetland	None
Wetland 12 (W-12)	31.108744	-87.478218	0.06 acre	Non-WOTUS, non-adj wetland	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, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

The review area for this AJD is limited to the features identified as D-3, D-9, D-10, D-11, W-3, W-4, W-5, W-7, W-8, and W 12 within a 500-acre parcel primarily planted in row crops. The review area is located near the intersection of Interstate 65 and State Highway 21, centered at Latitude: 31.105481 North, Longitude 87.472085 West; Section 28, Township 2 North, Range 6 East; Atmore, Escambia County, Alabama. The wetlands on-site are primarily depressional in nature and formed in Grady Soils. A preliminary jurisdictional determination (PJD) will be prepared for D-1, D-2, D-4, D-6, D-7, D-8, D-12, W-1, W-2, W-6, W-9, W-10, W-11, W-13, IS-1, IS-2 and P-1, on the approximately 500-acre parcel in question.

The review area was subject to work in waters under the DA number AL04-00059-B (SAM-2004-00059-MBM) for the filling of approximately 5,358 linear feet of intermittent streams and 24.47 acres of wetlands. A significant amount of wetlands and streams were proposed for mitigation and preservation as a form of permittee responsible mitigation (PRM) outside of the review area and north of Interstate 65. Much of the permitted work was never began. However, on 16 February 2006, a modification approved approximately 1,202 linear feet of intermittent stream impacts in order to create a pond associated with an adjacent hotel and restaurant development. The modification was constructed and completed. PRM is currently on-going. On 16 April 2013, Wetland 8 (W-8) was determined to be 'isolated' by an AJD under the DA number SAM-2013-00411-JEB.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED⁶.

The nearest TNW is the Escambia River. The Escambia River is a designated Section 10 water and is therefore 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.

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

Flow leaves the review area via two ways. Flow from the northern portion of the parcel flows offsite to the north where it meets Wet Weather Creek, a relatively permanent tributary (RPT). It then continues through Wet Weather Creek until meeting Sizemore Creek (RPT) where flow continues to the east until meeting a confluence with Big Escambia Creek (RPT). It then turns predominantly southeast until the confluence with the Escambia River – A TNW. Flow from the southern portion of the review area leaves to the east via a RPW ditch which is outside of the review area and continues to an unnamed tributary to Sizemore Creek (SC, RPT). SC flows to Big Escambia Creek (RPT). Flow then turns predominantly southeast until the confluence with the Escambia River – A 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**

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.

- 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

- 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.

Ditch 9 (D-9): D-9 is a man-made linear drainage feature which lacks hydric soils indicators. After examining desktop resources including National Resource Conservation Service (NRCS) soil mapping, the National Hydrography Dataset (NHD), historic aerial imagery dating back to 1998, as well as applicant provided information, and a site visit conducted on 31 July 2024 – USACE has determined that D-9 is a ditch that was excavated wholly in and draining only uplands with less than a relatively permanent flow of water. Therefore, D-9 is not jurisdictional.

Ditch 10 (D-10): D-10 is a man-made linear drainage feature which lacks hydric soils indicators. Historically, D-10 has drained uplands to the east and acted as a headwater for an unnamed and now non-existent intermittent stream impacted by the original permitting effort AL04-00059-B (SAM-2004-00059-MBM). However, D-10 now drains uplands west into W-10. After examining desktop resources including National Resource Conservation Service (NRCS) soil mapping, the

⁹ 51 FR 41217, November 13, 1986.

National Hydrography Dataset (NHD), historic aerial imagery, as well as applicant provided information and a site visit conducted on 31 July 2024, the USACE has determined that D-10 is a ditch that was excavated wholly in and draining only uplands with less than a relatively permanent flow of water. Therefore, D-10 is not jurisdictional.

- 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).

Ditch 3 (D-3): D-3 is approximately 335.53 linear feet in length and is a man-made drainage feature dug in uplands, has an ordinary high-water mark, and appears to convey less than a relatively permanent flow of water (explained below). After examining desktop resource including National Resource Conservation Service (NRCS) soil mapping, the National Hydrography Dataset (NHD), historic aerial imagery, applicant-provided information and photos, as well as a site visit conducted on 31 July 2024, USACE has determined that D-3 is a ditch that was excavated wholly in uplands with less than a relatively permanent flow of water due to the lack of both hydric soils indicators and surface water. Therefore D-3 is not jurisdictional.

Ditch 11 (D-11): D-11 is a manmade linear drainage feature approximately 215.27 linear feet in length which, upon site inspection on 31 July 2024, did not maintain an ordinary high-water mark (OHWM) as leaf litter was present in the bed as well as some herbaceous plant species. Additionally, a shallow aquitard was present preventing contact with the water table, and D-11 lacks hydric soil indicators. The information above suggests the feature does not convey a relatively permanent flow of water. However, applicant provided material does suggest the feature does convey significant volumes of stormwater but with less than seasonal flow – particularly after strong storm events. After examining desktop resource including National Resource Conservation Service (NRCS) soil mapping, the National Hydrography Dataset (NHD), historic aerial imagery, as well as applicant provided information, and a site visit conducted on 31 July 2024; the USACE has determined that D-11 is not jurisdictional.

Wetland-3 (W-3): W-3 is a 2.28-acres palustrine forested wetland which developed in depressional Grady soils. W-3 abuts non-jurisdictional D-3 and does not immediately abut a requisite water. Therefore, W-3 lacks a continuous surface connection (CSC) to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-3 is not jurisdictional.

Wetland-4 (W-4): W-4 is an approximately 0.80-acre portion of a larger, multi-acre forested palustrine wetland complex that extends outside of the review area. W-4 is depressional in nature and formed in Grady soils. There is no channel flowing in or out of W-4 and it is surrounded by uplands. Additionally, W-4 does not immediately abut a requisite water. Therefore, W-4 lacks a CSC to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-4 is not jurisdictional.

Wetland-5 (W-5): W-5 is a depressional mix of herbaceous and scrub / shrub palustrine wetland. W-5 is approximately 3.81 acres in area and regularly planted in row crops and is transected north-south by a swale feature which connects to D-11 (non-RPW) where flow continues south to D-12 (RPW). W-5 does not immediately abut a requisite water. Therefore, W-5 lacks a CSC to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-5 is not jurisdictional.

Wetland-7 (W-7): W-7 is a depressional palustrine scrub / shrub wetland, approximately 1.58 acres in area, which has formed in Grady soil. The wetland appears to drain offsite and to the east via a non-RPW ditch (determined via the lack of hydric soils indicators in the bed of the drainage feature) which is outside of the review area. W-7 does immediately abut a requisite water and lacks a CSC

to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-07 is not jurisdictional.

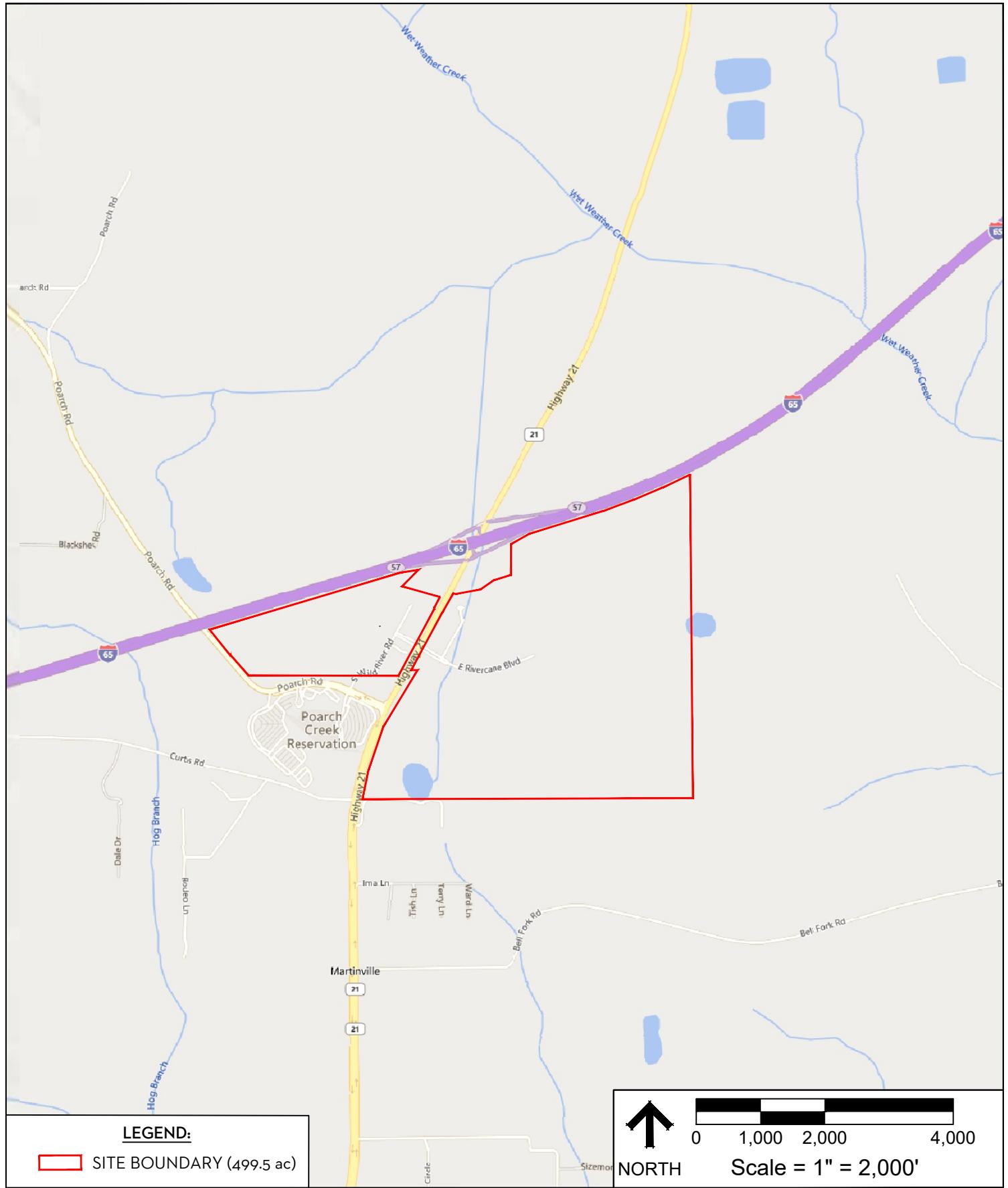
Wetland-8 (W-8): W-8 is a depressional palustrine scrub / shrub wetland, approximately 6.23 acres in area, which has formed in Grady soil and lacks a channel flowing into or out of W-8. W-8 is surrounded by uplands. Additionally, W-8 does not immediately abut a requisite water. Therefore, W-8 lacks a CSC to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-8 is not jurisdictional.

Wetland-12 (W-12): W-12 is an approximately 0.06-acre palustrine forested wetland which is depressional in nature, surrounded by uplands, and it lacks a channel flowing in or out. W-12 does not immediately abut a requisite water. Therefore, W-12 lacks a CSC to a RPW, TNW, territorial sea, interstate water, or impoundment of a jurisdictional water; therefore, W-12 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. A site visit and field inspection were conducted on 31 July 2024, as evidenced in the photolog found in the administrative record of this file. Additional photo evidence is located inside the National Regulatory Viewer (NRV) web-based platform.
 - b. Office Evaluations were conducted periodically from April 2024 to July 2025 via inspection of mapping layers accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey (USGS) topographical mapping, the National Hydrological Dataset, 3DEP Elevation Modeling, 3DEP Hillshade Modeling, National Oceanographic and Atmospheric (NOAA) LiDAR data, Google Earth Pro historic aerial imagery, National Resource Conservation Service (NRCS) soil mapping, and the U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory (NWI) Mapping.
 - c. Applicant provided delineation report entitled “*Overall Existing Conditions; Margaritaville; Wharf Landing, LLC.*”
 - d. Department of the Army (DA) authorization (“Original Permit”) issued on 27 October 2024 to “*Joe Raley Builders for the City of Orange Beach*” and assigned the DA project number AL04-00324-M.
10. OTHER SUPPORTING INFORMATION.

- a. *"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 (499.5 ac)

NORTH

NORTH Scale = 1" = 2,000'

Scale = 1" = 2,000'

REF. SHEET: ESRI WORLD STREETS
DESCRIPTION: WATER RESOURCE DELINEATION

Rivercane Development

ATMORE ESCAMBIA COUNTY, ALABAMA

FIGURE 1

GENERAL LOCATION MAP

GMC # EMQB220005

DATE: 06.18.25

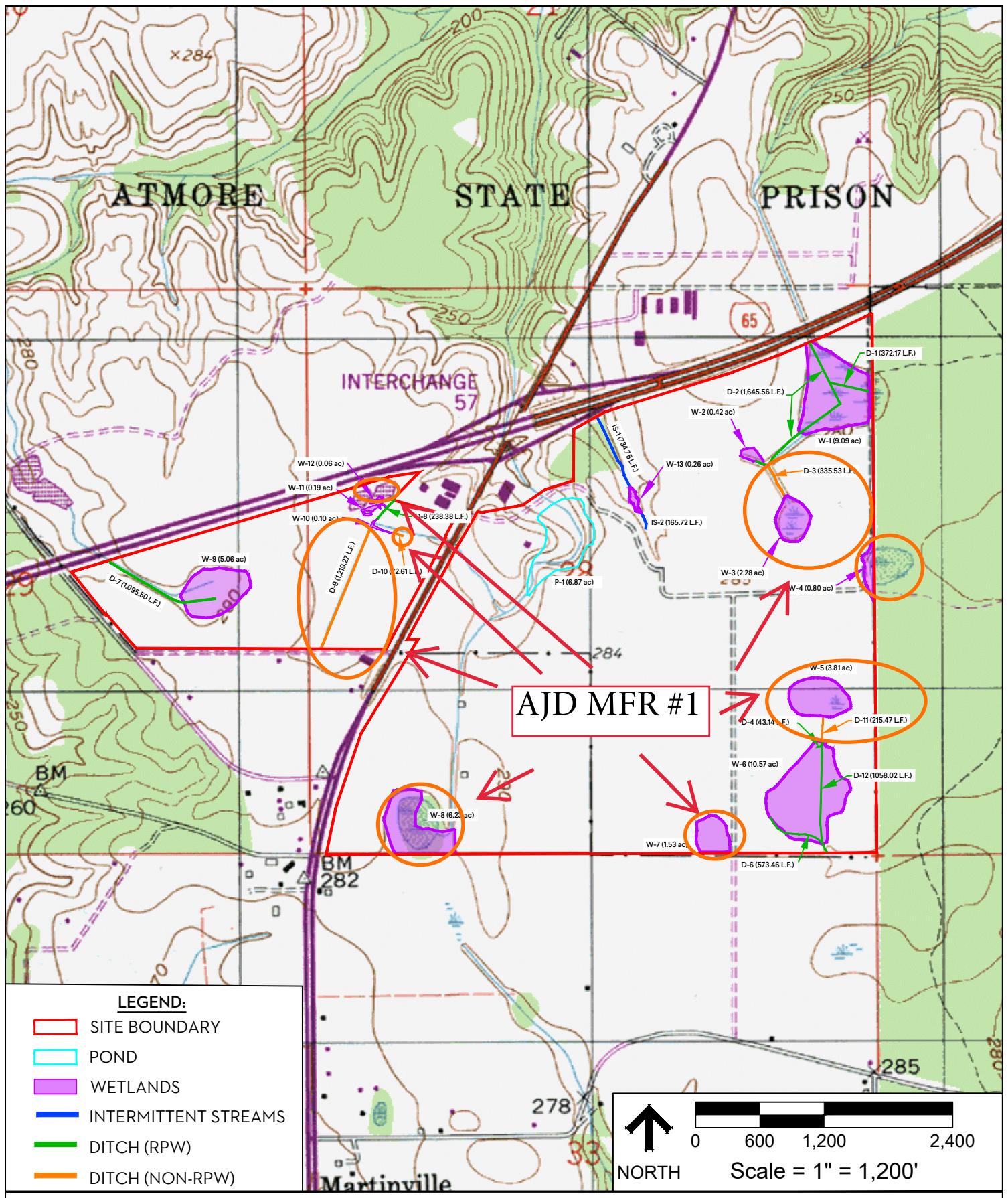
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2000 East Chase Lane, Suite 100
Montgomery, AL 36117

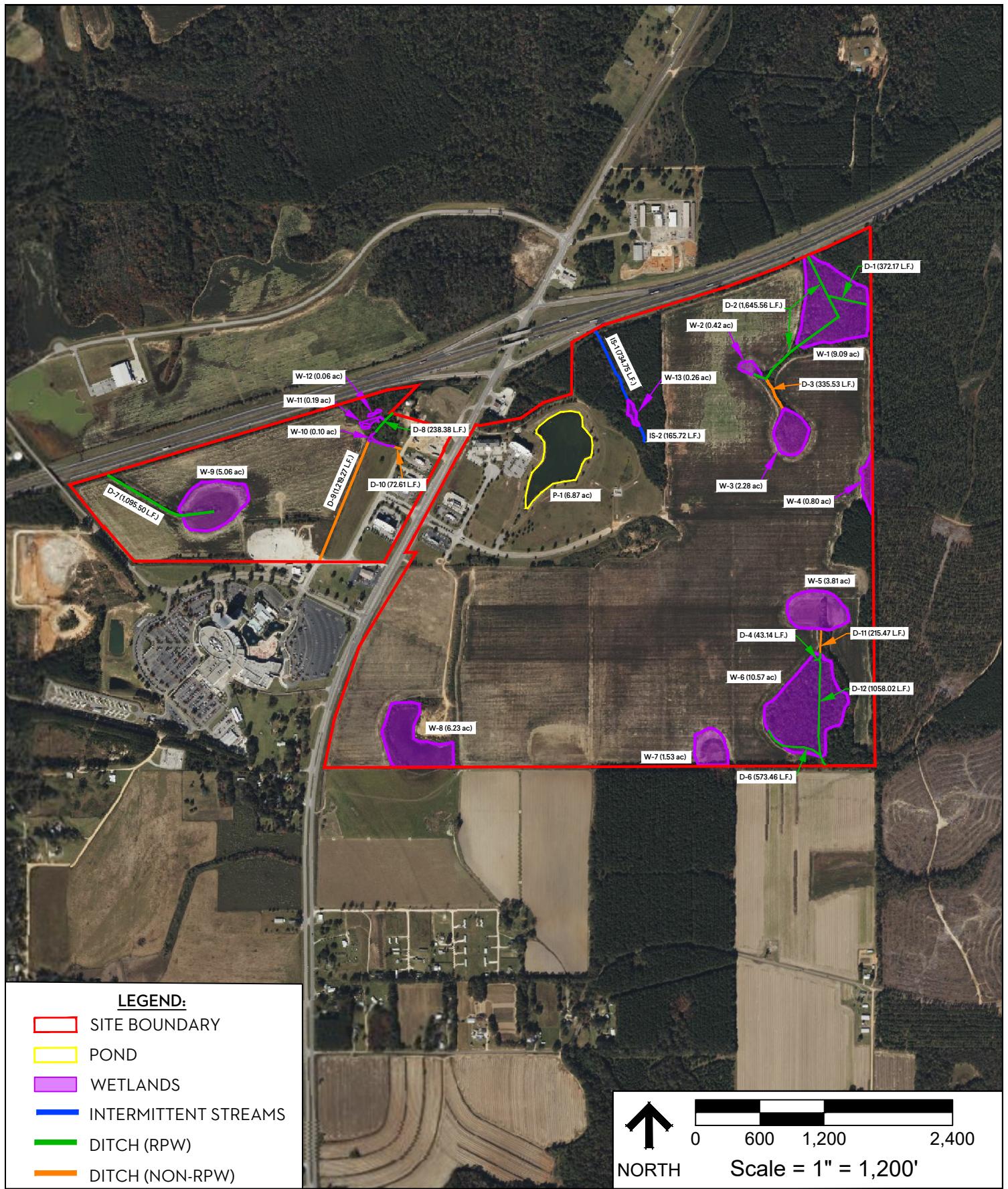
Montgomery, AL

GMNETWORK.COM

GMC



GMC



REF. SHEET: ESRI WORLD IMAGERY
DESCRIPTION: WATER RESOURCE DELINEATION

► **Rivercane Development**
ATMORE, ESCAMBIA COUNTY, ALABAMA

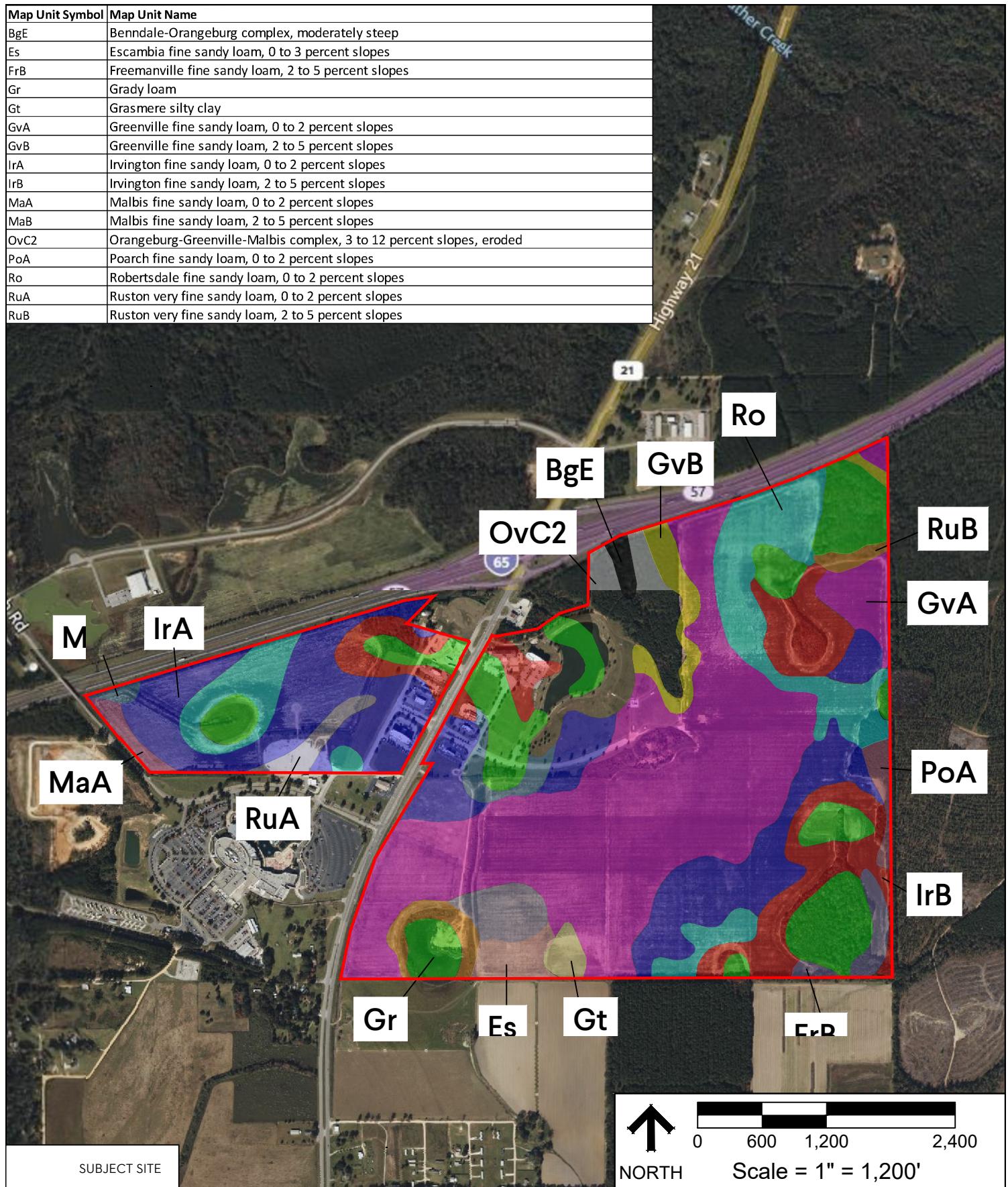
FIGURE 3

AERIAL PHOTOGRAPH
GMC # EMOB220005
DATE: 06.18.25
DRAWN BY: AYH

2660 East Chase Lane, Suite 200
Montgomery, AL 36117
T 334.271.3200
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GMC

Map Unit Symbol	Map Unit Name
BgE	Benndale-Orangeburg complex, moderately steep
Es	Escambia fine sandy loam, 0 to 3 percent slopes
FrB	Freemanville fine sandy loam, 2 to 5 percent slopes
Gr	Grady loam
Gt	Grasmere silty clay
GvA	Greenville fine sandy loam, 0 to 2 percent slopes
GvB	Greenville fine sandy loam, 2 to 5 percent slopes
IrA	Irvington fine sandy loam, 0 to 2 percent slopes
IrB	Irvington fine sandy loam, 2 to 5 percent slopes
MaA	Malbis fine sandy loam, 0 to 2 percent slopes
MaB	Malbis fine sandy loam, 2 to 5 percent slopes
OvC2	Orangeburg-Greenville-Malbis complex, 3 to 12 percent slopes, eroded
PoA	Poarch fine sandy loam, 0 to 2 percent slopes
Ro	Robertsdale fine sandy loam, 0 to 2 percent slopes
RuA	Ruston very fine sandy loam, 0 to 2 percent slopes
RuB	Ruston very fine sandy loam, 2 to 5 percent slopes



REF. SHEET: ESCAMBIA COUNTY SOIL SURVEY
 DESCRIPTION: WATER RESOURCE DELINEATION
Rivercane Development
 ATMORE, ESCAMBIA COUNTY, ALABAMA

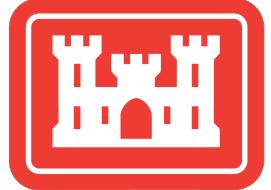
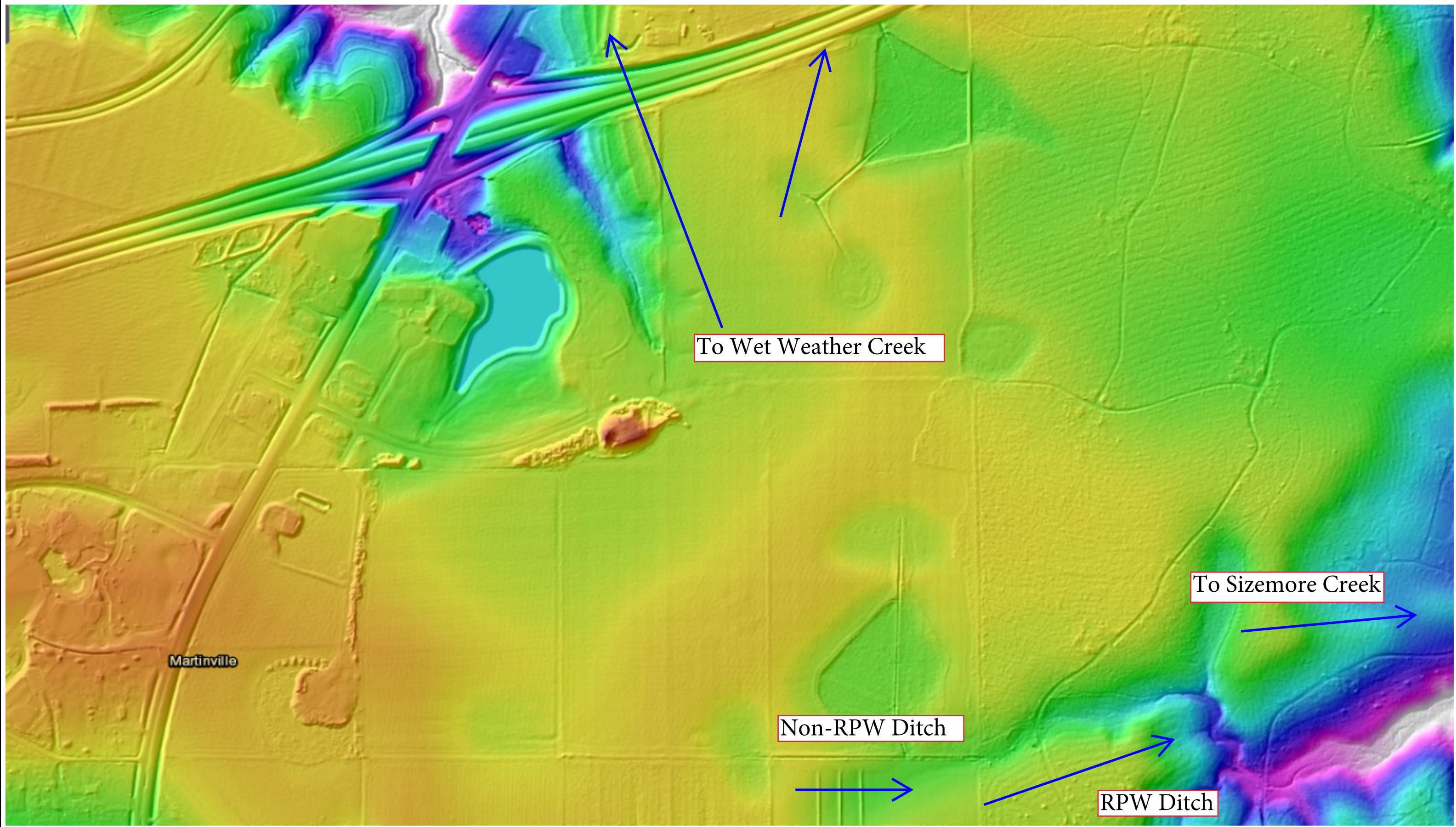
FIGURE 4

SOIL MAP
 GMC # EMOB220005
 DATE: 06.18.25
 DRAWN BY: AYH

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 Montgomery, AL 36117
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Scale = 1" = 1,200'



Department of the Army // Flow Mapping // SAM-2024-00340

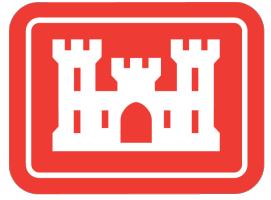
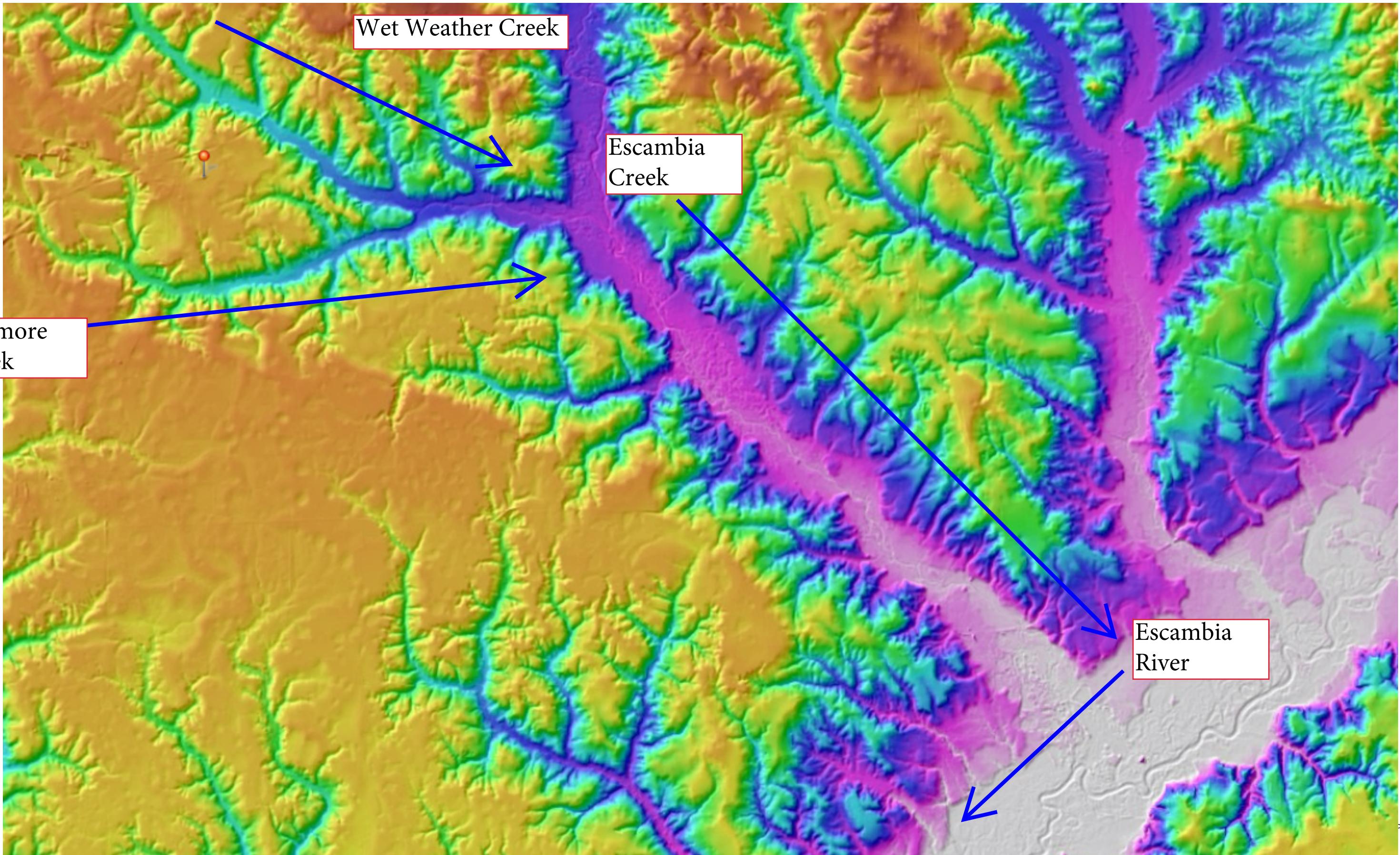
0 0.13 0.25 0.5
mi

Map Center: 87.467093°W 31.106298°N

Map Created by: M. Derek Jacobs

Date: 7/14/2025

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



Department of the Army // Flow Mapping // SAM-2024-00340



Map Center: 87.467093°W 31.106298°N

Map Created by: M. Derek Jacobs

Date: 7/14/2025

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