



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

CESAM-RD-A

21 Aug 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-2024-00488-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 JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

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

1. SUMMARY OF CONCLUSIONS.

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

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

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

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- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland A – Wetland A is a part of an unnamed tributary of Chickasaw Creek and is a jurisdictional Water of the United States which belongs to Section 404. As such, it is non-navigable.
 - ii. Wetland B – Wetland B is part of an unnamed tributary to Chickasaw Creek and is jurisdictional Water of the United States which belongs to Section 404. As such, it is non-navigable.
 - iii. Wetland C – Wetland C is part of an unnamed tributary to Chickasaw Creek and is a Jurisdictional Water of the United States which belongs to Section 404. As such, it is non-navigable.
 - iv. Wetland D – Wetland D is a non-jurisdictional wetland.
 - v. Wetland E - Wetland E was once part of an unnamed tributary of Chickasaw Creek, however, the construction of Highway 158 has severed the surface connection and it is non-jurisdictional.
 - vi. Stream 1– Relatively Permanent Water – This RPW is non-navigable and intrinsically is a Section 404 water.

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 Section 10 waters list

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3. REVIEW AREA. The subject parcel is an approximate 8.89-acre undeveloped piece of property this is bounded by State Highway 158 (Industrial Parkway), to the south, in Saraland, Mobile County, Alabama. Specifically, the site is located at 30.798507, -88.083331; within Section 9, Township 3 South, Range 1 West, Saraland, Mobile County Alabama.

The parcel is rectangular shaped with vegetation located around the north, east and western perimeter. The central portion of the parcel consists of rocky material that is indicative of the presence of a former driveway or road. Topographically, a hilltop sits along the central portion of the site and slopes down to the east and west.

The parcel is located south of a residential area which consists of apartments and individual homes. The parcel is undeveloped, however, during the site inspection it was noted that a building was once located on the property due to the presence of slab like material identified during site reconnaissance. Furthermore, aerial review depicts the footprint of a former building. (Attachment A)

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

Overall, the area is located 0.41 mile north of Chicksaw Creek, a TNW that is tidally influenced in this area. Review of the EPA's Water Geoviewer 2.0 confirm that this water is navigable and tidally influenced. Chickasaw Creek is also on the Mobile District's list of Section 10 waters. Section 10 waters are a subset of TNWs.

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

Wetland A, B, C, and Stream 1 – All of these features flow directly south, underneath State Highway 158 (Industrial Parkway), for approximately 0.48 mile, and directly into Chicksaw Creek, a TNW.

Wetlands D and E – Wetland D and E does not have a continuous surface connection to a TNW, interstate water or territorial seas.

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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
 - d. Impoundments (a)(4): N/A
 - e. Tributaries (a)(5): One tributary (stream 1), located at 30.797830 N, 88.082635 W, runs along the eastern property boundary for approximately 630 feet. This tributary is considered an RPW and was identified during site reconnaissance activities having a definite bed and bank and continuous flow. This RPW is located along the eastern property boundary and was denoted on the Wetland Delineation provided by the applicant's agent. Furthermore, this RPW flows directly south and into Chickasaw Creek, a Section 10 TNW. Flow path was

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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determined from available USGS Topographic Map of the area and was further verified from the EPA's Water Geoviewer 2.0. (Attachment B). Stream 1 is depicted as an unnamed perennial tributary to Chickasaw Creek on the USGS topographic map.

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

g. Adjacent wetlands (a)(7):

Wetland A: Wetland A, located approximately at 30.798608 N, 88.082333 W, consists of a laterally extending area approximately 0.008 acre in size that physically abuts the bank of Stream 1 (RPW). . This area runs along the eastern portion of the property boundary and provides a continuous surface connection to Stream 1 (RPW) which flows into Chickasaw Creek (TNW).

Wetland B: Wetland B, located at approximately 30.798460 N, 88.082462 W, consists of a laterally extending area approximately 0.004 acre in size that physically abuts the bank of Stream 1 (RPW). This area runs along the eastern portion of the property boundary and provides a continuous surface connection to Stream 1 (RPW) which flows into Chickasaw Creek (TNW).

Wetland C: Wetland C, located at approximately 30.797723 N, -88.082676 W, consists of a laterally extending area approximately 0.57 acre in size that physically abuts the bank of Stream 1 (RPW). This area runs along the southeastern portion of the property boundary and provides a continuous surface connection to Stream 1 (RPW) which flows into Chickasaw Creek (TNW).

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

⁷ 51 FR 41217, November 13, 1986.

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be non-jurisdictional under the CWA based on the criteria listed in the guidance.
N/A

- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland D: During site reconnaissance activities it was noted that Wetland D, located approximately at 30.798165 N, 88.083258 W, is, an approximately 0.03 acre area, was not considered a Waters of the United States under the pre-2015 regulatory regime. This wetland was formed due to disturbance of the upland area (hilltop) located in the central portion of the project site that has been previously disturbed by historic construction activities. Upon inspection it was noted that this wetland was surrounded on all sides by uplands and lacked any continuous surface connection to Stream 1 because they are separated by uplands. Therefore, it has been determined that this wetland is non-adjacent and thus not considered a Waters of the United States.

Wetland E: Wetland E, located at approximately 30.798085 N, 88.084283 W, is approximately 0.08 acre (3,553 square feet) in size. This wetland bounds the subject parcel along the southwestern property boundary and appears to extend

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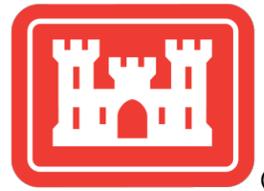
to the west outside of the review area onto the adjacent parcel. It was once adjacent to an unnamed tributary (RPW) of Chickasaw Creek; however, the connection to the unnamed tributary has been severed through the construction of State Highway 158 (Industrial Parkway). No culverts are located immediately adjacent to this wetland to provide a connection to the wetlands on the southside of State Highway 158 (Industrial Parkway). Likewise, the relief of the State Highway's Right-of-Way (ROW) is such that the wetland boundary does not extend past the property boundary into the ROW, causing this wetland to be depressional in nature. Because there is no continuous surface connection to an RPW, TNW, territorial seas, interstate water or impoundment, Wetland C 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 – 7/24/2024, Desktop Review – 8/20/2024
 - b. EPA's Water Geoviewer 2.0, 8/20/2024
 - c. Alabama Regulatory Reviewer, 8/20/2024
10. OTHER SUPPORTING INFORMATION. N/A
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

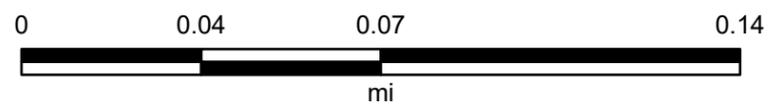
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City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Maxar, Microsoft



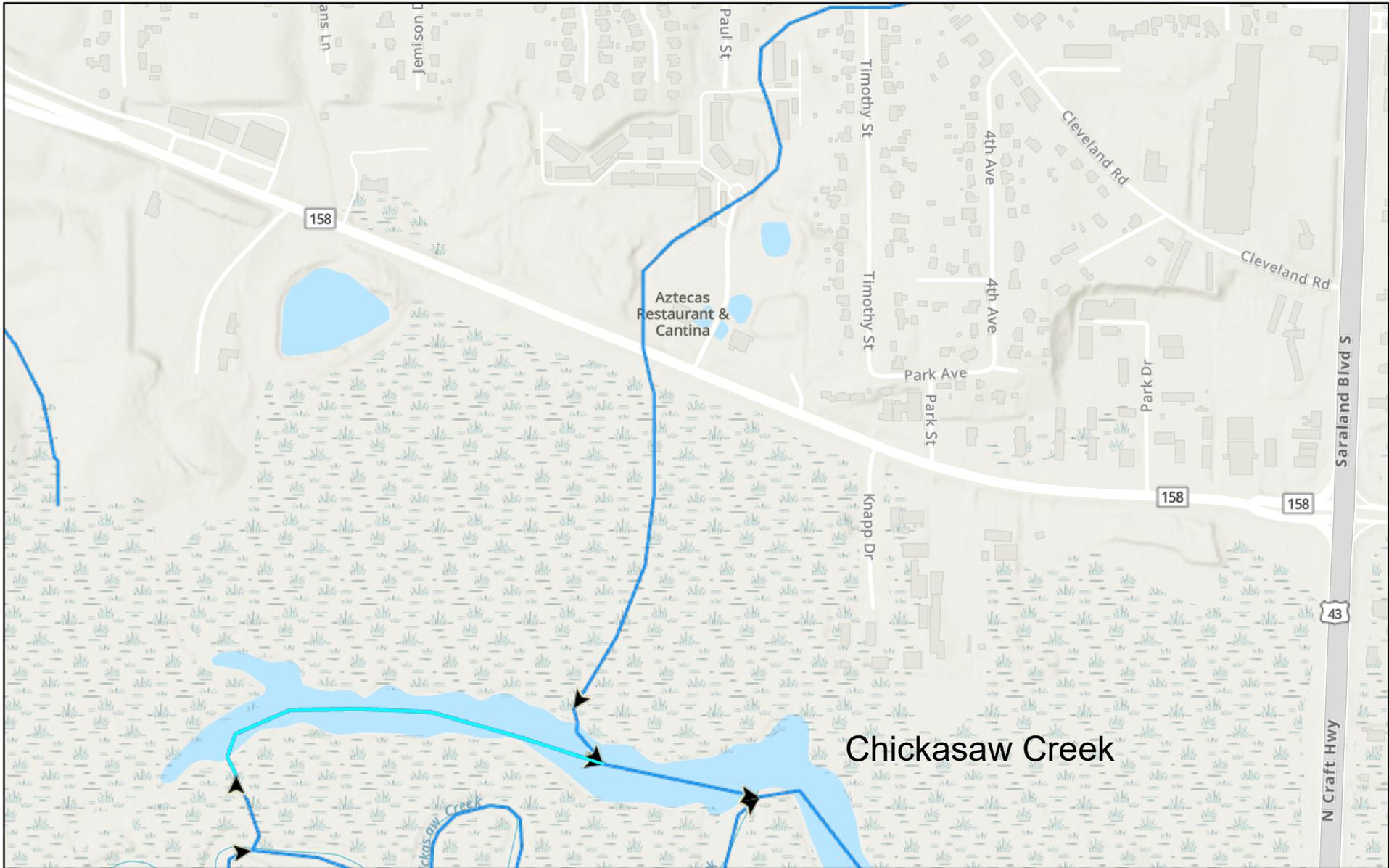
SAM-2024-00488-LHL
Aerial Overview



Map Center: 88.082715°W 30.798298°N

Map Created by: Leslie Hiles Lott
Date: 8/21/2024

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

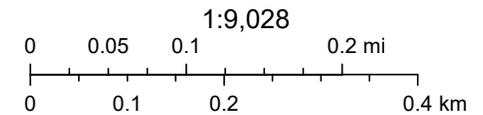


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Attachment B

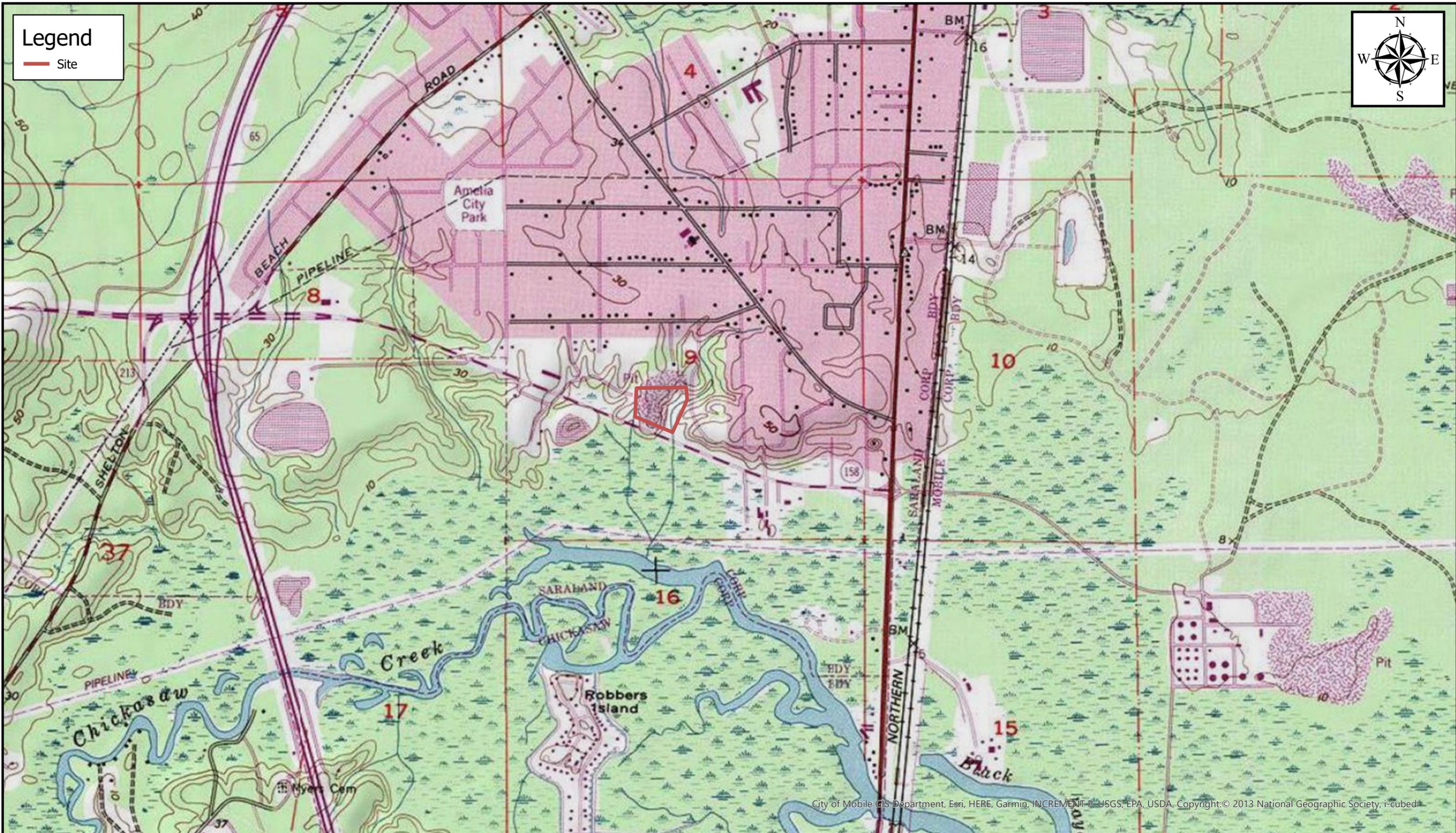
- Streams
- ▲ Flow Direction



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Leslie Hiles Lott

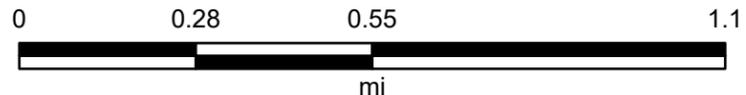
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SAM-2024-00488-LHL
 Overview Map



Map Center: 88.079849°W 30.797901°N

Map Created by: Leslie Hiles Lott
 Date: 8/20/2024

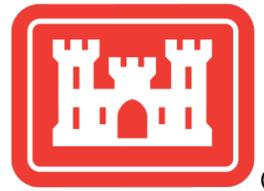
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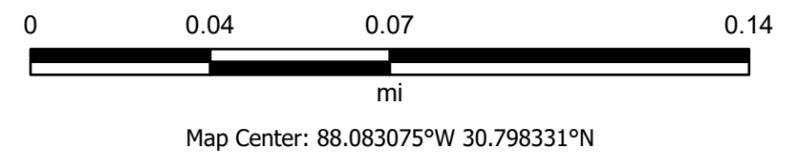
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- RPW
- Wetlands



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



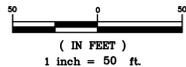
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Site Overview



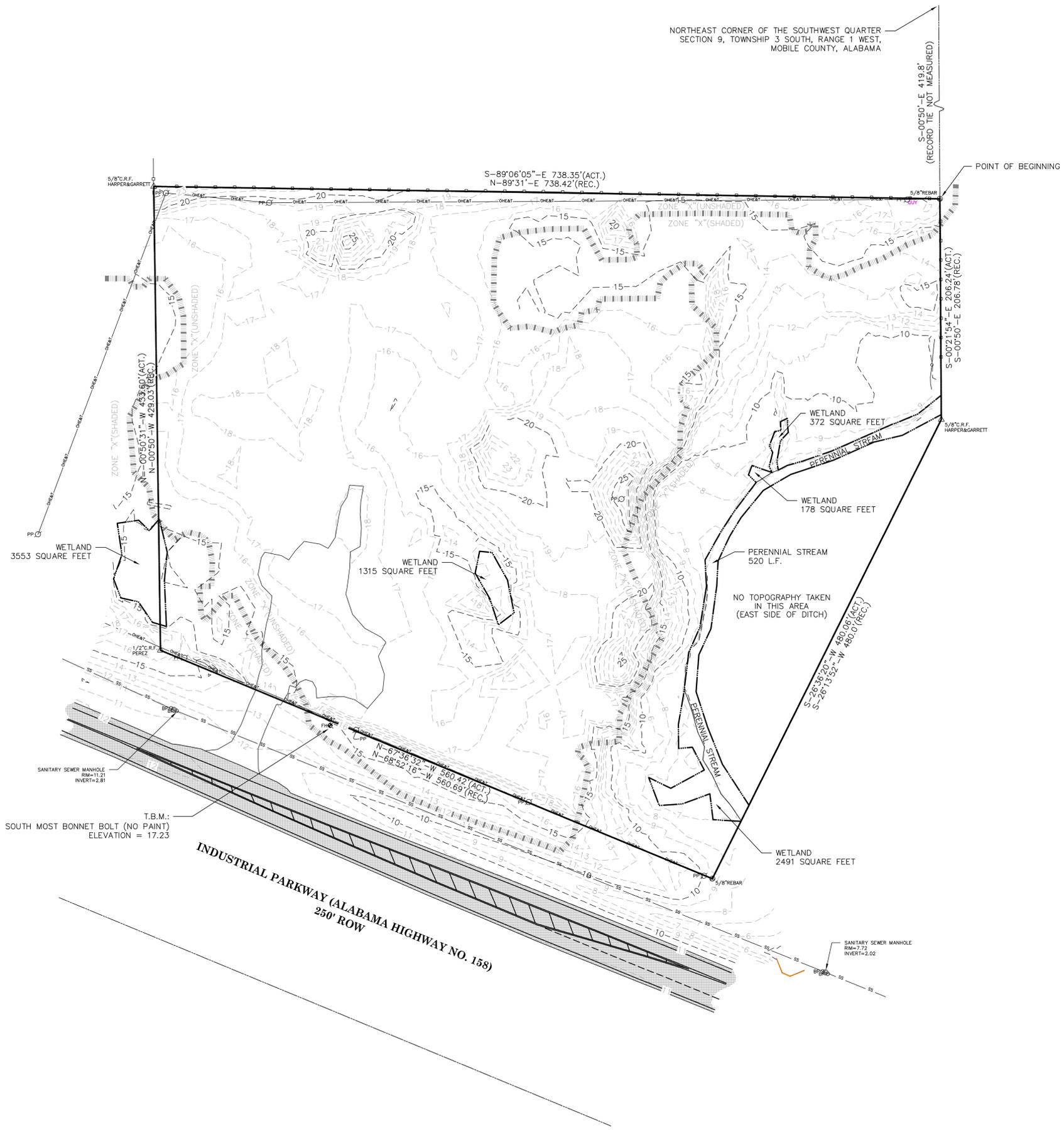
Map Created by: Leslie Hiles Lott
Date: 8/20/2024
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



GRAPHIC SCALE



NORTHEAST CORNER OF THE SOUTHWEST QUARTER
SECTION 9, TOWNSHIP 3 SOUTH, RANGE 1 WEST,
MOBILE COUNTY, ALABAMA



S-00°50'-E 419.8'
(RECORD TIE NOT MEASURED)

POINT OF BEGINNING

S-89°06'05"-E 738.35'(ACT.)
N-89°31'-E 738.42'(REC.)

5/8" C.R.F.
HARPER & GARRETT

5/8" REBAR

S-00°21'54"-E 206.78'(ACT.)
S-00°50'-E 206.78'(REC.)

5/8" C.R.F.
HARPER & GARRETT

PP 07

PP 08

PP 09

PP 10

PP 11

PP 12

PP 13

PP 14

PP 15

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