



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
600 VESTAVIA PARKWAY, SUITE 203
VESTAVIA HILLS, ALABAMA 35216

CESAM-RD-N

October 4, 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-2024-00684-CMS 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.

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

1. SUMMARY OF CONCLUSIONS.

- a. Provide Zlist 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).

Wetland 1 – Non-jurisdictional forested wetland, negative (a)(7), centered at latitude 34.021347, longitude -85.972057.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is comprised of approximately 4 acres of forested property located in Gadsden, Etowah County, Alabama. The review area is centered at latitude 34.0215, longitude -85.9721 within Section 2, Township 12 South, Range 6 East. The review area is within Alabama Power Company's Gadsden Stream Plant property.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The aquatic resource is not connected to a TNW, interstate water or territorial seas. The Coosa River (Neely Henry Lake) is the closest TNW. The Coosa River is on the Mobile District's Section 10 waters list. Sectionf 10 waters are a subset of TNWs. ⁶

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 1 is a depressional wetland and does not flow to a TNW, interstate water or territorial seas.
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

conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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

g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

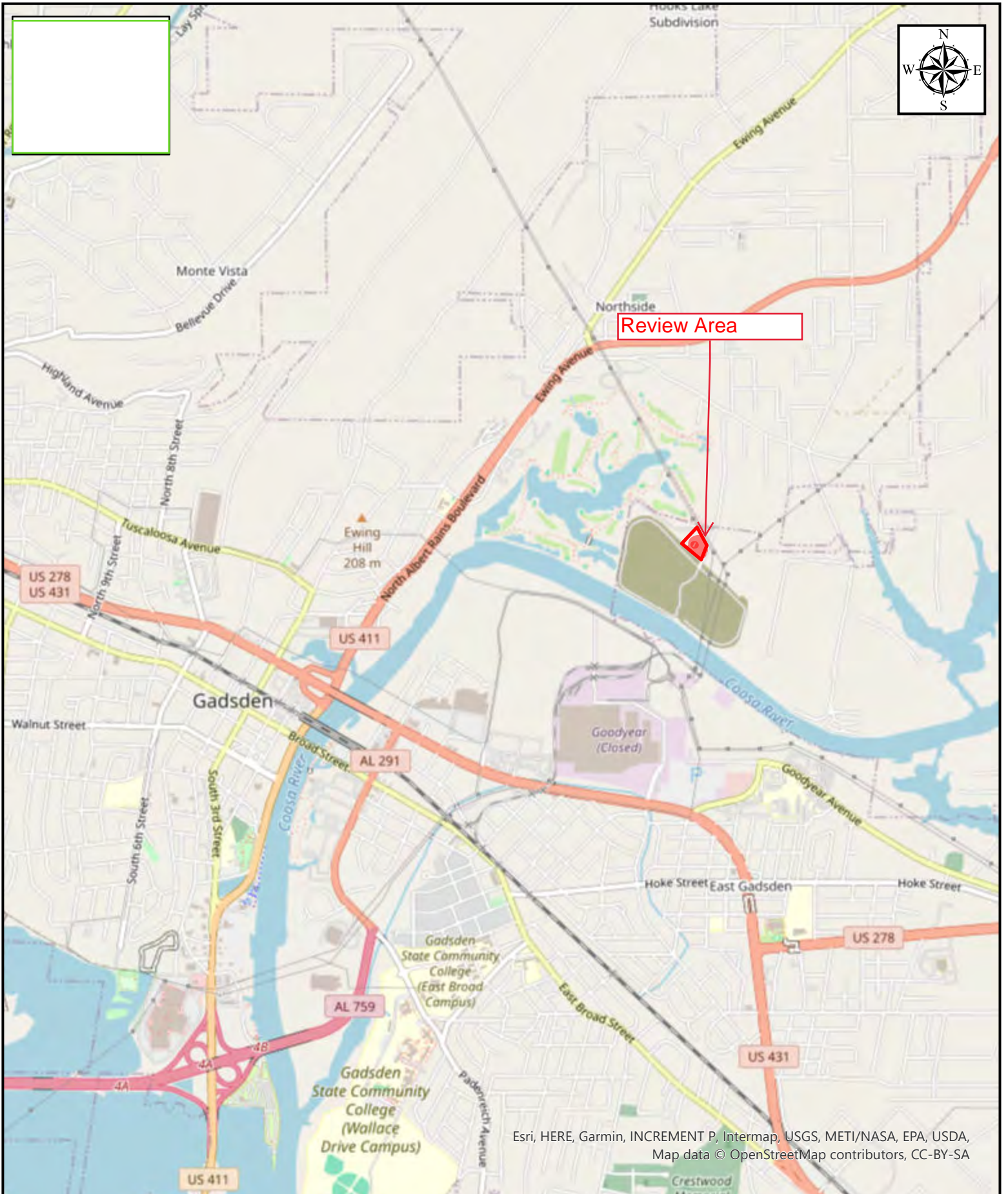
- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁹ Include size of the aquatic resource or feature within the review area and describe how it was determined 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. 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

⁹ 51 FR 41217, November 13, 1986.

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 1 (1.01 acres in area) sits in a depressional area and is surrounded by uplands. There is a slight rise in elevation along the western boundary of the wetland that separates the wetland from a low area in the review area. Photos 1 and 2 in the Photolog depict this low area. This area does not have hydric soil indicators or an ordinary high water mark and is separated from Wetland 1 by 65 feet of uplands. This area leads to the beginning of a linear wetland (Photo 3 in Photolog) just beyond the western corner of the review area and is approximately 180 feet from the wetland boundary. Uplands are present between the wetland and headwater of the linear wetland outside of the review area. Wetland 1 does not have a continuous surface connection to an RPW, TNW, territorial seas, interstate water, or impoundment because it is surrounded by uplands; therefore, it is not jurisdictional. Additionally, wetlands cannot be adjacent to another wetland under (a)(7) or an "other water" under (a)(3) of the 1986 regulations.

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. Corps Project Manager site visit with APCO personnel on July 31, 2024.
 - b. "Wetland Assessment Report" prepared by Cahaba Consulting on behalf of Alabama Power Company, August 2024. Note the report erroneously describes topography across the site sloping east and southeast. The topography slopes gently west, although the site has very little topographic relief at all.
 - c. National Regulatory Viewer, 3DEP Hillshade and 3DEP Slope, accessed September 16, 2024.
10. OTHER SUPPORTING INFORMATION. Memorandum on LRB-2023-0045, September 3, 2024.
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.



**SAM-2024-00684-CMS
SITE LOCATOR MAP
FIGURE 1**

0 0.28 0.55 1.1
mi

Map Center: 85.985176°W 34.018288°N

Map Created by: Courtney Shea
Date: 9/16/2024
Coordinate System: WGS 1984 Web
Mercator Auxiliary Sphere

Legend



Review Area



Wetland
Boundary



Reg Field Collection - Photo



Wetland 1 wetland boundary

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



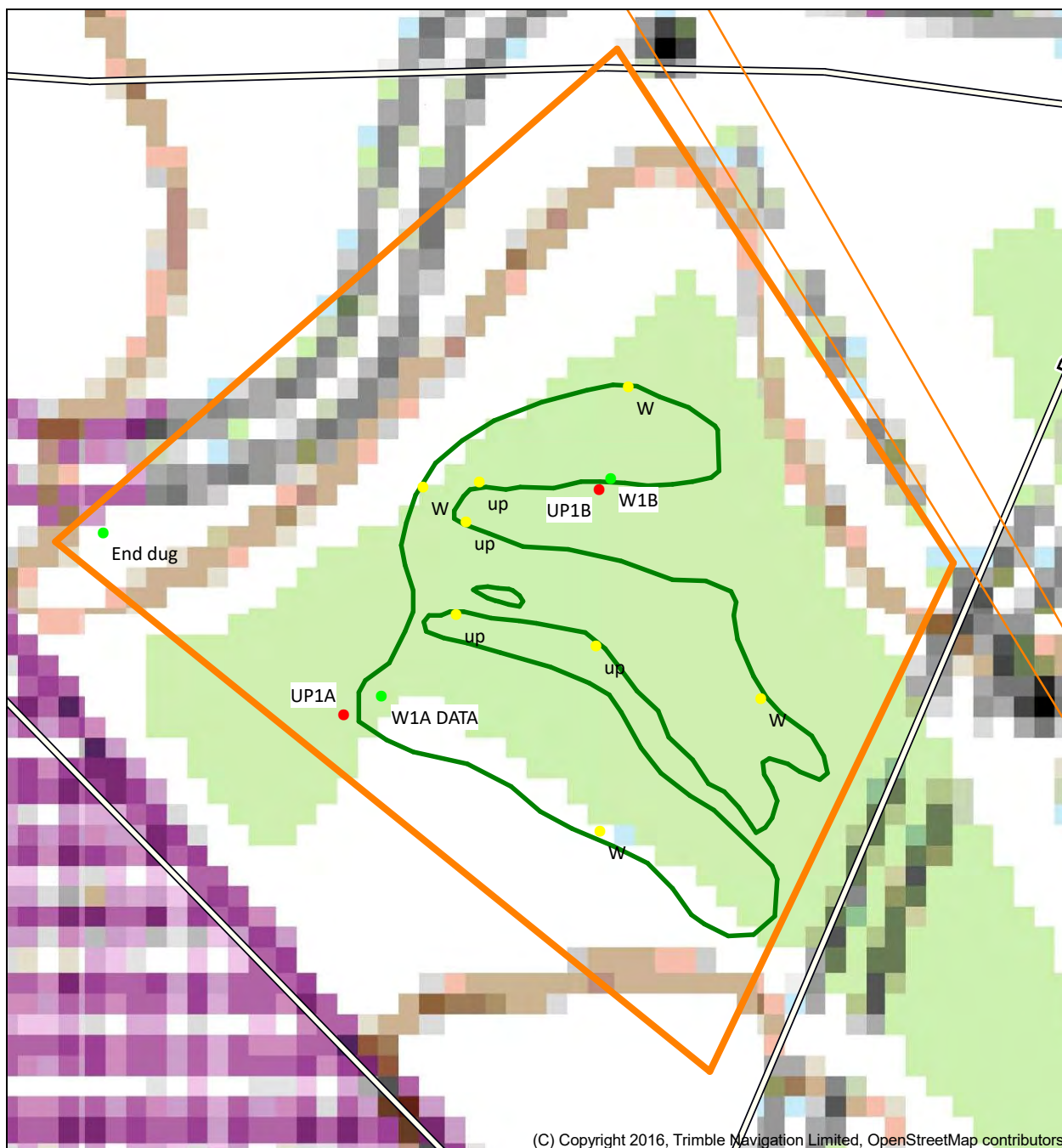
SAM-2024-00684-CMS
Delineation
Figure 2

0 0.02 0.04 0.07
mi

Map Center: 85.97185°W 34.021365°N

Map Created by: ArcGIS Web AppBuilder
Date: 9/16/2024

Coordinate System: WGS 1984 Web
Mercator Auxiliary Sphere

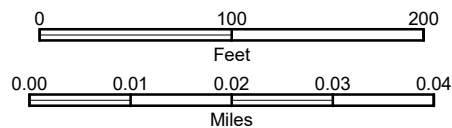


Legend

- APPROXIMATE BOUNDARY
- WETLAND
- WETLAND DATA
- UPLAND DATA
- ASSESSMENTS



Gadsden Steam Plant
Figure 3- Delineation figure
USGS 7.5 Min. Quadrangle - Gadsden
East
August 2024



Scale: 1:1,200
Datum/Zone: NAD27, Zone 16
Basemap: Topographic
Basemap Date: Jan 4, 1986



Alabama Power

Cahaba Consulting, LLC
Environmental and Mining

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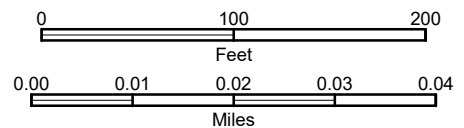
Legend

- APPROXIMATE BOUNDARY
- WETLAND
- WETLAND DATA
- UPLAND DATA
- ASSESSMENTS



ALABAMA POWER COMPANY

Gadsden Steam Plant
Figure 4 - Delineation figure - Aerial
Terrain Navigator Aerial - Gadsden East
August 2024



Scale: 1:1,200
Datum/Zone: NAD27, Zone 16
Basemap: Aerial Photo
Basemap Date: Unknown



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