



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
109 ST JOSEPH STREET
MOBILE, ALABAMA 36602

CESAM-RD-A

March 19, 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-2024-00863-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.

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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 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).
 - i. **Isolated WL (IWL)**: Non-WOTUS, non-jurisdictional depressional wetland approximately 4.93 acres (214,857-square feet) in area, which lacks a continuous surface connection to a jurisdictional 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. 651 (2023)

3. REVIEW AREA. The review area consists of approximately 78.1 acres with an approximate center point located at Latitude: 30.677401 North, Longitude 87.775740 West; within Section 21, of Township 4 South, Range 3 East; in Loxley, Baldwin County Alabama. The review area is bounded by active silviculture land and transected by a maintained silviculture access road. The review area is a subsection of a larger parcel identified by the Baldwin County Parcel Number: 05-33-05-21-0-000-001.000 (PIN: 72255).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW, interstate water, or territorial sea is Fish River which is approximately 16.4 miles to the south and west of the review area which becomes a Section 10 Water at approximately river mile 8. Fish River is on the

Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs. See attached mapping⁶

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

Isolated WL (IWL): As evidenced in the attached photolog, IWL is a depressional non-tidal palustrine forested wetland which is completely surrounded by uplands. IWL lacks both inflow and outflow, and therefore does not have a flow path to a TNW, interstate water, or territorial sea.

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.

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.

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.

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- 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

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

⁹ 51 FR 41217, November 13, 1986.

- 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).

Isolated WL (IWL): IWL is an approximately 4.93-acre (214,857-square-feet) non-tidal palustrine depressional wetland that is surrounded, in its entirety, by uplands. There is no channel flowing into or out of IWL. For these reasons, IWL lacks a continuous surface connection to a RPW, TNW, territorial seas, interstate water, or impoundment of a jurisdictional water; therefore, IWL is not jurisdictional.

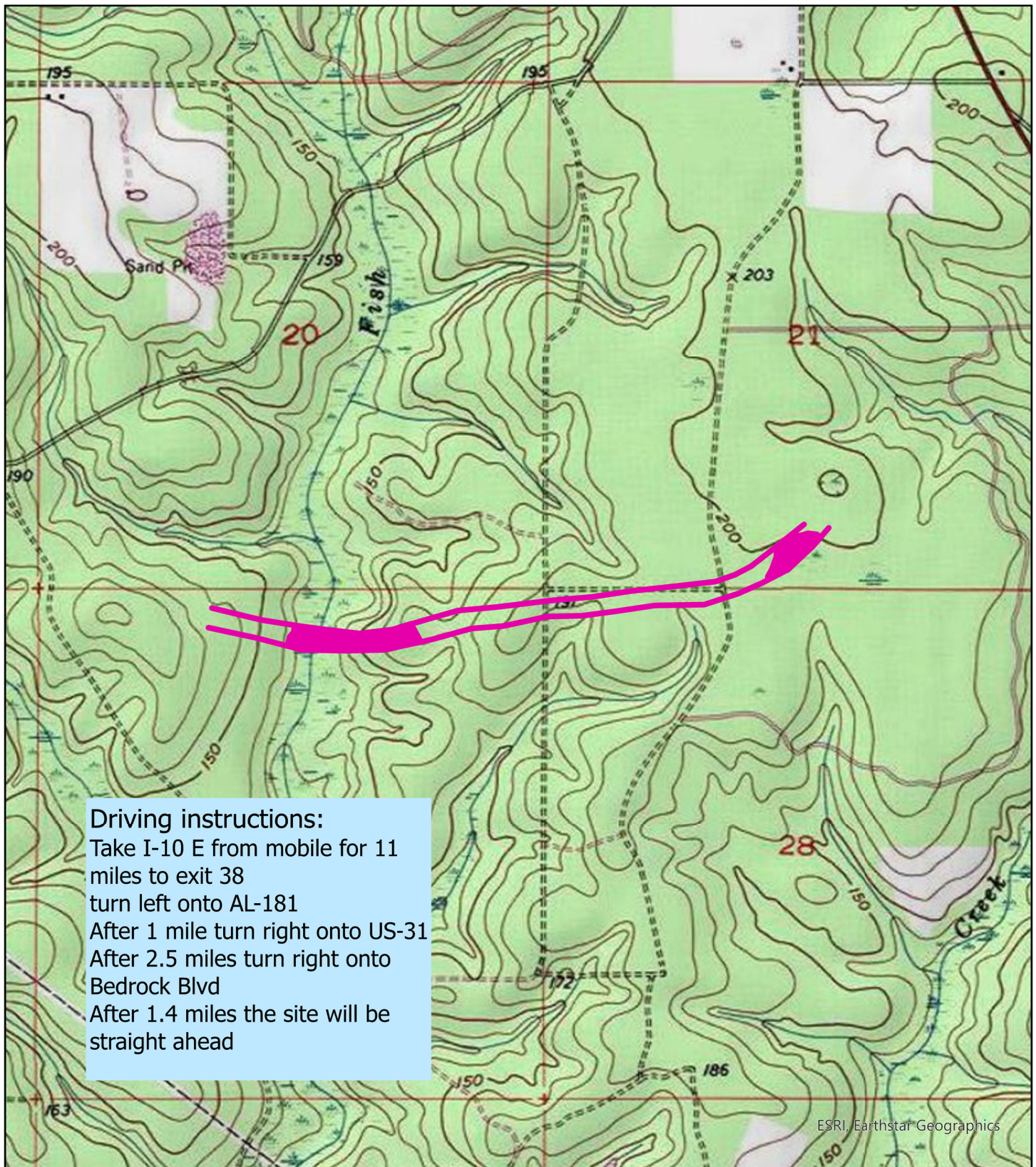
- 9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. On January 2, 2024, a site visit was conducted as evidenced in the photolog included in the administrative record. A second site visit was conducted on January 6, 2024. See attached Photo Log.
 - b. Applicant provided wetland delineation which includes both mapping and wetland determination data forms from the Atlantic and Gulf Coastal Plain Region Regional Supplement, and dated July 16, 2024, and October 14, 2024.
 - c. Office evaluations were conducted periodically from February 2024 to October 2024 via inspection of mapping layer accessible through the National Regulatory Viewer (NRV) which includes, but is not limited to, U.S. Geological Survey topographical mapping, the National Hydrological Dataset, 3DEP Elevation Modeling, 3DEP Hillshade Modeling, Nation 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) Nation Wetland Inventory (NWI) Mapping.

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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.



Fish River Bridge

68V PAY DIRT LLC

S29 T4S R3E

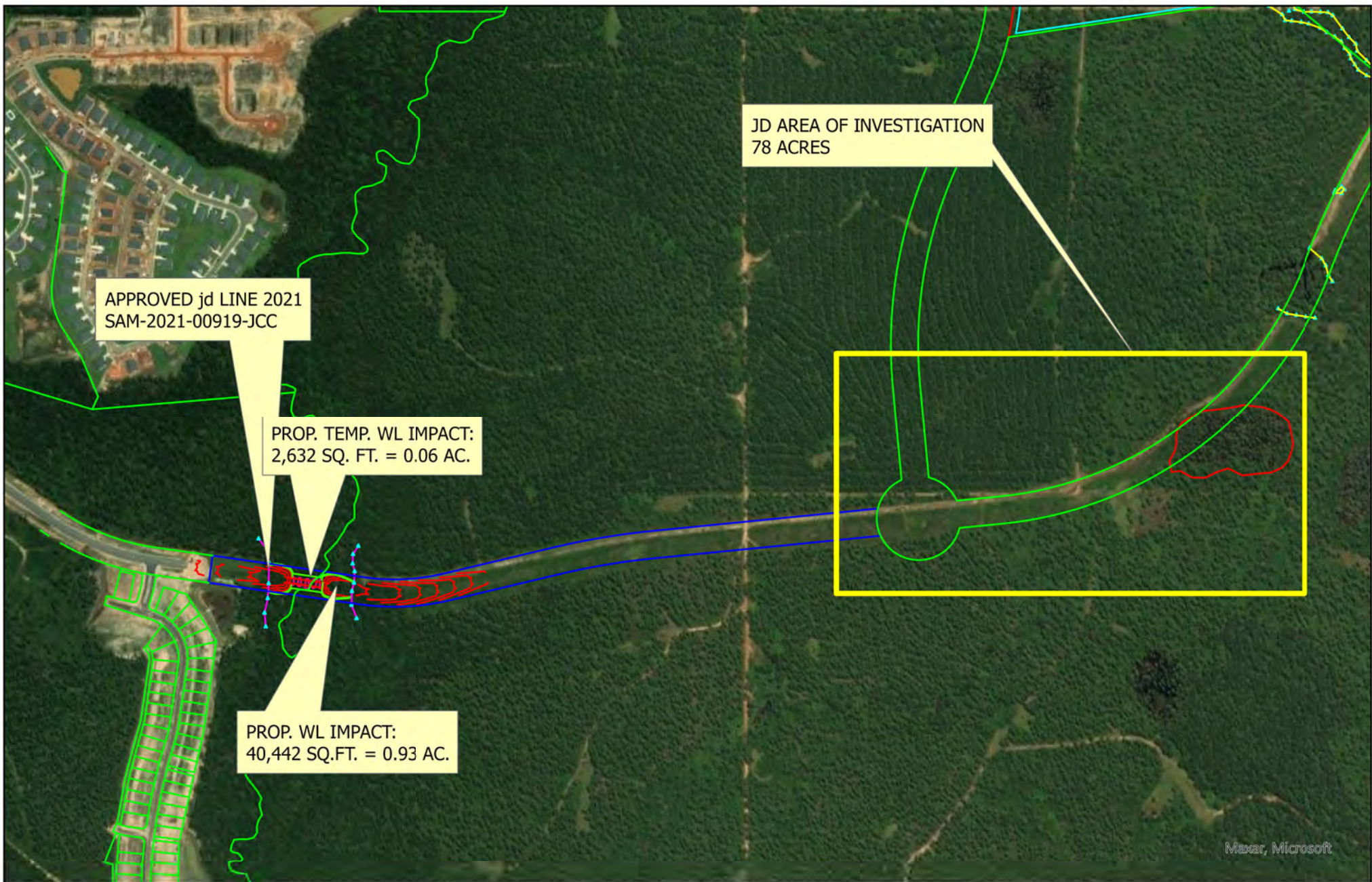
Drawn By: Tyler Henschel

Date: 10/04/2024

Locator Map

0 415 830 1,660 2,490 3,320 4,150
Feet





Fish River Bridge

68V PAY DIRT LLC
S29 T4S R3E

Drawn By: Tyler Henschel

Date: 11/15/2024

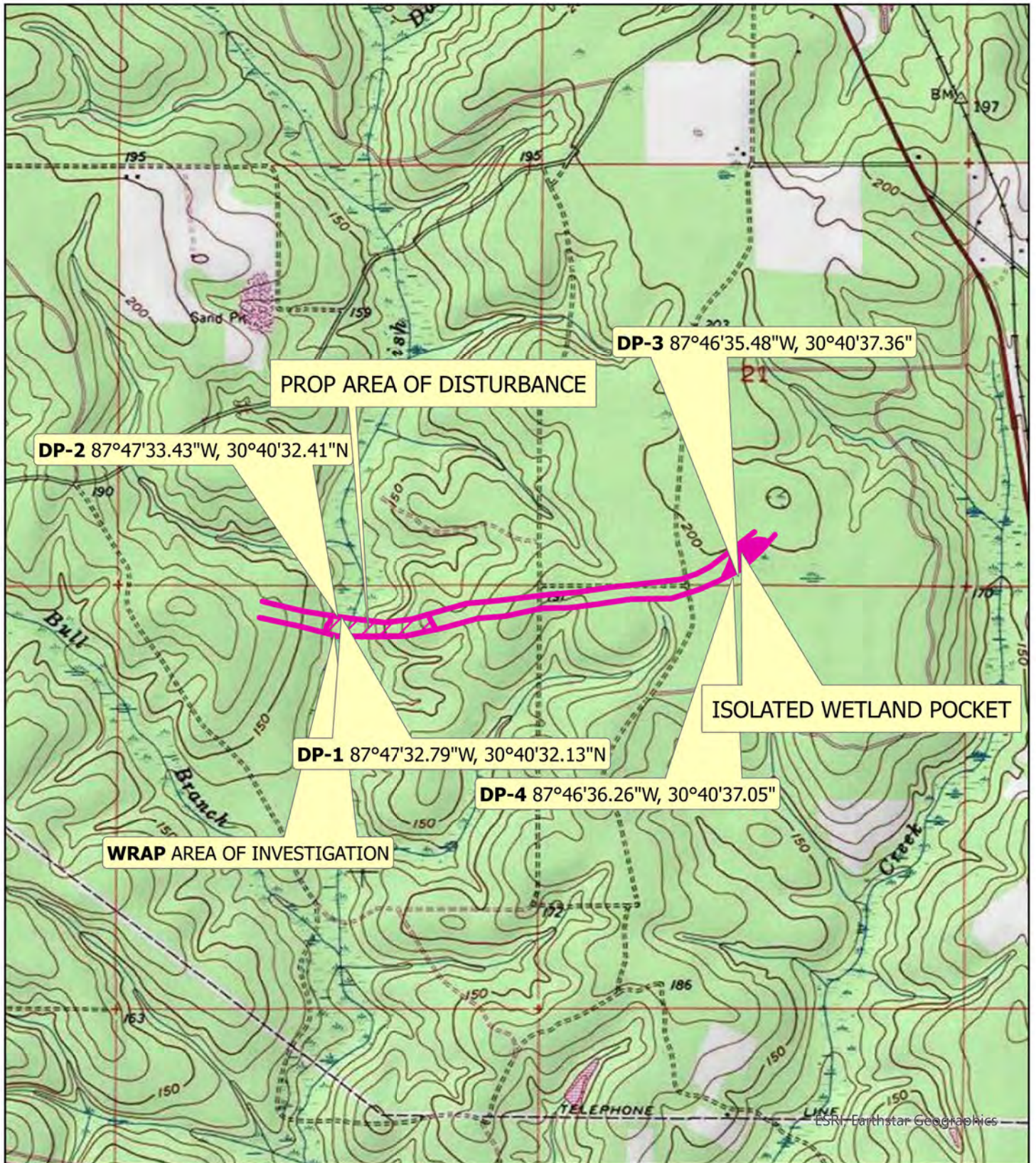
JD map

0 200 400 800 1,200 1,600 2,000
Feet



Dewberry®

25353 Friendship Road
Daphne, AL 36526-6278
Phone: 1 (251) 990-9950



Fish River Bridge

68V PAY DIRT LLC

S29 T4S R3E

Drawn By: Tyler Henschel

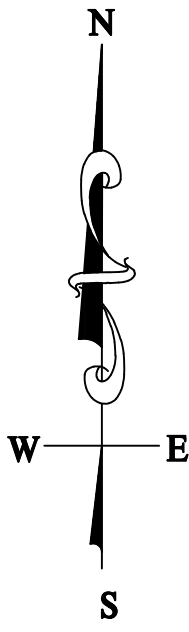
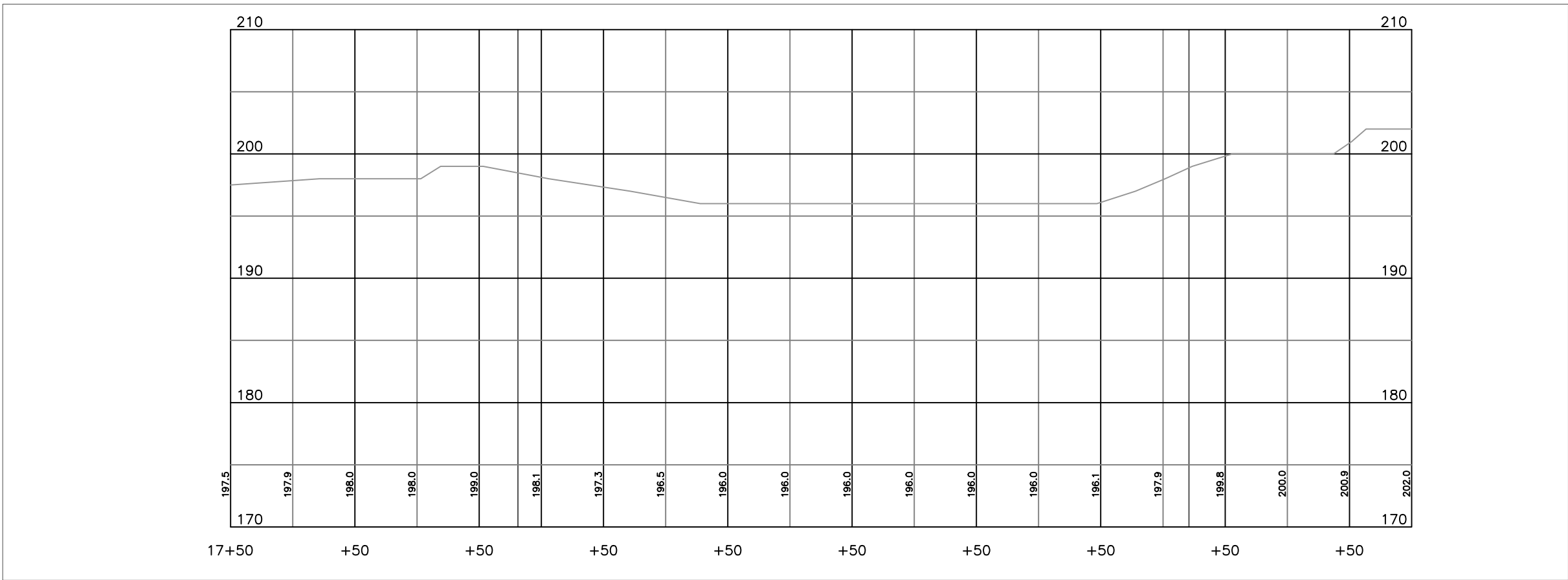
Date: 11/15/2024

Topo DP map

0 489 70 1,940 2,910 3,880 4,850
Feet



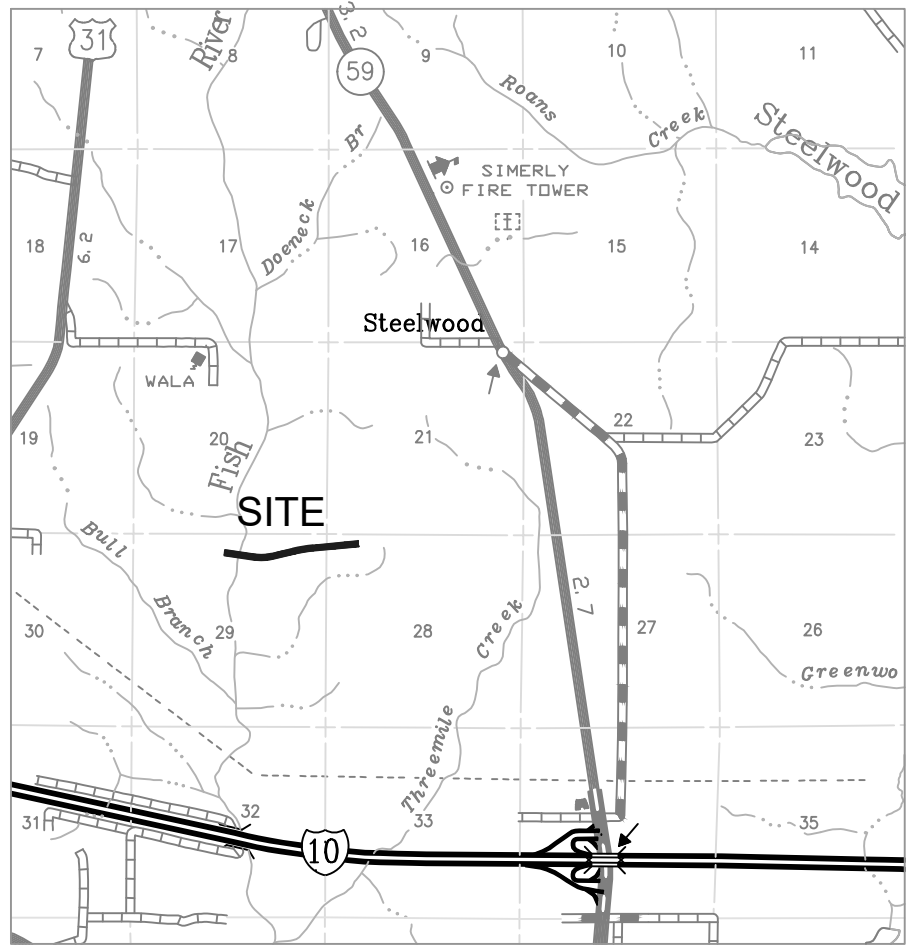
Isolated Wetland Cross Section



PROP. TEMP. WL IMPACT
2,632 SQ. FT = 0.06 AC.

PROP. WL IMPACT :
40,442 SQ. FT = 0.93 AC.

PROPERTY IS LOCATED IN SECTIONS 20 & 25,
TOWNSHIP 4 SOUTH, RANGE 3 EAST, BALDWIN COUNTY, ALABAMA.



VICINITY MAP
SCALE: 1" = 1 MILE

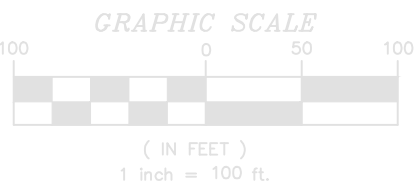
PROPOSED WL IMPACTS

— PROP. WL IMPACT : 40,442 SQ. FT = 0.93 AC.

TOTAL ISOLATED WL AREA : 214,857 SQ. FT = 4.93 AC.

—PROP. TEMP. IMPACTS = 2,632 SQ. FT = 0.06 AC.

SHEET SIZE (24"X36")



BEDROCK BLVD.
WETLAND DELINEATION OVERVIEW

JULY 17, 2024 - SHEET 1 OF 3

PRELIMINARY / FINAL PLAT FOR RIGHT-OF-WAY

| | | |
|-------------|---------------|----------------|
| DESIGN: N/A | DRAWN: TJH | CHKD.: CB |
| ENG: N/A | SURVEYOR: N/A | PROJ MGR |
| | | SCALE: 1"=100' |
| | | PROJ. NO. |
| | | FILE |
| | | SHEET 1 OF 1 |