



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT  
5151 FLYNN PARKWAY, SUITE 306  
CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RDR

29 JUL 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),<sup>1</sup> SWG-2007-01509 (MFR 1 of 1)<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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 Texas 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).

<b>Feature Name</b>	<b>Latitude/ Longitude</b>	<b>Size (AC)</b>	<b>Feature Type</b>	<b>Jurisdiction</b>
Wet-01	27.60037 N 97.22339 W	12.56	PEM 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. \_\_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximate 16.1-acre site is located on North Padre Island at the intersection of Whitecap and Park Road 22 (South Padre Island Drive), in Corpus Christi, Nueces County, Texas.

LATITUDE/LONGITUDE (Decimal Degrees): Center,  
Latitude: 27.60037° N; Longitude: 97.22346° W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A<sup>6</sup>

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<sup>6</sup> 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.

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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
  - f. The territorial seas (a)(6): N/A

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<sup>7</sup> 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.

<sup>8</sup> 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.

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”).<sup>9</sup> 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.
- 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 consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are

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<sup>9</sup> 51 FR 41217, November 13, 1986.

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

**Wetland Wet-01:** LiDAR, topo, aerial photographs, the applicant-provided delineation report and a site visit were utilized as part of the desktop analysis to identify that this palustrine wetland sits in a depressional sump that collects rainwater from the surrounding commercial and residential development, and from an adjacent highway ditch that flows into it from outside the Review Area after a precipitation event. The adjacent highway ditch that extends outside of the review area toward the north through a culvert located under Whitecap Boulevard contains an area of higher elevation (berm feature, labelled as “Berm” on sheet 5 of the attached figures) within it (north of the Review Area) at approximately 27.604164°N, 97.222385°W, that prohibits any flow between Wetland WET-01 and any RPW/TNW, the closest being a residential canal located approximately 900 feet north of the Review Area. This higher-elevation berm feature acts to divert flow in opposite directions and does not exhibit signs of ordinary high watermark (OHWM) or bed/banks. To the south of the berm feature, drainage is conveyed to a low elevation swale within the ditch alignment (outside the review area) and does not reach Wetland WET-01 except during discrete storm events. Drainage collects in this area until evaporation and/or groundwater recharge occurs. An additional but less prominent berm feature (labelled as “Small Berm” on sheet 5 of the attached figures) was also observed further south between the primary berm feature and the Review Area as indicated on sheet 5 of the attached figures. This smaller berm feature appears to further limit the conveyance of surface drainage between the Review Area and the nearest residential canal and does not exhibit OHWM or bed/banks. The results of the supplemental topographic survey indicate the absence of a continuous surface connection between Wetland WET-01 and the closest residential canal feature through the roadside ditch. Based on the limiting topography, any speculative connection between the onsite Wetland WET-01 and the residential canal feature would be severed by the berm features. Further, drainage within this roadside ditch would only occur sporadically following heavy rainfall events and does not appear to constitute a continuous connection with predictable flow. Additionally, there appears to be no surface outflow from Wetland WET-01 any other direction, as it is surrounded by development on all sides that was constructed two to four feet higher than the wetland surface, effectively turning Wetland WET-01 into a sump. There is no continuous surface connection or culvert extending from the wetland, nor is there any evidence of sheet flow from it to an RPW or TNW. Wet-01 does not meet the definition of adjacent as defined in the pre-2015 post *Sackett* guidance and is not a water of the United States.

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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. Wetland Delineation Report: *Request for JD Confirmation, Park Road 22 and Whitecap Boulevard*, prepared by Anchor QEA, 9 OCT 2023
  - b. Aerials (1956, 1985, 2005, 2022; source: Google Earth)
  - c. Site visit conducted 29 February 2024
  - d. USGS Topographic Map 1:24,000 Crane Islands SW, Texas (1968 and 2022)
  - e. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet vertical root mean square error (RMSEz) in open terrain.
  - f. Topographic Survey conducted by Anchor QEA on Review Area and Roadside Ditch along Park Road 22 (26 March 2024)
  - g. Web Soil Survey Hydric Rating Map for Nueces County, Texas (NRCS website accessed 21 JAN 2022)
  - h. National Wetland Inventory (NWI) (USFWS website accessed 6 FEB 2024)
  - i. National Hydrologic Dataset (NHD) – 12110203 - North Laguna Madre
  - j. ORM2 Database: A jurisdictional determination (JD) was issued for this property in 20 OCT 2006 (D-19094) and 27 JAN 2015 (SWG-2007-01509) determining this wetland as jurisdictional under the former Rapanos guidance, due to its presence within the 100-year floodplain.
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.

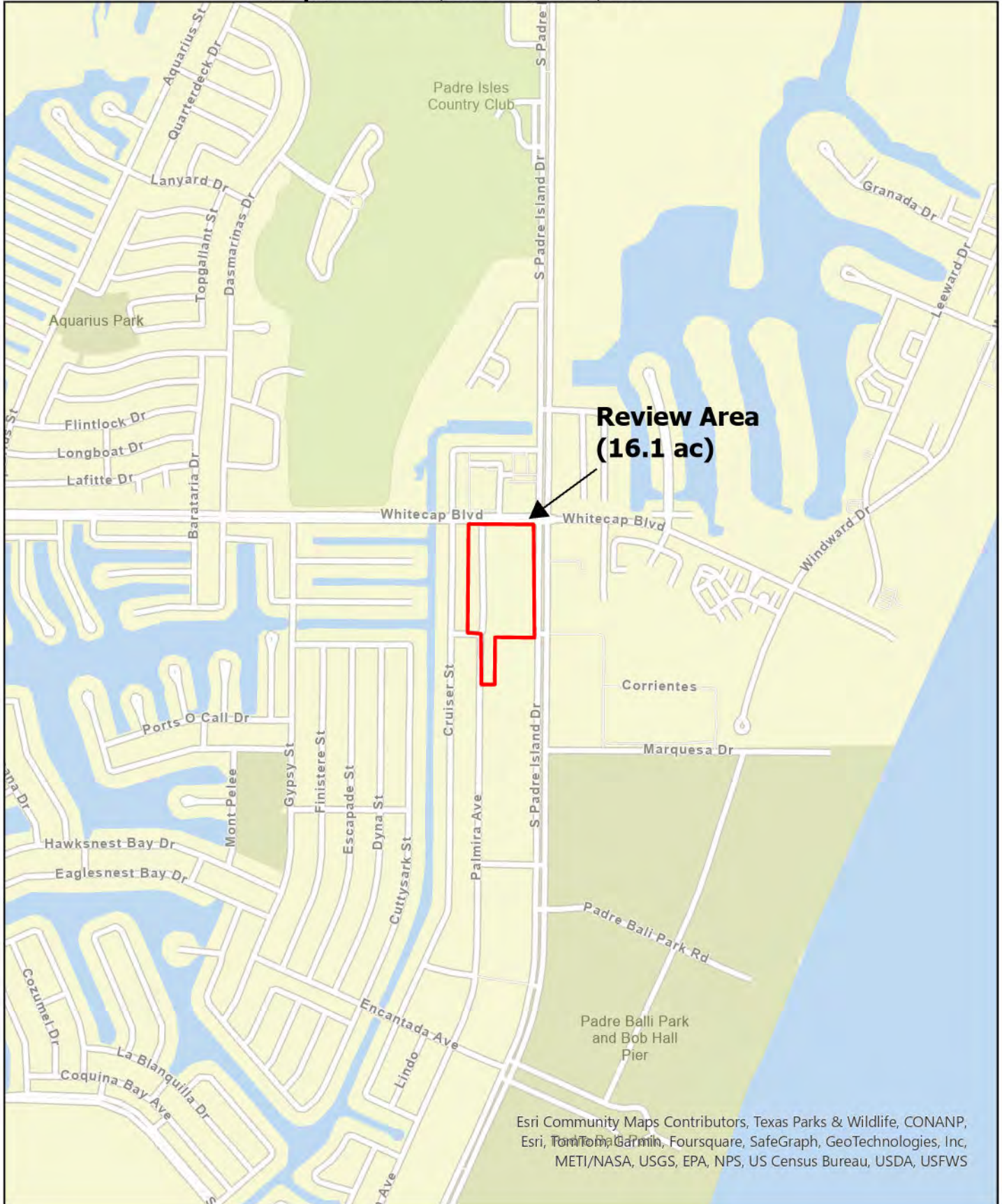


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Vicinity Map

Corner of Whitecap and S. Padre Island Drive

Corpus Christi, Nueces Co., TX



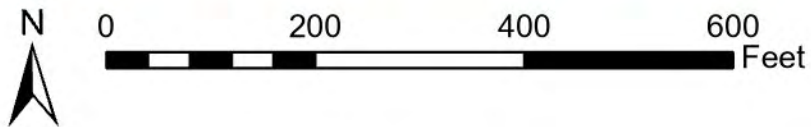
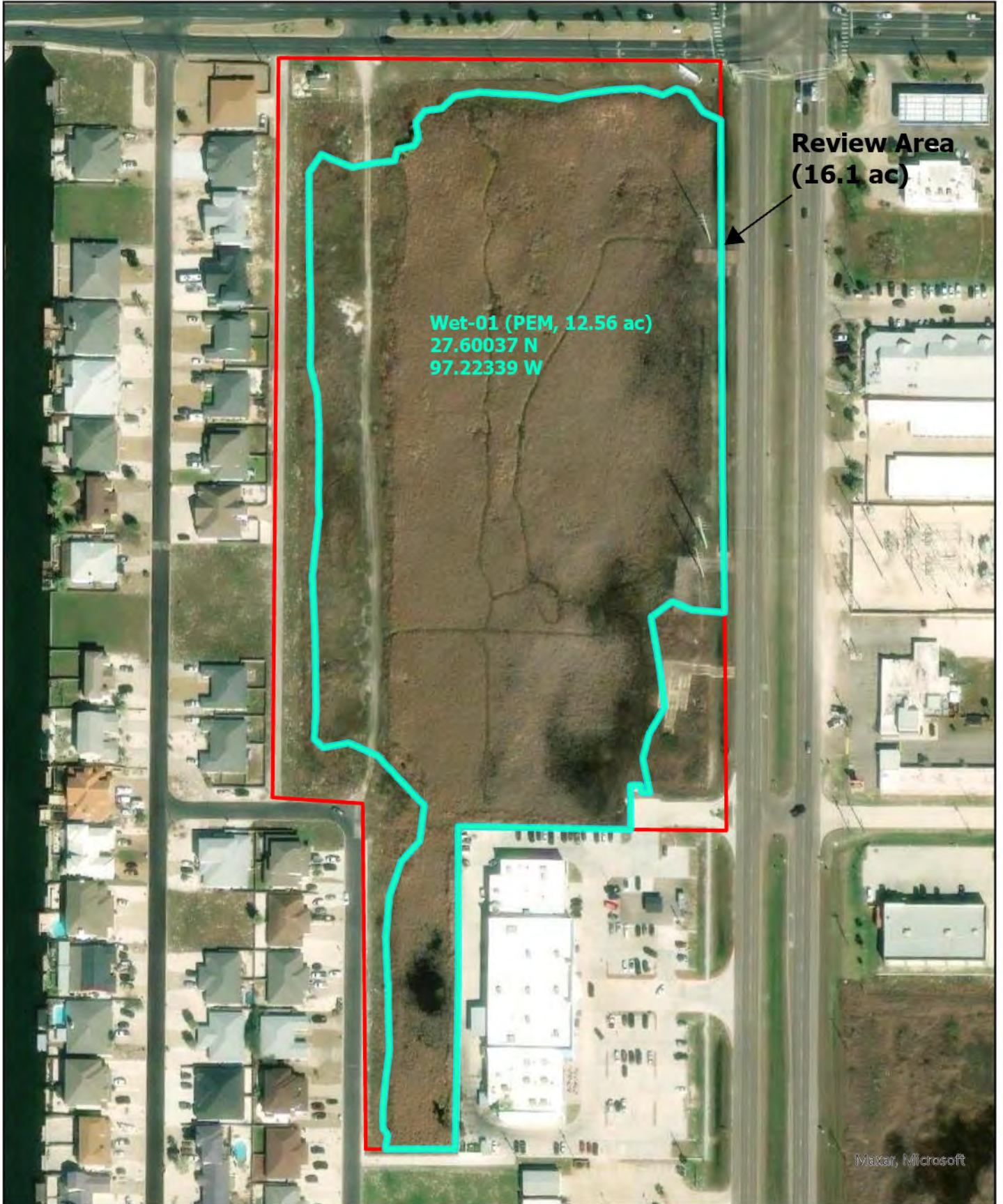
**Review Area  
(16.1 ac)**

Esri Community Maps Contributors, Texas Parks & Wildlife, CONANP, Esri, TomTom, Garmin, Foursquare, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA, USFWS



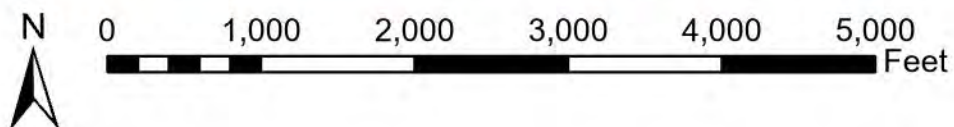
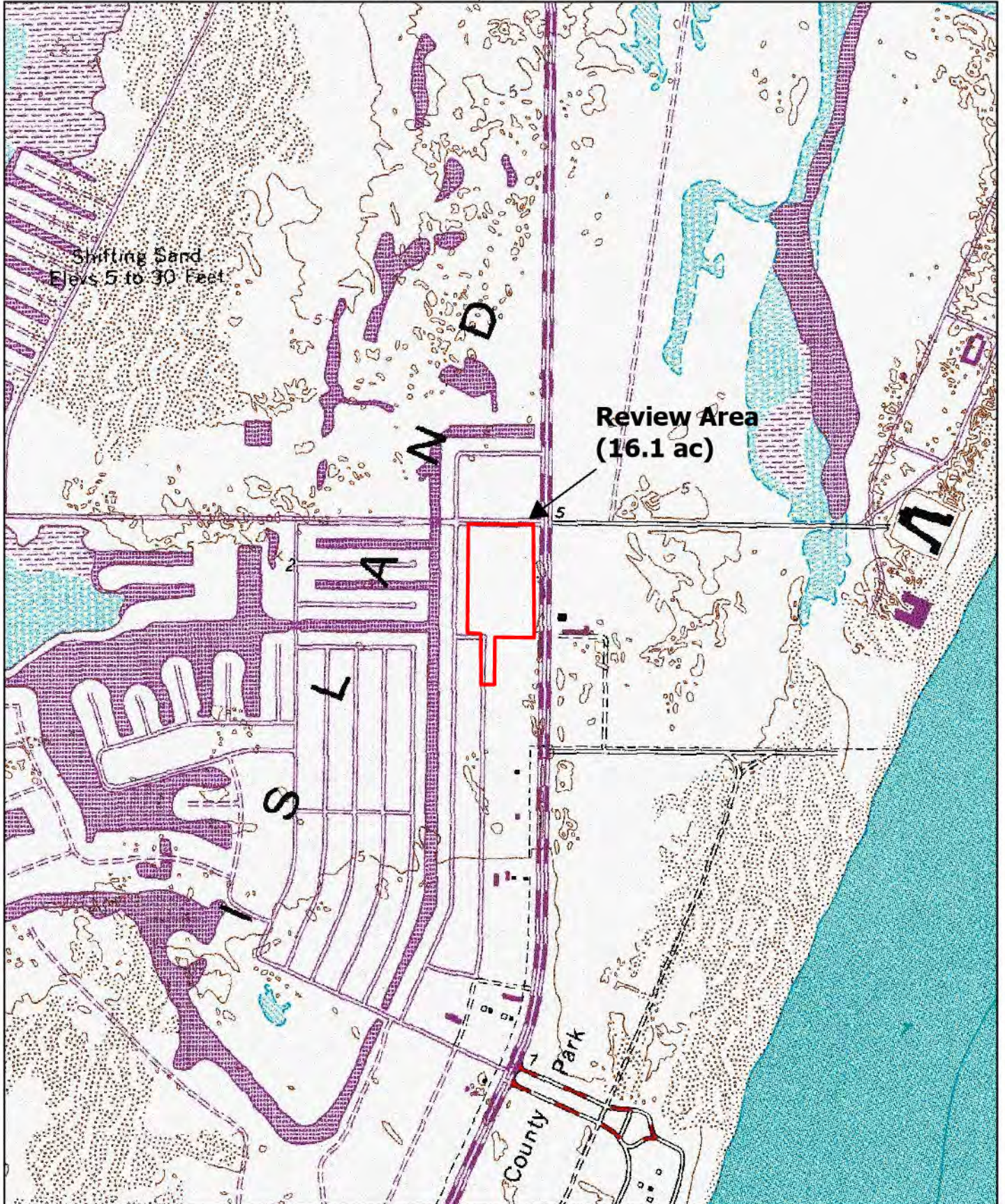


SWG-2007-01509 Review Area (16.1 ac)

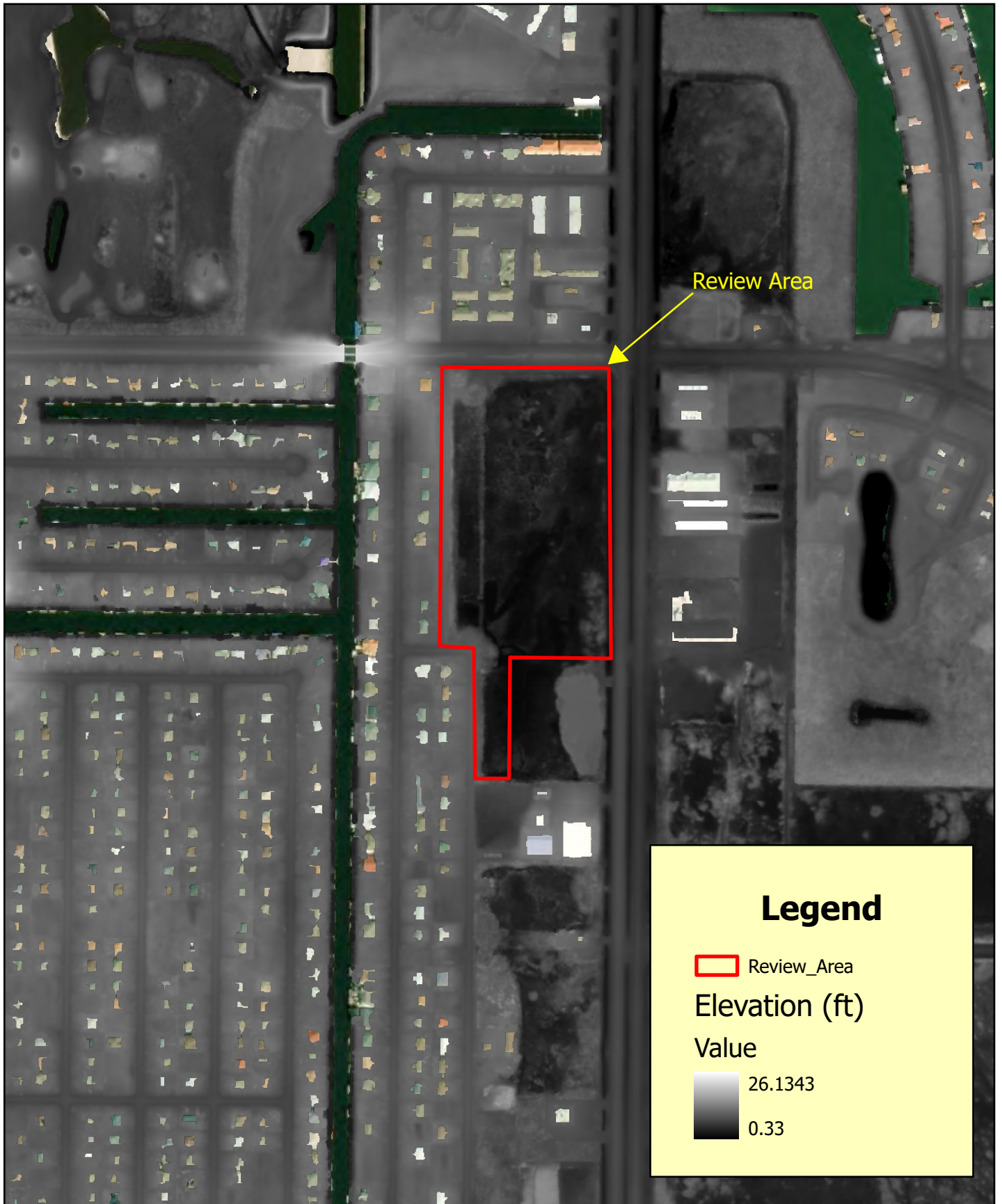




SWG-2007-01509 Crane Islands SW, TX Quad







Review Area

### Legend

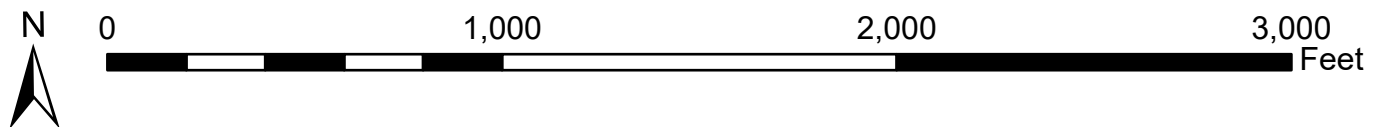
 Review\_Area

Elevation (ft)

Value

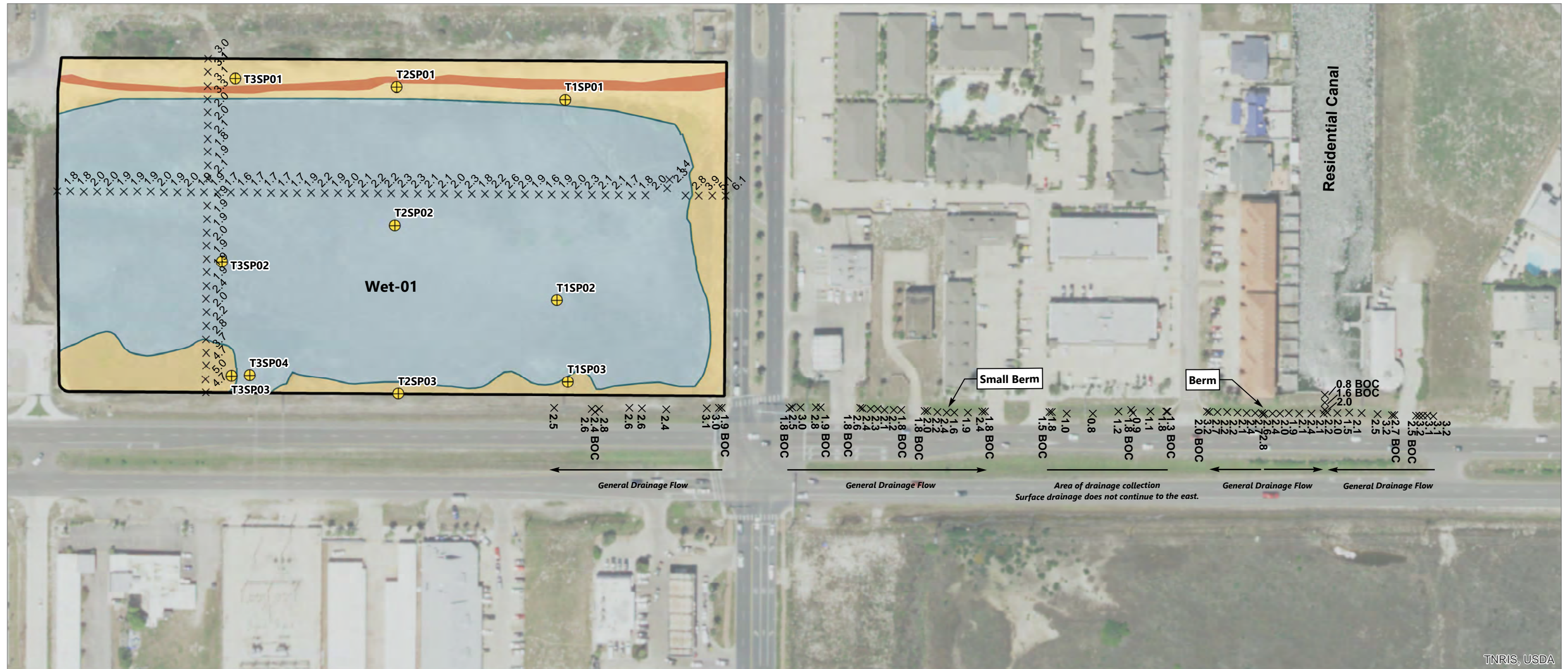
 26.1343

 0.33





SWG-2007-01509 Topographic Survey Demonstrating Lack of Surface Connection between Wetland Wet-01 and Residential Canal



- LEGEND:**
- Property Boundary
  - Sample Point
  - Palustrine Emergent Wetland (8.8 Acres)
  - Herbaceous Upland (2.4 Acres)
  - Previously Disturbed Road (0.2 Acre)
  - Topographic Survey Point

- NOTES:**
1. Basemap: 2020 National Agricultural Imagery Program 60 Centimeter Imagery, Nueces County, Texas. Obtained from the Texas Natural Resources Information System.
  2. Horizontal Datum: North American Datum of 1983, State Plane Texas South (4205)
  3. Vertical Datum: North American Vertical Datum of 1988
  4. For planning and permitting purposes only. Not for construction.
  5. Abbreviations:  
BOC - bottom of culvert

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**Figure 1**  
**Supplemental Topographic Survey Map**  
 Request for Approved Jurisdictional Determination Re-Evaluation  
 The Place at Park 22