



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

CESWG-RDR

16 October 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 SWG-2021-00674 (MFR 1 of 1)²

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.

CESWG-RDR

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00674

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).

Feature Name	Latitude/ Longitude	Size (AC)	Feature Type	Jurisdiction
W101	27.57935 N 97.22486 W	6.48	PEM Wetland with no CSC to a RPW/TNW. Not jurisdictional	Not jurisdictional
W101b	27.57813 N 97.22525 W	5.62	PEM Wetland with no CSC to a RPW/TNW. Not jurisdictional	Not jurisdictional
W102	27.57949 N 97.22403 W	0.69	PEM Wetland with no CSC to a RPW/TNW. Not jurisdictional	Not jurisdictional
W103	27.57998 N 97.22355 W	0.88	PEM Wetland with no CSC to a RPW/TNW. Not jurisdictional	Not jurisdictional
W103b	28.57975 N 97.22310 W	0.01	PEM Wetland with no CSC to a RPW/TNW. Not jurisdictional	Not jurisdictional

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 48-acre site (including the 44.6-acre review area, which does not include any features east/seaward of the primary dune line) is located on North Padre Island between Park Road 22 and the primary dune line, just south of Beach Access Road 6 in Corpus Christi, Nueces County, Texas.

CESWG-RDR

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00674

LATITUDE/LONGITUDE (Decimal Degrees):

Latitude: 27.57891° North; Longitude: 97.22503° West

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
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

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.

- 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
- 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

⁹ 51 FR 41217, November 13, 1986.

CESWG-RDR

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00674

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).

The provided LiDAR, topo and other data sources (NHD maps, aerial imagery, site photos and the wetland delineation field data forms) were utilized as part of the desktop analysis to identify that the review area, and surrounding areas, include depressional wetlands that are surrounded by uplands with no more than overland sheet flow exiting the wetlands. There is a lack of a possible connection to relatively permanent waters as there is an absence of any swales, erosional features, ditches or culverts.

Wetlands W101, W101b, W102, W103, and W103b (13.68 ac): Based on data sources listed in #9, we have determined these palustrine wetlands are part of a wetland mosaic that resides in depressional areas either entirely within the review area, or that extend outside of the review area approximately 100 feet north (W101) and south (W101b), respectively, and that collect rainwater from the surrounding countryside. There is no presence of a continuous surface connection (swale, ditch, tributary, culvert, pipe, etc.) to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment. In accordance with pre-2015 regulatory regime in light of *Sackett v. EPA*, a wetland is adjacent if connected by a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment. Only overland sheet flow would exit the wetlands. Wetlands W101, W101b, W102, W103, and W103b do not meet the definition of adjacent in the pre-2015 post *Sackett* regime and therefore are not waters of the United States.

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.

CESWG-RDR

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2021-00674

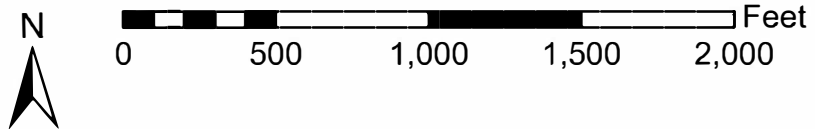
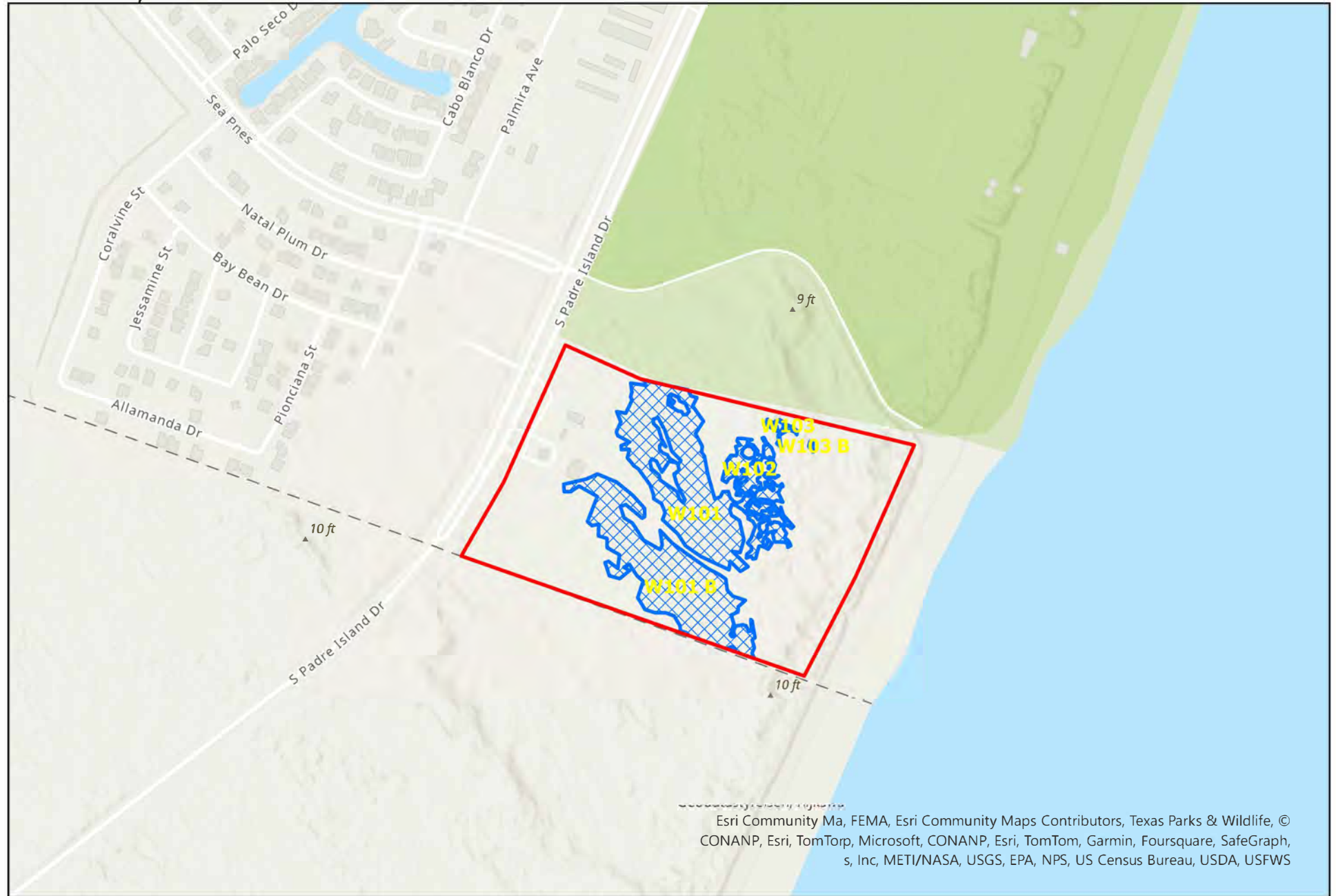
- a. Wetland Delineation Report: Wetland Delineation: *48± ACRE WHITE SANDS TRACT, PARK ROAD 22 ON PADRE ISLAND, CORPUS CHRISTI, NUECES COUNTY, TEXAS*, prepared by Coastal Environments, Inc., received 9 November 2023
- b. Aerials (2002, 2017, 2023; source: Google Earth)
- c. USGS Topographic Map 1:24,000 Crane Islands SW, Texas (2022)
- d. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet vertical root mean square error (RMSEz) in open terrain.
- e. Web Soil Survey Hydric Rating Map for Nueces County, Texas (NRCS website accessed 24 APR 2024)
- f. National Wetland Inventory (NWI) (USFWS website accessed 24 APR 2024)
- g. National Hydrologic Dataset (NHD) – 12110203 North Laguna Madre
- h. ORM2 Database: No prior determination has been completed for this review area.

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.

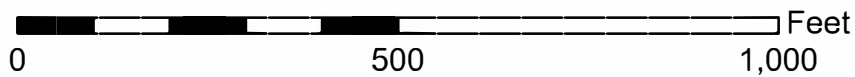
SWG-2021-00674 Review Area (44.6 ac)

27.57891 N, 97.22503 W



SWG-2021-00674 Review Area (44.6 ac) Aerial Photo (2023)

27.57891 N, 97.22503 W

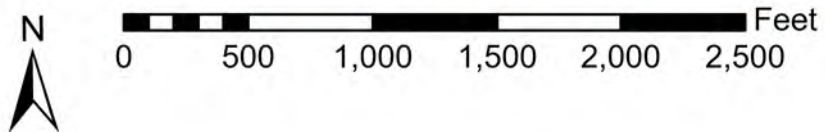
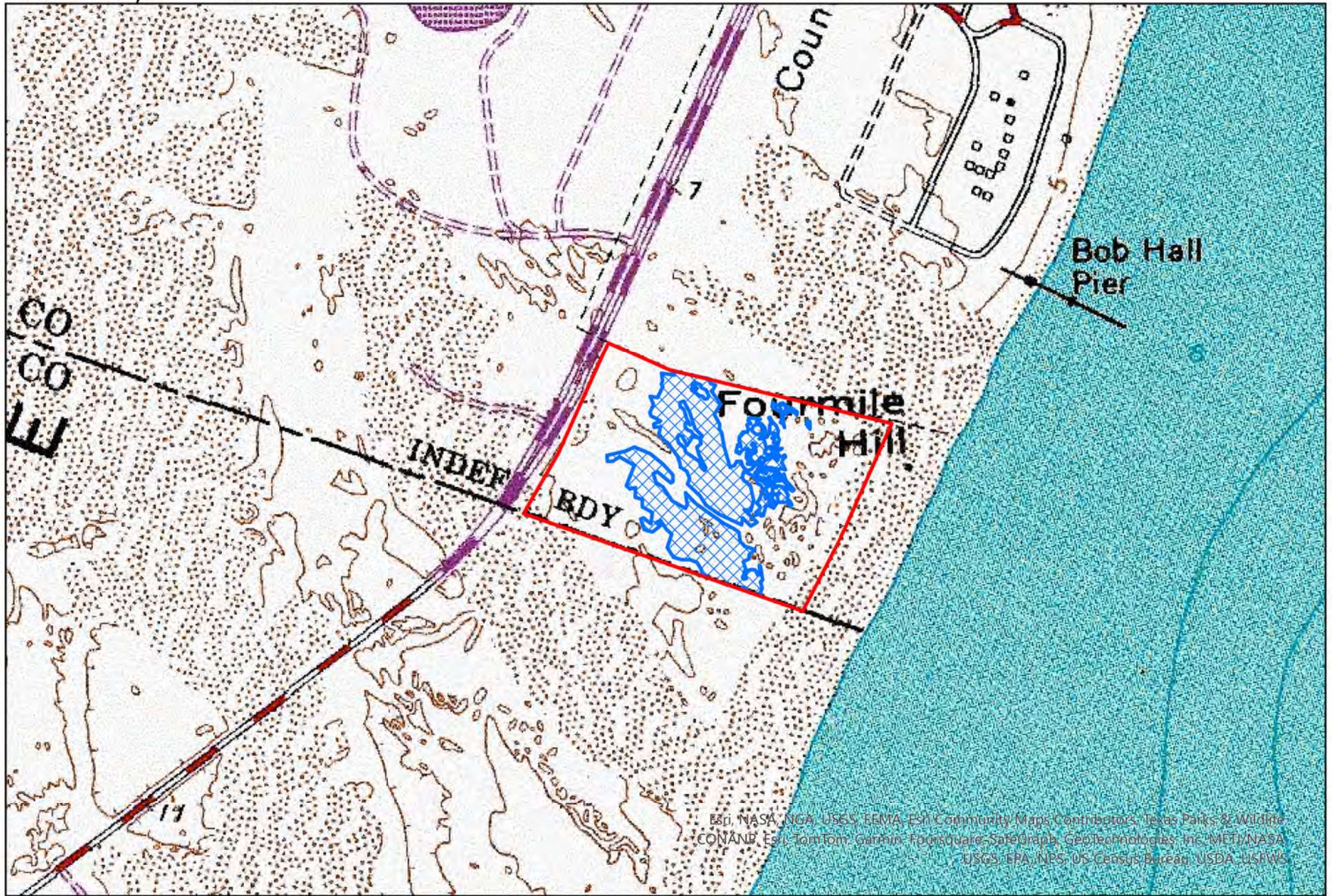


Legend

— PropertyBoundary

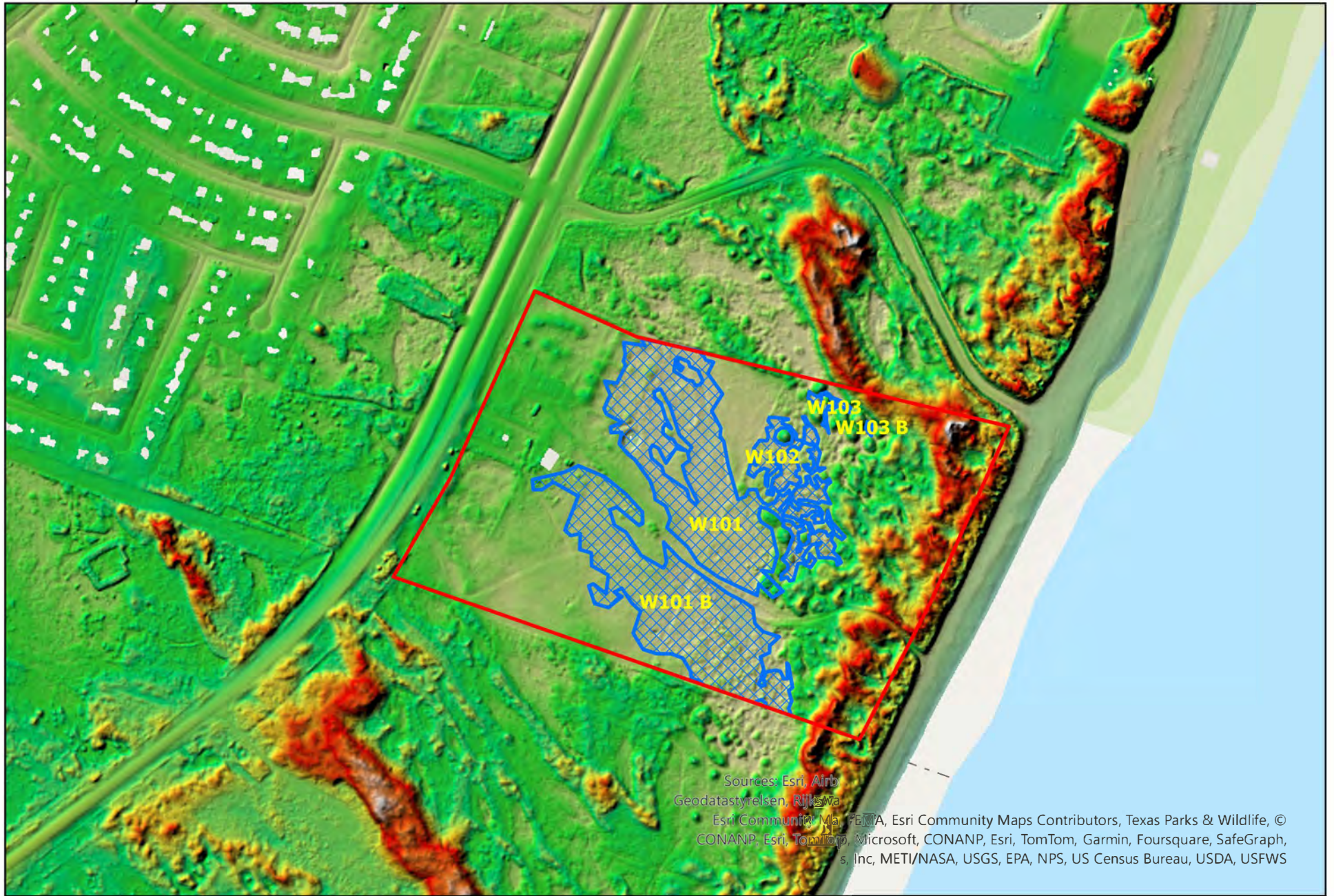
Wetland_Boundaries

SWG-2021-00674 Review Area (44.6 ac) Crane Islands SW, Texas Quad
27.57891 N, 97.22503 W

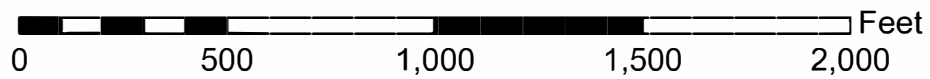


SWG-2021-00674 Review Area (44.6 ac) Elevation Map (USGS 2018 LiDAR)

27.57891 N, 97.22503 W



Sources: Esri, Airb
Geodatastyrelsen, Rijkswa
Esri Community, Ma, FEMA, Esri Community Maps Contributors, Texas Parks & Wildlife, ©
CONANP, Esri, TomTom, Microsoft, CONANP, Esri, TomTom, Garmin, Foursquare, SafeGraph,
s, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA, USFWS



Legend

- PropertyBoundary
- Wetland_Boundaries
- 255 Elevation in Feet
- 0