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

CESWG-RDR 10 June 2025

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-2024-00745[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.

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

      i. D103 (4,732.55 linear feet), Ditch, 25.979795 N, 97.421001 W, Relatively Permanent, Section 404

      ii. W104 (0.25 acres), PEM Wetland, 25.979572 N 97.421886 W, non-adjacent, non-jurisdictional

      iii. W105A (0.67 acres), PEM Wetland, 25.977699 N, 97.422204 W, non-adjacent, non-jurisdictional

      iv. W105B (1.14 acres), PEM Wetland, 25.978387 N, 97.422204 W, non-adjacent, non-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. 651, 143 S. Ct. 1322 (2023)

   e. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.

3. REVIEW AREA. The review area is located approximately 0.75 miles east of the intersection of Old Port Isabel Road and State Highway 550, in Brownsville, Cameron County, Texas. Latitude: 25.980059 N; Longitude: 97.424533 W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. San Martin Lake, an extension of the Bahia Grande.[6]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. D103 has three branches flowing into Loma Alta Lake. Flowing from the west, D103 begins outside of the review area off of Old Port Isabel Road and flows in an eastern direction to confluence with the southern and eastern flow paths (approximately 2,800 linear feet within the review area). The southern branch of D103 flows from existing ditches off of State Highway 550 in a northern direction to confluence with the western and eastern branches of D103 (approximately 750 linear feet within the review area). The eastern branch of D103 flows in a western direction to confluence with the western and southern branches. At the confluence of all three branches, D103 flows in a northern direction to Loma Alta Lake, that drains through approximately 1.97 miles of drainage ditch into the Rancho Viejo Floodway, that flows approximately 2.4 miles northeast into San Martin Lake, an extension of the Bahia Grande which is subject to the ebb and flow of the tide through the Brownsville Ship Channel, a Traditional Navigable Waterway.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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

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[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.

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):

   D103: LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that the mapped features labelled as a ditch system within the review area. This drainage ditch system exhibits relatively permanent flow with the presence of an ordinary high water mark. The water of this ditch system flows generally in a northern direction into Loma Alta Lake. Loma Alta Lake drains through approximately 1.97 miles of drainage ditch into the Rancho Viejo Floodway, that flows approximately 2.4 miles northeast into San Martin Lake, an extension of the Bahia Grande which is subject to the ebb and flow of the tide through the Brownsville Ship Channel, a Traditional Navigable Waterway. Therefore, D103 is a relatively permanent water of the United States subject to Section 404 of the Clean Water Act.

   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.

P1: LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that the mapped feature labelled as a pond (P1) resides in excavated stock pond. There is no presence of a continuous surface connection to a TNW or RPW. This pond is separated from the ditch system by high berms. This pond is isolated so there is no overland sheet flow. P1 (0.14 acres) is best described in the preamble for 33 CFR 328.3, published in the Federal Register Volume 51, Number 219, 13 NOV 1986 (page 41217), which states, "For clarification, it should be noted that we generally do not consider the following waters to be Waters of the United States (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." This pond was created in uplands for the purpose of stock watering and is not a water of the United States. Any discharge of dredged and/or fill material into P1 does not require a Department of Army Permit.

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).

W105A and W105B: LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that the mapped features labelled as palustrine emergent wetlands (W105A and W105B) resides in small depressional areas. These wetlands are separated from the ditch system by high berms. There is no presence of a continuous surface connection to a TNW or RPW. The elevation changes isolate these wetlands so that there is no overland sheet flow. Therefore, in accordance with the pre-2015 regime post Sackett and the 12 March 2025 Memorandum to the Field Between U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act, W105A (0.67 acres) and W105B (1.14 acres) do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into W105A or W105B does not require a Department of Army Permit.

W104: LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that the mapped feature labelled as a palustrine emergent wetland (W104) resides in excavated stock pond. There is no presence of a continuous surface connection to a TNW or RPW. This wetland is separated from the ditch system by high berms. Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary. No more than overland sheet flow would exit the wetlands due to upland areas surrounding the wetlands. Therefore, in accordance with the pre-2015 regime post Sackett and the 12 March 2025 Memorandum to the Field

Between U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act, W104 (0.25 acres) does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into W104 does not require a Department of Army Permit.

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: 574 Acre Tract Parcels A, B, C, and E, Brownsville, Cameron County, Texas prepared by Coastal Environments, Inc.

   b. Google Earth Historical Aerials accessed 5 June 20025 with dates: 1962, 1996, 2008, 2016, 2017, 2020, 2022, 2023, and 2025.

   c. USGS Topographic Map/Scale: East Brownsville, TX; 1:24,000

   d. Web Soil Survey Hydric Rating Map for Cameron County, Texas (NRCS website accessed 5 June 2025)

   e. US Fish and Wildlife Service (FWS) National Wetland Inventory (NWI): Web Mapper dated 5 June 2025

   f. 3D Hydrography (3DHP): USGS Mapper accessed 5 June 2025

   g. Texas Regulatory Viewer: Accessed 5 June 2025

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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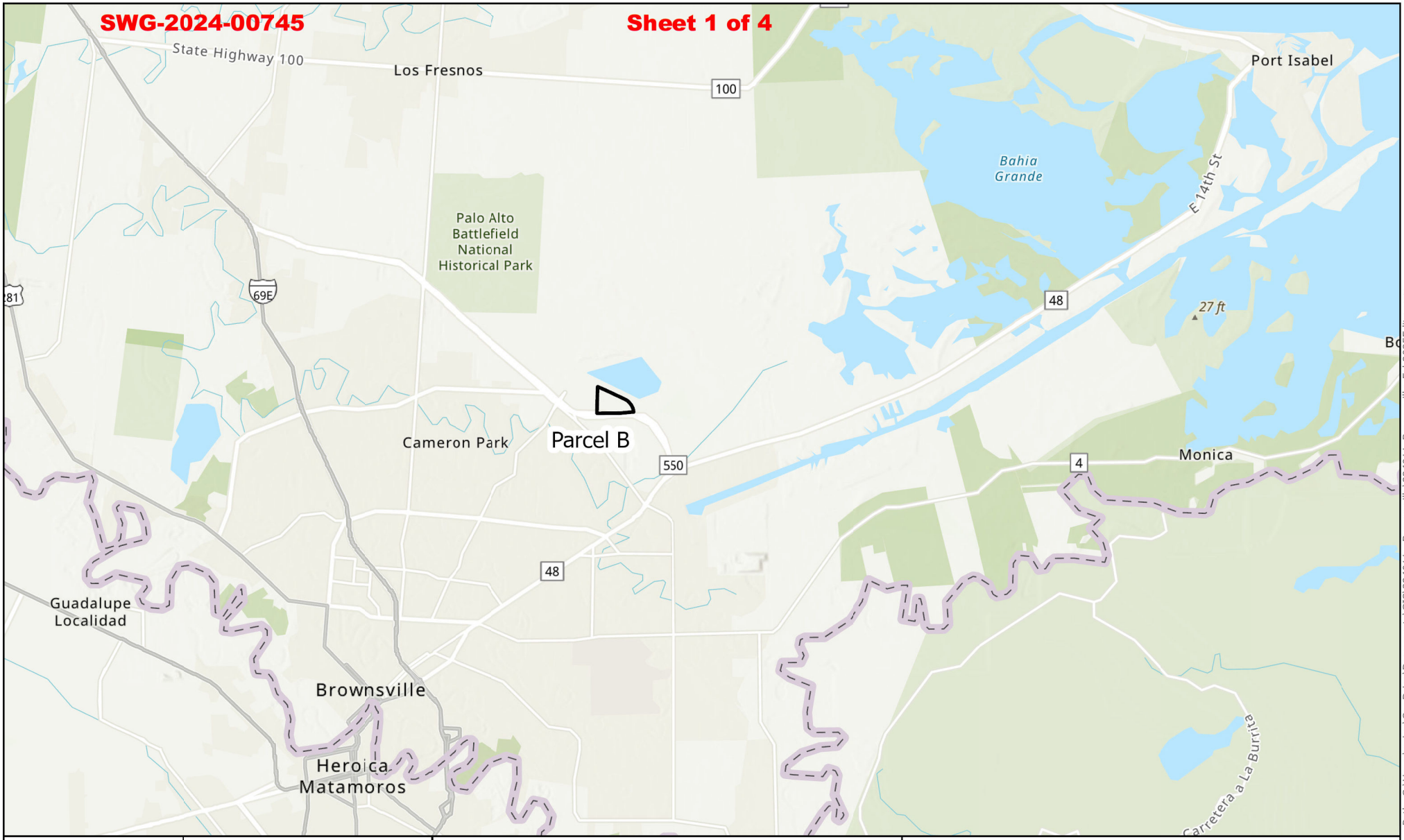
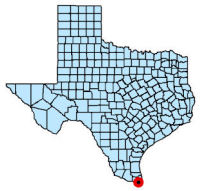
Sheet 1 of 4





N

Feet

0 7,000 14,000

Parcel B Boundary

SOURCE: CEI FIELD SURVEY
BASE: WORLD TOPO MAP, ARCGIS ONLINE
DATUM: NAD 83

WETLAND DELINEATION -VICNITY CAMERON COUNTY, TEXAS

LOCATION: BROWNSVILLE
COUNTY: CAMERON
MAP DATE: 3/5/25

FIGURE 21

Path: C:\Users\guiyu\OneDrive\Documents\GIS\224011 - Brownsville\224011_Brownsville_Feb2025Edits.aprx

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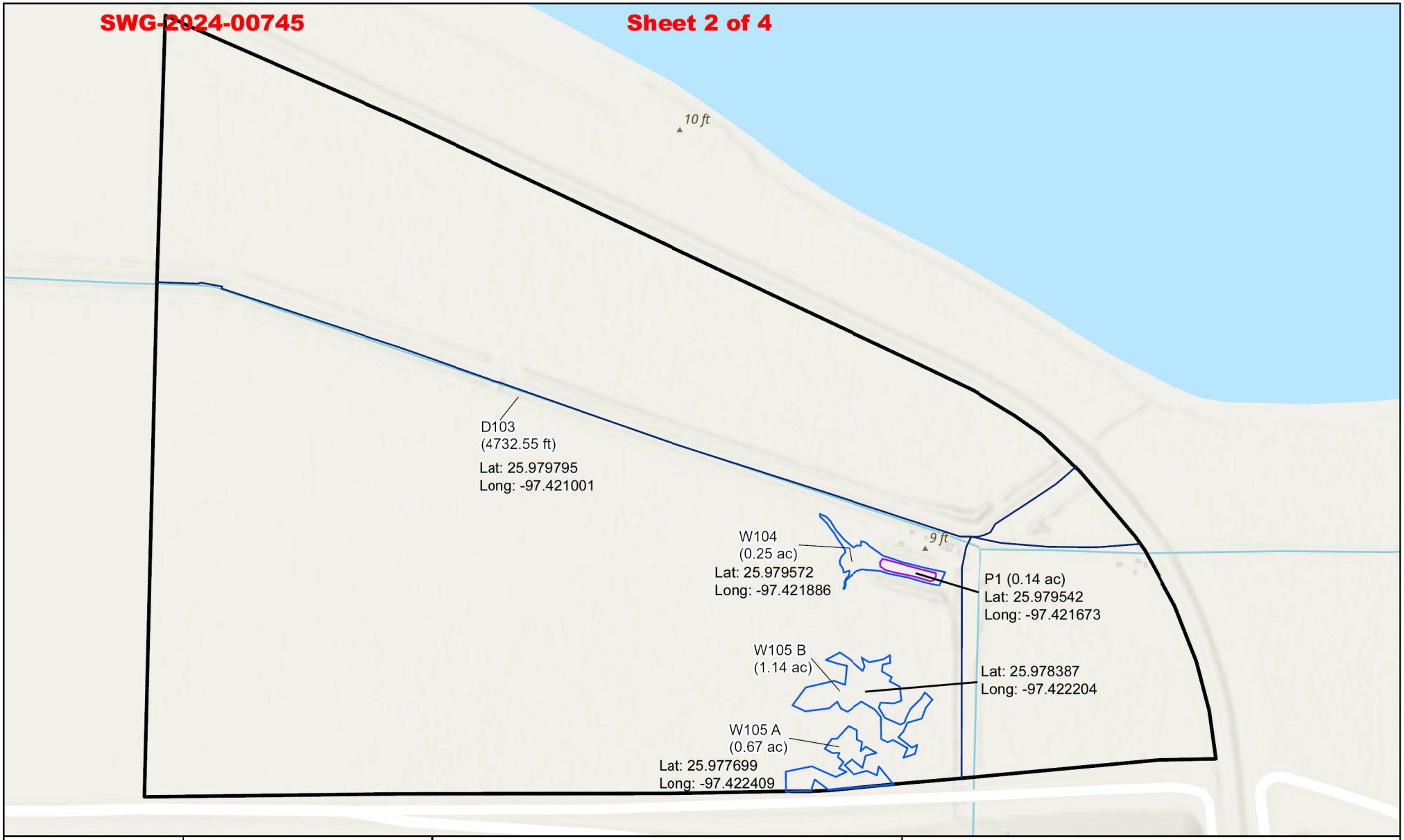

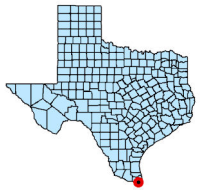

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Feet

0 250 500

SOURCE: CEI FIELD SURVEY
BASE: WORLD TOPO MAP, ARCGIS ONLINE
DATUM: NAD 83

Parcel Boundary
PEM Wetlands (2.05 ac)
Ditch (4732.55 ft)
Ponds (0.14 ac)

WETLAND DELINEATION - PARCEL B
CAMERON COUNTY, TEXAS

LOCATION: BROWNSVILLE
COUNTY: CAMERON
MAP DATE: 2/28/25

FIGURE 8

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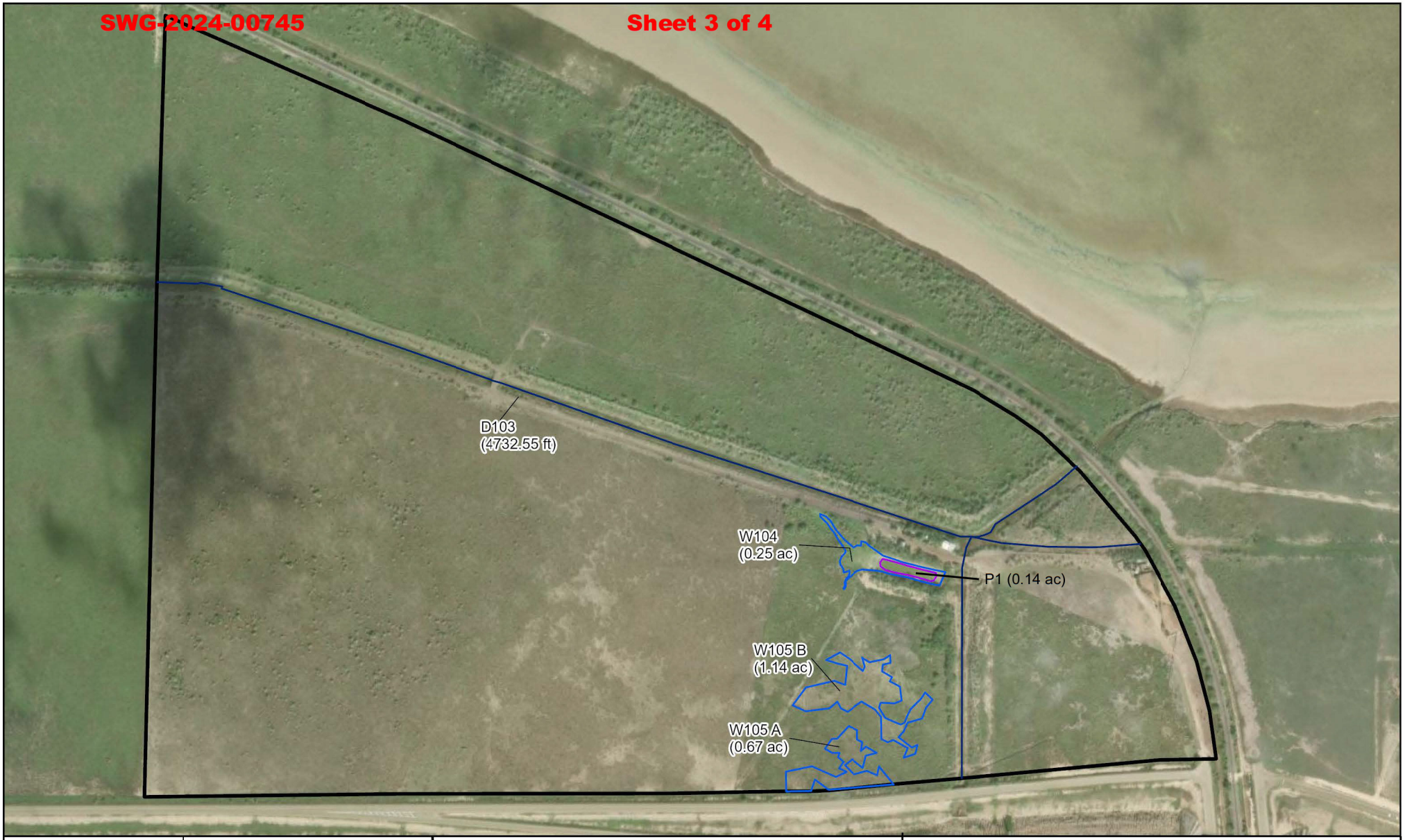

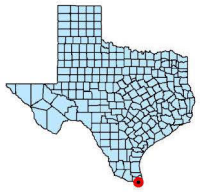

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Feet

0 250 500

SOURCE: CEI FIELD SURVEY
BASE: WORLD IMAGERY, ARCGIS ONLINE
DATUM: NAD 83

Parcel Boundary
PEM Wetlands (2.05 ac)
Ditch (4732.55 ft)
Ponds (0.14 ac)

WETLAND DELINEATION - PARCEL B
CAMERON COUNTY, TEXAS

LOCATION: BROWNSVILLE
COUNTY: CAMERON
MAP DATE: 2/28/25

FIGURE 9

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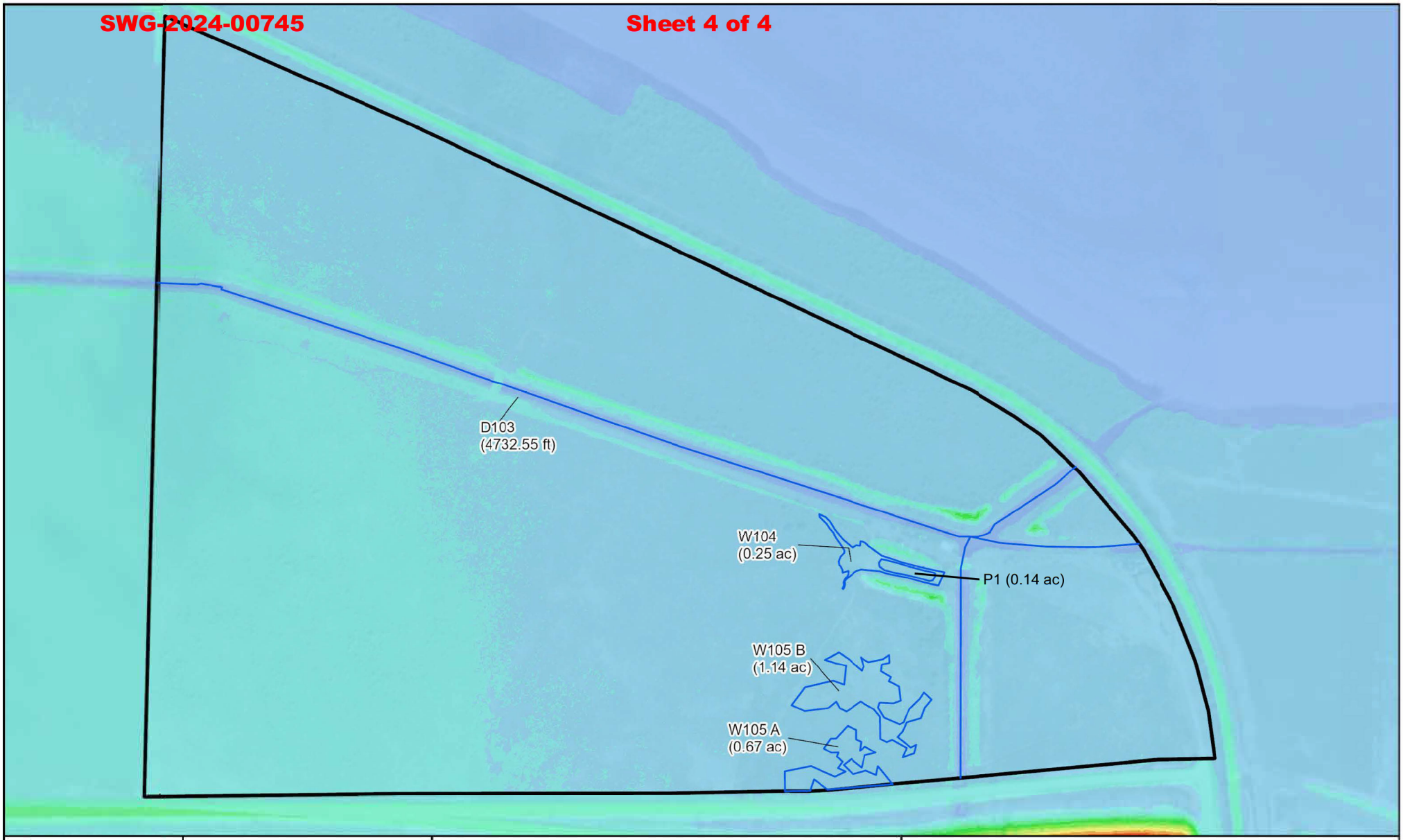
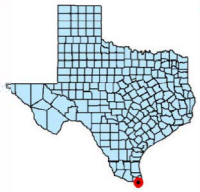
Sheet 4 of 4





N

Feet

0 250 500

SOURCE: CEI FIELD SURVEY
BASE: WORLD IMAGERY, ARCGIS ONLINE
DATUM: NAD 83

Parcel Boundary

PEM Wetlands (2.05 ac)

Ditch (4732.55 ft)

Elevation (ft)

15

0

WETLAND DELINEATION - PARCEL B
CAMERON COUNTY, TEXAS

LOCATION: BROWNSVILLE
COUNTY: CAMERON
MAP DATE: 1/8/25

FIGURE 10