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-2025-00093[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 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).

      i. OWP3002 (0.46 ac), Gulf of America, 27.74017° N; 97.12487° W, Traditional Navigable Water, jurisdictional, Section 10/404

      ii. WP3001_PEM (1.98 ac), PEM wetland, 27.74256° N; 97.12912° W, abutting/adjacent, jurisdictional, Section 404

      iii. OWP3001 (0.23 ac), PUBx pond excavated from wetlands, 27.74113° N; 97.12697° W, non-adjacent, non-jurisdictional

      iv. WP3002_PEM (0.46 ac), PEM wetland, 27.74148° N; 97.12682° W, non-adjacent, non-jurisdictional

      v. WP3003_PEM (0.23 ac), PEM wetland, 27.74102° N; 97.12619° W, non-adjacent, non-jurisdictional

      vi. WP3004_PEM (0.02 ac), PEM wetland, 27.74097° N; 97.12703° 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.

REVIEW AREA. The 12-acre review area is located at 108 Mustang Island Estates, along TX-361 in Port Aransas, Nueces County, Texas. Latitude: 27.74145° N; Longitude: 97.12723° W

3. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Corpus Christi Bay[6]

4. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. WP3001_PEM is in effect one contiguous wetland with palustrine and estuarine wetlands on the west side of TX-361 through one under-highway culvert adjacent to roadside ditches approximately 800 feet southwest of the southwestern-most corner of the review area. This one continuous wetland is abutting Corpus Christi Bay, a TNW. Multiple pieces of evidence support that the divided wetland is functioning as one wetland (See Section 7g).

5. 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

6. 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,

[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.

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):

Feature OWP3002 (0.46 acre): This feature is a mapped portion of the Gulf of America below the High Tide Line within the review area, and is therefore a waterbody that qualifies as a "navigable water of the United States" (33 C.F.R. Part 329) and is (a) subject to the ebb and flow of the tide, and (b) is presently used, and/or has been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

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):

Wetland WP3001_PEM (1.98 acres): LiDAR, topo, aerial imagery, site visit photos, and wetland delineation data forms were utilized as part of the desktop analysis to identify that this palustrine wetland is contiguous with the wetland on the opposite side of TX-361. Aerial imagery and site visits confirmed that the boundaries of WP3001_PEM (1.98 acres) extends into a roadside ditch that flows outside the review area for approximately 800 linear feet and leads to a culvert where water flows under TX-361 to wetlands abutting Corpus Christi Bay. Corpus Christi Bay is a waterbody that qualifies as a "navigable water of the United States" (33 C.F.R. Part 329) and is (a) subject to the ebb and flow of the tide, and (b) is presently used, and/or has been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Based on the "*Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436*", the culvert acts as a discreate feature so that the aquatic resources listed above is a continuation of wetlands on the west side of TX-361. Furthermore, the topographic quad (2022 TX Crane Island NW) reveals wetland characteristics/symbols with a slope line that extends across TX-361 into the review area. When comparing the topographic quad and the LiDAR data, this information indicates the continuation of slopes and hydrology of wetlands on either side of TX-361 extending into the review area. Hydrology contributing to WP3001_PEM consists of runoff from local precipitation events and the presence of groundwater hydrology characterized by a high water table characteristic of barrier islands due to the presence of what can be described as a *freshwater lens* resting atop groundwater of a much higher salt content below. Local ponds and wetlands occupy low, depressed areas within the island's vegetated barrier flats, commonly linear wind-deflation troughs left behind by migrating back-island dune fields and blowout dunes. The wetlands on either side of TX-361 have the same mapped hydric mustang fine sandy soils, occupy these same linear wind-deflation troughs, receive hydrology from precipitation runoff and the presence of a high water table, and share similarities in plant communities between the divided portions of the wetland on either side of TX-361. The EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003- 60436 states that "slopes and topography allow for a shallow subsurface connection from wetlands" on either side of the road and "multiple pieces of evidence to assess whether divided wetland areas are separate, distinct wetlands or are functioning as one wetland" can be assessed to provide valuable information including historic conditions "to determine if a divided wetland is functioning as one wetland". This valuable information includes hydrologic connection, discrete features like culverts through a shallow subsurface connection, similarities in plant communities, slope and topography, soils and hydrologic indicators. Therefore, WP3001_PEM is considered one contiguous jurisdictional water with the wetlands on the east and west sides of TX-361. Therefore, WP3001_PEM meets the definition of adjacent because it is abutting Corpus Christi Bay, a traditional navigable water. Hence, the discharge of dredged and/or fill material into WP3001_PEM is subject to Section 404 of the Clean Water Act.

7. 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

[9] 51 FR 41217, November 13, 1986.

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

Wetlands WP3002_PEM, WP3003-PEM, WP3004_PEM, and Pond OWP3001 (totaling 0.94 acre): LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these palustrine wetlands, and pond excavated from wetlands, reside in small depressional areas. There is no presence of a continuous surface connection to a TNW or RPW due to elevation changes. The elevation changes isolate these wetlands so that there is no overland sheet flow with the exception of large precipitation events. 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, Wetlands WP3002_PEM, WP3003-PEM, WP3004_PEM, and Pond OWP3001 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 Wetlands WP3002_PEM, WP3003-PEM, WP3004_PEM, and Pond OWP3001 does not require a Department of Army Permit.

8. 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: Ocean Breeze Subdivision Project, Nueces County, Texas*, prepared by Perennial Environmental Services, February 2022.

   b. Google Earth Aerials dated: 1979, 1985, 1995, 2002, 2009, 2017, 2020, 2022, 2024.

   c. USGS Topographic Map/Scale: Crane Islands NW; 1:24,000 (2022)

   d. NRCS Soil Survey: Soil Survey titled: Nueces County, Texas; NRCS Website accessed on 5 June 2025

   e. USGS LiDAR: South Texas (2018) Vertical Accuracy (cm): 4.5 - Tested to meet vertical root mean square error (RMSEz) in open terrain.

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

   g. ORM2 Database: No prior determinations have been made for this review area.

   h. Site visit conducted 5 June 2025.

   i. *Environmental Geologic Atlas of the Texas Coastal Zone – Corpus Christi Area;* prepared by the Bureau of Economic Geology, University of Texas at Austin, 1976.

9. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on NWO-2003-60436, dated 19 December 2023.

10. 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-2025-00093 12-acre Review Area Project Location Sheet 1 of 5

Project Location

County Boundary

0 2.5 5 Miles

PERENNIAL

Vicinity Map
Ocean Breeze Subdivision Project
Mostaghasi InvestmentTrust
Nueces County, Texas

Page 1 of 1	Scale: 1:250,000
NAD1983 TX S ft	Date: February 2022

Document Path: P:\GIS\Client\Urban_Engineering\Ocean_Breeze_Subdivision\Maps\ENV\WR\20220121\mxds\1_Vicinity.mxd

Author: MM

SWG-2025-00093 12-acre Review Area Crane Islands NW, TX Quad Sheet 2 of 5

PEM Wetland

Open Water

Environmental Survey Area

Feet
0 500 1,000

PERENNIAL

Topographic Map
Ocean Breeze Subdivision Project
Mostaghasi Investment Trust
Nueces County, Texas

Page 1 of 1	Scale: 1:12,000
NAD1983 TX S ft	Date: February 2022

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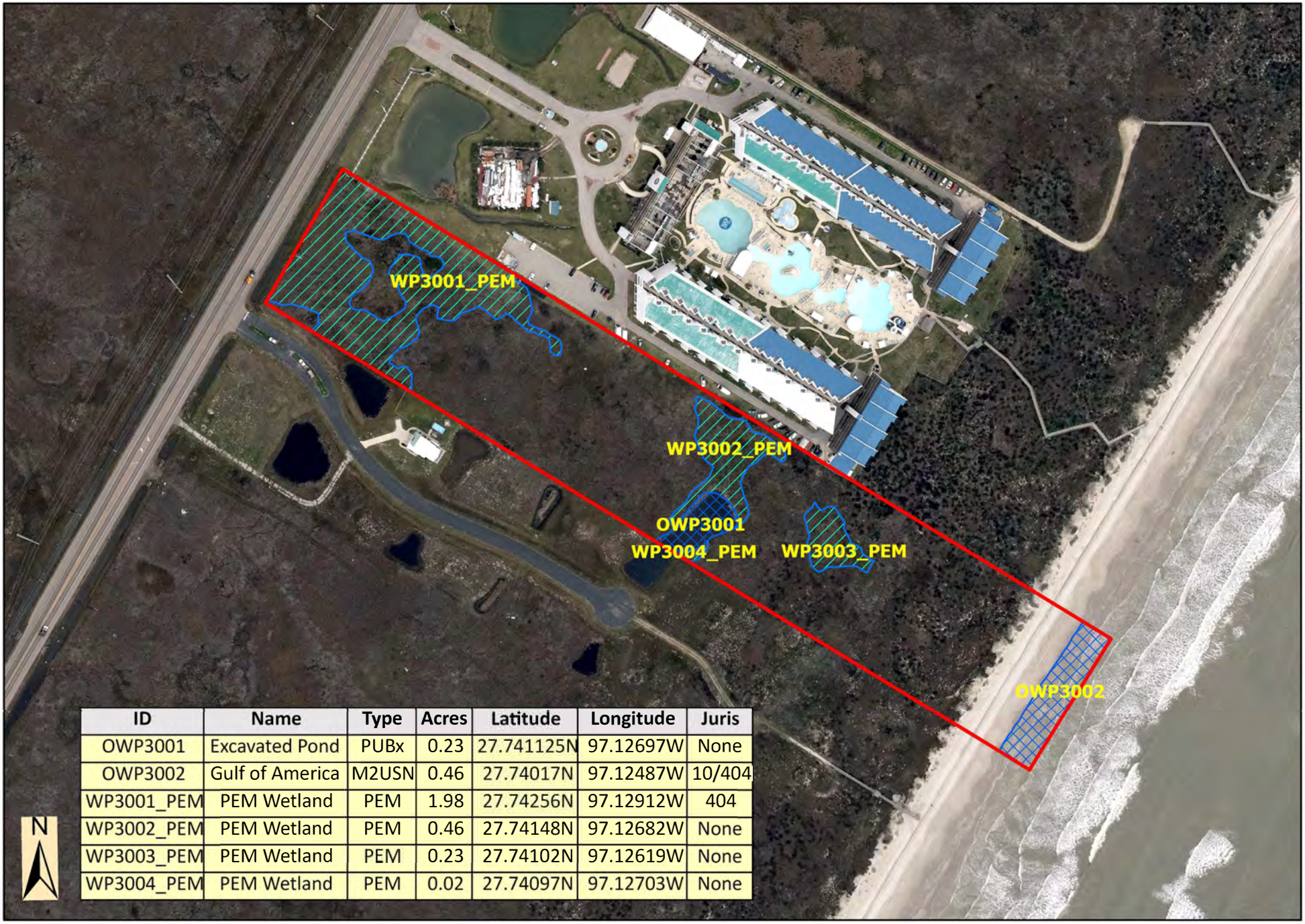
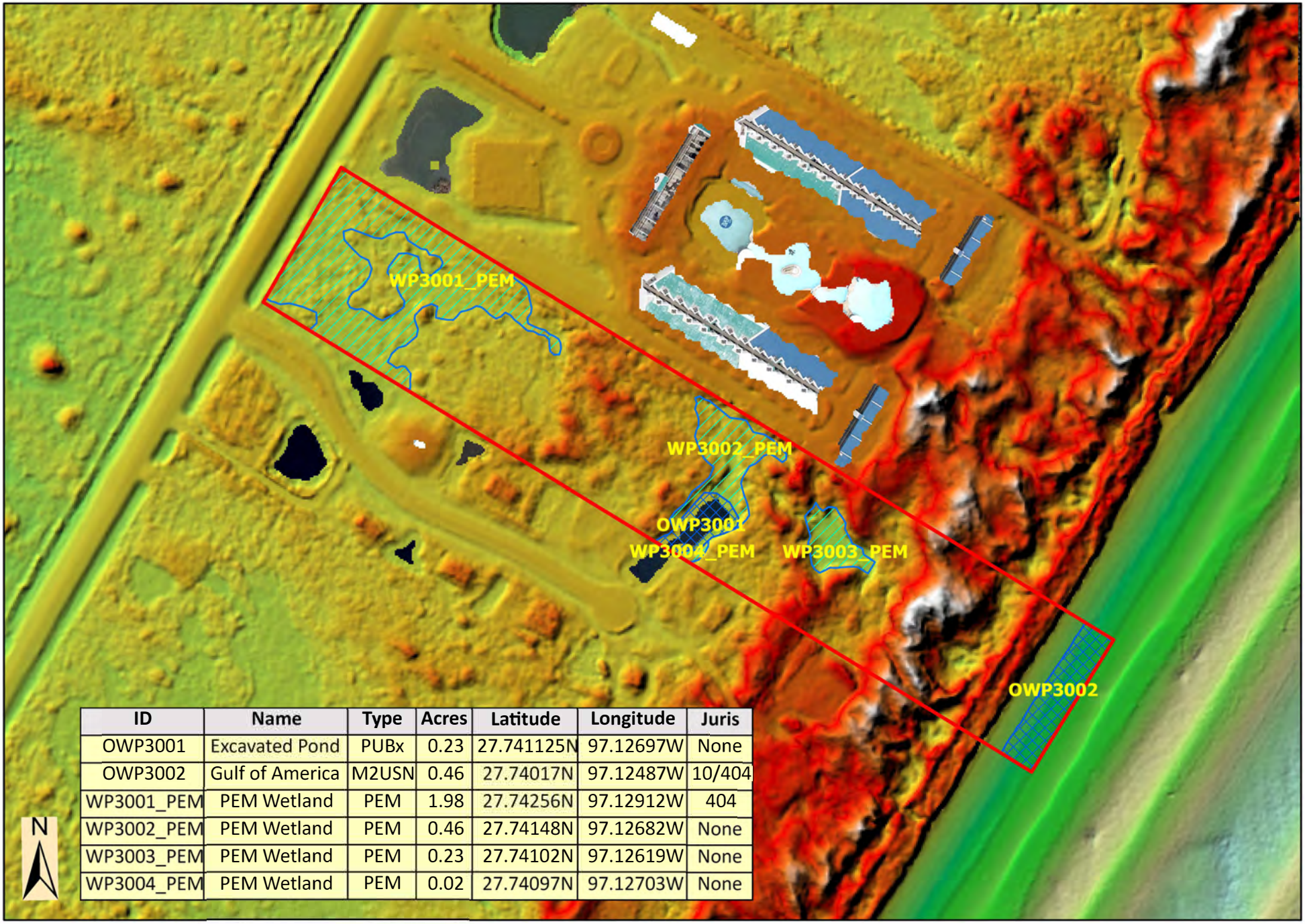
Author: MM



ID	Name	Type	Acres	Latitude	Longitude	Juris
OWP3001	Excavated Pond	PUBx	0.23	27.741125N	97.12697W	None
OWP3002	Gulf of America	M2USN	0.46	27.74017N	97.12487W	10/404
WP3001_PEM	PEM Wetland	PEM	1.98	27.74256N	97.12912W	404
WP3002_PEM	PEM Wetland	PEM	0.46	27.74148N	97.12682W	None
WP3003_PEM	PEM Wetland	PEM	0.23	27.74102N	97.12619W	None
WP3004_PEM	PEM Wetland	PEM	0.02	27.74097N	97.12703W	None



ID	Name	Type	Acres	Latitude	Longitude	Juris
OWP3001	Excavated Pond	PUBx	0.23	27.741125N	97.12697W	None
OWP3002	Gulf of America	M2USN	0.46	27.74017N	97.12487W	10/404
WP3001_PEM	PEM Wetland	PEM	1.98	27.74256N	97.12912W	404
WP3002_PEM	PEM Wetland	PEM	0.46	27.74148N	97.12682W	None
WP3003_PEM	PEM Wetland	PEM	0.23	27.74102N	97.12619W	None
WP3004_PEM	PEM Wetland	PEM	0.02	27.74097N	97.12703W	None

0 500 1,000 1,500 2,000 Feet

SWG-2025-00093 12-acre Review Area Flow path Sheet 5 of 5