



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
P.O. BOX 2288
MOBILE, AL 36628-0001

CESAM-RD-A

June 10, 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 SAM-2022-00475-CDJ (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.

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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 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).

Waters Name	Latitude	Longitude	Waters Size (acres)	Type Of Aquatic Resource	Geographic Authority
Wet 1	30.288862	-87.603994	0.0015	A7-AJD.WETL-404	Section 404

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)
- e. 2008 Rapanos Guidance
- f. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

3. REVIEW AREA. The review area encompasses 3.43 acres and is centered at latitude 30.289712, longitude -87.603753 in Orange Beach, Baldwin County, Alabama. The site is located in the Wolf Bay Frontal 8-digit hydrologic unit code (03140107). The site has historically been maintained in its natural state, consisting of hydric pine flatwoods and uplands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

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CONNECTED. The nearest TNW is Wolf Bay, which is on the Mobile District's Section 10 Waters List. Section 10 waters are a subset of TNWs.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland W1 is part of a larger, contiguous wetland (one wetland) that continues outside of the review area and connects north to a non-RPW roadside ditch outside of the review area, which directs flow into two 36-inch concrete culverts that extend approximately 140 feet under Canal Road and Commercial Avenue from the south side of Canal Road to the north side of Commercial Avenue. Flow from the culverts on the north side of Commercial Avenue is routed directly into a relatively permanent pond that discharges directly to an unnamed RPW tributary that flows into a large wetland complex situated along Gulf Bay Road. The water from this wetland system flows into Wolf Bay through three large culverts under Gulf Bay Road at approximate latitude 30.297640, longitude -87.602565. The entire length from the south roadside culvert to Wolf Bay TNW is 3000 feet (0.58 miles).
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 NA
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

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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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
- g. Adjacent wetlands (a)(7):

Wet 1 is a 0.0015-acre forested wetland that has a continuous surface connection to an unnamed RPW tributary to Wolf Bay. As mentioned in Section 5, Wet 1 is part of a larger wetland complex located outside of the review area (as delineated by the consultant and depicted in red hatching on the Figures titled "Wetland Sketch"). The wetland system extends to a non-RPW ditch that parallels Canal Road outside of the review area. The ditch directs water to a culvert at approximate latitude 30.290188, longitude -87.606071. The culvert discharges directly to a pond north of Commercial Avenue. The pond's outfall is located at approximate latitude 30.292350, longitude -87.605712, which is the start of the unnamed RPW tributary to Wolf Bay to which Wet 1 is connected. The distance from the culvert (and the larger contiguous offsite wetland) and the unnamed RPW tributary to Wolf Bay is approximately 787 linear feet (140 through culvert and 647 linear feet of pond). The non-RPW ditch, culvert and pond all contribute to the direct surface connection from Wet 1 to the unnamed RPW tributary to Wolf Bay.

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

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- 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 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). N/A
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. Corps personnel field visit on November 14, 2023.

⁹ 51 FR 41217, November 13, 1986.

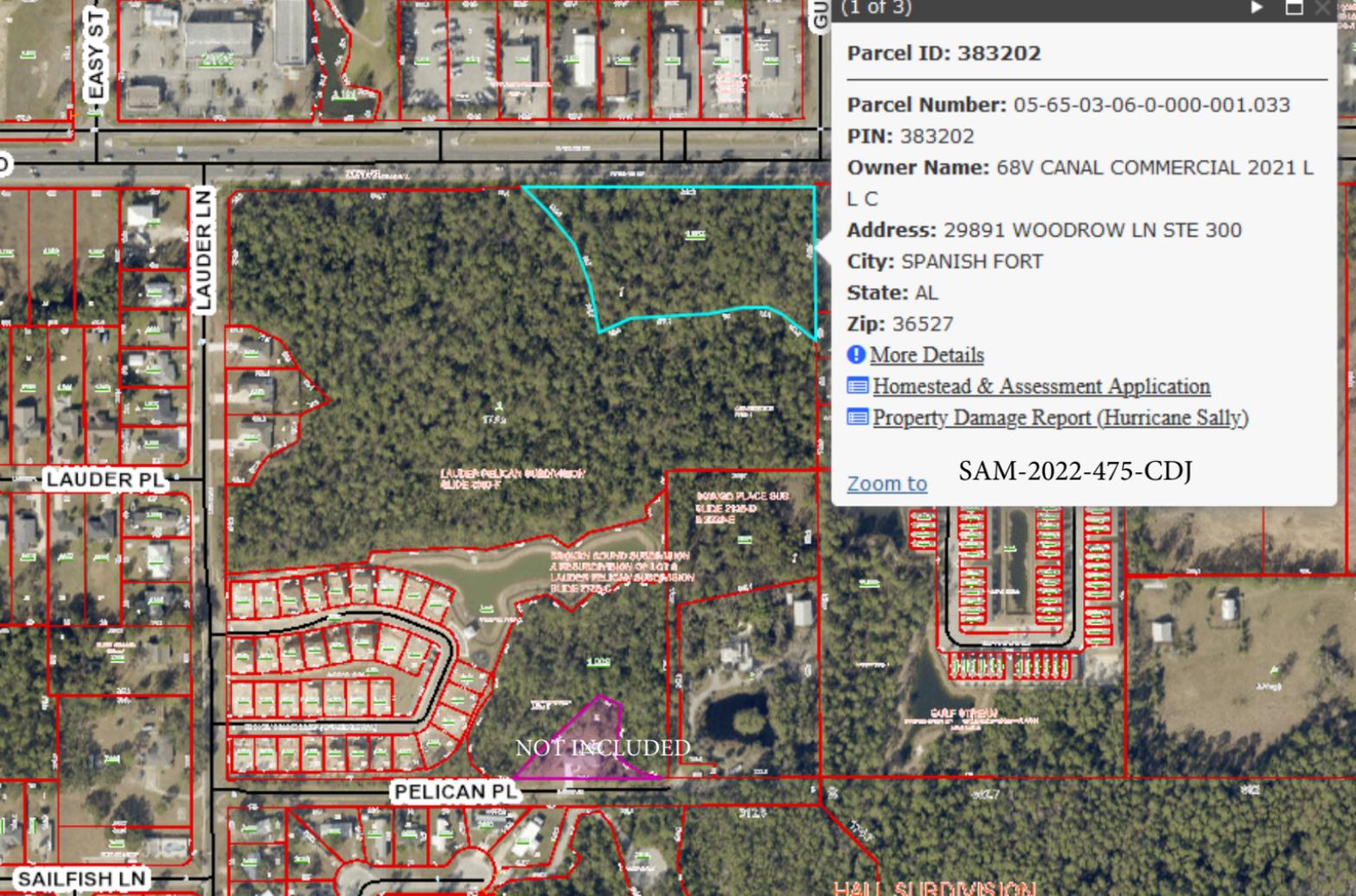
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- b. Hillshade, Site Location and Aerial, NRCS Hydric Soil Rating, NWI, HUC map, and Aquatic Resources Delineation Map.
- c. National Regulatory Viewer, FEMA Flood map, accessed June 6, 2024

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.



Parcel ID: 383202

Parcel Number: 05-65-03-06-0-000-001.033

PIN: 383202

Owner Name: 68V CANAL COMMERCIAL 2021 L L C

Address: 29891 WOODROW LN STE 300

City: SPANISH FORT

State: AL

Zip: 36527

[More Details](#)

[Homestead & Assessment Application](#)

[Property Damage Report \(Hurricane Sally\)](#)

[Zoom to SAM-2022-475-CDJ](#)

LAUDER-PELICAN SUBDIVISION
SLIDE 2007-F

WINDY PLACE SUB
SLIDE 2008-D
SLIDE 2008-E

BETWEEN ROUND SUBDIVISION
A RESUBDIVISION OF LOT 4
LAUDER PELICAN SUBDIVISION
SLIDE 2007-F

NOT INCLUDED

GOLF COURSE

HALL SUBDIVISION



AREA SUBJECT TO WETLAND DELINEATION
3.43± AC (GIS CALCULATED)



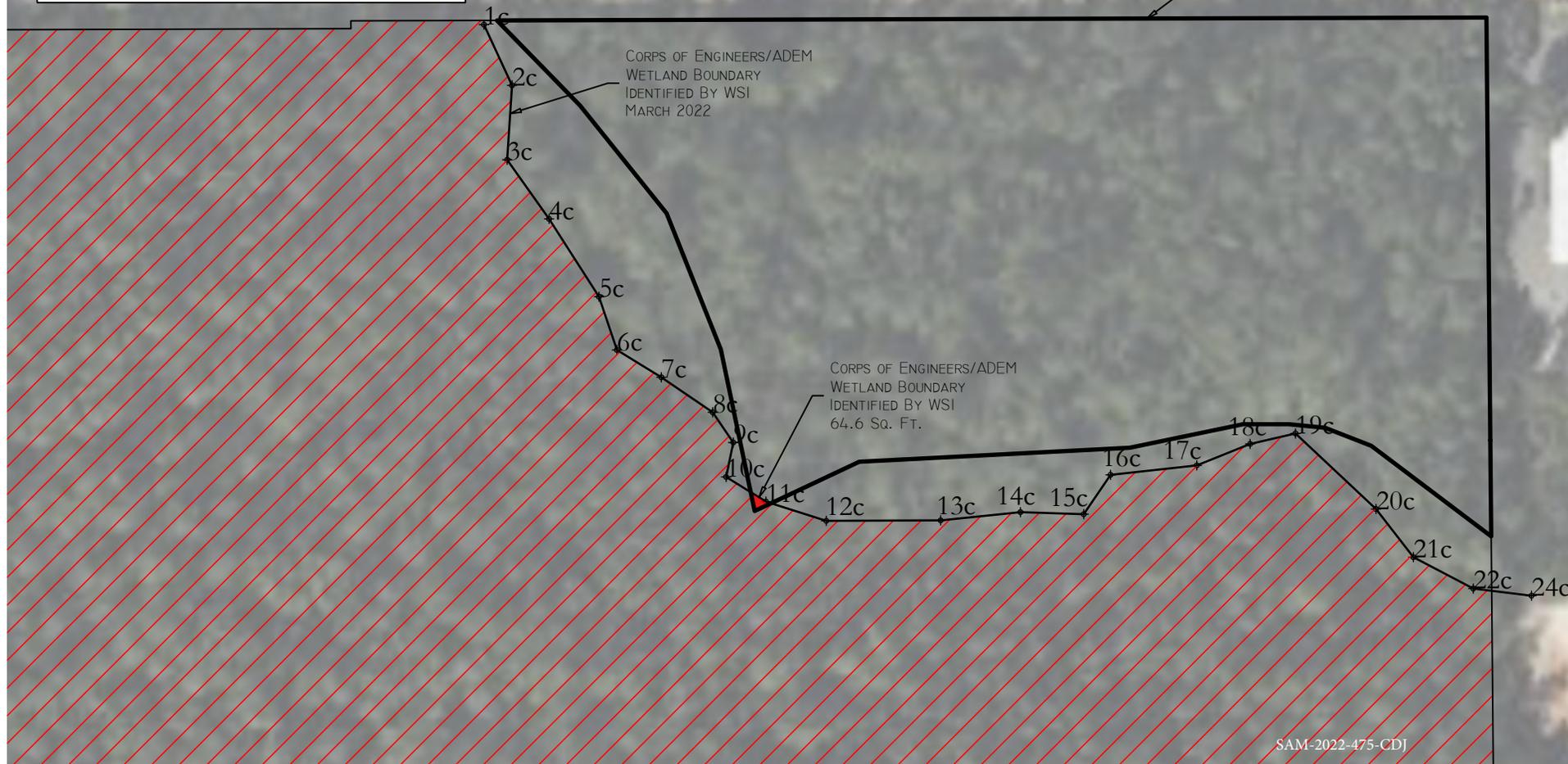
CORPS/ADEM WETLANDS
IDENTIFIED BY WSI
64.6 Sq. FT.



UPLANDS
3.43± AC

CANAL ROAD

APPROXIMATE PARCEL
BOUNDARY PER BALDWIN COUNTY
GIS DATA



ENVIRONMENTAL CONSULTANTS

3308 GULF BEACH HIGHWAY
PENSACOLA, FLORIDA 32507
TEL: 850.453.4700
CRAIG@WETLANDSCIENCES.COM

PROJECT NAME: PPIN 383202 CANAL ROAD

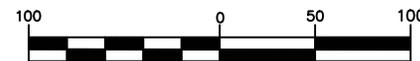
WETLAND SKETCH

PROJECT NO.: 2022-185

DRAWN BY: AJN

DATE: 3/19/2024

SHEET: 1



SCALE: 1" = 100 Feet

Find address or place [Search icon]

[Home] [Layers] [Measure] [Full Screen] [Help]

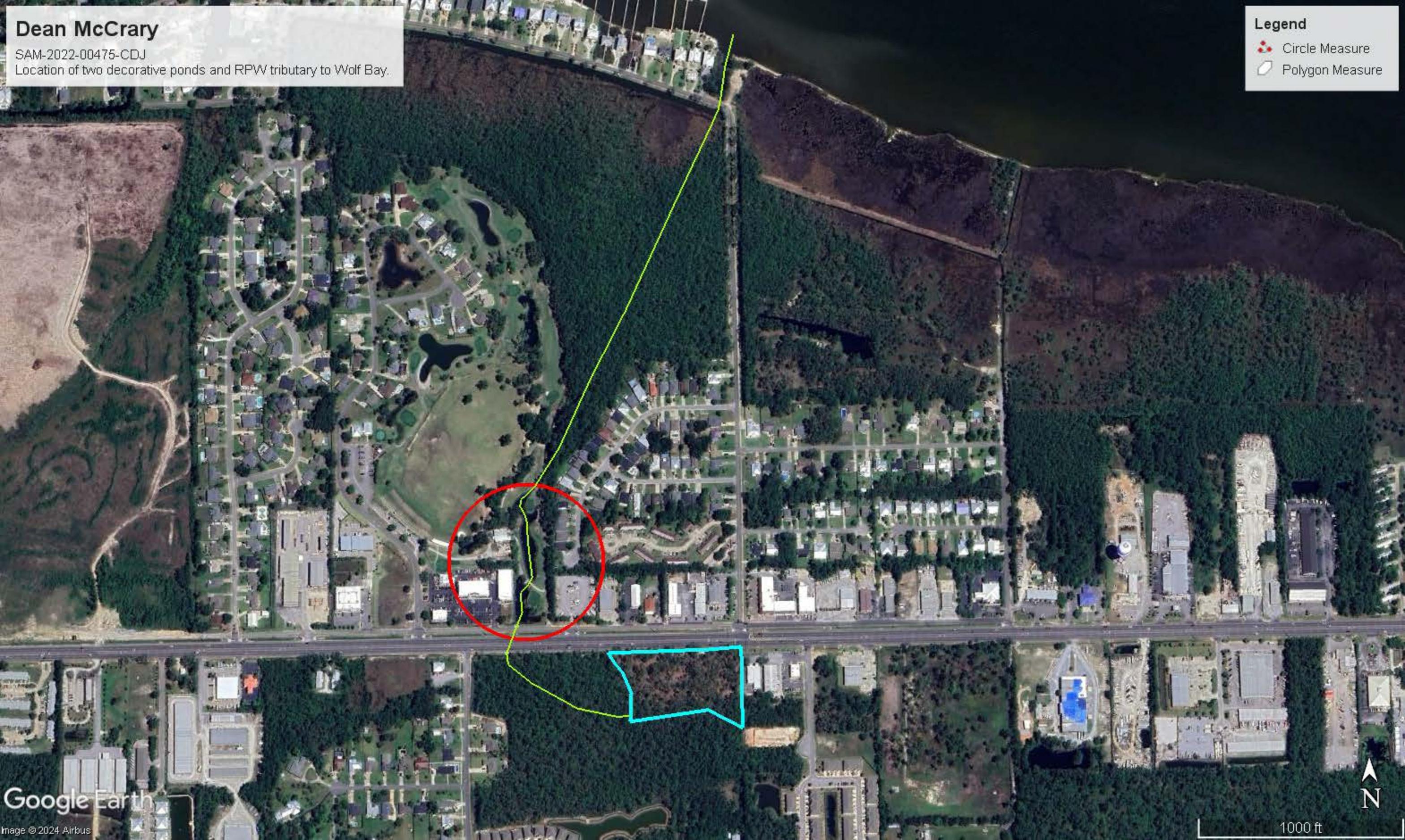
SAM-2024-00475-CDJ
Flow path to Wolf Bay TNW



Dean McCrary
SAM-2022-00475-CDJ
Location of two decorative ponds and RPW tributary to Wolf Bay.

Legend

-  Circle Measure
-  Polygon Measure



Dean McCrary

SAM-2022-00475-CDJ

Beginning of unnamed RPW tributary to Wolf Bay, to which Wet 1 has a continuous surface connection.
Aerial photo 2011

Legend

 30.292350, -87.605712



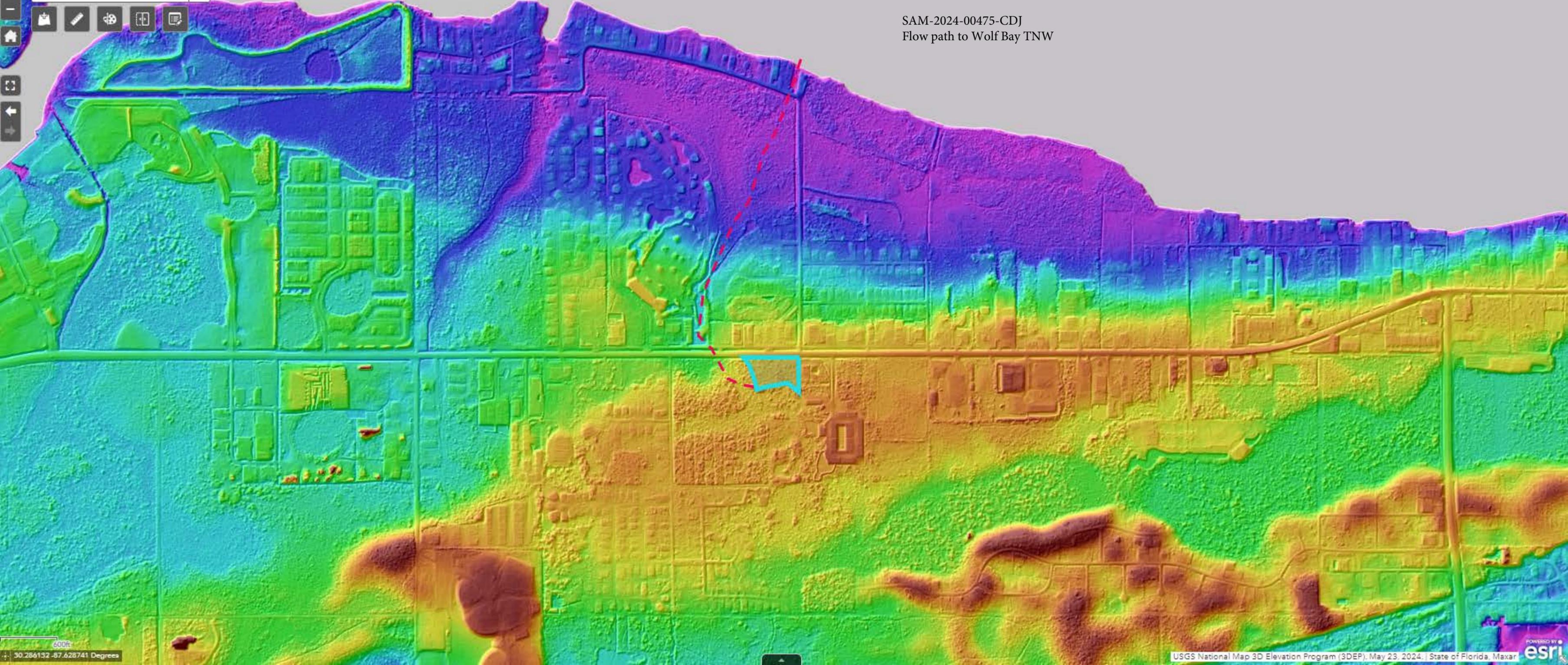
30.292350, -87.605712



Find address or place



SAM-2024-00475-CDJ
Flow path to Wolf Bay TNW



600ft
30.286132 -87.628741 Degrees

Dean McCrary
SAM-2022-00475-CDJ
36-inch culverts under Canal Road. Looking East.

Legend

-  Path Measure
-  Polygon Measure
-  Polygon Measure



Dean McCrary
SAM-2022-00475-CDJ
36-inch culverts under Canal Road.

Legend

- Path Measure
- Polygon Measure
- Polygon Measure

