



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

CESAM-RD-A

March 17, 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-2022-01227-JEB (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 |
|-------------|-----------|------------|---------------------|----------------------------|----------------------|
| Impoundment | 30.650231 | -87.774968 | 0.55 | A4-IMPOUNDMENTAJD.WETL-404 | Section 404 |
| Wet 1 | 30.651141 | -87.775110 | 0.7 | A7-AJD.WETL-404 | Section 404 |
| Wet 2 | 30.649652 | -87.783148 | 55.55 | A7-AJD.WETL-404 | Section 404 |
| Wet 3 | 30.636842 | -87.782715 | 1.26 | A7-AJD.WETL-404 | Section 404 |
| Wet 4 | 30.639994 | -87.760922 | 0.43 | A7-AJD.WETL-404 | Section 404 |
| NONJD 1 | 30.651114 | -87.767788 | 0.04 | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| NONJD 2 | 30.646145 | -87.770199 | 1.2 | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| NONJD 3 | 30.639630 | -87.770398 | 5.19 | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| NONJD 4 | 30.635600 | -87.777838 | 1.9 | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| NONJD 5 | 30.642089 | -87.778491 | 0.6 | NON-WOTUS-WETL.NEGATIVE-A7 | None |
| NONJD 6 | 30.640880 | -87.780378 | 0.37 | NON-WOTUS-WETL.NEGATIVE-A7 | 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)

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- 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 990 acres and is centered at latitude 30.641841, longitude -87.774450 in Loxley, Baldwin County, Alabama. The site is located in the South Atlantic-Gulf Region 8-digit hydrologic unit code (03160205). The site has historically been maintained as a series of large agricultural fields, crisscrossed by multiple man-made ditches excavated in uplands.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Fish River, 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. The main unnamed wetland drain on-site flows south through Threemile Creek 68,640 feet (13 miles) to reach the Fish River TNW. Other wetland features on-site follow a similar flow path and distance to reach the Fish River TNW. One wetland flows east for 26.3-miles to enter TNW Perdido River.
 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

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.

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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 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):
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): "Impoundment" is a 0.55-acre farm pond used to water cattle. It is an impoundment of jurisdictional Wetland Wet 1. It connects to jurisdictional Wet 1 via a culvert/standpipe.
- e. Tributaries (a)(5):
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):

Wet 1 is a 0.7-acre wetland that has a continuous surface connection to RPW Threemile Creek, a perennial jurisdictional tributary to TNW Fish River. Wet 1 drains through a culvert under Interstate 10 and flows north 1051-feet into RPW

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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Three Mile Creek offsite. The break in the wetland is the dam structure for the impoundment listed above.

Wet 2 is a 55.55-acre wetland that has a continuous surface connection to Threemile Creek, a perennial jurisdictional tributary to TNW Fish River. The large Northwestern portions of Wet 2 abut and drain directly into RPW Three Mile Creek offsite. The break in the wetland is a culverted crossing.

Wet 3 is a 1.26-acre wetland that has a continuous surface connection through an unnamed tributary to Threemile Creek, a perennial jurisdictional tributary to TNW Fish River. Wet 3 flows west for 3,747 feet before entering RPW Three Mile Creek offsite.

Wet 4 is a 0.43-acre wetland that has a continuous 1.92-mile surface connection via a series of man-made ditches and culverts to RPW Blackwater River, a perennial jurisdictional tributary to TNW Perdido River. These ditches appear to have surface water visible most of the year. Distance from Wet 4 to TNW Perdido River is 26.3-miles.

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.

NONJD 3 is a 5.19-acre ditch system that does not have a continuous surface connection to a jurisdictional water. The breaks in the ditches as shown on the attached site map are due to multiple culverted road crossings. This system is made up of a series of man-made ditches that are excavated wholly in uplands, drain only uplands, and do not carry a relatively permanent flow of water. This ditch system is not a water of the United States and is therefore non-jurisdictional.

⁹ 51 FR 41217, November 13, 1986.

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NONJD 4 is a 1.9-acre ditch system that does not have a continuous surface connection to a jurisdictional water. The breaks in the ditches as shown on the attached site map are due to multiple culverted road crossings. This system is made up of a series of man-made ditches that are excavated wholly in uplands, drain only uplands, and do not carry a relatively permanent flow of water. This ditch system is not a water of the United States and is therefore non-jurisdictional.

- 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).

NONJD 1 is a 0.04-acre non-tidal wetland surrounded by uplands that does not have a continuous surface connection to a jurisdictional water and is therefore not a water of the United States and is therefore non-jurisdictional.

NONJD 2 is a 1.2-acre non-tidal wetland surrounded by uplands that does not have a continuous surface connection to a jurisdictional water. The break in the wetland as shown on the attached site map is due to a culverted road crossing.

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This wetland is not a water of the United States and is therefore non-jurisdictional.

NONJD 5 is a 0.60-acre non-tidal wetland surrounded by uplands that does not have a continuous surface connection to a jurisdictional water. This wetland is not a water of the United States and is therefore non-jurisdictional.

NONJD 6 is a 0.37-acre non-tidal wetland surrounded by uplands that does not have a continuous surface connection to a jurisdictional water. This wetland is not a water of the United States and is therefore non-jurisdictional.

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 4/5/23.
- 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 March 5, 2024.
- d. Google Earth historical imagery 1997-2023.

10. OTHER SUPPORTING INFORMATION.

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.

GULF CORP
SAM-2022-01227-JEB
Project Location

Legend

Mobile-Tensaw Delta Wildlife Management Area

Escambia River



Google Earth

Image Landsat / Copernicus

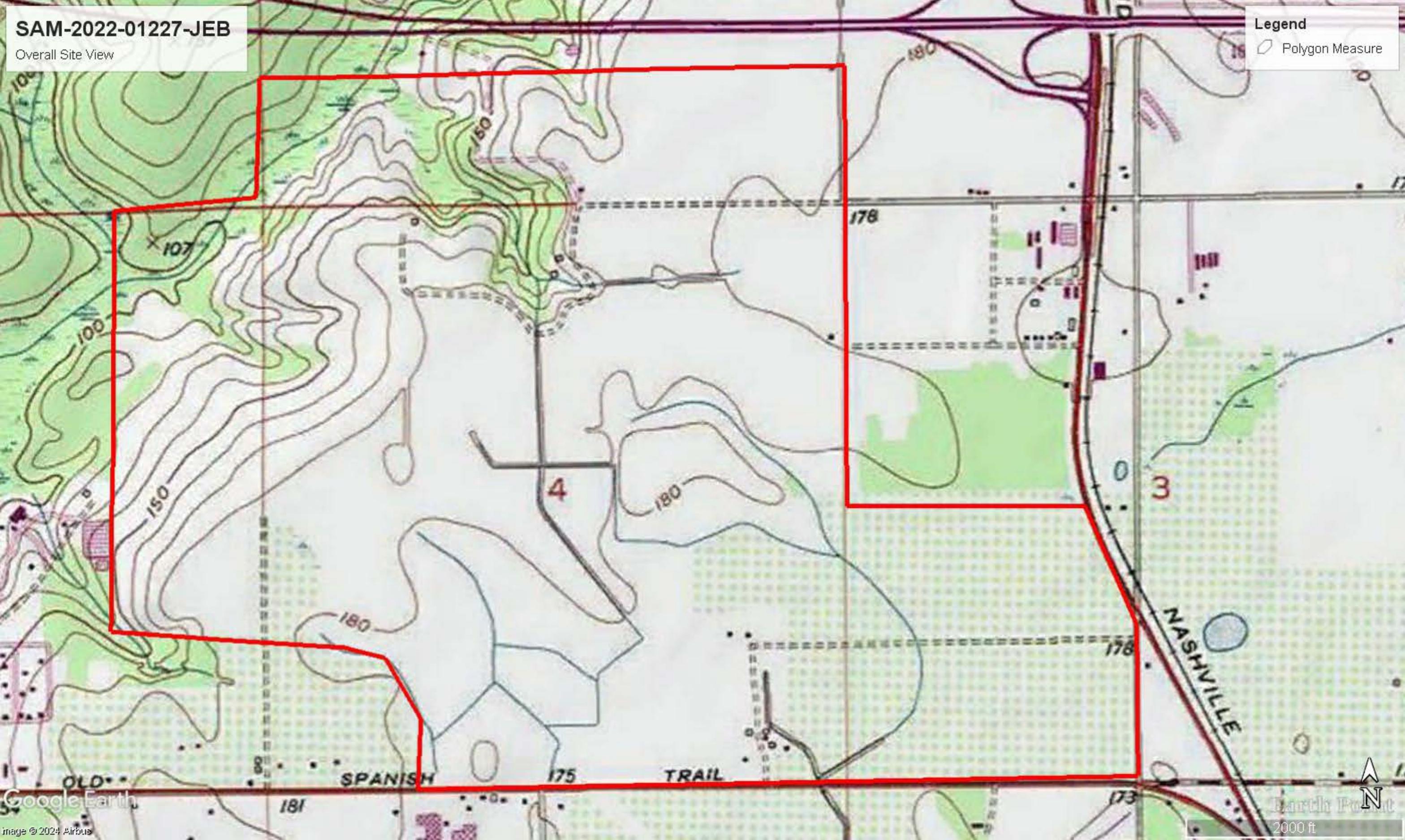
10 mi





Legend

-  Polygon Measure

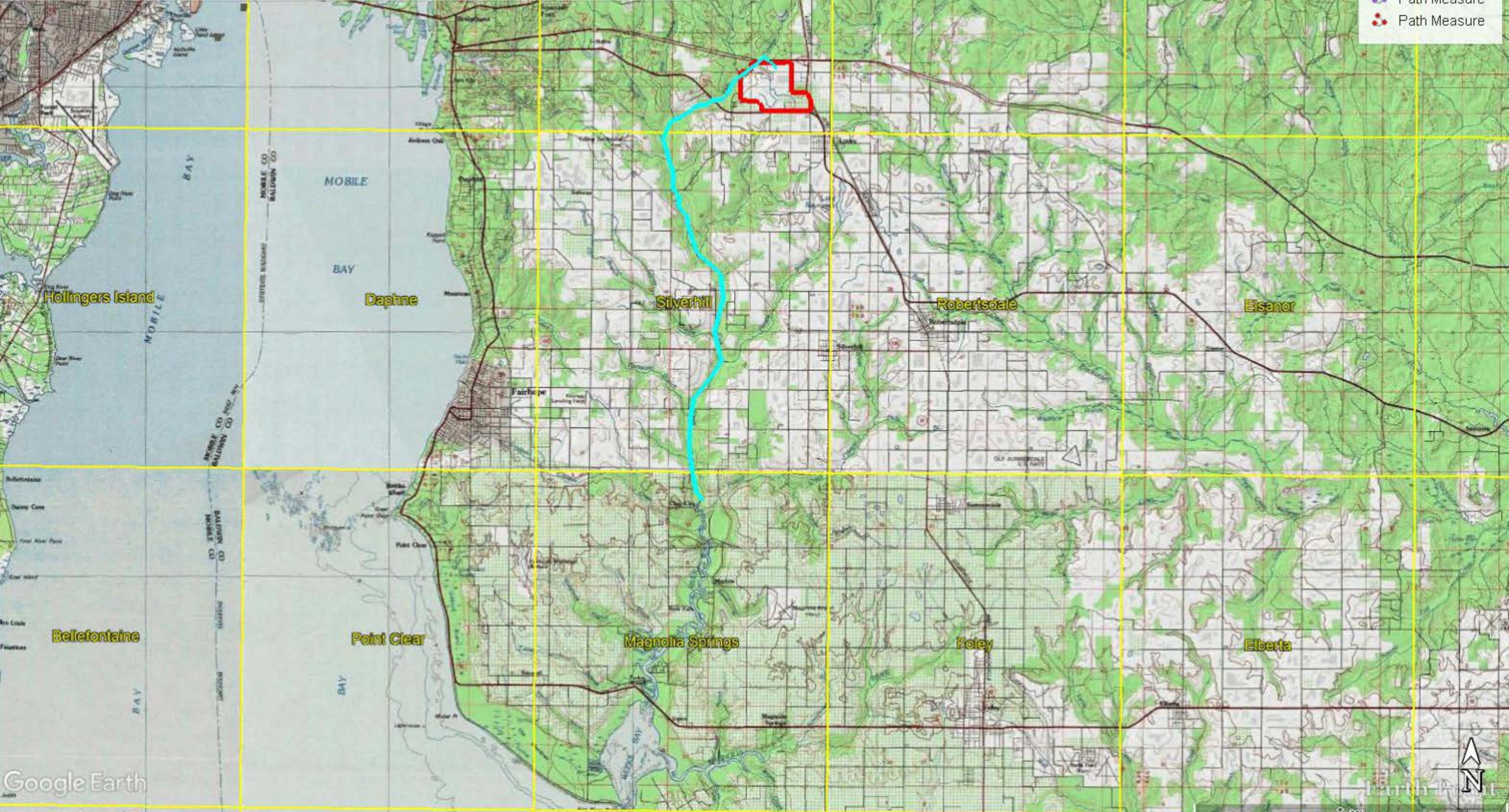


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Blue- Wet 1 and Impoundment RPW Threemile Creek to RPW Fish River (14.23 miles to TNW Fish River)

Legend

- Line Measure
- Path Measure
- Path Measure



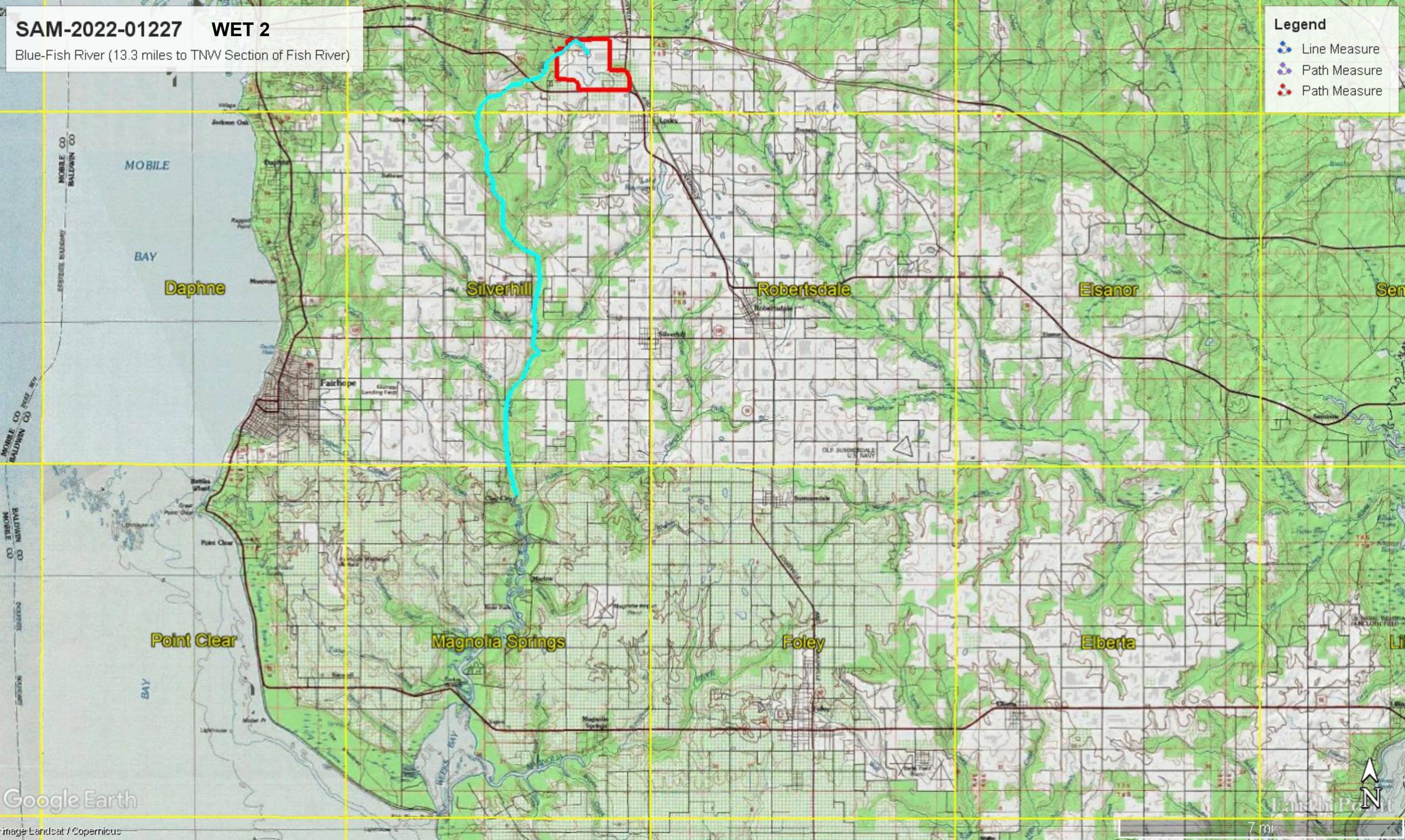
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WET 2

Blue-Fish River (13.3 miles to TNW Section of Fish River)

Legend

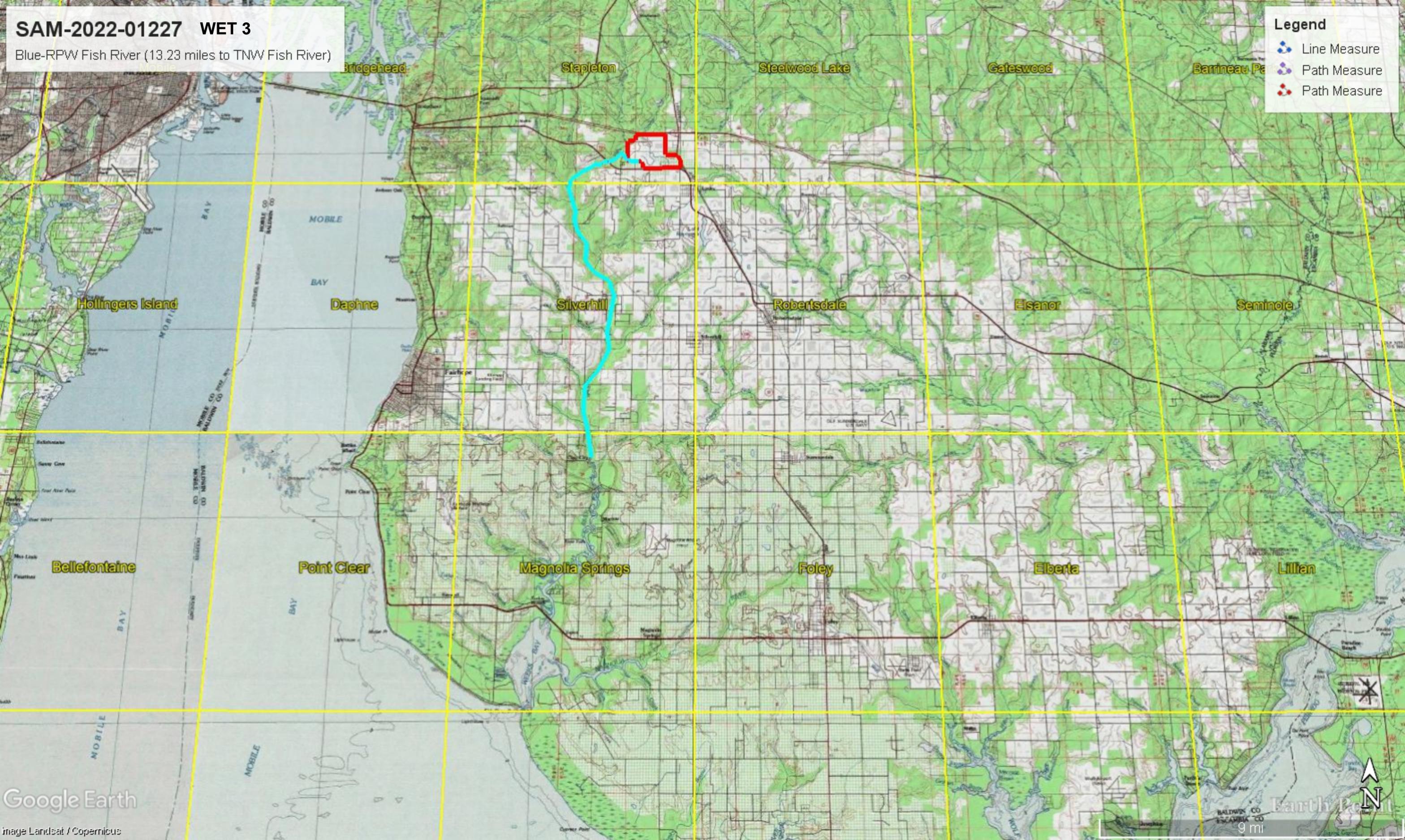
- Line Measure
- Path Measure
- Path Measure



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Blue-RPW Fish River (13.23 miles to TNW Fish River)

Legend

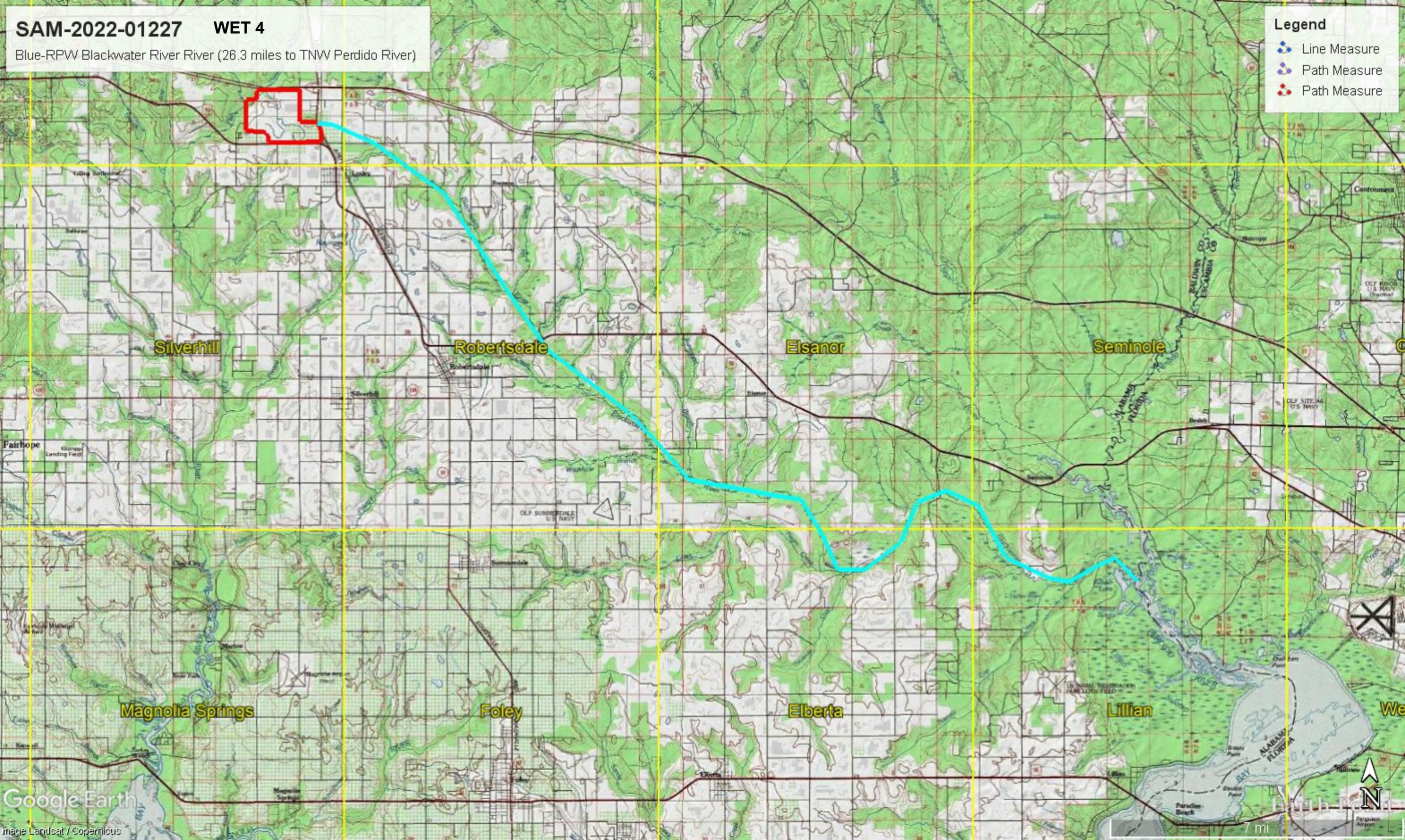
- Line Measure
- Path Measure
- Path Measure



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Blue-RPW Blackwater River River (26.3 miles to TNW Perdido River)

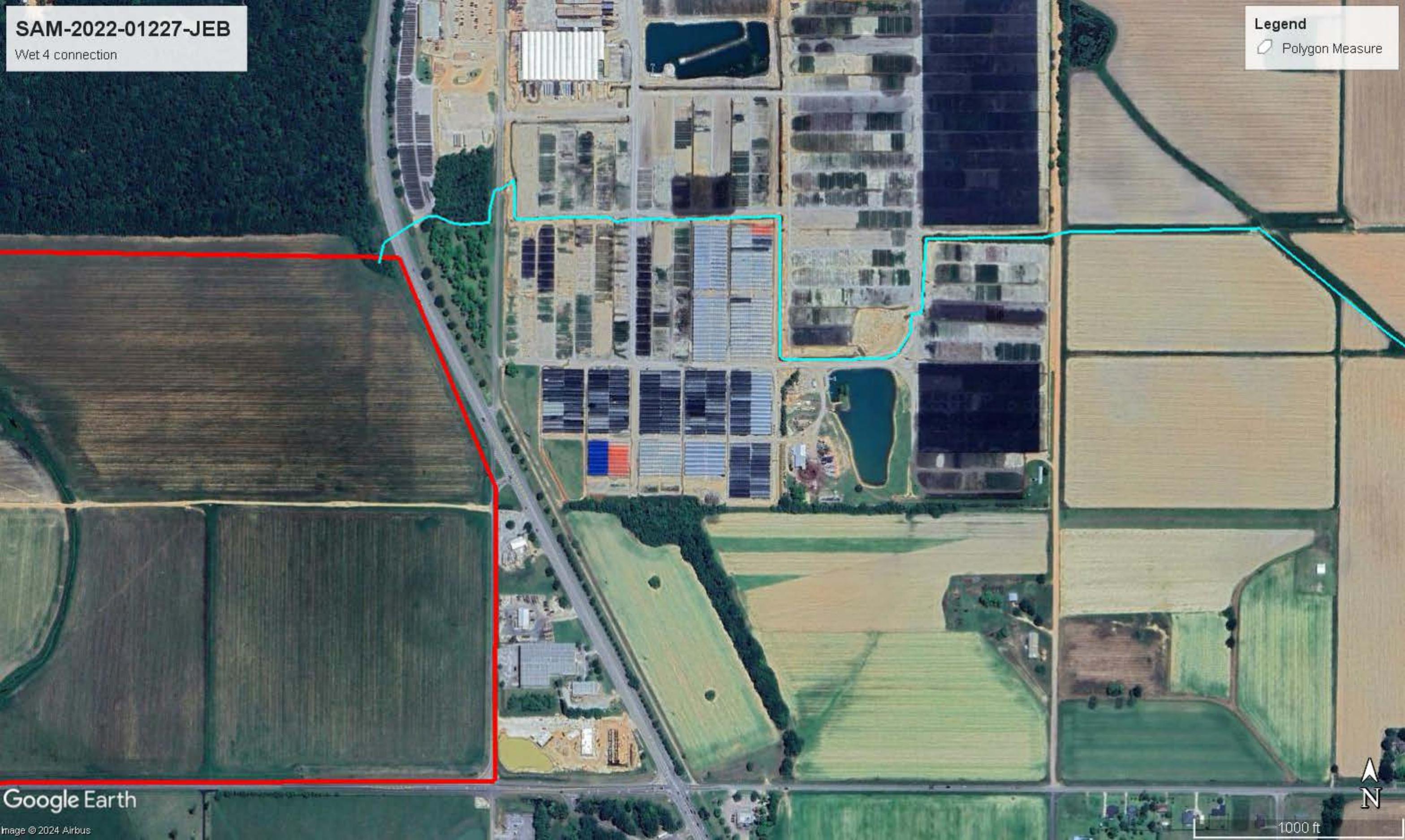
Legend

- Line Measure
- Path Measure
- Path Measure



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Wet 4 connection

Legend
Polygon Measure



Google Earth

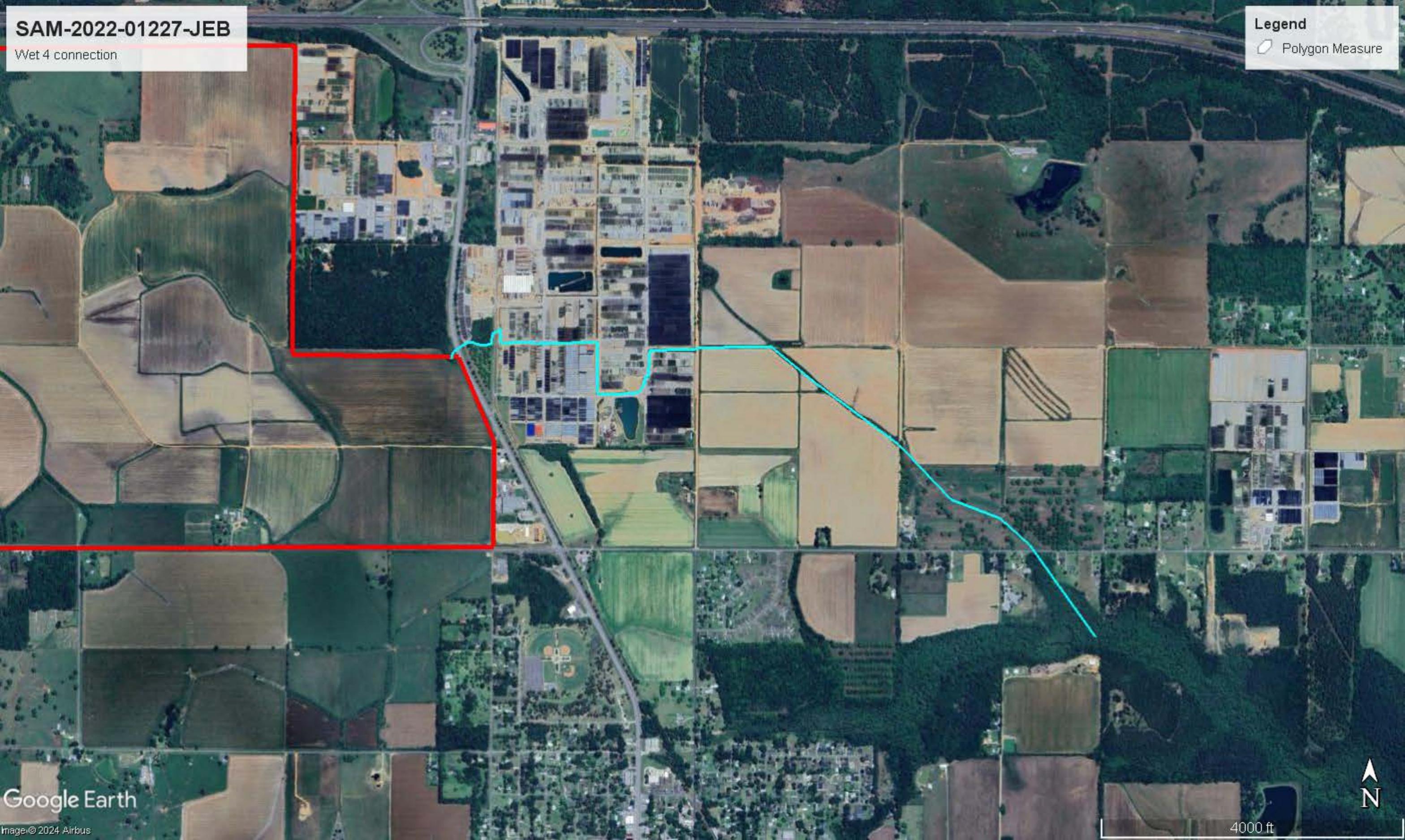
Image © 2024 Airbus

1000 ft



SAM-2022-01227-JEB
Wet 4 connection

Legend
Polygon Measure



Google Earth

Image © 2024 Airbus

4000 ft

