



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

CESAM-RD-A

March 11, 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-2024-00161-JEB, MFR #1 of #1²

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 in 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).
 - i. **Large wetland**, a 1.2-acre wetland area located on an undeveloped parcel on Ono Island, AL. This wetland does not have a continuous surface connection to a jurisdictional water and it is therefore not a water of the United States.
 - ii. **Wetlands on Lot at 30538 Harbor Drive**, 0.324-acre wetland area that is a portion of the larger wetland referenced above. This wetland portion does not have a continuous surface connection to a jurisdictional water and it is therefore not a water of the United States.

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 review area is a small portion of an approximately 1.2-acre wetland and is part of a residential lot that will be filled for a single family home. This 0.324-acre wetland area features soils, hydrology and vegetation consistent with the 1986 Wetland Delineation Manual. This wetland is located at 30538 Harbor Drive on Ono Island in Orange Beach, Baldwin County, Alabama. Coordinates are 30.295026,-87.503783.

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

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CONNECTED. N/A, the wetlands are not connected to a TNW, interstate water or territorial seas.⁶

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
 - b. Interstate Waters (a)(2): N/A
 - c. Other Waters (a)(3): 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.

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- 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 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

⁹ 51 FR 41217, November 13, 1986.

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- 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 review area is a small portion of an approximately 1.2-acre wetland and is part of a residential lot that will be filled for a single family home. This 0.324-acre wetland area features soils, hydrology and vegetation consistent with the 1986 Wetland Delineation Manual and Atlantic and Gulf Coastal Plain Regional Supplement. This wetland is located at 30538 Harbor Drive on Ono Island in Orange Beach, Baldwin County, Alabama. Coordinates are 30.295026, -87.503783. The wetland is completely surrounded by uplands and lacks a continuous surface connection to an RPW, TNW, territorial seas, interstate water or impoundment of a jurisdictional water. Therefore, the 1.2 acre wetland, which includes the 0.324-acre section on the lot proposed for construction, is not 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. Site visit 9/11/12. Conducted for previous property owner.
 - b. Google Earth Pro-multiple historical aerial photographs and associated topographic map overlays dated February 1997 through June 2023.
 - c. National Regulatory viewer-USGS Hillshade topographic map accessed 2/28/24, 3D Digital elevation model accessed 2/28/24.

10. OTHER SUPPORTING INFORMATION. N/A

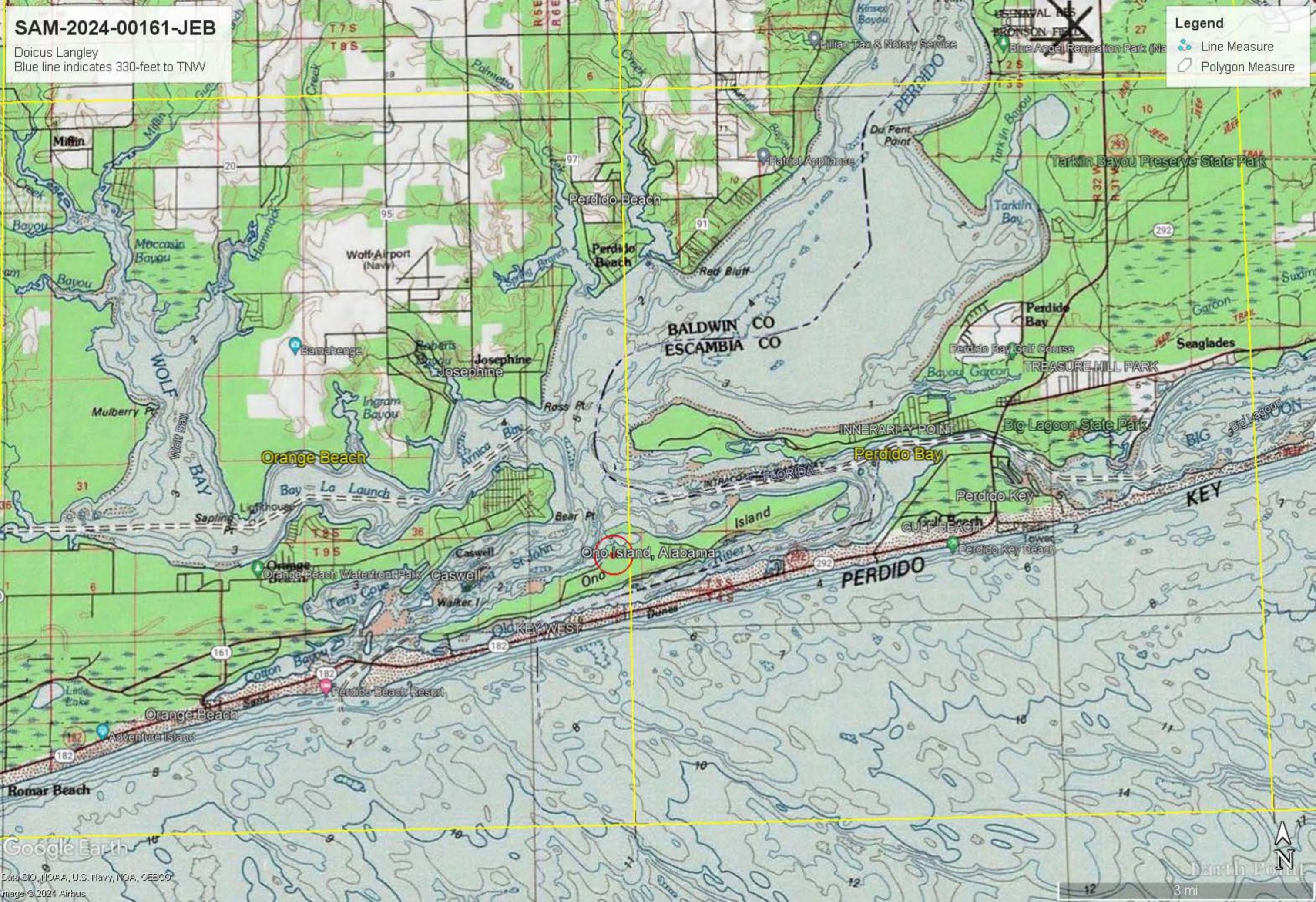
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

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Doicus Langley
Blue line indicates 330-feet to TNW

Legend

- Line Measure
- Polygon Measure

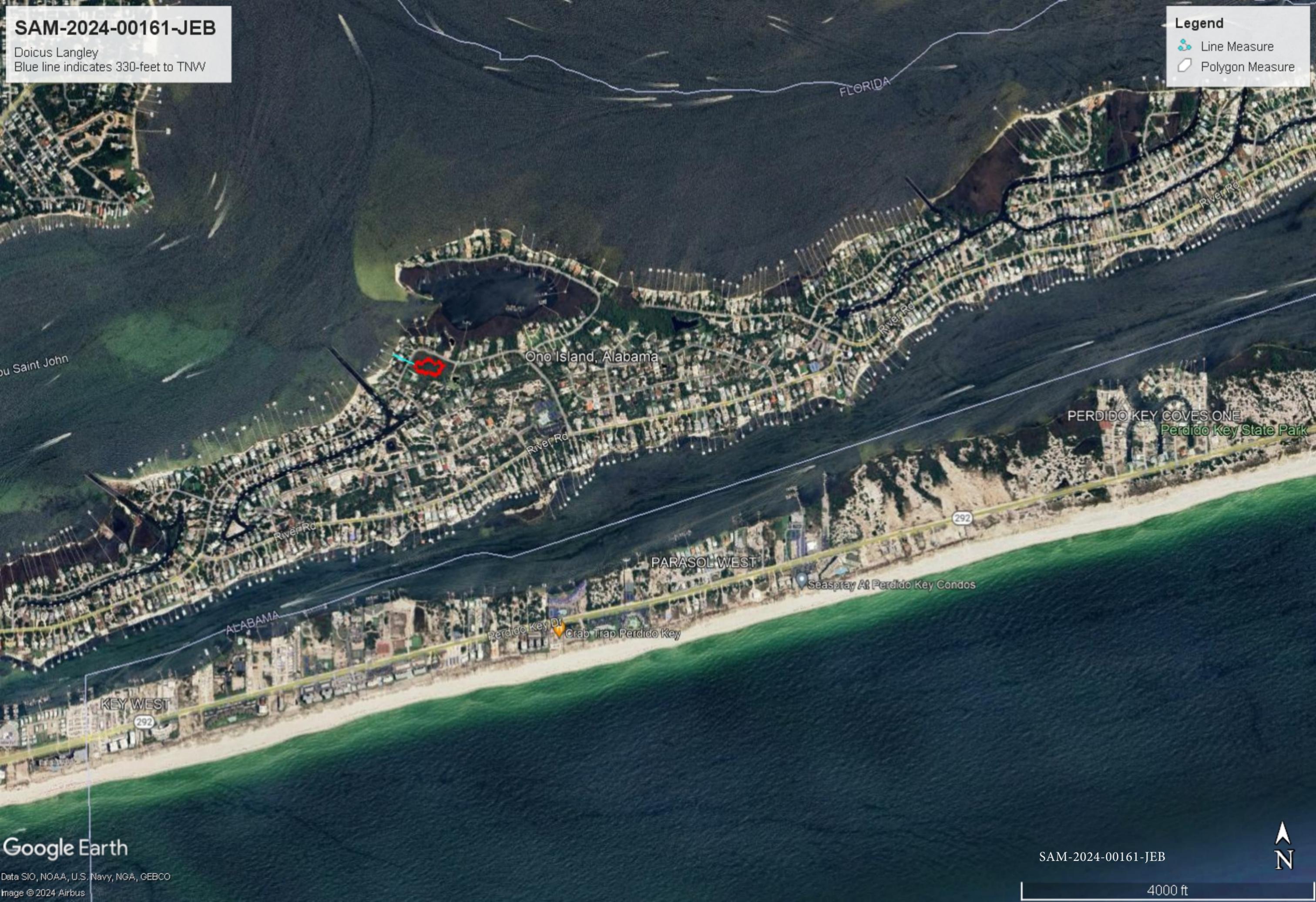


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Doicus Langley
Blue line indicates 330-feet to TNW

Legend

-  Line Measure
-  Polygon Measure



SAM-2024-00161-JEB

Doicus Langley
Blue line indicates 330-feet to TNW

Legend

- Line Measure
- Polygon Measure



Google Earth

Data SIO, NOAA, U.S. Navy, NGA, GEBCO
Image © 2024 Airbus

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4000 ft

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Doicus Langley
Blue line indicates 330-feet to TNW

Legend

- Line Measure
- Polygon Measure

Ono Harbor

Non-adjacent wetland
1.2-acres



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Doicus Langley
Blue line indicates 330-feet to TNW

Legend

- Line Measure
- Polygon Measure



Non-adjacent wetland
1.2-acres

Harbour Dr

Harbour Dr

Harbour Dr

Harbour Dr

Harbour Dr

Club Ct

One Harbor



30538 Harbour Dr, Orange Beach X

SAM-2024-00161-JEB



Scale: 1:4,514
Zoom Level: 17
300ft

-87.504 30.295 Degrees

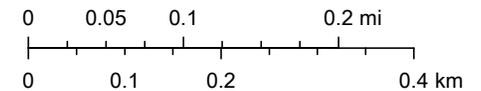
SAM-2012-00777-JEB



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- | | | | | |
|-------------------------|-----------|--------------------------|----------------------|------------|
| Waterbody - Large Scale | LakePond | SwampMarsh | Area to be Submerged | CanalDitch |
| Estuary | Playa | Area - Large Scale | BayInlet | DamWeir |
| Ice Mass | Reservoir | Area of Complex Channels | Bridge | Flume |

1:9,028



USGS National Map 3D Elevation Program (3DEP), USGS TNM - National

USGS

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Doicus Langley
Blue line indicates 330-feet to TNW
Green indicates AJD area.

Legend

- Line Measure
- Polygon Measure



AJD area
0.324-acres



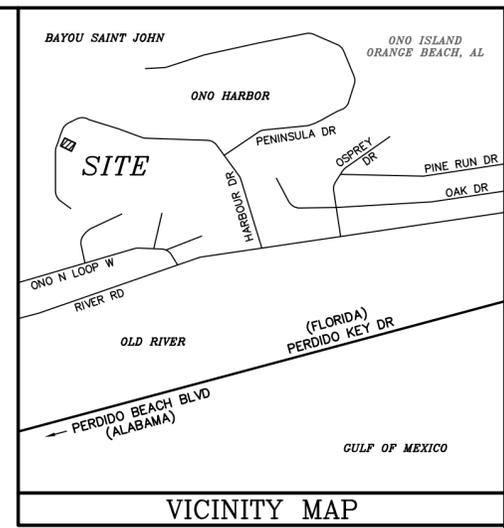


LEGEND

- R/W RIGHT-OF-WAY
- (REC) RECORD
- - - - RIGHT-OF-WAY-LINE
- - - - CENTER LINE
- - - - FORESHORTENED LINE
- ⊕ TEMPORARY BENCH MARK



SCALE: 1" = 20'



VICINITY MAP

NOTES:

- 1.) Standards of Practice for Land Surveying in Alabama require that "the horizontal position of physical features must be plotted to 1/20th inch of final map scale". Dimensions "snapped" from the electronic version of this map should be considered to be no more accurate than 1/20th of the map scale noted. Critical clearance dimensions must be field checked.
- 2.) Type of Survey: Site Plan.
- 3.) Field Date(s): June 01, 2023.
- 4.) Bearing Basis: Referenced to Alabama State Plane Coordinate System West Zone (102) NAD 83(2011) established by RTK GPS utilizing ALDOT Net as a continuously operating reference station.
- 5.) All corners are as noted.
- 6.) Setback lines shown on this plat (if any) are taken from the recorded plat of the subdivision. Setback lines established by statute, ordinances or restrictive covenants are not shown.
- 7.) This drawing does not reflect an easement or title search by the surveyor. Easements or Claims of easements may exist.
- 8.) Interior improvements (if any) not located.
- 9.) Elevations on this plat are referenced to NAVD 88, established by RTK GPS utilizing ALDOT Net as a continuously operating reference station.

LEGAL DESCRIPTION

STATE OF ALABAMA
COUNTY OF BALDWIN

Lot 12, Ono Harbour, Unit Four, as recorded on Slide 1444-A,
Probate Court Records, Baldwin County, Alabama.

I hereby state that all parts of this survey and drawing have been completed in accordance with the current requirements of the Standards of Practice for Surveying in the State of Alabama to the best of my knowledge, information and belief.

This is to state that I have consulted the Federal Insurance Administration Flood Hazard Boundary Map No. 01003C0xxx M, and dated April 19, 2019, and found that the above described property now is located in Flood Hazard Area "AE" (EL 8) as determined by a graphic scaling.

Date: 06/01/2023

Cecil T. Hudson, PLS
Alabama Licensed Professional
Land Surveyor No. 29983-S
Prints not valid unless
they bear an original seal



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REVISIONS:	
1/24/2024	House

<h3>SITE PLAN</h3>	
<h2>ROWE</h2>	
ENGINEERING & SURVEYING	
CONSULTING ENGINEERS	
3502 LAUGHLIN DR • SUITE B • MOBILE, AL 36693	
PHONE 251-666-2766 • FAX 251-660-1040	
DRAWING: 52625-BL.dwg	CHECKED BY: CTH
DRAWN BY: BWL	PLAT DATE: 06/06/2023
JOB: 52625	SCALE: 1" = 20'
FB: 2059/65	
TAX: 64-03-06-0-000-001.086	

