



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
100 CANAL STREET
MOBILE, AL 36602-1901

CESAM-RD-M

August 6, 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 SAM-2024-00695-CSP, Ecological Asset Management, LLC, 8.60-acre Parcel E & F (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

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.

AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Mississippi 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	Waters Size	Type Of Aquatic Resource	Geographic Authority
W1	3.71 acres	NON-WOTUS-AJD. WETL NEGATIVE-A7	None
Non-RPW1	1,140 LF	NON-WOTUS. TRIB NEGATIVE-A5	None
Man-Made Ditch1	440 LF	NON-WOTUS. TRIB NEGATIVE-A5	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)
- d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
- e. 2008 Rapanos Guidance

3. REVIEW AREA. The site is located along Dolphin Lane; within Section 19, Township 7S, Range 10W; Latitude 30.422956° N and Longitude 89.0269382° W; HUC-03170009 – Mississippi Coastal; in Gulfport, Harrison County, Mississippi. The site is approximately 8.60 acres in size and is mostly forested, except for some areas along Dolphin Lane that have been cleared and a newly constructed commercial building in the northeastern corner of the subject site. Residential homes and Creel Circle border the property to the south, Old Lorraine Road borders the property to the west, Dolphin Lane borders the property to the north, and an undeveloped lot

borders to the property to the east. The subject wetland extends outside of the review area onto the adjacent parcel, which is assessed under the AJD file number SAM-2024-00697-CSP.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Big Lake is approximately 1.25 miles east of the site boundary. Big Lake is on the Mobile District's Section 10 Waters list and is therefore a TNW.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

W1 flows to the west and abuts two (2) non-RPWs.

W1 abuts non-RPW1 on the western boundary of Lot E and flows west through Lot F approximately 1,065 linear feet before entering Culvert #1 and continuing under Old Lorraine Road approximately 50 linear feet. The flowpath is then directed northward approximately 300 linear feet within a concrete flume, which is severely sloped from an elevation approximately 20 feet high to 1 foot. The flow then empties into the Industrial Seaway through the concrete flume and flows eastward into the Big Lake.

W1 also abuts the Man-Made Ditch1 and flows northwesterly approximately 440 linear feet. The flowpath then enters Culvert #2 and continues north under Dolphin Lane and into the Industrial Seaway for approximately 100 linear feet. The culvert pipe that empties into the seaway is approximately 5 feet above the mean high-water line.

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.

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
- 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

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.

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).

W1 is a wetland depression 3.71 acres in size that traverses the southern half of the subject site. The wetland abuts two (2) non-RPWs which carry flow off-site to the Industrial Seaway to the north and then east into Big Lake, a TNW. The wetland also continues to the west across Old Lorraine Road, which is outside of the review area. However, this portion of the wetland abuts a concrete flume, which is a non-RPW. W1 does not directly abut, nor does it have a continuous surface connection to a TNW, interstate water, relatively permanent impoundment, RPW, or territorial seas. Therefore, W-1 is not an adjacent wetland.

Non-RPW1 is a first order stream 1,140 feet in length with the review area which begins on Parcel E and flows west through Parcel F. The agent utilized the *North Carolina Division of Water Quality Methodology for Identification of Intermittent and Perennial Streams and Their Origins, Version 4.11* to assess the geomorphology, hydrology, and biology of Non-RPW-1. The resulting score was 14.5, indicating ephemeral flow regime. The stream conveys surface water from the surrounding uplands and wetlands but does not exhibit continuous flow at least seasonally. USACE conducted a site visit on May 19, 2025, and observed no surface water within this stream during that time. Utilizing the Antecedent Precipitation Tool (APT), USACE determined that the site visit was conducted during the wet season. While there was no rain at the project location since the end of April 2025, there was still wetter than normal antecedent rainfall conditions. The agent conducted another site visit on June 16, 2025, and observed surface water within the stream. The APT indicates this site visit was conducted during the dry season and there was a large rain event in the days leading up to June 16, 2025. Again, there was wetter than normal antecedent rainfall conditions during the agent's site visit. Therefore, surface water within this stream only occurs directly after storm events and does not persist. The stream channel depth is shallow at only a few inches, which is higher than the water table found in the wetland. There was no water table observed in the wetland within 12 inches of the soil surface at the time the datasheets were completed. Neither topographic maps nor the national hydrology dataset map depict any tributaries within the review area. For these reasons, the feature lacks baseflow. The feature also lacks a discontinuous bed and bank since the only flow is directly after storm events and is not continuous enough for a bed and bank to persist. The feature is sparsely vegetated which typically indicates a relatively permanent flow. However, this area of the site has been cleared and there is little vegetation even within the wetland/upland areas. There are equipment tire prints within this feature depicted in the May 19, 2025, site visit photographs indicating the feature has been impacted/maintained. The feature also exhibits a discontinuous ordinary high-water mark (OHWM) as it only appears in areas where a bed and bank is present. Non-RPW1 is considered a non-relatively permanent tributary because it lacks a bed and bank, lacks baseflow, lacks an OHWM, and lacks continuous connectivity. For these reasons, Non-RPW1 does not have relatively permanent flow and is therefore not jurisdictional.

Man-Made Ditch1 is 440 feet in length located on Lot F that was dug partially in wetland and uplands, and is connected to Non-RPW1. The stream conveys surface water from the surrounding uplands and some wetlands but does not exhibit continuous flow at least seasonally. Most of the surface water from W1 appears to flow westward along Non-RPW1 and not through Ditch1. USACE conducted a site visit on May 19, 2025, and observed no surface water within the

ditch during that time. Utilizing the Antecedent Precipitation Tool (APT), USACE determined that the site visit was conducted during the wet season. While there was no rain at the project location since the end of April 2025, there was still wetter than normal antecedent rainfall conditions. The agent conducted another site visit on June 16, 2025, and observed surface water within the ditch. The APT indicates this site visit was conducted during the dry season and there was a large rain event in the days leading up to June 16, 2025. Again, there was wetter than normal antecedent rainfall conditions during the agent's site visit. Therefore, surface water within this ditch only occurs directly after storm events and does not persist. The ditch channel depth also appears to be higher than the water table found in the wetland. There was no water table observed in the wetland within 12 inches of the soil surface at the time the datasheets were completed. While a portion of ditch was created in the wetlands, the majority of ditch was created in uplands. Neither topographic maps nor the national hydrology dataset map depict any tributaries within the review area. Again, the only flow is directly after storm events. For these reasons, the feature lacks baseflow. While the ditch does have a bed and bank, this is an artificial feature mostly created in uplands, which appears to be maintained due to the recent clearing and grading activities that have taken place along and within this feature. The feature is sparsely vegetated which typically indicates a relatively permanent flow. However, this area of the site has been cleared and there is little vegetation even within the wetland/upland areas. Ditch1 exhibits an OHWM due to the artificial bed and bank and surface flow from storm events. Ditch1 is considered a non-relatively permanent tributary because it has an artificial bed and bank that lacks baseflow and lacks continuous connectivity. For these reasons, Ditch1 does not have relatively permanent flow and is therefore 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. Ecological Asset Management, LLC's Wetland Delineation Report dated July 8, 2024
 - b. Ecological Asset Management, LLC's additional information for Dolphin Lane Lots E & F dated June 25, 2025
 - c. Ecological Asset Management, LLC's stream assessment sheet using the *North Carolina Division of Water Quality – Methodology for Identification of Intermittent and Perennial Streams and Their Origins v. 4.11*

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- d. Corps LiDAR Elevations and Hillshade, NHD Map, Topographic Map, NWI Map, and the Section 10 Waters Map accessed using the National Regulatory Viewer
- e. Antecedent Precipitation Tool analysis of the review area for May 19, 2025, and June 16, 2025
- f. Corps site visit photographs May 19, 2025

10. OTHER SUPPORTING INFORMATION.

- a. Memorandum to the Field Between the U.S. Department of the 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”, March 12, 2025.

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.

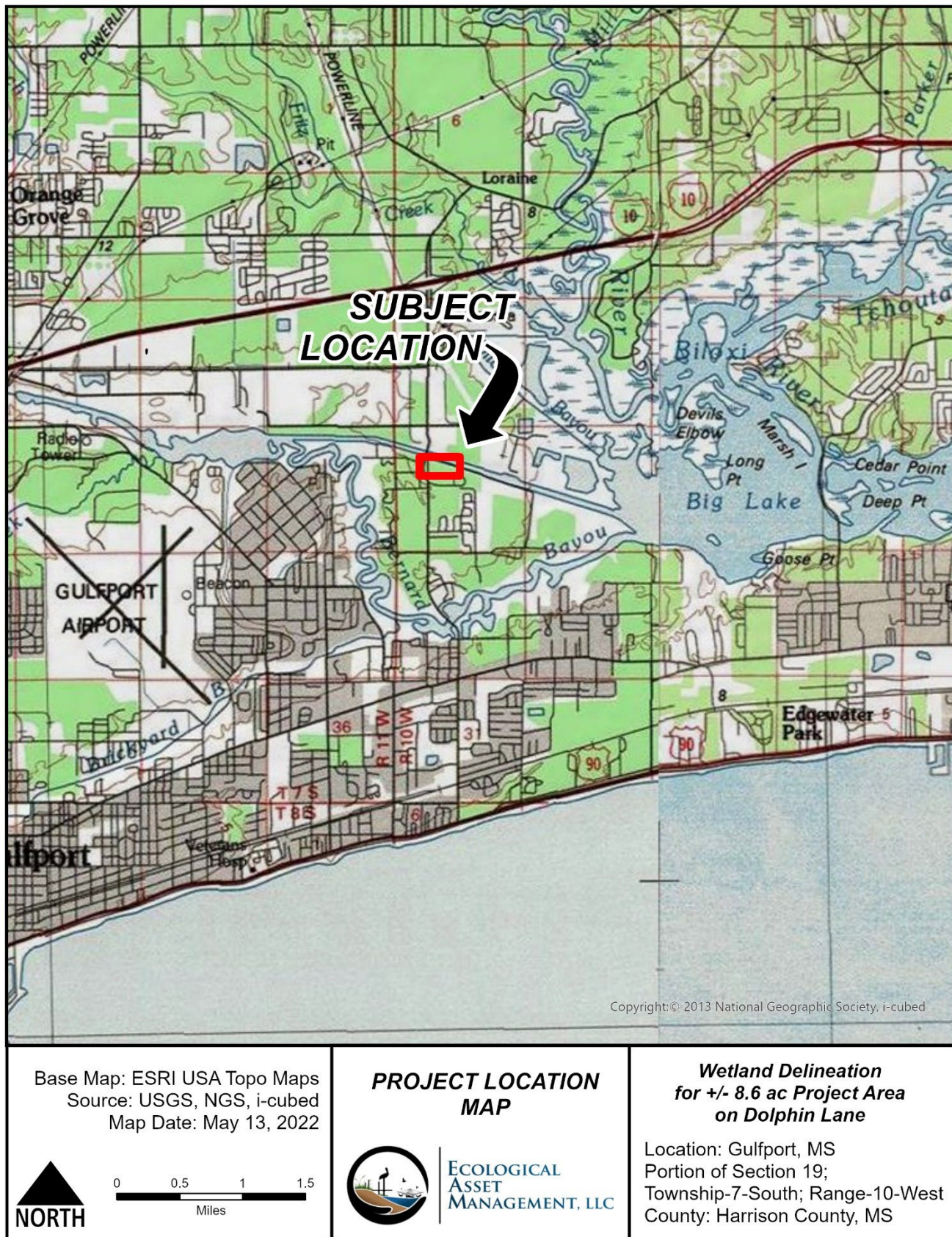


Figure 1: Project Location of the +/- 8.6-acre Dolphin Lane project area; Gulfport, Harrison County, MS.

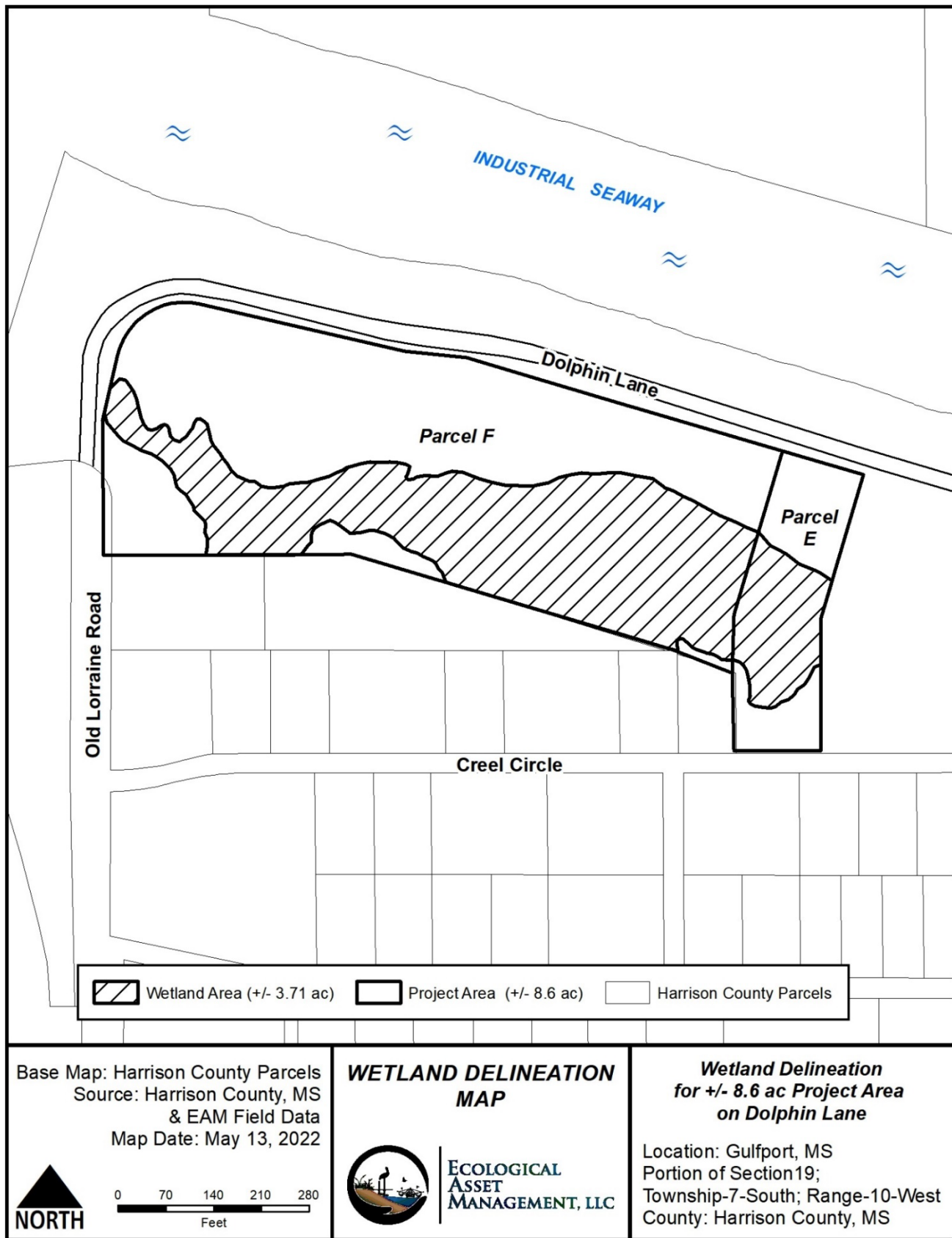


Figure 2: Wetland Delineation Map of the +/- 8.6-acre Dolphin Lane project area; Gulfport, Harrison County, MS

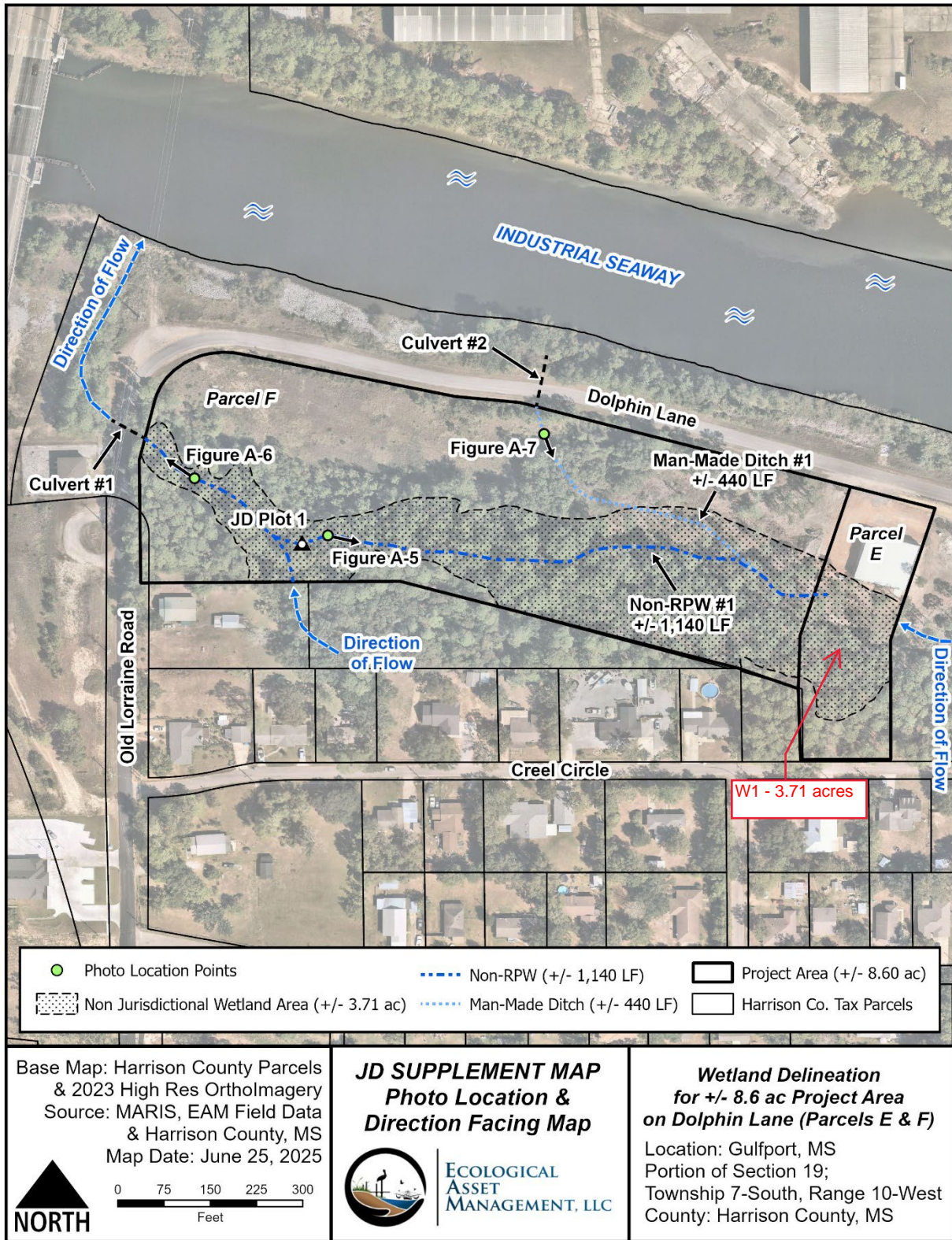


Figure 1. JD Supplement Map with Photo Locations

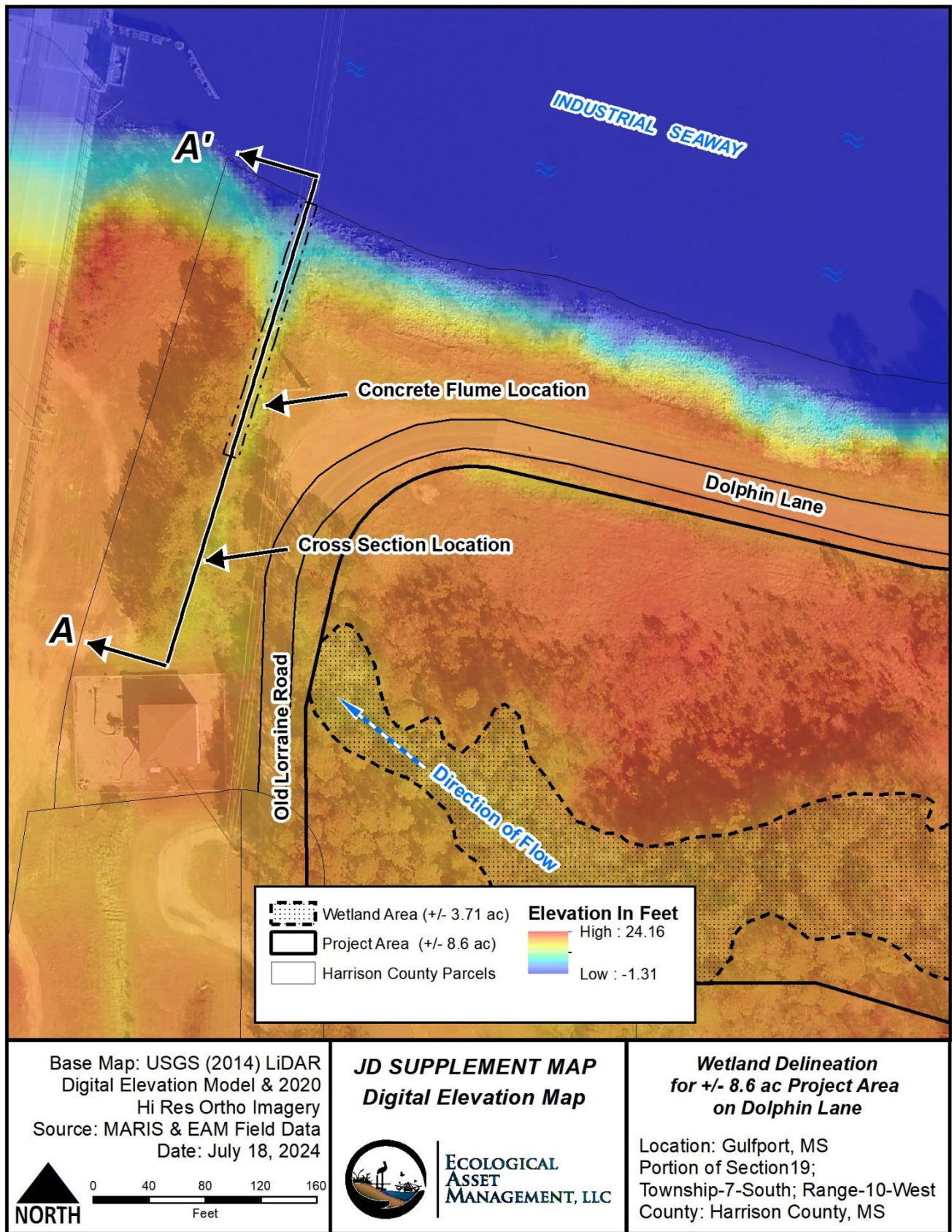


Figure 4: DEM and Cross Section Location Map for the +/- 8.6-acre Dolphin Lane project area; Gulfport, Harrison Co., MS

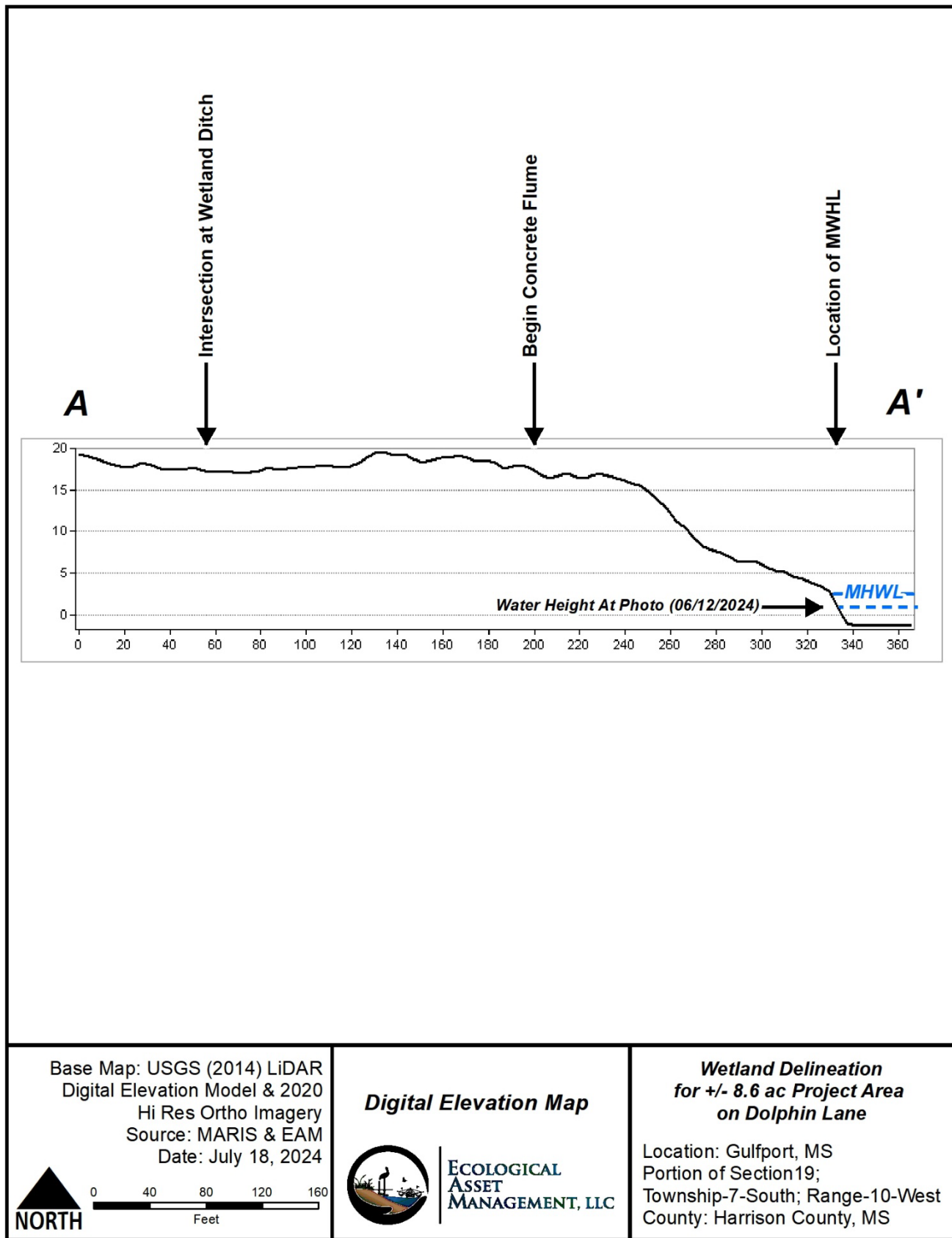


Figure 5: Concrete Flume Cross Section for the +/- 8.6-acre Dolphin Lane project area; Gulfport, Harrison County, MS