



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SWF DISTRICT  
819 TAYLOR STREET  
FORT WORTH, TEXAS

CESWF-RDE

May 01, 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),<sup>1</sup> SWF-2023-00244.

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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 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.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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- 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).

Water Feature	TNW	Size	Status	Rationale
Forested FW09	No	0.036	Not Jurisdictional	Pre-2015 regulatory regime consistent with the Supreme Court's decision in <i>Sackett</i>
Forested FWL11	No	0.029	Not Jurisdictional	Pre-2015 regulatory regime consistent with the Supreme Court's decision in <i>Sackett</i>
Emergent EW06	No	0.66	Not Jurisdictional	Pre-2015 regulatory regime consistent with the Supreme Court's decision in <i>Sackett</i>
Emergent EW09	No	0.533	Not Jurisdictional	Pre-2015 regulatory regime consistent with the Supreme Court's decision in <i>Sackett</i>
Pond OW01	No	0.66	Not Jurisdictional	Preamble Water
Pond OW02	No	0.533	Not Jurisdictional	Preamble Water
Pond OW06	No	1.95	Not Jurisdictional	Preamble Water
Swales VS01, VS02, VS11-VS35, VS37-VS41, VS43-VS65, VS67, VS70	No	0.39 AC	Not Jurisdictional	Rapanos Guidance

## 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).

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- 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 approximately 777.85205 acres of rural land in the Blackland Prairie Region in Limestone County, Texas. Elevation ranges from 480 to 515 feet above mean sea level. The southeastern portion of the project area is mostly flat. As the project area drains to the west, the channel of an unnamed tributary to Big Elm Creek is located in a valley at 480 feet above MSL. The project area quickly climbs to a crest of 515 feet above MSL. Average slopes throughout the project area are approximately 2 percent with a maximum slope approaching approximately 10 percent. Per Texas Parks and Wildlife Department (1984) the side is located within the Oak-Mesquite-Juniper Parks/Woods vegetation type.
- This is a bifurcated AJD/PJD. The buildable acres for the AJD are 731.4656 acres; The avoided acreage for the PJD is 46.38645 acres. There is no other relevant site-specific information or previous JDs associated with the review area. Reference Enclosure 1 for site location map, Enclosure 2 for all delineated features and Enclosure 3 for map of buildable acres for this AJD.
- Center coordinates: 31.521970-96.680317.  
Watershed: Brush Creek-Big Creek watershed; HUC 10:1207010102
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The swales are not connected to other features and are most likely animal trails. The ponds are man-made isolated features, each with small wetland nearby, one forested wetland appears to be a remnant and now an isolated feature.
- See PJD for features avoided including the stream and wetland-swales complexes. These features drain into other streams that eventually drain into the Brazos River (TNW)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Isolated features have only overland flow towards Big Elm Creek, Indian Camp Creek, Cottonwood Creek, Big Creek, Little Brazos River, Brazos River.

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6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> Not applicable.
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): Not applicable.
  - b. Interstate Waters (a)(2): Not applicable.
  - c. Other Waters (a)(3): Not applicable.
  - d. Impoundments (a)(4): Not applicable.
  - e. Tributaries (a)(5): Not applicable.
  - f. The territorial seas (a)(6): Not applicable.
  - g. Adjacent wetlands (a)(7): Not applicable.
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").<sup>7</sup> Include size of the aquatic resource or feature within

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 51 FR 41217, November 13, 1986.

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the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Information referenced in Section 9 indicates that the ponds listed in Section 1a were excavated by humans (i.e., artificially created) within dry land (i.e., upland). Flows received to and conveyed from these ponds are from stormwater runoff from uplands. Review of aerial imagery indicates that streams, lakes, or wetlands are not nearby these ponds.

The ponds meet the description of water features that generally are not considered waters of the United States as detailed in the 1986 preamble of the regulations—33 CFR, part 328.3 (c)—artificial lakes or ponds created by excavating and / or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

Water Feature	Coordinates	Size	Status	Rationale
Pond OW01	31.530153 -96.690888	0.66	Not Jurisdictional	Preamble Water
Pond OW02	31.52025 -96.681808	0.533	Not Jurisdictional	Preamble Water
Pond OW06	31.524223 -96.701238	1.95	Not Jurisdictional	Preamble Water

- 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.

Numerous scattered vegetated swales are included in this AJD because they are not linked to a stream and are most likely features created by livestock grazing. The swales meet the description of features that agencies generally will not assert jurisdiction over as detailed in the Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in *Rapanos v. United States* ^ *Carabell v. United States*.

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Water Feature	Coordinates	Size (AC)	Status	Rationale
Swales VS01, VS02, VS11-VS35, VS37-VS41, VS43-VS65, VS67, VS70	Varies	0.39	Not Jurisdictional	Rapanos Guidance

- 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. Not applicable.
- 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. Not applicable.
- 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*. Not applicable.
- 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 emergent wetland EW09 is most likely the area where spillway of pond OW06 occasionally overflows or feeds the area via lateral infiltration of pond water. EW06 is related to OW02 and may be the head of the pond or a small fringe wetland. The ponds are isolated and man-made; thus, these wetlands are considered isolated.

The small, forested wetland appears disconnected from other features that were avoided and are listed in the PJD for this bifurcated project. It may once upon a

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time been connected to the ephemeral stream, but no longer displays a connection.

Water Feature	Coordinates	Size	Status	Rationale
Forested FWL11	31.529873, -96.685305	0.029	Not Jurisdictional	Pre-2015 regulatory regime consistent with the Supreme Court's decision in Sackett
Emergent EW06	31.520503 -96.681882	0.66		
Emergent EW09	31.523926 -96.700808	0.533		

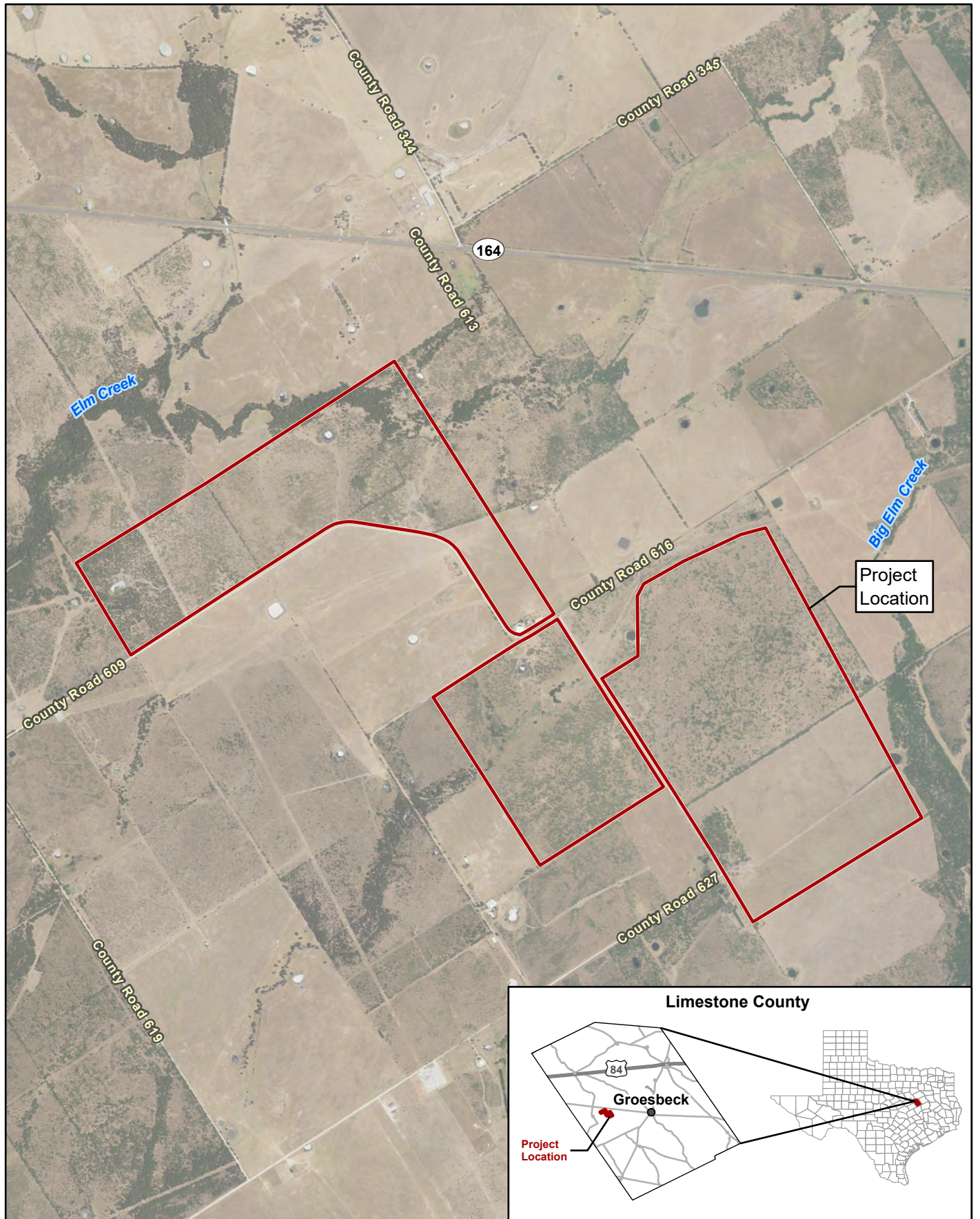
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. USACE site visit was not necessary and a conference calls with the consultant in addition to desk-top review (February 6, 2024) of all available information listed herein was used for this determination, multiple dates of review. The consultant visited the site on March 31, April 4, and June 19-20, 2023.
  - b. Maps, delineation of aquatic resources, waters delineation report and other information submitted on behalf of the applicant by the consultant, multiple submittal dates.
  - c. National Wetlands Inventory, National Hydrography Dataset, 3DEP Hillshade and Slope, USGS Topo Map, Soils Maps, National Regulatory Viewer-SWD-Texas, multiple assessment dates.
  - d. 1987 Wetland Delineation Manual and Great Plains Supplement were referenced to identify potential jurisdiction.
  - e. Regulatory Guidance Letter 2005-05 was used to identify the boundaries of non-wetland water features.
  - f. Regulatory Guidance Letter 2005-05 was used to identify the boundaries of non-wetland water features.
10. OTHER SUPPORTING INFORMATION. [N/A or Provide any additional discussion to support this determination.]

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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 (Aerial Base)**

Naduah Solar

 Project Location



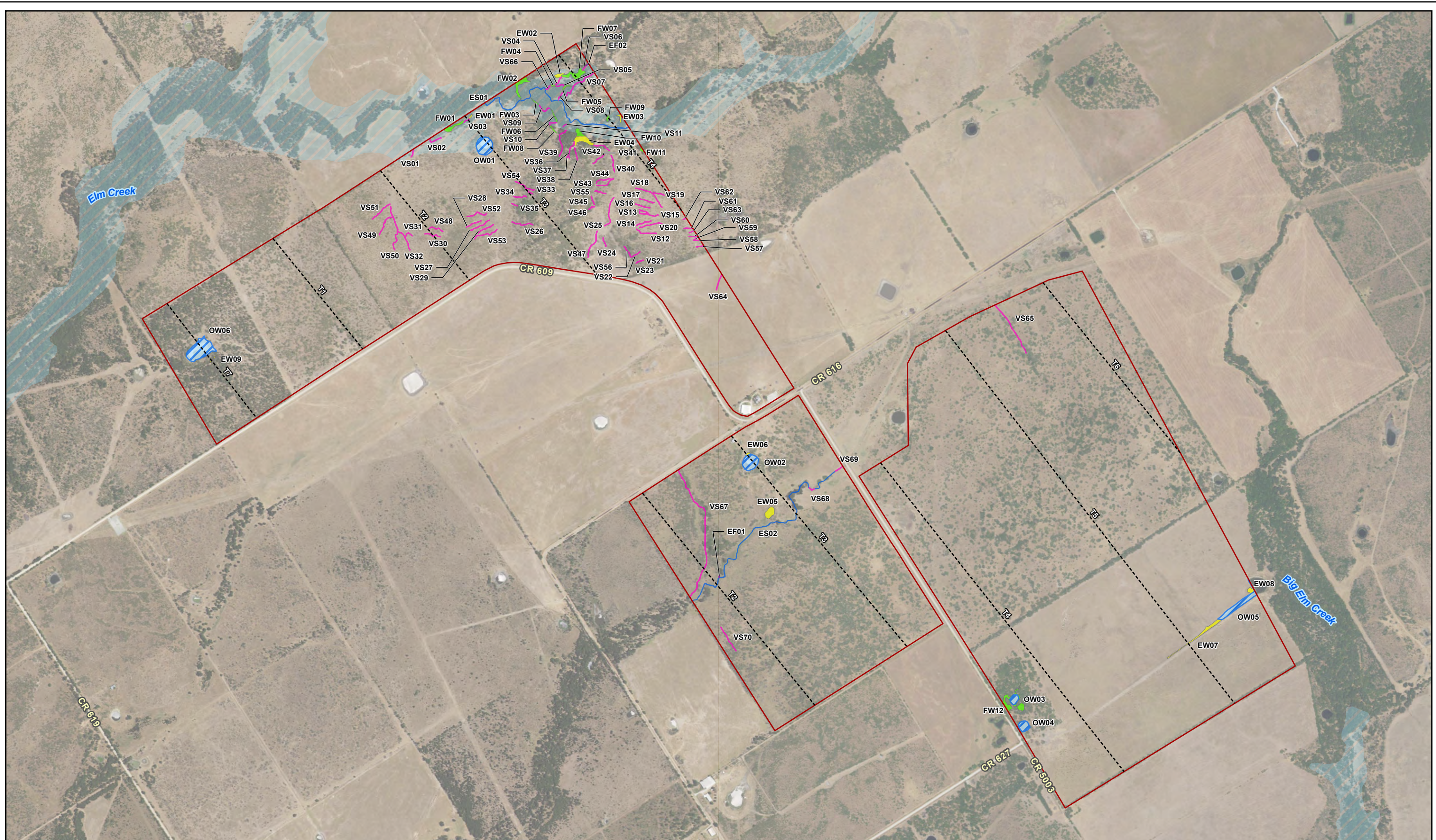
 Stantec

0 2,000 Feet 1 in = 2,000 feet  
0 600 Meters Scale: 1:24,000  
Date: 6/22/2023

Aerial Source: NAIP (2022)

Path: U:\2353\235300863\03\_data\gis\_cad\gis\naduah\_solar\_eatr.aprx - naduah\_all\_figure\_1\_project\_location\_aerial\_20230622.tls





**Figure 8.**  
**Overview of Delineated Aquatic Features**

Naduah Solar  
U:\2353\235300863\03\_data\gis\cad\gis\naduah\_solar\_npr\_letter.aprx

- Project Location
- 100-Year Flood Zone
- Emergent Wetland
- Erosional Feature
- Open Water
- Ephemeral Stream
- Forested Wetland
- Vegetated Swale
- Transect

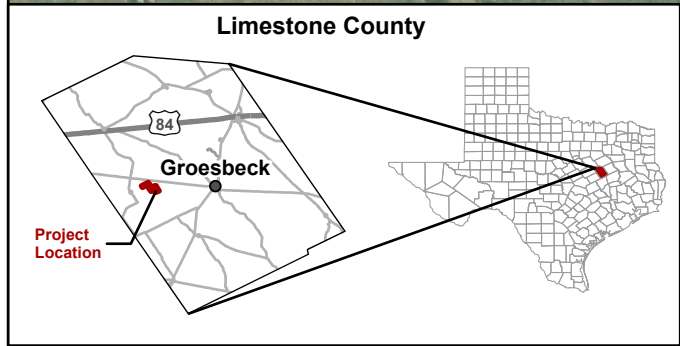
Data Sources:  
Stantec (2023), FEMA (2023)  
Aerial Source: NAIP (2022)

0 1,000 Feet 1 in = 1,000 feet

0 300 Meters Scale: 1:12,000

Date: 7/18/2023





**Project Location (Aerial Base)**  
**Buildable Area**

Naduah Solar

Path: U:\2353\235300863\03\_data\gis\_cad\gis\naduah\_solar\_npr\_letter.aprx - naduah\_npr\_project\_location\_aerial\_20240408.tls

- Parcel/Lease Boundary
- Buildable Area
- Forested Wetland
- Bore Location
- Emergent Wetland
- Open Water

0 1,000 Feet 1 in = 1,000 feet

0 300 Meters Scale: 1:12,000

Date: 4/5/2024

Data Source: Stantec (2024)  
Aerial Source: Maxar (2023)