



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT
819 TAYLOR STREET
FORT WORTH, TEXAS 76102

CESWF-RDE

June 3, 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 [SWF-2023-00276](#), 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.

CESWF-RDE

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWF-2021-00360

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.

- 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
PB02 (pond)	No	0.37 AC	Not Jurisdictional	Preamble Water
PB03 (pond)	No	0.42 AC	Not Jurisdictional	Preamble Water
SW-28 (pond)	No	0.30 AC	Not Jurisdictional	Preamble Water
S-10 (swale)	No	1539 LF	Not Jurisdictional	Rapanos Guidance
S-11 (EF1)	No	52 LF	Not Jurisdictional	Rapanos Guidance
S-23 (EF 2)	No	1894 LF	Not Jurisdictional	Rapanos Guidance
S-24 (EF 3)	No	26 LF	Not Jurisdictional	Rapanos Guidance
S-25 (EF 4)	No	200 LF	Not Jurisdictional	Rapanos Guidance
S-5A (ES)	No	1730 LF	Not Jurisdictional	Does not meet (a)(5)

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 approximately 1600 acres located in rural Bell County, Texas (31.136043°, -97.258526°). There is no relevant site-specific information or previous JDs associated with the review area. Reference Enclosure 1 for map of the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Not applicable⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. [The flow path of the aquatic features is southeast towards the Brazos River.](#)⁷
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ [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

⁶ 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.

⁷ 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.

- 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”).⁸ 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.

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.

- 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.

The swale is at the uppermost end of a stream channel. Neither stream characteristics nor indicators of an ordinary high water mark (OHWM) were observed. The swale is channelized and has been modified by human activity over the past several decades. The swale is in a portion of the tract that is used for row-crop agriculture and subject to normal farming practices that are not regulated. Desktop tools (i.e., topo maps, NWI, NHD) indicate a historic stream system, where the swale feature was identified. However, evidence collected and detailed herein indicates that topographic maps, NWI, and NHD do not accurately identify the current landscape within the review area.

Erosional features 1-4 formed as a result of row-crop agricultural practices. Desktop tools (i.e., topo maps, NWI, NHD) do not indicate that the erosional features were part of a stream system.

The swales and erosional features meet the description of features that agencies generally will not assert jurisdiction over as detailed in Clean Water Act

⁸ 51 FR 41217, November 13, 1986.

[Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*.](#)

- 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).

[S-5A is a first order stream that begins within the review area and ends off site. It has an overall length of 2862 feet. 60% of the stream reach is within the review area. The National Hydrography Dataset \(NHD\) identifies the stream as having an intermittent flow duration. However, evidence from on-site observation, small drainage area \(<150 acres\), and desktop resources indicate that the stream has an ephemeral flow duration. Thus, S-5A does not provide sufficient flow duration to constitute sustained, seasonal flow and is not a relatively permanent water. S-5A flows only in direct response to precipitation events, as evidence detailed herein indicates.](#)

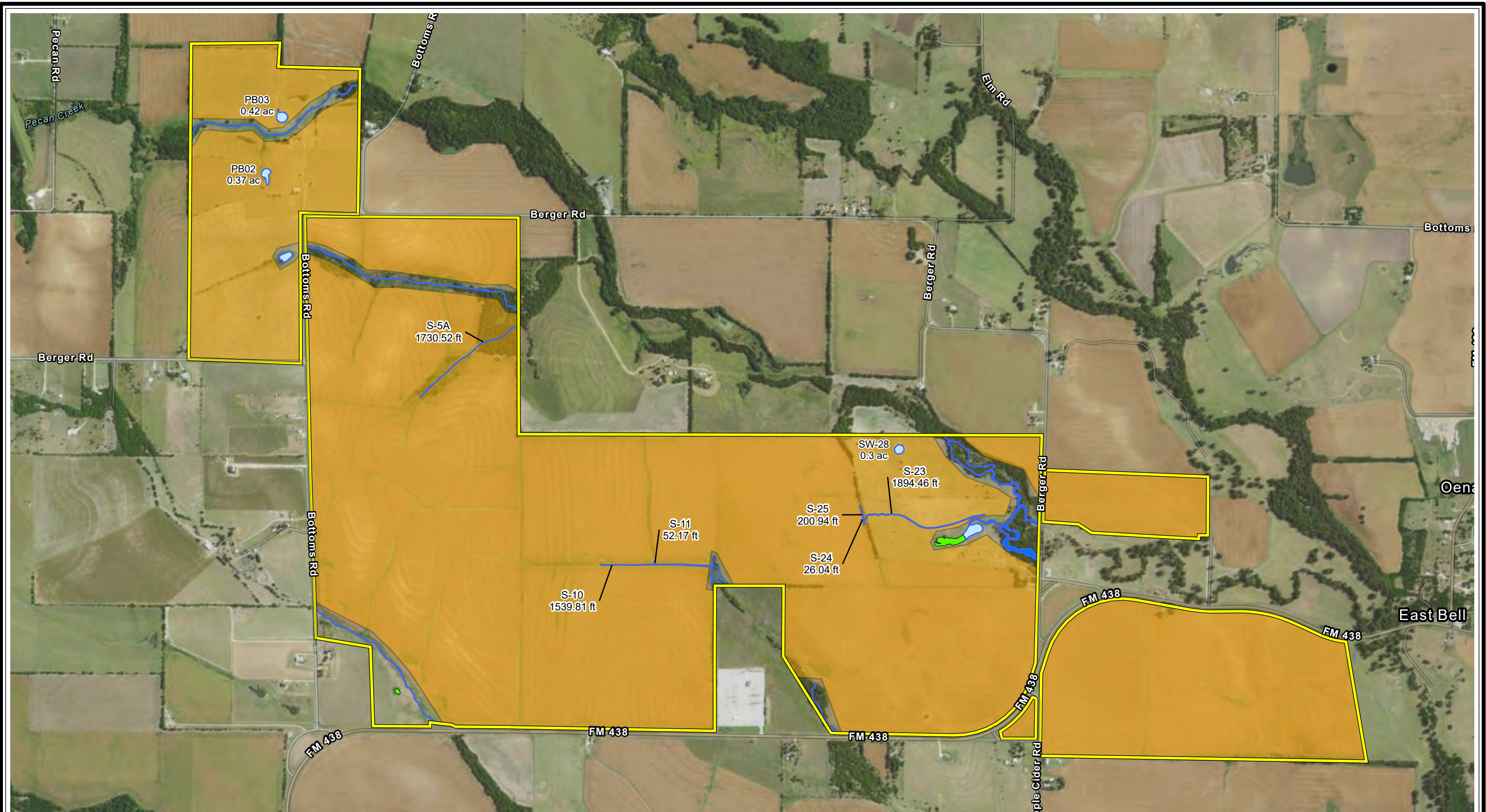
[Lastly, S-5A is not a paragraph \(a\)\(1\) TNW, not a paragraph \(a\)\(2\) interstate water \(i.e., it does not cross or serve as a state boundary\), not a lake or pond and is therefore not paragraph \(a\)\(3\) water \(i.e., lakes or ponds that support a](#)

CESWF-RDE

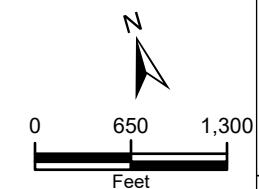
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWF-2021-00360

link to interstate or foreign commerce because it is known to be used by interstate or foreign travelers), not a paragraph (a)(4) impoundment of a water of the U.S., not a paragraph (a)(5) tributary due to its non-relatively permanent flows, not a paragraph (a)(6) territorial sea, and not a paragraph (a)(7) adjacent wetland.

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 conducted August 16, 2023.
 - b. Maps, delineation of aquatic resources, 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. Aerial imagery provided by online resources, Google Earth Pro and Historicaerials.com, all available years, multiple assessment dates.
10. OTHER SUPPORTING INFORMATION. Additional analysis for S-5A: Only the upper 1200 linear feet (LF) of the stream had unobstructed view by using Google Earth Pro aerial imagery. For the upper 1200 LF section of the stream water was not observable within any of the images reviewed (June 2004, October 2005, June 2008, December 2009, November 2011, December 2012, February 2015, August 2015, January 2017, January 2018, August 2018, October 2019, May 2021, August 2022).
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.



- Project Boundary
- Approved Jurisdictional Determination Area
- Culvert
- Stream
- Wetland
- Waterbody



Base Layer: USDA NAIP Aerial Imagery, 2021

Figure 2
Approved Jurisdictional Determination

Limewood Solar
Bell County, Texas

Date: 4/16/2024

ECT