



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SWF DISTRICT
819 TAYLOR STREET RM 3A37
FORT WORTH, TEXAS 76102

CESWF-RDE

20 MAY 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-2024-00225.

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 the State of Texas due to litigation.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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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).

ID	Area (AC)	Length (LF)	Jurisdictional (Section 404)	Water of the US (WOUS)
ES-1	0.0036	NA	Non-Jurisdictional	Not WOUS
ES-2	0.0035	NA		
EW-1	0.05	NA		
EW-2	0.02	NA		
UP-1	0.04	NA		
UP-2	0.11	NA		
UP-3	0.28	NA		
UP-4	0.05	NA		
UP-5	0.03	NA		
UP-6	0.067	NA		
UP-7	0.04	NA		
UP-8	0.34	NA		
UP-9	0.07	NA		
EF-1	NA	214		
SW-1	NA	294		
SW-2	NA	98		
SW-3	NA	296		
SW-4	NA	230		
SW-5	NA	459		
SW-6	NA	799		
SW-7	NA	265		
SW-8	NA	163		
SW-9	NA	178		
SW-10	NA	3,976	Avoided – No determination mad	Not evaluated

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 study area is 1,117 acres of undeveloped land located northeast of the City of Floresville, Wilson County, Texas. (See attached Site Location Map and Aquatic Features Map set.) The area is located west of County Road 404 and north of County Road 405. The entire study area is located within FEMA's Zone X: Area of Minimal Flood Hazard and outside of the 100-year and 500-year flood zones. Wilson County is in the Southern Post Oak Savanna region of the East Central Texas Plains Ecoregion. Vegetative cover is mainly rangeland (40%), shrubland (30%) and upland forest (30%).
- Center coordinates: latitude, 29.161709; longitude -98.088060
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Gulf of Mexico.
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The nearest drainage is Marcelinas Creek, which is a Tributary of the San Antonio River and the Gulf of Mexico.
 6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

⁵ 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.

⁶ 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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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").⁷ 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.

NA

- 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.

⁷ 51 FR 41217, November 13, 1986.

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ID	Type	Coordinates	Area (AC)	Length (LF)	Jurisdictional (Section 404)	Justification
UP-1	Stock Ponds	29.157362, -98.105315	0.04	-	No	Rapanos Guidance - Swales or erosional features (e.g., gullies, small washes, characterized by low volume, infrequent, or short duration flow). Upland Stock Ponds, Excavated in uplands and observed to be off channel.
UP-2		29.15792, -98.1057450	0.11	-		
UP-3		29.159507, -98.098272	0.28	-		
UP-4		29.153936, -98.096251	0.05	-		
UP-5		29.155187, -98.086923	0.03	-		
UP-6		29.161993, -98.087172	0.067	-		
UP-7		29.164675, -98.092307	0.04	-		
UP-8		29.165301, -98.076632	0.34	-		
UP-9		29.168712, -98.079119	0.07	-		
EF-1	Erosional Feature	29.172651, -98.078464	-	214	No	Rapanos Guidance - Swales or erosional features (e.g., gullies, small washes, characterized by low volume, infrequent, or short duration flow). Generally dry and vegetated across the bottom. No observable OHWM, showed conditions of short duration, low volume flows and transition into overland flow.
SW-1	Swales	29.155447, -98.107683	-	294		
SW-2		29.157651, -98.105537	-	98		
SW-3		29.158054, -98.105236	-	296		
SW-4		29.163945, -98.102496	-	230		
SW-5		29.161869, -98.079003	-	459		
SW-6		29.166163, -98.088006	-	799		
SW-7		29.169138, -98.872809	-	265		
SW-8		29.171273, -98.084213	-	163		
SW-9		29.171353, -98.08389	-	178		

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- 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).

ID	Type	Coordinates	Area (AC)	Length (LF)	Jurisdictional (Section 404)	Justification
ES-1	Ephemeral Stream	29.165709, -98.086866	0.0036	156	Not JD	Non-WOTUS: Tributary to a water identified in paragraphs (a)(1) through (4), where the tributary is not a relatively permanent, standing or continuously flowing body of water. Observed to transition into overland flow.
ES-2		29.166256, -98.08666	0.0035	152		

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ID	Type	Coordinates	Area (AC)	Length (LF)	Jurisdictional (Section 404)	Justification
EW-1	Emergent Wetland	29.159546, -98.099022	0.02	163	Not JD	Non-WOTUS: Wetland that is not adjacent to water identified in paragraph (a)(1) through (6). Linear in nature, resulting from ponded runoff along an elevated ridge
EW-2		29.160297, -98.099993	0.05	182		

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 by contractor occurred February 14-15, 2023. USACE in-office determination conducted on May 9, 2024.
 - b. USGS topographic map: Marcelinas Hill, Texas quadrangle (Per Delineation Report).
 - c. National Wetlands Inventory Maps (NWI), FEMA Flood Insurance Rate Map (FIRM) (Panel Number 48493C0325C, Eff. Nov 25, 2010; National Hydrography Dataset (NHD), HUC # 12-121003030203 on SWD Regulatory Viewer.
10. OTHER SUPPORTING INFORMATION. See Project files SWF-2024-00225 for maps, data, photos, Waters Delineation Report, and kmz file submitted by the applicant.
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

DATE: 08/07/2023
DRAWN: BLD
CHECKED: SPN
KVA NO: 068913009

VICINITY MAP
Source: ESRI Basemap

ALINA ENERGY PROJECT
Wilson County, Texas

Kimley»Horn

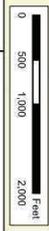
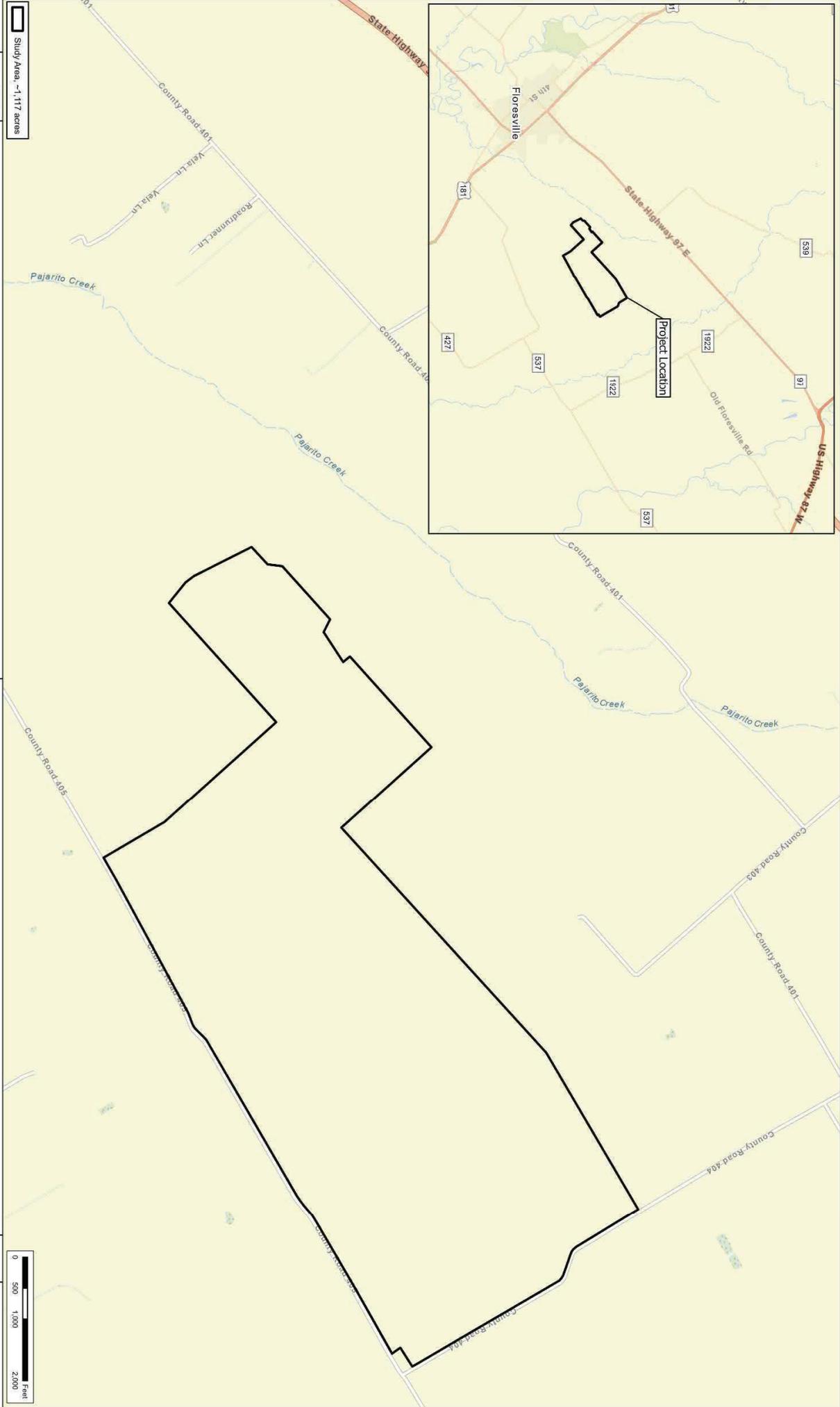


FIGURE
1.0

DATE: 02/15/2024
DRAWN: RSK
CHECKED: CBH
KMA NO.: 088915009

AQUATIC FEATURES MAP KEY SHEET
Source: Neatmap January 2023

ALINA ENERGY PROJECT
Wilson County, Texas

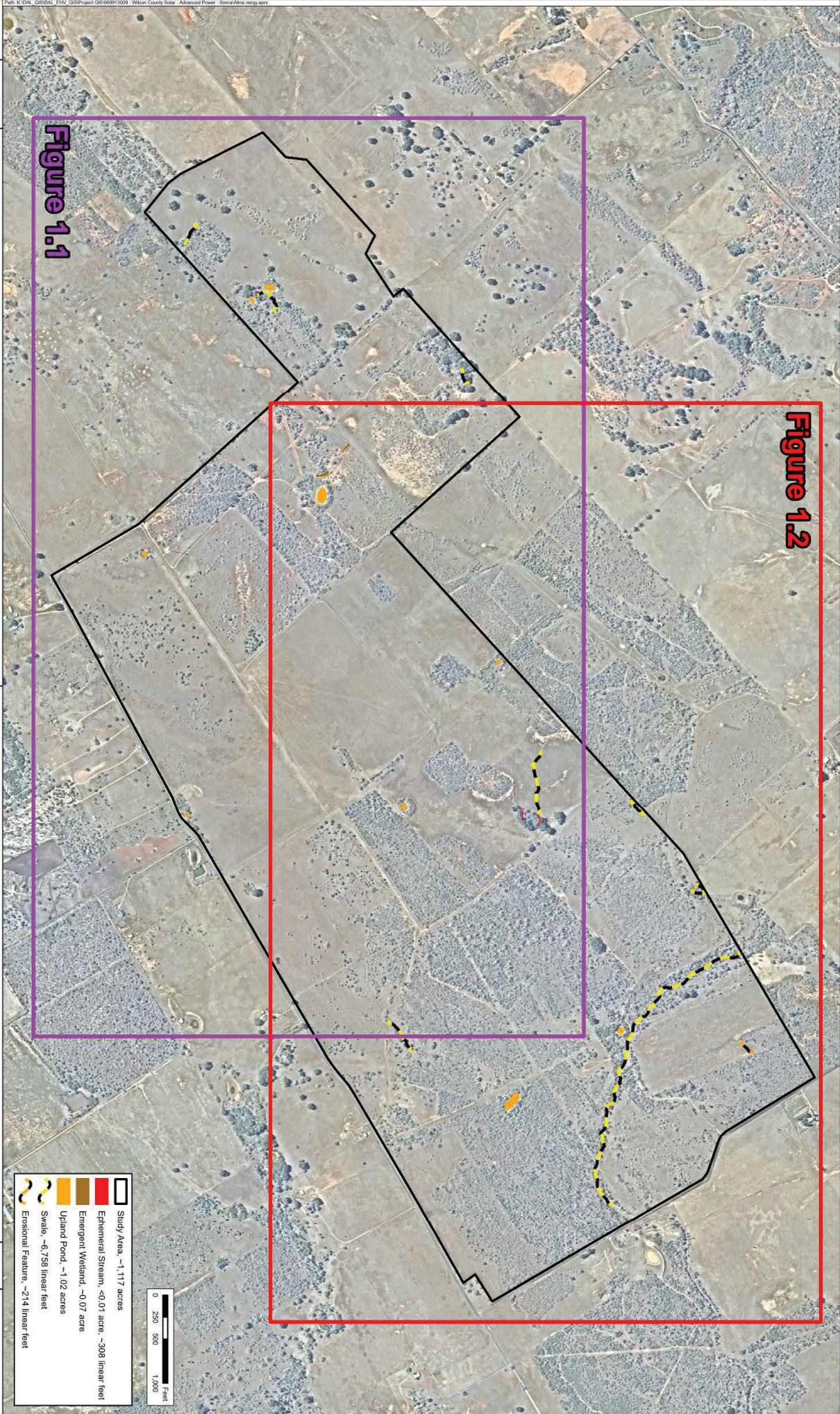


Figure 1.1

Figure 1.2

- Study Area, ~1,117 acres
- Ephemeral Stream, <0.01 acre, ~308 linear feet
- Emergent Wetland, ~0.07 acre
- Upland Pond, ~1.02 acres
- Swale, ~6,738 linear feet
- Excessional Feature, ~214 linear feet

