



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

CESWF-RDE

12 August 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-2024-00310.

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 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).

Aquatic Features					
ID	Type 1	Type 2	WOTUS	TNW	Authority
S1	Ephemeral stream	Non RPW	No	No	NA
S2	Ephemeral stream	Non RPW	No	No	NA
S3	Ephemeral stream	Non RPW	No	No	NA
S4	Ephemeral stream	Non RPW	No	No	NA
SW1	Vegetated Swale	Non RPW	No	No	NA
SW2	Vegetated Swale	Non RPW	No	No	NA
SW3	Vegetated Swale	Non RPW	No	No	NA
UD1	Upland drainage	Non RPW	No	No	NA
UP1	Upland pond	Non RPW	No	No	NA
UP2	Upland pond	Non RPW	No	No	NA
UP3	Upland pond	Non RPW	No	No	NA
UP4	Upland pond	Non RPW	No	No	NA

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. Include review area size, latitude, and longitude (in decimal degrees) at the center of the review area, city, county, and state. Attach relevant figures including one depicting the boundary of the review area. Include any additional relevant site-specific information associated with this AJD request, and any additional details, such as previous JDs (and their outcomes) in the review area.

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The site's two areas (216 acres) are intersected by FM 1209, southwest of FM 969 and southeast of the Colorado River (a TNW) in Bastrop County, Texas. The site is within the Willbarger Creek-Colorado River and the Piney Creek-Colorado River watersheds (USGS HUCs 1209030101 and 1209030102). Center coordinates are: 30.152, -97.410.

Most of the site is undeveloped rangeland with four residential buildings in the western portion of the study area. Vegetation is approximately 60% forbs and 40% woody vegetation. There are 16 soil types mapped on the site, which range from fine sand, fine sandy loams, loams, silty clay loams, silty clay and clay. Three of the soil types were mapped as hydric soils for Bastrop County. No wetlands were observed during the consultant's site reconnaissance. The topographic map showed one blue line feature and the NWI map (SWD Regulatory Map Viewer) showed three blue line features and three pond features located within the study area. The blue line features were determined to be upland drainage features and the two drainages west of FM 1209 faded out into the floodplain close to the western boundary as illustrated in the SWD Regulatory Map Viewer Hill-shade Map. All three streams were confirmed to have disconnected sections during the site visit (See Figure 3 Aquatic Features Map). A man-made ditch (UD1) and trail-like feature was created between 2022-2023 (Google Maps), which disconnected 2 upland ponds (UP2 and UP3) from stream (S1). The drainage from pond (UP3) now flows through a man-made ditch (UD1). The ephemeral stream (S3) is connected to ephemeral stream (S1) by a culvert under FM 1209. All ponds found on the site were confirmed to be excavated in upland areas.

Per the FEMA maps, the NW portion of the study area is within Zone AE: 100-Year Floodplain and Zone AE: 500-Year Floodplain. In addition, a 275 LF strip of Zone A is depicted through the central portion of the study area along S1 (ephemeral) and a smaller area along SW1 (swale). The remainder of the study area is listed as Zone X: Area of Minimal Flood Hazard. During field reconnaissance, the riverine features were identified as ephemeral streams and vegetated swales (S1-S4, SW1-SW4). The pond and freshwater emergent wetlands (NWI map) were determined to be excavated upland ponds (UP1-UP4). Refer to attached maps and Delineation Report.

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

The nearest TNW is the Colorado River, which is to the northwest approximately 0.5 miles from the site.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

Water appears to drain through ephemeral and grass swales to ponds on site and the channels then fade out into the floodplain. Water will eventually enter the Colorado River or infiltrate into the floodplain land.

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

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.

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.

- 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): 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.

Not applicable.

- 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.

Not applicable.

- 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.

⁷ 51 FR 41217, November 13, 1986.

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- 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).

ID	Type 1	Coordinates	Length (LF)	OHHM (LF)	Area (AC)	Description
S1	Ephemeral, Non RPW	30.149396, -97.410017	1,222	2	0.06	The stream originated from the roadside culvert was observed to be dry with a stream bed composition of sand and dead leaves. The stream terminated on site.
S2	Ephemeral, Non RPW	30.149003, -97.409963	191	2	0.01	Streams S2 and S3 were observed to be dry and separated by a swale, (SW3). Both streams generally travelled north into the roadside culver off FM 1209
S3	Ephemeral, Non RPW	30.148292, -97.410141	330	2	0.02	
S4	Ephemeral, Non RPW	30.146535, -97.407999	972	2	0.07	Stream S4 was observed to originate offsite and travelled onsite to the north. The stream was observed to originate offsite and travelled onsite to the north. S4 was observed to be dry and terminate onsite.
SW1	Vegetated Swale, Non RPW	30.154233, -97.415662	406	-	-	The three swales were observed to be vegetated across the bottom with upland vegetation. An OHHM was not observed, and no surface water was present. The swales appeared to only receive infrequent flows for short duration.
SW2	Vegetated Swale, Non RPW	30.153024, -97.415128	394	-	-	
SW3	Vegetated Swale, Non RPW	30.148308, -97.410134	100	-	-	
SW4	Vegetated Swale, Non RPW	30.154127, -97.408758	220.34	-	-	

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UD1	Vegetated Swale,	30.155731, -97.410022	728	-	-	This non-RPW, upland drainage feature appears to convey flow from an upland pond (UP3) during flooding events. The upland drainage feature was observed to be dry, excavated in uplands and maintained through artificial armoring of the bed and bank. The feature terminates prior to reaching the floodplain. (UD1) feature was built within the 2022-2023 timeframe.
UP1	Upland pond, Non-RPW	30.155901, -97.415208	-	-	0.04	The current, non-RPW, upland ponds appear to be isolated and entirely excavated in uplands for use in agricultural purposes. UP1, UP2 and UP4 were observed to be completely isolated and non-adjacent to other features. Only UP3 has a connection to the UD1 ditch. UP3 was observed to be isolated from surface connection to the upland drainage feature (UD1).
UP2	Upland pond	30.155675, -97.411885	-	-	0.25	
UP3	Upland pond	30.155273, -97.408790	-	-	0.39	
UP4	Upland pond	30.150778, -97.413273	-	-	0.08	

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.

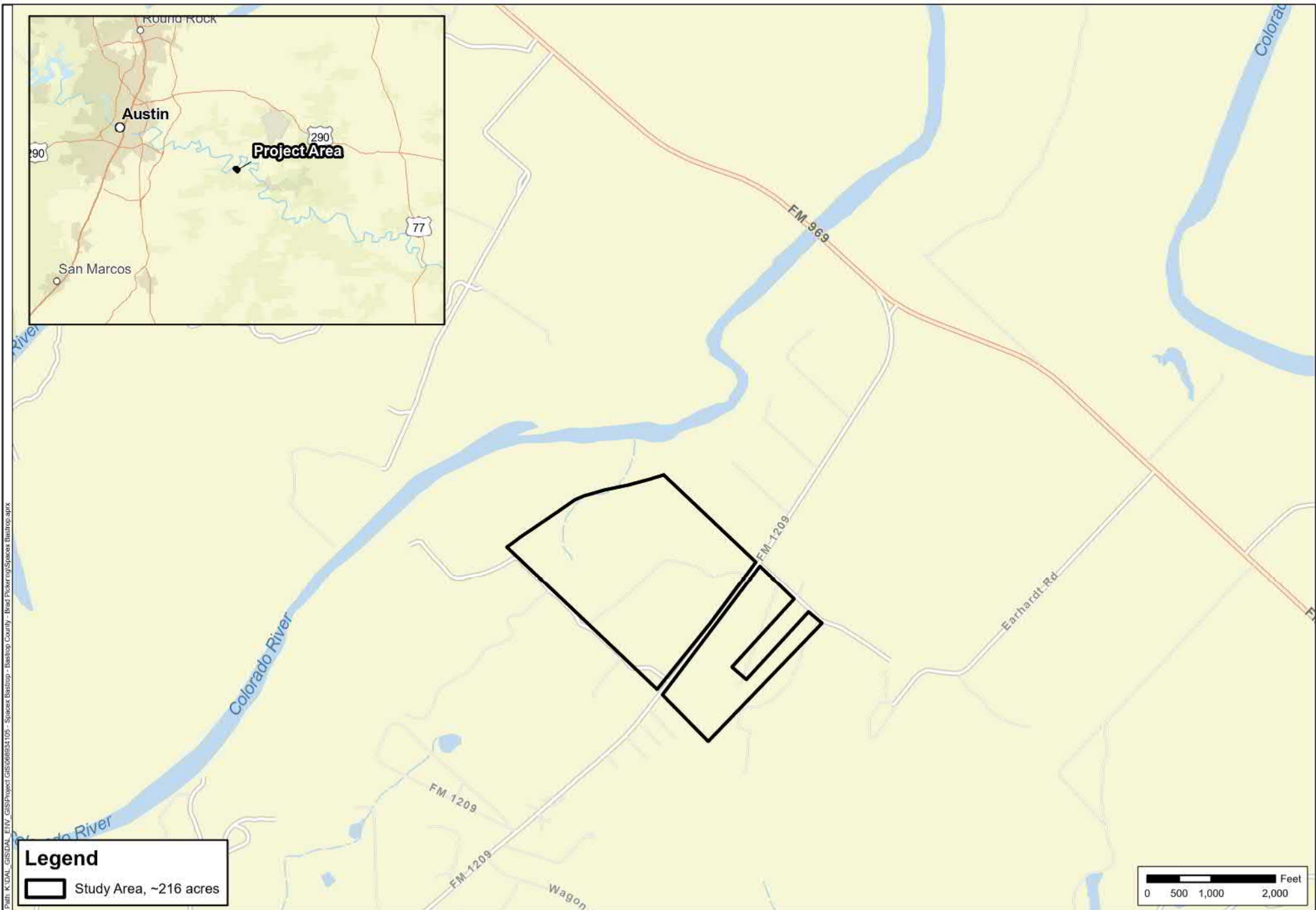
- a. The contractor's site visit occurred on April 16, 2024. In office USACE evaluations occurred on September 11, 2024.
- b. SWD Regulatory Mapper – topography, NWI, NHD, FEMA and hill shade layers, accessed on September 11, 2024.
- c. Google Earth timeline aerials 2002 through 2023, accessed on September 11, 2024.
- d. Aquatic Resources Delineation Report, SpaceX Bastrop, dated June 4, 2024 (several resources were cited in this report including FEMA Map National Flood Hazard Layer, USACE Wetlands Delineation Manual, USACE Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region Version 2, March 2010, USDA NRCS Web Soil Survey, USGS Topographical Map, USFWS NWI Online Mapper.)

10. OTHER SUPPORTING INFORMATION. N/A

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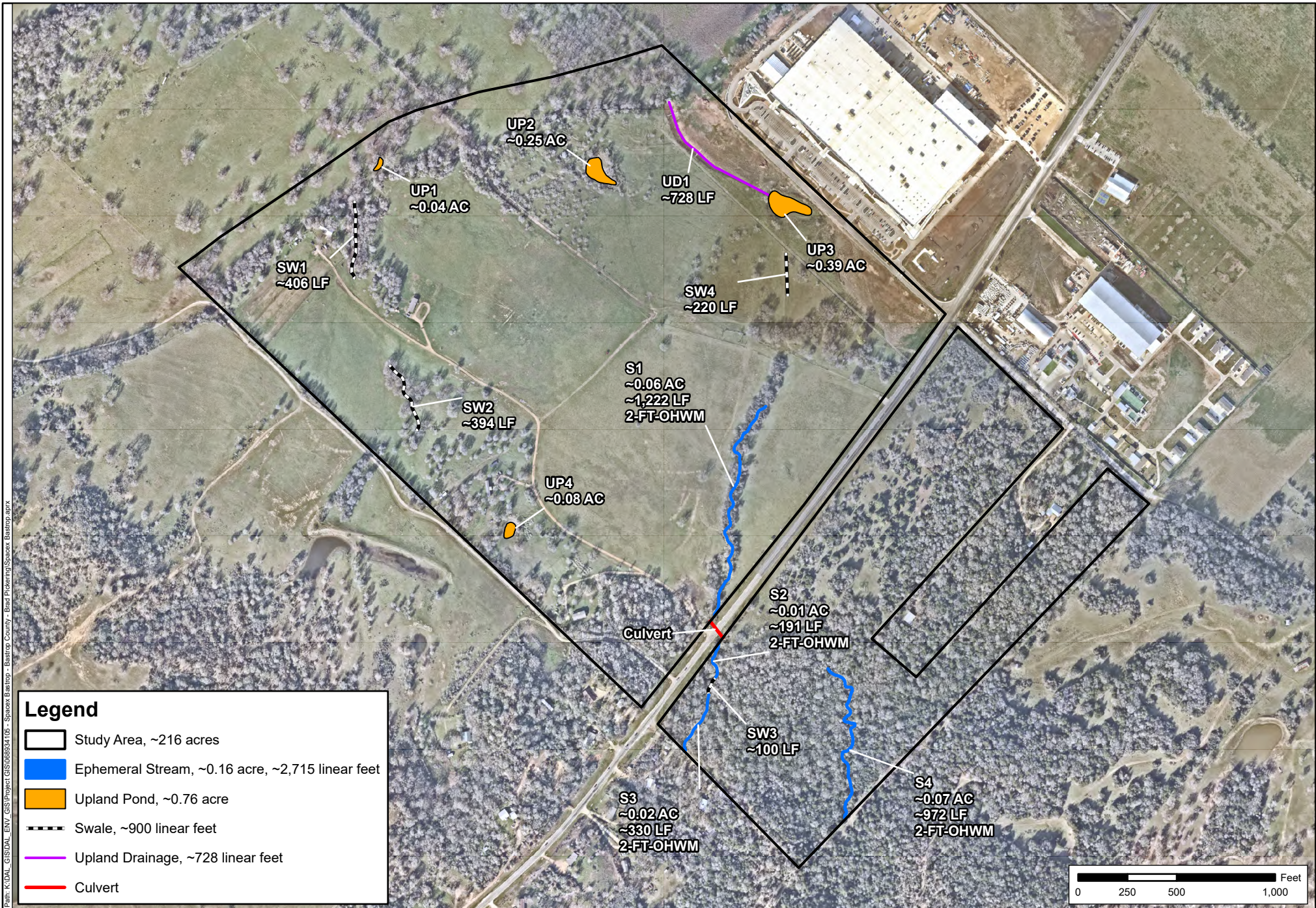
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11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance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



<p>FIGURE</p> <p>1</p>	<p>DATE: 05/07/2024</p> <p>DRAWN: KRK</p> <p>CHECKED: CGH</p> <p>KHA NO.: 068934105</p>	<p>Vicinity Map</p> <p>Source: ESRI Basemap</p>	<p>SpaceX Bastrop</p> <p>Bastrop County, Texas</p>	<p>Kimley»Horn</p> <p><small>This product is for informational purposes only and may not have been prepared for or be suitable for legal, engineering, or survey purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.</small></p>
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FIGURE

3

DATE: 05/07/2024
 DRAWN: KRK
 CHECKED: CGH
 KHA NO.: 068934105

Aquatic Features Map

Source: Nearmap January 2024

SpaceX Bastrop

Bastrop County, Texas



Kimley»Horn

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PANEL
48021C0195F
eff. 5/9/2023

Zone
AE

30.157782 -97.392061 Degrees

Austin Community College, City of Austin, Texas Parks & Wildlife, Esri,

Oklahoma

Texas

Missouri

Arkansas

Louisiana

Tools



Texas Regulatory Viewer

IPaC DigitalGlobe USGS Stream Stats



30.152, -97.410



Show search results for 30.152, -97.410



600ft

30.152306 -97.411986 Degrees

Austin Community College, City of Austin, Texas Parks & V