



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

CESWF-RDE

24 July 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-2024-00370.

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).

ID	Feature Type	Coordinates	Type 2	Jurisdiction	Authority
SW1	Swale	33.37389 -97.88429	Non-RPW	NA	NA
UP1	Upland Pond (PUSCh)	33.371912 -97.885322	Non-WOTUS	NA	NA
UP2	Upland Pond	33.372358 -97.88506	Non-WOTUS	NA	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. The review area is a 27-acre tract of undeveloped land located north of CR 1895 and east of CR 1875 in Wise County, Texas. The site is located in the Lake Bridgeport-West Fork Trinity River Watershed. The vegetation is predominantly rangeland with honey mesquite, prick pear cactus, Bermuda grass and post oak, round green briar, yucca and a few eastern red cedar. The site consists of three soils that range from loamy sand to sandy loam with slopes between 0-5 percent. None of these soils were listed on the hydric soils list by NRCS. USGS topography maps do not show any blue-line features for the site and FEMA FIRM has defined the entire area to be in Zone X: Area of Minimal Flood Hazard. USFWS NWI maps show two freshwater pond features in the southern portion of the study area, which were determined to be two upland stock ponds excavated wholly in uplands. One swale was observed in the northern portion of the property and was vegetated and isolated from other onsite aquatic features, there was not any OHWM, and it appears to be rain-fed. (See attached maps and refer to office files for more information.) Center coordinates; 33.373261, -97.885544.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Not applicable.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Not applicable.
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): 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”).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.

ID	Feature Type	Coordinates	Length (LF)	Area (AC)	Type 2	Description
SW1	Swale	33.37389 -97.88429	177	NA	Non-RPW	Rapanos Guidance – Swales was vegetated characterized by low volume, infrequent or short duration flow and isolated from other aquatic features.

- 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.

⁷ 51 FR 41217, November 13, 1986.

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- 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*.

ID	Feature Type	Coordinates	Length (LF)	Area (AC)	Type 2	Description
UP1	Upland Pond (PUSCh)	33.371912 -97.885322	NA	0.03	Non-WOTUS	Artificial lake/pond created by excavating/diking dry land, used exclusively for purposes such as stock watering, irrigation, settling basins or rice growing.
UP2	Upland Pond	33.372358 -97.88506	NA	0.02	Non-WOTUS	Artificial lake/pond created by excavating/diking dry land, used exclusively for purposes such as stock watering, irrigation, settling basins or rice growing.

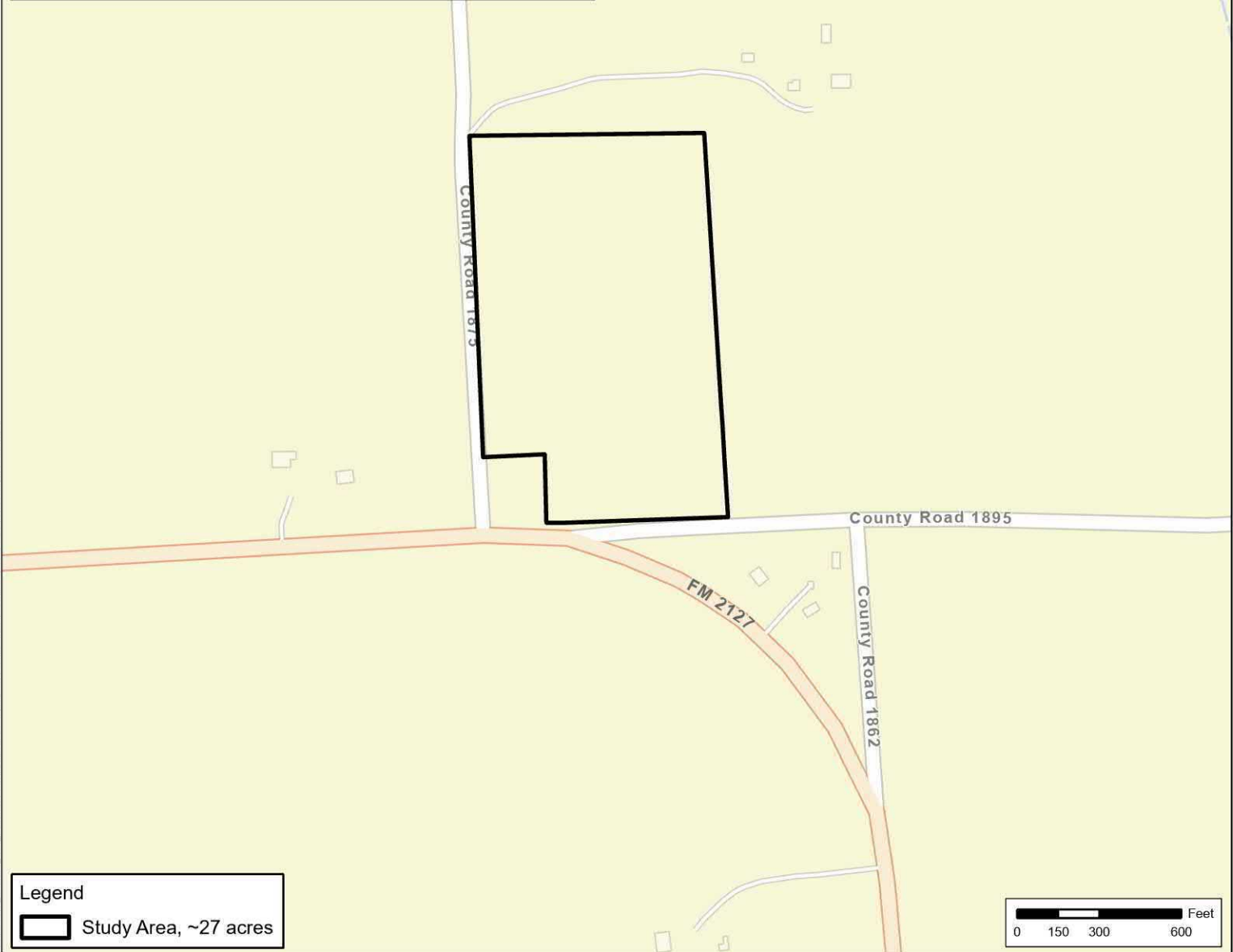
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Not applicable.

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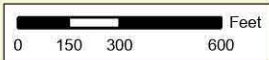
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9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Consultant's site visits were conducted on Feb 16, 2023, and May 30, 2024. USACE in-office review was conducted on July 23, 2024.
 - b. Aerial (2024), Aerial (2015), Color infrared (CIR) aerial photography., Historic Color Infrared Aerial (1996)
 - c. Aerial (2024), Aerial (2015), Color infrared (CIR) aerial photography., Historic Color Infrared Aerial (1996)
 - d. FEMA Mapped National Flood Hazard Layer
 - e. U.S. Department of Agriculture (USDA) Web Soil Survey
 - f. U.S. Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) online Mapper
 - g. United States Geological Survey (USGS) Hydrologic Unit Code (HUC) 1203010104
 - h. United States Geological Survey (USGS) Topographic Map
 - i. USACE Waterway Experiment Station Wetlands Research Program Technical Report Y-87-1, January 1987 as modified by Regional Supplement to the Corps of Engineers Wetland delineation Manual: Great Plains Region Version 2, March 2010
 - j. USACE, Corps of Engineers Wetlands Delineation Manual
10. OTHER SUPPORTING INFORMATION. Ground level photographs and data forms located within the "Aquatic Resources Delineation Report, Legato BESS, LLC, Wise County, Texas" dated June 19, 2024. (Refer to office files).
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.



Legend

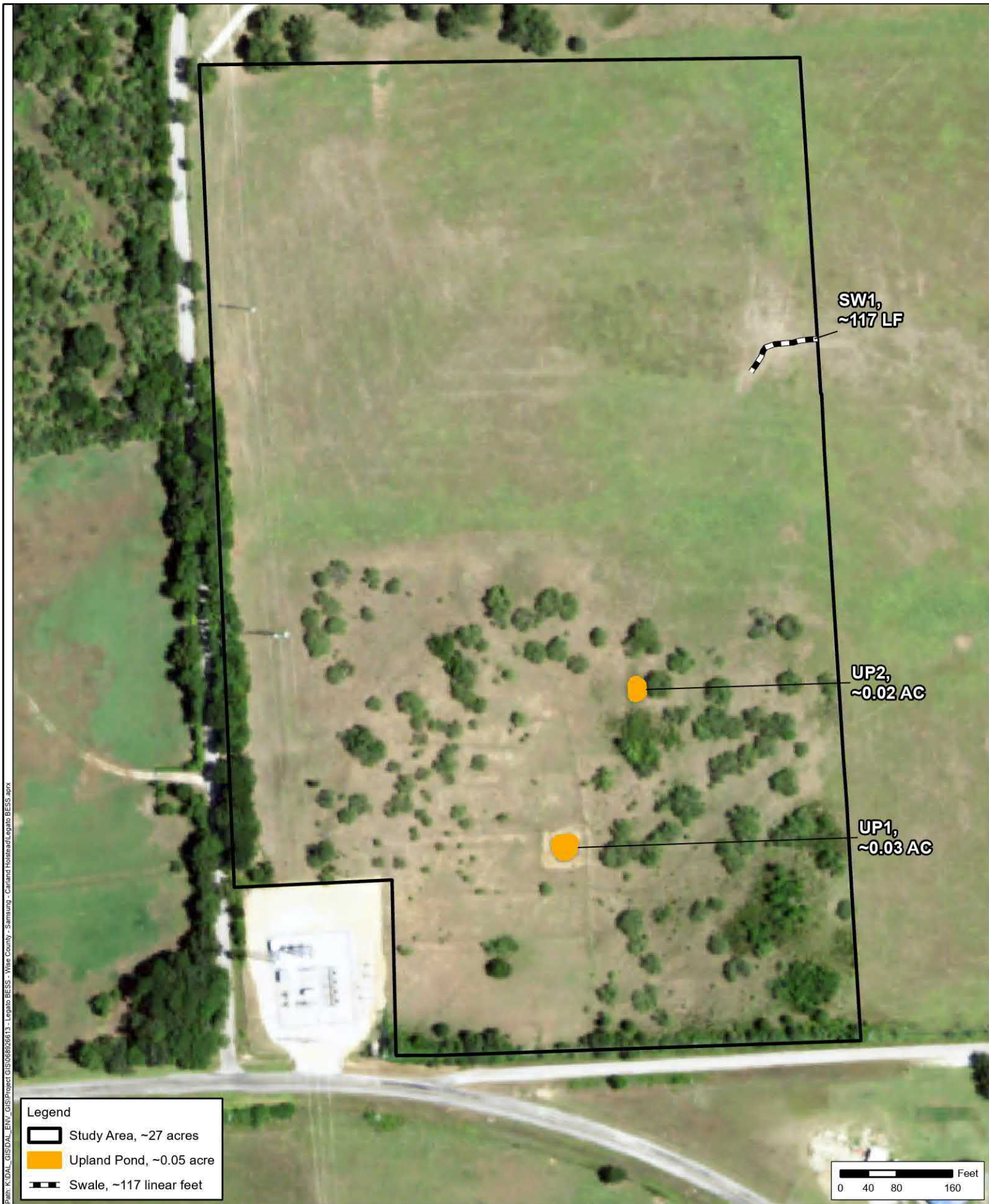
Study Area, ~27 acres



Path: K:\DAL_GISDAL_ENV\GIS\Project\GIS068926613 - Legato BESS - Wise County - Samsung - Corland Holbeard\Legato BESS.aprx

<p>FIGURE</p> <p>1</p>	<p>DATE: 06/11/2024</p> <p>DRAWN: MCF</p> <p>CHECKED: KRK</p> <p>KHA NO.: 068926613</p>	<p>Vicinity Map</p> <p>Source: ESRI Basemap</p>	<p>Legato Storage, LLC</p> <p>Wise County, Texas</p>		<p>Kimley»Horn</p> <p><small>This product is for informational purposes 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: 07/17/2024
DRAWN: MCF
CHECKED: MMC
KHA NO.: 068926613

Final Aquatic Features Map

Source: NAIP 2022

Legato Storage, LLC

Wise County, Texas



Kimley»Horn

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