



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

CESWF-RDE

30 SEPTEMBER 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-2024-00413.

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 Feature	Subsection	Coordinates	Jurisdiction	Section 404	Section 10
S1	NA	32.589545, -96.712634	Non-Jurisdictional, non-RPW	N/A	N/A
Stream 2 (Roadside Ditch, mapped on USGS, FEMA and NWI as stream)	S2a	32.589232, -96.720149	Non-Jurisdictional, non-RPW	N/A	N/A
	S2b	32.587630, -96.716762	Non-Jurisdictional, non-RPW	N/A	N/A
	S3	32.587551, -96.719926	Non-Jurisdictional, non-RPW	N/A	N/A
	On-line pool (Backwater at perched culvert)	32.587551, -96.719926	Non-Jurisdictional, RPW Approx. 1% of entire stream/ditch	N/A	N/A

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 site is south of Greene Road and North of Belt Line Road in the City of Lancaster, Dallas County, Texas. Total area is 57.0 acres. There are three ephemeral streams and a small backwater pond associated with a culverted road crossing. Approximately 4/5 of the site is in pasture/hay land and 1/5 is

forested. The main drainage has been altered and runs parallel to the roads on the west and south boundaries (S2a and S2b) and both stream portions have a heavily forested riparian area. Stream 1 (S1) runs approximately parallel to the eastern boundary and only half of the stream is on the project site. There are two soils listed for the site, 17-Branyon clay (0-1% slopes) and 44-Houston Black clay (1-3 percent sloped). These soils are listed as hydric soils and have slow infiltration rates. The entire area is mapped by FEMA as Zone X, Area of Minimal Flood Hazard. NWI maps show only streams 2a and 2b.

Center Coordinates: 32.588858, -96.716470

FEMA FIRM: panel 48113C0655K and 48139C0100F

Watershed: HUC 120301050203 Tenmile- Creek – Trinity River watershed

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

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

Flow path of first-order stream S-1 is to the south (half of the stream is off-site) and it merges with the first-order ditch/stream S-2 almost immediately off-site. S-3 is a split-off of S-2 (western boundary) and it rejoins S-2 on-site on the southern boundary. The off-site, second-order stream joins with Cottonwood Creek (third-order, 1.44 miles east), and flows eastward and merges with the Trinity River (TNW). The total distance from the site to the Trinity River is approximately 9.0 miles.

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

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.

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): 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. N/A
- 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. N/A

⁷ 51 FR 41217, November 13, 1986.

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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).

Aquatic Feature	Subsection	Coordinates	Area (AC)	Length (LF)	OHWM Width LF
S1		32.589434, - 96.712638	0.07	640	4
Total Stream 1			0.07	640	
Stream 2 (Roadside Ditch, mapped on USGS, FEMA and NWI as stream)	S2a	32.589428, - 96.720170	0.15	1,126	5-6
	S2b	32.587588, - 96.714958	0.34	2,249	2-6
	On-line pool (Backwater at perched culvert)	32.587567, - 96.719925	0.01	10	N/A
	Subtotal		0.5	3,385	
	S3	32.587964, - 96.7188930	0.20	1,166	2-8
	Total for Stream 2		0.7	4,551	

Stream S1 is a first-order reach that is approximately 2129 linear feet (LF) in length. It begins off site, north of the review area, and flows south for approximately 932 LF before entering the review area for 640 LF, then flows off site for approximately 557 LF until its confluence with Stream 2, off site. Approximately 30% (640 LF) of Stream 1 is within the review-area boundary. The drainage area for Stream 1 is less than 200 acres. Desktop resources (i.e., topo maps, NWI, NHD) do not indicate that Stream 1 was an historic stream system; however, the delineation provided by the consultant identified an OHWM and it was delineated as a stream rather than ditch constructed in upland. Aerial imagery (1938 to 2022) indicates the land use in the area largely is row-crop agricultural that presently is being converted to commercial property. Stream 1 has been channelized and modified by human activity over the past several decades. Pooling or flowing water was not observed within the on-site portion of Stream 1 during the consultant's field work on August 1, 2024. The consultant's report states that some areas of the on-site portion have defined banks, while other areas have some upland vegetation growth within the channel. Sediment settling within the streambed and some woody debris within the channel in some areas was also reported. Evaluation for the presence / absence of visible water within Stream 1 by using Google Earth Pro aerial imagery was not possible because the entirety of the channel being reviewed is obstructed from view by vegetation for all available imagery dates. Small drainage area and desktop resources indicate that Stream 1 has an ephemeral flow duration and does not provide sufficient flow duration to constitute sustained, seasonal flow and is not a relatively permanent water. Stream 1 flows only in direct response to precipitation events, as evidence detailed herein indicates.

Stream 2 (0.7 acres) is a first-order reach that is approximately 4,601 linear feet (LF) in length. It begins off site, north of the review area, and flows south for approximately 1,186 LF before entering the review area for 3,385 LF, then flows off site for a very short distance (~30 LF) until its confluence with Stream 1, off site. Approximately 74% (3,375 LF) of Stream 2 is within the review-area boundary. Aerial imagery (1938 to 2022) indicates the land use has been row-crop agricultural that presently is being converted to commercial property.

Stream 2 has been channelized and modified by human activity over the past several decades. As such, the stream is bifurcated at a point approximately 590 LF into the review area on the western boundary as it flows southward. This bifurcation of the stream continues for 1,166 LF as it makes a 90-degree bend eastward until the two stream reconverge on the southern boundary and flow east for 1442 LF within the review area. The drainage area for Stream 2 is less than 300 acres.

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Note: During the consultant's field visit on August 1, 2024, pooled water was observed within a scour hole associated with a culvert within the bifurcated portion of Stream 2. The area of pooled water is relatively permanent (RPW), but is a negligible part of the entire stream reach; therefore, the entire stream is determined to be a non-RPW.

National Hydrography Dataset (NHD) identifies Stream 2 as having an intermittent flow duration. However, the small drainage area and desktop resources indicate that Stream 2 has an ephemeral flow duration and does not provide sufficient flow duration to constitute sustained, seasonal flow and is not a relatively permanent water. Stream 2 flows only in direct response to precipitation events, as evidence detailed herein indicates.

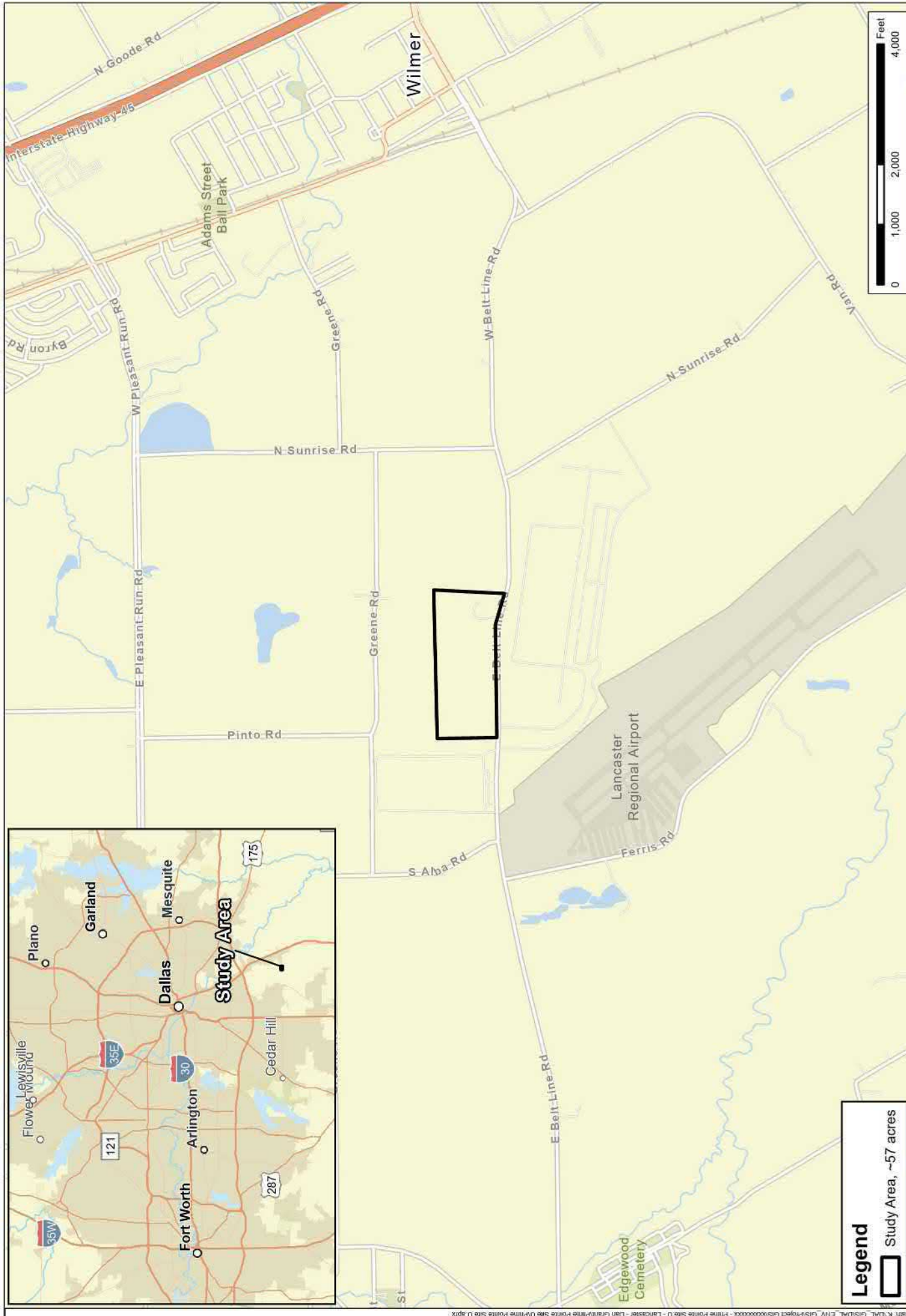
Streams 1 and 2 are not a paragraph (a)(1) TNW, not a paragraph (a)(2) interstate water (i.e., it does not cross or serve as a state boundary), not a lake or pond and is therefore not paragraph (a)(3) water (i.e., lakes or ponds that support a link to interstate or foreign commerce because it is known 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. Consultant site visit: August 1, 2024; USACE in-office evaluation: September 25, 2024.
 - b. National Regulatory Viewer, SWD, various layers including USGS topography, USFWS NWI, FEMA FIRM, DEM, Hill-shade,
 - c. USDA NRCS Web Soil Survey and Hydric Soils list for Dallas County
 - d. 2024 Aerial photography
 - e. USACE Antecedent Precipitation Tool
10. OTHER SUPPORTING INFORMATION. Aquatic Resources Delineation Report, Prime Pointe Site U, prepared by Kimley Horn, dated August 14, 2024.

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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.



Legend

Study Area, ~57 acres

FIGURE 1	Vicinity Map		Prime Pointe Site U		
	Source: ESRI Basemap		Lancaster, Dallas County, Texas		

This product is for informational purposes and may not have been prepared or approved as an engineering survey and represents only the approximate relative location of property boundaries.

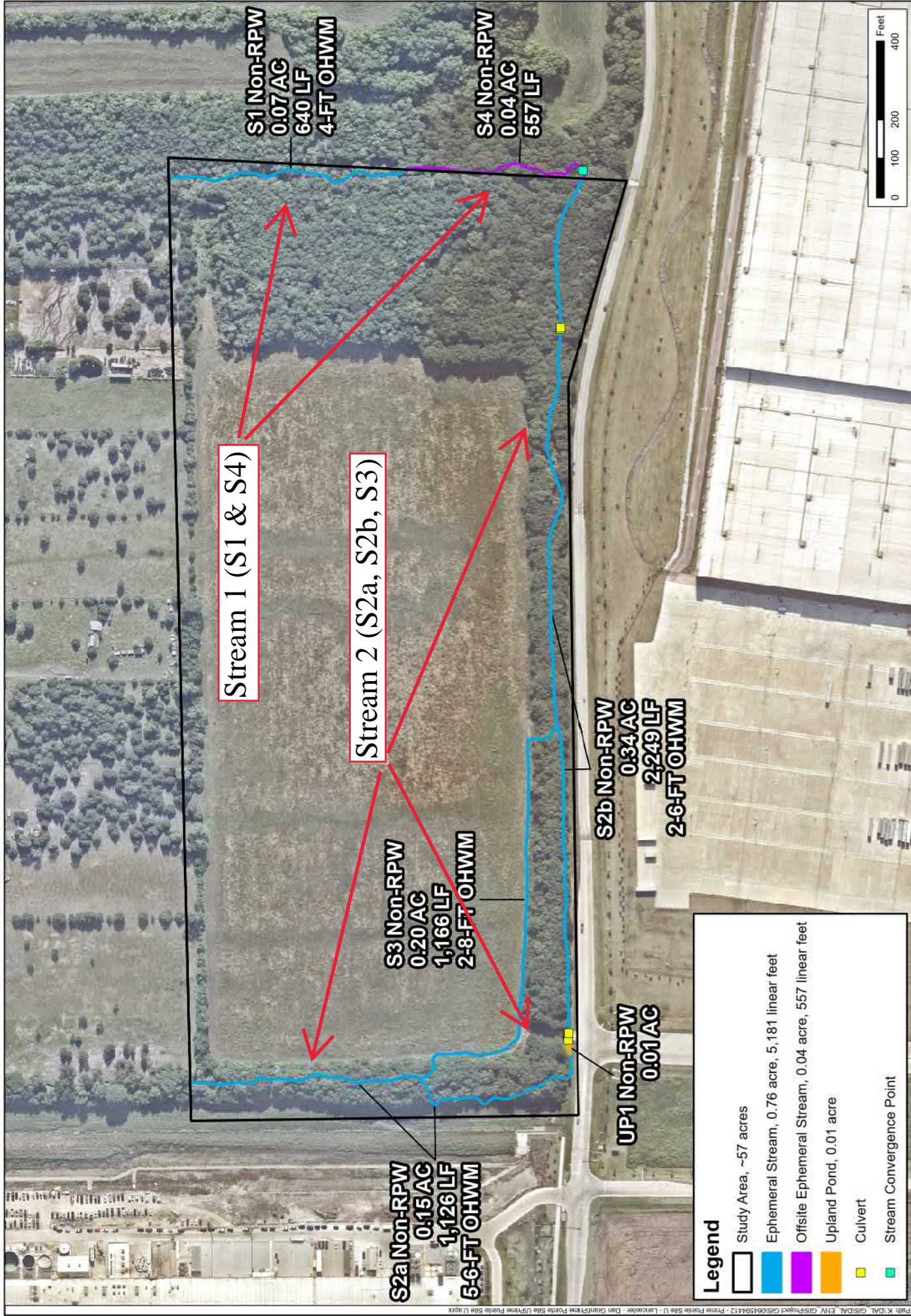


FIGURE
11

DATE: 09/20/2024
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Aquatic Features Map
Enclosure 1

Prime Pointe Site U
 Lancaster, Dallas County, Texas

Kimley»Horn
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Source: Nearmap May 2024