



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

CESWF-RDE

28 OCTOBER 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-2024-00496.

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.

1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional. There are no aerial signatures showing saturation or ponding in the assessment area. There are no polygons in NWI maps. There are no NHD features on the tract. All land is above the 500-year floodplain.

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. (2023), 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area covers 20 acres of agricultural land northwest of Coahoma, Howard County, Texas. The review area is surrounded by other agricultural fields. The entire study area is in the Area of Minimal Flood Hazard (Zone X) on FEMA's maps (panel 48227C0350C, effective October 10, 2010). Drainage generally flows overland toward the western portion of the study area. No aquatic features were identified within the review area. Center Coordinates: 31.747308, -96.184631

There are no previous finalized AJDs for this study area.

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, no aquatic resources on site.

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, Dryland only.
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.

TNWs (a)(1): Not applicable.

- a. Interstate Waters (a)(2): Not applicable
- b. Other Waters (a)(3): Not applicable
- c. Impoundments (a)(4): Not applicable
- d. Tributaries (a)(5): Not applicable
- e. The territorial seas (a)(6): Not applicable
- f. Adjacent wetlands (a)(7): 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.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

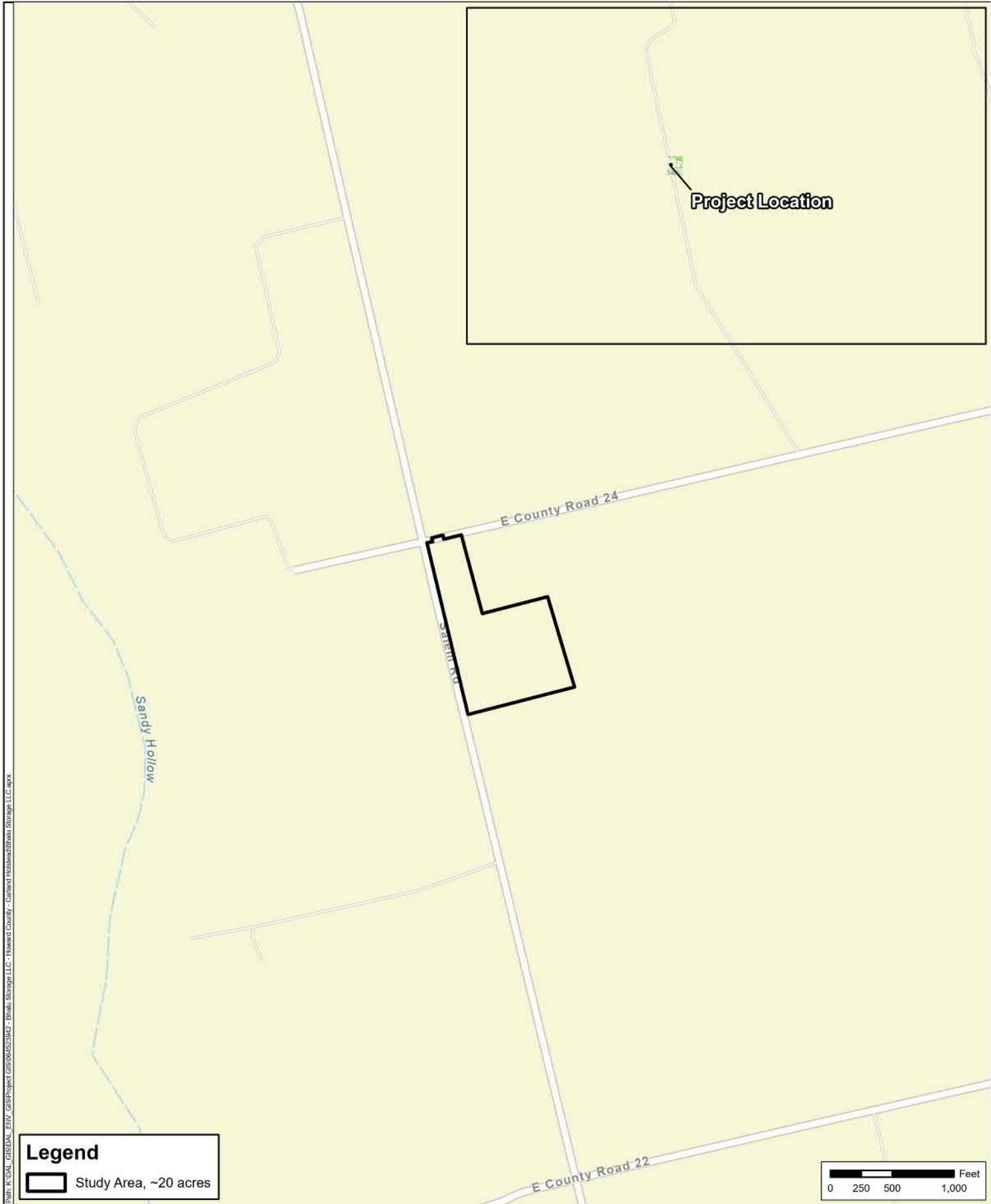
- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within the review area and describe how it was determined 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.
- 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). Not applicable.

⁷ 51 FR 41217, November 13, 1986.

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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. Contractor site visit dates: November 30, 2023. USACE in office review: October 21, 2024
 - b. National Regulatory Map Layers: USFWS National Wetlands Inventory (NWI) Map, National Hydrography Dataset (NHD), USGS 7.5 min Quad, FEMA FIRM maps, Aerial, Hill-Shade
 - c. Google Earth recent and historical aerial photography
 - d. USGS 7.5- minute quadrangle sheets for Coahoma, Texas
 - e. Contractor's Report, Aquatic Resources Delineation Report, Bhalu Storage, LLC, Howard County, Texas, August 6, 2024, prepared by Kimley Horn.
10. OTHER SUPPORTING INFORMATION. See project files for SWF-2024-00496.
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.




Path: K:\DAL_GIS\DAL_ENV_GIS\Project GIS\064523942 - Bhalu Storage LLC - Howard County - Caland Hollows\Bhalu Storage LLC.aprx

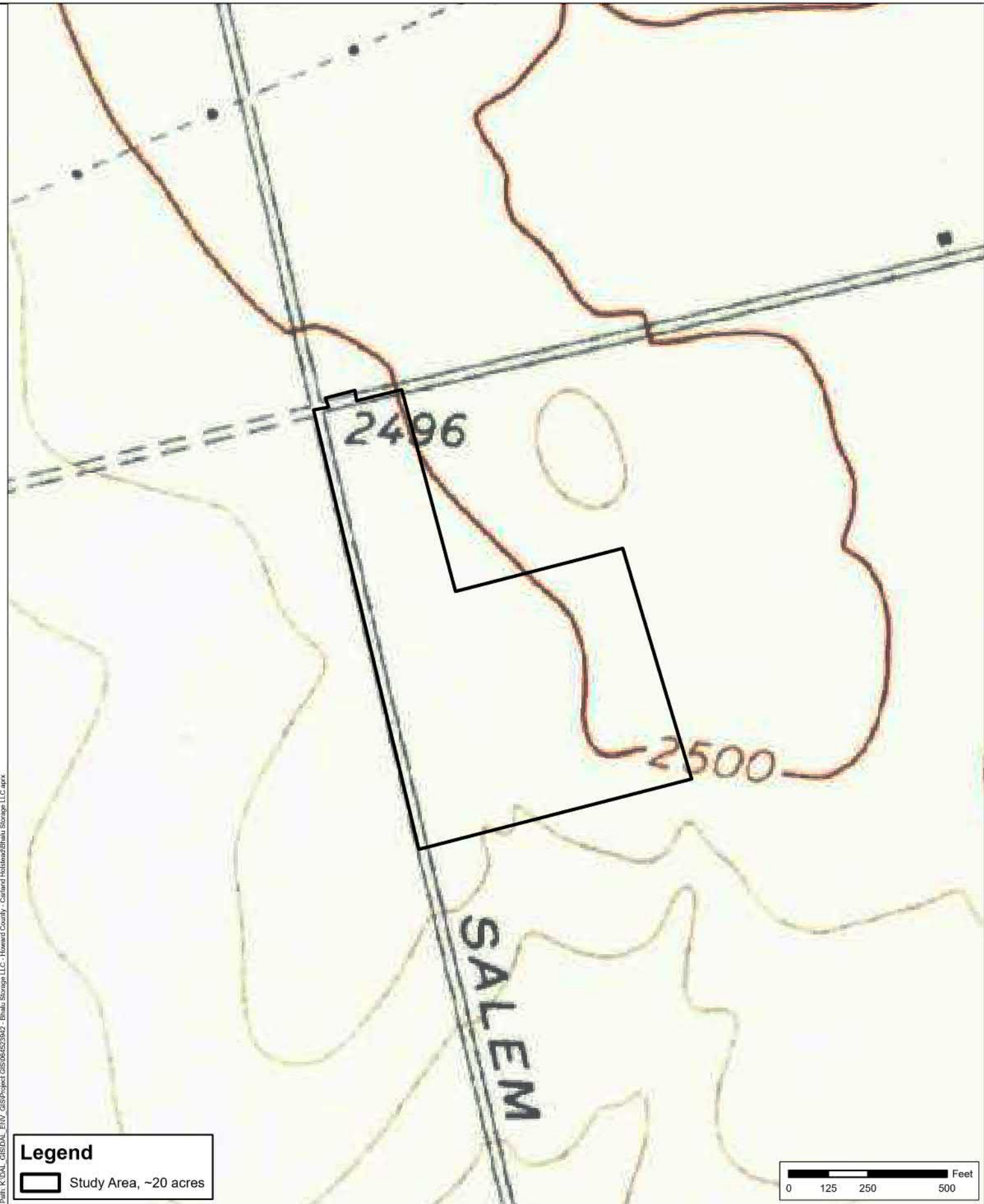
Legend

 Study Area, ~20 acres

0 250 500 1,000 Feet

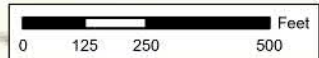
FIGURE 1	DATE: 09/03/2024	Vicinity Map Source: ESRI Basemap	Bhalu Storage, LLC Howard County, Texas		Kimley»Horn <small>This product is for informational purposes and may not have been prepared for, or be suitable for, legal, engineering, or survey purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.</small>
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Legend

 Study Area, ~20 acres



FIGURE

2

DATE:	09/03/2024
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KHA NO.:	064523942

USGS Topographic Map

Quad: Coahoma, TX

Bhalu Storage, LLC

Howard County, Texas



Kimley»Horn

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<p>FIGURE</p> <p>7</p>	<p>DATE: 01/24/2024</p> <p>DRAWN: OGR</p> <p>CHECKED: AMB</p> <p>KHA NO.: 064523942</p>	<p>FEMA Mapped Flood Hazard</p> <p>Source: FEMA</p>	<p>Bhalu Storage, LLC</p> <p>Howard County, Texas</p>	<p>N</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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Note: Aquatic Features were not observed within the study area.

Legend

 Study Area, ~20 acres



FIGURE

3

DATE:	09/03/2024
DRAWN:	KRK
CHECKED:	CGH
KHA NO.:	064523942

Final Aquatic Features Map

Source: NAIP 2022

Bhalu Storage, LLC

Howard County, Texas



Kimley»Horn

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