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

CESWF-RDE 22 APRIL 2025

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-2024-00393, MFR 1 of 1.[2]

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.[3] 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.[4] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[5] 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

[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] When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).
[3] 33 CFR 331.2.
[4] Regulatory Guidance Letter 05-02.
[5] 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.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Texas due to litigation.

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).

| Water Feature | Size | Status | Rationale |
|---|---|---|---|
| **WA003** | 0.16 AC | Not Jurisdictional | Non-adjacent / lacks CSC |
| **PA002** | 0.34 AC | Not Jurisdictional | Preamble Water |
| **SA001** | 661 LF | Not Jurisdictional | 1st Order and 2nd Order segments are Non-RPW |
| **SA002** | 155 LF | Not Jurisdictional | 1st Order Non-RPW, connects to SA001 which is a Non-RPW stream. |
| **PA003** | 0.19 AC<br>171 LF | Not Jurisdictional | PA003 is connected to non-RPW stream portions, SA003 and SA004. All are part of the same non-RPW tributary. |
| **SA003** | 629 LF | Not Jurisdictional | SA003 is a 1st Order Non-RPW and is the upstream stream portion that connects to PA003 and SA004. |
| **SA004** | 715 LF | Not Jurisdictional | SA004 is 1st Order Non-RPW downstream segment that is connected to PA003 and SA003 (There is 419 LF of stream outside of the project which was accounted for in the Delineation report for SA004 (totaled 1,134 LF) |
| **WA006** | 0.25 AC | Not Jurisdictional | Non-adjacent / lacks CSC |
| **SA009** | 457 LF | Not Jurisdictional | Non-RPW segment that connects to SA010 just prior to connecting to WA006 |
| **SA010** | 142 LF | Not Jurisdictional | Non-RPW, that connects to SA009 just prior to connecting to WA006 |
| **WA005** | 0.25 AC | Not Jurisdictional | Non-adjacent / lacks CSC |
| **SA012** | 440 LF | Not Jurisdictional | Non-RPW connects to WA005 |

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 approximately 40.0 acres, approximately two miles northwest of the City of Naples, Morris County, Texas and along the north side of Highway 77. Central coordinates: 33.223164, -94.701868. The watershed code is HUC 6-111403. There is not a mapped FEMA floodplain and only one pond feature is mapped within the Project area. No other wetland or aquatic features were mapped on the topography, NWI, FEMA and hydrography layers. There is no other relevant site-specific information or previous JDs associated with the review area. Reference enclosed maps of the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Sulphur River (TNW Segment east of Wright Patman Lake) is approximately 73 river miles to the northeast.[6]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Unnamed tributary SA001 continues off-site for 1,007 LF and SA003-SA004 continues off-site for 395 LF to join with the flow of Mary Lee Branch to White Oak Creek to Sulphur River which runs through Wright Patman Lake and joins to a TNW segment of the Sulphur River east of the lake. The Sulphur River drains into the Red River.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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

[6] This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

[7] 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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[8] 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.
   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").[9] 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.

| Water Feature | TNW | Size | Rationale |
|---|---|---|---|
| **PA002** | No | 0.34 AC | Constructed in uplands. Not Jurisdictional. |

[8] 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.
[9] 51 FR 41217, November 13, 1986.

**PA002** is a 0.34-acre PUB pond excavated in uplands and built after 1981 and before 1996. There are no connecting features as determined during the consultant's site visit. Office electronic data files support that this pond was excavated in upland. There are no stream features identified as being connected to this pond. The pond is the only feature that the National Regulatory Databases identify on the entire site. This feature is non-jurisdictional according to the 1986 regulations for "preamble waters."

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).

| Water Feature | TNW | Size | Rationale |
|---|---|---|---|
| **WA003** | No | 0.16 AC | Non-adjacent / lacks CSC; Not Jurisdictional |
| **SA001** | No | 661 LF | 1st Order and 2nd Order segments are Non RPW; The SA001 stream continues off-site for 1,007 LF before joining with an RPW; Not Jurisdictional |
| **SA002** | No | 155 LF | 1st Order Non-RPW, connects to SA001; Not Jurisdictional. |
| **PA003** | No | 0.19 AC 171 LF | PA003 is connected to non-RPW stream portions, SA003 and SA004; |
| **SA003** | No | 629 LF | SA003 is a 1st Order Non-RPW upstream portion that connects to PA003 and SA004, which is the downstream portion. The stream continues off property to merge with a second order RPW; Not Jurisdictional stream. |
| **SA004** | No | 715 LF | SA004 is 1st Order Non-RPW connected SA003 and PA003 and is the downstream portion of SA003. The stream continues off property for 419 LF to merge with a second order RPW. Not Jurisdictional. Not Jurisdictional stream. (Delineation Report defines SA004 as 1,134 LF which included the portion outside of the project boundary.) |
| **Off-site portion of stream** | No | 395 LF | Ephemeral flow, merges with an RPW intermittent stream. |
| | Total LF | 1,910 LF | If pond was RPW portion then 171/1,910 = 0.09 or 9% of total stream length for RPW. Therefore: RPW is less than 50% of total stream, which makes the entire stream and pond Non-Jurisdictional. |
| **WA006** | No | 0.25 AC | Non-adjacent / lacks CSC Not Jurisdictional. |
| **SA009** | No | 457 LF | Non-RPW segment Connects to SA010 just prior to connecting to WA006 Not Jurisdictional. |
| **SA010** | No | 142 LF | Non-RPW, connects to SA009 just prior to connecting to WA006 |
| **WA005** | No | 0.25 AC | Non-adjacent / lacks CSC SA012), Not Jurisdictional. |
| **SA012** | No | 440 LF | 1st Order Non-RPW connects to WA005. Not Jurisdictional |

Refer to data sources listed in Section 9 and accompanying maps and photos for the following:

**WA003** is a 0.16-acre PEM wetland and appears to be a shallow depression. A continuous surface connection (CSC) to an (a)(5) tributary is not observable. Any hydrology flowing from WA003 to a discrete feature or an (a)(5) tributary would occur through overland sheet flow and not a CSC. In summary, WA003 is not a paragraph (a)(7) adjacent wetland because it does not physically abut a RPW (i.e., (a)(1) TNW, (a)(2) interstate water, (a)(3) water, (a)(4) impoundment,

(a)(5) tributary, (a)(6) territorial sea) or have a CSC to an (a)(5) tributary through a discrete hydrology feature (i.e., swale, ditch, pipe, culvert, NRPW tributary.) The wetland is a depressional feature, lacking a CSC to a requisite RPW water.

**WA005** is a 0.25-acre wetland dominated by black willow (*Salix nigra*), groundsel tree (*Baccharis halimifolia*) and lamp rush. The wetland appears to be a shallow depression that connects to with the uphill ephemeral stream (Non-RPW) SA012. Overflow of the wetland occurs only during rain events and is overland flow, and no other channels were observed in the field by the contractor. In summary, WA005 is not a paragraph (a)(7) adjacent wetland because it does not physically abut a RPW (i.e., (a)(1) TNW, (a)(2) interstate water, (a)(3) water, (a)(4) impoundment, (a)(5) tributary, (a)(6) territorial sea) or have a CSC to an (a)(5) tributary through a discrete hydrologic feature (i.e., swale, ditch, pipe, culvert, NRPW tributary). The wetland is a depressional feature, lacking a CSC to a requisite RPW water.

**WA006** is a shallow depression at the downstream terminus of a non-RPW ephemeral stream. The SA010 and SA009 non-RPW ephemeral streams converge for a short distance prior to entering the shallow depressional area of WA006. There were no features found that would drain the overflow downstream and excess water spreads over land. This feature was not identified in any of the databases. A continuous surface connection (CSC) to an (a)(5) tributary is not observable. Any hydrology flowing from WA006 to a discrete feature or an (a)(5) tributary would occur through overland sheet flow and not a CSC. In summary, WA006 is not a paragraph (a)(7) adjacent wetland because it does not physically abut a RPW (i.e., (a)(1) TNW, (a)(2) interstate water, (a)(3) water, (a)(4) impoundment, (a)(5) tributary, (a)(6) territorial sea or have a CSC to an (a)(5) tributary through a discrete hydrologic feature (i.e., swale, ditch, pipe, culvert, NRPW tributary). The wetland is a depressional feature, lacking a CSC to a requisite RPW water.

**SA001** is a 661 LF 1st order, ephemeral stream. The on-site feature does not appear on any aerial imagery, topographic map or NHD stream data. SA001 merges with SA002 another 1st order ephemeral to become a second order stream. The steam continues off-site for 1007 LF prior to merging with Mary Lees Branch; However, the full stream remains in an ephemeral condition as it merges with the headwater of Mary Lees Branch which becomes a 3rd order intermittent stream. Refer to photos taken at both ends of the stream that support an ephemeral, non-RPW state for the stream. This stream does not appear on any of the reviewed aerial imagery, topographic maps or NHD stream data. The stream flows in response to rainfall. Therefore, this stream is considered a non-RPW stream and is not regulated.

**SA002** is a 155 LF first order, ephemeral stream that merges with SA001 as described above. This stream does not appear on any of the reviewed aerial imagery, topographic maps or NHD stream data. The stream flows in response to rainfall. Therefore, this stream is considered a non-RPW stream and is not regulated.

**SA003, SA004 and PA003** form part of the same non-RPW tributary.

**SA003** is a 638 LF 1st order, ephemeral. SA003 connects to PA003 and subsequently with the downstream segment SA004, however, the full stream remains an ephemeral, 1st order stream with only the stretch within the on-line pond (PA003) considered a RPW for stream assessment. (638 LF non-RPW +710Lf + 395LF (off-site) + 171 LF (pond) = 1,914 LF of stream of which 171/1,914 or 8.9% is considered an RPW stretch. Therefore, this stream is considered a non-RPW stream and is not regulated.

**PA003** is a 0.19-acres (171 LF) PUB on-line stock pond. The pond connects upstream with the ephemeral, 1st order stream segment, SA003 and a downstream connection with the ephemeral, 1st order stream segment, SA004. SA004 drains westward and converges with a RPW intermittent stream known as Mary Lees Branch. **SA003-SA004** stream remains an ephemeral stream (non-RPW) throughout its entire length and flows only in response to precipitation. In summary, PA003 is the only RPW segment in the stream and is less than 50% of the entire stream segment, which makes it a non-RPW feature along with the rest of the stream. PA003 is not an (a)(1) TNW, (a)(2) interstate water, (a)(3) water, (a)(4) RPW impoundment, (a)(5) tributary, (a)(6) territorial sea).

**SA004** is a 710 LF (on-site) and 395 LF (off-site) 1st order, ephemeral stream segment beginning at the drainpipe of PA003 and the pond is connected to the SA003 stream segment. SA004 continues off-site for an additional 395 LF. The full stream remains an ephemeral, 1st order stream with only the stretch within the on-line pond (PA003) considered a RPW for stream assessment. (638 LF non-RPW +710 LF + 395 LF (off-site) + 171 LF (pond) = 1,914 LF of stream of which 171/1,914 or 8.9% is considered an RPW stretch. Therefore, this stream (and pond) is considered a non-RPW stream and is not regulated.

**SA009** is a 457 LF ephemeral stream that does not appear on any of the reviewed imagery, topographic maps or the NHD stream data. This stream is connected to WA006 where is dies out. SA010 also merges with this stream and becomes a 2nd order stream for a short segment prior to merging dying out into the wetland. This stream is considered a non-RPW stream and is not regulated.

**SA010** is a 142 LF, ephemeral stream that also does not appear in any digital or mapped data resource. As mentioned above it merges with SA009 and dies out into WA006. This stream is considered a non-RPW stream and is not regulated.

**SA012** is a 440 LF, ephemeral stream that also does not appear in any digital or mapped data resource. SA012 flows into WA005 and dies out into the wetland. There was no flowing or pooled water observed in the stream during the delineation and appears to flow only during rain events. This stream is considered a non-RPW stream and is not regulated.

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.

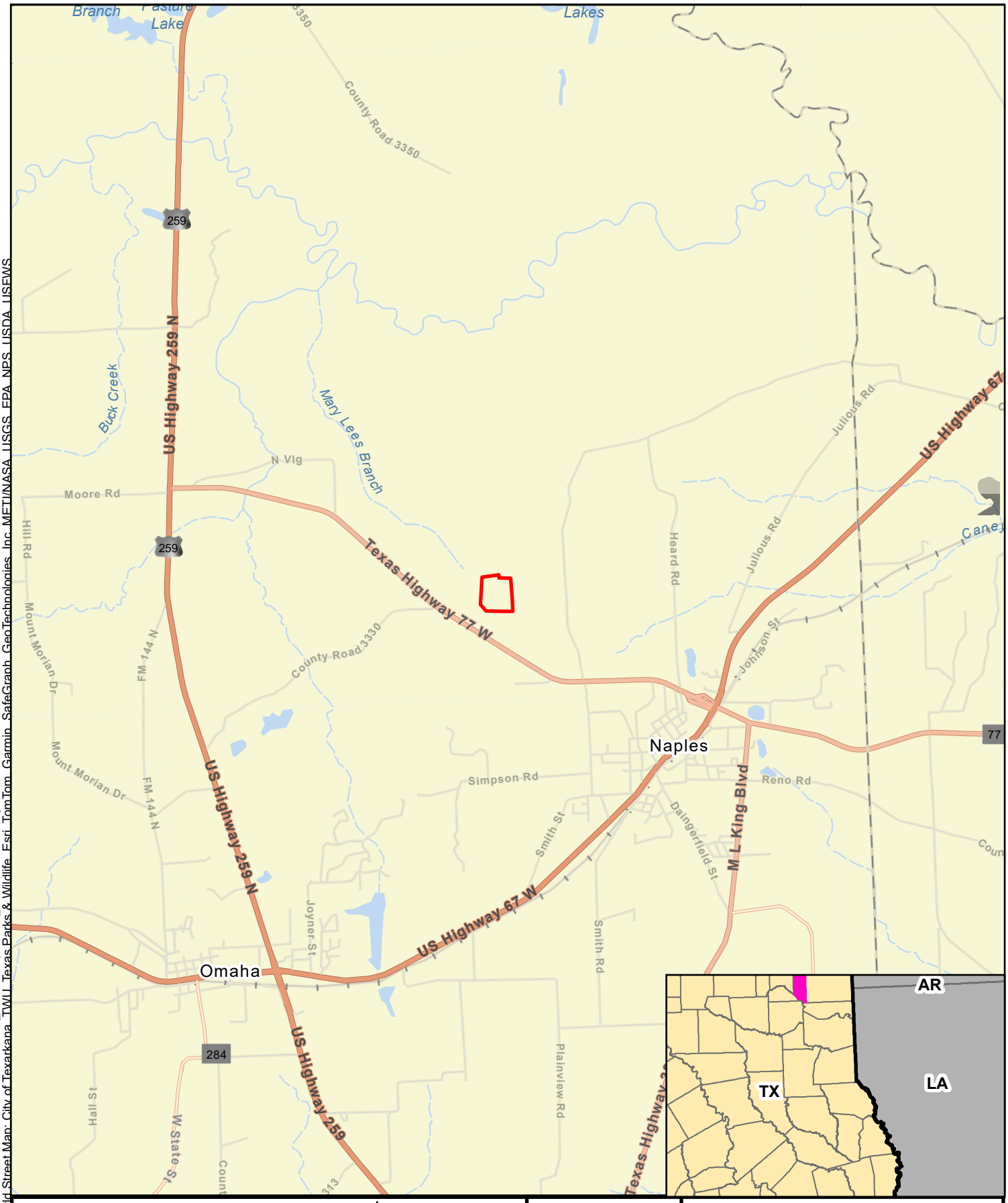
   a. Consultant site visits were conducted on February 27, 2024, and November 13, 2024. USACE desktop evaluations were completed December 12, 2024.

   b. Wetland Delineation Report: Arkansas Electric Cooperative Corporation Naples Power Plant, Wetland Delineation Report, October 2024.

   c. AJD SWF Review Maps using Google Earth imagery and topography, TNW layers and the National Regulatory Viewer (Texas) layers including topography, NWI, FEMA, NHD, Watershed, imagery DEM and LIDAR layers, accessed on December 6, 2024.

10. OTHER SUPPORTING INFORMATION. Not applicable.

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.




BURNS McDONNELL

Figure A-1
General Location Map
Naples Power Plant
Arkansas Electric
Cooperative Corporation
Morris County, Texas

Source: ESRI, Arkansas Electric Cooperative Corporation, and Burns & McDonnell

Issued: 9/3/2024

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Service Layer Credits: World_Street_Map; City of Texarkana_TWU, Texas Parks & Wildlife, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, USDA, USFWS

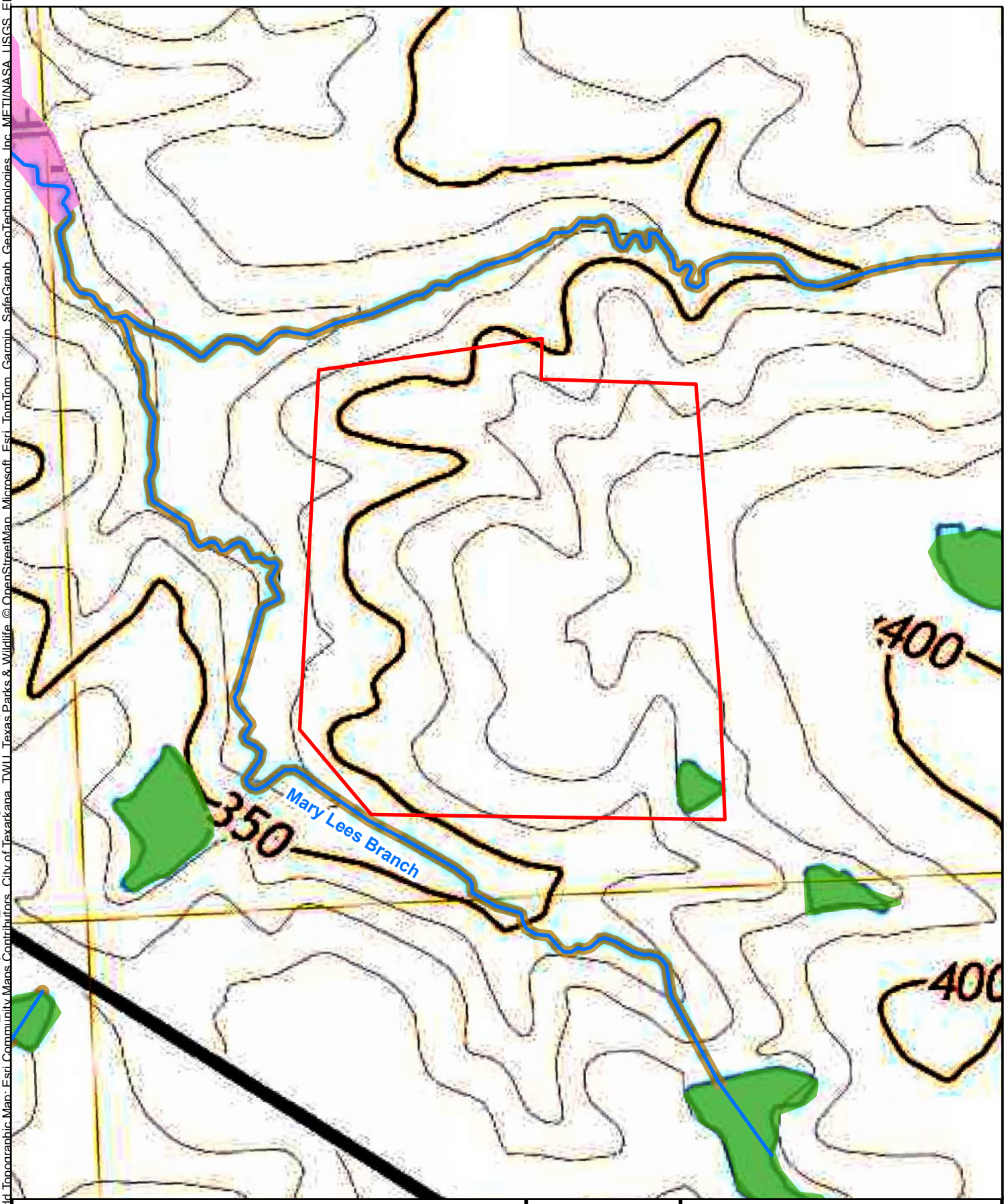


Figure A-2
NWI, FEMA Floodplain, and
USGS Topographic Map
Naples Power Plant
Arkansas Electric
Cooperative Corporation
Morris County, Texas

Source: ESRI, Arkansas Electric Cooperative Corporation, and Burns & McDonnell

Issued: 9/3/2024

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Service Layer Credits: World Topographic Map: Esri Community Maps Contributors, City of Texarkana, TWU, Texas Parks & Wildlife, © OpenStreetMap, Microsoft, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA,

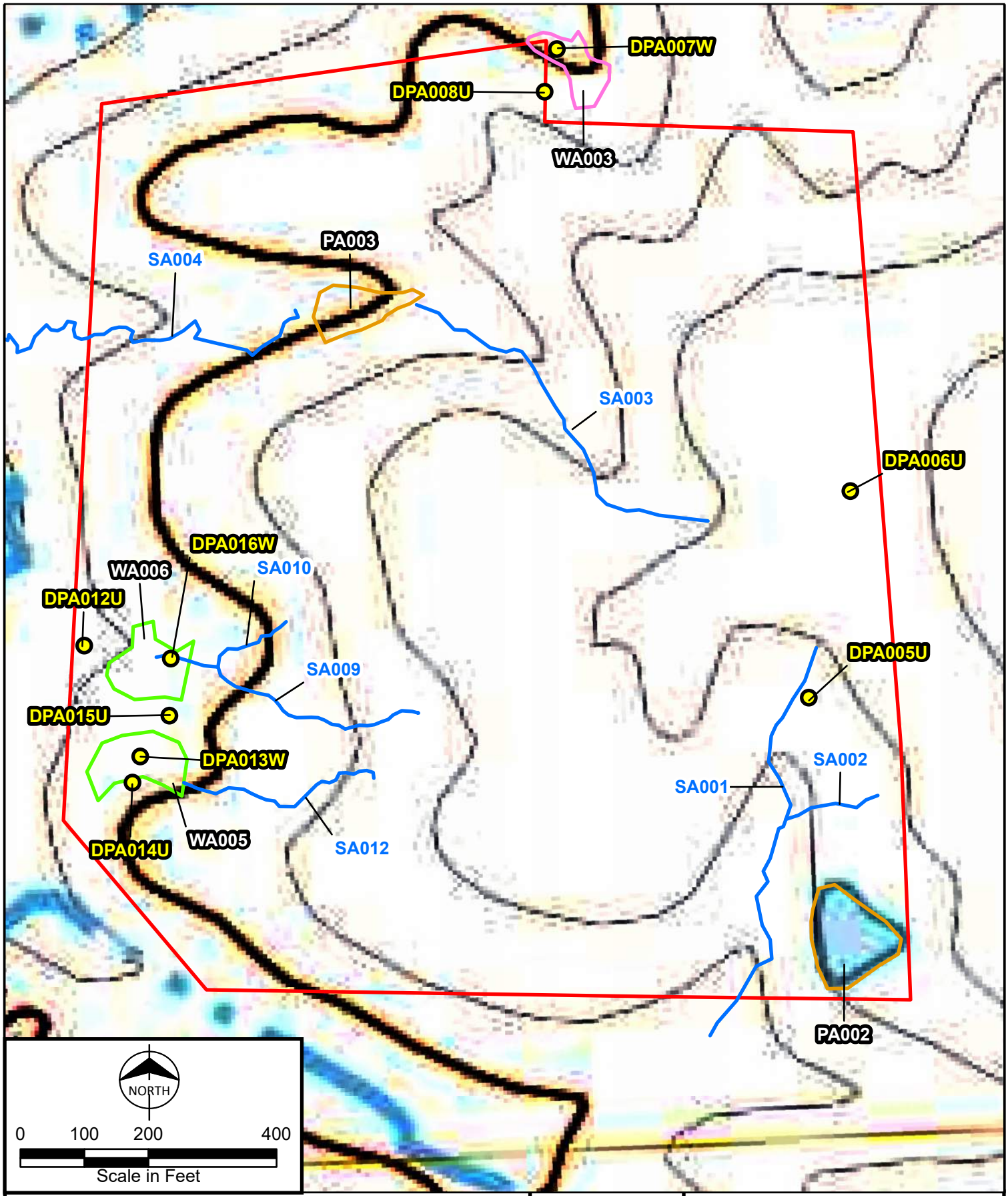


Figure A-4
Wetlands and Other Water Resources
Naples Power Plant
Arkansas Electric
Cooperative Corporation
Morris County, Texas

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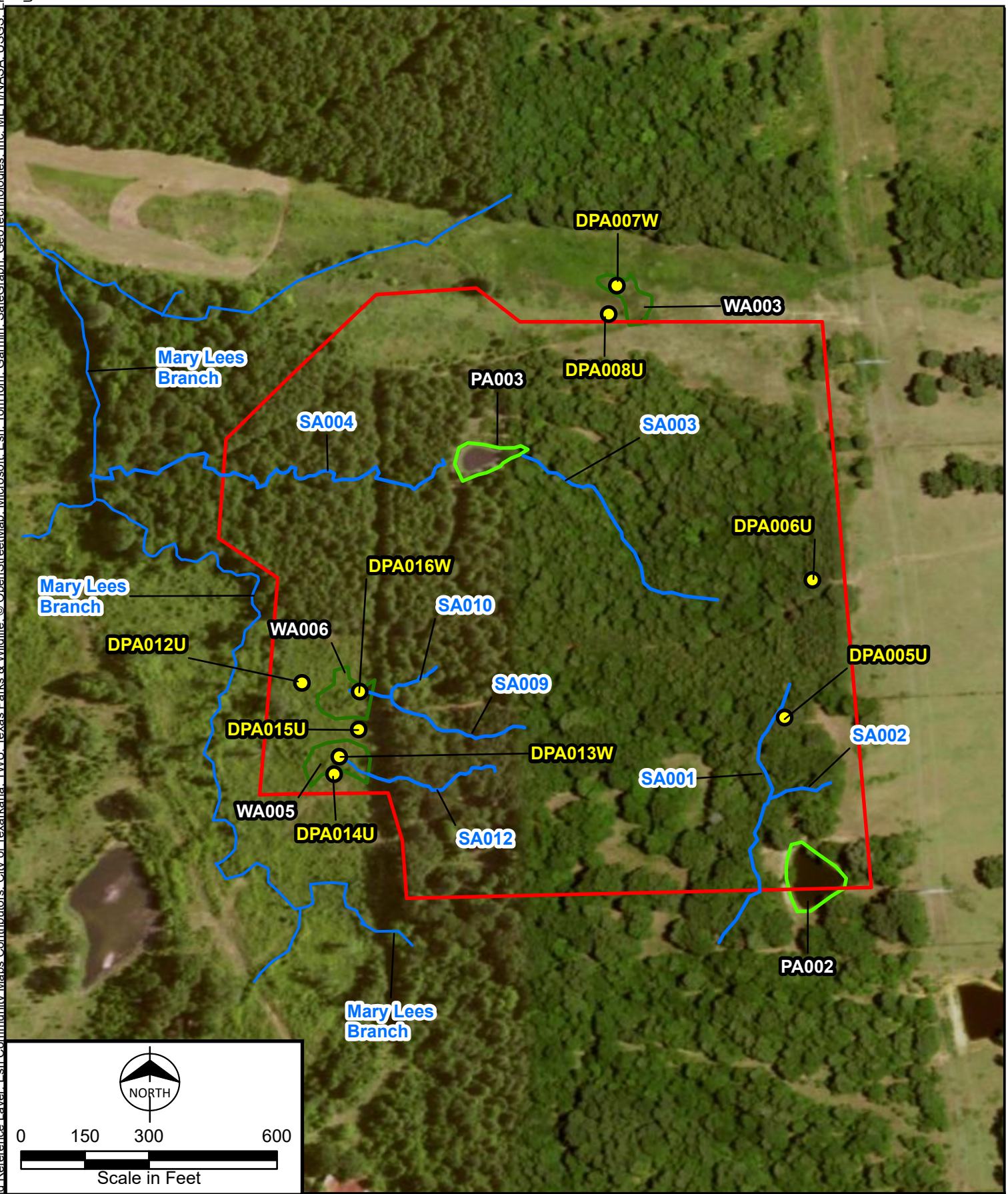
Source: ESRI, Arkansas Electric Cooperative Corporation, and Burns & McDonnell

Issued: 9/3/2024




Project Area
Data Point (DP)
Streams (S)
Ponds (P)
Wetlands (W)

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Figure A-4
Wetlands and Other Water Resources
Naples Power Plant
Arkansas Electric
Cooperative Corporation
Morris County, Texas

Source: ESRI, Arkansas Electric Cooperative Corporation, and Burns & McDonnell

Issued: 11/15/2024