



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

SWFCE-RD

OCTOBER 7, 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-2025-00469.

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).

i. SW1, non-jurisdictional swale, non-WOUS.

ii. UP1, non-jurisdictional pond, non-WOUS

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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. Vista Bluff Windpower, LLC Review Area 3 (Area 3, 400.59076 acres), encompasses a section of High Lonesome Draw, a non-discrete ephemeral flow wash. The proposed Area 3 is situated just east of N State Highway 349, approximately 8 miles south of FM 2401, and approximately 8 miles west of the Midkiff, Texas. The majority of the overall project site, including Area 3 is in Upton County with the easternmost section of the Project Site in neighboring Reagan County, Texas. Area 3 is located in the Benedum Oil Field-Upper High Lonesome Draw watershed within the Middle Concho River sub basin of the Middle Concho-Colorado river basin. Vegetation is observed at a higher density across the center of the review area from west-northwest to east-southeast. The area is intersected by Ranch to Market Road 2594. The NWI database shows two water features, a Stream/River and a Freshwater Pond. The NHD database shows a flowline that follows the High Lonesome Draw with two features on the east side of the review area branching off northwards from the central drainage feature. The FEMA Floodplains for Upton and Reagan Counties have not been mapped. Review Area 3 is comprised primarily of High Plains mesquite shrubland with surrounding secondary success mesquite shrubland and Trans-Pecos mixed desert shrubland.

Coordinates: 31.453312, -101.828481

HUCs 12.120901030104

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FEMA: no map panels
NWI – shows a RFSBC Pond

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [N/A](#)
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS [N/A](#)
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](#)
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](#)

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.

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- 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](#)
- 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*.

⁷ 51 FR 41217, November 13, 1986.

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UP1, non-jurisdictional pond, 0.36-acre determined to be an abandoned aggregate pit immediately west of RM 2594 and partially within the Area 3 boundary. This feature was determined to be an isolated, artificially-bermed pond and is not an RPW feature. The feature does not have a CSC and was constructed totally in uplands. (NON-WOTUS – Intrastate Lake or Pond that is not a tributary to a water identified in paragraphs (a)(1) through (4)).

- 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).

SW1, 6,692 LF, non-RPW. non-jurisdictional swale, coordinates 31.454946318, -101.831278. The NWI-mapped this feature as a riverine feature. On-site investigation by Contractor found only a broad vegetated swale; the swale lacked an OHWM. Per topography maps this feature is a remnant of the High Lonesome Draw, which would have been an ephemeral feature rather than a stream or river in this region of Texas; The swale is fragmented by county roads, oil and gas pads and access roads, and rights-of-ways. (Rapanos Guidance – Swales or erosional features [e.g., gullies, small washes, characterized by low volume, infrequent, or short duration flow])

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 onsite evaluations were made on July 15, 2025, and August 12, 2025; USACE in office assessment was made on October 6, 2025.
 - b. Google Earth topographic layer and recent and historical aerials
 - c. National Regulatory Database layers for topography, NWI, NHD, HUC, FEMA, aerial and Hillshade
10. OTHER SUPPORTING INFORMATION. Waters of the US (WOTUS) Jurisdictional Determination (JD) Report of Findings for Vista Bluff Wind Review Area 3 Report by Parnell engineering environmental services, dated September 16, 2025.

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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.



Attachment A: Figures
Figure 1A: Location Map

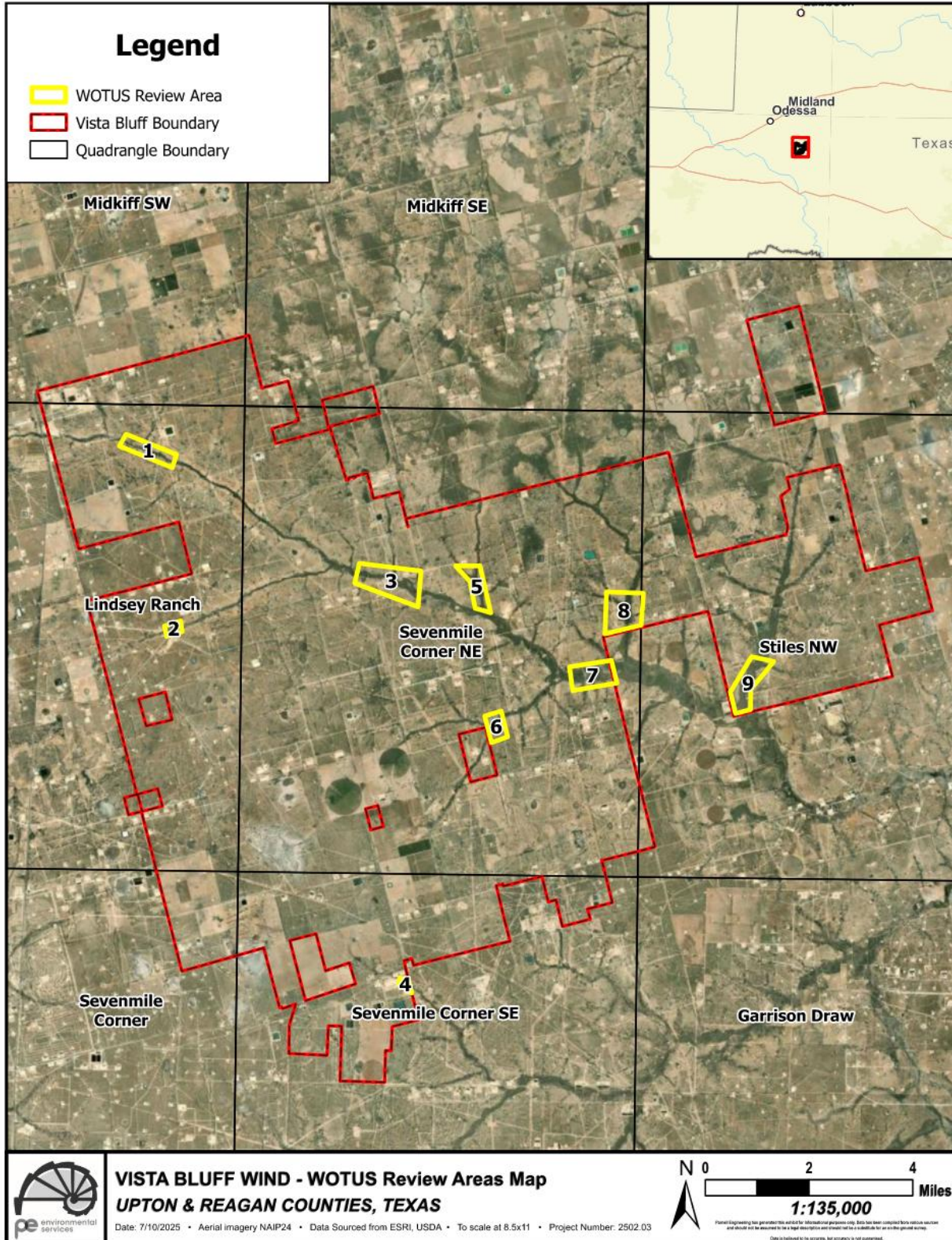




Figure 1B: Aerial Map

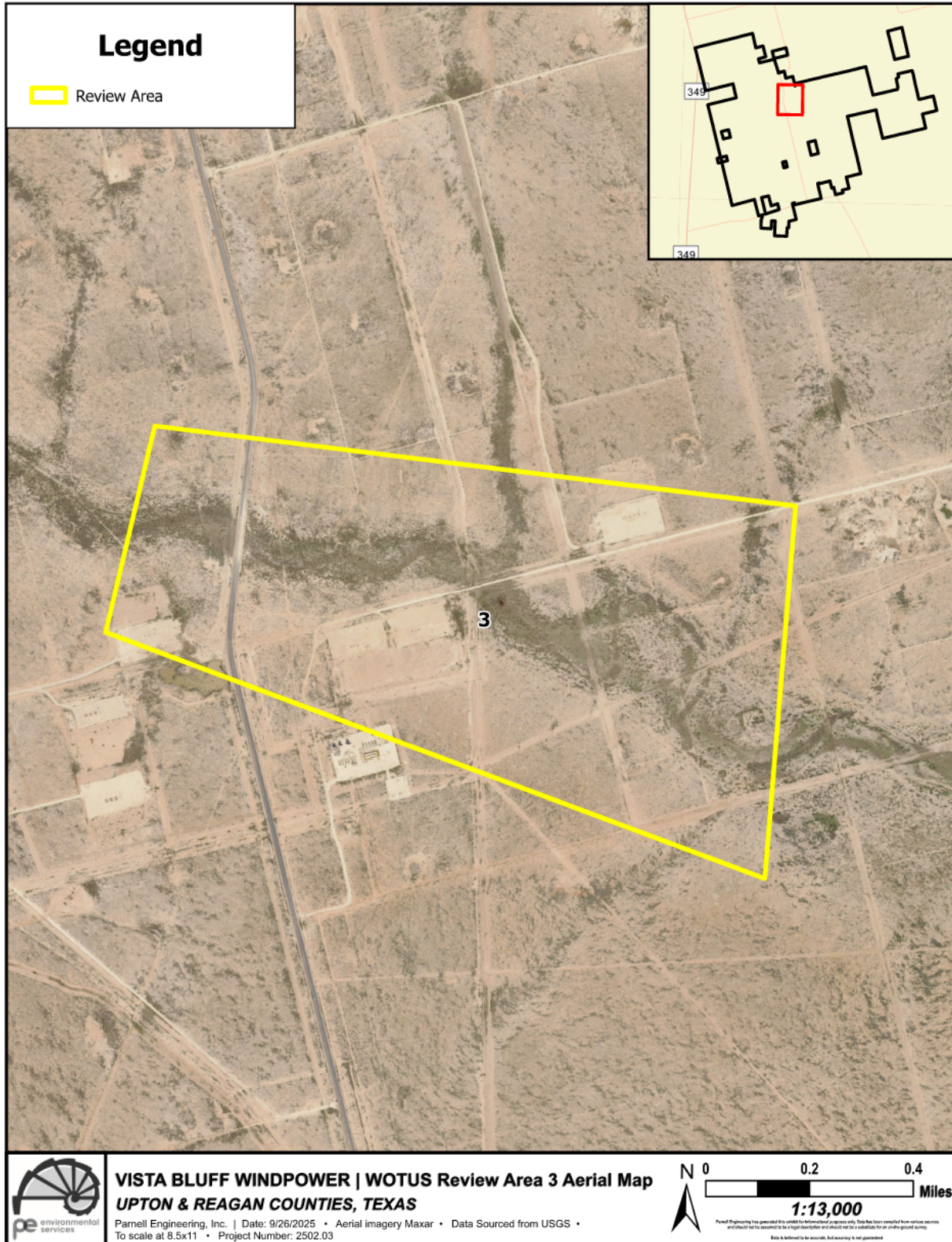




Figure 2: USGS Topographic Map

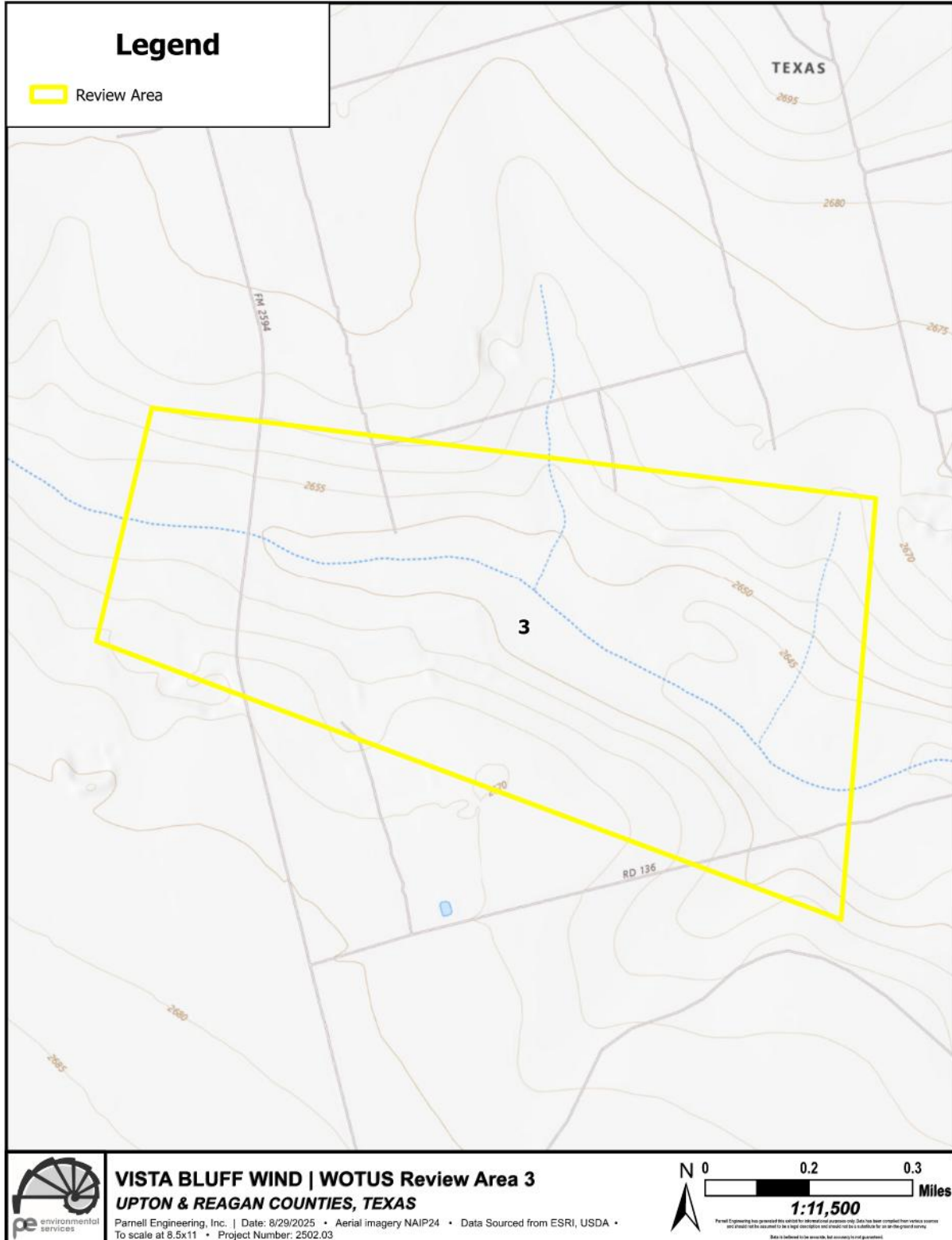




Figure 4: National Wetland Inventory

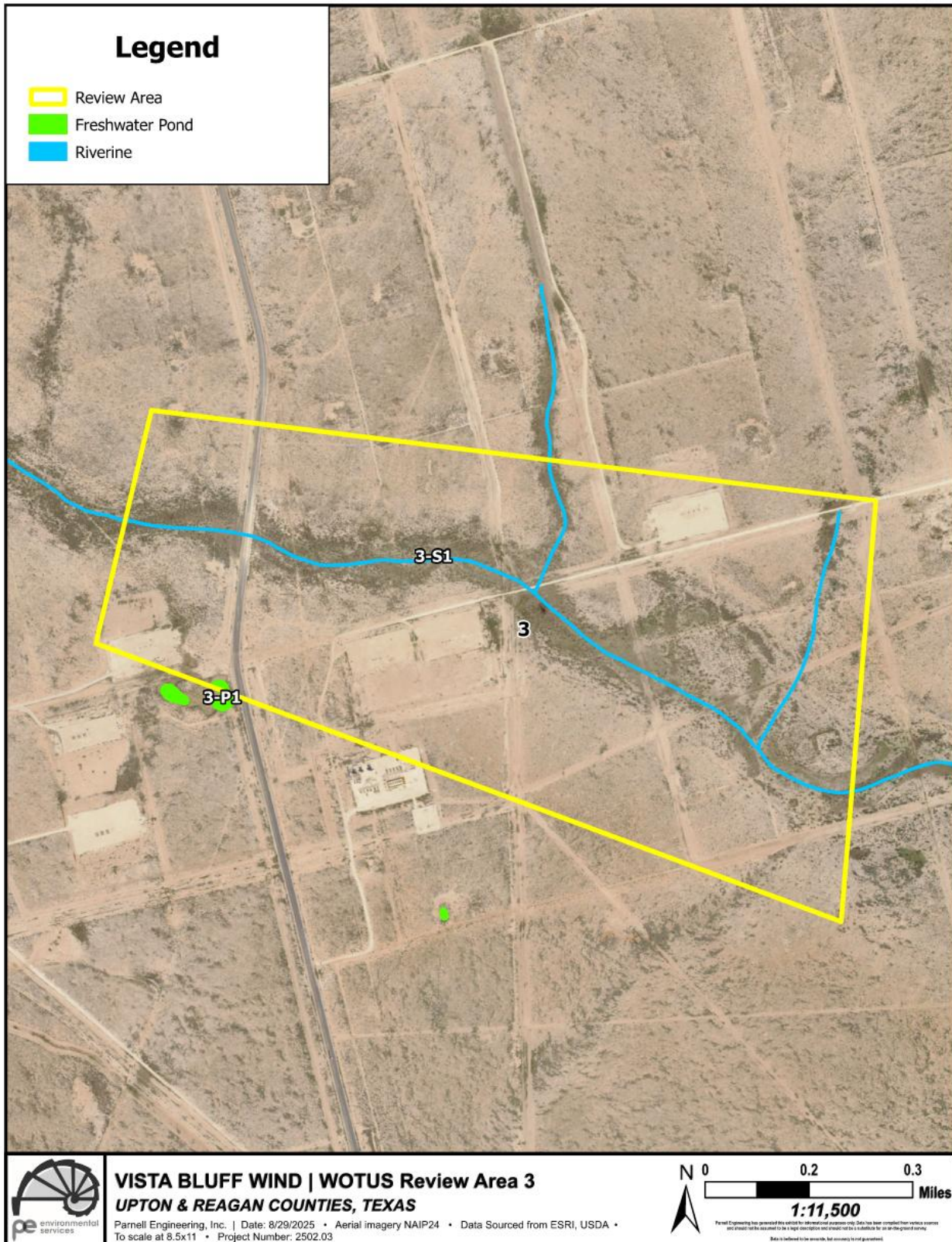




Figure 5: National Hydrography Dataset

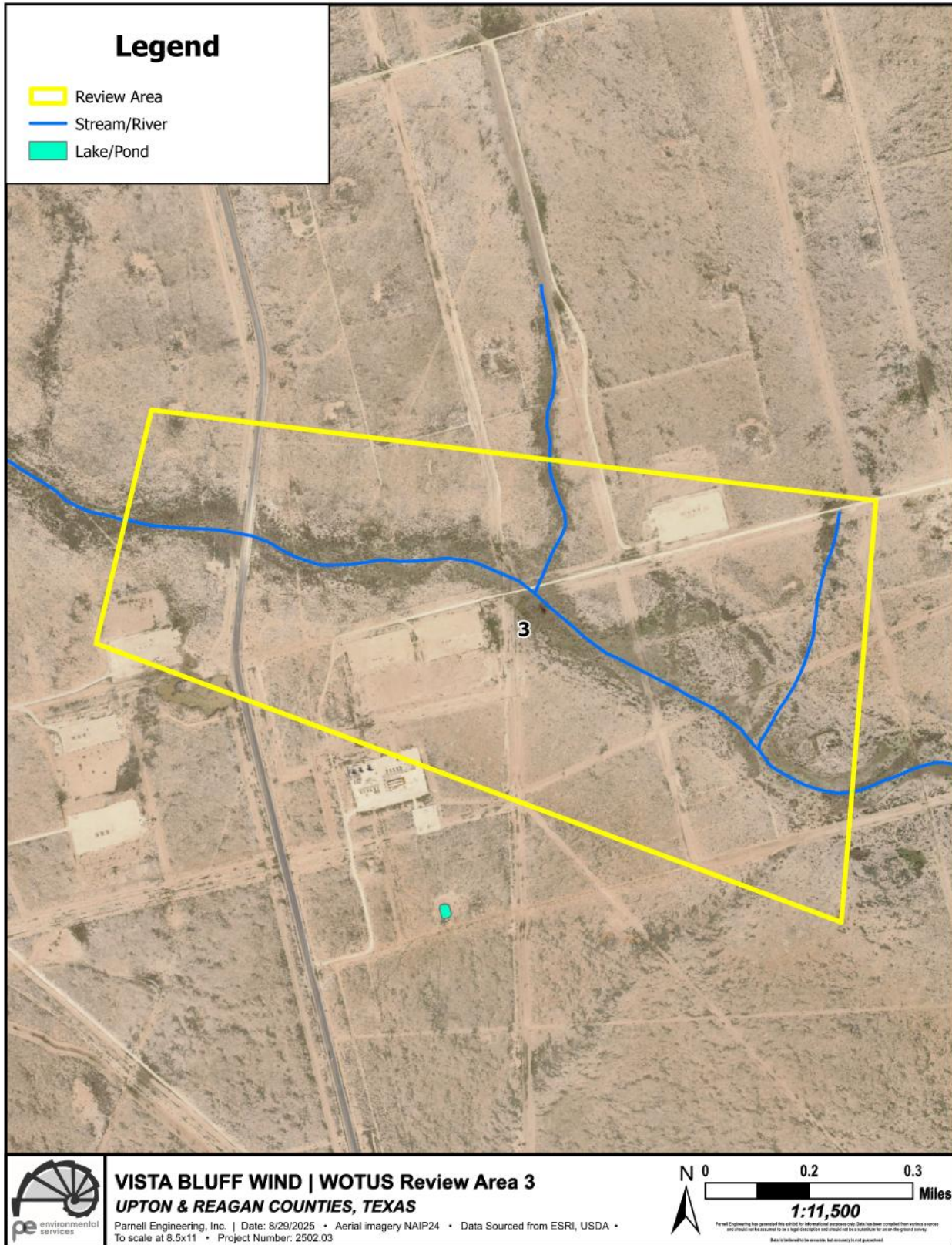
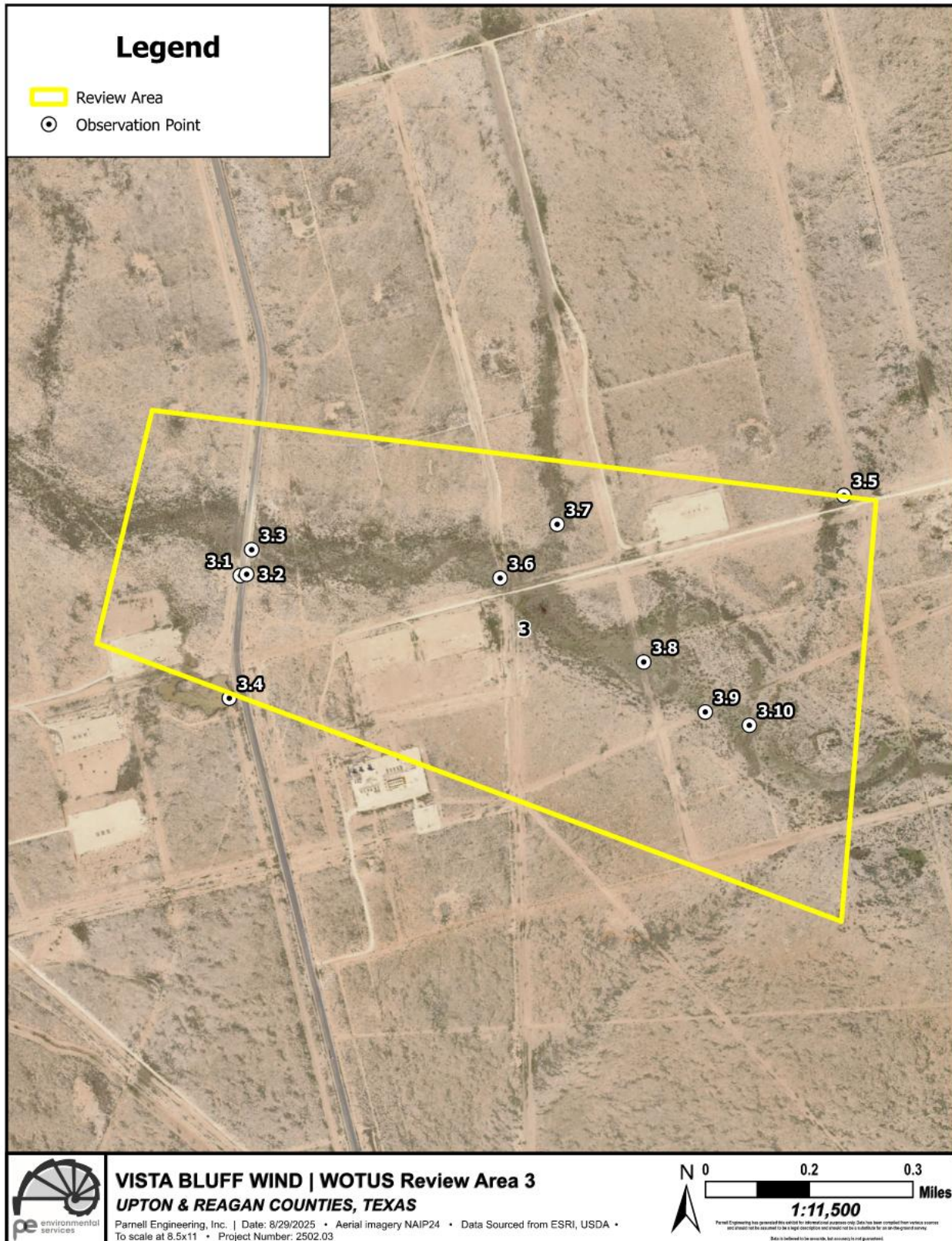
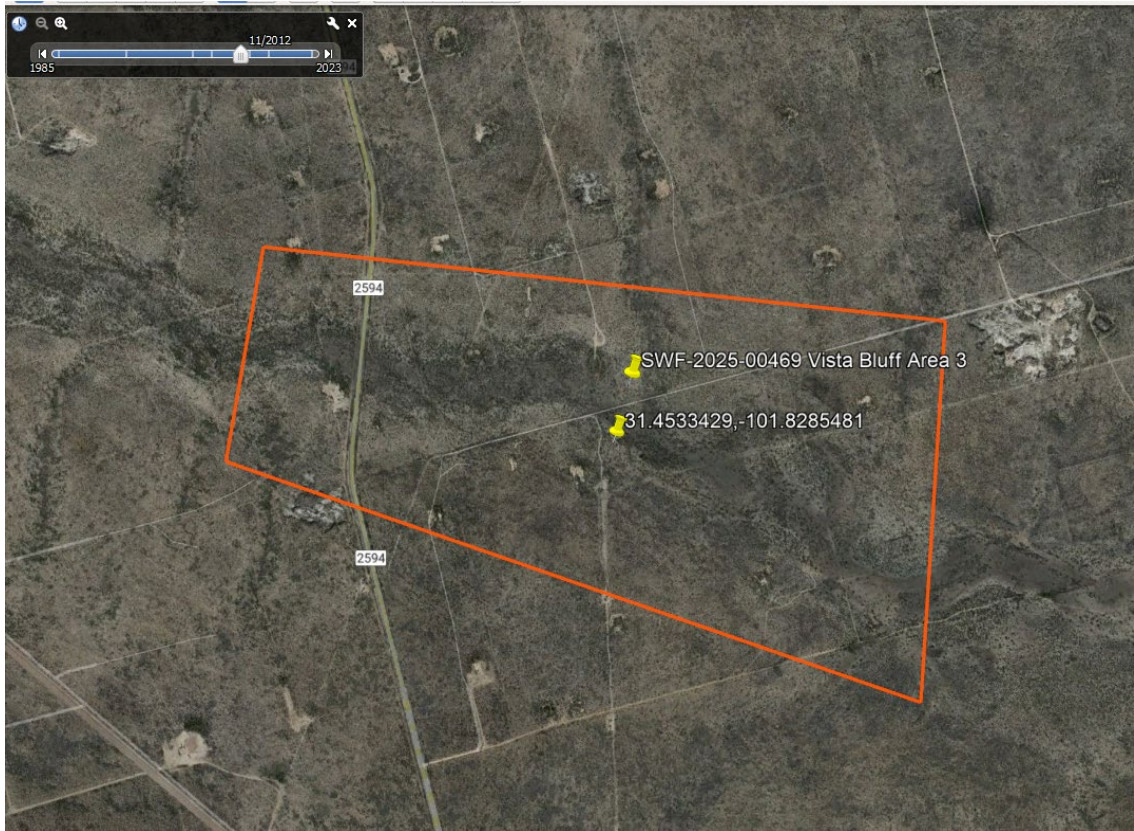
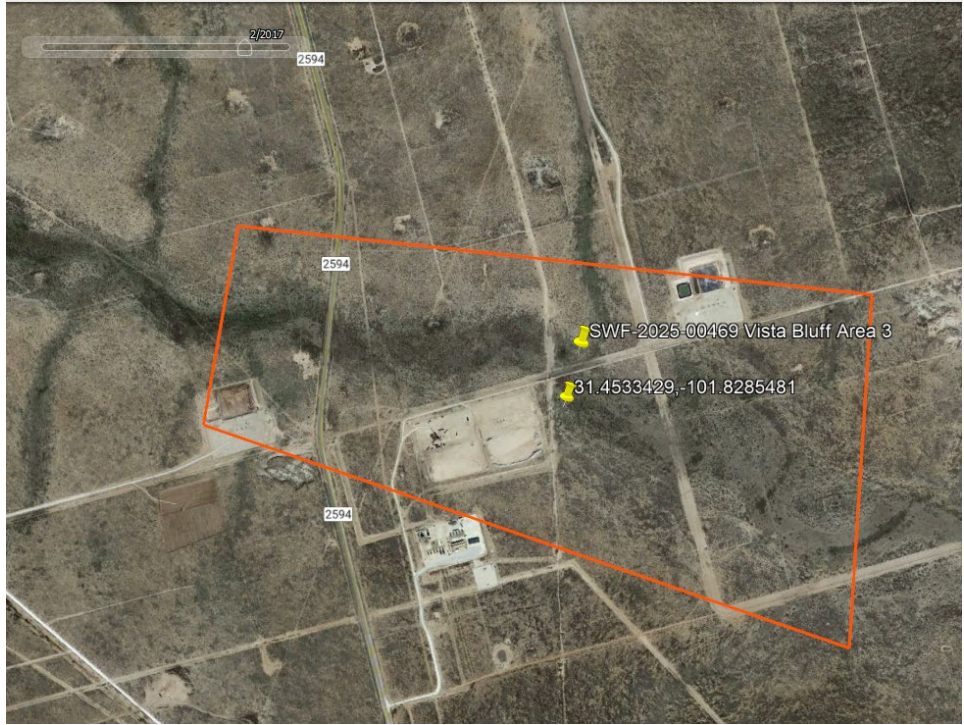


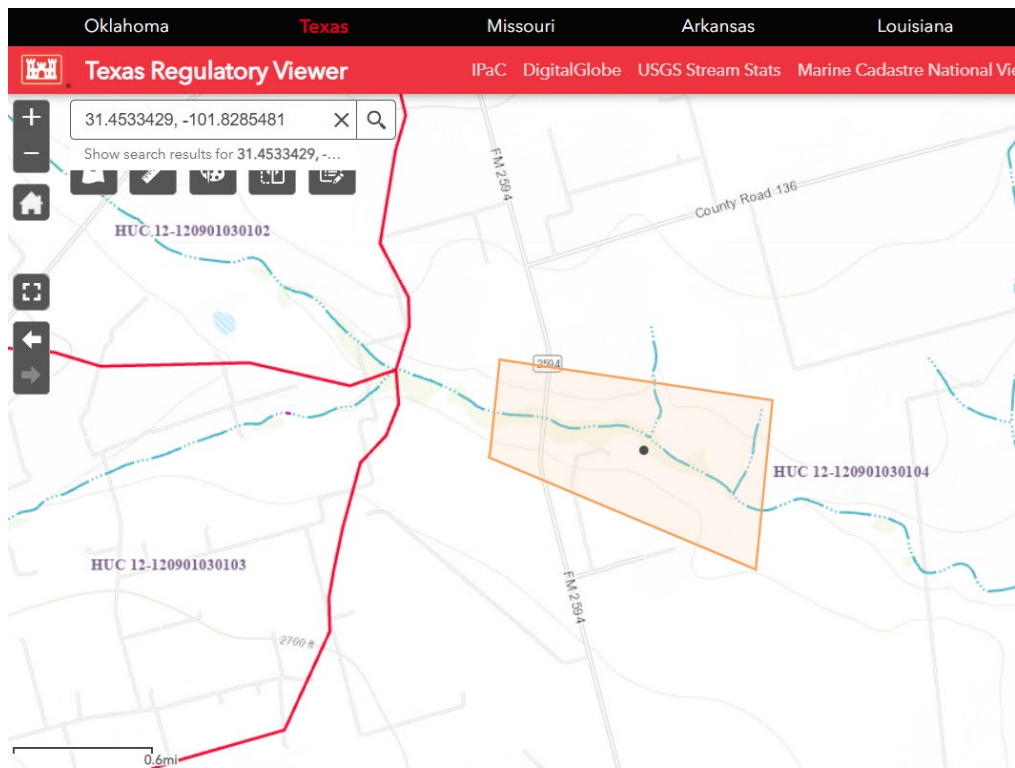
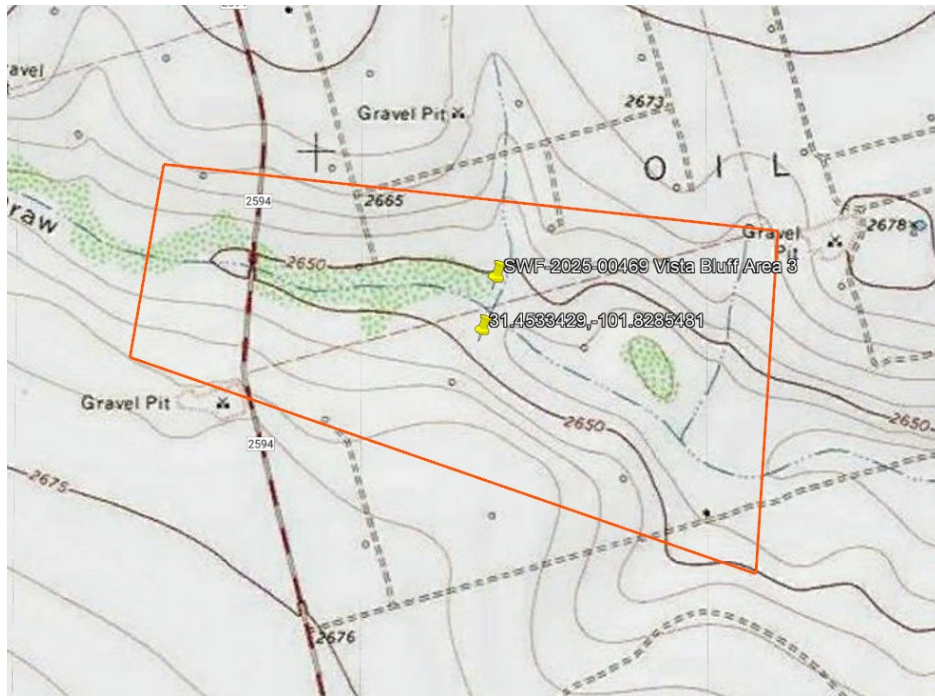


Figure 7: Field Map









Oklahoma

Texas

Missouri

Arkansas

Louisiana



Texas Regulatory Viewer

IPaC DigitalGlobe USGS Stream Stats Marine Cadastre National View

31.4533429, -101.8285481 X Q

Show search results for 31.4533429, -101.8285481

