DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
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CORPUS CHRISTI, TEXAS 78411-4318

Corpus Christi Field Office 12 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] SWG-2022-00690

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. SUMMARY OF CONCLUSIONS.

[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.

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).

Table 1: Features and Type within Review Area						
Name	**Start**	**End**	**Total Dist (feet)**	**Dist in RA (feet)**	**Strahler order**	**Type (Jurisdiction)**
S1	26.93665 N 99.25859 W	26.91030 N 99.23845 W	12,828	2,100	2	Seasonal RPW (404)
S2	26.92169 N 99.24291 W	26.91654 N 99.24305 W	1,936	1,509	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S3	26.91806 N 99.23962 W	26.91295 N 99.23999 W	1,870	492	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S4	26.93021 N 99.24047 W	26.92217 N 99.23327 W	2,986	722	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S4a	26.92293 N 99.23636 W	26.92375 N 99.23551 W	427	427	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S5	26.92870 N 99.23051 W	26.92217 N 99.23327 W	2,854	2,854	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S6	26.92375 N 99.23551 W	26.91183 N 99.22877 W	5,381	1,411	2	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S7	26.92915 N 99.22829 W	26.91686 N 99.22422 W	5,315	1,345	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S8	26.93003 N 99.22423 W	26.92577 N 99.21556 W	3,543	1,411	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S9	26.93512 N 99.22766 W	26.94104 N 99.22443 W	2,526	1,181	1	Non-Relatively Permanent Feature (Not Jurisdictional)
S10	26.94104 N 99.22443 W	26.93896 N 99.21887 W	2,428	1,509	2	Non-Relatively Permanent Feature (Not Jurisdictional)
S11	26.95765 N 99.24203 W	26.93896 N 99.21887 W	10,663	1,017	2	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S12	26.93969 N 99.21588 W	26.93758 N 99.21633 W	1,017	1,017	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S13	26.93896 N 99.21887 W	26.93156 N 99.20954 W	3,510	1,870	3	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S14	26.93638 N 99.21247 W	26.93254 N 99.20952 W	1,804	591	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)

S15	26.95126 N 99.22129 W	26.94033 N 99.20461 W	7,119	3,314	2	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S16	26.94546 N 99.20617 W	26.94277 N 99.20361 W	984	1,345	2	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S17	26.94998 N 99.20427 W	26.94277 N 99.20361 W	3,084	1,739	2	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S18	26.94277 N 99.20361 W	26.9358 N 99.20465 W	2,822	1,444	3	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S19	26.97961 N 99.20367 W	26.93580 N 99.20465 W	19,948	1,115	3	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)
S20	26.95237 N 99.19209 W	26.94686 N 99.19738 W	2,986	131	1	Swale, Non-Relatively Permanent Feature (Not Jurisdictional)

Table 1a: Features and Type within Review Area

Feature Name	Latitude/ Longitude	Size (AC)	Feature Type	Jurisdiction
P1	26.91418 N 99.24681 W	0.11	Pond Excavated from Uplands	Non-jurisdictional
P2	26.91595 N 99.24273 W	0.30	Pond Excavated from Uplands	Non-jurisdictional
W1	26.91672 N 99.24322 W	0.47	PEM	Adjacent, Jurisdictional, Section 404
W2	26.91611 N 99.24260 W	0.16	PEM	Adjacent, Jurisdictional, Section 404
P3	26.91593 N 99.24191 W	2.10	Impoundment in flow path of S1	RPW, Jurisdictional, Section 404
P4	26.91693 N 99.23956 W	0.15	Pond Excavated in NHD flow path of S3	Non-jurisdictional
P5	26.92285 N 99.23655 W	0.45	Pond Excavated in headwaters of NHD flow path of S4a	Non-jurisdictional
P6	26.92133 N 99.23315 W	0.34	Pond Excavated from Uplands	Non-jurisdictional
P7	26.92166 N 99.23263 W	0.08	Pond Excavated in NHD flow path of S6	Non-jurisdictional
P8	26.92605 N 99.23072 W	0.39	Pond Excavated in NHD flow path of S5	Non-jurisdictional
P9	26.92524 N 99.22869 W	0.18	Pond Excavated from Uplands	Non-jurisdictional
P10	26.92472 N 99.22846 W	0.42	Pond Excavated from Uplands	Non-jurisdictional
P11	26.92526 N 99.22756 W	0.25	Pond Excavated in NHD flow path of S7	Non-jurisdictional

P12	26.92946 N 99.22069 W	0.44	Pond Excavated in NHD flow path of S8	Non-jurisdictional
P13	26.93544 N 99.21196 W	0.18	Pond Excavated in NHD flow path of S14	Non-jurisdictional
P14	26.93651 N 99.21236 W	0.50	Pond Excavated in headwaters of NHD flow path of S14	Non-jurisdictional
P15	26.93694 N 99.21605 W	0.31	Pond Excavated in NHD flow path of S13	Non-jurisdictional
P16	26.93843 N 99.21978 W	0.51	Pond Excavated from Uplands	Non-jurisdictional
P17	26.93989 N 99.21596 W	0.98	Pond Excavated in headwaters of NHD flow path of S12	Non-jurisdictional
W3	26.93846 N 99.20669 W	0.08	PEM adjacent to Excavated Pond	Non-jurisdictional
W4	26.93966 N 99.20504 W	0.07	PEM adjacent to Excavated Pond	Non-jurisdictional
P18	26.93919 N 99.20599 W	0.66	Pond Excavated in NHD flow path of S18	Non-jurisdictional
W5	26.94463 N 99.20187 W	0.14	PEM adjacent to Excavated Pond	Non-jurisdictional
P19	26.94395 N 99.20271 W	0.73	Pond Excavated in NHD flow path of S17	Non-jurisdictional
P20	26.94474 N 99.19717 W	0.15	Pond Excavated in NHD flow path of S19	Non-jurisdictional

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 1,141 acres located south of US Highway 16, east of north US Highway 83, and east of the city limits of Zapata, Zapata County, Texas.

   Coordinates: 26.92946° North, 99.22069° West

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Stream S1, locally known as the Arroyo Costa Rica, flows across and through the western end of the Review Area in a generally southerly direction for 0.4-mile. From the stream's exit from the Review Area, Stream S1 flows an additional 0.44-mile to a point where it meets the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditionally Navigable Water.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

   d. Impoundments (a)(4):

[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.

Pond P3: LiDAR, topo, aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that Pond P3 is a ponded impoundment with fringe wetlands that was constructed along Stream 1. Stream 1, known locally as the Arroyo Costa Rica is a seasonal relatively permanent water that flows directly into a Traditionally Navigable Water, the Rio Grande. Therefore, Pond P3 was constructed out of a water of the United States and is a water of the United States.

e. Tributaries (a)(5):

Stream 1: LiDAR, topo, aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream 1, known locally as the Arroyo Costa Rica, is recorded with the National Hydrologic Database as a Strahler 2nd order seasonally relatively permanent water feature that begins 1.55 miles outside of the Review Area at the confluence of two unnamed Strahler 1st order streams at coordinates 26.93665°N, 99.25859°W and runs for approximately 2.43 miles (including 0.4-mile within the review area) generally toward the south, to a point 0.44-mile outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande. Starting 1,015 feet upstream of its confluence with Stream S2, Stream S1 has been excavated and channelized to handle additional flow. Observations of bed and bank characteristics, as well as an ordinary high water mark and seasonal flow, were observed during the March 23, 2023, site visit. Stream 1 is a water of the United States.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):
Wetlands W1 and W2 are fringe wetlands of Pond P3, which is an impoundment of Stream 1, a seasonal relatively permanent water. Both Stream 1 and Pond P3 are waters of the United States. Wetlands W1 and W2 directly abut an RPW that flows into a TNW, Falcon Reservoir. Therefore, Wetlands W1 and W2 have continuous surface connection to a TNW and meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are waters of the United States.

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").[6] 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.

Excavated Ponds P1, P2, P6, P9, P10, and P16: LiDAR, topo, aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that these water features are agricultural stock ponds that have been excavated from uplands. These excavated ponds do not have any continuous surface connection to a RPW or TNW. These features are best described in the preamble for 33 CFR 328.3, published in the Federal Register Volume 51, Number 219, November 13, 1986 (page 41217), which states "For clarification, it should be noted that we generally do not consider the following waters to be Waters of the United States…(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." These ponds were created in uplands for the purpose of stock watering and are not waters of the United States.

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.

Stream S2: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S2 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins approximately 30 feet outside of the Review Area at coordinates 26.92169°N, 99.24291°W and runs for approximately 0.37-mile (including 0.29-mile within the review area) generally toward the south, to its confluence with Stream S1 (26.91654°N, 99.24291°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S2 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

[6] 51 FR 41217, November 13, 1986.

Stream S3: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S3 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.91806°N, 99.23962°W and runs for approximately 0.35-mile (including 0.09-mile within the review area) generally toward the south, to its confluence with Stream S1 (26.91295°N, 99.23999°W) outside the Review Area. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S3 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S4: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S4 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins approximately 0.44-mile northwest of the Review Area at coordinates 26.93021°N, 99.24047°W and runs for approximately 0.57-mile (including 0.14-mile within the review area) generally toward the southeast, to its confluence with Stream S4a (26.92375°N, 99.23551°W), where Stream S6 begins. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S4 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S4a: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S4a is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.92293°N, 99.23636°W and runs completely within the Review Area for distance of approximately 0.08-mile generally toward the northeast, to its confluence with Stream S4 (26.92375°N, 99.23551°W), where Stream S6 begins. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S4a is best defined as a geographic swale that does not meet the

definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S5: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S5 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.92870°N, 99.23051°W and runs completely within the Review Area for distance of approximately 0.54-mile generally toward the northeast, to its confluence with Stream S6 (26.92217°N, 99.23327°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S5 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S6: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S6 is recorded with the National Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins within the Review Area at coordinates 26.92375°N, 99.23551°W at the confluence of Streams S4 and S4a, and runs generally south for distance of approximately 1.02 miles (including 0.27-mile within the Review Area), to a point outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditional Navigable Water (26.91183°N, 99.22877°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S6 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S7: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S7 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins approximately 427 feet north of the Review Area at coordinates 26.92915°N, 99.22829°W, and runs generally south for distance of approximately 1.01 miles (including 0.25-mile within the Review Area), to a point

outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditional Navigable Water (26.91686°N, 99.22422°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S7 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S8: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S8 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.93003°N, 99.22423°W, and runs generally southeast for distance of approximately 0.67-mile (including 0.27-mile within the Review Area), to a point outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft), an impoundment of the Rio Grande, a Traditional Navigable Water (26.92577°N, 99.21556°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S8 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S9: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S9 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.91532°N, 99.22766°W and runs for approximately 0.48-mile (including 0.22-mile within the review area) generally toward the northeast, to its confluence with Stream S10 (26.94104°N, 99.22443°W) outside of the Review Area. The presence of bed and banks were recorded in the applicant-provided delineation report, and review of several years of aerial photography and direct observation during the March 23, 2023, site visit confirmed this finding. However, the flow regime of Stream S9 is limited to the direct result of infrequent and localized precipitation and does not meet the definition of a relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S10: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S10 is recorded with the National Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins 0.17-mile outside the Review Area at the confluence of Stream S9 and another unnamed stream at coordinates 26.94104°N, 99.22443°W, and runs for approximately 0.46-mile (including 0.29-mile within the review area) generally toward the southeast, to its confluence with Stream S11 (26.93896°N, 99.21887°W) within the Review Area. The presence of bed and banks were recorded in the applicant-provided delineation report, and review of several years of aerial photography and direct observation during the March 23, 2023, site visit confirmed this finding. However, the flow regime of Stream S10 is limited to the direct result of infrequent and localized precipitation and does not meet the definition of a relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S11: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S11 is recorded with the National Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins 1.83 miles outside the Review Area at the confluence of two unnamed streams at coordinates 26.95765°N, 99.24203°W, and runs for approximately 2.02 miles (including 0.19-mile within the review area) generally toward the southeast, to its confluence with Stream S10 (26.93896°N, 99.21887°W) within the Review Area, where Stream S13 begins. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S11 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S12: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S12 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.93969°N, 99.21588°W, and runs for approximately 0.0.19-mile generally toward the southeast, to its confluence with Stream S13 (26.93758°N, 99.21633°W) within the Review Area. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the

March 23, 2023, site visit. Stream S12 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S13: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S13 is recorded with the National Hydrologic Database as a Strahler 3rd order non-relatively permanent water feature that begins within the Review Area at the confluence of Streams S10 and S11 at coordinates 26.93896°N, 99.21887°W, and runs for approximately 0.66-mile (including 0.35-mile within the review area) generally toward the southeast, to a point outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditional Navigable Water (26.93156°N, 99.20954°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S13 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S14: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S14 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins within the Review Area at coordinates 26.93638°N, 99.21247°W, and runs for approximately 0.34-mile (including 0.11-mile within the review area) generally toward the southeast, to a point outside the Review Area where it meets with the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Relatively Permanent Water (26.93254°N, 99.20952°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S14 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S15: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S15 is recorded with the National

Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins 1.16 km outside the Review Area at the confluence of two unnamed streams at coordinates 26.95126°N, 99.22129°W, and runs for approximately 1.35 miles (including 0.63-mile within the review area) generally toward the southeast, to its confluence with Stream S18 (26.94033°N, 99.20461°W) within the Review Area. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S15 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S16: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S16 is recorded with the National Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins 0.01-mile outside the Review Area at the confluence of two unnamed streams at coordinates 26.94546°N, 99.20617°W, and runs for approximately 0.27-mile (including 0.25-mile within the review area) generally toward the southeast, to its confluence with Stream S17 (26.94998°N, 99.20427°W) within the Review Area, where Stream S18 begins. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S16 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S17: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S17 is recorded with the National Hydrologic Database as a Strahler 2nd order non-relatively permanent water feature that begins 0.25-mile outside the Review Area at the confluence of two unnamed streams at coordinates 26.94998°N, 99.20427°W, and runs for approximately 0.58-mile (including 0.33-mile within the review area) generally toward the southeast, to its confluence with Stream S16 (26.94998°N, 99.20427°W) within the Review Area, where Stream S18 begins. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S17 is best defined as a geographic swale that does not meet the

definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S18: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S18 is recorded with the National Hydrologic Database as a Strahler 3rd order non-relatively permanent water feature that begins within the Review Area at the confluence of Streams S16 and S17 at coordinates 26.94277°N, 99.20361°W, and runs for approximately 0.53-mile (including 0.27-mile within the review area) generally toward the south, to a point outside the Review Area where it meets with Stream S19, a Strahler 3rd order stream, to become an unnamed Strahler 4th order stream (26.93580°N, 99.20465°W). The unnamed Strahler 4th order stream continues in a southwesterly direction to the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditional Navigable Water. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S18 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S19: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S19 is recorded with the National Hydrologic Database as a Strahler 3rd order non-relatively permanent water feature that begins 2.62 miles outside the Review Area at the confluence of two unnamed streams at coordinates 26.97961°N, 99.20376°W, and runs for approximately 3.78 miles (including 0.21-mile within the review area) generally toward the southwest, to a point outside the Review Area where it meets with Stream S18, a Strahler 3rd order stream, to become an unnamed Strahler 4th order stream (26.93580°N, 99.20465°W). The unnamed Strahler 4th order stream continues in a southwesterly direction to the conservation pool elevation of Falcon Reservoir (301.2 ft MSL), an impoundment of the Rio Grande, a Traditional Navigable Water. There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S19 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

Stream S20: LiDAR, topo, review of aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that the reach labelled as Stream S20 is recorded with the National Hydrologic Database as a Strahler 1st order non-relatively permanent water feature that begins 0.54-mile outside of the Review Area at coordinates 26.95237°N, 99.19209°W and runs for approximately (including 0.02-mile within the review area) generally toward the southwest, to its confluence with Stream S19 (26.94686°N, 99.19738°W). There were no observations of bed or banks, ordinary high water mark, or flow recorded in the applicant-provided delineation report, review of several years of aerial photography, or during direct observation during the March 23, 2023, site visit. Stream S20 is best defined as a geographic swale that does not meet the definition of a tributary or relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

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*.

Ponds P4, P5, P7, P8, P11, P12, P13, P14, P15, P17, P18, P19, and P20: LiDAR, topo, aerial photographs, the applicant-provided delineation report, and a site visit were utilized as part of the desktop analysis to identify that Ponds P4, P5, P7, P8, P11, P12, P13, P14, P15, P17, P18, P19, and P20 are stock ponds excavated from uplands within a geographic swale with no presence of bed or banks or an ordinary high water mark.

The ponds are relatively permanent and do not meet one of the other jurisdictional categories. The ponds were constructed swales which directly or indirectly connects to Falcon Reservoir, an impoundment of the Rio Grande and a Traditional Navigable Water. The only flow in the swales occurs after a precipitation event. The use, degradation, or destruction of the ponds could not affect interstate or foreign commerce including any such waters which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce: or which are used or could be used for industrial purposes by industries in interstate commerce. Therefore Ponds P4, P5, P7, P8, P11, P12, P13, P14, P15, P17, P18, P19, and P20 are not waters of the United States.

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).

   Wetlands W3, W4, and W5: Wetlands W3 and W4 are fringe wetlands of Pond P18. Pond P18 was determined to not be a water of the United States. W3 flows through Pond P18 and Swale S18 for approximately 3,352 linear feet until it reaches Falcon Reservoir, a Traditional Navigable Water. Wetland W4 flows through pond 18 and Swale S18 for approximately 2,873 feet until it reached Falcon Reservoir, a Traditional Navigable Water. Water only flows in the swale after heavy rainfalls as the project site is in an arid area with little yearly precipitation. It is doubtful that water from Wetlands W3 or W4 reaches Falcon Reservoir during normal conditions. Wetland W5 is a fringe wetland of Pond P19. Pond P19 was determined not to be a water of the United States. W5 flows through Pond P19, Swale S17, and Swale S18 for approximately 5,078 linear feet until it reaches Falcon Reservoir, a Traditional Navigable Water. Water only flows in the swales after heavy rainfalls as the project site is in an arid area with little yearly precipitation. It is doubtful that water from Wetland W5 reaches Falcon Reservoir during normal conditions. Therefore, Wetlands W3, W4, and W5 do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States.

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. Aquatic Resources Delineation Report: *Desert Vine Solar* by Kimley-Horn and Associates, Inc., September 14, 2022.

b. Aerial photographs (2021, 2020, 2017, 2015, 2008, 2002,1995; source: Google Earth)

c. USGS Topographic Map 1:24,000, Zapata, TX and 1:24,000 Arroyo Veleno, TX

d. Web Soil Survey Hydric Rating Map for Zapata County, Texas (NRCS website accessed 10/2/2023)

e. National Wetland Inventory (NWI) (USFWS website accessed 10/2/2023)

f. National Hydrography Dataset (NHD) (USGS website accessed 10/03/2023)

g. Site Visit on March 23, 2023.

10. OTHER SUPPORTING INFORMATION.

N/A

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.

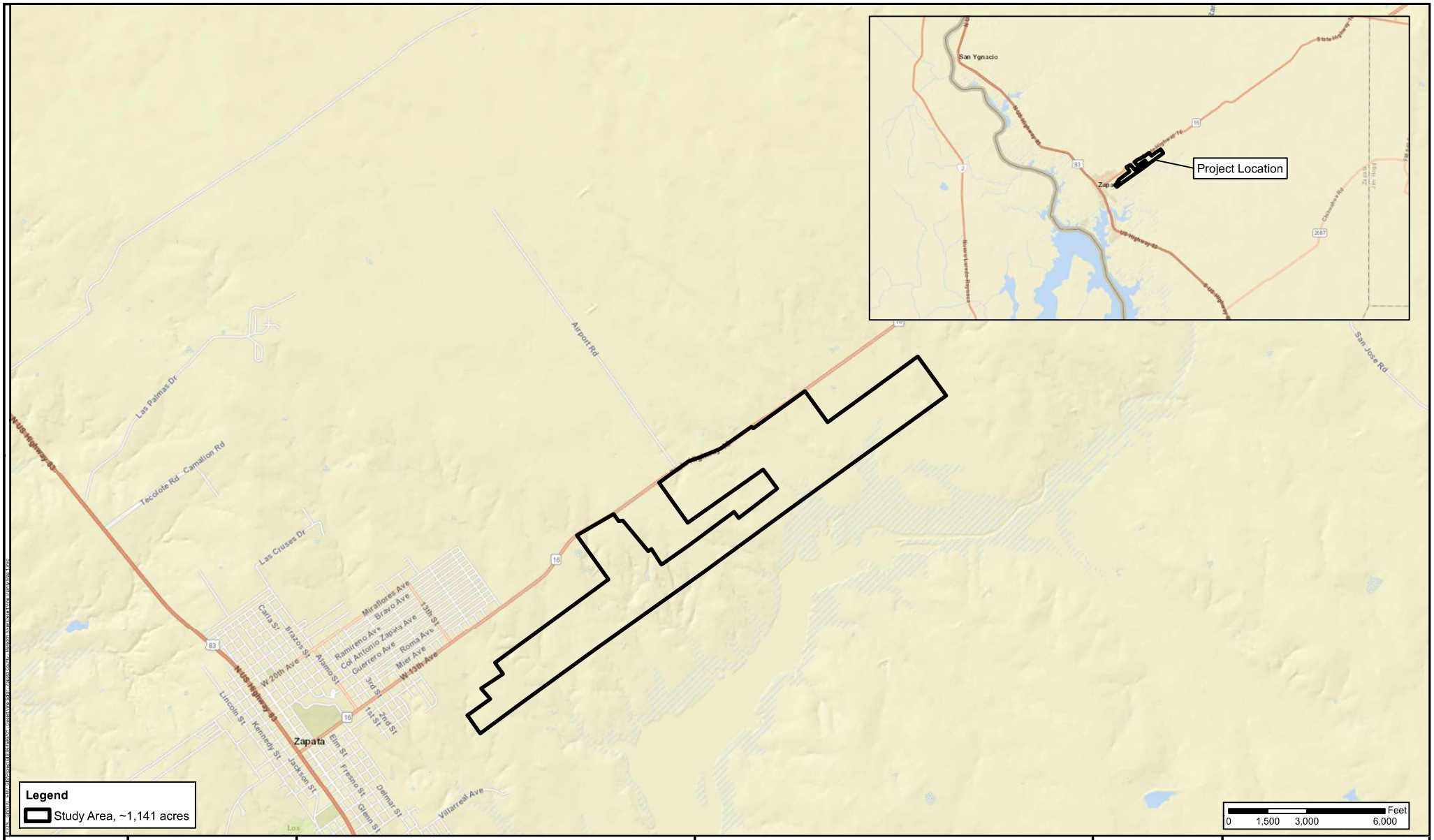
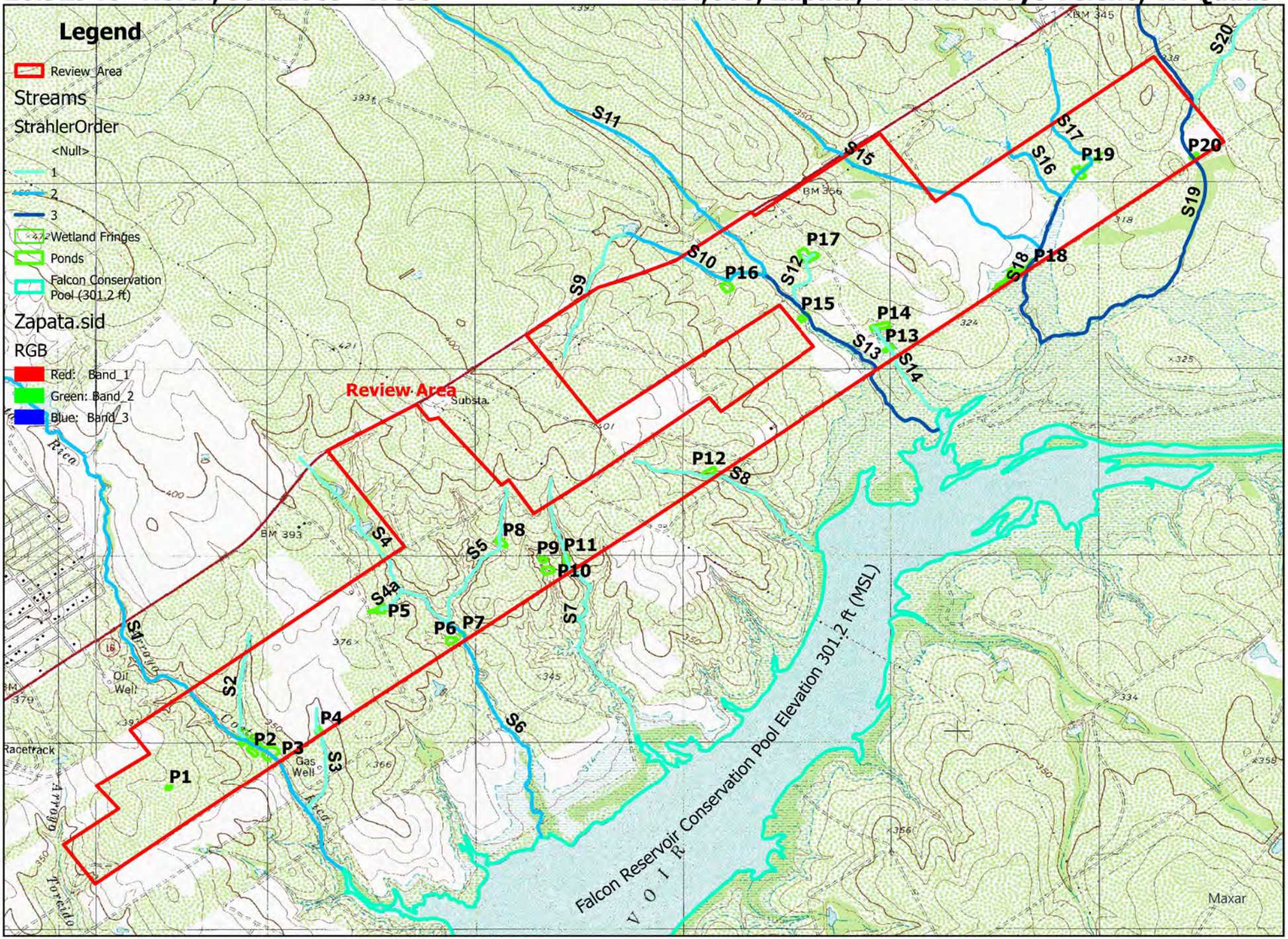


FIGURE				
1	DATE: 03/25/2022 DESIGN: TMB CHECKED: MREA KHA NO.: 064596701	VICINITY MAP Source: Esri Basemap	DESERT VINE SOLAR Zapata County, Texas	Kimley»Horn

SWG-2022-00690 Review Area (1,141 Acres)

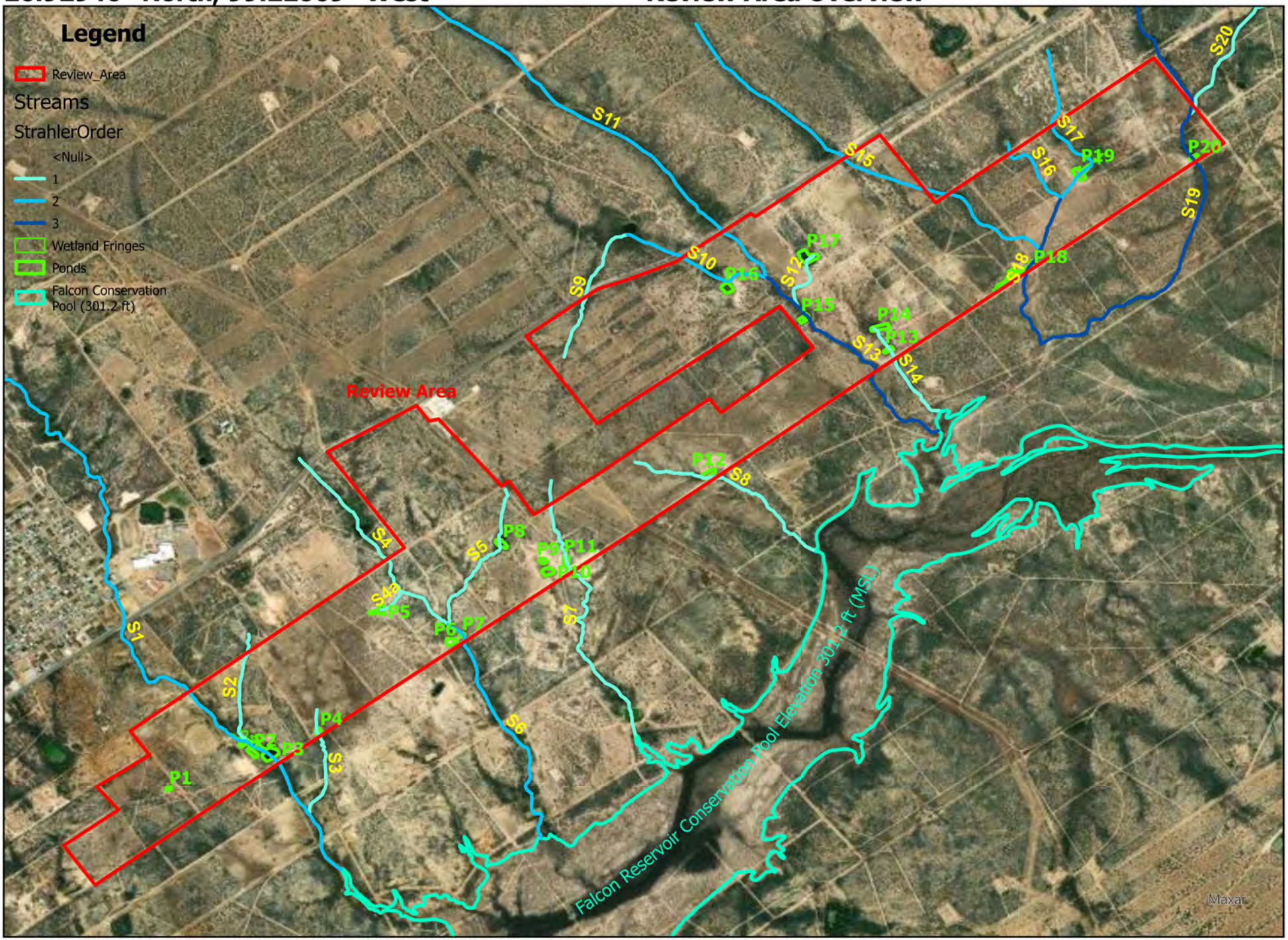
26.92946° North, 99.22069° West 1:24,000, Zapata, TX and Arroyo Veleno, TX Quads



SWG-2022-00690 Review Area (1,141 Acres)

26.92946° North, 99.22069° West

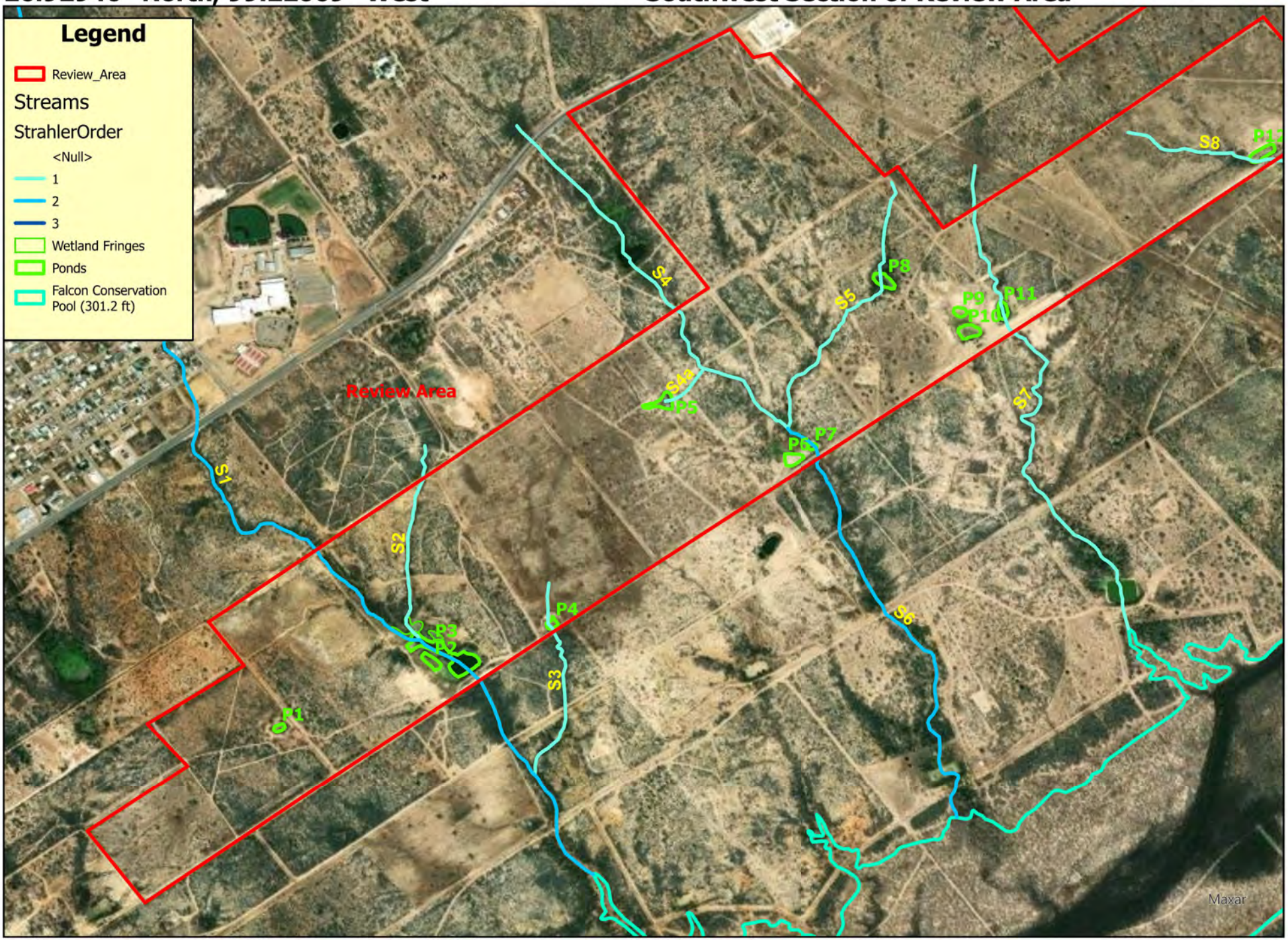
Review Area Overview



SWG-2022-00690 Review Area (1,141 Acres)

26.92946° North, 99.22069° West

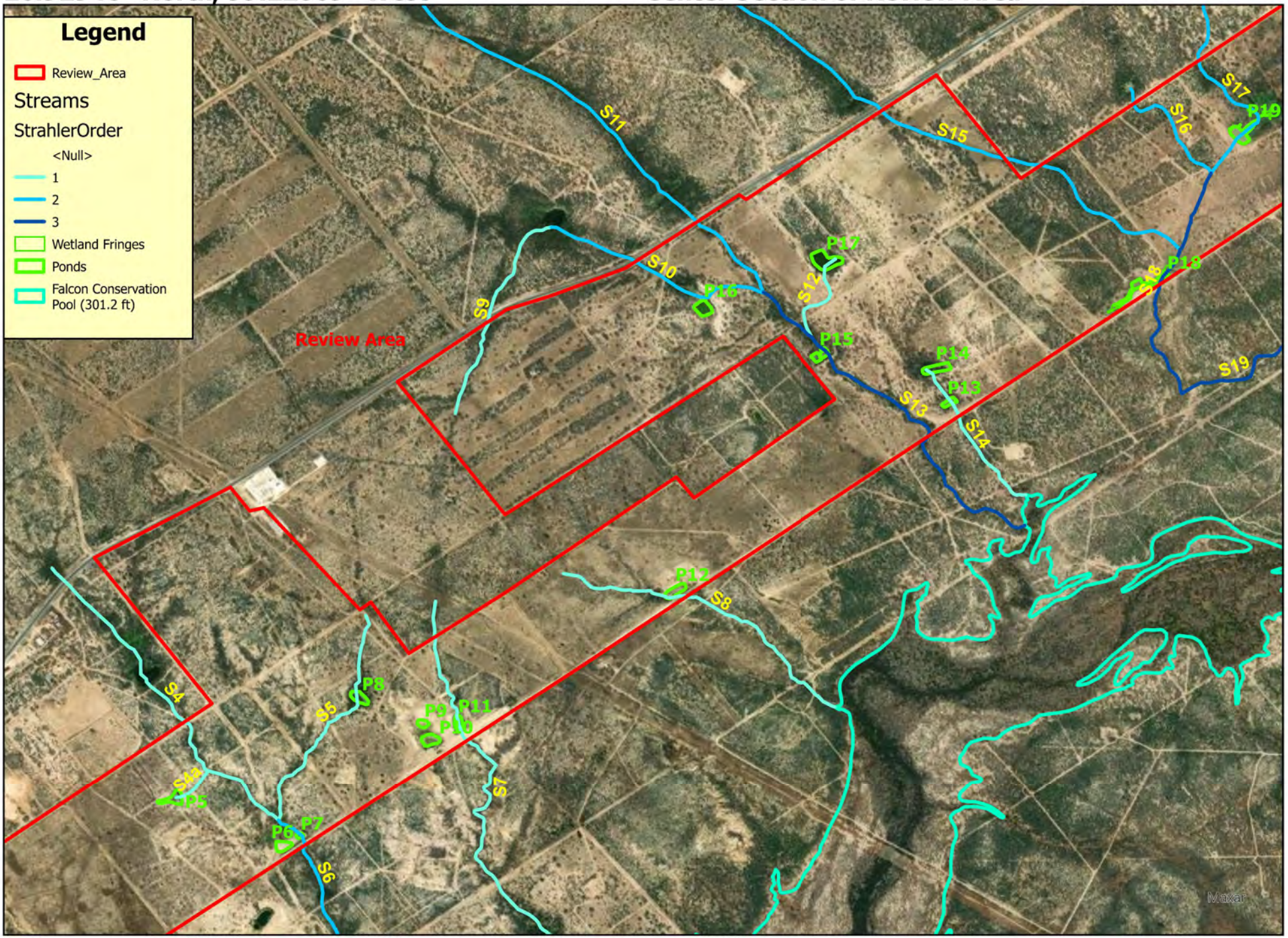
Southwest Section of Review Area



SWG-2022-00690 Review Area (1,141 Acres)

26.92946° North, 99.22069° West

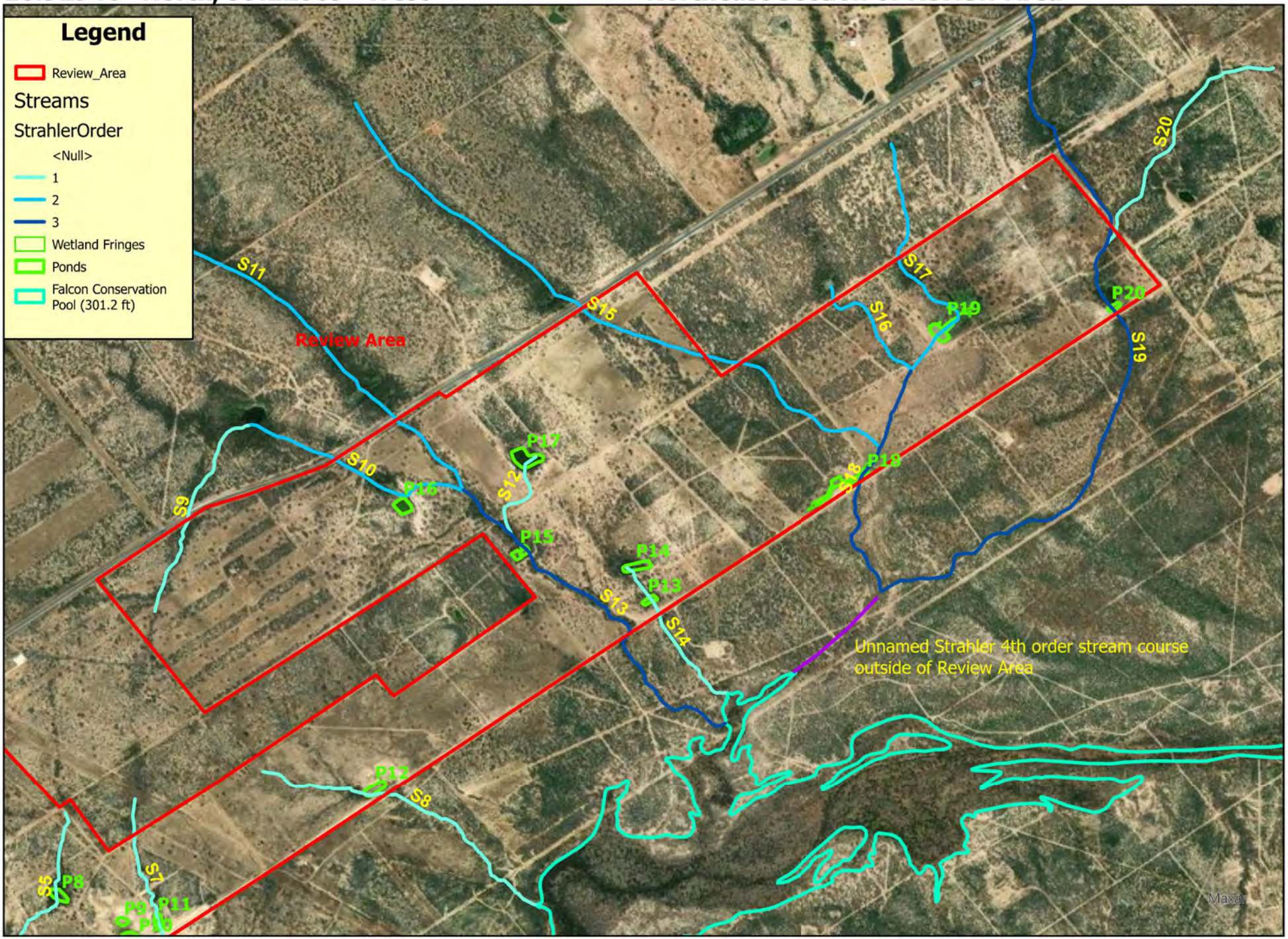
Center Section of Review Area



SWG-2022-00690 Review Area (1,141 Acres)

26.92946° North, 99.22069° West

Northeast Section of Review Area



SWG-2022-00690 Review Area (1,141 Acres)

26.92946° North, 99.22069° West Elevation Data