DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
5151 FLYNN PARKWAY, SUITE 306
CORPUS CHRISTI, TEXAS 78411-4318

CESWG-RDR 29 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] SWG-2023-00227[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 September 8, 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.

   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).

Feature Name	Size (ac)	Latitude	Longitude	Feature Type	Jurisdiction
Pond-1	2.91	28.041227	-97.070894	Retention pond	None
PEM-1	0.51	28.041557	-97.070761	PEM Wetland	None
PEM-2	0.2	28.041593	-97.065860	PEM Wetland	None
PEM-3	0.1	28.042264	-97.064864	PEM Wetland	None
PEM-4	0.01	28.042530	-97.070281	PEM Wetland	None
PEM-5	0.5	28.042472	-97.072160	PEM Wetland	None
Pond-2	0.88	28.043099	-97.068209	Retention Pond	None
PEM-6	0.26	28.043466	-97.068419	PEM Wetland	None
PEM-7	0.13	28.044074	-97.065811	PEM Wetland	None
PEM-8	0.02	28.044251	-97.064846	PEM Wetland	None
Pond-3	0.43	28.045027	-97.065986	Retention Pond	None
PEM-9	0.24	28.045102	-97.066267	PEM Wetland	None
PEM-10	0.12	28.045235	-97.066438	PEM Wetland	None
PEM-11	0.07	28.045643	-97.066853	PEM Wetland	None
PEM-12	0.03	28.045882	-97.067845	PEM Wetland	None
PEM-13	0.02	28.046007	-97.068305	PEM Wetland	None
PEM-14	0.06	28.045921	-97.068691	PEM Wetland	None
PEM-15	0.06	28.046135	-97.067271	PEM Wetland	None
PEM-16	0.08	28.046132	-97.067548	PEM Wetland	None
PEM-17	0.07	28.046351	-97.067942	PEM Wetland	None
PEM-18	0.09	28.047363	-97.068511	PEM Wetland	None
PEM-19	0.2	28.047163	-97.067205	PEM Wetland	None
Pond-4	0.84	28.047257	-97.066336	Retention Pond	None
PEM-20	0.2	28.047248	-97.065902	PEM Wetland	None
PEM-21	0.01	28.047242	-97.065465	PEM Wetland	None
Ditch-1	0.27	28.044877	-97.063883	Drainage Ditch	None
Ditch-2	0.81	28.041698	-97.066055	Drainage Ditch	None
Ditch-3	0.09	28.043792	-97.067353	Drainage Ditch	None

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)

   e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

   f. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act

3. REVIEW AREA. The approximate 134-acre review area is located at 1886 FM 2165, Rockport, Aransas County, Texas.

   LATITUDE/LONGITUDE (Decimal Degrees):
   Latitude: 28.043637°N; Longitude: 97.068674°W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A[6]

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

[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.

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

[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.

[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.

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.

Retention Ponds Pond-1, Pond-2, Pond-3, Pond-4 (5.06 ac): LiDAR, topo, aerial imagery, applicant-provided site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these features are pond/stormwater retention ponds that were excavated from uplands for the purpose of livestock support and sand mining within the last decade. The ponds are connected by ditches dug from uplands (Ditch-1, Ditch-2, and Ditch-3), which appear to carry non-relatively permanent flow from discrete precipitation events towards the ponds. As stated under 33CFR 328.3 subsection(b)(5) & (b)(7), "Artificial lakes or ponds, including water storage reservoirs, and farm, irrigation, stock watering…constructed or excavated in upland or in non-jurisdictional waters" do not fall under jurisdictional waters of the U.S. as long as they are not impoundments of jurisdictional waters that meet conditions of 33CFR 328.3 subsection (c)(6) and waterfilled depressions created in dry land incidental to construction activities and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(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.

Ditch-1, Ditch-2, Ditch-3 (1.17 ac): LiDAR, topo, aerial imagery, applicant-provided site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these features are ditches constructed from uplands that appear to carry non-relatively permanent flow towards the retention ponds. LiDAR data shows a high elevation crest within the drainage ditch at the eastern end of the review area (lat/lon: 28.0448985°N, 97.0628601°W). Elevation at this crest is approximately at 5.33 meters, while the elevation to both the east and west of this crest is approximately 4.82 meters. From this crest, water would flow west to the pond system, or east towards the roadside drainage ditch along FM 2165. In addition, the beds of the ditches are

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

higher in elevation than the retention ponds. The ditches do not contain relatively permanent water, are not under tidal influence, and do not act as a tributary to any TNW. The preamble of Section 328.3 (16 November 1986 Federal Register Vol. 51, No. 219) defines waters that are generally non-jurisdictional, including "non-tidal drainage ditches excavated on dry land… Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water (33 CFR 328.3(b)(3)."

c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A

e. Describe aquatic resources (i.e., lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in "*SWANCC*," would have been jurisdictional based solely on the "Migratory Bird Rule." Include the size of the aquatic resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. N/A

f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetlands PEM-1, PEM-6, PEM-9, PEM-20 (1.21 ac): LiDAR, topo, aerial imagery, applicant-provided site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these features are emergent fringe wetland communities that have developed around the retention pond features (Pond-1, Pond-2, Pond-3, and Pond-4). There is no presence of a continuous surface connection, nor is there any evidence of sheet flow from these wetlands to an RPW or TNW. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with pre-2015

regulatory regime in light of Sackett v. EPA and the 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act, a wetland is considered adjacent if connected by a continuous surface connection, meaning that the wetland must physically abut or touch the paragraph (a)(1), a jurisdictional impoundment, or relatively permanent water.

Wetlands PEM-2, PEM-4, PEM-5, PEM-7, PEM-8, PEM-10, PEM-11, PEM-12, PEM-13, PEM-14, PEM-15, PEM-16, PEM-17, PEM-18, PEM-19, PEM, PEM-21 (1.51 ac): LiDAR, topo, aerial imagery, applicant-provided site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that these palustrine wetlands reside in small depressional areas entirely within the review area that collect rainwater from the surrounding countryside through sheet flow. There is no presence of a continuous surface connection, nor is there any evidence of sheet flow from these wetlands to an RPW or TNW. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with pre-2015 regulatory regime in light of Sackett v. EPA and the 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act, a wetland is considered adjacent if connected by a continuous surface connection, meaning that the wetland must physically abut or touch the paragraph (a)(1), a jurisdictional impoundment or relatively permanent water.

Wetland PEM-3 (0.1 ac): LiDAR, topo, aerial imagery, applicant-provided site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that this palustrine wetland extends westward outside the review area approximately 25 feet, but does not provide a continuous surface connection, nor is there evidence of sheet flow to an RPW or TNW. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with 33 CFR Part 328.3, a wetland is considered a WOUS when it is adjacent to waters identified in paragraph (a)(1)-(a)(3) of the federal regulations. In accordance with pre-2015 regulatory regime in light of Sackett v. EPA and the 12 March 2025 Memorandum to the Field Between the U.S.

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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. Waters of the US Survey Report: 134-Acre (Approximate) Project Review Area, Rockport, Aransas County, Texas; prepared by Triton Environmental Solutions LLC (8 April 2023, revised 9 June 2023)

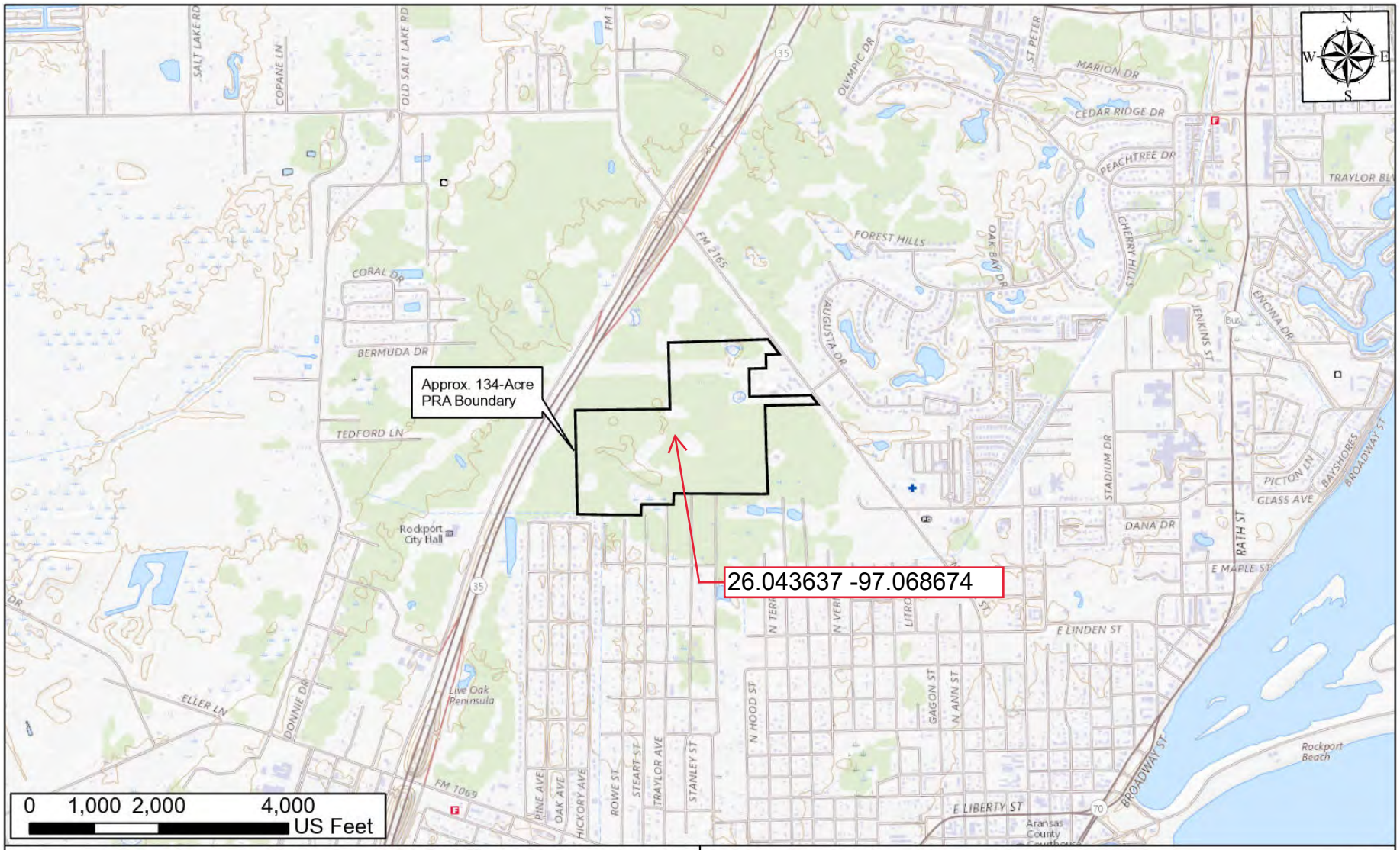
- FEMA FIRM, 48007C0240G, effective 17 February 2016
- National Wetland Inventory (NWI), map prepared March 16, 2023
- NRCS Web Soil Survey for Aransas County, Texas, map prepared March 16, 2023
- Aerials (1995, 2005, 2008, 2016, 2020, source: Google Earth)
- USGS Topographic Map (1:24,000 scale); Rockport, Texas (2022)
- Lidar (flown 2018); NOAA Digital Coast.

b. ORM2 Database – no previous jurisdictional determinations for this review area

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.

SWG-2023-00227



USGS Topographic Overview Map

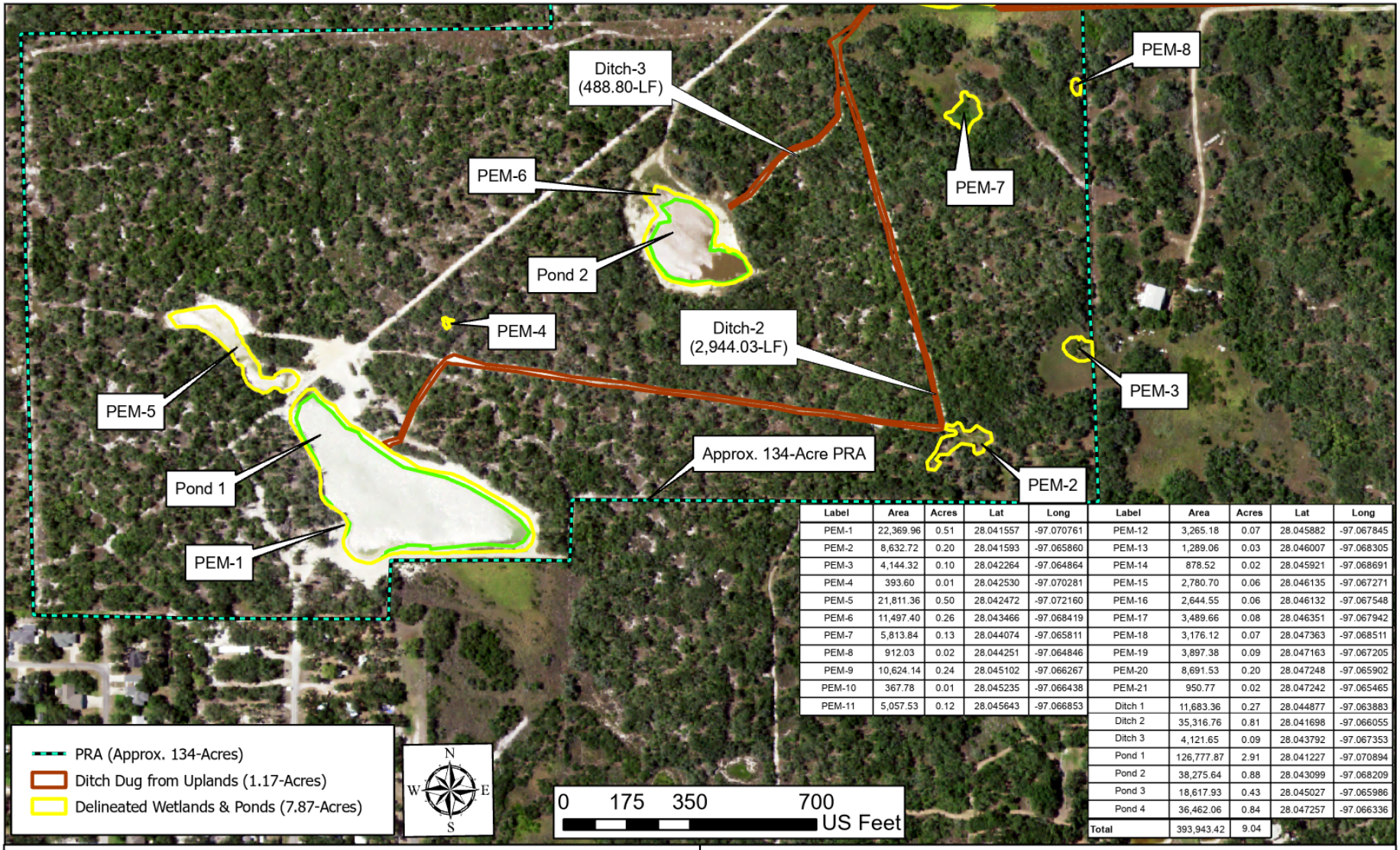
Approx. 134-Acre Project Review Area (PRA)
Rockport, Aransas County, Texas

Prepared By:
Triton Environmental Solutions, LLC
P.O. Box 1755
Rockport, Texas 78381

Prepared For:
Brett Bohn
Pearl Street Land Holdings, LLC
Rockport, TX 78382

Map Notes:
For planning and permitting only, not for construction.
Base Map Source: ESRI USGS Topographic World Map.
Map Preparation Date: 3/16/2023 (SP).

RECD 12 MAR 2025



Label	Area	Acres	Lat	Long
PEM-1	22,369.96	0.51	28.041557	-97.070761
PEM-2	8,632.72	0.20	28.041593	-97.065860
PEM-3	4,144.32	0.10	28.042264	-97.064864
PEM-4	393.60	0.01	28.042530	-97.070281
PEM-5	21,811.36	0.50	28.042472	-97.072160
PEM-6	11,497.40	0.26	28.043466	-97.068419
PEM-7	5,813.84	0.13	28.044074	-97.065811
PEM-8	912.03	0.02	28.044251	-97.064846
PEM-9	10,624.14	0.24	28.045102	-97.066267
PEM-10	367.78	0.01	28.045235	-97.066438
PEM-11	5,057.53	0.12	28.045643	-97.066853

Label	Area	Acres	Lat	Long
PEM-12	3,265.18	0.07	28.045882	-97.067845
PEM-13	1,289.06	0.03	28.046007	-97.068305
PEM-14	878.52	0.02	28.045921	-97.068691
PEM-15	2,780.70	0.06	28.046135	-97.067271
PEM-16	2,644.55	0.06	28.046132	-97.067548
PEM-17	3,489.66	0.08	28.046351	-97.067942
PEM-18	3,176.12	0.07	28.047363	-97.068511
PEM-19	3,897.38	0.09	28.047163	-97.067205
PEM-20	8,691.53	0.20	28.047248	-97.065902
PEM-21	950.77	0.02	28.047242	-97.065465
Ditch 1	11,683.36	0.27	28.044877	-97.063883
Ditch 2	35,316.76	0.81	28.041698	-97.066055
Ditch 3	4,121.65	0.09	28.043792	-97.067353
Pond 1	126,777.87	2.91	28.041227	-97.070894
Pond 2	38,275.64	0.88	28.043099	-97.068209
Pond 3	18,617.93	0.43	28.045027	-97.065986
Pond 4	36,462.06	0.84	28.047257	-97.066336
Total	393,943.42	9.04		

Wetland Delineation Results Map: South Detail

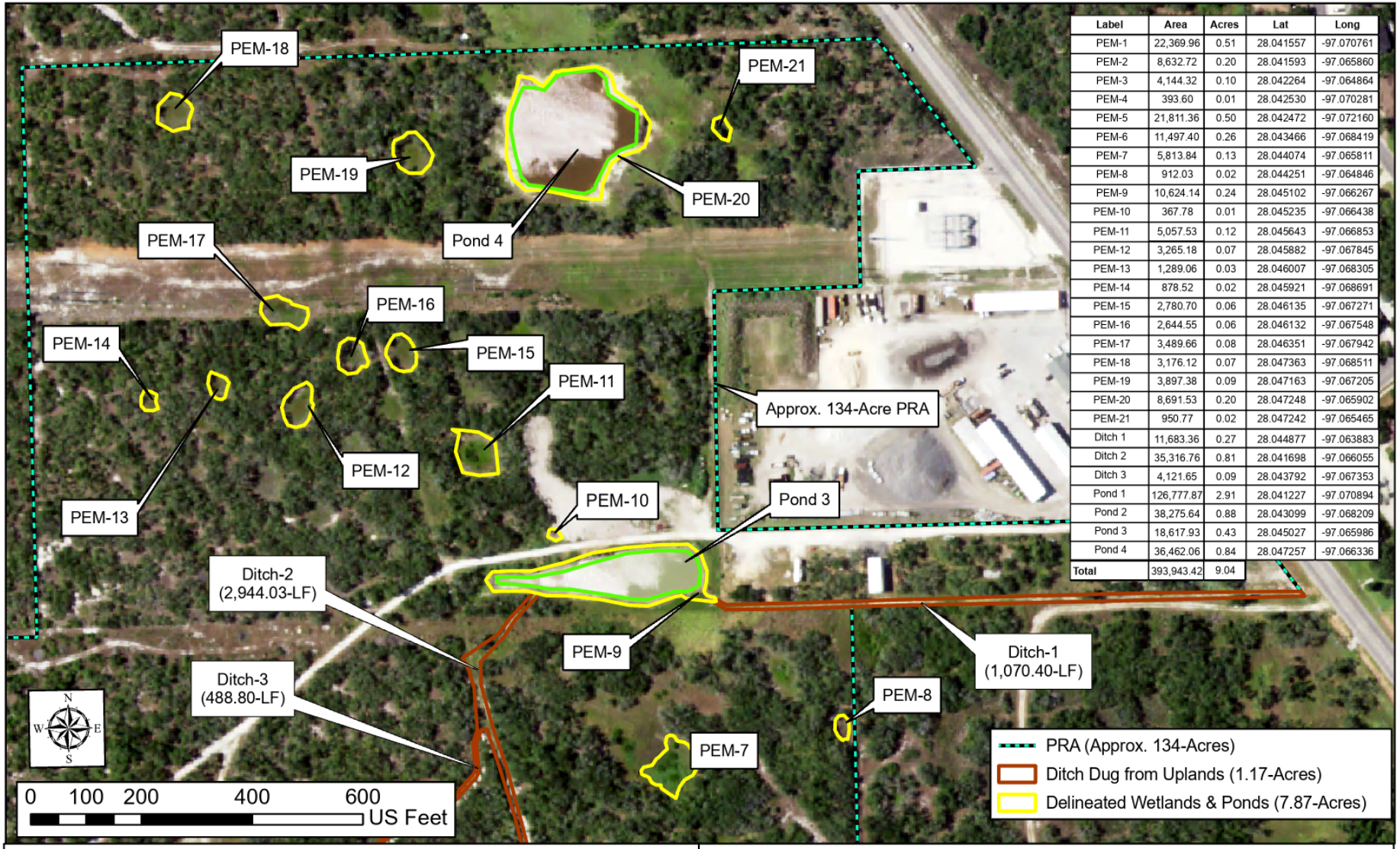
Approx. 134-Acre Project Review Area (PRA)
Rockport, Aransas County, Texas

Prepared By:
Triton Environmental Solutions, LLC
P.O. Box 1755
Rockport, Texas 78381

Prepared For:
Brett Bohn
Pearl Street Land Holdings, LLC
Rockport, TX 78382

Map Notes:
For planning and permitting only, not for construction.
Base Map Source: United States Department of Agriculture (USDA).
Texas NAIP Imagery, 2020-06-05.
Map Preparation Date: June 3, 2023 (RKW).
REV. May 1, 2024 (RKW)

RECD 12 MAR 2025



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Ditch 2	35,316.76	0.81	28.041698	-97.066055
Ditch 3	4,121.65	0.09	28.043792	-97.067353
Pond 1	126,777.87	2.91	28.041227	-97.070894
Pond 2	38,275.64	0.88	28.043099	-97.068209
Pond 3	18,617.93	0.43	28.045027	-97.065986
Pond 4	36,462.06	0.84	28.047257	-97.066336
Total	393,943.42	9.04		

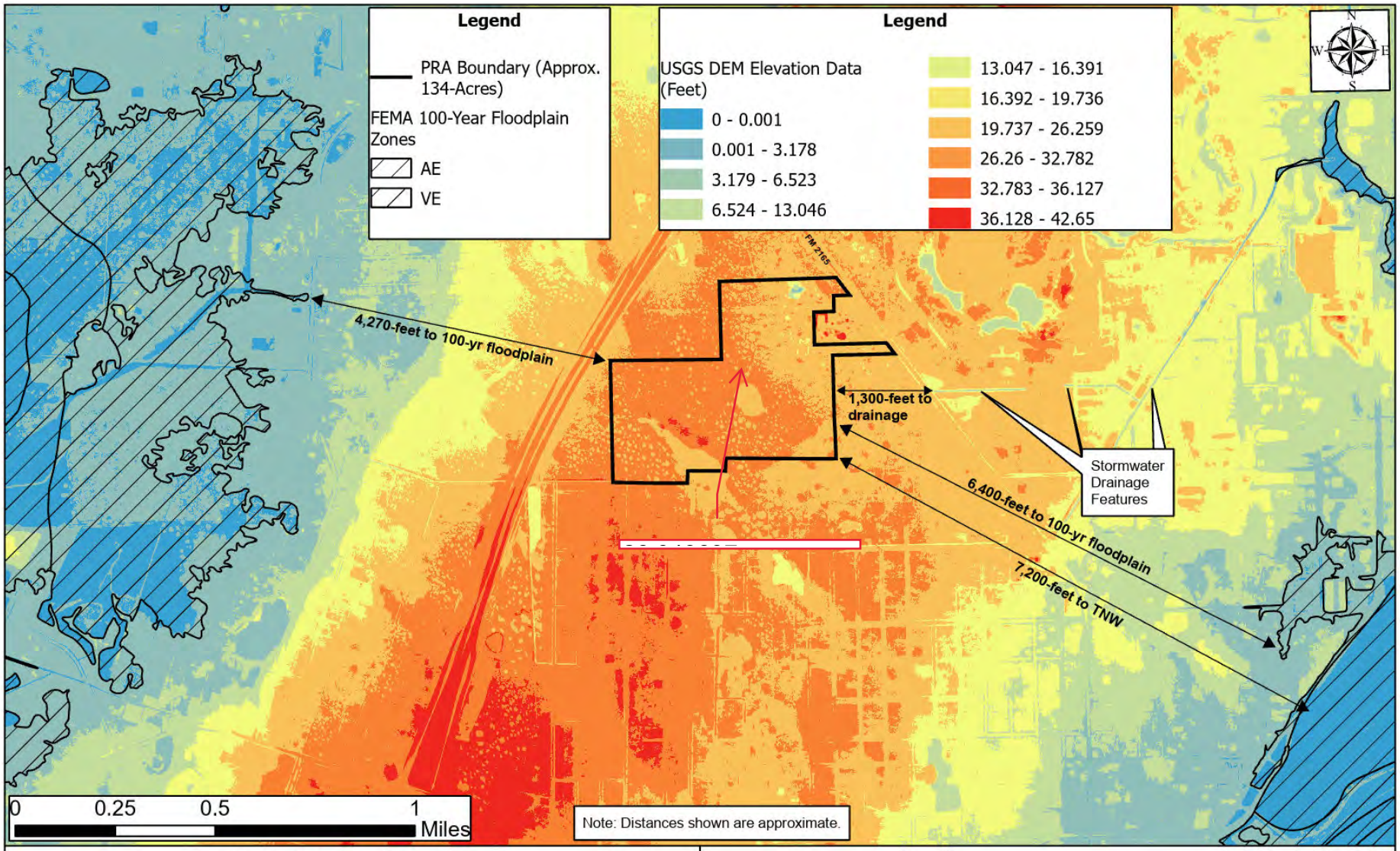
Wetland Delineation Results Map: North Detail

Approx. 134-Acre Project Review Area (PRA)
Rockport, Aransas County, Texas

Prepared By:
Triton Environmental Solutions, LLC
P.O. Box 1755
Rockport, Texas 78381

Prepared For:
Brett Bohn
Pearl Street Land Holdings, LLC
Rockport, TX 78382

Map Notes:
For planning and permitting only, not for construction.
Base Map Source: United States Department of Agriculture (USDA).
Texas NAIP Imagery, 2020-06-05.
Map Preparation Date: June 3, 2023 (RKW).
REV. May 1, 2024; March 12, 2025



LiDAR Overview Map

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Rockport, Aransas County, Texas

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Rockport, TX 78382

Map Notes:
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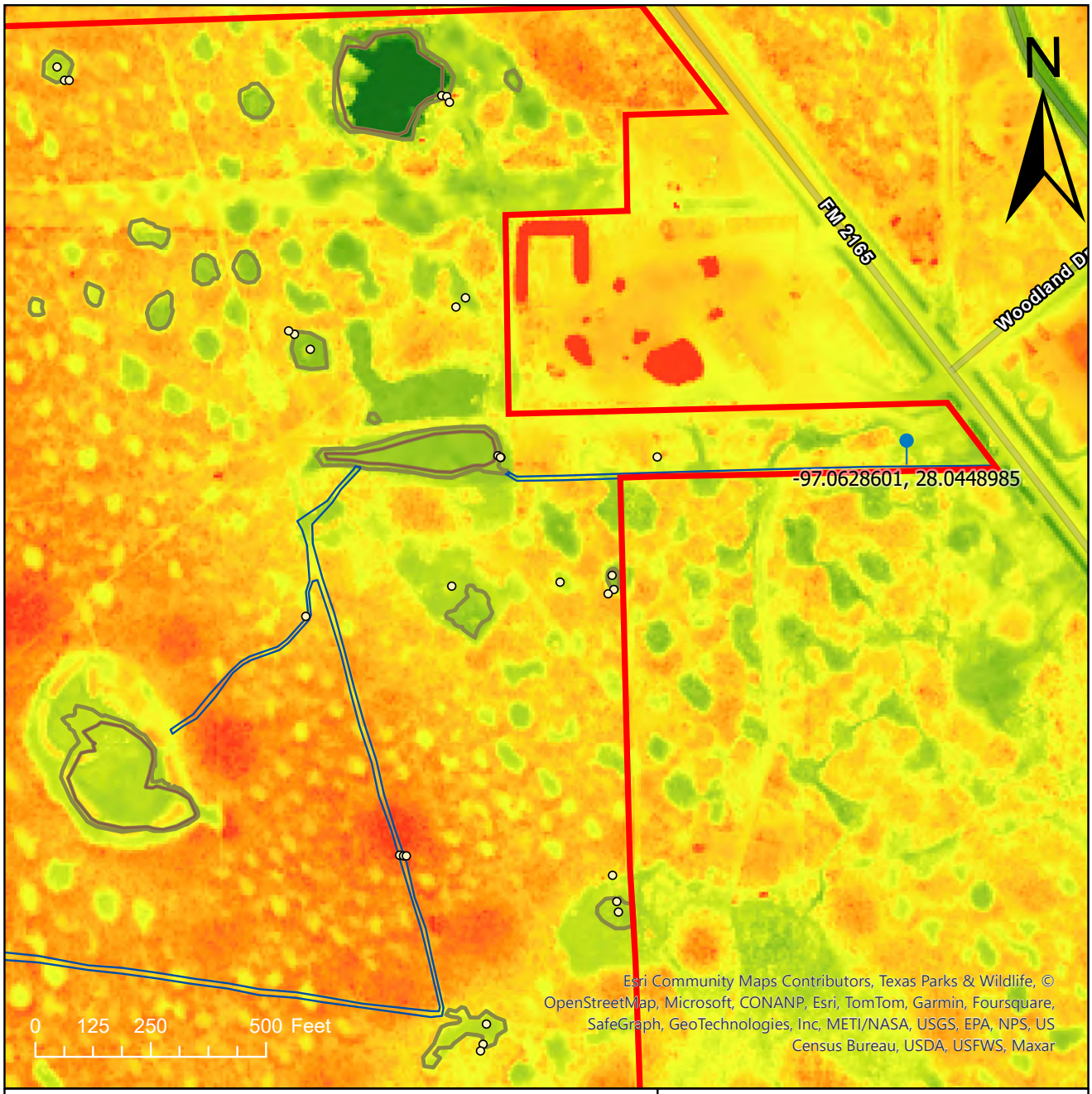
Base Map Source: United States Geological Survey (USGS). South Texas Lidar, 2018-02-23.
Map Preparation Date: 3/16/2023 (SP).



SWG-2023-00227

Review Area: 28.0436.7 -97.068674

High elevation point observed in drainage ditch (28.0448985 -97.0628601). From this point, water flows east towards FM 2165 or west towards the ponds.

Legend

- Review Area
- Pond Features
- Ditch Dug from Uplands
- Delineated Wetlands

Lidar Elevations (meters)

6.34
4.01