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

CCRFO-RDR August 21, 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-2023-00436[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).

      i. EW-1 (1.83 ac) PEM Wetland, 25.895880 N, 97.467026 W, non-jurisdictional

      ii. EW-2 (0.65 ac) PEM Wetland, 25.894815 N. 97.465075 W, non-jurisdictional

      iii. EW-3 (5.94 ac) PEM Wetland, 25.89187 N, 97.467067 W, non-jurisdictional

      iv. FW-1 (0.39 ac) PFO Wetland, 25.896479 N, 97.467897 W, non-jurisdictional

      v. FW-2 (1.98 ac) PFO Wetland, 25.894385 N, 97.466129 W, non-jurisdictional

      vi. DD-1 (0.13 ac) Drainage Ditch, 25.891724 N, 97.469696 W, non-jurisdictional

      vii. DD-2 (0.87 ac) Drainage Ditch with relatively permanent flow, 25.895864 N, 97.465368 W, Jurisdictional (Section 404)

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 113-acre review area is located north of the Rio Grande levee, south of East Avenue between Liska Lane and Impala Drive in Brownsville, Cameron County, Texas.

   LATITUDE/LONGITUDE (Decimal Degrees):

Latitude: 25.894342 N; Longitude: 97.467893 W

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

   Brownsville Ship Channel

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

   Ditch DD-2 drains generally east through a drainage ditch toward the Brownsville International Airport. The ditch flows around the southern end of the airport, and then continues in a generally northeast direction and eventually drains into the Brownsville Ship Channel, a TNW, approximately 11 miles northeast of the Review Area.

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

[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.

[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.

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):

DD-2: LiDAR, topo, aerial imagery, site photos, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that this feature is a man-made drainage ditch excavated from uplands and exhibits relatively permanent flow. Every Google Earth aerial photo shows water in Ditch DD-2. Ditch DD-2 drains to a pump station located immediately outside of the review area boundary. In times of an extreme flood event, the pump station pumps flow over the levee into a ditch that drains to the Rio Grande. In normal circumstances, Ditch DD-2 drains through a series of drainage ditches to the Brownsville Ship Channel, a TNW, approximately eleven miles to the northeast.

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").[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.
N/A

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

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.

DD-1: LiDAR, topo, aerial imagery, site photos, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that this feature is a man-made concrete lined drainage ditch that conveys stormwater into a retention basin (EW-3). The ditch was excavated from dry land between 1996-2002. The ditch does not extend the OHWM of any RPW or TNW, does not have connectivity to any TNW/RPW, and was excavated from uplands for the purpose of draining uplands. This ditch is best described as "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries, or they do not have a continuous surface connection to downstream traditional navigable waters."

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 EW-1, EW-2, EW-3, FW-1, and FW-2:
LiDAR, topo, aerial imagery, site photos, and the applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that these features are wetlands that have no more than overland sheetflow would exit the wetlands and the wetlands lack a continuous surface connection to a Relatively Permanent Water (RPW) or TNW. There are no culverts, streams, or other waterways that could provide a connection between these wetlands and a RPW or TNW. Wetlands EW-1, EW-2, EW-3, FW-1, and FW-2 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.

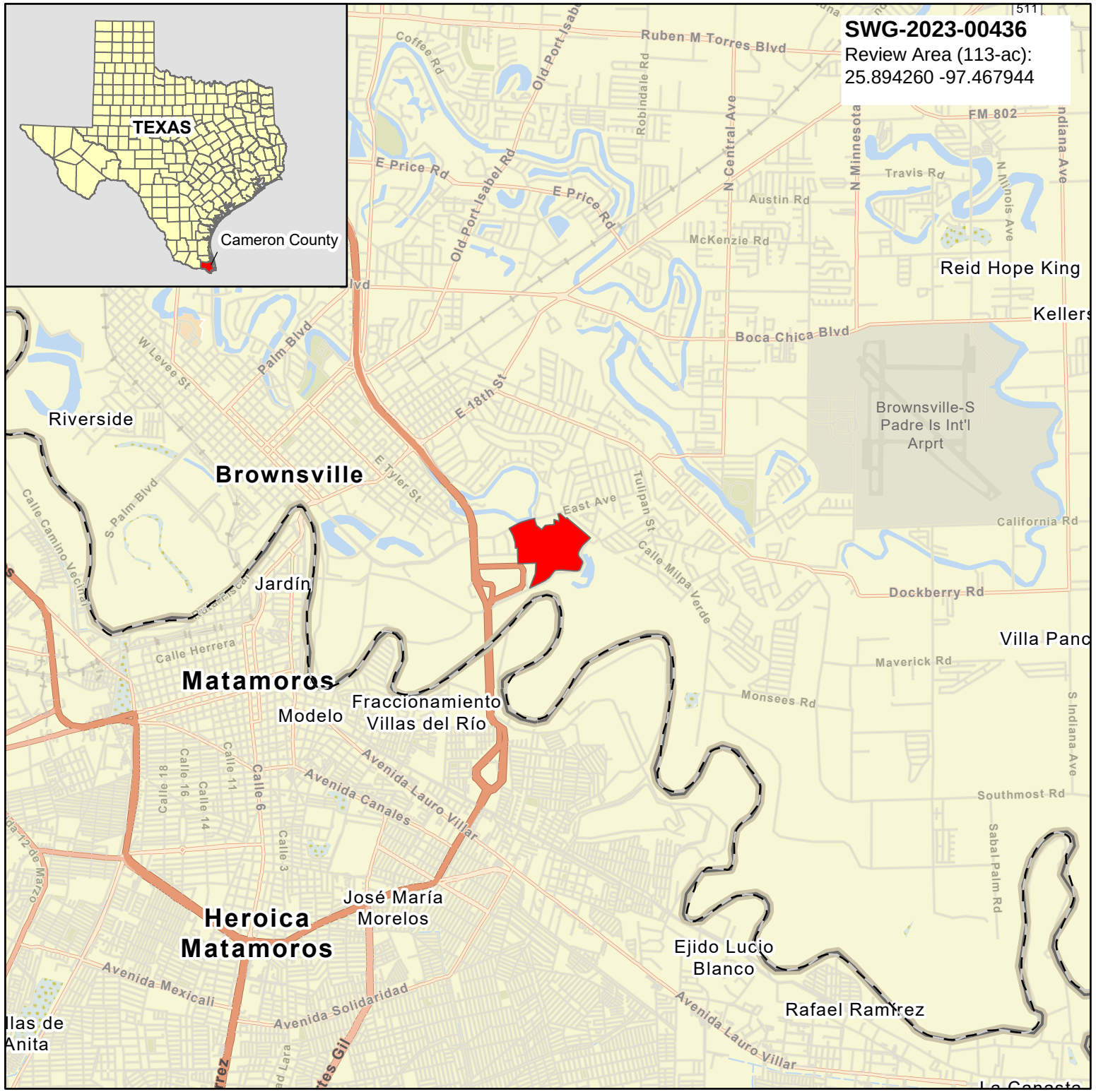
a. Waters of the United States Delineation Report: *Jeronimo Banco Regional Detention Pond, Brownsville, Cameron County, Texas*; prepared by Halff, dated November 2023

b. Aerials (1962, 1996, 2002, 2006, 2016, 2017, 2020, 2022 2023; source: Google Earth)

c. 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.



Legend

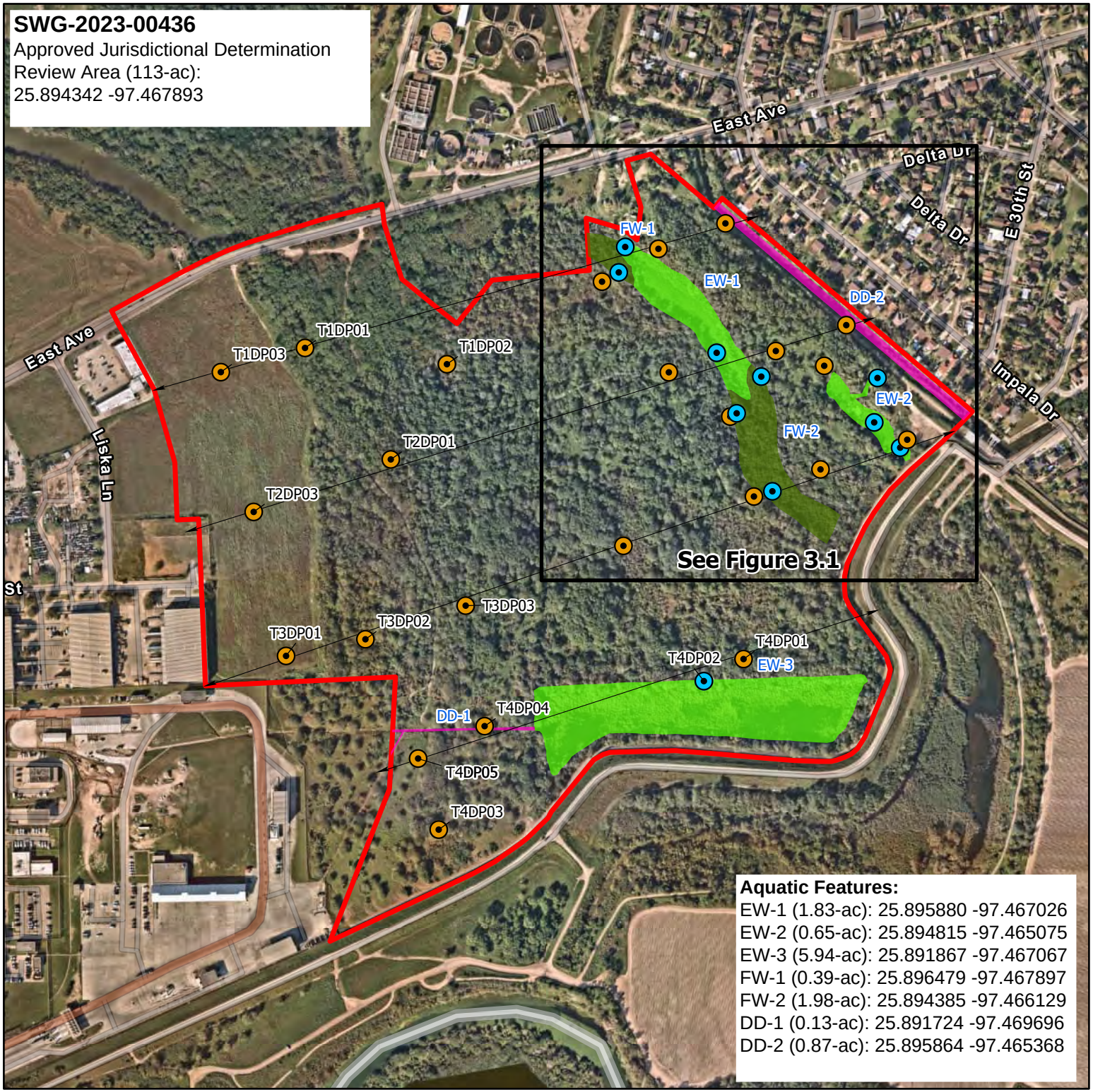
- Study Area
- County Boundary

Notes:
1. Map Center: 97.46895°W 25.89404°N
2. World Street Map: Texas Parks & Wildlife, CONANP, Esri, HERE, Garmin, Foursquare, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, USDA

Jeronimo Banco Regional Detention Pond
Brownsville, Cameron County, Texas
Waters of the U.S. Delineation Report
Date: 10/25/2023

Figure 1
Location Map

halff



N

0 250 500 1,000

Feet

Legend

- Study Area
- Transect

Data Point Type

- Non-Wetland Data Point
- Wetland Data Point

Aquatic Resource Type

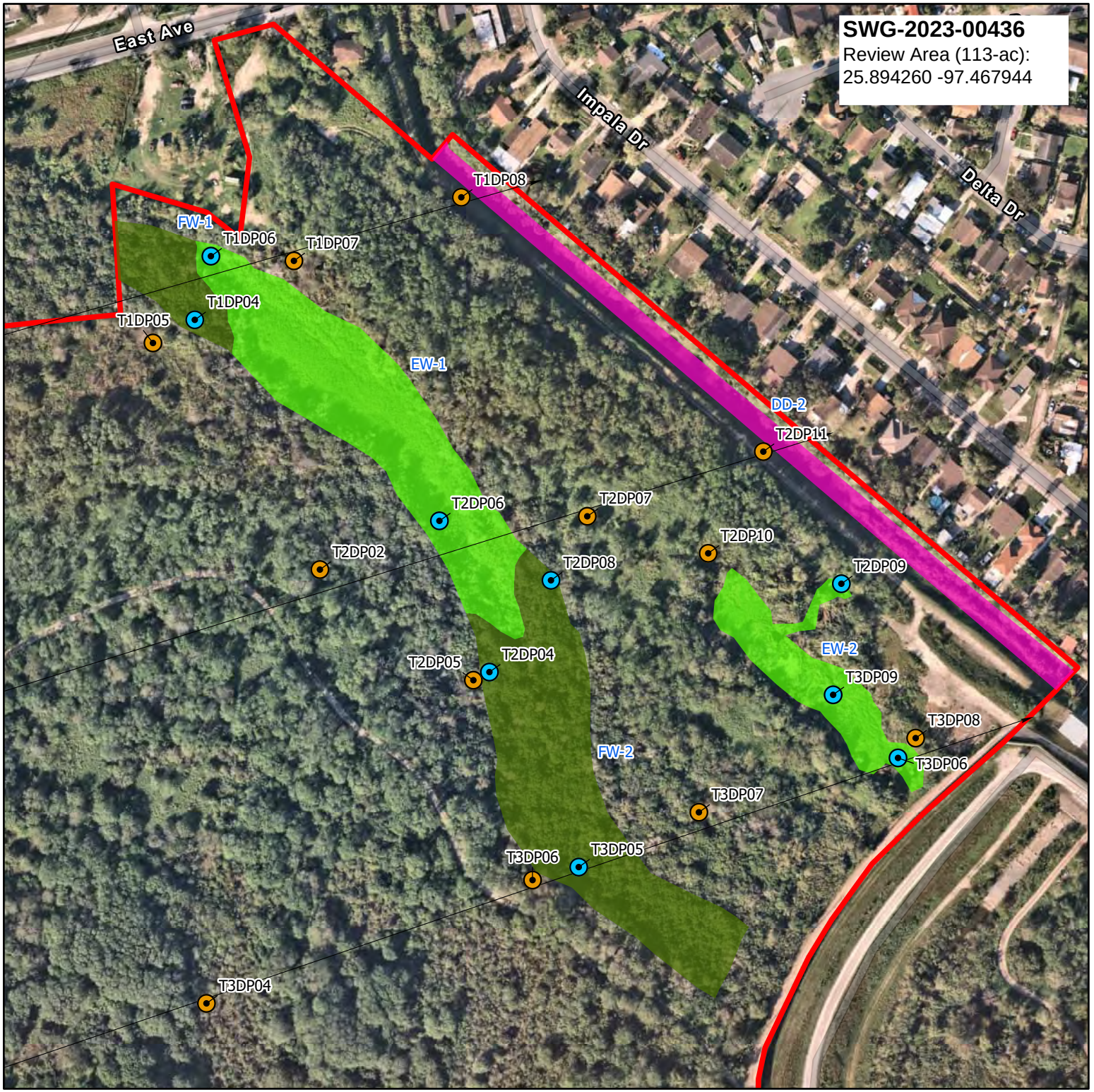
- Ditch
- Emergent Wetland
- Forested Wetland

Notes:
1. Map Center: 97.46868°W 25.89357°N
2. Hybrid Reference Layer: Esri Community Maps Contributors, Texas Parks & Wildlife, © OpenStreetMap, Microsoft, CONANP, Esri, HERE, Garmin, Foursquare, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA Nearmap WMS Server: November 29, 2022

Jeronimo Banco Regional Detention Pond
Brownsville, Cameron County, Texas
Waters of the U.S. Delineation Report
Date: 11/3/2023

Figure 3.0
Aquatic Features Delineation Map

halff



N

0 100 200 400

Feet

Legend

- Study Area
- Transect

Data Point Type

- Non-Wetland Data Point
- Wetland Data Point

Aquatic Resource Type

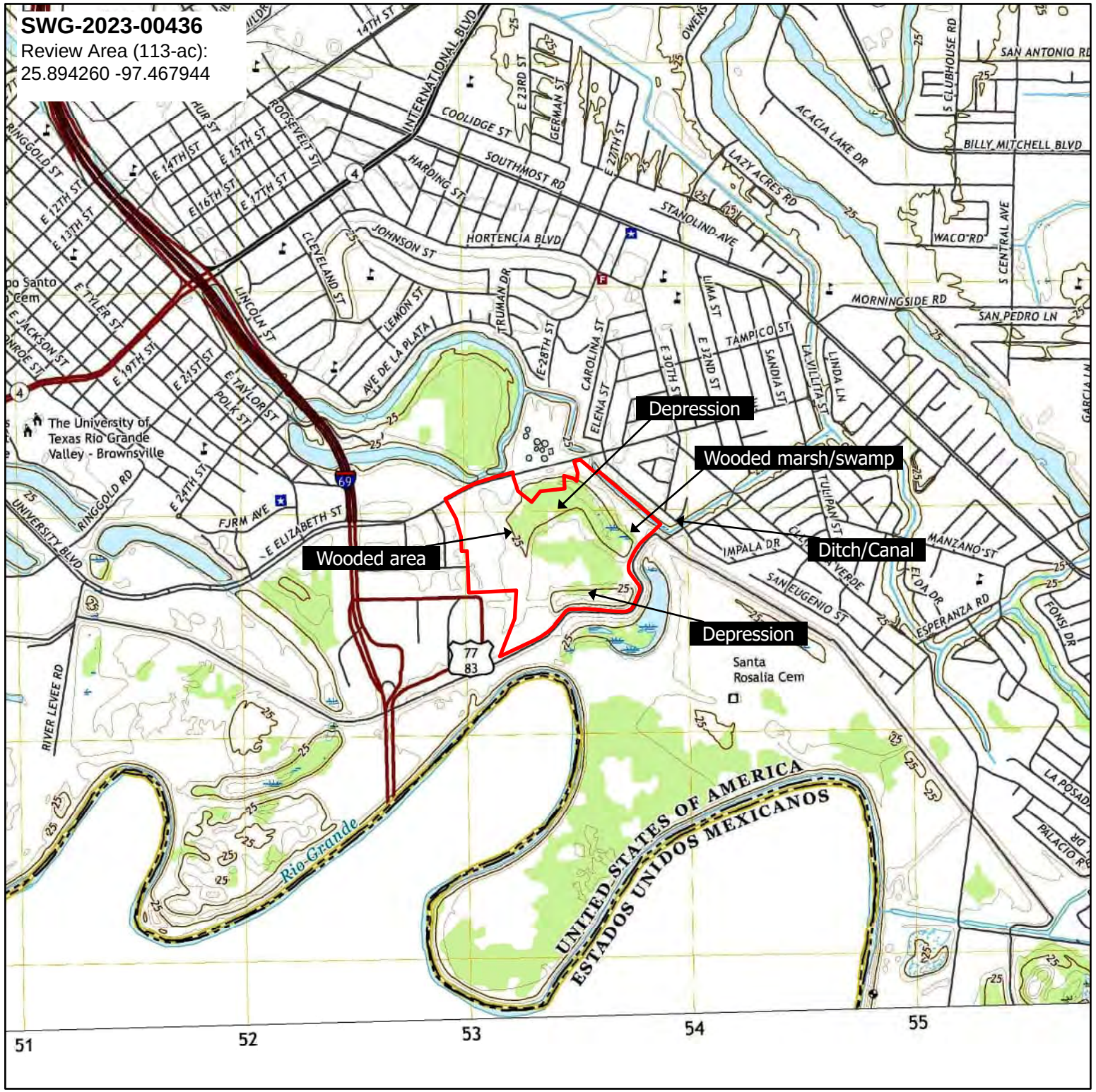
- Ditch
- Emergent Wetland
- Forested Wetland

Notes:
1. Map Center: 97.46625°W 25.89536°N
2. Hybrid Reference Layer: Esri Community Maps Contributors, Texas Parks & Wildlife, © OpenStreetMap, Microsoft, CONANP, Esri, HERE, Garmin, Foursquare, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA Nearmap WMS Server: November 29, 2022

Jeronimo Banco Regional Detention Pond
Brownsville, Cameron County, Texas
Waters of the U.S. Delineation Report
Date: 11/3/2023

Figure 3.1
Aquatic Features Delineation Map

halff



0 1,000 2,000 4,000

Feet

Legend

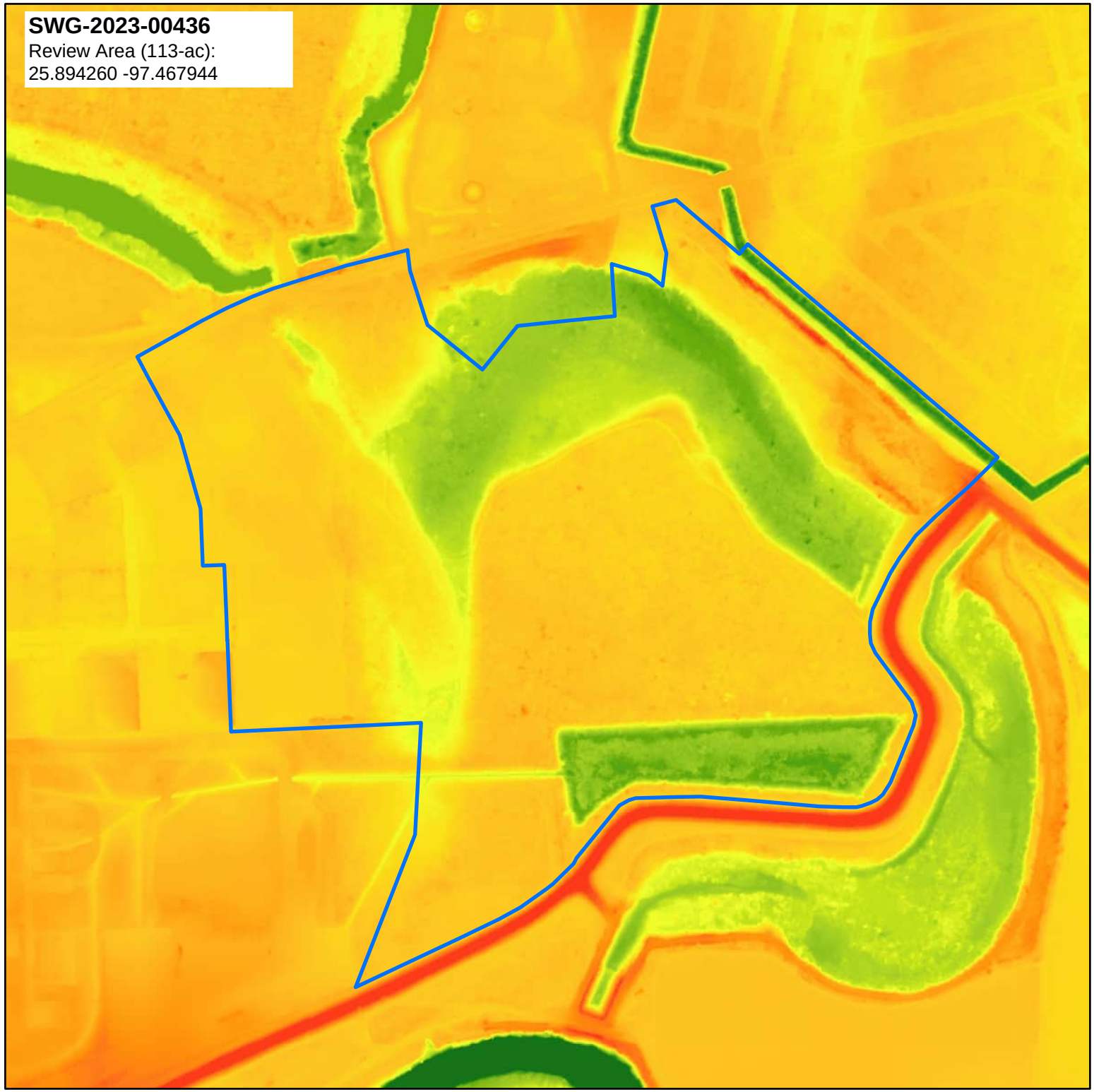
Study Area

Notes:
1. Map Center: 97.46895°W 25.89404°N
2. USGS topoView: "East Brownsville, Texas" 7.5 minute quadrangle, 2022

Jeronimo Banco Regional Detention Pond
Brownsville, Cameron County, Texas
Waters of the U.S. Delineation Report
Date: 11/3/2023

Figure A-4
2022 USGS Topographic Map

halff



N

0 250 500 1,000

Feet

Legend

Study Area

Value (Feet)

48.4536

11.296

Notes:
1. Map Center: 97.46895°W 25.89404°N
2. TNRIS - South Texas Lidar, 2018: East Brownsville SW

Jeronimo Banco Regional Detention Pond
Brownsville, Cameron County, Texas
Waters of the U.S. Delineation Report
Date: 11/3/2023

Figure A-11
LiDAR Map

halff