



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT  
2000 FORT POINT ROAD  
GALVESTON TEXAS 77550

CESWG-RD-C

14 November 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),<sup>1</sup> SWG-2024-00088<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable 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. WA, 0.83-acre; 29.665314°North, 096.022988°West; non-jurisdictional/non-adjacent
  - ii. WB, 0.05-acre; 29.665964°North, 096.021926°West; non-jurisdictional/non-adjacent
  - iii. WC, 0.08-acre, 29.664595°North, 096.020416°West; non-jurisdictional/non-adjacent
  - iv. SWA, 0.23-acre, 29.665182°North, 096.020132°West; non-jurisdictional/non-adjacent
  - v. OW, 0.5-acre, 29.667165°North, 096.021730°West; non-jurisdictional/non-adjacent

## 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. Approximate 74.20-acre site located 0.30 miles southwest from the Farm to Market Road 1093 crossing of the Brazos River (latitude 29.663934°North, longitude, 096.020107°West) in Wallis, Austin County, Texas.

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 WATERS<sup>6</sup>: 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.<sup>7</sup> 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.

TNWs (a)(1): N/A

a. Interstate Waters (a)(2): N/A

b. Other Waters (a)(3): N/A

c. Impoundments (a)(4): N/A

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<sup>6</sup> 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.

<sup>7</sup> 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.

- d. Tributaries (a)(5): N/A
- e. The territorial seas (a)(6): N/A
- f. 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”).<sup>8</sup> 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.

A waterfilled depression (OW ~ 0.5-acre), located on the northeastern boundary of the review area, was excavated from dry land in 2019 and is an ongoing sand mining operation, per Google Earth aerial imagery. No wetland signatures appear in the vicinity of the man-made waterfilled depression. This waterfilled depression has a berm around the entire excavated area and has no connection to any of the wetlands in the review area or any other aquatic resource.

- 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

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<sup>8</sup> 51 FR 41217, November 13, 1986.

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).

Four non-jurisdictional wetlands were identified within the review area; WA ~ 0.83-acre, WB ~0.05-acre, WC ~0.08-acre, and SWA ~0.23 totaling approximately 1.19-acres.

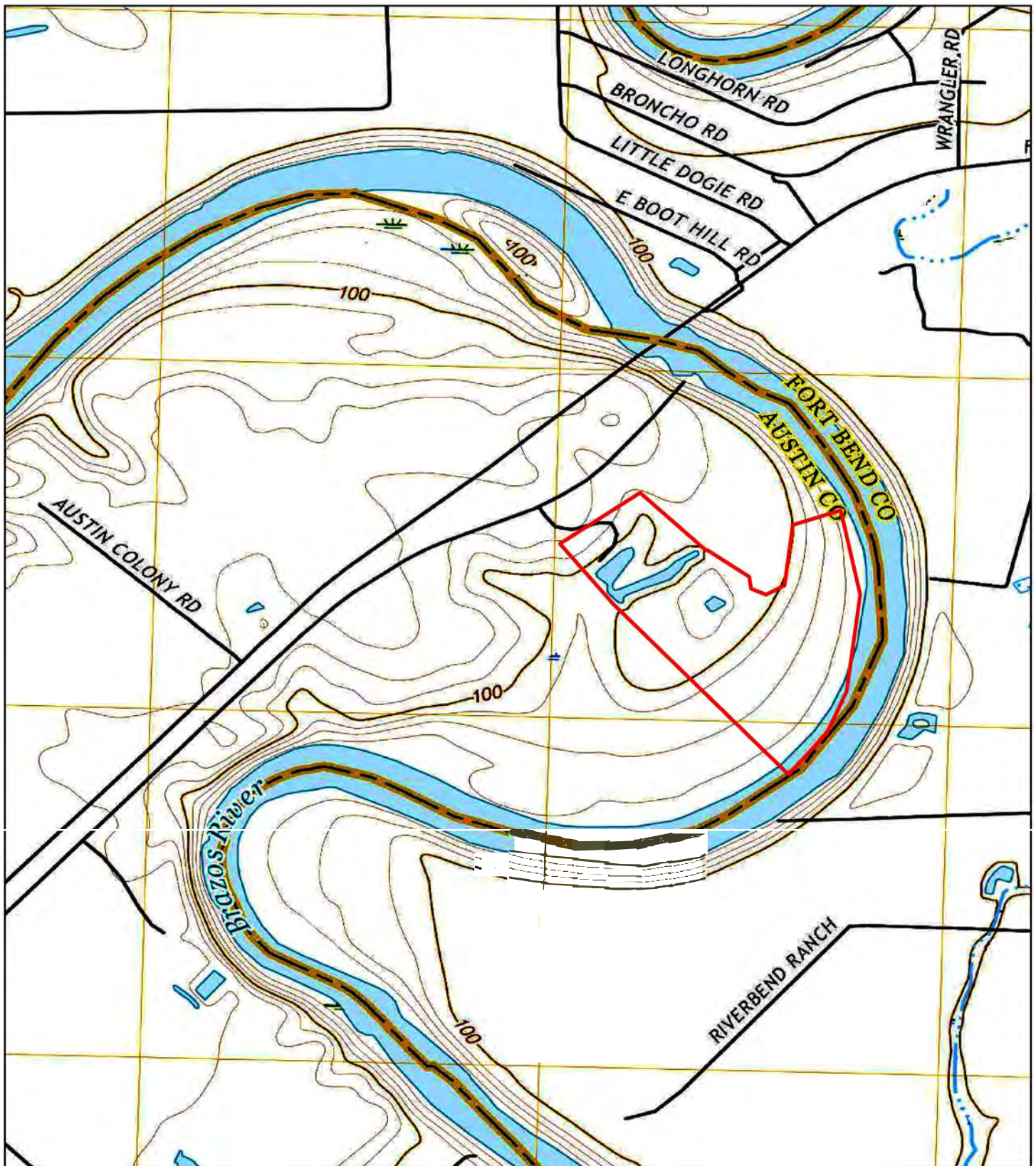
The wetlands were delineated in accordance with the 1987 Wetland Delineation Manual Atlantic and Gulf Coastal Plain Regional Supplement by Hodges, Harbin, Newberry & Tribble, Inc. (HHNT). Twenty-three data points were taken within the review area with four data points meeting all three criteria of a wetland. The Google Earth Imagery shows that the review area has remained undeveloped back to the earliest available imagery dated 1995. Imagery before 2005 shows that the Brazos River was once within the review area but has receded further east and has not been within the review area since then. The Digital Elevation Model (DEM) and topographic maps show that the review area is highest in the northwest portion and elevation gradually reduces towards the Brazos River. The DEM shows a berm around the southern edge of the review area where it borders the Brazos River. Another berm is visible around WA which does not allow flow between WA and the drainage feature to the west nor to the much smaller feature to the east. The DEM clearly shows the depressional features within the review area that were delineated by HHNT as WA, WB, WC, and SWA. There is no surface connection between these wetlands and the Brazos River, nor to any RPW or TNW. This desktop review supports the Corps determination that wetlands WA, WB, WC, and SWA are non-adjacent/non-jurisdictional.

Based on the information above and data sources listed in #9 below, we have determined these wetlands are located in depressional areas and do not share a continuous surface connection with the Brazos River (the nearest TNW), any other TNW, RPW, or other water of the United States. The closest point of approach from the nearest wetland to the Brazos River is 0.23-miles.

Therefore, these four wetlands 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. Desk Review: 15 May 2024
  - b. Wetland Delineation, Maps, plans, plots, and data submitted by or on behalf of the applicant consultant: Submitted by Hodges, Harbin, Newberry, & Tribble, Inc. (HHNT) on 05 January 2024
  - c. Aerial Photos: Google Earth Aerial Imagery (1995-2022)
  - d. NOAA Data Viewer, 2018 Texas Water Development Board Lidar: Coastal Texas. Accessed 15 May 2024.
  - e. United States Geological Survey (USGS) Topographic Map, Quad Wallis, TX 2022 1:24,000. Accessed 15 May 2024.
  - f. United States Department of the Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); FWS NWI Esri Layer. Accessed 15 May 2024.
  - g. United States Department of Agriculture (USDA), National Resource Conservation Service (NRCS), Soil Survey Geographic Database (SSURGO), USA Soil Map Units Esri Layer. Accessed 15 May 2024.
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-2024-00088**  
**USGS Wallis, TX 2022 1:24,000**  
**(Latitude 29.6639349°North, Longitude 096.0201070°West)**

**Legend**

 Review Area

Prepared 15 May 2024

Coordinate System  
GCS North American 1983

0 1 000 2 000 Feet  
Scale: 1:15 500





## SWG-2024-00088 Vicinity Map

Approximate 74.20-acre Site

(Latitude 29.6639349°North, Longitude 096.0201070°West)

### Legend

 Review Area

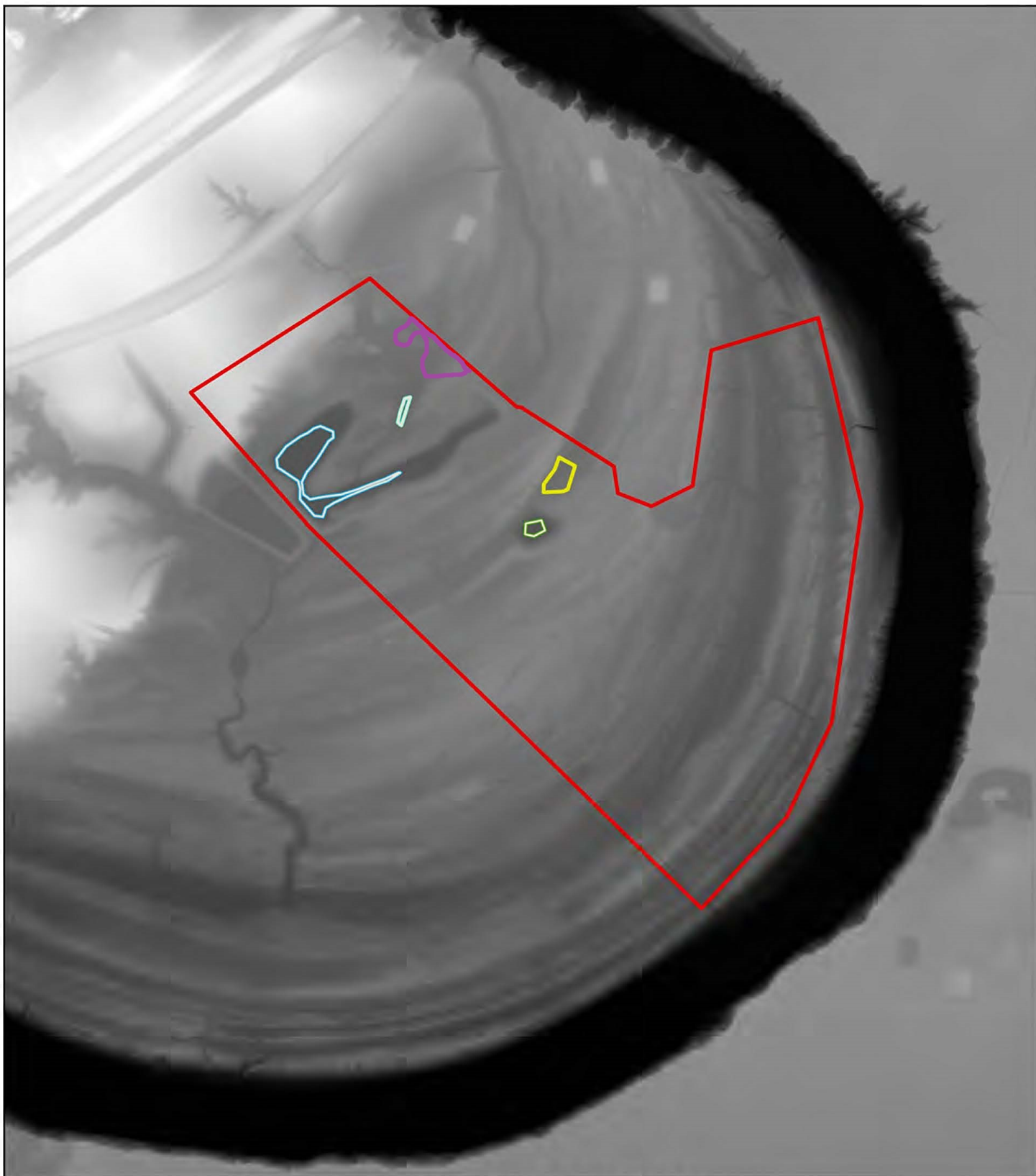
Prepared 15 May 2024

Coordinate System  
GCS North American 1983

0 1,000 2,000 Feet  
Scale: 1:17,000



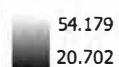




## SWG-2024-00088 DEM


NOAA Data Access Viewer - 2018 TWDB Lidar: Coastal Texas  
(Latitude 29.6639349°North, Longitude 096.0201070°West)

### DEM in Feet





54.179  
20.702


 Review Area ~  
74.20-acres

 WA ~ 0.83-acre

 OW ~ 0.5-acre

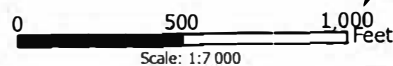
 WB ~ 0.05-acre

 WC ~ 0.08-acre

 SWA ~ 0.23-acre

Prepared 15 May 2024



Coordinate System  
GCS North American 1983





**SWG-2024-00088**  
**(Latitude 29.6639349°North, Longitude 096.0201070°West)**

**Legend**

-  Review Area ~ 74.20-  
acres
-  WA ~ 0.83-acre

-  OW ~ 0.5-acre
-  WB ~ 0.05-acre
-  WC ~ 0.08-acre
-  SWA ~ 0.23-acre

Prepared 15 May 2024  
Coordinate System  
GCS North American 1983

