



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

Central Branch

12 May 2026

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-2025-00246

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas due to litigation.

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Pond, P-1, 0.69-acre, non-adjacent, non-jurisdictional, Latitude 28.982318 , Longitude -96.202021
 - ii. Wetland, WET-1, 0.54-acre, non-adjacent, non-jurisdictional, Latitude 28.97968 , Longitude -96.20205
 - iii. Wetland, WET-2, 0.17-acre, non-adjacent, non-jurisdictional, Latitude 28.981297 , Longitude -96.201634
 - iv. Ditch, D-1, 918 linear feet, non-RPW, non-jurisdictional, Latitude 28.981503 , Longitude -96.203639
 - v. Ditch, D-2, 1548 Linear Feet, non-RPW non-jurisdictional, Latitude: 28.979381 , Longitude -96.206154

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. 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.

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3. REVIEW AREA: An approximate 113-acre tract located 0.25-mile south of the intersection of Nygard Road and Highway 71, in Markham, Matagorda County, Texas. Latitude: 28.9818329 , Longitude: -96.2043775
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED: N/A
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: N/A
6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ : N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. TNWs (a)(1): N/A
 - b. Interstate Waters (a)(2): N/A

⁵ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁶ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- 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

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Pond (P-1, 0.69-acre) is an excavated stock pond used for watering and is therefore a preamble water. The 1986 preamble to 33 CFR 320-330 regulations states that 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, setline basins, or rice growing.” Furthermore, the pond does not abut a traditional navigable water, relatively permanent water, and/or jurisdictional impoundment. Therefore, Pond P-1 is not a water of the United States and is not subject to Section 404 of the Clean Water Act.

- 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 (D-1, 918 linear feet) and Ditch-2 (D-2, 2,466 linear feet):

Based on the data sources listed in #9 and our 11 February 2026 desk review, we have determined that D-1 and D-2 are man-made ditches designed to aid in the removal of excess water and aid in irrigation. These ditches were dug from uplands and do not traditionally hold water outside of rain events. D-1 and D-2 do not have

⁷ 51 FR 41217, November 13, 1986.

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any connection to tributaries or relatively permanent water-bodies.

- 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: WET-1 and WET-2 (0.71-acre total)

Based on data sources listed in #9 and our 11 February 2026 desk review, we have determined WET-1 and WET-2 reside in depressional areas within the review area. Based on our review, the wetlands do not meet the continuous surface connection standard for adjacent wetlands as they do not abut a traditional navigable water, relatively permanent water, and/or a jurisdictional impoundment. Therefore, in accordance with the pre-2015 regime post-Sackett 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, WET-1 and WET-2 fail to meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not a water of the United States subject to Section 404 of the Clean Water Act.

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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. Desk Review: 11 February 2026
 - b. Maps, plans, plots, and data submitted by Dewberry Engineers, Inc.: Wetland Delineation Report conducted 17 April 2025, received 23 April 2025
 - c. KMZ File and additional data submitted by the applicant 3 June 2025
 - d. Aerial Photos: Google Earth Aerial Imagery: 1943, 1957, 1965, 1995, 2005, 2011, 2014, 2018, 2020, 2022, and 2024
 - e. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); FWS NWI ESRI Layer. 17 April 2025
 - f. United State Department of Agriculture (USDA), Natural Resource Conservation Service (NRCS), Soil Survey Geographic Database (SSURGO) Esri Layer 17 April 2025
 - g. United States Geological Survey Topographic Maps (Midfield, Texas Quadrangles) 4 December 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.

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Date: 12 May 2026

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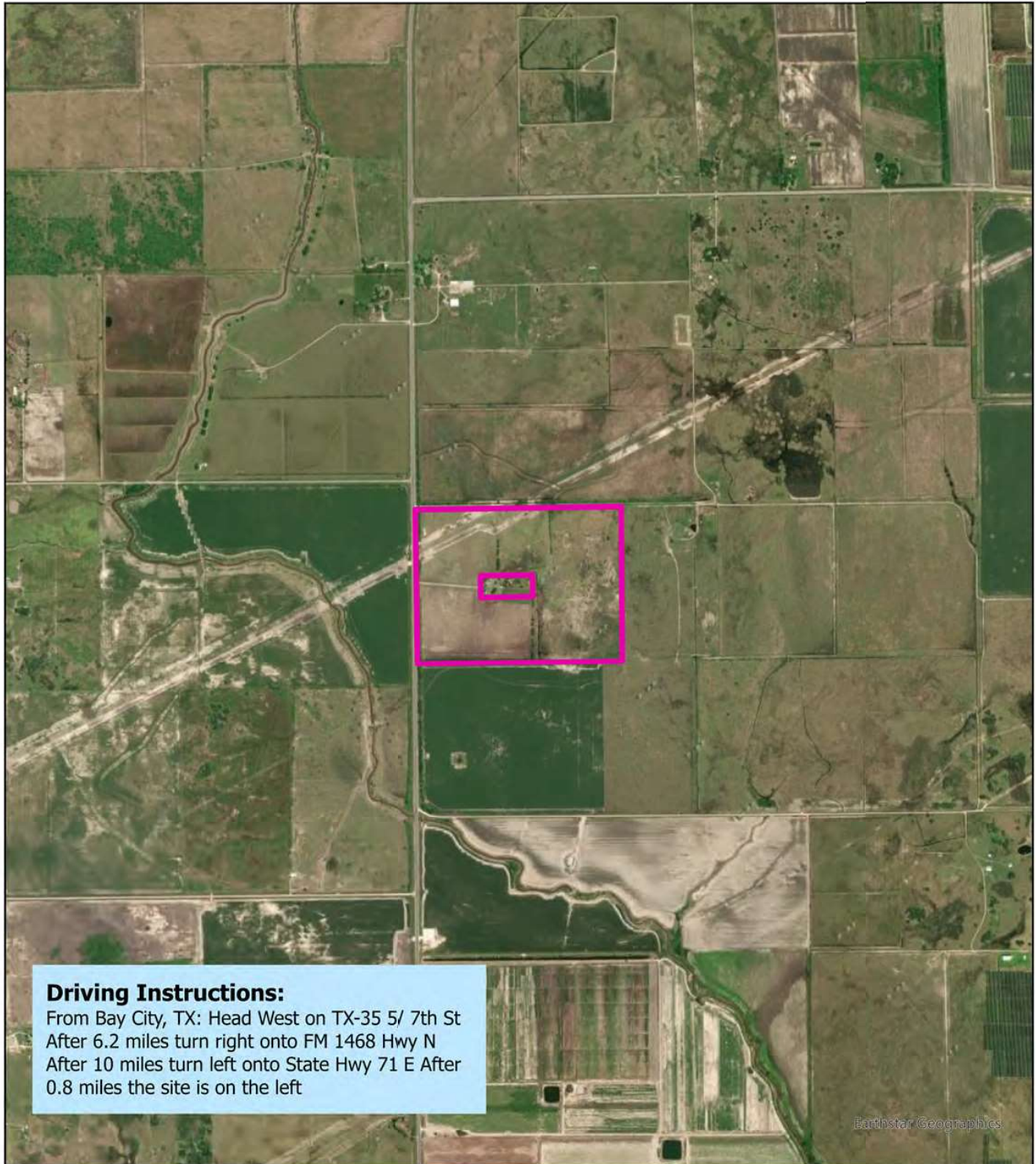
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K. Marie Taylor
Leader, Central Branch
Regulatory Division, Galveston District

Date: 12 May 2026



25353 Friendship Road
Daphne, AL 36526-6278
Phone: 1 (251) 990-9950



Driving Instructions:
From Bay City, TX: Head West on TX-35 5/ 7th St
After 6.2 miles turn right onto FM 1468 Hwy N
After 10 miles turn left onto State Hwy 71 E After
0.8 miles the site is on the left

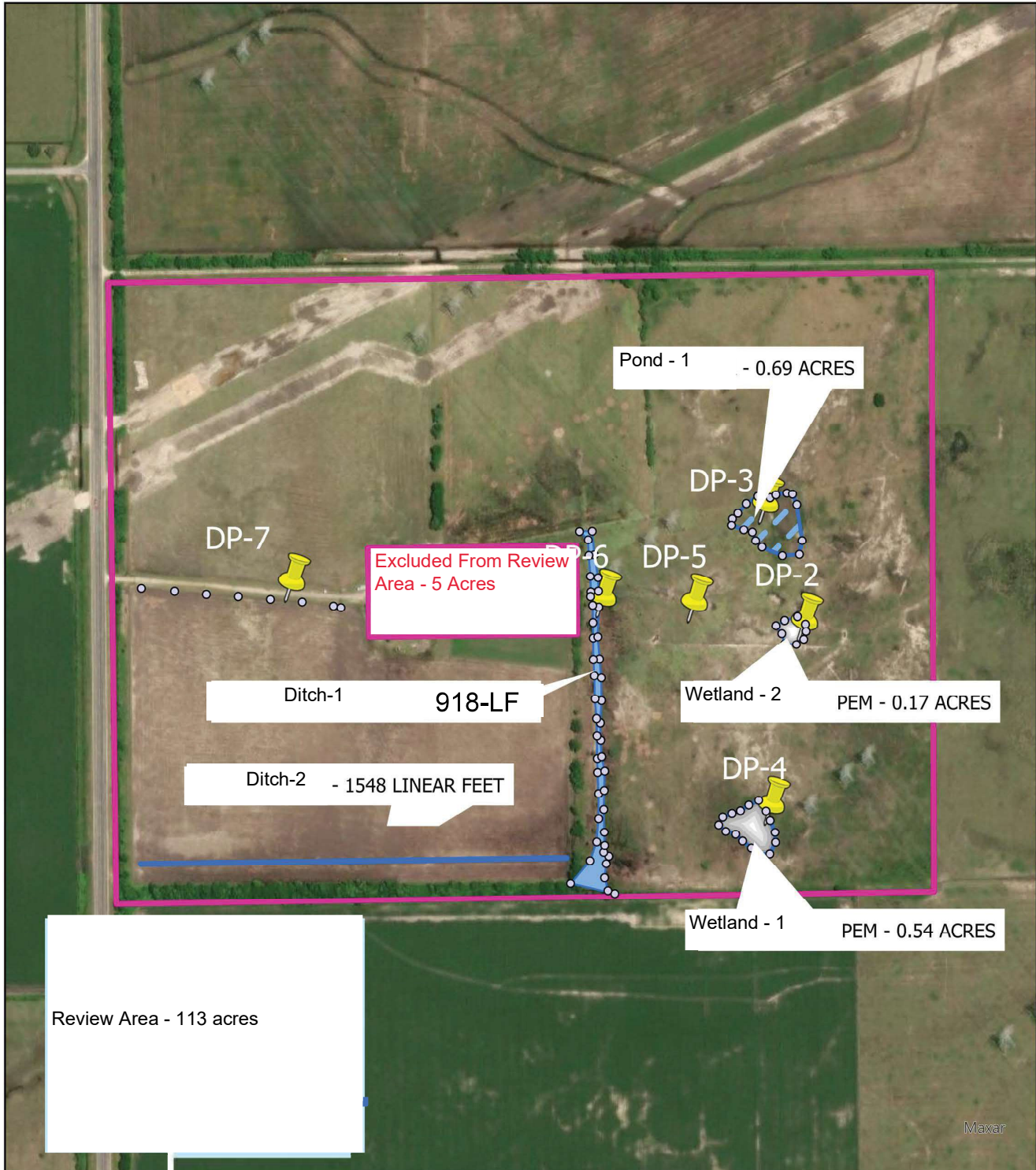
Earthstar Geographics

Juanita Creek Energy Center	Drawn By: Tyler Henschel	
	Date: 12/4/2024	Locator Map
Juanita Creek Energy Center	0 500,000 2,000 3,000 4,000 Feet	
AB 0469, C WICKSON, TRACT 3		





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Juanita Creek Energy Center	Drawn By: Tyler Henschel	
	Date: 4/17/2025	Aerial W points Map
Juanita Creek Energy Center		
AB 0469, C WICKSON, TRACT 3		

