



**DEPARTMENT OF THE ARMY**  
LITTLE ROCK DISTRICT, CORPS OF ENGINEERS  
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CESWL-RD

15 September 2023

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> **SWL-2023-00144**

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>2</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>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

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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> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</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.

- 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. DR01 (ephemeral channel), non-jurisdictional.
  - ii. OpenWater 1 (man-made pond), non-jurisdictional.
  - iii. OpenWater 2 (man-made pond), non-jurisdictional.
  - iv. OpenWater 3 (man-made pond, non-jurisdictional.
  - v. OpenWater 4 (man-made pond, non-jurisdictional.
  - vi. Upland Swale, 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 subject property (Ball Property) totals approximately 74 acres (center coordinates: Lat: 36.2419, Long: -94.1134). The subject property is located adjacent to Old Wire Road in Lowell, Benton County, Arkansas. The subject property and aquatic resources are illustrated in the attached figures (Pages 1-4).
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River, HUC 11110103<sup>5</sup>

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<sup>5</sup> 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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. DR01 (an ephemeral channel), flows to Puppy Creek, to Spring Creek, then to Illinois River (TNW).
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.
  - 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

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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.

## 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 wetland delineation by Cattails Environmental (the agent) identified four man-made livestock ponds (OpenWater 1 through OpenWater4). OpenWater1 totals approximately 0.41 acre, OpenWater2 totals approximately 0.23 acre, OpenWater3 totals approximately 0.18 acre, and OpenWater4 totals approximately 0.17 acre. A Corps site visit in May 2023 confirmed the findings provided by the agent. These man-made ponds were all constructed in uplands for the purpose of stock watering, and therefore meet the criteria of features that are generally considered non-jurisdictional in the preamble of the 1986 regulations.
- 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. The upland swale enters the southern boundary of the subject property and flows northwest for distance of approximately 915 linear feet. This upland swale feature lacks an OHWM and supports upland vegetation. Per *Rapanos* guidance, this feature fits the description of generally non-jurisdictional features and would not be regulated under Section 404 of the CWA.
- 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

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

resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A

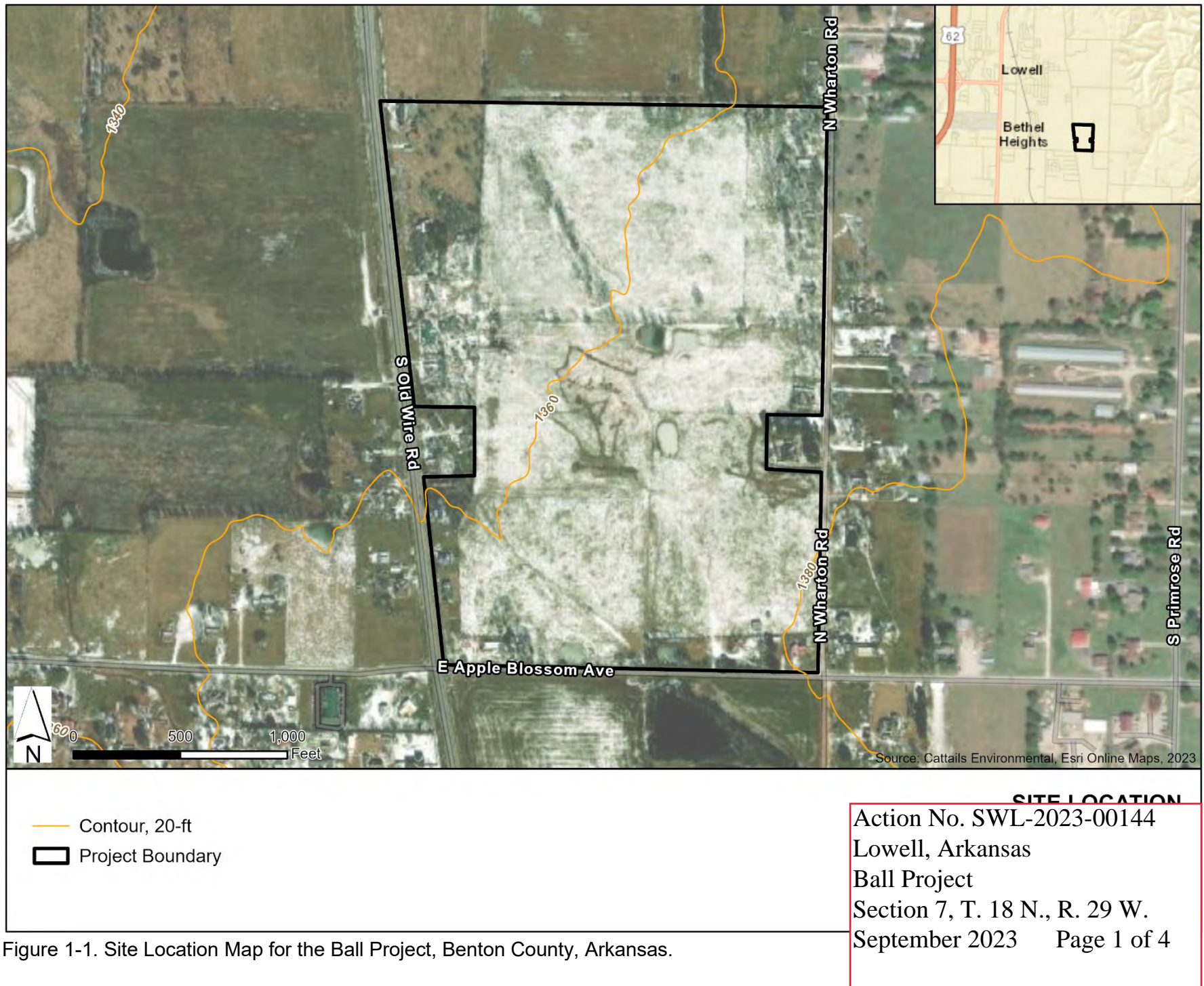
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). DR01 is an ephemeral channel extending approximately 186 linear feet within the subject property. This channel is the downstream reach of the upland swale mentioned in Section 8(b). Upon its transition to an ephemeral channel, it supports indicators of an ordinary high water mark (OHWM), including sediment deposition, scour, and an abrupt change in plant community. DR01 is approximately 3 feet wide, 0.5 feet in depth and supports approximately 2:1 side slopes. The substrate is comprised of silts, cobbles, and vegetation (primarily herbaceous hydrophytes at approximately 5%). Based on field observations and a review of aerial photography, this channel appears to flow only immediately after a storm event, most likely 6-10 times per year. This channel exits the subject property via a culvert under Old Wire Road and is directed along a roadside ditch that eventually enters Puppy Creek. Due to the ephemeral nature of this channel, it would not be regulated with the pre-2015 regulatory regime consistent with *Sackett*.
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. A Corps site visit was conducted (with agent in attendance) on May 22, 2023.
  - b. Preliminary Waters of the U.S. Assessment & Wetland Delineation Report: Ball Project Benton County, Arkansas dated April 2023 by Cattails Environmental, May 26, 2023
  - c. NHD stream data (USGS) – accessed on National Regulatory Viewer, May 23, 2023
  - d. USGS Survey Map: Sonora, AR (1:24K) (provided by agent in wetland delineation dated April 2023).
10. OTHER SUPPORTING INFORMATION. NWI maps were provided by agent in wetland delineation. Aerial photographs were provided by agent and accessed on Google Earth (periods of record 1994-2021). Site photographs were provided by the agent in the wetland delineation (May 2023) and collected by Corps during site visit (May 2023). StreamStats (USGS) was used for determination of watershed size

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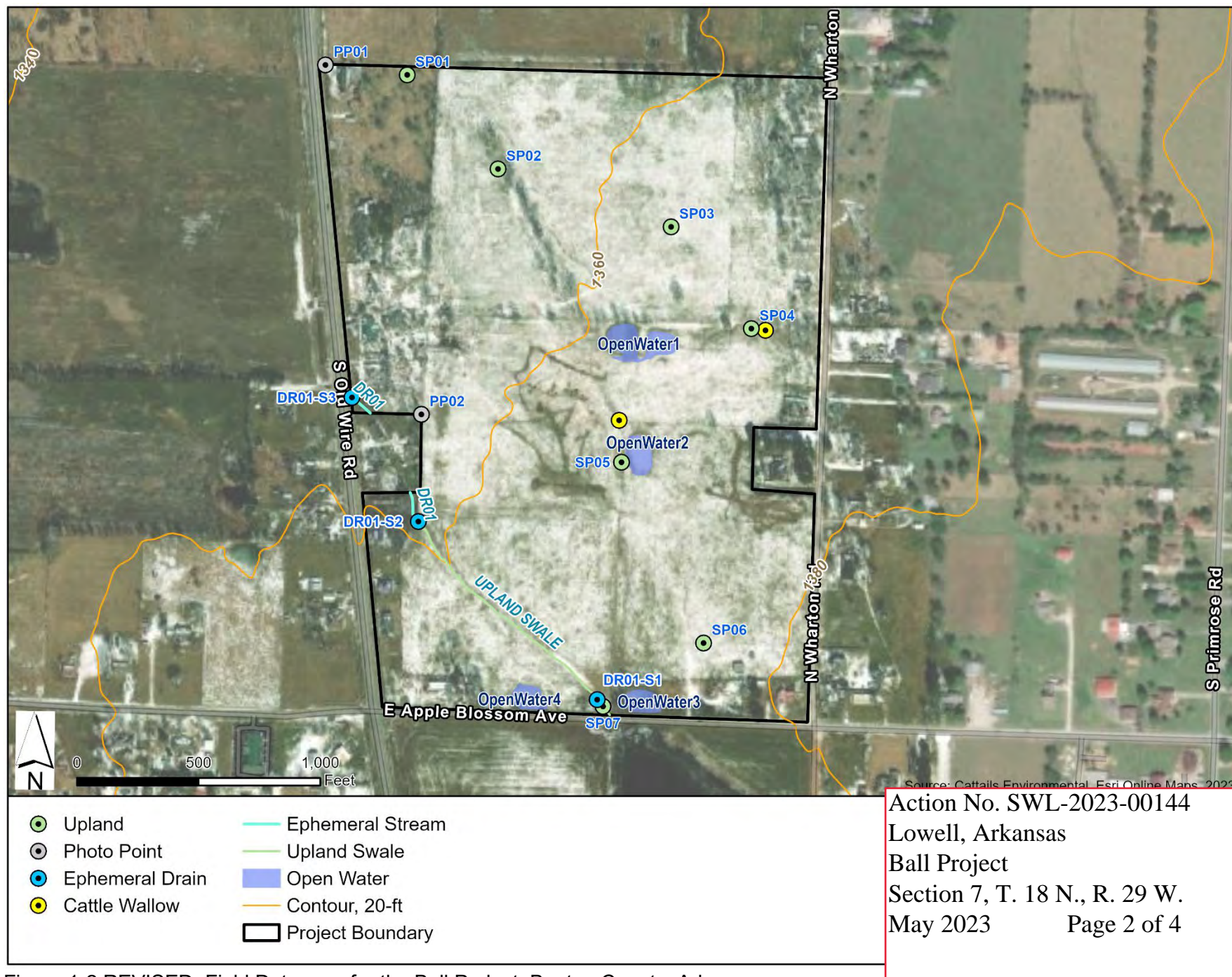
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(<https://streamstats.usgs.gov/ss/>). FEMA/FIRM maps, Panel 05007C0455J, were provided by agent in wetland delineation (site was mapped in Zone X, area of minimal flood hazard).

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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Figure 1-2 REVISED. Field Data map for the Ball Project, Benton County, Arkansas.



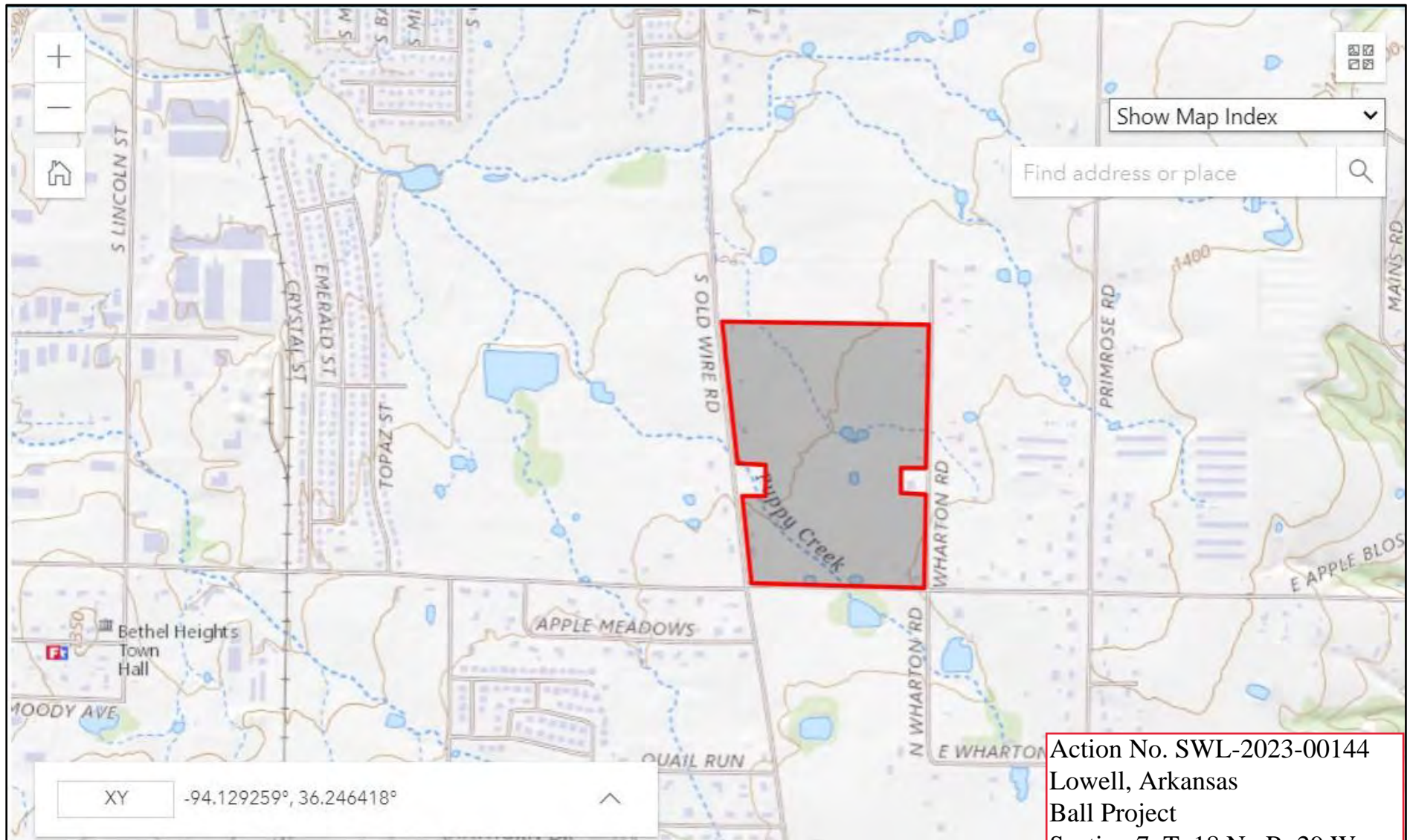


Figure 1-4. USGS National Hydrography Dataset (NHD) Map for the Ball Project, Benton County, Arkansas.

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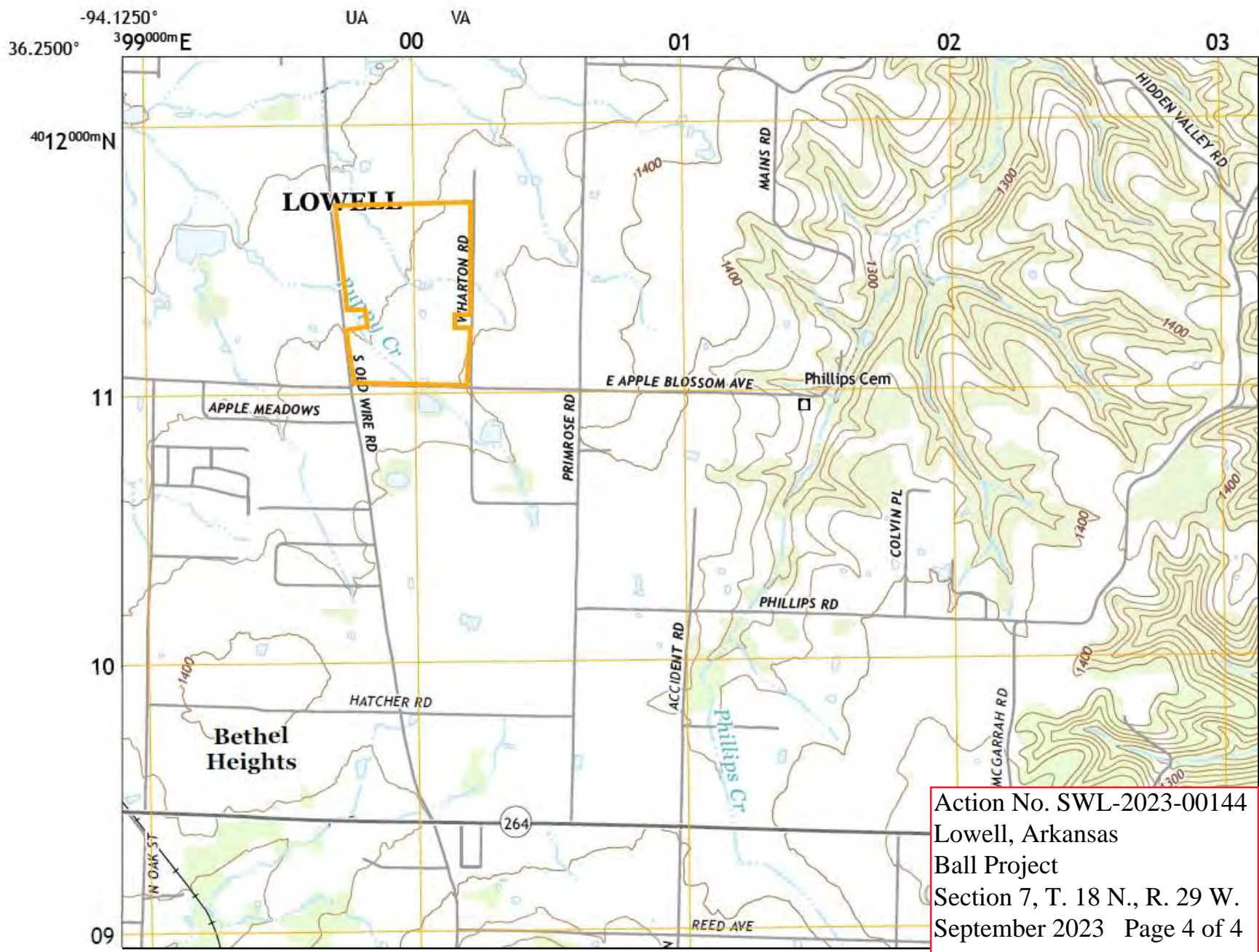


Figure 1-7. USGS topo map of Sonora quadrangle dated 2020 for the Ball Project, Benton County, in orange. CONTOUR INTERVAL 20 FEET, NORTH AMERICAN VERTICAL DATUM OF 1988