



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT  
701 SAN MARCO BOULEVARD  
JACKSONVILLE, FLORIDA 32207

CESAJ-RDW-F

23 September 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),<sup>1</sup> SAJ-2025-01613

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 Florida 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.

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- 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. Wetland #1 (0.01 acres), non-jurisdictional
  - ii. Wetland #2 (0.09 acres), non-jurisdictional
  - iii. Wetland #3 (0.01 acres), non-jurisdictional
  - iv. Wetland #4 (0.0 acres), non-jurisdictional
  - v. Roadside Swale #1 (0.05 acres), non-jurisdictional
  - vi. Roadside Swale #2 (acres), non-jurisdictional
  - vii. Roadside Swale #3 (0.9 acres), non-jurisdictional
  - viii. Roadside Swale #4 (0.4 acres), non-jurisdictional
  - ix. Roadside Swale #5 (0.2 acres), non-jurisdictional
  - x. Roadside Swale #6 (0.58 acres), non-jurisdictional
  - xi. Roadside Swale #7 (0.25 acres), non-jurisdictional
  - xii. Roadside Swale #8 (0.07 acres), non-jurisdictional
  - xiii. Roadside Swale #9 (0.27 acres), non-jurisdictional
  - xiv. Roadside Swale #10 (0.98 acres), non-jurisdictional
  - xv. Roadside Swale #11 (0.6 acres), non-jurisdictional
  - xvi. Roadside Swale #12 (0.23 acres), non-jurisdictional
  - xvii. Roadside Swale #13 (0.31 acres), non-jurisdictional
  - xviii. Roadside Swale #14 (0.2 acres), non-jurisdictional
  - xix. Roadside Swale #15 (0.28 acres), non-jurisdictional
  - xx. Roadside Swale #16 (0.13 acres), non-jurisdictional
  - xxi. Roadside Swale #17 (0.59 acres), non-jurisdictional
  - xxii. Roadside Swale #18 (0.28 acres), non-jurisdictional
  - xxiii. Roadside Swale #19 (0.76 acres), non-jurisdictional
  - xxiv. Roadside Swale #20 (0.57 acres), non-jurisdictional
  - xxv. Roadside Swale #21 (0.18 acres), non-jurisdictional
  - xxvi. Roadside Swale #22 (1.57 acres), non-jurisdictional
  - xxvii. Roadside Swale #23 (0.03 acres), non-jurisdictional
  - xxviii. Roadside Swale #24 (0.43 acres), non-jurisdictional
  - xxix. Roadside Swale #25 (0.21 acres), non-jurisdictional
  - xxx. Roadside Swale #26 (0.43 acres), non-jurisdictional
  - xxx. Roadside Swale #27 (0.03 acres), non-jurisdictional

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

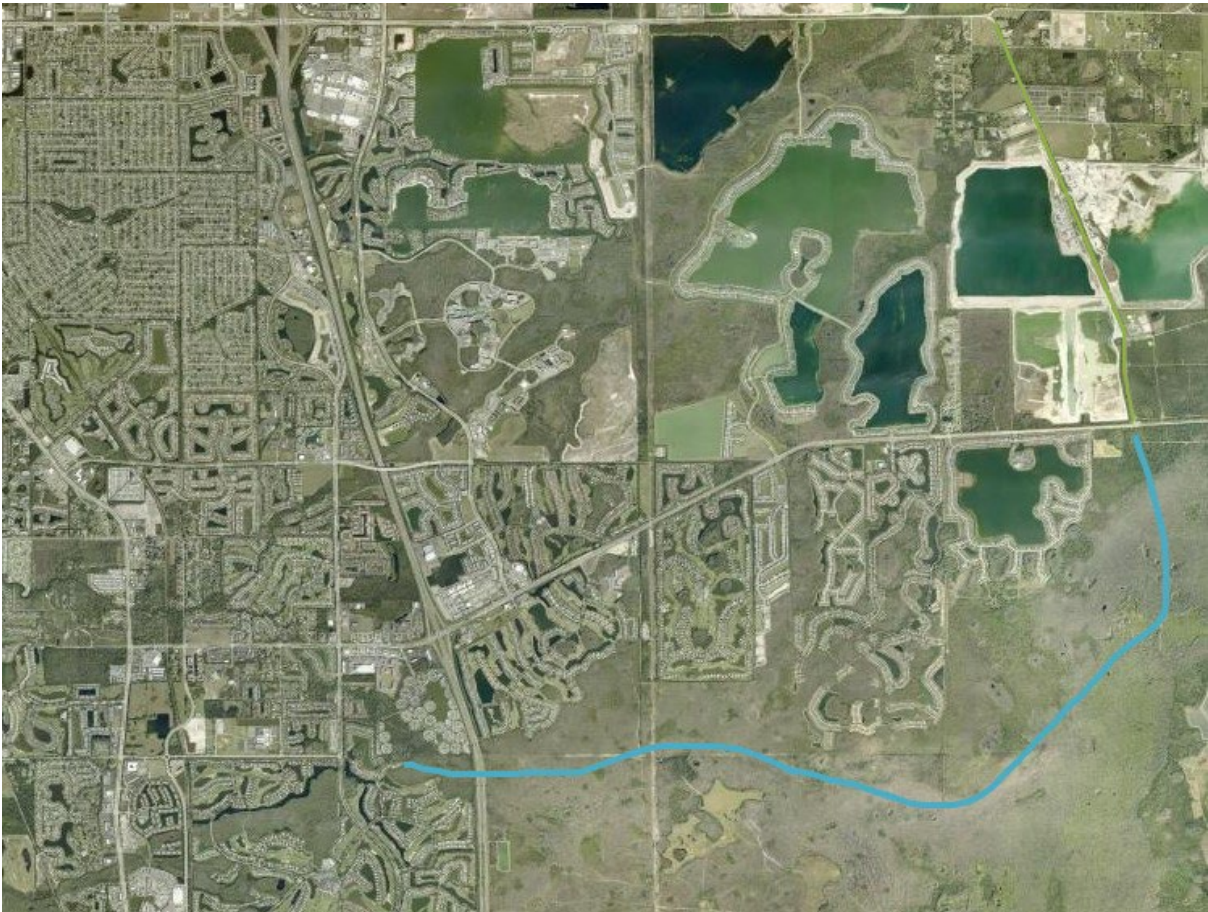
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- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
  - c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
  - d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
  - e. Memorandum to the field between the U.S. Department of the 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 (March 12, 2025)
3. REVIEW AREA. 30.27-acre Alico Roadway Corridor located at between Green Meadows and Corkscrew Road, in Section(s) 9, 15, 16 and 22, Township 46S and Range 26E, 26.47166°, 81.70972° central coordinates, Fort Myers, Lee County, Florida.
  4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest traditional navigable water is located 5.3 miles west to the Estero River South Branch.
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

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6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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>6</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

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<sup>5</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>6</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.

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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

- 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>7</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. N/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. 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

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<sup>7</sup> 51 FR 41217, November 13, 1986.

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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 #1-4, Roadside Swale #1-27 are all non-jurisdictional as there is no continuous surface connection to a relatively permanent water or to a traditional navigable water. The roadside swale does not convey a continuous flow, are not relatively permanent, standing or continuously flowing bodies of water and are not hydrologically connected to a jurisdictional water of the U.S.

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. Soils Map (May 2025)
  - b. 1986 Historical Aerial (May 2025)
  - c. LiDAR Map (September 10, 2025)
  - d. Florida Land Use, Cover, and Forms Classification System (FLUCFCS) (May 2025)

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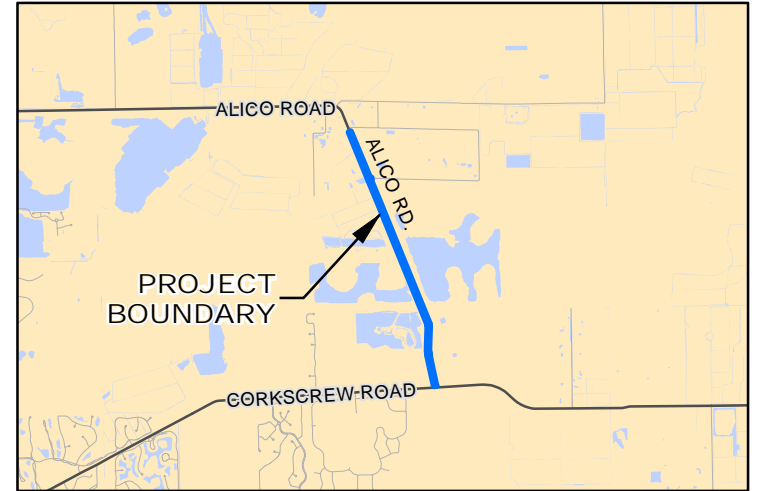
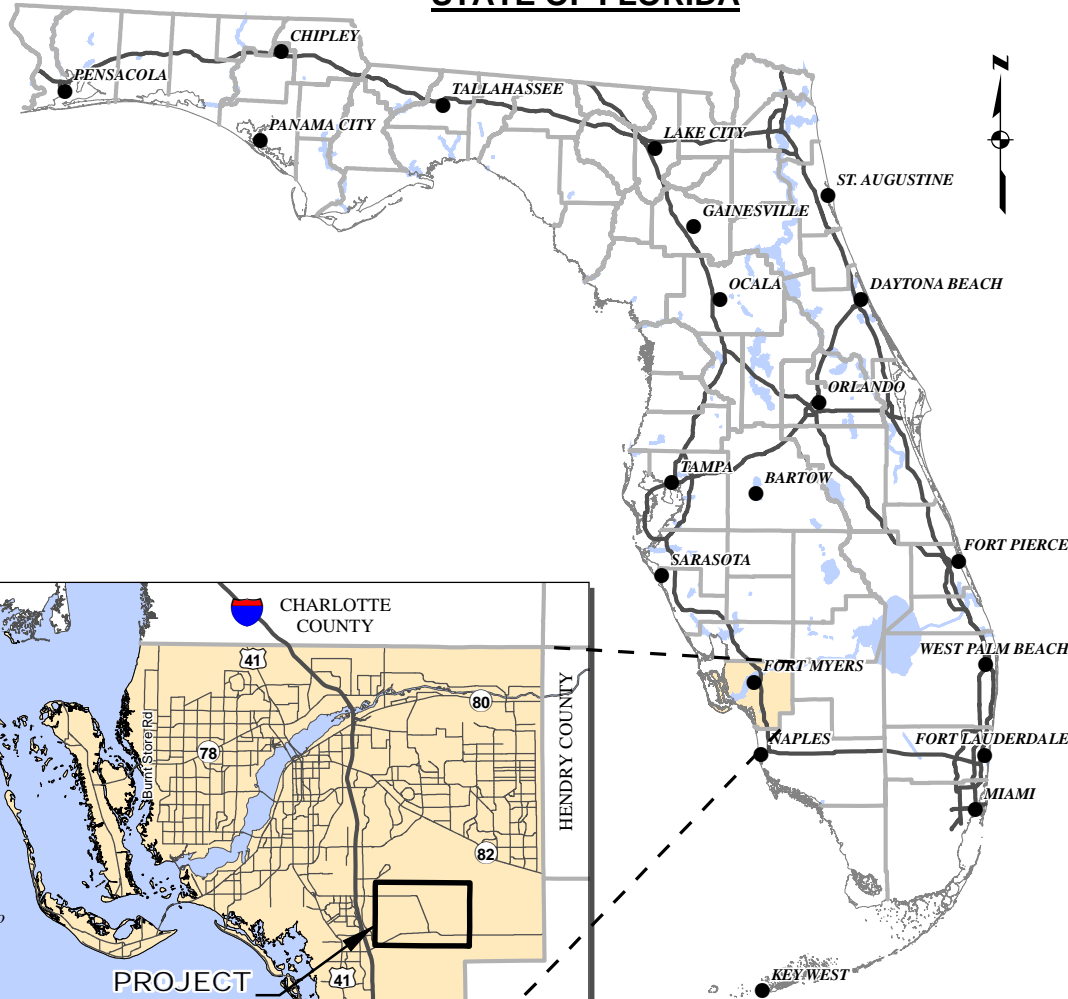
- e. National Regulatory Viewer (NRV) 3D Elevation Program (3DEP) Images (September 10, 2025)

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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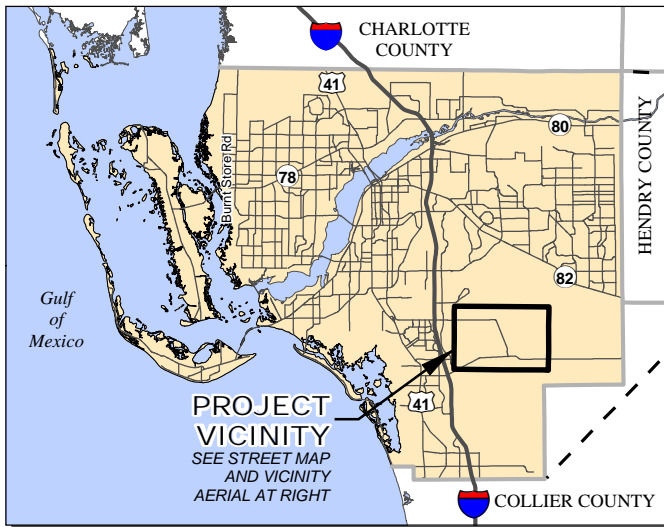
### STATE OF FLORIDA



**STREET MAP**  
N.T.S.



**VICINITY AERIAL**  
N.T.S.



**LEE COUNTY**  
N.T.S.

**NOTES**

1. The aerial photographs shown were acquired from Lee County and have a flight date of 2024.

Sections 9, 15, 16 & 22, Township 46 South, Range 26 East  
Latitude: 26.471667 N, Longitude: -81.709722 W

Alico Road Conveyance  
Drainage Improvements  
Lee County, Florida

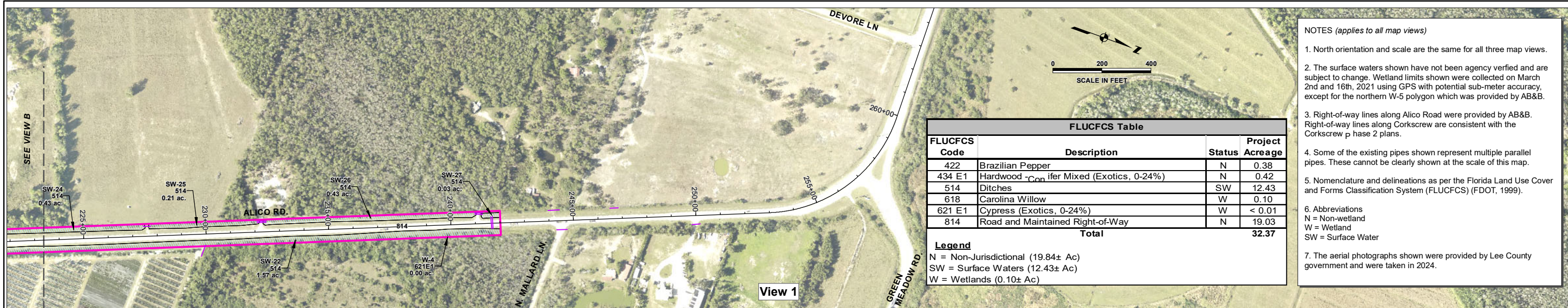
**JOHNSON**  
**ENGINEERING**  
— An Apex Company —

JOHNSON ENGINEERING, LLC  
2122 JOHNSON STREET  
FORT MYERS, FLORIDA 33901  
PHONE (239) 334-0046  
E.B. #642 & L.B. #642

### Location Map

DATE May 2025	PROJECT NO. 20203303-001	FILE NO.	SCALE N/A	SHEET Attachment C
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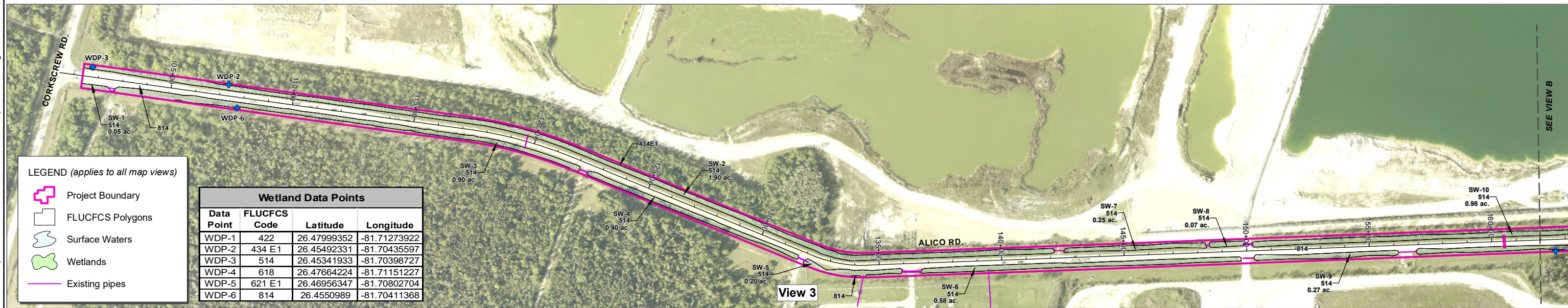
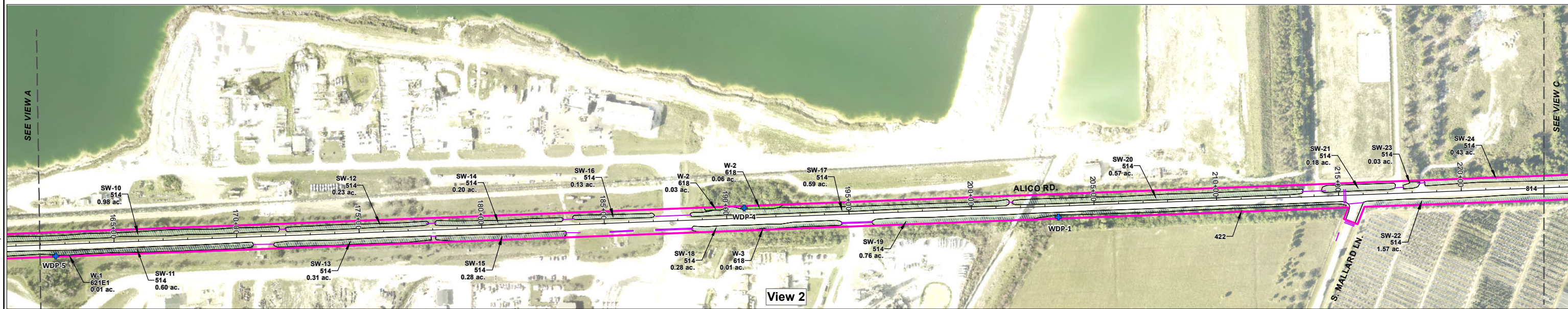
FLUCFCS Table			
FLUCFCS Code	Description	Status	Project Acreage
422	Brazilian Pepper	N	0.38
434 E1	Hardwood - Conifer Mixed (Exotics, 0-24%)	N	0.42
514	Ditches	SW	12.43
618	Carolina Willow	W	0.10
621 E1	Cypress (Exotics, 0-24%)	W	< 0.01
814	Road and Maintained Right-of-Way	N	19.03
<b>Total</b>			<b>32.37</b>

**Legend**

N = Non-Jurisdictional (19.84± Ac)  
 SW = Surface Waters (12.43± Ac)  
 W = Wetlands (0.10± Ac)

- NOTES (applies to all map views)
1. North orientation and scale are the same for all three map views.
  2. The surface waters shown have not been agency verified and are subject to change. Wetland limits shown were collected on March 2nd and 16th, 2021 using GPS with potential sub-meter accuracy, except for the northern W-5 polygon which was provided by AB&B.
  3. Right-of-way lines along Alico Road were provided by AB&B. Right-of-way lines along Corkscrew are consistent with the Corkscrew phase 2 plans.
  4. Some of the existing pipes shown represent multiple parallel pipes. These cannot be clearly shown at the scale of this map.
  5. Nomenclature and delineations as per the Florida Land Use Cover and Forms Classification System (FLUCFCS) (FDOT, 1999).
  6. Abbreviations  
 N = Non-wetland  
 W = Wetland  
 SW = Surface Water
  7. The aerial photographs shown were provided by Lee County government and were taken in 2024.



- LEGEND (applies to all map views)**
- Project Boundary
  - FLUCFCS Polygons
  - Surface Waters
  - Wetlands
  - Existing pipes

Wetland Data Points			
Data Point	FLUCFCS Code	Latitude	Longitude
WDP-1	422	26.47999352	-81.71273922
WDP-2	434 E1	26.45492331	-81.70435597
WDP-3	514	26.45341933	-81.70398727
WDP-4	618	26.47664224	-81.71151227
WDP-5	621 E1	26.46956347	-81.70802704
WDP-6	814	26.4550989	-81.70411368



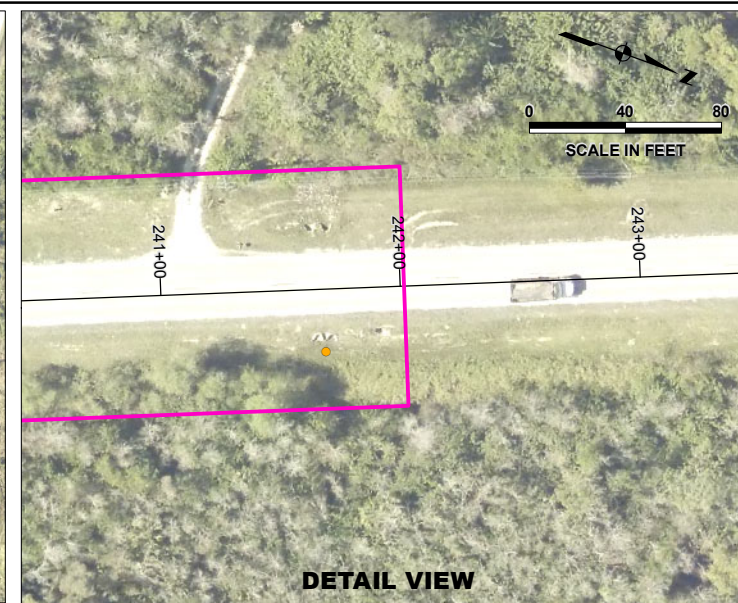
Alico Road Conveyance  
 Drainage Improvements  
 Lee County, Florida



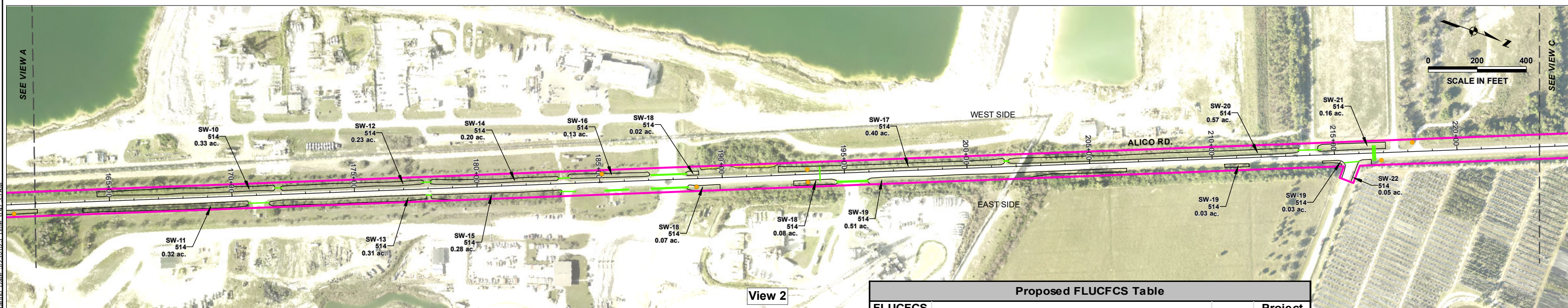
JOHNSON ENGINEERING, LLC  
 2122 JOHNSON STREET  
 FORT MYERS, FLORIDA 33902-1550  
 PHONE (239) 334-0046  
 E.B. #642 & L.B. #642

FLUCFCS Map

DATE	PROJECT NO.	FILE NO.	SCALE	SHEET
May 2025	25008154	22-46-26	As Shown	Attachment G

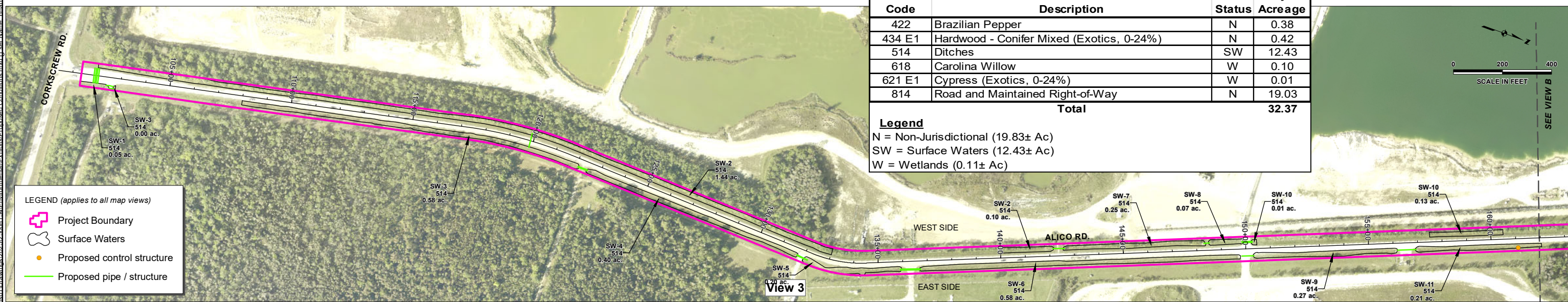


- NOTES (applies to all map views)
- The surface waters shown have not been agency verified and are subject to change. Wetland limits shown were collected on March 2nd and 16th, 2021 using GPS with potential sub-meter accuracy, except for the northern W-5 polygon which was provided by AB&B.
  - Right-of-way lines along Alico Road were provided by AB&B. Right-of-way lines along Corkscrew are consistent with the Corkscrew Phase 2 plans.
  - Some of the proposed pipes shown represent multiple parallel pipes. These cannot be clearly shown at the scale of this map. Please see Engineering plans for details.
  - See Sheet E-05 for typical sections.
  - Abbreviations  
N = Non-wetland  
W = Wetland  
SW = Surface Water  
Exc. = Excavation
  - The aerial photographs shown were provided by Lee County government and were taken in 2024.



Proposed FLUCFCS Table			
FLUCFCS Code	Description	Status	Project Acreage
422	Brazilian Pepper	N	0.38
434 E1	Hardwood - Conifer Mixed (Exotics, 0-24%)	N	0.42
514	Ditches	SW	12.43
618	Carolina Willow	W	0.10
621 E1	Cypress (Exotics, 0-24%)	W	0.01
814	Road and Maintained Right-of-Way	N	19.03
<b>Total</b>			<b>32.37</b>

**Legend**  
 N = Non-Jurisdictional (19.83± Ac)  
 SW = Surface Waters (12.43± Ac)  
 W = Wetlands (0.11± Ac)



- LEGEND (applies to all map views)
- Project Boundary
  - Surface Waters
  - Proposed control structure
  - Proposed pipe / structure



Alico Road Conveyance  
 Drainage Improvements  
 Lee County, Florida



FLUCFCS w/ Site Plan Map				
DATE	PROJECT NO.	FILE NO.	SCALE	SHEET
May 2025	25008154	22-46-26	As Shown	Attachment H