



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

CESWG-RD-P

January 6, 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),¹ SWG-2020-00389, MFR 1 of 1.²

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.

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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).

Wetland Name	Acreage	Jurisdictional/Adjacent	Latitude	Longitude
Wet 1	0.35	No	29.838515	-95.755679
Wet 2	0.71	No	29.840770	-95.754936
Wet 3	0.005	No	29.834351	-95.760434
Wet 7	0.83	No	29.839982	-95.762854
Wet 8	0.16	No	29.841902	-95.763460
Wet 11	0.24	No	29.844812	-95.764473
Wet 12	0.11	Yes	29.845815	-95.768905
Detention 1	0.73	No	29.834635	-95.757550

Field ID	Waterbody Name		Linear Feet	Jurisdictional	Latitude	Longitude
Water 1(a)	S Mayde Creek	Relatively Permanent Water	3,967	Yes	29.845147	-95.767479
Water 1(b)	S Mayde Creek	Relatively Permanent Water	86	Yes	29.839981	-95.761152
Water 1(c)	S Mayde Creek	Relatively Permanent Water	2,270	Yes	29.836627	-95.759225
Water 1(d)	S Mayde Creek	Relatively Permanent Water I	1,329	Yes	29.833446	-95.755717
Water 1(e)	S Mayde Creek	Relatively Permanent Water	949	Yes	29.832862	-95.753327
Water 1(f)	n/a	Non-Relatively Permanent Water	847	No	29.837187	-95.760783

Field ID	Waterbody Name		Linear Feet	Jurisdictional	Latitude	Longitude
Ditch 1	n/a	Non-Relatively Permanent Water	1,694	No	29.83884	-95.76099
Ditch 2	n/a	Non-Relatively Permanent Water	1,234	No	29.835338	-95.756801
Ditch 3	n/a	Non-Relatively Permanent Water	1,883	No	29.835126	-95.753279
Ditch 4	n/a	Non-Relatively Permanent Water	85	No	29.833644	-95.754194
Erosional Swales (28 features)	n/a	Non-Relatively Permanent Water	2,679	No	29.845917	-95.768810

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 (25 August 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)
- e. 2008 Rapanos guidance: “In addition, 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 significant nexus to downstream traditional navigable waters.”

3. REVIEW AREA. The review area is approximately 208 acres located south of Stockdick School Road and north of Clay Road, Harris County, Texas Latitude 29.838236° North, Longitude -95.761526° West.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Buffalo Bayou is a Traditional Navigable Water subject to Section 10 of the Rivers and Harbors Act of 1899 and is included on the Galveston District Navigable Waters list.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wet 12 is connected to South Mayde Creek by a non-relatively permanent swale. South Mayde Creek is a relatively permanent water that flows southeast into Buffalo Bayou, a Traditional Navigable Water, approximately 13 miles downstream of the project area. Ditch 1, Ditch 2, Ditch 3, Ditch 4, Water 1(f), and all the erosional swales connect to South Mayde Creek but do not carry relatively permanent flow and are not jurisdictional features.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 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

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.

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): **South Mayde Creek (Waters 1 (a) – (e))** is a second order stream at the project site which flows thirteen miles from the project site through Addicks Reservoir into Buffalo Bayou, a Traditional Navigable Water. South Mayde Creek flows year-round. Photographs from the consultant report and Google Earth Street Level views show that South Mayde Creek has a bed and bank and exhibits an ordinary high-water mark (OHWM). Based on photographic evidence and the 1915, 1971, 1983, and 2010 USGS topographic maps, South Mayde Creek is a relatively permanent water connected to Buffalo Bayou, a Traditional Navigable Water; therefore, **South Mayde Creek** meets the definition of a tributary as defined in the pre-2015 regime post Sackett guidance and is a water of the United States.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wet 12 is connected to South Mayde Creek, a relatively permanent water through a shallow swale which is 42 feet from the wetland to the creek. Under the pre-2015 regime and consistent with the Rapanos plurality and Sackett, adjacent wetlands are jurisdictional when they have a continuous surface connection with traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments, or relatively permanent tributaries. Although the shallow swale is not a relatively permanent water, it serves as a physical connection that maintains a continuous surface connection between an adjacent wetland, Wet 12, and a relatively permanent water, South Mayde Creek. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water as explained in Regulatory Guidance Memorandum on SWG-2023-00284 and NAP-2023-01223. Therefore, Wet 12 meets the definition of

adjacent as defined in the pre-2015 regime post Sackett guidance and is a water of the United States.

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
- 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 project area has four ditches, Ditch 1, Ditch 2, Ditch 3, and Ditch 4 which were excavated from uplands and drain only uplands. Based on Google Earth aerial photos 2017, 2019, and 2022 and photographs taken by consultants during their 10 September 2024 site visit, low volume, infrequent, and/or short duration flow was present indicating that the ditches primary source of water is runoff from rainfall. Ditch 1, Ditch 2, Ditch 3, and Ditch 4 are not relatively permanent waters and do not meet the definition of a tributary as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States.

The project area contains 28 erosional features, these features do not have a defined bed and bank and do not appear on the topographic map. The swales exhibit low volume, infrequent, and/or short duration flow indicating that the swales primary source of water is runoff from rainfall. They also do not appear near any of the wetlands on site. The erosional swales are not relatively permanent waters as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States.

- 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

⁹ 51 FR 41217, November 13, 1986.

- 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).

Based on our desk review, Wet 1, Wet 2, Wet 3, Wet 7, Wet 8, and Wet 11 are surrounded by uplands and do not have any known continuous surface connection to any water of the United States. There are no swales, erosional features, ditches, or culverts that would potentially serve as continuous surface connections. The LiDAR Digital Elevation Map (DEM) and Google Earth aerial photos do not show any continuous surface connection between Wet 1, Wet 2, Wet 3, Wet 7, Wet 8, and Wet 11 and any requisite jurisdictional water. There are ditches in the project area; however, those ditches do not connect to any of the delineated wetlands. Wet 2 could extend outside the project area but does not connect to any water of the United States through a ditch, swale, erosional feature, or culvert. No more than overland sheet flow would exit the wetlands. Wet 1, Wet 2, Wet 3, Wet 7, Wet 8, and Wet 11 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.

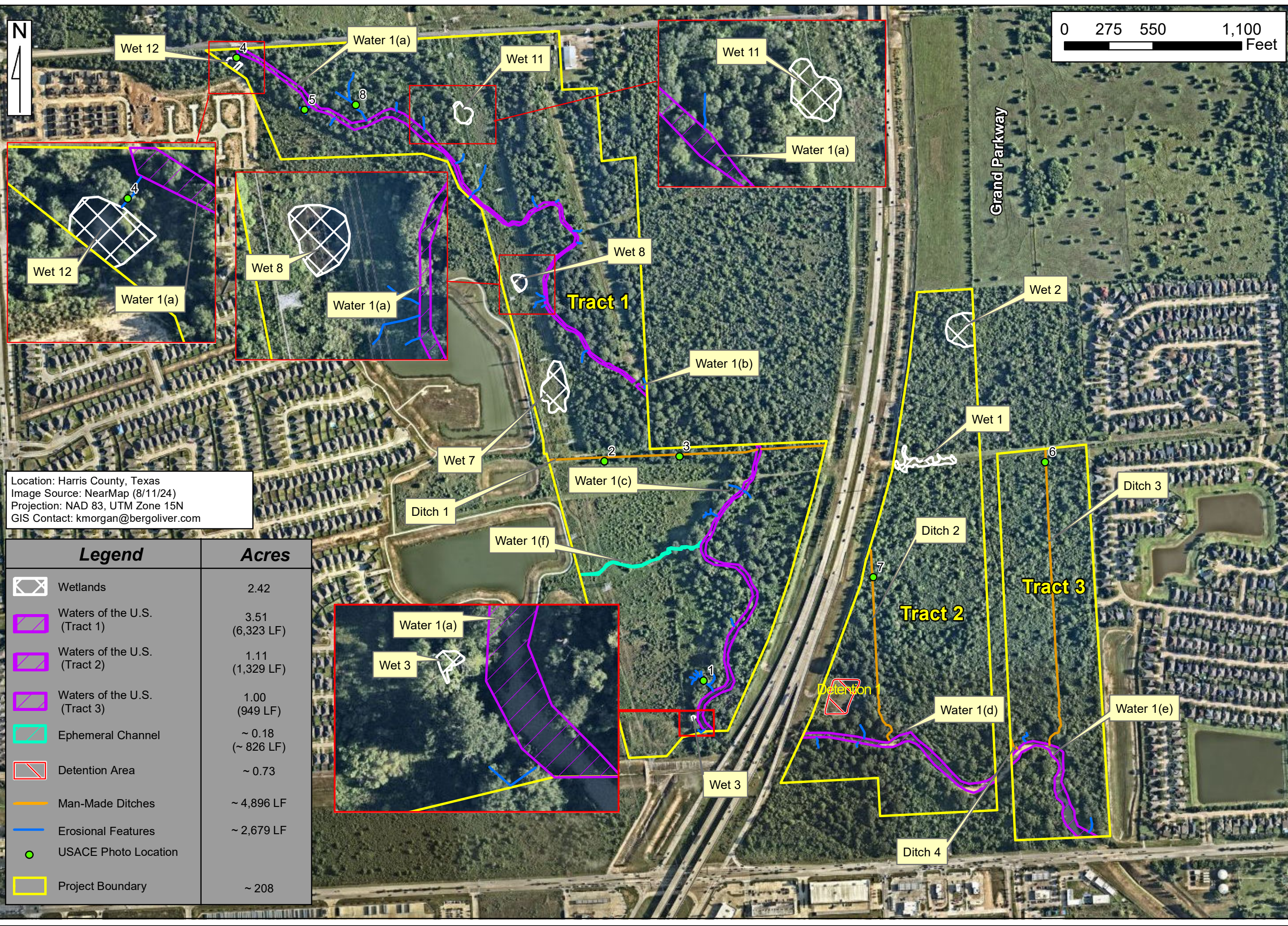
Detention 1 was created by excavating upland for the purpose of floodwater retention during extreme weather events. Detention 1 is not an open water feature; therefore, it is not relatively permanent and does not have any known continuous surface connection to any water of the United States. Detention 1 does not meet the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and is not a water of the United States.

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Water 1(f) was identified in the project area. Based on Google Earth aerial photos 2017, 2019, and 2022 and Katy, Texas 1915, 1971, and 1983 topographic maps, low volume, infrequent, and/or short duration flow was present indicating that Water 1(f)'s primary source of water is runoff from rainfall. Water 1(f) is not a relatively permanent water and does not meet the definition of a tributary 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. Google Earth 2017, 2019, 2022, and 2024
 - b. United States Geological Survey Topographic Quadrangle, Katy, Texas 1915, 1971 (1980 edition), 1983, and 2010
 - c. Wetland Assessment Determination and Delineation Report dated August 2021.
 - d. Supplemental Information received 01 October 2024.
 - e. United States Department of Agriculture, Natural Resources Conservation Service, Agricultural Applied Climate Information System (AgACIS) climate data.
10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on SWG-2023-00284 and NAP-2023-01223.
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.



Location: Harris County, Texas
 Image Source: NearMap (8/11/24)
 Projection: NAD 83, UTM Zone 15N
 GIS Contact: kmorgan@bergoliver.com

Legend	Acres
Wetlands	2.42
Waters of the U.S. (Tract 1)	3.51 (6,323 LF)
Waters of the U.S. (Tract 2)	1.11 (1,329 LF)
Waters of the U.S. (Tract 3)	1.00 (949 LF)
Ephemeral Channel	~ 0.18 (~ 826 LF)
Detention Area	~ 0.73
Man-Made Ditches	~ 4,896 LF
Erosional Features	~ 2,679 LF
USACE Photo Location	
Project Boundary	~ 208



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WETLAND DETERMINATION AND CLASSIFICATION (DIGITAL ELEVATION MODEL)
SITE LOCATION MAP

REVISIONS

Project #: 11589N-WD-HCFCD Project ID: U501-07-00-E001
 For: Geotest Engineering, Inc.
 Location: S of Stocklick School Rd and N of Clay Rd
 Harris County, Texas