



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

CESWG-RD-P

13 FEB 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-2022-00306<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.

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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).
  - i. EW-1, emergent wetland, non-jurisdictional, non-adjacent, not a water or navigable water of the US. 29.832619, -95.798862
  - ii. EW-2, emergent wetland, non-jurisdictional, non-adjacent, not a water or navigable water of the US. 29.832974, -95.798789
  - iii. EW-3, emergent wetland, non-jurisdictional, non-adjacent, not a water or navigable water of the US. 29.835345, -95.798633
  - iv. EW-4, emergent wetland, non-jurisdictional, non-adjacent, not a water or navigable water of the US. 29.835615, -95.798982
  - v. SSW-1, scrub/shrub wetland, non-jurisdictional, non-adjacent, not a water or navigable water of the US. 29.832277, -95.798999
  - vi. OW-1, open water pond, non-jurisdictional, not a water or navigable water of the US. 29.832169, -95.798628
  - vii. OW-2, open water pond, non-jurisdictional, not a water or navigable water of the US. 29.832169, -95.798628
  - viii. OW-3, open water pond, non-jurisdictional, not a water or navigable water of the US. 29.835340, -95.801145
  - ix. RD-1, roadside ditch, non-jurisdictional, not a water or navigable water of the US. 29.831478, -95.798226
  - x. RD-2, roadside ditch, non-jurisdictional, not a water or navigable water of the US. 29.831478, -95.798226

## 2. REFERENCES.

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- 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)
  - e. 2008 Rapanos guidance
  - f. 2003 SWANCC guidance
  - g. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988)).
  - h. 24 July 2020 Memo, "Joint Memorandum to the Field Between the U.S. Department of the Army, Corps of Engineers and the U.S. Environmental Protection Agency Concerning Exempt Construction or Maintenance of Irrigation Ditches and Exempt Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act".
3. REVIEW AREA. Project area consist of Clay Road right-of-way and vacant land for the construction of a four-lane asphalt boulevard with a 14-foot median, 12-foot turn lanes, and 24-inch minimum shoulders within a proposed 100-foot right-of-way and the addition of approximately 13.48 acres for the construction of a detention pond. Approximate center is 29.832619, -95.798862, Houston, Harris County, Texas. No known previous AJDs have been conducted within this tract nor along this span of roadside ditch. Site map attached.
  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.
  - 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

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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.

- 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.

Based on data sources identified in Section 9, OW-1 (0.56 ac), OW-2 (0.03 ac), and OW-3 (0.67 ac) are artificial ponds created by excavating dry land which were used for stock/irrigation. Historical reference maps and aerial photography show that these open water areas were constructed in uplands primarily for homestead aesthetics and cattle use. Maps show no evidence that these open water areas are connected by a ditch, swale, or ephemeral drainage to another water of the US. Therefore, OW-1, OW-2, and OW-3 are not waters of the United States.

RD-1, roadside ditch (4,045 LF), and RD-2, roadside ditch (3,132 LF). The 1986 regulations preamble describes ditches as generally not considered Waters of the United States if they are “non-tidal drainage and irrigation ditches excavated on dry land”. RD-1 and RD-2 are non-tidal, does not drain wetlands, is not a tributary and does not re-route or extend the OHWM of a tributary, nor carry permanent flow, and does not connect to WOTUS features. Historical reference maps and aerial photography show that these roadside ditches were constructed in uplands for road drainage. Maps show no evidence that these ditches are connected to another water of the US. Therefore, RD-1 and RD-2 are not waters of the United States.

- 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

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<sup>8</sup> 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 desk review and data sources listed in #9 , EW-1 (0.06 ac), EW-2 (0.02 ac), EW-3 (0.05 ac), EW-4 (0.02 ac) and SSW-1 (0.06 ac) do not have any known continuous surface connection to South Mayde Creek, a RPW located approximately 1.35 miles northeast of the project site, or any other water of the United States. No more than overland sheet flow would exit the wetlands. Therefore, EW-1 (0.06 ac), EW-2 (0.02 ac), EW-3 (0.05 ac), EW-4 (0.02 ac) and SSW-1 (0.06 ac) 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. Office evaluations were conducted 22 APR 22, 06 FEB 23, and 19 OCT 23.
  - b. ERIS. Historical Aerial Photographs. 1938, 1944, 1953, 1964, 1969, 1978, 1983, 1989, 1995, 2004, 2008, 2012, 2014, 2016, 2018, and 2020.
  - c. ERIS. Historical Topographic Maps, USGS 7.5-Minute Series, Brookshire and Katy, Texas Quadrangles. 1915, 1955, 1971, 1980, and 2016.
  - d. Southern Regional Climate Center. 2022. Houston William P Hobby Airport, Texas: Monthly Normals for Temperature and Rainfall.

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<https://www.srcc.tamu.edu> (Accessed February 3, 2022). Texas Parks and Wildlife Department (TPWD). 1984. Map Publication: The Vegetation Types of Texas.

[https://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_mp\\_e0100\\_1070n\\_34.pdf](https://tpwd.texas.gov/publications/pwdpubs/media/pwd_mp_e0100_1070n_34.pdf) (Accessed February 3, 2022).

- e. Texas Parks and Wildlife Department (TPWD). 2011. Map Publication: Level III Ecoregions of Texas.  
[http://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_mp\\_e0100\\_1070z\\_08.pdf](http://tpwd.texas.gov/publications/pwdpubs/media/pwd_mp_e0100_1070z_08.pdf) (Accessed February 3, 2022).
- f. U.S. Army Corps of Engineers (USACE). 1987. Corps of Engineers Wetlands Delineation Manual, by Environmental Laboratory. Wetlands Research Program Technical Report Y-87-1 (on-line edition). Washington, DC.
- g. U.S. Army Corps of Engineers (USACE). 2005. Regulatory Guidance Letter No. 05-05: Ordinary High Water Mark Identification.
- h. U.S. Army Corps of Engineers (USACE). 2007. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook.
- i. U.S. Army Corps of Engineers (USACE). 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic Gulf Coastal Plains (Version 2.0). Washington, DC.
- j. U.S. Department of Agriculture (USDA). 2022. Web Soil Survey.  
<http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx> (Accessed February 3, 2022).
- k. U.S. Environmental Protection Agency. 2022. Overview of the Navigable Waters Protection Rule.  
[https://www.epa.gov/sites/production/files/2020-01/documents/nwpr\\_fact\\_sheet\\_-\\_overview.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_overview.pdf). (Accessed February 3, 2022).
- l. U.S. Fish and Wildlife Service (USFWS). 1979. Classification of Wetlands and Deepwater Habitats of the United States.
- m. U.S. Fish and Wildlife Service (USFWS). 2020. National Wetlands Inventory (NWI) Seamless Data Download. <http://www.fws.gov/wetlands/data/Data-Download.html> (Accessed February 3, 2020).
- n. U.S. Geological Survey (USGS). 2022. Science in Your Watershed: Map Tool.

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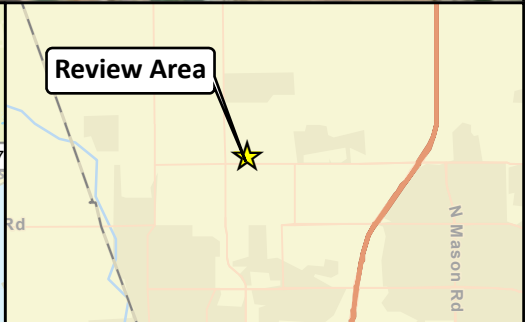
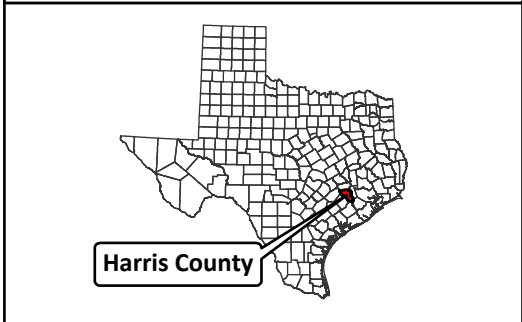
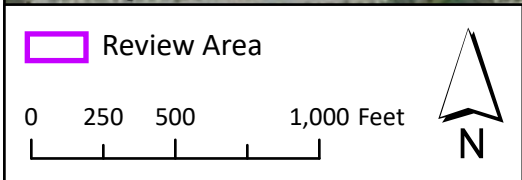
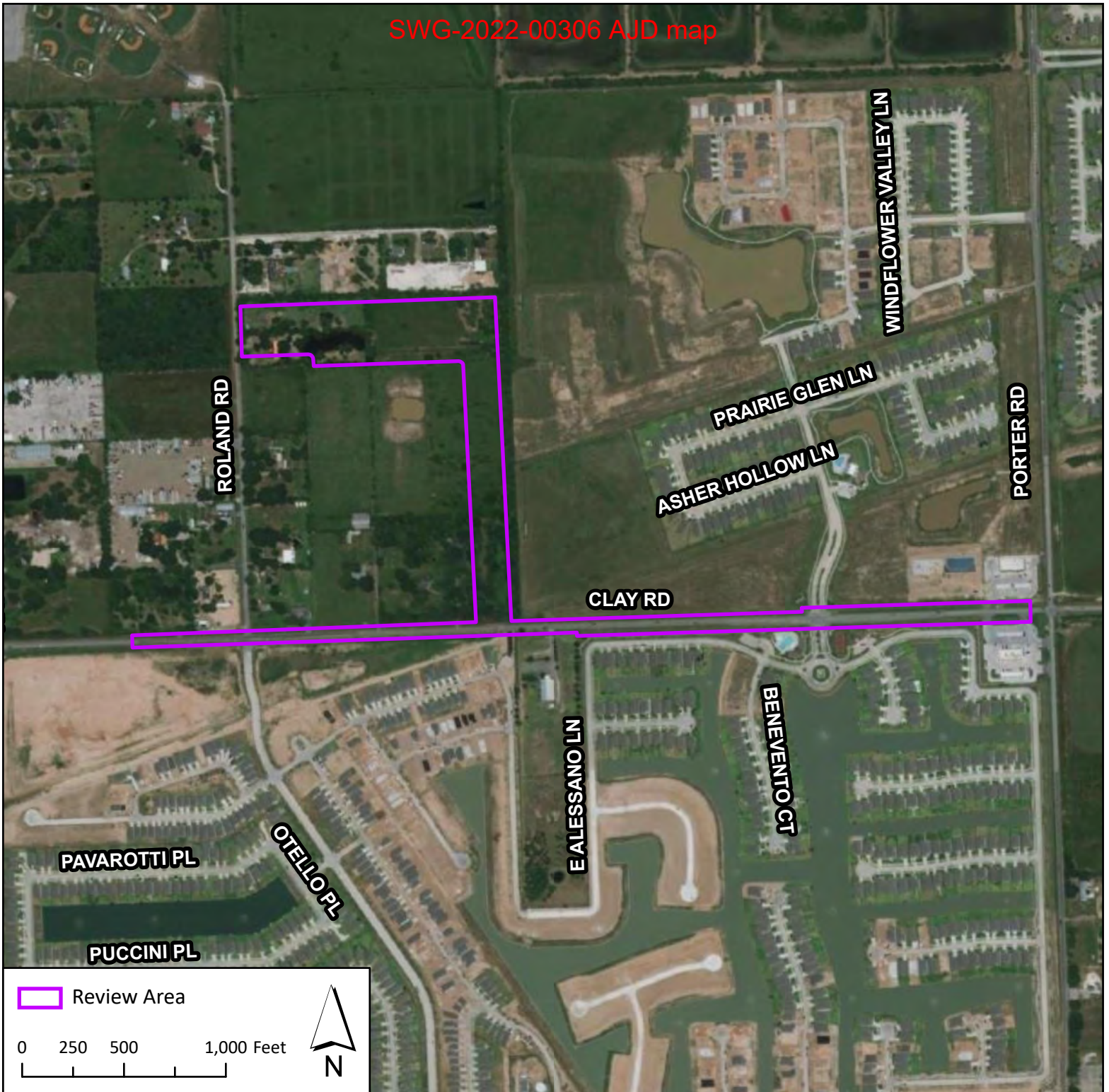
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<https://water.usgs.gov/lookup/getwatershed?12070205/www/cgi-in/lookup/getwatershed>. (Accessed February 3, 2022).

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.



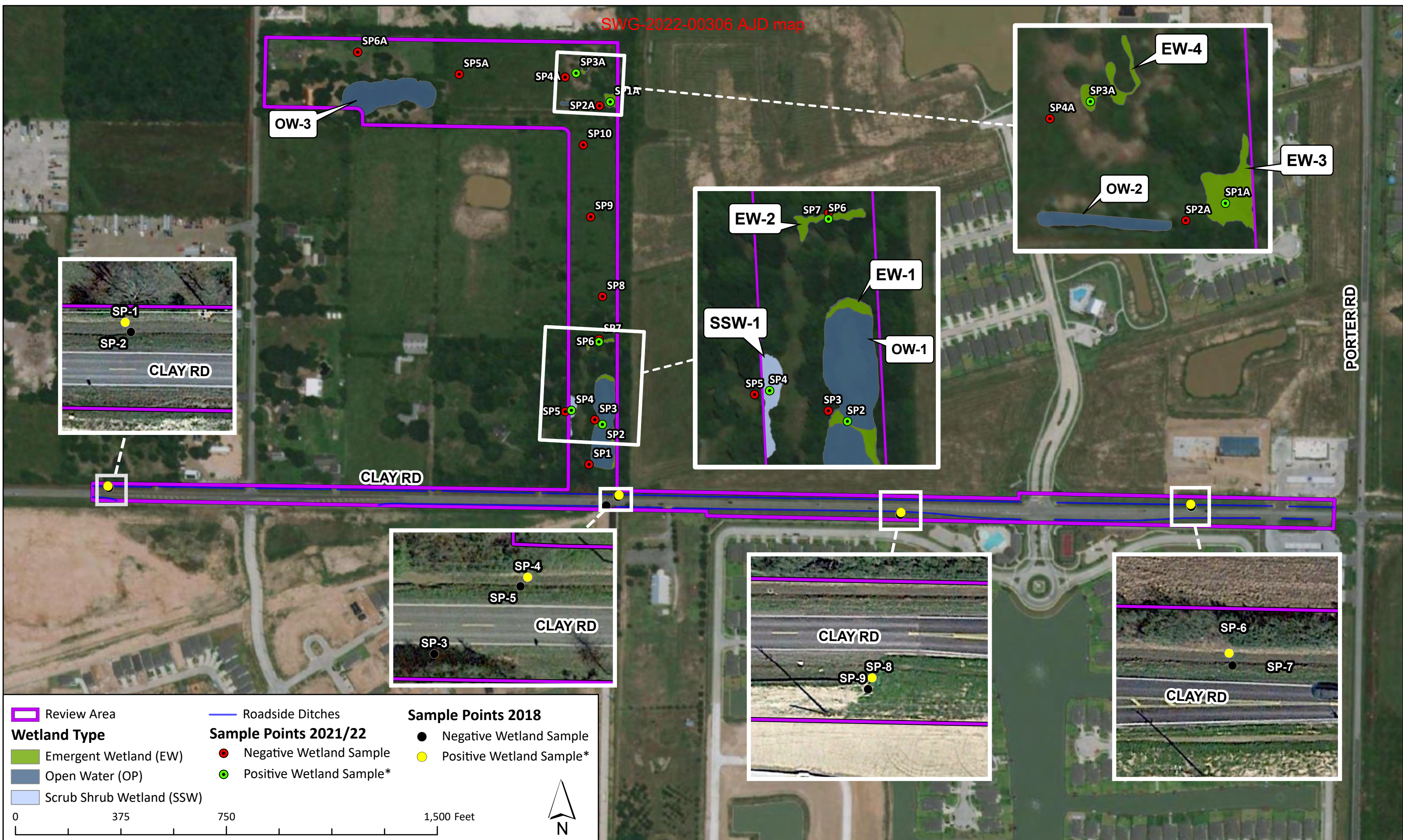


SOURCE: Aerial Photograph Obtained from DigitalGlobe - 2017

**PROJECT LOCATION**

Clay Road Improvements  
Harris County, Texas  
RKI Project No. ASF18-038-02

**FIGURE**



SOURCE: Aerial Photograph Obtained from DigitalGlobe - 2017

\*Positive sampling points exhibited all three indicator parameters required (hydrophytic vegetation, hydric soil, and hydrology) for the feature to be classified as a wetland. Negative sampling points did not.