



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

CESWG-RD-P

14 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-2023-00064

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 Texas 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. Halls Bayou, (P118-00-00), 1,522.98LF/1.39 ac, jurisdictional, Section 404, 29.894425, -95.357091.
  - ii. WET A, PEM, 0.01 ac, non-adjacent, non-jurisdictional, 29.89796399, -95.35811823.
  - iii. WET B, PEM, 0.01 ac, non-adjacent, non-jurisdictional, 29.89682481, -95.35768191.
  - iv. WET C, PEM, 0.01 ac, adjacent, jurisdictional, Section 404, abuts Halls Bayou, 29.89437733, -95.35596606.
  - v. WET D, PEM, 0.01 ac, adjacent, jurisdictional, Section 404, abuts Halls Bayou, 29.89489266, -95.35700667.
  - vi. DB 1, detention basin1, 7.17 ac, non-jurisdictional, 29.895498, -95.35710.

## 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)
- 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."

- 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. The Project Area is 42.68 acres (ac) and includes undeveloped forested land, a dry-bottom detention basin, and a portion of Halls Bayou (P118-00-00). The Project Area is bounded to the west and north by residential development, to the south by Halls Bayou, and to the east by Aldine Westfield Road, Houston, Harris County, Texas. Lat. 29.896570 N Long. 95.357056 W
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Greens Bayou
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Halls Bayou, an RPW, and its abutting wetlands flow southeast directly into Greens Bayou, an TNW. Halls Bayou is a 3rd order stream at the point closest to the review area and ends at its confluence with Greens Bayou, a 3rd order TNW, approximately 8.25 aerial miles southeast of the review area. Greens Bayou flows into Buffalo Bayou (TNW) south of the U.S. 90 Highway Bridge crossing. Buffalo Bayou flows east into the San Jacinto River (TNW) which flows south into Galveston Bay, then into the Gulf of Mexico.
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

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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.

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 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): Halls Bayou, (P118-00-00), 1,522.98LF/1.39 ac, is a relatively permanent water (RPW) within the review area. This reach has perennial flow based on historical and current USGS Topographic maps and aerial photography.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): WET C (0.01 ac) and WET D (0.01 ac) are fringe abutting wetlands located along Halls Bayou, they have a continuous surface connection (CSC) to Halls Bayou, an RPW. Halls Bayou has a CSC to Greens Bayou, an TNW, which eventually flows to the Gulf Mexico.

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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<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.



- 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. Detention Basin 1 (DB 1), 7.17 ac, is an artificial pond and non-jurisdictional as it is concrete lined stormwater detention created by excavating dry land used for floodwater retention. Therefore, DB 1 is not a water 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.
- 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 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
- e. 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
- f. 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

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

- g. 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 resources listed in #9, WET A (0.01 ac) and WET B (0.01 ac) are non-adjacent and do not have any known CSC to Halls Bayou or any other water of the United States. Based on 2018 LiDAR 1-foot contours, WET A and B are situated at approximately 65 feet, while the surrounding area is situated at approximately 67-68 feet. There are no elevation signatures to indicate a swale, erosional feature, ditch, or culvert that would potentially serve as surface connections to Halls Bayou. They are located over 1,000 feet from Halls Bayou. No more than overland sheet flow would exit the wetlands. Therefore, these wetlands 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 evaluation(s) were conducted on 03 MAR 22, 12 APR 23, and 01 NOV 23.
  - b. Federal Emergency Management Agency. Flood Insurance Rate Map - Panel 48201C0490L, Effective June 18, 2007.
  - c. ERIS. Historical Aerial Photographs, 1938, 1944, 1953, 1966, 1973, 1982, 1995, 2004, 2012, 2020.
  - d. USGS. Historical Topographic Maps, USGS 7.5-Minute Series: Humble, Texas 7.5-minute quadrangle: 1916, 1946, 1954, 1967, 1982, 1995, 2010, 2019. Science in Your Watershed: Map Tool.  
<https://water.usgs.gov/lookup/getwatershed?12070205/www/cgi-in/lookup/getwatershed>.
  - e. NHD. 2017 USGS National Hydrography Dataset.
  - f. USDA. Harris County, 2022 NRCS. Web Soil Survey.  
<http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>

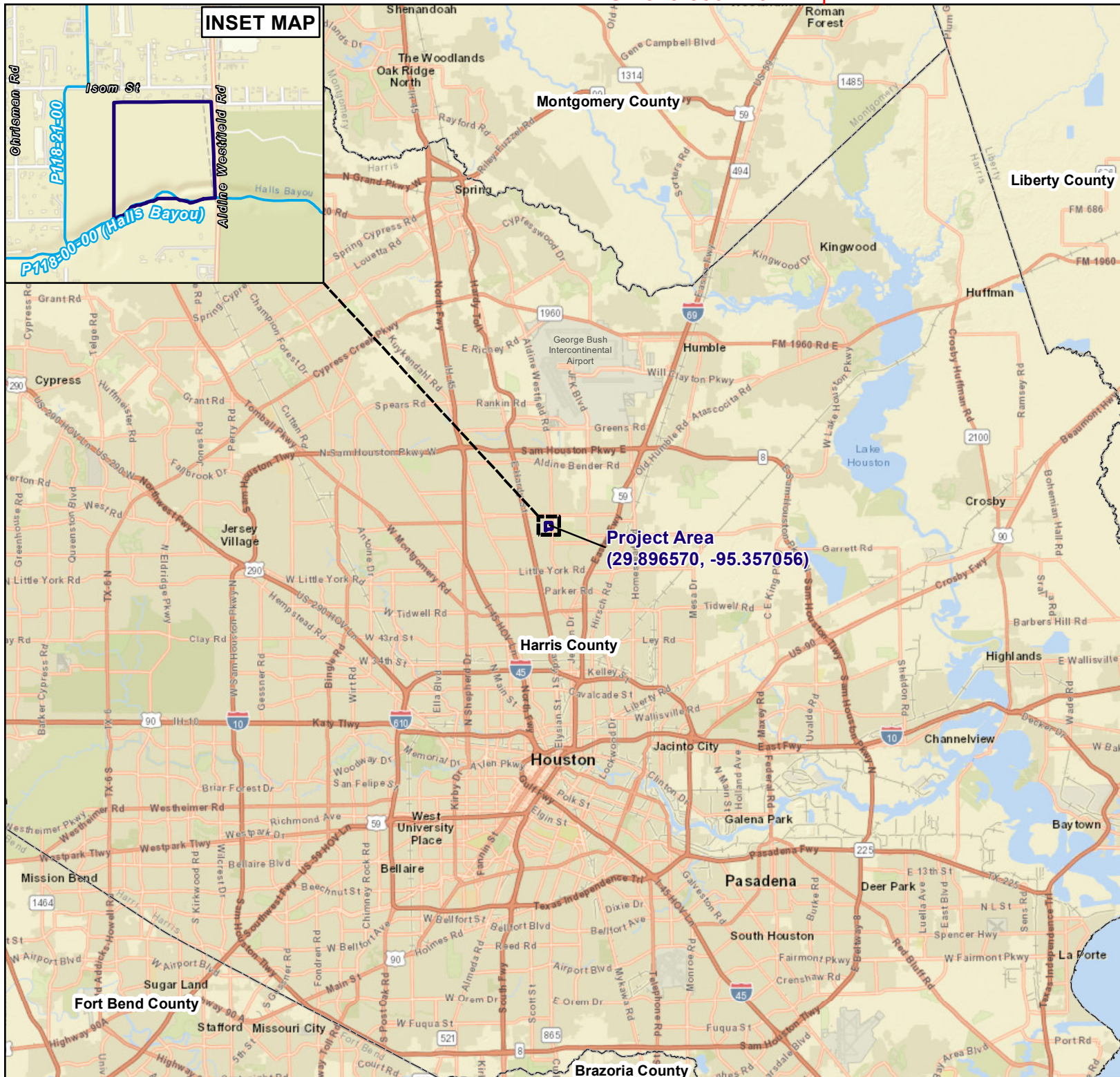
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- g. USFWS. 2021 National Wetlands Inventory. Classification of Wetlands and Deepwater Habitats of the United States. <http://www.fws.gov/wetlands/data/Data-Download.html>
- h. USACE. Antecedent Precipitation Tool (APT).
- i. Site visit photos. September 24, 2019, May 12, 2022, July 25, 2022, and October 7, 2022.
- j. 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.
- k. U.S. Army Corps of Engineers (USACE). 2005. Regulatory Guidance Letter No. 05-05: Ordinary High Water Mark Identification.
- l. 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.

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.






**HOLLAWAY**  
ENVIRONMENTAL + COMMUNICATIONS

## Waters of the United States Report

Halls Bayou Bond Project  
Implementation  
Bond ID C-41  
Harris County, Texas

Project ID P518-11-00-E002

### LEGEND

-  Project Area (42.68 ac)
-  County Boundaries
-  HCFCD Drainage

### Exhibit 1

#### Vicinity Map



#### NOTES

- Centroid Coordinates: 29.896570, -95.357056





**HOLLOWAY**  
ENVIRONMENTAL + COMMUNICATIONS

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Halls Bayou Bond Project  
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Harris County, Texas

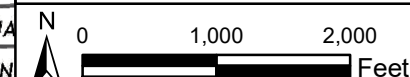
HCFC D Project ID P518-11-00-E002

## LEGEND

 Project Area (42.68 ac)

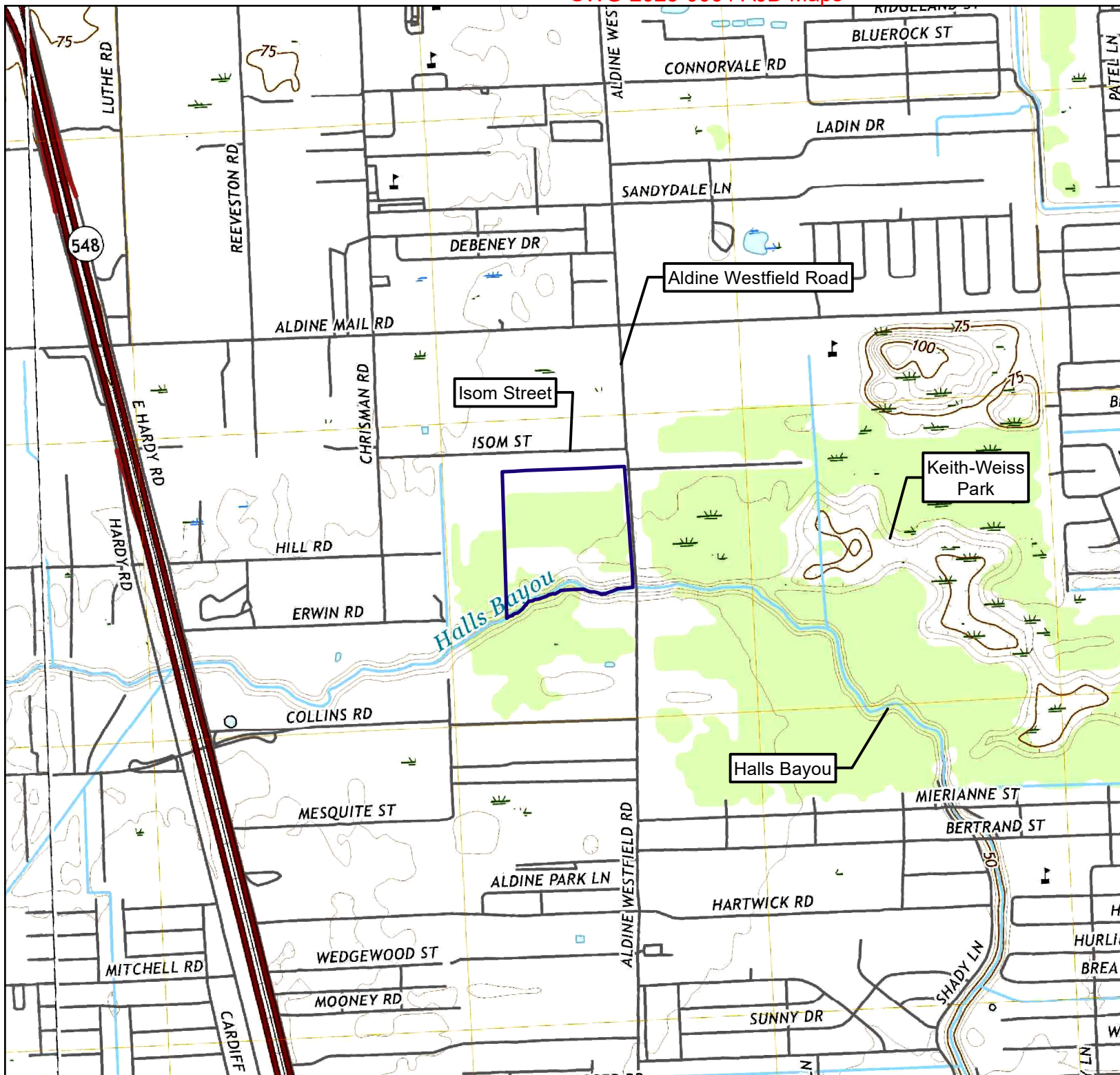
## Exhibit 6h

2019 Topographic Map

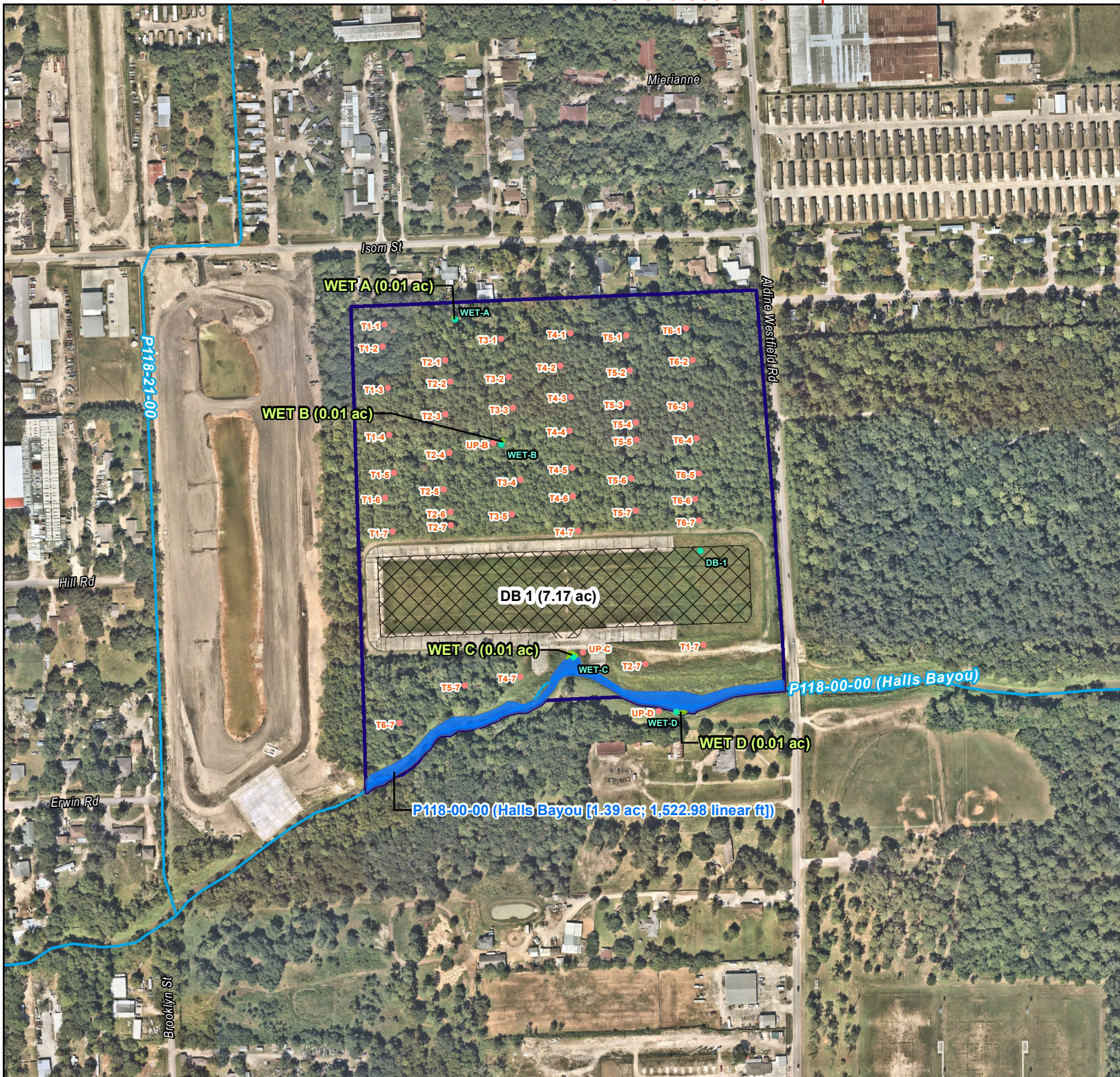


## NOTES

- Centroid Coordinates: 29.896570, -95.357056  
- Humble and Aldine, Texas USGS 7.5-minute  
Topographic Quadrangles







**HOLLAWAY**  
ENVIRONMENTAL + COMMUNICATIONS

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Halls Bayou Bond Project  
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Harris County, Texas

Project ID P518-11-00-E002

### LEGEND

- Project Area (42.68 ac)
- Detention Basin (7.17 ac)
- Perennial Stream  
(1.39 ac; 1,522.98 linear ft)
- Emergent Wetland (0.04 ac)
- HCFCF Drainage
- Wetland Data Points
- Upland Data Points

### Exhibit 3

### Delineation Data Map



### NOTES

- Centroid Coordinates: 29.896570, -95.357056
- NearMap Aerial Date: 09/29/2022





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ENVIRONMENTAL + COMMUNICATIONS

## Waters of the United States Report

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Harris County, Texas

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### LEGEND

Project Area (42.68 ac)

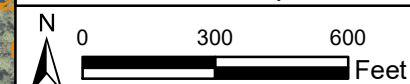
HCFCF Drainage

### Elevation (ft)

47 - 50  
 51 - 54  
 55 - 57  
 58 - 61  
 62 - 64  
 65 - 68  
 69 - 71  
 72 - 74  
 75 - 78

### Exhibit 7

### LiDAR Map



### NOTES

- Centroid Coordinates: 29.896570, -95.357056
- NearMap Aerial Date: 09/29/2022
- 2018 HCFCF 1-foot Contours

