



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

SWG-RD-P

20 March 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-2023-00244

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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. PEM-1, palustrine emergent wetland, non-adjacent, non-jurisdictional, 0.1 ac, 30.0878420, -95.5358730.
 - ii. PEM-2, palustrine emergent wetland, non-adjacent, non-jurisdictional, 1.99 ac, 30.0889704, -95.5335443.
 - iii. Pond-1, non-adjacent, non-jurisdictional, 0.28 ac, 30.089080, -95.533296.
 - iv. DD-1, upland drainage ditch, non-rpw, non-jurisdictional, 67.9 LF, 30.080528, -95.548895.
 - v. DD-2, upland drainage ditch, non-rpw, non-jurisdictional, 273 LF, 30.089491, -95.534383.
 - vi. Roadside Ditch, upland drainage ditch, non-rpw, non-jurisdictional, 11,384.4 LF, 30.086949, -95.537665.

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. 651, 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."
- g. 2003 SWANCC guidance

- h. 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))
 - i. 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”.
 - j. 12 March 2025 Memo, 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.
- 3. REVIEW AREA. Harris County is proposing construction of a four-lane concrete boulevard with a 14-foot median, 12-foot continuous left turn lanes, and detention within a 100-foot right-of-way (ROW) along Spring Stuebner Road between west of Leitner Way and State Highway (SH) 99 in Spring, Harris County, Texas (UPIN 20104MF1BX01). The review area is approximately 1.21 miles in length and includes an approximate 20-acre tract of vacant land north of the intersection of Spring Stuebner Road and Boudreaux Road. Approx. Center 30.086694, -95.540891. No previous jurisdictional determination in the review area.
 - 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 WATERS⁵: 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

⁵ 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 10.⁶ 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
 - 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").⁷ 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

⁶ 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 decide that water is a navigable water of the United States subject to Section 10 of the RHA.

⁷ 51 FR 41217, November 13, 1986.

- 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.

DD-1, upland drainage ditch, non-rpw, non-jurisdictional, 67.9 LF. DD-1 is a non-RPW based on historical USGS Topography, historical aerials, 2018 DEM, Lidar contours, and information referenced in Section 9. DD-1 is an upland excavated stormwater drainage ditch located immediately south of the roadside ditch on the southwest portion of tract. DD-1 only flows in response to precipitation. Based on historical aerials and topos, DD-1 does not have continuous flow. DD-1 was constructed wholly out of uplands, drains only dry land, is not a rerouted tributary, has non-relatively permanent flow, and does not extend the ordinary high-water mark (OHWM) of a Water of the United States. Therefore, the ditch meets the generally not jurisdictional category for certain ditches under the *Rapanos* guidance. Therefore, meets the generally not jurisdictional category for certain ditches under the *Rapanos* guidance.

DD-2, upland drainage ditch, non-rpw, non-jurisdictional, 273 LF. DD-2 is a non-RPW based on historical USGS Topography, historical aerials, 2018 DEM, Lidar contours, and information referenced in Section 9. DD-2 is an upland excavated drainage ditch located north out of PEM-2 at the northern portion of the subject tract. DD-2 only flows in response to precipitation. Based on historical aerials and topos, DD-2 does not have continuous flow. DD-2 was constructed wholly out of uplands, drains only dry land, is not a rerouted tributary, has non-relatively permanent flow, and does not extend the ordinary high-water mark (OHWM) of a Water of the United States. Therefore, the ditch meets the generally not jurisdictional category for certain ditches under the *Rapanos* guidance. Therefore, meets the generally not jurisdictional category for certain ditches under the *Rapanos* guidance.

Roadside Ditch, upland drainage ditch, non-rpw, non-jurisdictional, 11,384.4 LF. Roadside ditch is a non-RPW based on historical USGS Topography, historical aerials, 2018 DEM, Lidar contours, and information referenced in Section 9. Roadside ditch is an upland excavated stormwater drainage ditch located north and south of Spring Stuebner Road. Roadside ditch only flows in response to precipitation. Based on historical aerials and topos, roadside ditch does not have continuous flow. They were constructed wholly out of uplands, drains only dry land, is not a rerouted tributary, has non-relatively permanent flow, and does not extend the ordinary high-water mark (OHWM) of a Water of the United States. Therefore, the ditch meets the generally not jurisdictional category for certain

ditches under the Rapanos guidance. Therefore, meets the generally not jurisdictional category for certain ditches under the Rapanos 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 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*.

Pond-1, 0.64 ac, Pond-1 is not an impoundment of a water of the United States. The use, degradation, or destruction of Pond-1 would not affect interstate or foreign commerce including use by interstate or foreign travelers for recreational purposes, from which fish or shellfish are or could be taken and sold in interstate or foreign commerce, or which are used for or could be used for industrial purposes by industries in interstate commerce. Based on data sources listed in #9, Pond-1 does not have any known continuous surface connection to an RPW, Impoundment or TNW. The exhibits show no other ditch, culvert, tributary, or swale connecting Pond-1 to any water of U.S. Pond-1 is contained wholly within and does not extend beyond the project area boundary. Pond-1 does not meet the definition of a water of the United States and is not subject to Section 404 of the Clean Water Act.

- 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).

PEM-1, palustrine emergent wetland, non-adjacent, non-jurisdictional, 0.1 ac. The subject wetland does not have continuous surface connection nor abuts any

nearby water of the U.S. Based on data sources listed in #9, this palustrine wetland sits in depressional area that collects rainwater from the surrounding upland field. This wetland is contained within the review area and does not have any known continuous surface connection to RPWs, TNWs, or abut any water of the United States. This wetland does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are therefore not waters of the United States.

PEM-2, palustrine emergent wetland, non-adjacent, non-jurisdictional, 1.99 ac. The subject wetland does not have continuous surface connection nor abuts any nearby water of the U.S. Based on data sources listed in #9, this palustrine wetland sits in depressional area that collects rainwater from the surrounding upland field. This wetland is contained within the review area and does not have any known continuous surface connections to RPWs, TNWs, or abut any water of the United States. This wetland does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and therefore is not a water 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 January 14, 2025, and March 20, 2025.
 - b. Wetland Delineation Report. Raba Kistner, "Waters of the U.S. Delineation Report-Spring Steubner Road Segment E Improvements", April 7, 2023.
 - c. ERIS. Historical Aerial Photographs. 1938, 1944, 1952, 1958, 1964, 1969, 1979, 1983, 1989, 1995, 2005, 2006, 2008, 2010, 2012, 2014, 2016, 2018, and 2020.
 - d. ERIS Historical Topographic Maps, USGS 7.5-Minute Series, Louetta and Tomball, Texas Quadrangle dated 1916, 1920, 1962, 1979, 1995, 2016, and 2019.
 - e. U.S. Geological Survey (USGS). 2020. Science in Your Watershed: Map Tool. <https://water.usgs.gov/lookup/getwatershed?12070205/www/cgi-bin/lookup/getwatershed> (Accessed December 21, 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.

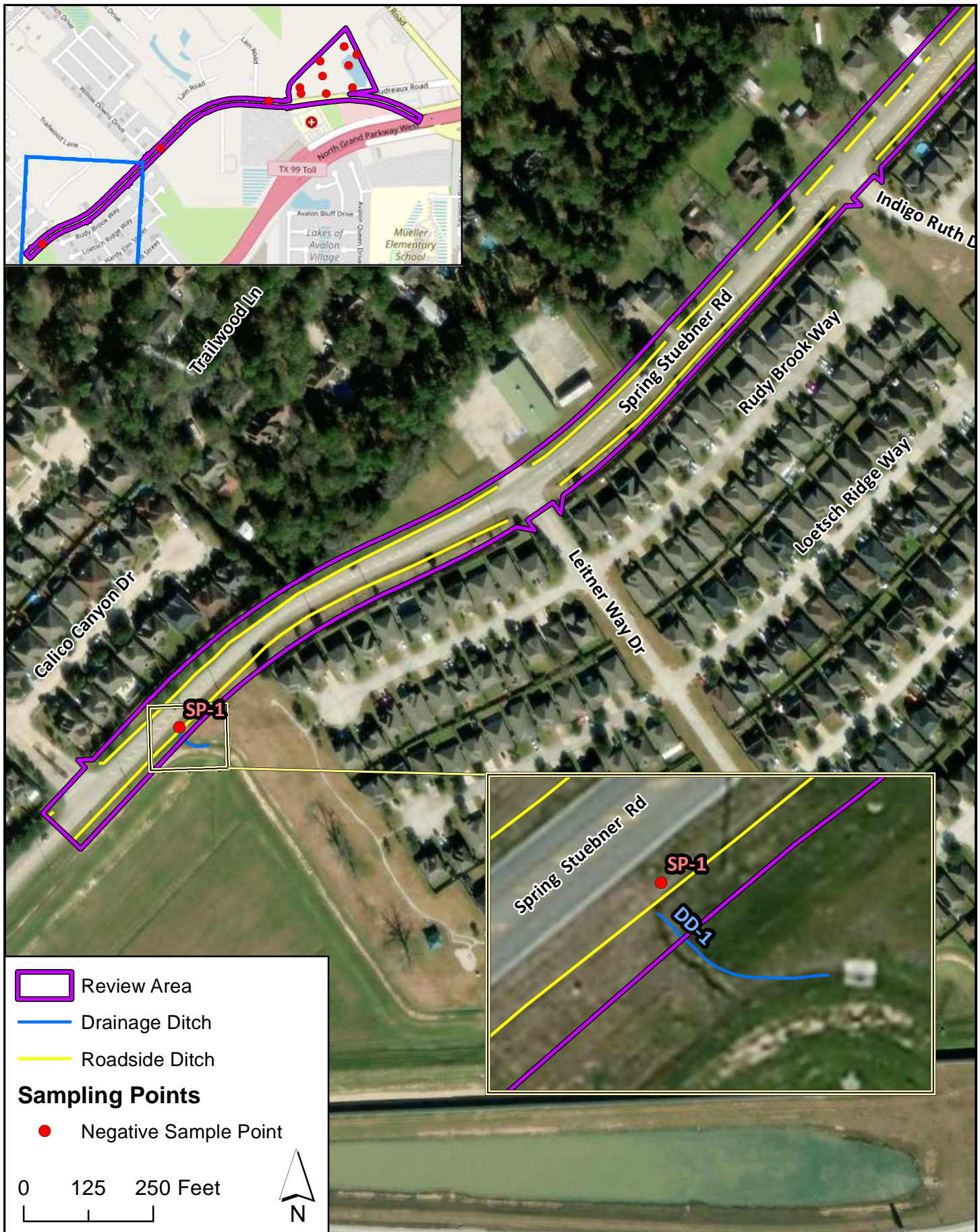
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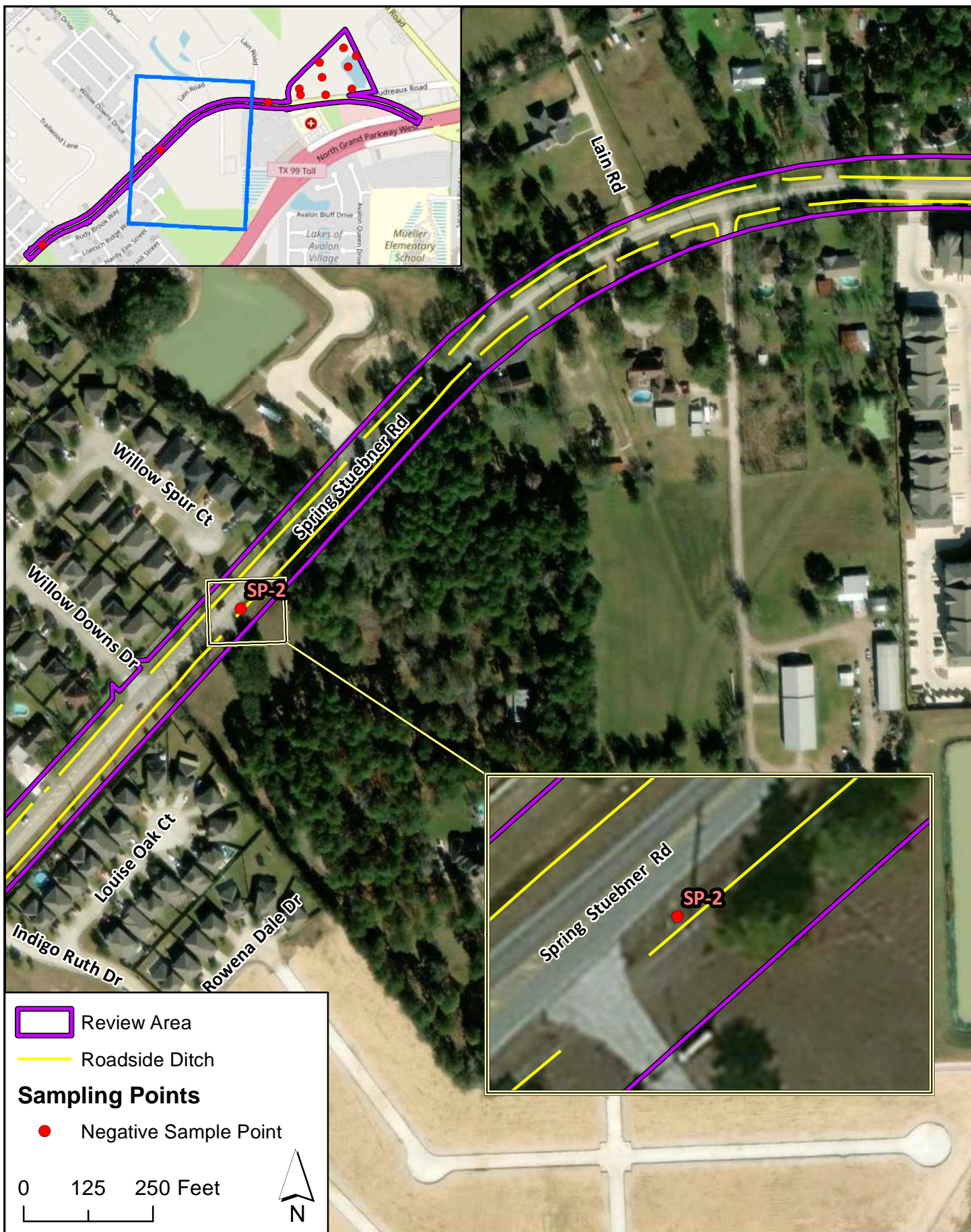
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- g. U.S. Army Corps of Engineers (USACE). 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plains (Version 2.0). Washington, DC.
- h. U.S. Fish and Wildlife Service (USFWS). 2022. National Wetlands Inventory (NWI) Seamless Data Download. <http://www.fws.gov/wetlands/data/Data-Download.html> (Accessed December 21, 2022).

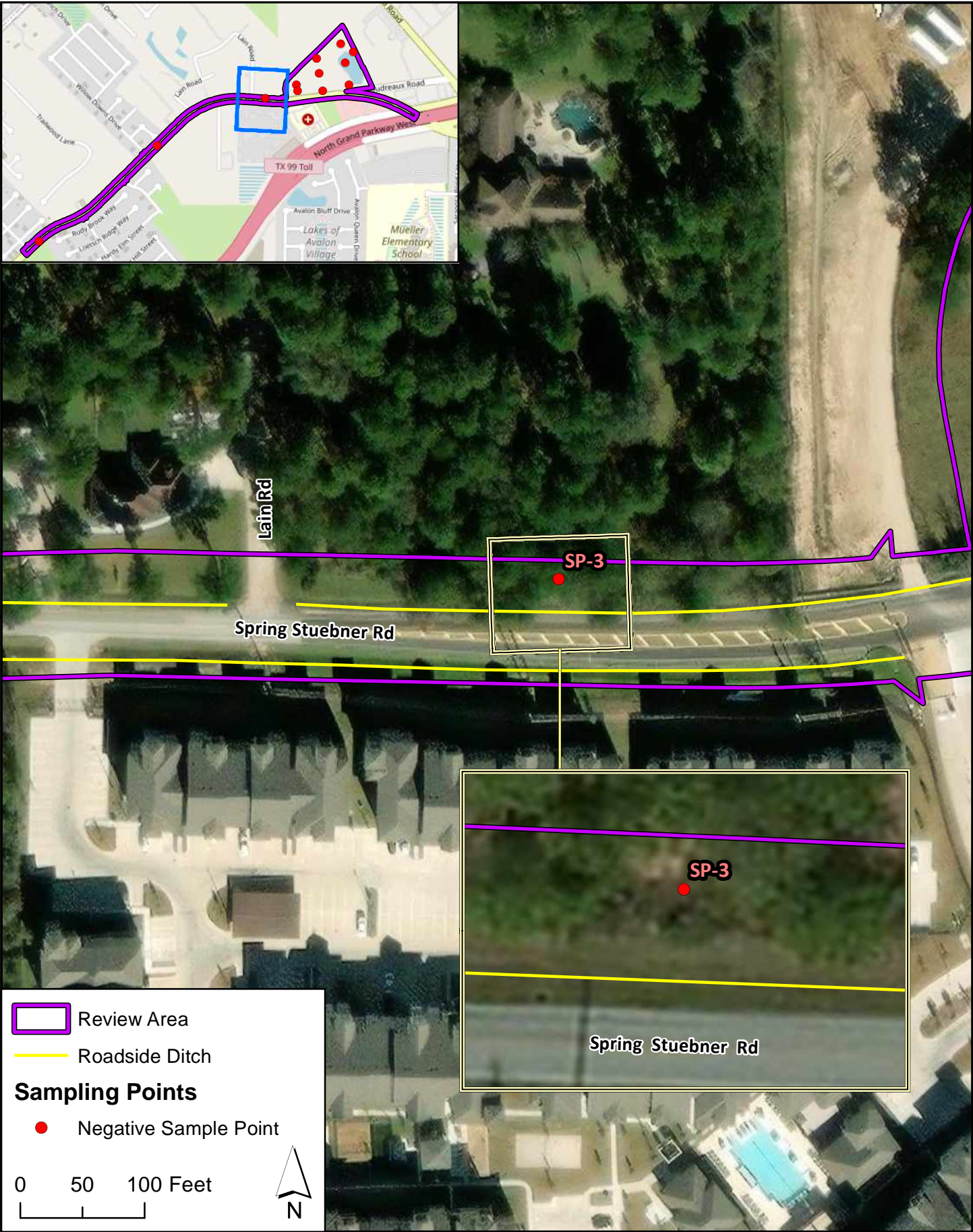
10. OTHER SUPPORTING INFORMATION. N/A

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.

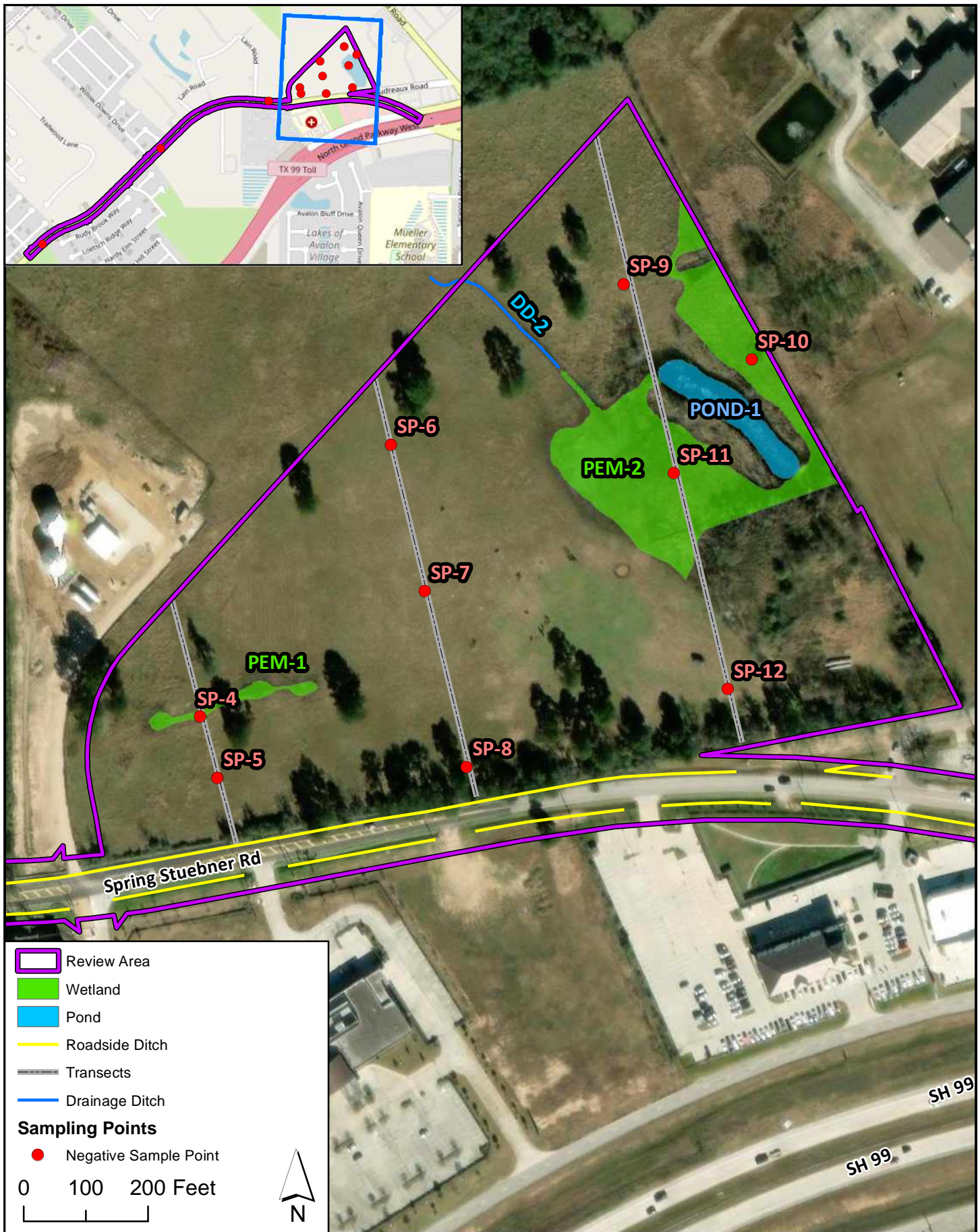




SOURCE: 1) Aerial basemap from ESRI

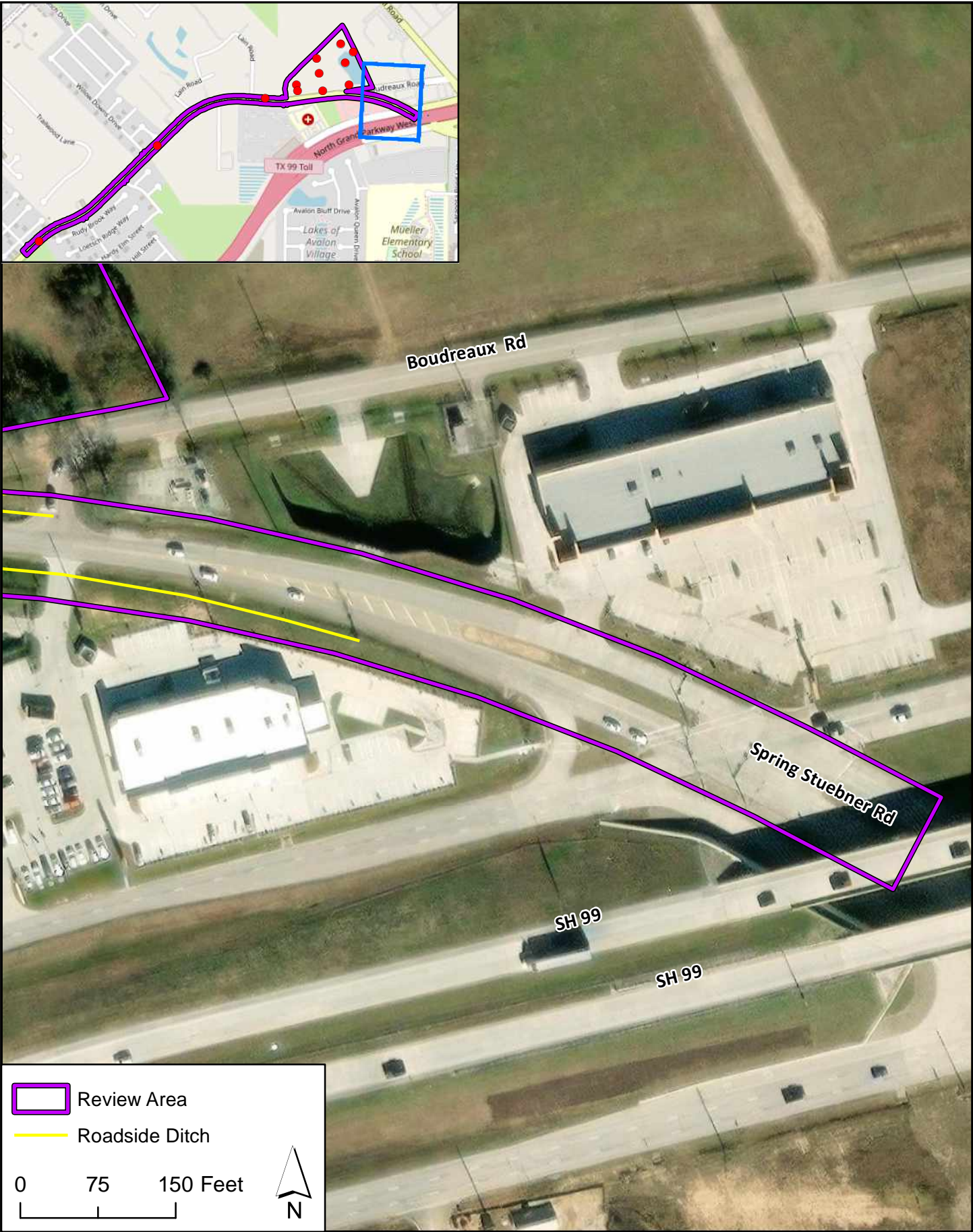


SOURCE: 1) Aerial basemap from ESRI

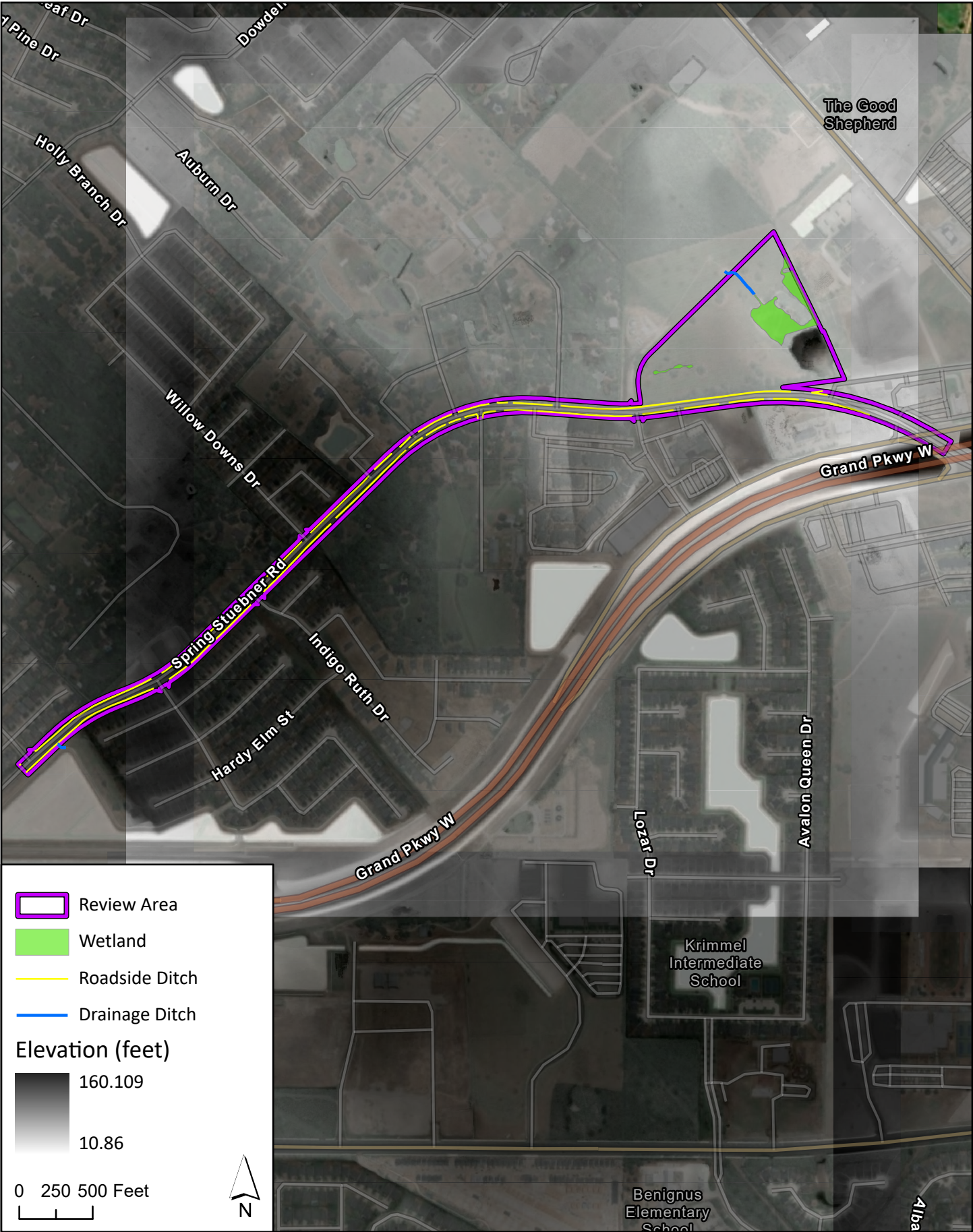


WATERS OF THE U.S.
Spring Stuebner Segment E Improvements
Spring, Harris County, Texas
RKI Project No. ASF22-140-00

**FIGURE
6D**



SOURCE: 1) Aerial basemap from ESRI



SOURCE:
1) USGS 10 Meter Digital Elevation Model (2022)

DIGITAL ELEVATION MODEL WITH WOTUS FEATURES
Spring Stuebner Segment E Improvements
Spring, Harris County, Texas
RKI Project No. ASF22-140-00

FIGURE



SOURCE:
1) USDA NAIP (2022)

LEAF-ON FALSE COLOR INFARED IMAGERY WITH CONTOURS

FIGURE

Spring Stuebner Segment E Improvements
Spring, Harris County, Texas
RKI Project No. ASF22-140-00

9A



