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

CESWG-RD-P April 23, 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-2023-00786, 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.

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. Stream 1 (Keegan's Bayou), 786 linear feet, jurisdictional, 29.67046°, -95.536753°

        ii. Ditch 1, 8,155 linear feet, jurisdictional, 29.649504°, -95.538083°

        iii. Wetland 1, 0.46 acre, non-adjacent, non-jurisdictional, 29.654128°, -95.532500°

        iv. Wetland 2, 0.35 acre, non-adjacent, non-jurisdictional, 29.652956°, -95.532209°

        v. Wetland 3, 0.22 acre, non-adjacent, non-jurisdictional, 29.653433°, -95.534152°

        vi. Wetland 4, 0.11 acre, non-adjacent, non-jurisdictional, 29.653271°, -95.532616°

        vii. Wetland 5, 1.61 acre, non-adjacent, non-jurisdictional, 29.648743°, -95.538036°

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."

f. March 12, 2025, Memorandum to the Field Between the U.S. Department of 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 to determine jurisdiction.

3. REVIEW AREA. The review area is approximately 113.96 acres located east of Highway 59 and north of the Sam Houston Tollway, Houston, Harris County, Texas. Latitude 29.669135° North, Longitude -95.536471° West.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Brays Bayou[6]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Ditch 1, a relatively permanent water, connects to Keegans Bayou, a relatively permanent water, which connects to Brays Bayou. Brays Bayou is a TNW subject to Section 10 of the Rivers and Harbors Act of 1899 and is included on the Galveston District Navigable Waters list. Brays Bayou becomes a TNW fourteen miles from the project site[7]

6. SECTION 10 JURISDICTIONAL WATERS[8]: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

[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] 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.
[8] 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.

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.[9] 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) Stream 1 (Keegans Bayou) is a second order stream which connects to Brays Bayou 0.5 mile from the project site. Keegans Bayou flows year-round. Photographs from the consultant report and Google Earth Street Level views show that Keegans Bayou has a bed and bank and exhibits an ordinary high-water mark (OHWM). Based on photographic evidence and the 1915, 1970, 1982, and 1995 USGS topographic maps, Keegans Bayou is a relatively permanent water connected to Brays Bayou, a Traditional Navigable Water; therefore, Keegans Bayou meets the definition of a tributary as defined in the pre-2015 regime post Sackett guidance and is a water of the United States.

      Ditch 1 was constructed out of uplands according to historic topographic maps. The ditch is not shown on the 1915 map but is shown on the 1970 topographic map and extended to current location by 1995. Ditch 1 drains only uplands;

[9] 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.

however, it appears to have relatively permanent flow. Water is visible in 2019, 2020, 2022, 2023, and 2024 Google Earth aerials. The Antecedent Precipitation Tool shows that conditions were normal or drier than normal in the 2019, 2020, 2022, and 2023 aerials. Photographs from the consultant report and Google Earth Street Level views show that Ditch 1 has a bed and bank and exhibits an ordinary high-water mark (OHWM).

According to the 2008 Rapanos guidance (Reference 2c) a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a TNW. Tributaries can also include ditches and canals. Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).

One type of waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 Rapanos Guidance (References 2a and 2c) are ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. A ditch must meet all criteria to be considered non-jurisdictional. According to all data reviewed, Ditch 1 has relatively permanent flow; therefore, does not meet the definition of a non-jurisdictional ditch, and as such, meets the definition of a tributary as defined in the pre-2015 regime post Sackett guidance.

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”).[10] 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

[10] 51 FR 41217, November 13, 1986.

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*. 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, Wetland 1, Wetland, 2, Wetland 3, Wetland 4, and Wetland 5 do not directly abut; and therefore, have no continuous surface connection with the nearest RPWs, Keegans Bayou and Ditch 1 or the nearest TNW, Brays Bayou. Wetland 1, Wetland, 2, Wetland 3, Wetland 4, and Wetland 5 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. Google Earth 2019, 2020, 2022, 2023, 2024

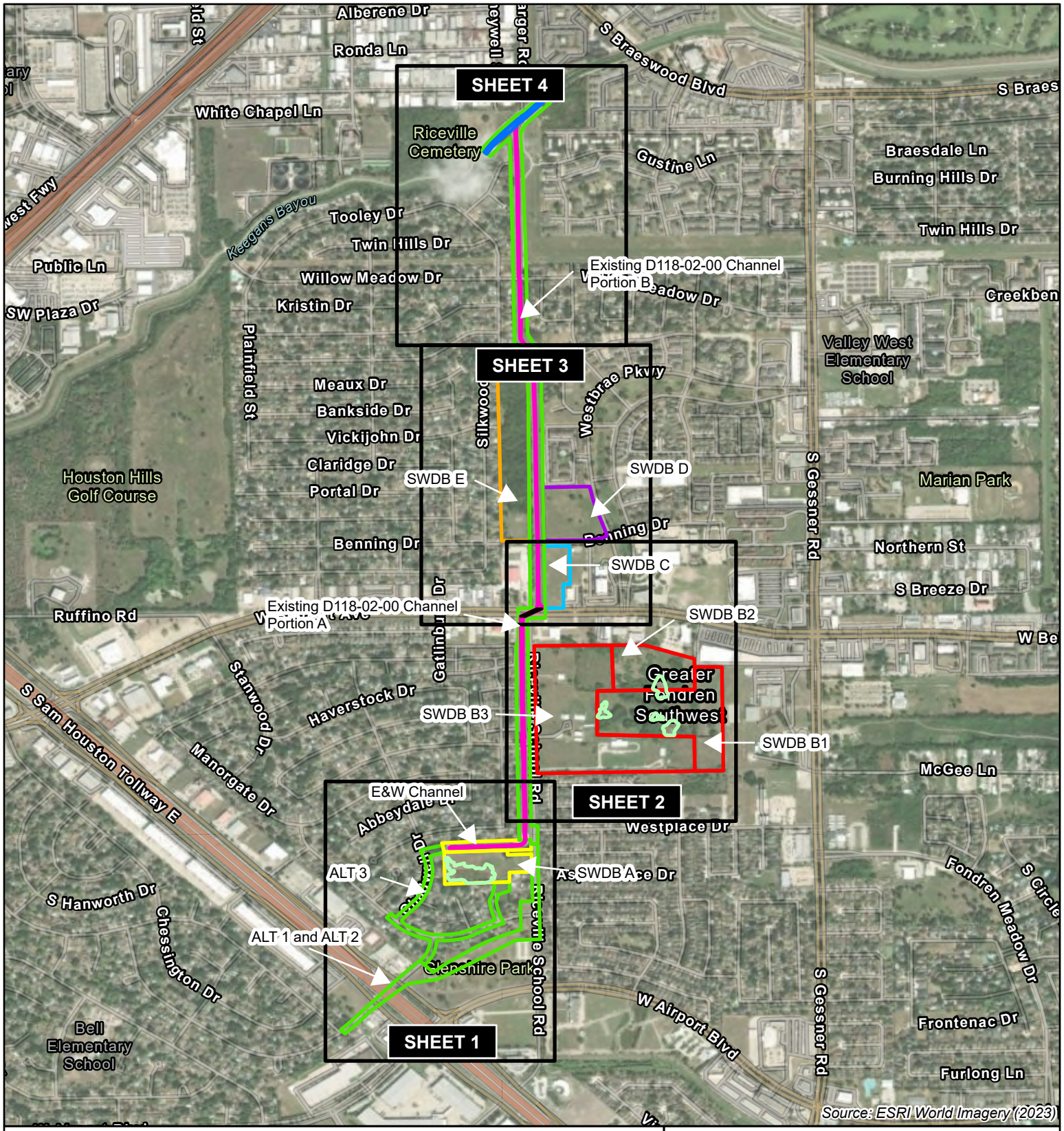
b. United States Geological Survey Topographic Quadrangle, Alief, Texas 1915, 1970, 1982, 1995, and 2019

c. Pre-USACE Verified Wetland and Waters of the U.S Delineation Report dated 13 November 2023.

d. United States Department of Agriculture, Natural Resources Conservation Service, Agricultural Applied Climate Information System (AgACIS) climate data.

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.



Legend

Project Review Area
- Study Area 1
- Study Area 2
- Study Area 3
- Study Area 4
- Study Area 5
- Study Area 6

Delineated Feature Type
- Drainage Ditch
- Intermittent Stream
- PEM Wetland
- Exisiting Culvert

N

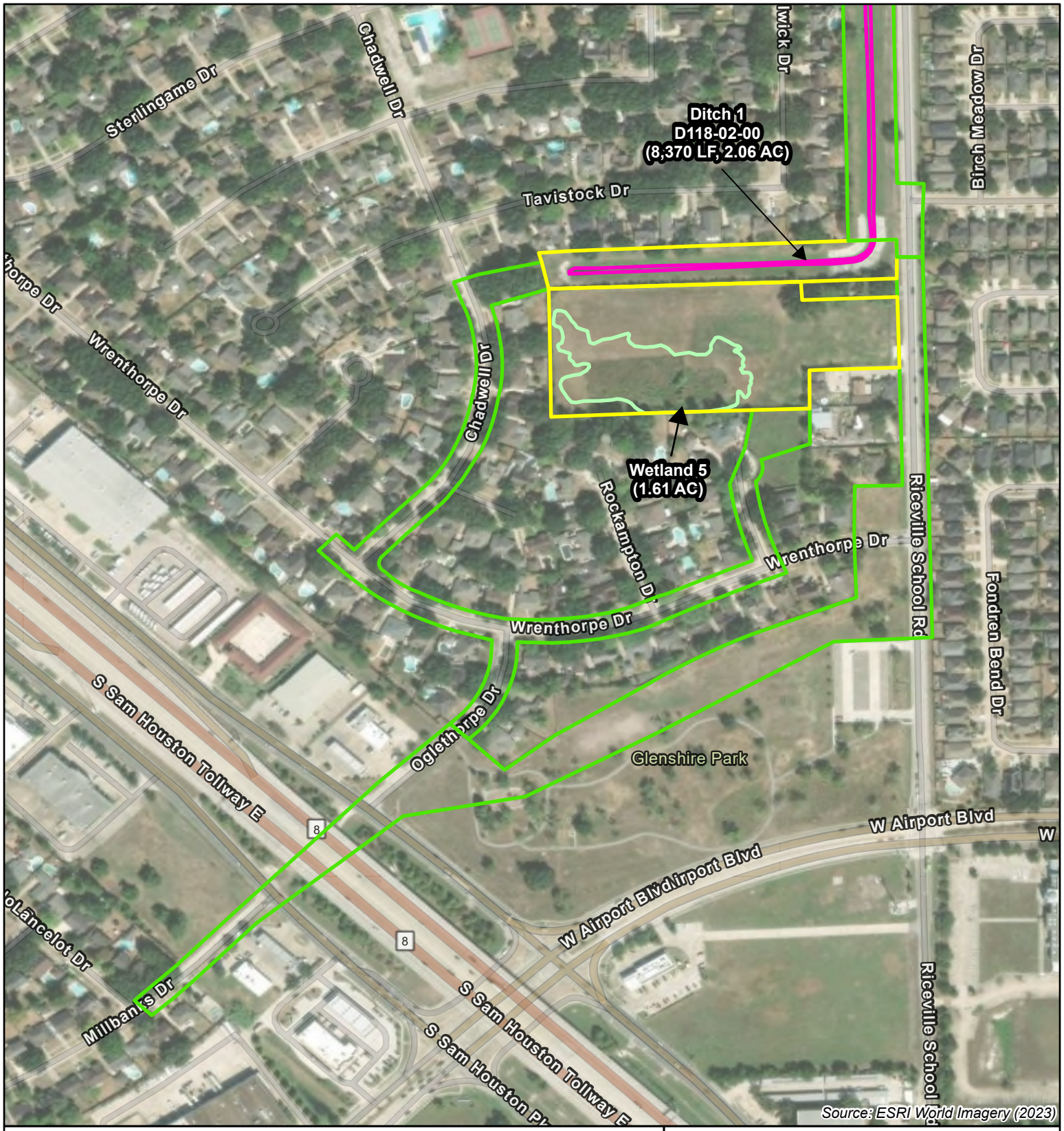
0 700 1,400 2,800 4,200 Feet

1 inch = 1,400 feet

FIGURE 10
DELINEATION KEY MAP

KEEGANS BAYOU STORMWATER DETENTION BASINS ON TRIBUTARY D118-02-00
DRAINAGE IMPROVEMENTS PROJECT
PROJECT ID D118-02-00-E001
HOUSTON, HARRIS COUNTY, TEXAS 77031

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023358
Date: 3/17/2025



Legend

Project Review Area

- Study Area 1
- Study Area 2

Delineated Feature Type

- Drainage Ditch
- PEM Wetland

N

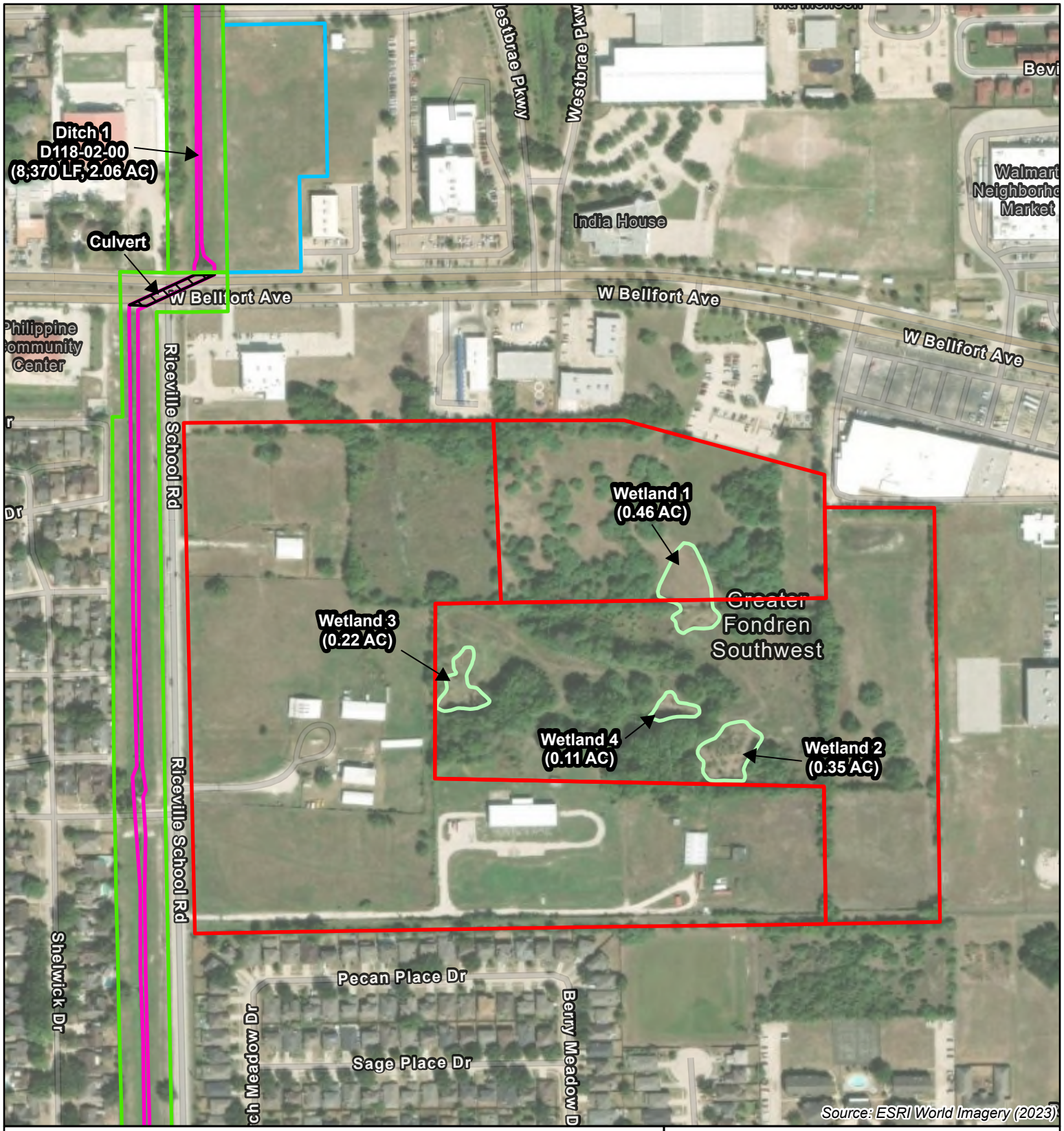
0 175 350 700 1,050 Feet

1 inch = 350 feet

FIGURE 10 - SHEET 1
DELINEATION MAP

KEEGANS BAYOU STORMWATER DETENTION BASINS ON TRIBUTARY D118-02-00
DRAINAGE IMPROVEMENTS PROJECT
PROJECT ID D118-02-00-E001
HOUSTON, HARRIS COUNTY, TEXAS 77031

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023358
Date: 3/17/2025



Legend

Project Review Area

- Study Area 1
- Study Area 3
- Study Area 4
- Study Area 6

Delineated Feature Type

- Drainage Ditch
- PEM Wetland
- Exisiting Culvert

0 175 350 700 1,050 Feet

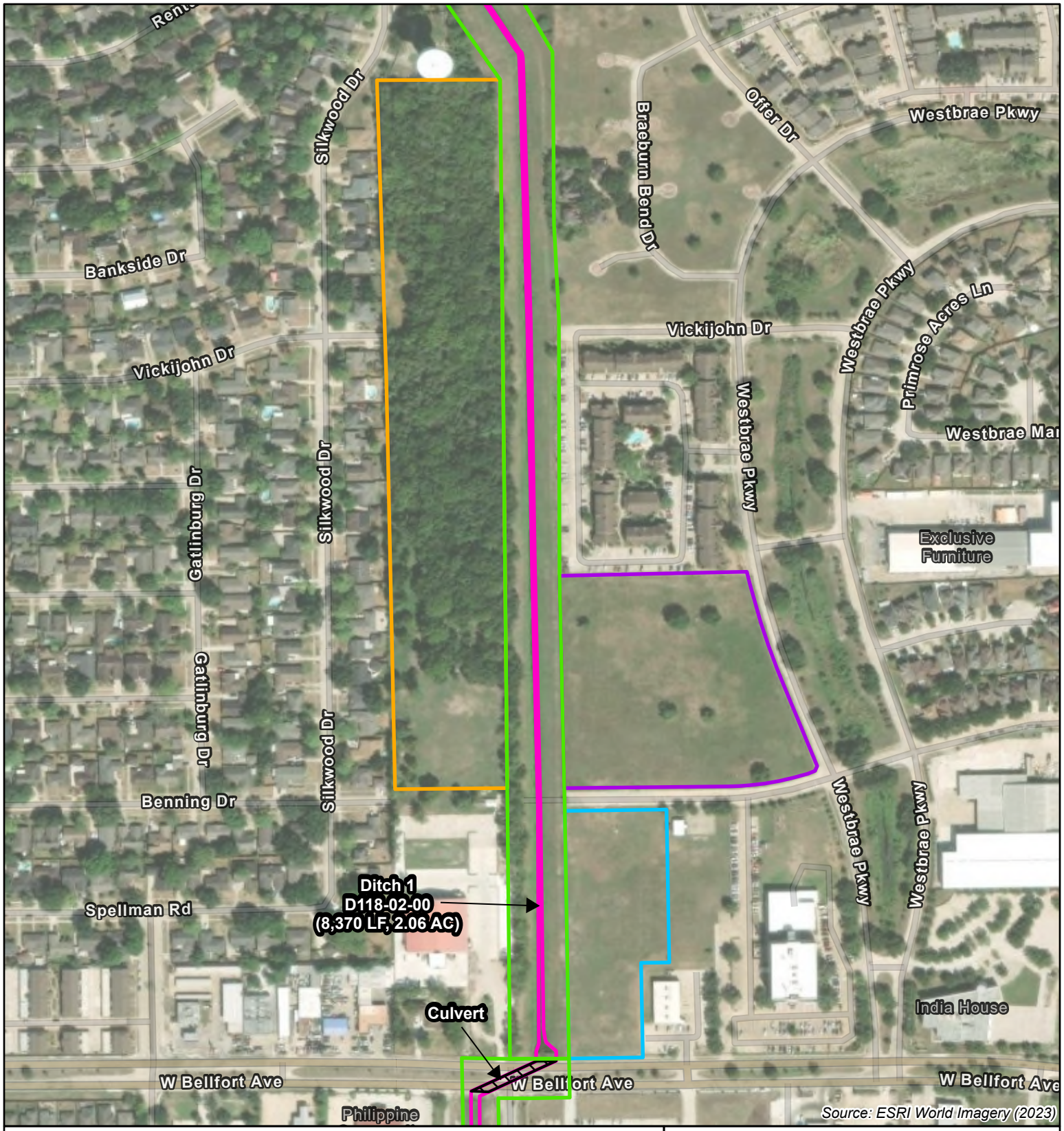
1 inch = 350 feet

N

FIGURE 10 - SHEET 2
DELINEATION MAP

KEEGANS BAYOU STORMWATER DETENTION BASINS ON TRIBUTARY D118-02-00
DRAINAGE IMPROVEMENTS PROJECT
PROJECT ID D118-02-00-E001
HOUSTON, HARRIS COUNTY, TEXAS 77031

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023358
Date: 3/18/2025



Legend

Project Review Area

- Study Area 1
- Study Area 4
- Study Area 5
- Study Area 6

Delineated Feature Type

- Drainage Ditch
- Exisiting Culvert

0 175 350 700 1,050 Feet

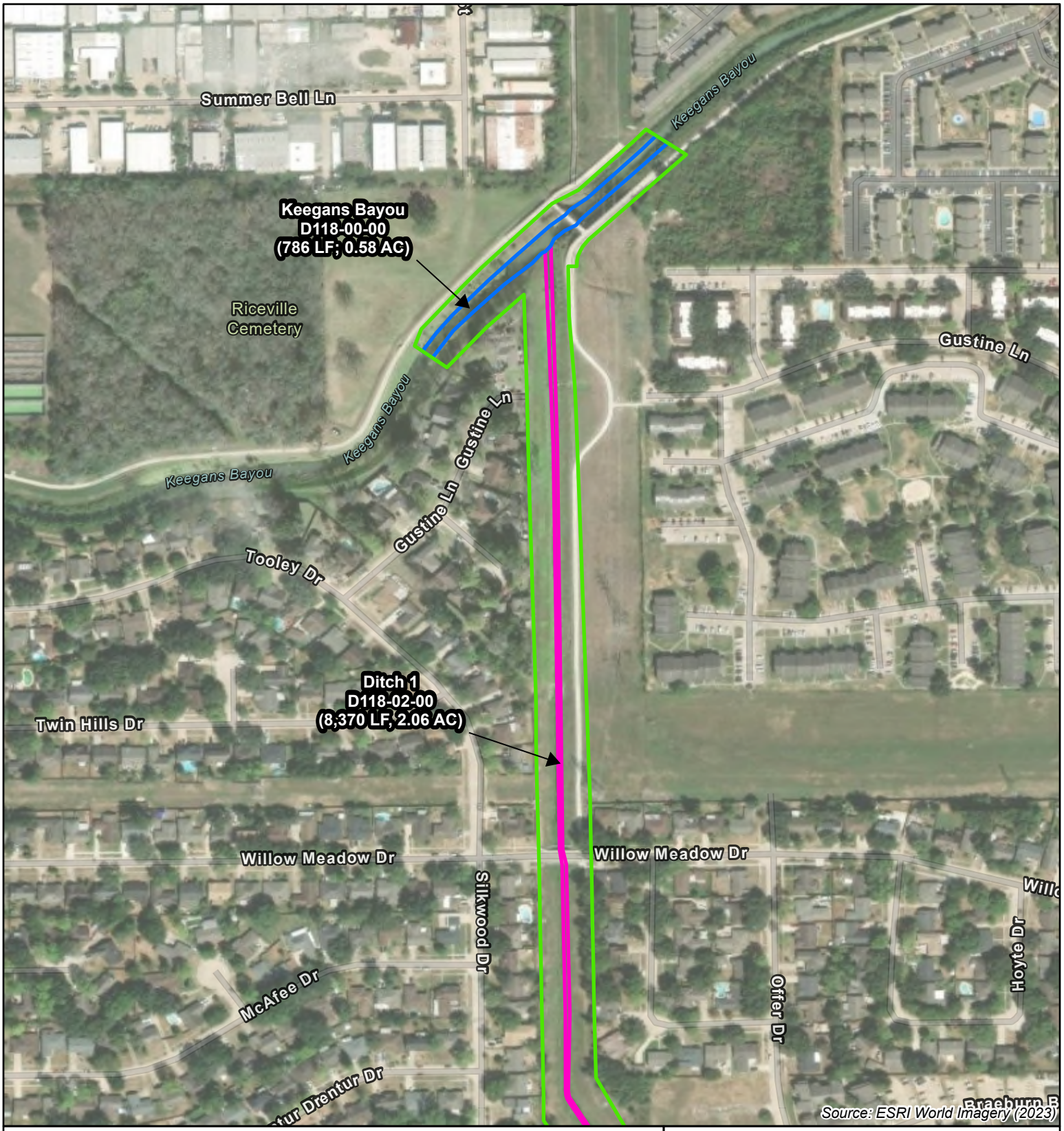
1 inch = 350 feet

N

FIGURE 10 - SHEET 3
DELINEATION MAP

KEEGANS BAYOU STORMWATER DETENTION BASINS ON TRIBUTARY D118-02-00
DRAINAGE IMPROVEMENTS PROJECT
PROJECT ID D118-02-00-E001
HOUSTON, HARRIS COUNTY, TEXAS 77031

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023358
Date: 3/18/2025



Legend

Project Review Area
- Study Area 1

Delineated Feature Type
- Drainage Ditch
- Intermittent Stream

N

0 175 350 700 1,050 Feet

1 inch = 350 feet

FIGURE 10 - SHEET 4
DELINEATION MAP

KEEGANS BAYOU STORMWATER DETENTION BASINS ON TRIBUTARY D118-02-00
DRAINAGE IMPROVEMENTS PROJECT
PROJECT ID D118-02-00-E001
HOUSTON, HARRIS COUNTY, TEXAS 77031

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023358
Date: 3/18/2025