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

CESWG-RD-P April 1, 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-2024-00348, 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. IS-1, 16,600 linear feet, relatively permanent, jurisdictional, 30.018519°, -95.074302°

      ii. IS-2, 8,816 linear feet, non-relatively permanent, non-jurisdictional, 30.027934°, -95.077834°

      iii. EW-1, 0.23 acre, non-adjacent, non-jurisdictional, 30.019554°, -95.079449°

      iv. EW-2, 6.55 acres, non-adjacent, non-jurisdictional, 30.020276°, -95.075982°

      v. EW-3, 0.13 acre, non-adjacent, non-jurisdictional, 30.019129°, -95.070750°

      vi. FW-1, 0.01, non-adjacent, non-jurisdictional, 30.018642°, -95.078655°

      vii. EDR-1, 1,311 linear feet, non-relatively permanent, non-jurisdictional, 30.019705°, -95.082142°

      viii. EDR-2, 74 linear feet, non-relatively permanent, non-jurisdictional, 30.0354540°, -95.459949°

      ix. EDR-3, 95 linear feet, non-relatively permanent, non-jurisdictional, 30.018546°, -95.078650°

      x. EDR-4, 70 linear feet, non-relatively permanent, non-jurisdictional, 30.018585°, -95.076598°

      xi. EDR-5, 59 linear feet, non-relatively permanent, non-jurisdictional, 30.018639°, -95.172517°

xii. BP-1, 0.07 acre, non-adjacent, non-jurisdictional, 30.019232°, -95.078152°

xiii. BP-2, 0.09 acre, non-adjacent, non-jurisdictional, 30.018946°, -95.078034°

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. 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."

   f. 12 March 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.

3. REVIEW AREA. The review area is approximately 333 acres located between Farm-to-Market (FM) 2100 and FM 1960, Huffman, Harris County, Texas. Latitude 30.021517° North, Longitude -95.079169° West.

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

[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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. IS-1 flows directly into to Cedar Bayou, a relatively permanent water, which becomes a TNW ten miles from the project site. Cedar Bayou is subject to Section 10 of the Rivers and Harbors Act of 1899 as well as Section 404 of the Clean Water Act and is included on the Galveston District Navigable Waters list.[7]

6. SECTION 10 JURISDICTIONAL WATERS[8]: 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.[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

[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.

[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.

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5) IS-1 was excavated wholly in and drains only uplands; however, it does carry a relatively permanent flow of water. IS-1 does not appear on the 1916 or 1920 topographic maps but does appear on the 1960 topographic map. IS-1 appears on a 1944 historical aerial map; therefore, suggesting it was constructed between 1920 and 1944. IS-1 has a bed and bank and an OHWM. Google Earth aerial images show water visible for over 50% of the reach in 2023, 2022, 2021, 2020, and 2019. Climactic conditions were wetter than normal in 2023 at the date of the image and normal in 2022, 2021, 2020, and 2019 at the date of the image. IS-1 connects to Cedar Bayou, a relatively permanent water which becomes a TNW approximately ten miles from the project site. IS-1 is a relatively permanent water connected to Cedar Bayou, a TNW; therefore, IS-1 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): 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.

The project area contains six features, EDR-1, EDR-2, EDR-3, EDR-4, EDR-5, and IS-2. EDR1, EDR-2, EDR-3, EDR-4, and EDR-5 do not have a bed and bank, nor do they have an ordinary-high water mark (OHWM). These features are essentially swales. The swales exhibit low volume, infrequent, and/or short

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

duration flow indicating that the swales primary source of water is runoff from rainfall. EDR-1, EDR-2, EDR-3, EDR-4, EDR-5 are not relatively permanent waters as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States.

IS-2 was excavated wholly in and drains only uplands and does not carry a relatively permanent flow of water. IS-2 does not appear on the 1916 or 1920 topographic maps but does appear on the 1960 topographic map. IS-2 appears in a 1944 historical image. IS-2 has a bed and bank and an OHWM. Google Earth aerial images show water visible for 62% of the reach in 2023 and 2022. Climactic conditions were wetter than normal in 2023 at the date of the image and normal in 2022 at the date of the image. Google Earth aerials 2021, 2020, and 2019 show that IS-2 was dry for greater than 50% of the reach. Climactic conditions for 2021, 2020, and 2019 were normal at the date of the image. IS-2 is not a relatively permanent water as defined in the pre-2015 regime post Sackett guidance and is not a water 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

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*.

Two ponds were identified in the project area, BP-1 totaling 0.07 acre and BP-2 totaling 0.09 acre. These ponds were constructed out of uplands between 2022 and 2023 according to Google Earth aerials. The use, degradation, or destruction of these ponds would not affect interstate or foreign commerce. These ponds are not used for interstate or foreign travelers for recreational or other purposes, fish or shellfish are not taken and sold in interstate or foreign commerce and are not used for industrial purpose by industries in interstate commerce. These ponds

are not impoundments of a tributary and do not flow to a Traditional Navigable Water, therefore, these ponds are not waters of the United States.

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, EW-1, EW-2, EW-3, and FW-1 do not directly abut and therefore have no continuous surface connection with Cedar Bayou which is a TNW as discussed in Section 5 of this MFR. EW-1, EW-2, EW-3, and FW-1 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, 2021, 2022, and 2023

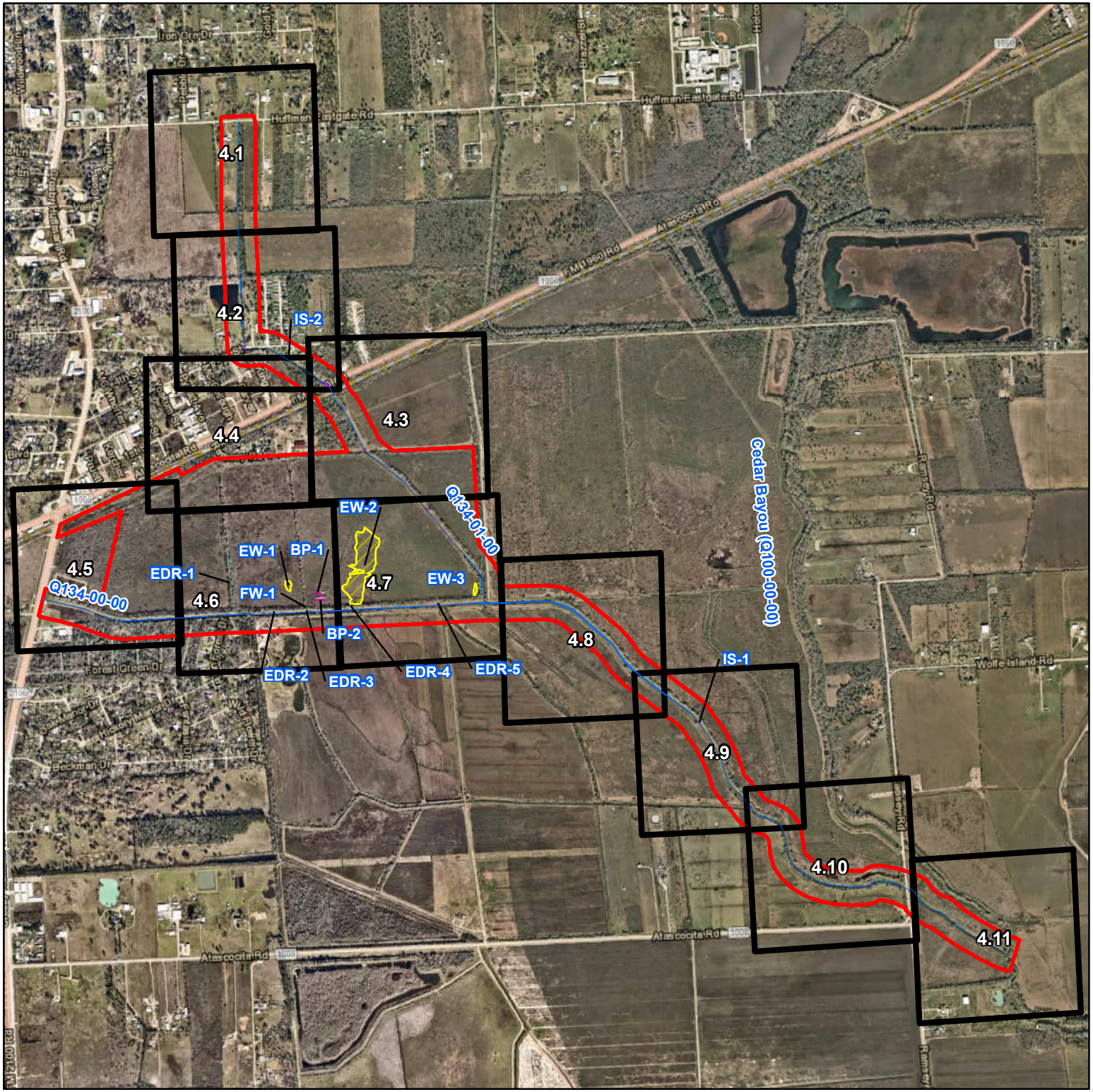
b. United States Geological Survey Topographic Quadrangle, Huffman, Texas 1916, 1920, 1960, and 2022

c. Environmental Information Document, HCFCD Project Q534-01-00-E002, dated October 2024.

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.



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0 1,000 2,000 4,000

Feet

Legend

- Study Area*
- Borrow Pit
- Emergent Wetland
- Forested Wetland
- Ephemeral Drainage
- Intermittent Stream

Notes:
1. LAT: 30.0208°, LONG: -95.0674°
2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community
3. *Study area exaggerated to show map detail.

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Aquatic Features Index Map
Figure 4.0a

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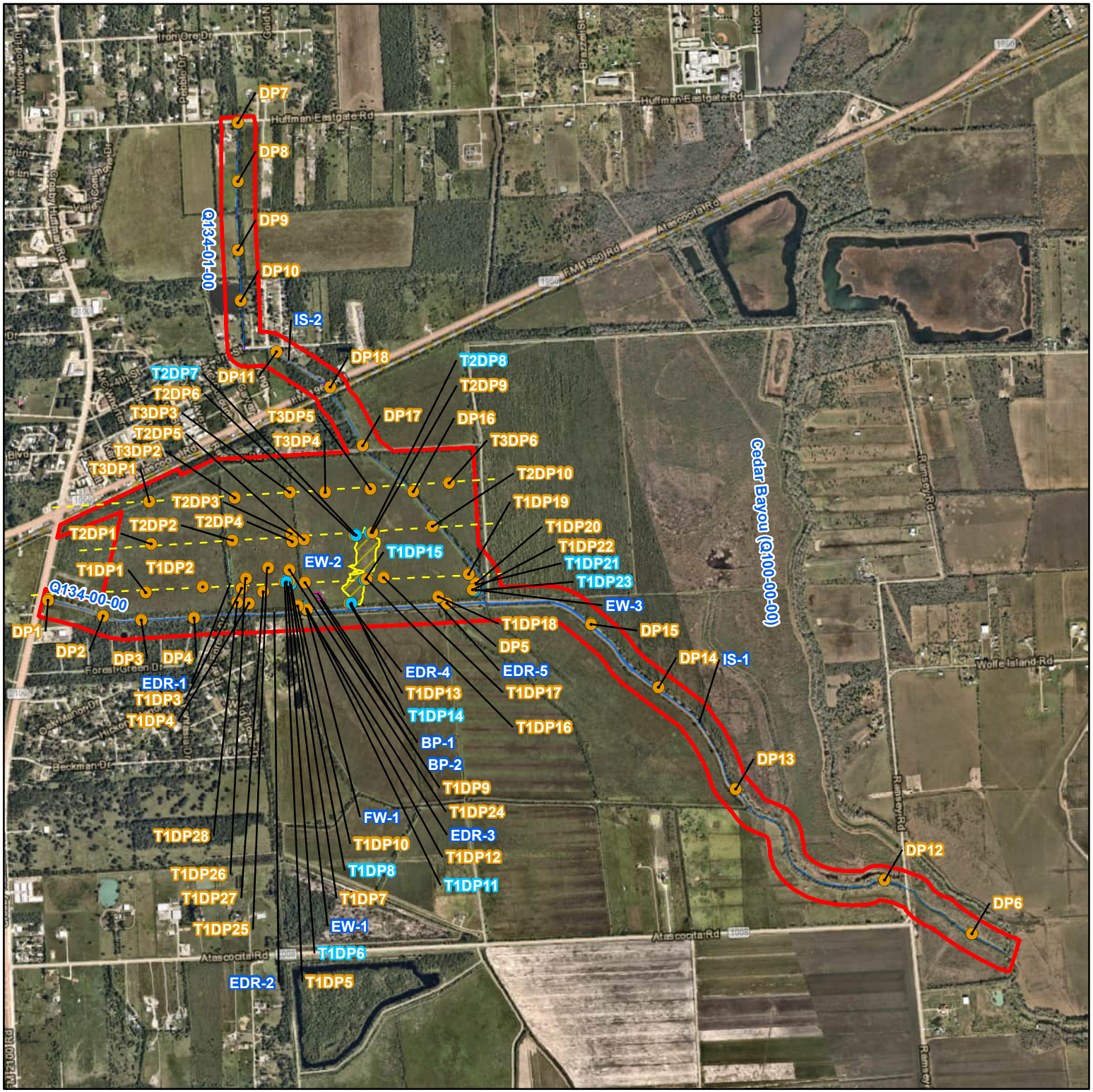

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Feet

Legend

- Study Area*
- Transect
- Non-Wetland Data Point
- Wetland Data Point
- Borrow Pit
- Emergent Wetland
- Forested Wetland
- Ephemeral Drainage
- Intermittent Stream

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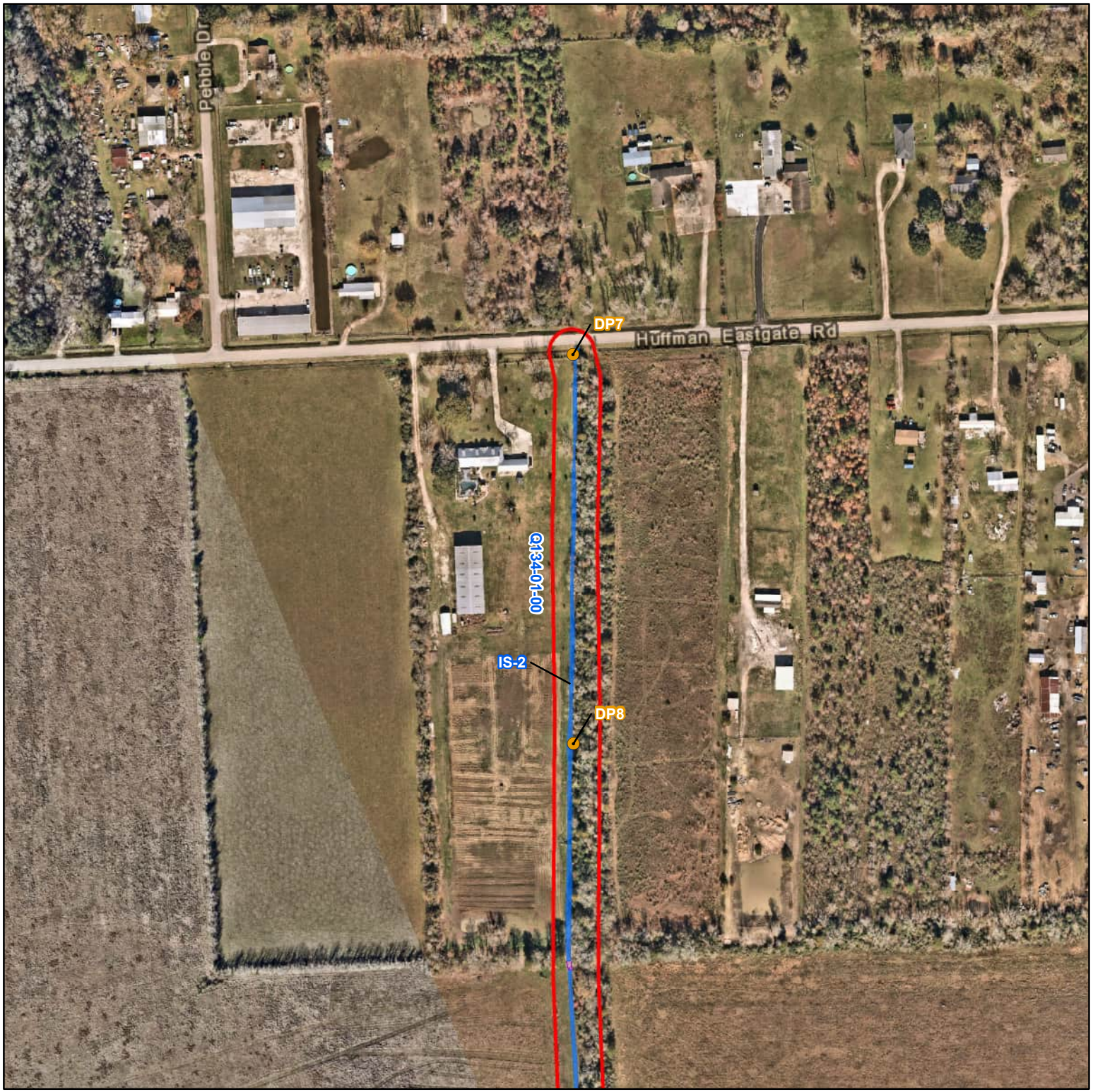

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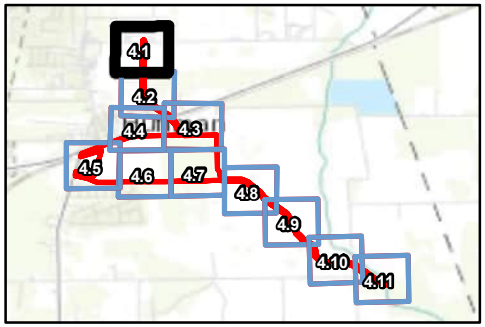
Feet

Legend

- Study Area
- Culverts
- Intermittent Stream
- Non-Wetland Data Point



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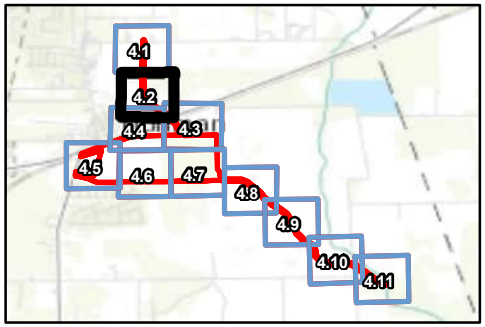
Feet

Legend

- Study Area
- Culverts
- Intermittent Stream
- Non-Wetland Data Point



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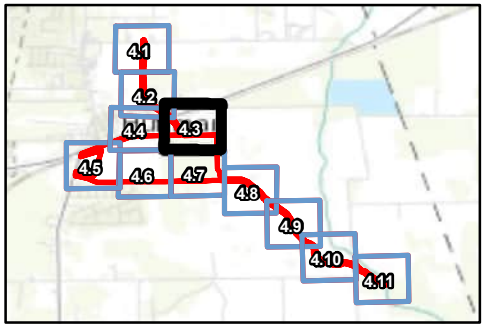
Feet

Legend

- Study Area
- Transect
- Culverts
- Intermittent Stream
- Non-Wetland Data Point



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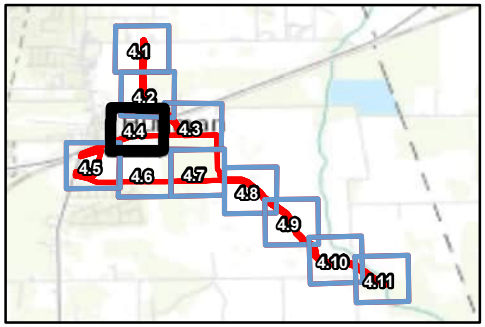
0 150 300 600

Feet

Legend

- Study Area
- Transect
- Intermittent Stream
- Non-Wetland Data Point



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Aquatic Features Map
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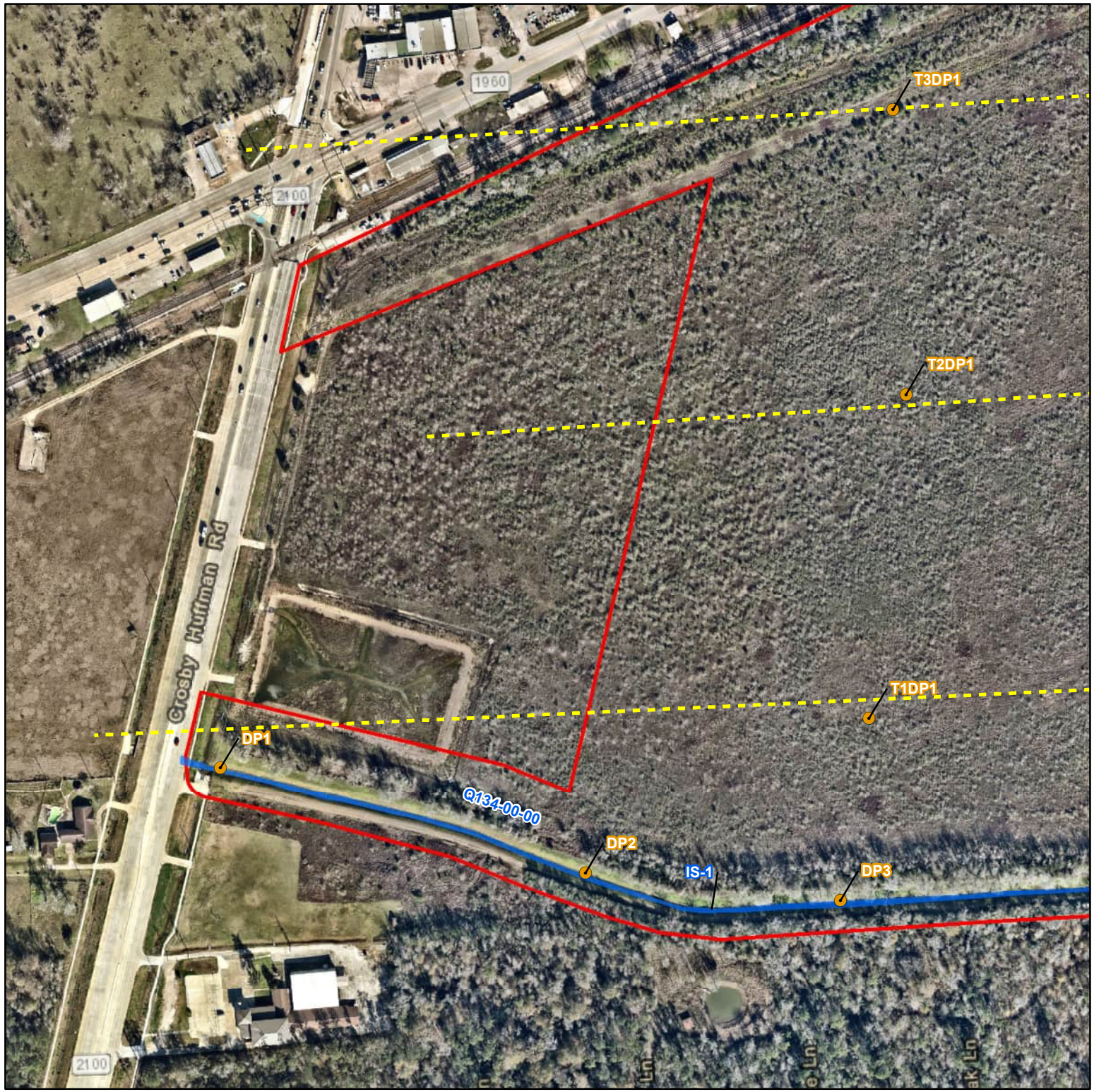

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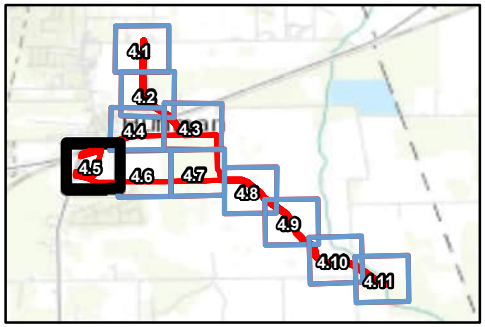
Feet

Legend

- Study Area
- Transect
- Intermittent Stream
- Non-Wetland Data Point



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Aquatic Features Map
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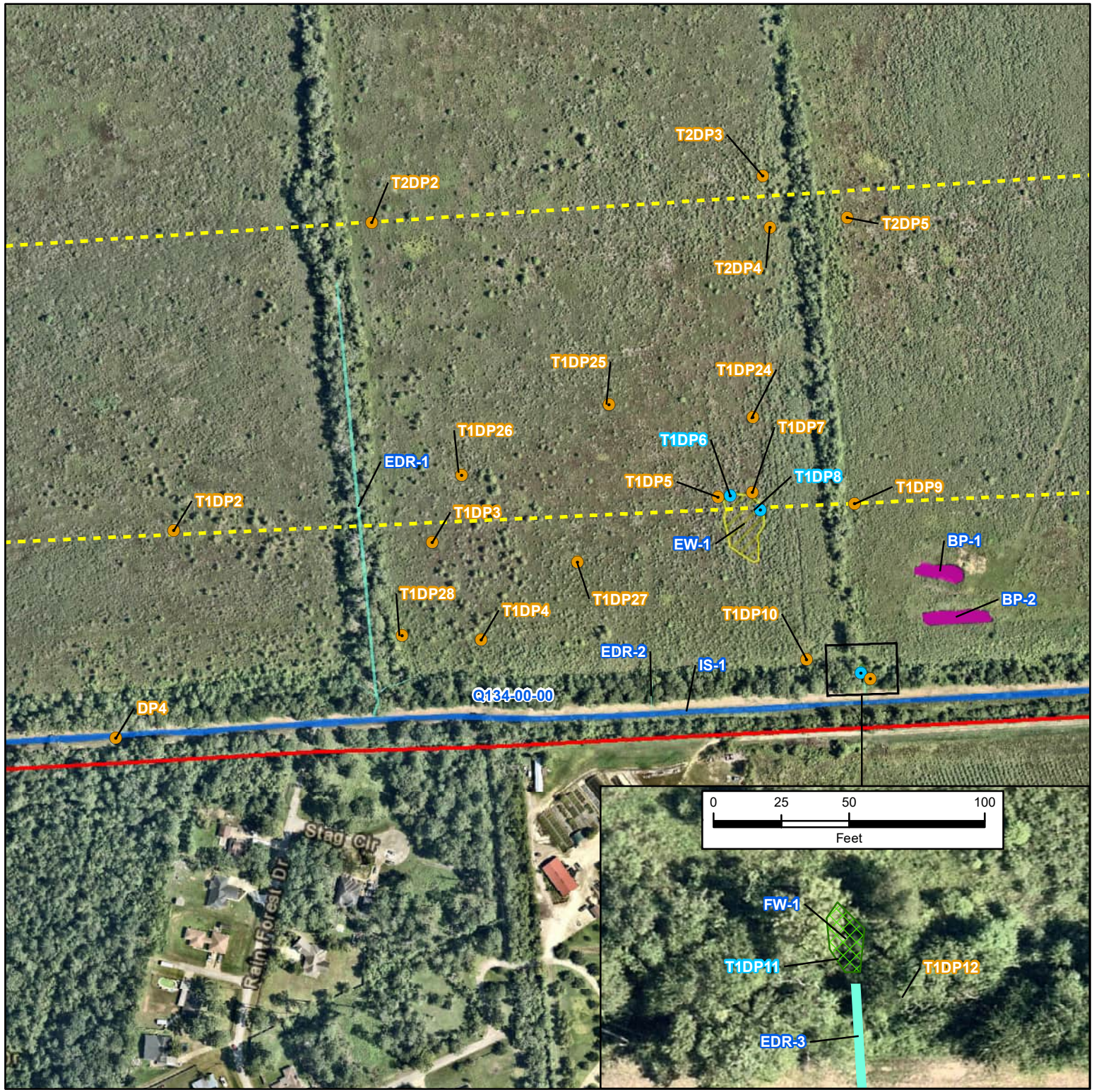

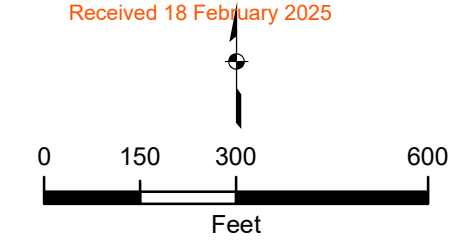

Legend

- Study Area
- Transect
- Borrow Pit
- Emergent Wetland
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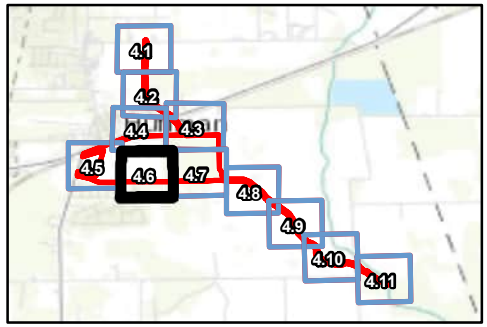
- Wetland Data Point



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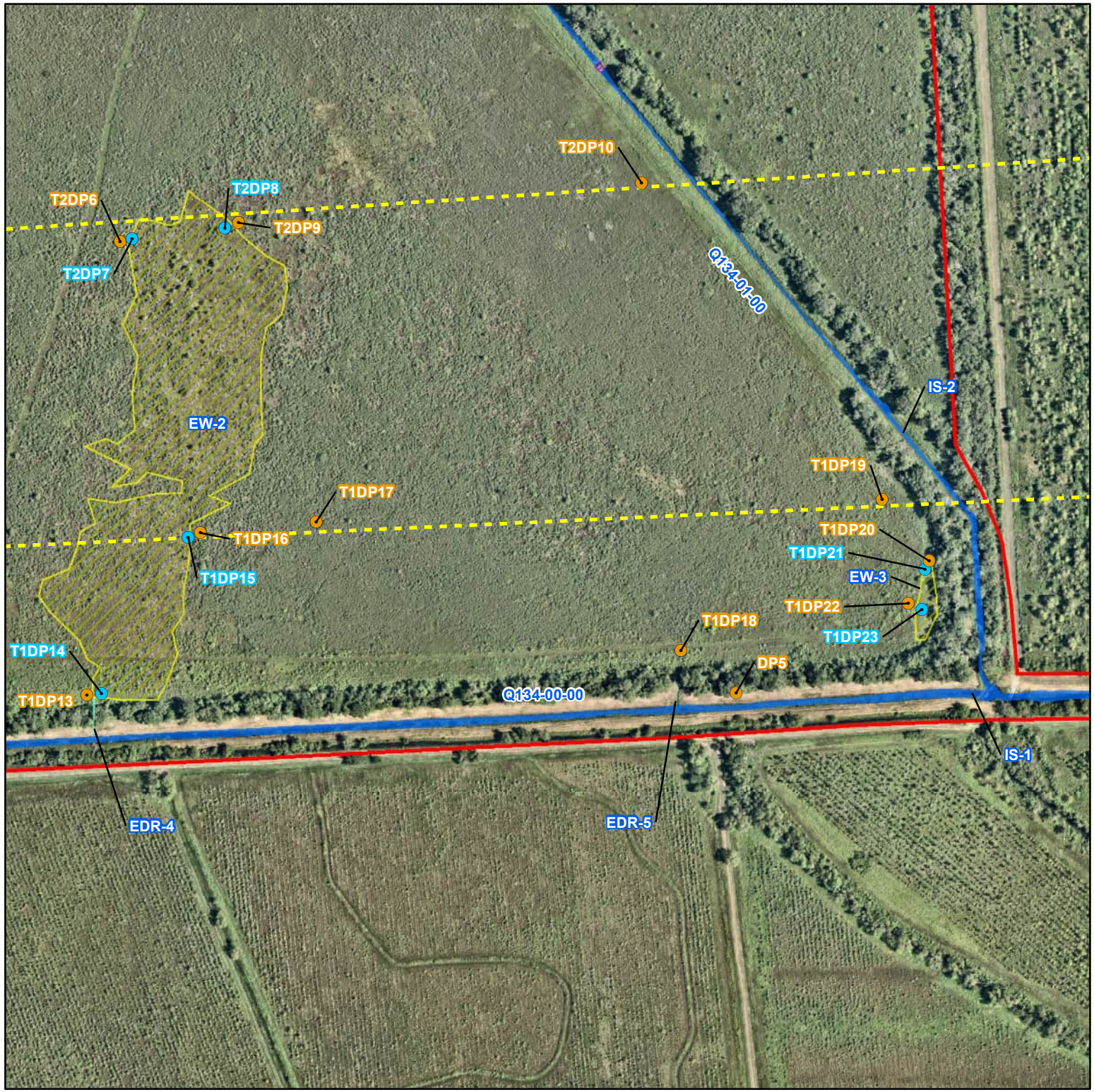

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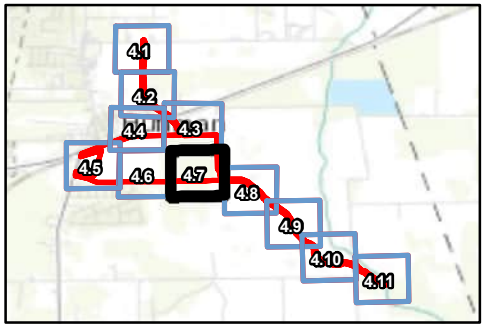

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2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

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Aquatic Features Map
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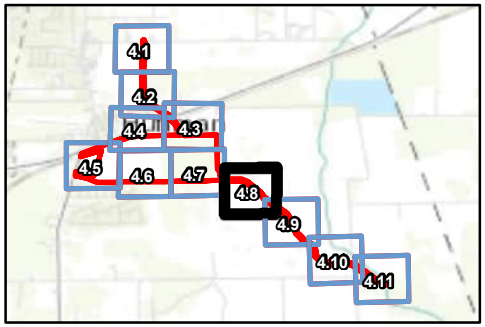
0 150 300 600

Feet

Legend

- Study Area
- Transect
- Intermittent Stream
- Non-Wetland Data Point



Notes:
1. LAT: 30.0170°, LONG: -95.0658°
2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

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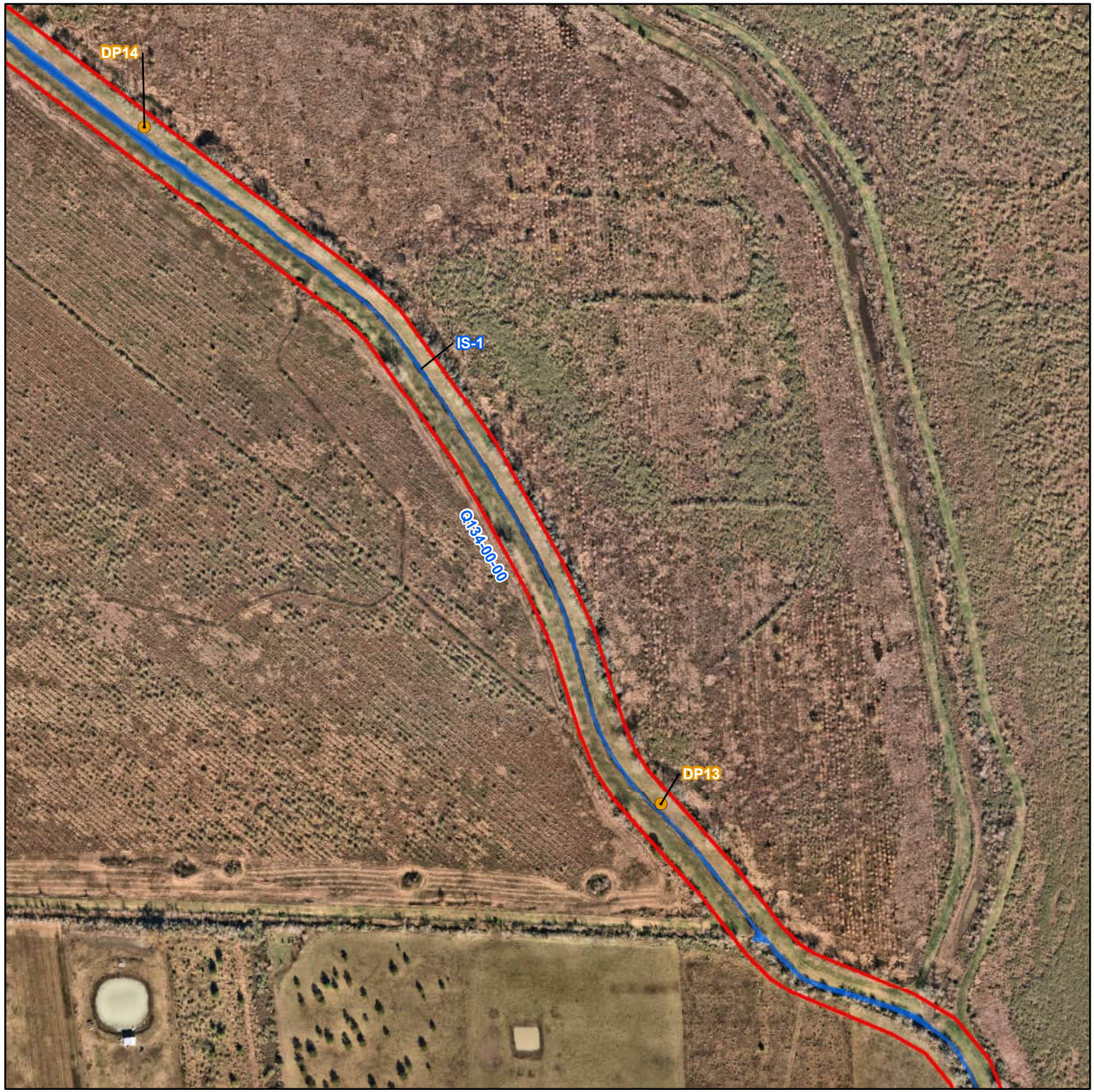
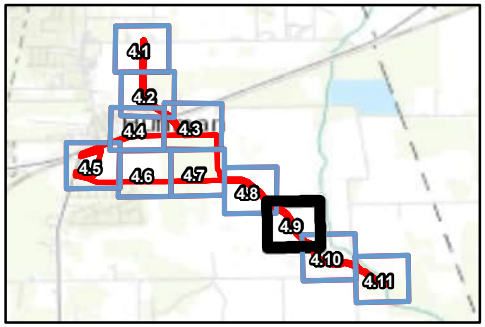


0 150 300 600

Feet

Legend

- Study Area
- Intermittent Stream
- Non-Wetland Data Point



Notes:
1. LAT: 30.0123°, LONG: -95.0597°
2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

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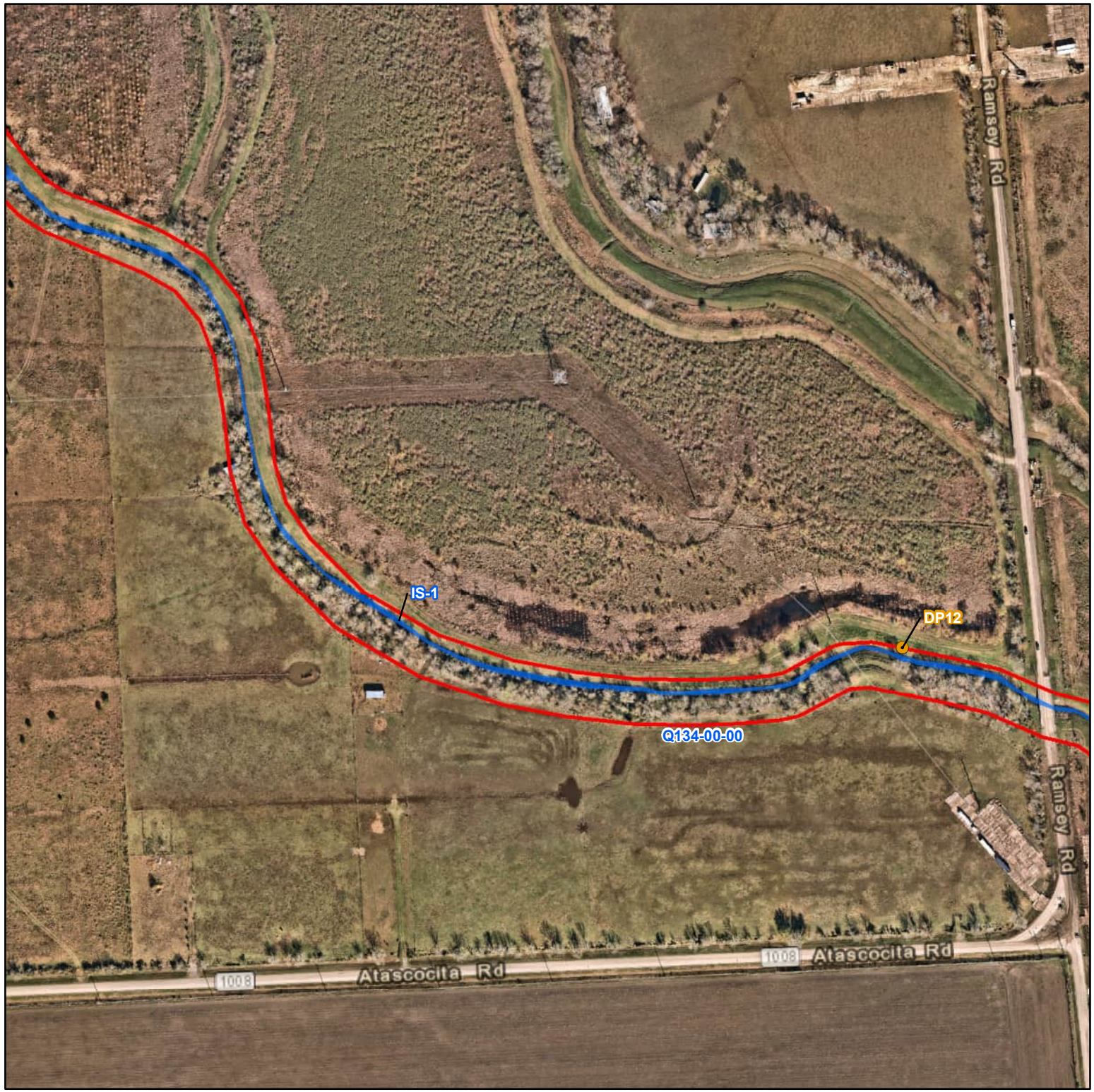
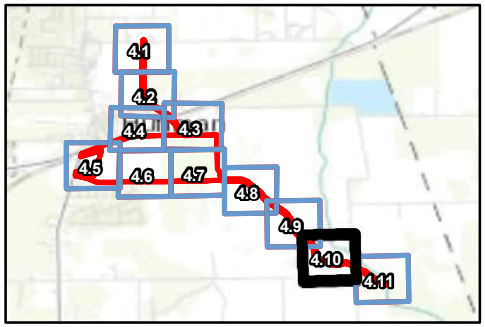


0 150 300 600

Feet

Legend

- Study Area
- Intermittent Stream
- Non-Wetland Data Point



Notes:
1. LAT: 30.0075°, LONG: -95.0546°
2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

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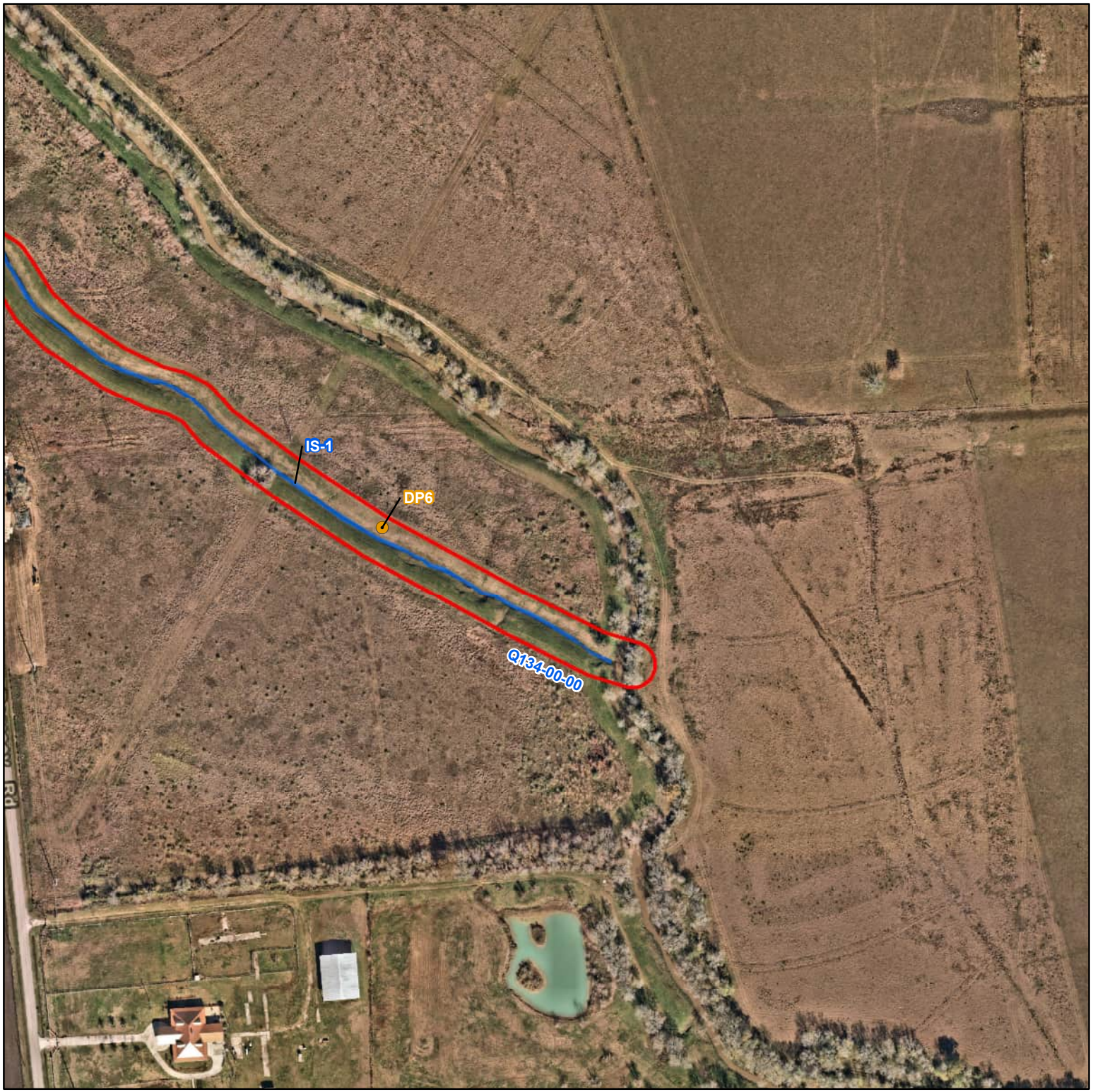
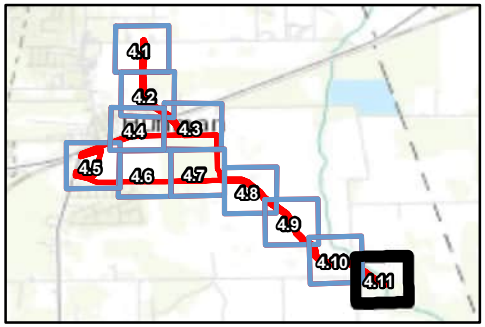


0 150 300 600

Feet

Legend

- Study Area
- Intermittent Stream
- Non-Wetland Data Point



Notes:
1. LAT: 30.0044°, LONG: -95.0470°
2. Service Layer Credits: Esri, HERE, Garmin, (c) OpenStreetMap contributors
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

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