



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

CESWG-RD-P

7 April 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-2024-00505

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.

- 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. Detention Basin 1, non-jurisdictional, 0.372 ac, 30.05439, -95.60647.
 - ii. Ditch 1, roadside ditch, non-jurisdictional, 0.035 ac., 30.05449, -95.60391.
 - iii. Ditch 2, roadside ditch, non-jurisdictional, 0.053 ac., 30.05497, -95.59881.
 - iv. Ditch 3, roadside ditch, non-jurisdictional, 0.080 ac., 30.05462, -95.59806.
 - v. Ditch 4, roadside ditch, non-jurisdictional, 0.075 ac., 30.05463, -95.59475.
 - vi. Ditch 5, roadside ditch, non-jurisdictional, 0.037 ac., 30.05449, -95.59504.
 - vii. Ditch 6, roadside ditch, non-jurisdictional, 0.014 ac., 30.05450, -95.59299.
 - viii. Ditch 7, roadside ditch, non-jurisdictional, 0.028 ac., 30.05448, -95.59194.
 - ix. M122-01-00, upland stormwater ditch, non-jurisdictional, 0.04 ac., 30.05455, -95.59685.

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. 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).
- f. 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. Roadway improvement project along Boudreaux Road, approximately 0.9 miles in length, and approximately 100 feet in width (Project Area, BS3), located in Harris County, Texas. The project site includes the existing Boudreaux Road right-of-way (ROW), which is approximately 100 feet in width and an area for a five (5) acres detention pond near HCFCD Channel M122-01-00. 30.05462N, -95. 59806W.
 - 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

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.

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 10.⁶ 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

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 make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

⁷ 51 FR 41217, November 13, 1986.

under the CWA as a preamble water. Detention Basin 1 is non-jurisdictional as it is a stormwater detention created by excavating dry land used for floodwater retention. Detention Basin 1 is located western portion of the tract and is an artificial lake or pond created by excavating dry land to collect and retain water for such purpose as a settling basin. Therefore, Detention Basin 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.

Upland Roadside Ditches 1-7 are non-RPW based on historical USGS Topography, historical aerials, 2018 DEM, Lidar contours, and information referenced in Section 9. They are upland excavated roadside/stormwater drainage ditches that only flow in response to precipitation. Based on historical aerials and topos, they do not have continuous flow. They were constructed wholly out of uplands, drains only dry land, are 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, upland roadside ditches 1-7 meets the generally not jurisdictional category for certain ditches under the *Rapanos* guidance.

M122-01-00, is an upland cut stormwater drainage ditch displaying only low volume, infrequent, or short duration flow and only flows after precipitation events. According to the USGS historical topographic maps, M122-01-00 does not relocate or replace a tributary or other water of the U.S. Based on 2008 *Rapanos* Guidance, 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.

- 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

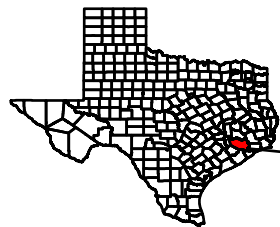
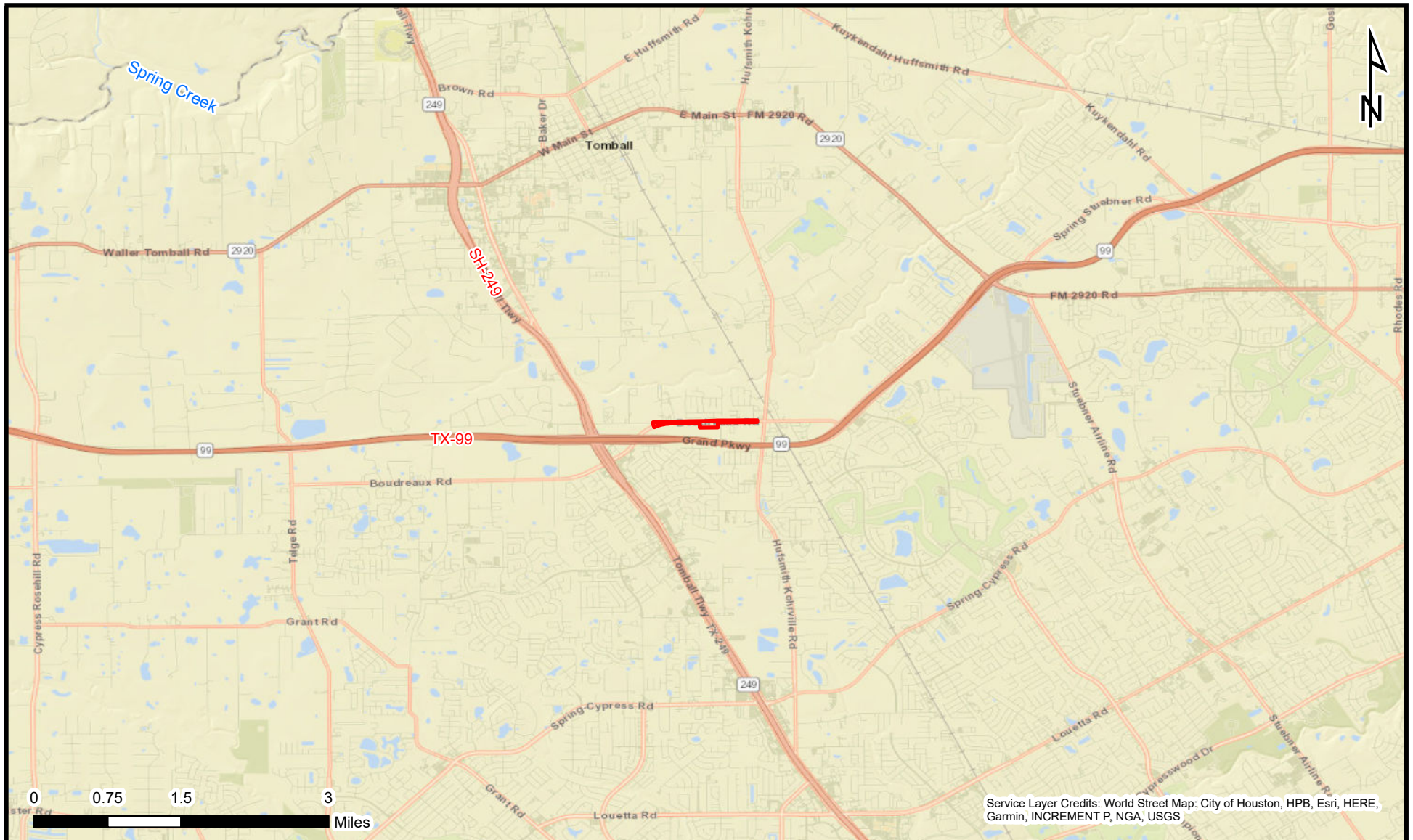
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of 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). N/A
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 22 JUL 2024, 26 NOV 2024, and 28 MAR 25.
 - b. Wetland Delineation Report: Wetland Delineation Report, Boudreaux Road Segment 3, Harris County, Texas. June 2023; Revised June 2024. Weisser Engineering & Surveying, Houston, Texas.
 - c. USGS. Historical Topographic Maps: Louetta and Tomball, TX 7.5-minute USGS quadrangle sheet, 1962, 1995, 2010, 2013, 2016, 2019, 2022, (Louetta 1916 and 1920).
 - d. U.S. Army Corps of Engineers. 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. RDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center.
 - e. Envirosite’s Historical Aerial Photo Report- Photographs, 1952, 1958, 1968, 1969, 1971, 1972, 1977, 1982, 1983, 1989, 1993, 1995, 2010, 2012, 2014, 2016, 2018, 2020.
 - f. COE Antecedent Precipitation Tool, Version 1.9, April 2023.
 - g. Site Photographs: see referenced wetland delineation report.

CESWG-RD-P

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWG-2024-00505

10. OTHER SUPPORTING INFORMATION. NWK-2024-00392

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.



Harris County,
Texas

VICINITY MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS



20465 State Highway 249, Suite 300
 Houston, TX 77070

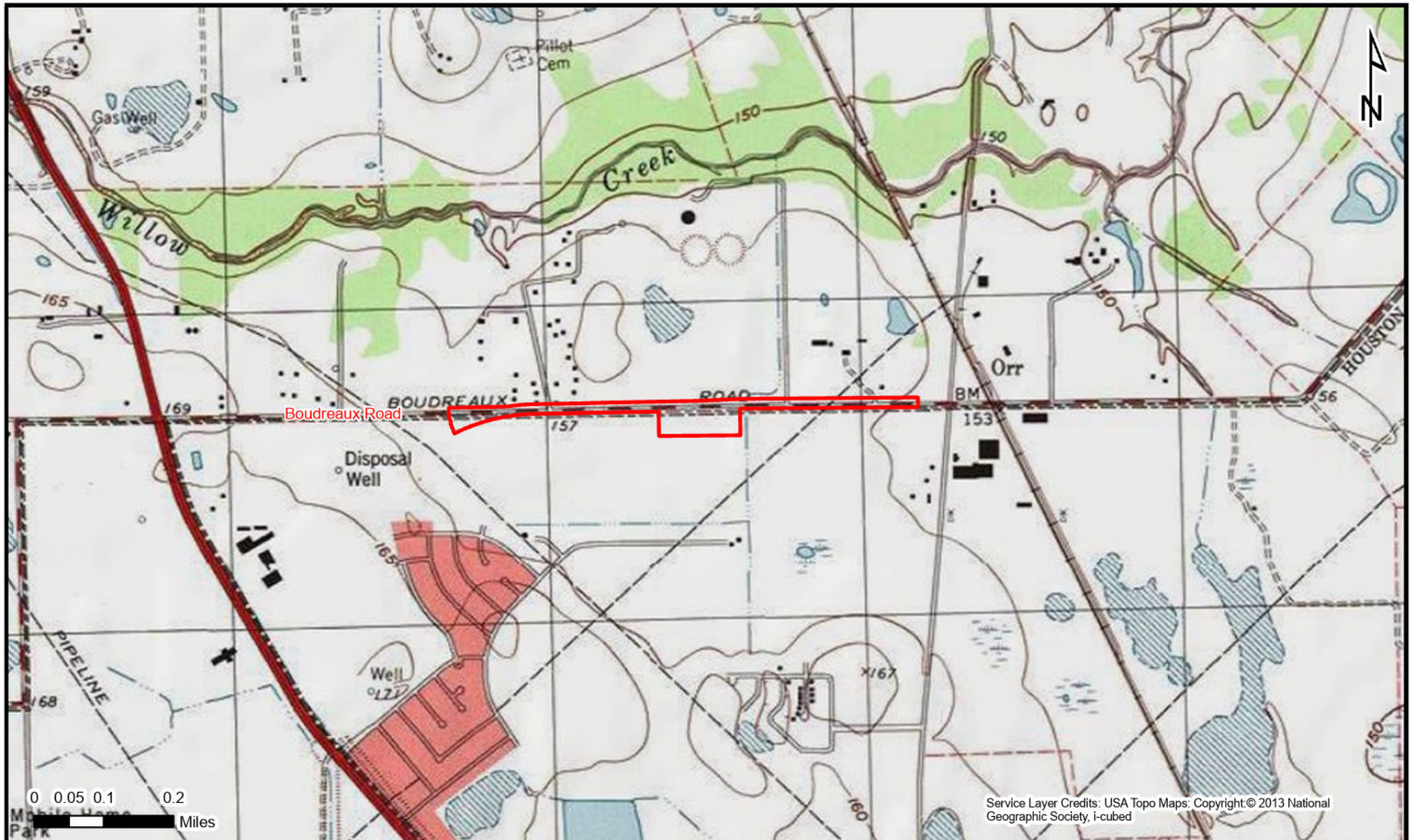
Figure No.: 1

Date: 6/10/2024

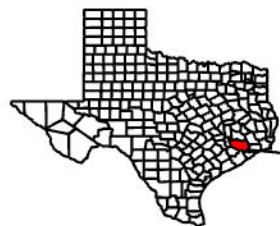
Project No.: 23267.00N

Drawn By: AHasse

Note: This is not a
 Property Boundary Survey



Service Layer Credits: USA Topo Maps. Copyright © 2013 National Geographic Society, i-cubed



Harris County,
Texas

TOPOGRAPHIC MAP
TOMBALL, TX 7.5-MINUTE QUAD
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS



20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 3

Date: 7/31/2024

Project No.: 23267.00N

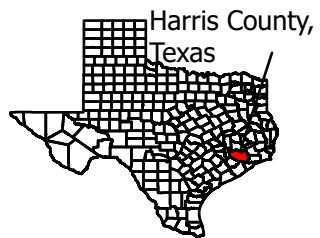
Drawn By: AHasse

Note: This is not a
Property Boundary Survey



Legend

Project Area



2022 AERIAL MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS

 **SPIRIT**
ENVIRONMENTAL
20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 2

Date: 6/10/2024

Project No.: 23267.00N

Drawn By: AHasse

Note: This is not a
Property Boundary Survey



Legend

- Project Area
- ▲ Culvert
- Culvert Connection
- Roadside Ditch
- Data Points
- Stormwater Detention Basin



**WETLAND AND WATERBODY MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS**



20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 8, Page 1 of 8

Date: 7/29/2024

Project No.: 23267.00N

Drawn By: DCostelloe

Note: This is not a
Property Boundary Survey



Legend

- Project Area
- ▲ Culvert
- Culvert Connection
- Roadside Ditch
- Data Points
- Stormwater Detention Basin



**WETLAND AND WATERBODY MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS**



20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 8, Page 2 of 8

Date: 7/29/2024

Project No.: 23267.00N

Drawn By: DCostelloe

Note: This is not a
Property Boundary Survey



Service Layer Credits: World Imagery: Maxar, Microsoft
World Imagery: Maxar

Legend

- Project Area
- ▲ Culvert
- Culvert Connection
- Roadside Ditch
- Data Points
- Stormwater Detention Basin



WETLAND AND WATERBODY MAP
BOUDREAUX ROAD SEGMENT 3
 UPIN20104MF1C401
WEISSER ENGINEERING
 HARRIS COUNTY, TEXAS



20465 State Highway 249, Suite 300
 Houston, TX 77070

Figure No.: 8, Page 3 of 8

Date: 7/29/2024

Project No.: 23267.00N

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 Property Boundary Survey



Legend

- Project Area
- ▲ Culvert
- Culvert Connection
- Roadside Ditch
- Data Points
- Stormwater Detention Basin



**WETLAND AND WATERBODY MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS**



20465 State Highway 249, Suite 300
Houston, TX 77070

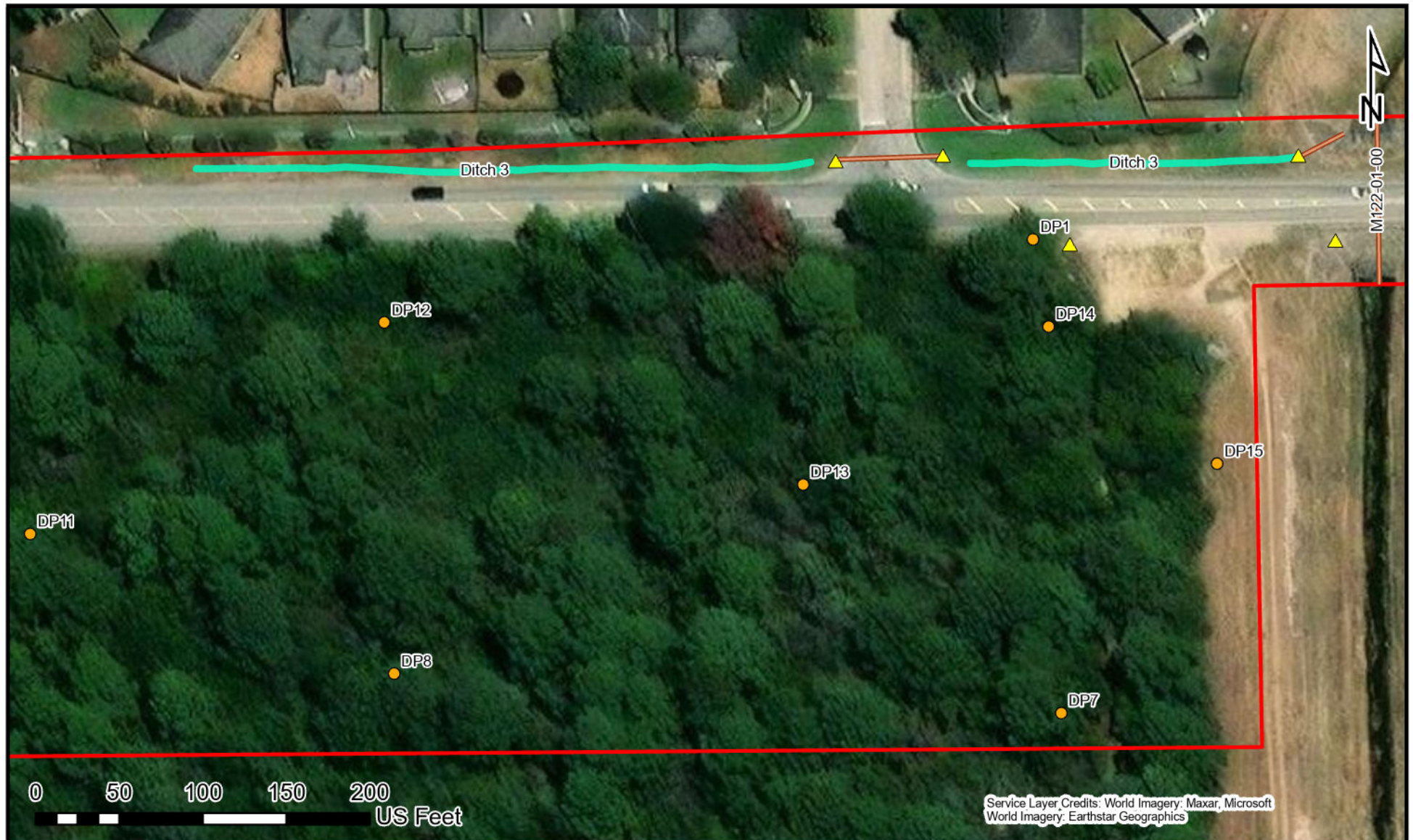
Figure No.: 8, Page 4 of 8

Date: 7/29/2024

Project No.: 23267.00N

Drawn By: DCostelloe

Note: This is not a
Property Boundary Survey



Legend

- Project Area
- ▲ Culvert
- Culvert Connection
- Roadside Ditch
- Data Points
- Stormwater Detention Basin



**WETLAND AND WATERBODY MAP
BOUDREAUX ROAD SEGMENT 3
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HARRIS COUNTY, TEXAS**



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Figure No.: 8, Page 5 of 8

Date: 7/29/2024

Project No.: 23267.00N

Drawn By: DCostelloe

Note: This is not a
Property Boundary Survey



Legend

■ Project Area

Elevation (Feet)

141	149	158
142	150	159
143	151	160
144	152	161
145	153	162
146	154	163
147	155	
148	156	
	157	

LIDAR MAP
BOUDREAUX ROAD SEGMENT 3
UPIN20104MF1C401
WEISSER ENGINEERING
HARRIS COUNTY, TEXAS



20465 State Highway 249, Suite 300
 Houston, TX 77070

Figure No.: 7

Date: 6/10/2024

Project No.: 23267.00N

Drawn By: DCostelloe

Note: This is not a
 Property Boundary Survey