



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT  
4751 BEST ROAD, SUITE 140  
COLLEGE PARK, GEORGIA 30337

CESAS-RDP

27 February 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> SAS-2023-00988 Kingston Cove Residential Development, Barrow County.

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 Georgia due to litigation.

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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.

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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).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
ED1	Non-JD	No Authority

- i. ED1, non-jurisdictional, no authority

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)

3. REVIEW AREA. The approximately 26-acre project site is located southwest of the Atlanta Highway and Autry Road intersection in Auburn, Barrow County, Georgia (central coordinates latitude: 34.003257, longitude: -83.841953)

- A. Project Area Size (in acres): 26 acres
- B. Center Coordinates of the Project Site (in decimal degrees)  
Latitude: 34.003257                      Longitude: -83.841953
- C. Nearest City or Town: Auburn
- D. County: Barrow
- E. State: Georgia

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

- A. Name of nearest downstream TNW, Territorial Sea or interstate water: N/A

B. Determination based on: This determination was made based on a review of desktop data resources listed in Section 9 of this memorandum, a review of the SAS

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Section 10 list (for a water body that is navigable in fact under federal law for any purpose (such as Section 10, RHA), that water body categorically qualifies as a Section 404 "traditional navigable water" subject to CWA jurisdiction under 33 CFR 328.3(a)(1)), and documented (include in AR) occurrences of boating traffic on the identified water.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS  
N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</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): N/A
  - f. The territorial seas (a)(6): N/A

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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.

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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”).<sup>6</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. 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
- 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, that 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

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<sup>6</sup> 51 FR 41217, November 13, 1986.

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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Name of excluded feature	Size (in acres)	Flow Regime and additional description of the tributary and Method for determining flow regime
ED1	328 linear feet (0.01-acre)	Based on the submitted and reviewed materials, Ephemeral drainage ED1 appears to be a drainage feature that carries only stormwater flow to the northwest portion of the review area before losing definition of bed and bank. PM reviewed the NC DWR Stream identification form and submitted materials.

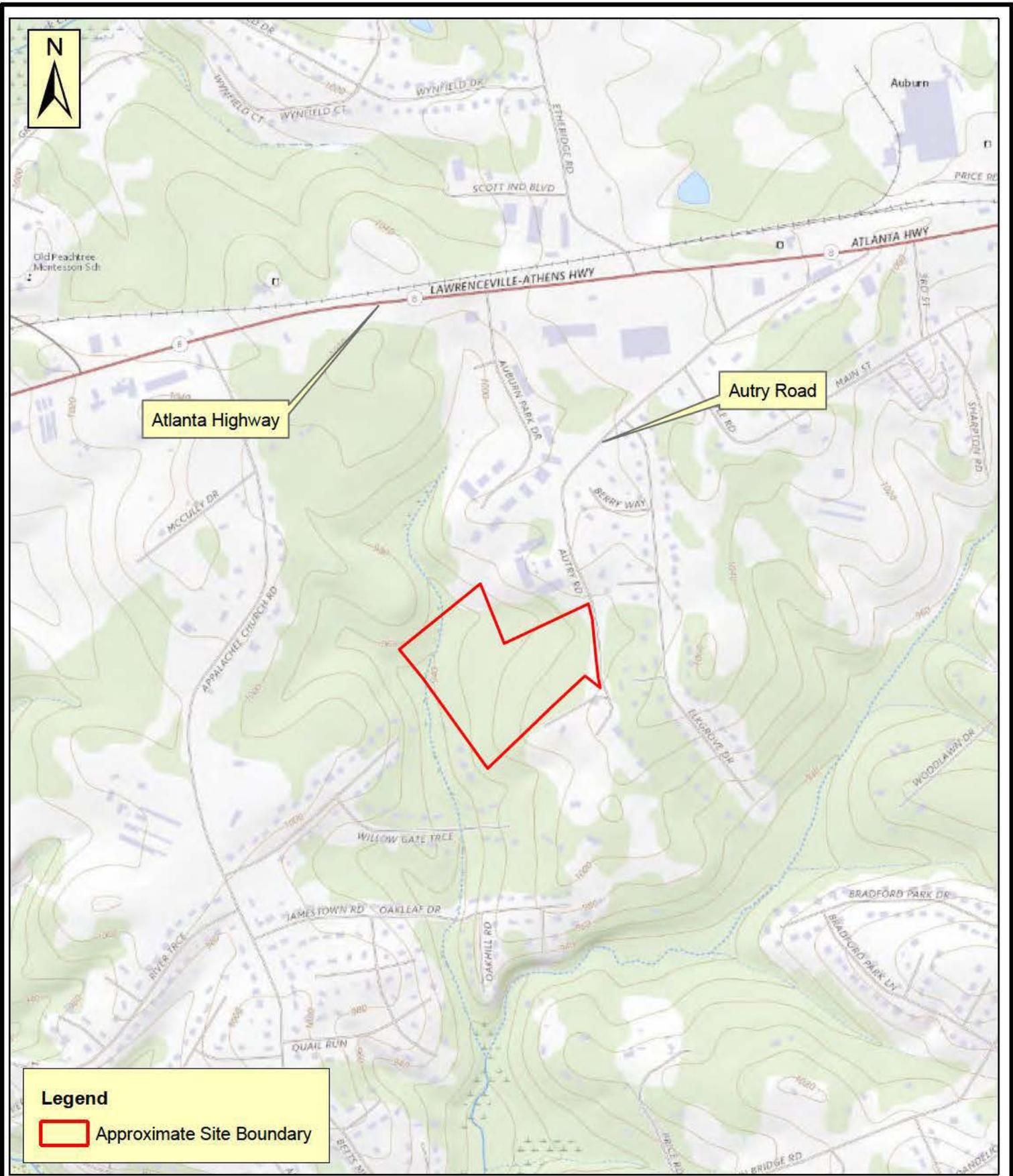
9. DATA SOURCES. List sources of data/information used in making the determination. Include titles and dates of sources used and ensure that the information referenced is available in the administrative record.
  - a. 1. Date of Office (desktop review): January 25, 2024  
2. Date(s) of Field Review (if applicable): N/A
  - b. Data sources used to support this determination (included in the administrative record).
    - Aquatic Resources delineation submitted by, or on behalf of, the requestor:** "Figure 3: Kingston Cove, Aquatic Resources Map", received on December 12, 2023.
    - Photographs:** Kingston Cove Photos, received on December 12, 2023, Photograph No. 5-7.
    - Aerial Imagery:** Maxar, Global Enhanced GEOINT Delivery: Digital Earth Globe Tiled Aerial Imagery, date accessed January 25, 2023.
    - LIDAR:** National Regulatory Viewer (NRV), LiDAR with Hillshade layers, date accessed January 25, 2023.
    - USGS topographic maps:** USGS Website, Map Locator, NRV USGS topographic basemap date accessed January 25, 2023.
    - USGS NHD data/maps:** National Regulatory Viewer (NRV), NHD layer, data accessed January 25, 2023.
    - Antecedent Precipitation Tool Analysis:** Reviewed for February 7, 2023, conditions were wetter than normal.
    - Other sources of information:** USGS StreamStats WIM Tool date accessed January 25, 2023, National Regulatory Viewer (NRV), FEMA data layers, date accessed January 25, 2023.

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10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and the 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.



Base Map Source: USGS Topographic Map

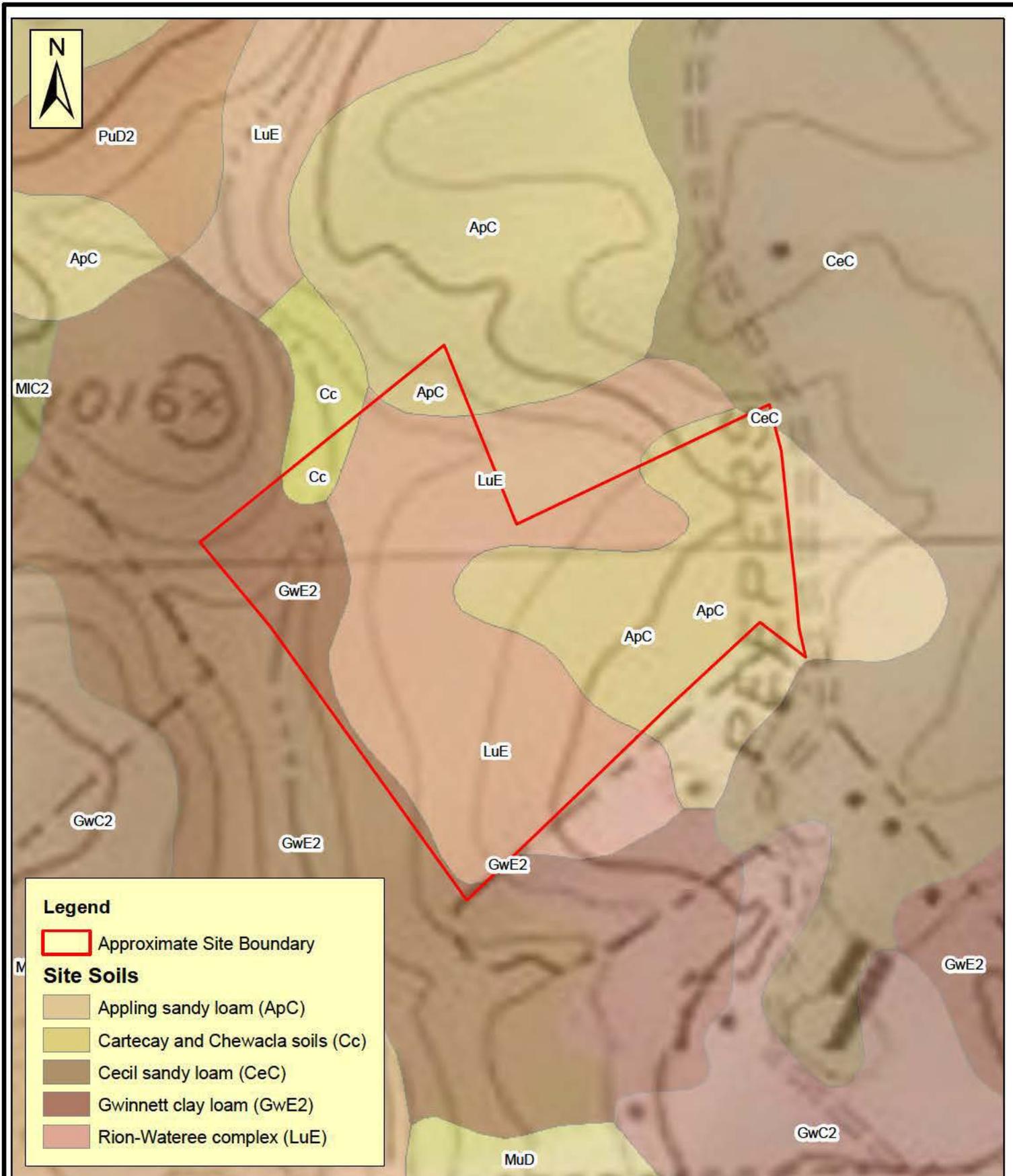
1:12,000

0 600 1,200 2,400 Feet

Kingston Cove  
NWP 29  
Auburn, Georgia



Figure 1  
Site Location Map  
Project No. 02-050412

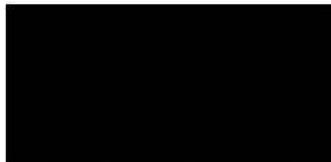


Base Map Source: USA Topo Maps  
 Soil Data Source: USDA Web Soil Survey

1:4,000

0 205 410 820 Feet

**Kingston Cove**  
**NWP 29**  
**Auburn, Georgia**

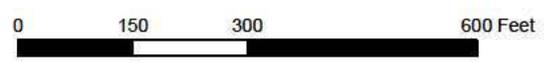


**Figure 2**  
**Site Soils Map**  
**Project No. 02-050412**

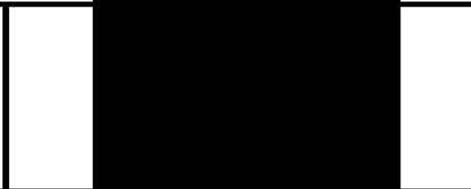


Base Map Source: ESRI Aerial Imagery  
 GPS Data Collected: 2/7/2023

1:3,000



**Kingston Cove**  
**NWP 29**  
**Auburn, Georgia**



**Figure 3**  
**Aquatic Resources Map**  
**Project No. 02-050412**