



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT  
100 WEST OGLETHORPE AVENUE  
SAVANNAH GEORGIA 31401

SAS-OD-RC

April 1, 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-2024-00172

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 |
|--------------------------|--------------|------------------------|
| Wetland FE               | Non-JD       | N/a                    |
| Wetland FF               | Non-JD       | N/a                    |
| Wetland FD               | Non-JD       | N/a                    |
| Wetland FJ               | Non-JD       | N/a                    |
| Wetland MH               | Non-JD       | N/a                    |
| Wetland MJ               | Non-JD       | N/a                    |
| Wetland MO               | Non-JD       | N/a                    |
| Wetland MP               | Non-JD       | N/a                    |
| Wetland MS               | Non-JD       | N/a                    |
| Wetland TK               | Non-JD       | N/a                    |
| Wetland TN               | Non-JD       | N/a                    |
| Wetland TO               | Non-JD       | N/a                    |
| Wetland TG               | Non-JD       | N/a                    |
| Wetland MG               | Non-JD       | N/a                    |
| Wetland MD               | Non-JD       | N/a                    |
| Borrow Pit B1            | Non-JD       | N/a                    |
| Borrow Pit B2            | Non-JD       | N/a                    |
| Ditch D1                 | Non-JD       | N/a                    |
| Ditch D2                 | JD           | Section 404            |
| Ditch D3                 | JD           | Section 404            |
| Ditch D4                 | JD           | Section 404            |
| Ditch D5                 | JD           | Section 404            |
| Wetland MA               | JD           | Section 404            |
| Wetland FC               | JD           | Section 404            |
| Wetland TF               | JD           | Section 404            |
| Wetland TI               | JD           | Section 404            |
| Wetland FB               | JD           | Section 404            |
| Wetland FG               | JD           | Section 404            |
| Wetland FI               | JD           | Section 404            |
| Stream STA               | JD           | Section 404            |

## 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)

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d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)

e. [2008 Rapanos guidance](#)

3. REVIEW AREA.

A. Project Area Size (in acres): 714.31

B. Center Coordinates of the Project Site (in decimal degrees)

Latitude: 32.3796

Longitude: -81.7874

C. Nearest City or Town: Statesboro

D. County: Bulloch

E. State: Georgia

F. Other associated Jurisdictional Determinations (including outcomes)

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: The Canoochee River is the nearest TNW and is located 16 miles from the review site.

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

The wetlands onsite meet the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Eastern Mountains and Piedmont Regional Supplement.

Wetlands FB, FC, FG, FI and MA, are all abutting and have a continuous surface connection (CSC) to Little Lotts Creek, a tributary that is a relatively permanent water (RPW), is a tributary to Lotts Creek (an RPW), which is a tributary to the Canoochee River, which is a TNW.

Wetland TF and TI abut and have a CSC with ditches D4 and D2 respectively, which are RPWs, which flow and have a CSC to wetland FC, which is abutting and has a

CSC with Little Lotts Creek (RPW), which is a tributary to the Canoochee River, a TNW.

Ditches D2, D3, D4 and D5 are all RPWs and have an Ordinary High-Water Mark (OHWM). Additionally portions of these ditches were dug in wetlands and drain wetlands.

Ditch D2 flows from Wetland TI and continuous to flow south through a culvert under an existing forestry road (continuous flow observed through culvert pipe) and has a CSC with Wetland FC, which, abuts and flows into Little Lotts Creek (RPW), which is a tributary to the Canoochee River, which is a TNW.

Ditch D4 flows from Wetland TF and flows south through a culvert under an existing forestry road (continuous flow observed through the culvert to its outlet and continues) and then has a continuous surface connection with Ditch D2 and follows the same aforementioned flowpath.

Ditch D3 flows into Wetland MA, which continues to flow over the forestry and has a CSC to Wetland FC. Wetland FC abuts and is contiguous with Little Lots Creek (RPW), which is a tributary to the Canoochee River, which is a TNW.

Ditch D5 has a CSC and flows into Wetland FC and abuts Wetland FC. Ditch D5 follows the same flowpath as the aforementioned flowpath as described for Wetland FC.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</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

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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.

<sup>6</sup> 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.

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):

| Name of Aquatic Resource | Size (in linear feet) | Flow Regime and additional description of the tributary   | Method for determining flow regime  |
|--------------------------|-----------------------|---|---|
| STA                      | 730                   | Intermittent Stream with relatively permanent flow and an ordinary highwater mark.                        | observed flow in photographs from consultants site visit in September 2023 during normal precipitation conditions, NCDWR stream identification form |
| Ditch D2                 | 150                   | Ditch that has relatively permanent flow and an OHWM. Ditch was dug through wetlands and drains wetlands. | Observed flow during onsite investigation   |
| Ditch D3                 | 616                   | Ditch that has relatively permanent flow and an OHWM. Ditch was dug through wetlands and drains wetlands. | Observed flow during onsite investigation   |
| Ditch D4                 | 198                   | Ditch that has relatively permanent flow and an OHWM. Ditch was dug through wetlands and drains wetlands. | Observed flow during onsite investigation   |
| Ditch D5                 | 839                   | Ditch that has relatively permanent flow and an OHWM. Ditch was dug through wetlands and drains wetlands. | Observed flow during onsite investigation   |

f. The territorial seas (a)(6): N/a

g. Adjacent wetlands (a)(7):

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| Name of Aquatic Resource    | Size (in acres) | Describe continuous surface connection  |
|-----------------------------|-----------------|---|
| Wetlands FB, FC, FG, FI, MA | 287.42          | All of these wetlands are functioning together as part of one large wetland system and abut to Little Lots Creek an RPW.  |
| TF                          | 1.79            | Has a continuous surface connection (CSC) and abuts Ditch D4 (RPW), which is a tributary to RPW Ditch D, which is a tributary to Little Lots Creek (RPW) which is a tributary to the Canoochee River (TNW).   |
| TI                          | 3.03            | Has a continuous surface connection (CSC) and abuts Ditch D3 (RPW), which has CSC to wetland MA which functions as a the same wetland system with Wetland FC, which abuts and is contiguous with Little Lots Creek (RPW) which is a tributary to the Canoochee River (TNW). |

Wetland FC has an existing forestry access road that bisects the wetlands, but there is an open CSC through the road (i.e. low water ford crossing) where flows continues from north of the road to the south of the road.

Wetland FB has a continuous surface connection to wetland FC through an at grade forestry road with evident surface water observed during the site visit connecting the wetland across the road, indicating that these wetlands are connected and are functioning as one large wetland system that abuts and is contiguous with Little Lots Creek.

Wetland MA connects to wetland FC through a culvert under the existing forestry road maintaining a CSC (flowing water observed through culvert) indicating that these wetlands are connected and are functioning as one large wetland system that abuts and is contiguous with Little Lots Creek.

Wetland TI abuts and flows into ditch D2 which flows south through a culvert under the existing forestry road maintaining a CSC (flowing water observed through culvert) indicating that these wetlands are connected and are functioning as one large wetland system that abuts and is contiguous with Little Lots Creek.

Wetland TF abuts and flows into ditch D4 which flows south through a culvert under the existing forestry road maintaining a CSC (flowing water observed through culvert) that flows into Ditch D2 which flows into Wetland FC which abuts and is contiguous with Little Lots Creek.

As described above wetlands FB, FC, FG, FI and MA are all functioning as one wetland and are contiguous and abutting with Little Lots Creek a RPW. The flowpath to the nearest TNW is described in Section 5 above.

## 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>7</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.

| Name of excluded feature | Size (in acres or linear feet) | Type of resource generally not jurisdictional   |
|--------------------------|--------------------------------|---|
| Ditch D1                 | 585 linear feet                | This ditch meets the generally not jurisdictional 3-part test in <i>Rapanos</i> guidance for identifying ditches as generally not jurisdictional. 1.) the ditch has been excavated solely in uplands. 2.) the ditch drains only uplands. 3.) the ditch does not have relatively permanent flow. |
| Borrow Pit B1            | 0.26                           | Borrow pit B1 is a waterfilled depression that was created in dry land for the purpose of obtaining fill, sand, or gravel. The pit does not have a discrete outlet (i.e. swale, gully, ditch, etc.) that would constitute a CSC and does not have a connection to an RPW.                       |
| Borrow Pit B2            | 0.26                           | Borrow pit B2 is a waterfilled depression that was created in dry land for the purpose of obtaining fill, sand, or gravel. The pit does not have a discrete outlet (i.e. swale, gully, ditch, etc.) that would constitute a CSC and does not have a connection to an RPW.                       |

- 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

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<sup>7</sup> 51 FR 41217, November 13, 1986.

- 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).

| Name of excluded feature | Size (in acres) | Type of resource generally not jurisdictional   |
|--------------------------|-----------------|---|
| Wetlands MD and FE       | 1.6             | Wetland lacks a continuous surface connection to water of the US. Wetland MD and FE function as one wetland system with an at grade forestry road traveling through them. The wetlands are considered one wetland due to the same soils, contours and similar vegetation present in both areas. These are closed depressional wetlands surrounded by uplands and do not have an identifiable discrete feature that would constitute a CSC to a requisite water. |
| Wetland FJ               | 0.47            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland FF               | 0.63            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland TK               | 0.70            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland MJ               | 5.68            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland MO               | 0.24            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland TO               | 0.63            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland MH               | 0.93            | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded  |

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|            |      |  |
|------------|------|--|
|            |      | by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.  |
| Wetland MP | 0.79 | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water. A possible feature was observed on lidar and contours to the northwest of the wetland, but after being field verified there was no feature present. |
| Wetland MS | 0.50 | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.   |
| Wetland TN | 0.27 | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.   |
| Wetland MG | 0.11 | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.   |
| Wetland FD | 0.41 | Wetland lacks a continuous surface connection to water of the US. This wetland is a closed depressional wetland surrounded by uplands and does not have an identifiable discrete feature that would constitute a CSC to a requisite water.   |

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. 1. Date of Office (desktop review): 3/13/2024
2. Date(s) of Field Review (if applicable):
- 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 6 Delineation Map; dated: 3/26/2024
  - ☒ Photographs: Site Photographs dated, September 2023, submitted with application
  - ☒ Aerial Imagery: Imagery created by USACE in Google Earth: 1999, 2020, 2022
  - ☒ LIDAR: Maps made by USACE with source from NOAA, Lidar with delineated resources, transparent lidar with hillshade with delineated resources
  - ☒ USDA NRCS Soil Survey: Figure 3: Soils Map, dated 10/10/2023 provided in the application
  - ☒ USFWS NWI maps: Figure 4: NWI map, dated 10/10/2023 provided in the application

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- ☒ USGS topographic maps: Figure 2: Topographic Map, dated 10/10/2023 provided in the application
- ☒ USGS NHD data/maps: Map created USACE title NHD Map with delineated resources
- ☒ Section 10 resources used: Savannah District Section 10 list
- ☒ NCDWR stream identification forms: dated 9/21/2023 provided with the application
- ☒ Antecedent Precipitation Tool Analysis: 9/18/2023-9/22/2023

10. OTHER SUPPORTING INFORMATION.

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.

| Jurisdictional Wetlands |        |
|-------------------------|--------|
| Name                    | Acres  |
| FB                      | 12.52  |
| FC                      | 264.71 |
| FG                      | 0.95   |
| FI                      | 0.32   |
| MA                      | 4.38   |
| TF                      | 1.79   |
| TI                      | 3.03   |
| Total                   | 287.7  |

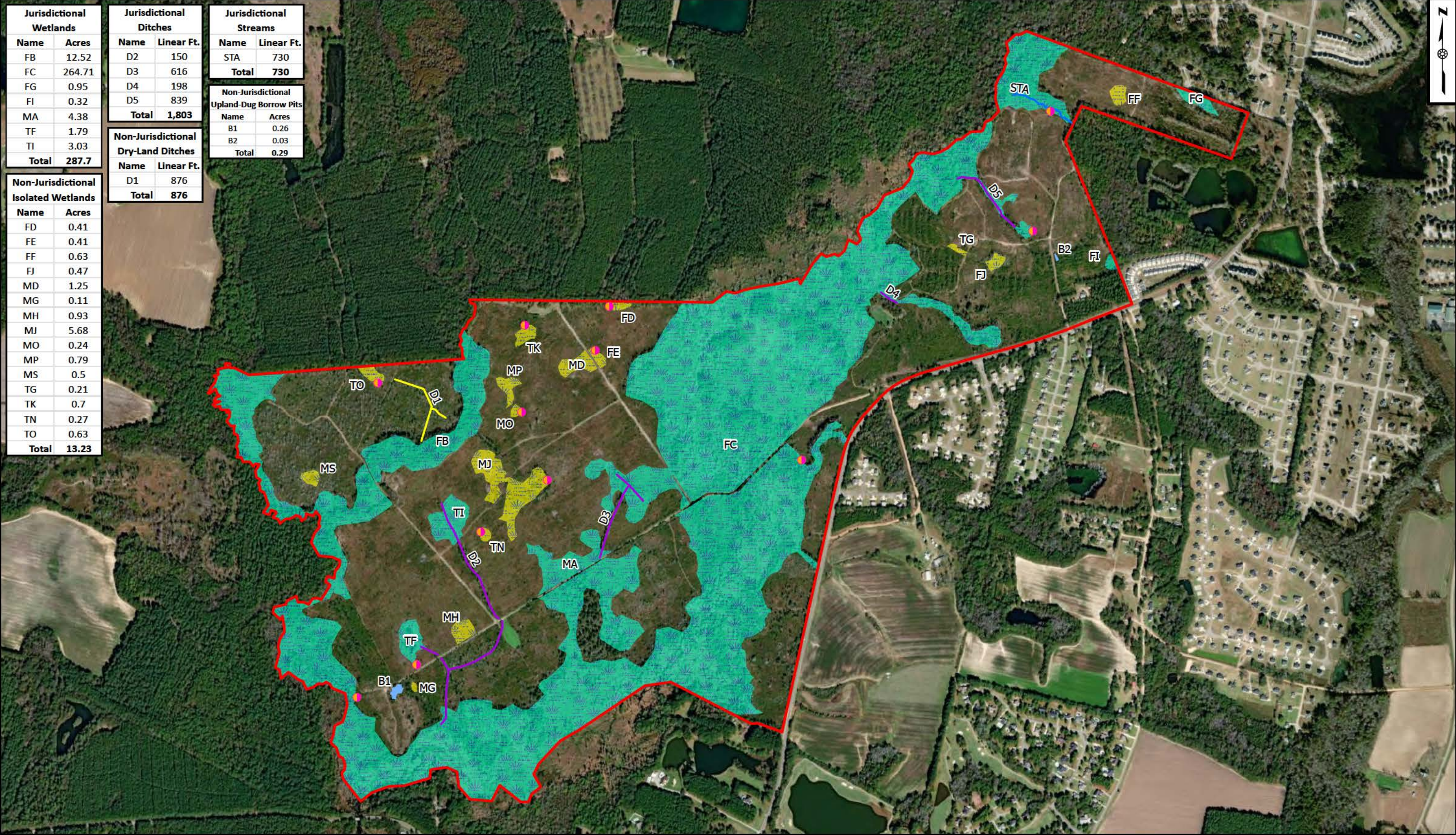
| Jurisdictional Ditches |            |
|------------------------|------------|
| Name                   | Linear Ft. |
| D2                     | 150        |
| D3                     | 616        |
| D4                     | 198        |
| D5                     | 839        |
| Total                  | 1,803      |

| Jurisdictional Streams |            |
|------------------------|------------|
| Name                   | Linear Ft. |
| STA                    | 730        |
| Total                  | 730        |

| Non-Jurisdictional Upland-Dug Borrow Pits |       |
|---|-------|
| Name                                      | Acres |
| B1  | 0.26  |
| B2  | 0.03  |
| Total                                     | 0.29  |

| Non-Jurisdictional Dry-Land Ditches |            |
|-------------------------------------|------------|
| Name                                | Linear Ft. |
| D1                                  | 876        |
| Total                               | 876        |

| Non-Jurisdictional Isolated Wetlands |       |
|--------------------------------------|-------|
| Name                                 | Acres |
| FD                                   | 0.41  |
| FE                                   | 0.41  |
| FF                                   | 0.63  |
| FJ                                   | 0.47  |
| MD                                   | 1.25  |
| MG                                   | 0.11  |
| MH                                   | 0.93  |
| MJ                                   | 5.68  |
| MO                                   | 0.24  |
| MP                                   | 0.79  |
| MS                                   | 0.5   |
| TG                                   | 0.21  |
| TK                                   | 0.7   |
| TN                                   | 0.27  |
| TO                                   | 0.63  |
| Total                                | 13.23 |



**Figure 6**  
3/26/2024

0 450 900  
1 inch equals 900 feet

**Delineation Map**  
Burkhalter Rd. Tract  
JCWSJR, LLC  
Bulloch County, GA

Project Area (~714.31 Acres)

Data Form Locations

Jurisdictional Intermittent Stream

Jurisdictional Ditch

Non-Jurisdictional Dry-Land Ditch

Non-Jurisdictional Upland-Dug Borrow Pits

Non-Jurisdictional Isolated Wetlands

Jurisdictional Wetlands

**HHNT**  
HODGES, HARBIN,  
NEWBERRY & TRIBBLE, INC.  
Consulting Engineers

Notes:

1. Imagery obtained from ESRI World Basemap. Source: Vivid, Maxar Date: 11/8/2021.
2. Aquatic resource delineation performed by HHNT scientists September 18-22, 2023.
3. Depicted Waters of the U.S. delineation and presumed jurisdictional status remains an opinion of HHNT until it is formally verified in writing by the U.S. Army Corps of Engineers via a formal determination letter.