DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT
100 W. OGLETHORPE AVENUE
SAVANNAH, GEORGIA 31401-3604

SAS-RD-C February 16, 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) ,[1] SAS-2023-00957

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 this state due to litigation.

[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.

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 1 (W1)	JD	Section 404
Wetland 3 (W3)	JD	Section 404
Wetland 4 (W4)	JD	Section 404
Ditch 1 (D1)	JD	Section 404
Ditch 2 (D2)	JD	Section 404
Ditch 5 (D5)	JD	Section 404
Wetland 2 (W2)	Non-JD	N/A
Wetland 5 (W5)	Non-JD	N/A
Borrow Pit 1 (BP1)	Non-JD	N/A
Borrow Pit 2 (BP2)	Non-JD	N/A
Ditch 3 (D3)	Non-JD	N/A
Ditch 4 (D4)	Non-JD	N/A

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)

   e. 20190625 Section 10 Waters List Savannah District

   f. 2007 Rapanos Approved Jurisdictional Determination Form Instructional Guidebook

3. REVIEW AREA. The project review area is an approximately 157.63-acre site located approximately 0.22 miles north of the intersection of Interstate 95 and Georgia Highway 251, in Darien, McIntosh County, Georgia (Latitude 31.4045, Longitude -81.4502).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[5] Cathead Creek is the nearest TNW. The project review area is located approximately 0.65 miles from Cathead Creek. This determination was made based on a review of desktop data resources described in Section 9 of this memorandum including review of the SAS Section 10 Waters list, and a field visit conducted on February 8, 2024.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 1 is a wetland that meets the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic Gulf Coastal Plain Regional Supplement. Wetland 1 is part of a larger wetland outside of the project area that has a continuous connection via a culvert under Georgia Highway 251 to the Chisholm Swamp system which abuts Cathead Creek, a TNW. Wetland 4 is a wetland that meets the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic Gulf Coastal Plain Regional Supplement. There is a continuous surface connection between Wetland 1 and Wetland 4 provided by Ditch 1. Wetland 3 is a wetland that meets the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Atlantic Gulf Coastal Plain Regional Supplement. There is a continuous surface connection between Wetland 1 and Wetland 3 provided by Ditch 2 which branches off from Ditch 1 (connecting to Wetland 1). Ditch 5 flows into the Chisholm Swamp system via another culvert under Georgia Highway 251.

6. SECTION 10 JURISDICTIONAL WATERS[6]: 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

[5] 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.
[6] 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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[7] 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):

Name of Aquatic Resource	**Size (in acres)**	**Flow Regime and additional description of the tributary**	**Method for determining flow regime**
Ditch 1 (D1)	0.07	See attached delineation map	Ditch 1 is connected to Wetland 1 (there is a functioning culvert in the middle of Ditch 1 as shown on delineation map). Ditch 1 was

[7] 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.

			observed to have relatively permanent flow and drains wetlands, not solely uplands. Wetland 1 is part of a larger wetland outside of the project area that has a continuous connection via a culvert under Georgia Highway 251 to the Chisholm Swamp system which abuts Cathead Creek, a TNW.
Ditch 2 (D2)	0.06	See attached delineation map	Ditch 2 is connected to (branches off from) Ditch 1 which flows into Wetland 1. Ditch 2 drains wetlands, not solely uplands. Ditch 2 was observed to have relatively permanent flow.
Ditch 5 (D5)	0.25	See attached delineation map	Ditch 5 flows into the Chisholm Swamp system via a culvert under Georgia Highway 251. The Chisholm Swamp abuts Cathead Creek, a TNW. Ditch 5 was observed to have relatively permanent flow and was dug in wetlands.

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

g. Adjacent wetlands (a)(7):

Name of Aquatic Resource	Size (in acres)	Contiguous with or abutting? If so, list water	Describe continuous surface connection
Wetland 1 (W1)	22.1	Yes, Cathead Creek	Wetland 1 is part of one larger wetland system, Chisholm Swamp, via a continuous surface connection through the culvert under Georgia Highway 251. Chisholm Swamp abuts Cathead Creek, a TNW.
Wetland 3 (W3)	2.11	No	Wetland 3 has a continuous surface connection through jurisdictional Ditch 2 and jurisdictional Ditch 1, which flows into jurisdictional Wetland 1, which abuts Cathead Creek (TNW).
Wetland 4 (W4)	0.21	No	There is a continuous surface connection between Wetland 1 and Wetland 4 provided by Jurisdictional Ditch 1.

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").[8] 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.

Name of excluded feature	Size (in acres)	Specific exclusion a-e

[8] 51 FR 41217, November 13, 1986.

Ditch 3 (D3)	0.12	(a) Non-tidal drainage and irrigation ditches excavated on dry land.

Ditch 3 (D3) is a ditch that was dug between 1983 and 1988, as seen with historic aerial imagery, in an upland area of the project site (Ditch 5 appears prior to D3 and was most likely excavated in or adjacent to wetland). Historic topography also supports the determination that this ditch was excavated in dry land. According to the NRCS survey, the soil in the area of D3 consists of Klej fine sand (0 to 2 percent slopes) which is not rated as a hydric soil compared to D5, D2 and D1 which are located in areas that are rated as hydric soils. There is an area of upland between Ditch 3 and Wetland 3 with no continuous surface connection between D3 and W3.

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, 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
Wetland 2 (W2)	0.14	Wetland lacks a continuous surface connection to water of the US.
Wetland 5 (W5)	0.16	Wetland lacks a continuous surface connection to water of the US.
Ditch 4 (D4)	0.01	Ditch lacks a continuous surface connection to water of the US.
Borrow Pit 1 (BP1)	0.27	Wetland lacks a continuous surface connection to water of the US.
Borrow Pit 2 (BP2)	0.4	Wetland lacks a continuous surface connection to water of the US.

Wetland 2 (W2) is a closed depressional wetland surrounded by uplands and lacks a continuous surface connection to a water of the US; therefore, W2 is non-jurisdictional. Wetland 5 (W5) is also a closed depressional wetland surrounded by uplands with no continuous surface connection to a water of the US. An area of uplands was observed on site between W5 and W1 and no continuous surface connection was observed between W5 and Ditch 1. W5 is determined to be non-jurisdictional. Borrow Pit 2 (BP2) is surrounded by and dug in uplands for borrow purposes and lacks a continuous surface connection to a water of the US; therefore, BP2 is non-jurisdictional. No outfalls, ditches or connections were observed around the perimeter of BP2. The perimeter of Borrow Pit 1 (BP1) was viewed on site and an upland berm between Ditch 5 and BP2 was observed, and there is no continuous surface connection between D5 and BP2. BP1 is determined to be non-jurisdictional. Ditch 4 (D4) was located on the north side of BP2 and dug in uplands. D4 flows out of BP2 and ends with no continuous surface connection to a water of the US so D4 is non-jurisdictional.

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 (Desk) Determination: February 20, 2024
    Field Visit: February 8, 2024

    b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Approved Jurisdictional Determination request and exhibit submitted by [redacted]

c. Data sheets prepared/submitted by or on behalf of the applicant/consultant: submitted by [redacted]

d. U.S. Geological Survey map(s): McIntosh County 1'=2,000 ft.

e. U.S. Geological Survey Hydrologic Atlas: HUC 030602040803.

f. USDA Natural Resources Conservation Soil Survey: McIntosh County, GA.

g. National Wetlands Inventory map(s): McIntosh County, GA.

h. Photographs: Aerial: Google Earth 1998, 2004, 2016, 2021 and 2023, and Historic Aerial Imagery: 1974, 1983, and 1988

i. Historical Topographic Maps: 1959 and 1980.

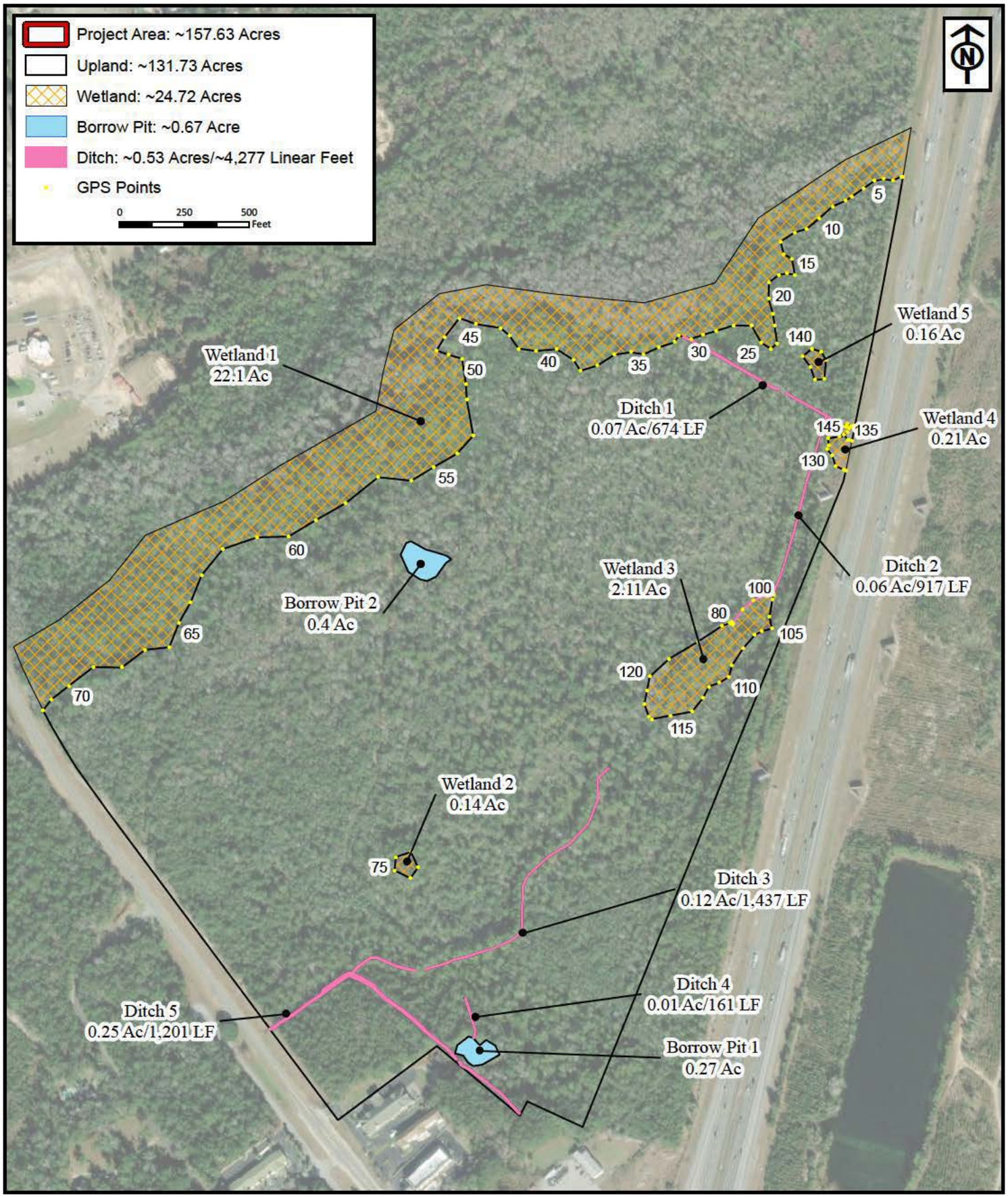
j. NOAA Topographic LiDAR: 2018 NOAA LiDAR.

k. Antecedent Precipitation Tool Analysis: [redacted] agent site visit on October 31, 2023, and Corps site visit on February 8, 2024.

l. FEMA/FIRM maps: Panel ID: 13191C0289E.

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.



[redacted] Project No.:	16-219.1
Figure No.:	8
Prepared By:	[redacted]
Sketch Date:	2/12/2024
Map Scale :	1 inch = 500 feet

Magnolia Bluffs Tract

McIntosh County, Georgia

Aquatic Resource GPS Delineation Exhibit

Prepared For: [redacted]

[redacted]

Y:\2016 Projects\16-219.1[redacted] Magnolia Bluffs Tract\graphics\South_Fig8_Delineation.mxd

Source(s): ESRI Basemap, World Imagery

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