



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

SAS-2020-00420

April 10, 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-2020-00420

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
JD Wet B	JD	Section 404
JD Wet C	JD	Section 404
JD Wet D	JD	Section 404
JD Wet E	JD	Section 404
JD Wet F	JD	Section 404
JD Wet G	JD	Section 404
JD Wet H	JD	Section 404
JD Wet I	JD	Section 404
JD Wet J	JD	Section 404
JD Wet K	JD	Section 404
NJD Wet AA	Non-JD	N/a
NJD Wet BB	Non-JD	N/a
NJD Wet CC	Non-JD	N/a
NJD Wet DD	Non-JD	N/a
NJD Wet EE	Non-JD	N/a
NJD Wet FF	Non-JD	N/a
NJD Wet GG	Non-JD	N/a
NJD Wet HH	Non-JD	N/a
NJD Wet II	Non-JD	N/a
NJD Upland Dug Pond A	Non-JD	N/a
NJD Upland Dug Pond B	Non-JD	N/a
NJD Upland Dug Pond C	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. 2008 Rapanos Guidance

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3. REVIEW AREA

A. Project Are Size (in acres): 290 acres

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

Latitude: 32.213728

Longitude: -81.292660

C. Nearest City or Town: Guyton

D. County: Effingham

E. State: Georgia

F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2020-00420	AJD/ARDR	An AJD and ARDR were performed for an area directly to the south adjacent to the current project's review area. This AJD/ARDR was issued on October 6, 2022. Wetland boundaries were verified, and two wetlands (Wetland 4 and Wetland 3 (totaling 2.84 acres of non-tidal wetlands) was determined to be non-jurisdictional.

G. Any additional, relevant site-specific information: This site has been historically managed for timber harvest. The most recent timber harvest off of the property was between 2011 and 2012 based on historic aerial imagery.

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 nearest TNW is Saint Augustine Creek, which is approximately 2.8 miles southwest of the review area.

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 field visit conducted on March 29, 2024 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 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.

JD Wetland E continues offsite with surface flow to the southwest where it has a continuous surface connection and flowing surface water through a culvert under Midland Road and is part of a large wetland system that abuts an Unnamed Tributary to Saint Augustine Creek, a relatively permanent water (RPW), which flows into Saint Augustine Creek a TNW.

JD Wetland B is located at the northeastern boundary of the review area has continuous surface through a culvert under a driveway that conveys continuous surface flow into JD Wetland K. JD Wetland K has a continuous surface connection through a culvert under a logging road, that conveys continuous surface water, to the aforementioned JD Wetland E. These wetlands are functioning as one wetland and JD wetlands B and K follow JD Wetland E's flowpath.

JD Wetland H has continuous surface connection with JD Wetland G and JD Wetland K. As previously mentioned, JD Wetland K is functioning with JD Wetland E as a large wetland system. JD Wetland G is also functioning as one wetland with the same aforementioned wetland system. Both JD Wetland H and G follow JD Wetland E's flowpath.

JD wetland F and JD Wetland I continue offsite to the west and north respectively and are part of the same aforementioned wetland and follow JD Wetland E's flow path. Additionally, JD wetland J has a continuous surface connection with JD Wetland I through two culverts under a logging road. These culverts have and maintain surface water from JD wetland I and JD Wetland J.

JD Wetlands C and D are located at the northern boundary of the review and are part of the same aforementioned wetland system and function as one wetland.

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

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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.

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 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):
- 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

Wetlands JD Wet B, JD Wet C, JD Wet D, JD Wet E, JD Wet F, JD Wet G, JD Wet I, JD Wet J and JD Wet K all function as one large wetland system. These wetlands total 123.08 acres. This large wetland systems continues offsite to the west where it has a continuous surface connection through a culvert under Midland Road (surface water and flow was observed through the culvert). The wetland continues to flow west and abuts an UNT to Saint Augustine Creek (RPW), which is tributary to Saint Augustine Creek a TNW.

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<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.

## 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)	Type of resource generally not jurisdictional
NJD Upland Dug Pond AA	0.14	This pond was dug in an area that was previously uplands and does not have a CSC to a RPW.
NJD Upland Dug Pond BB	0.07	This pond was dug in an area that was previously uplands and does not have a CSC to a RPW.
NJD Upland Dug Pond CC	2.387	This pond was dug in an area that was previously uplands and does not have a CSC to a 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
- 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

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

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
NJD Wet AA	1.653	Wetland is located in the northeastern portion of the review area. The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet BB	0.808	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet CC	0.623	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet DD	0.545	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet EE	0.808	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet FF	1.386	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. The wetland is separated from JD Wet F by a 30-foot-wide timber road. There was no evidence of a CSC between the two wetlands. There was no culvert located at this location and no overflow of surface water or other discrete feature that would constitute a CSC. The wetlands appear to be functioning as two separate wetlands with different vegetation in each wetland and no evidence of subsurface flow underneath the road that would connect these two wetlands or consider them to be functioning as one wetland system.
NJD Wet GG	0.322	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet HH	0.648	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. During the site visit and desktop review there was no CSC observed.
NJD Wet II	0.785	The wetland is a closed depressional wetland surrounded by uplands. Surrounding uplands are higher in elevation per lidar and contours. The wetland is separated from JD Wet F by a 30-foot-wide timber road. There was no evidence of a CSC between the two wetlands. There was no culvert located at this location and no overflow of surface water or other discrete feature that would constitute a CSC. The wetlands appear to

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		be functioning as two separate wetlands with different vegetation in each wetland and no evidence of subsurface flow underneath the road that would connect these two wetlands or consider them to be functioning as one wetland system.
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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.

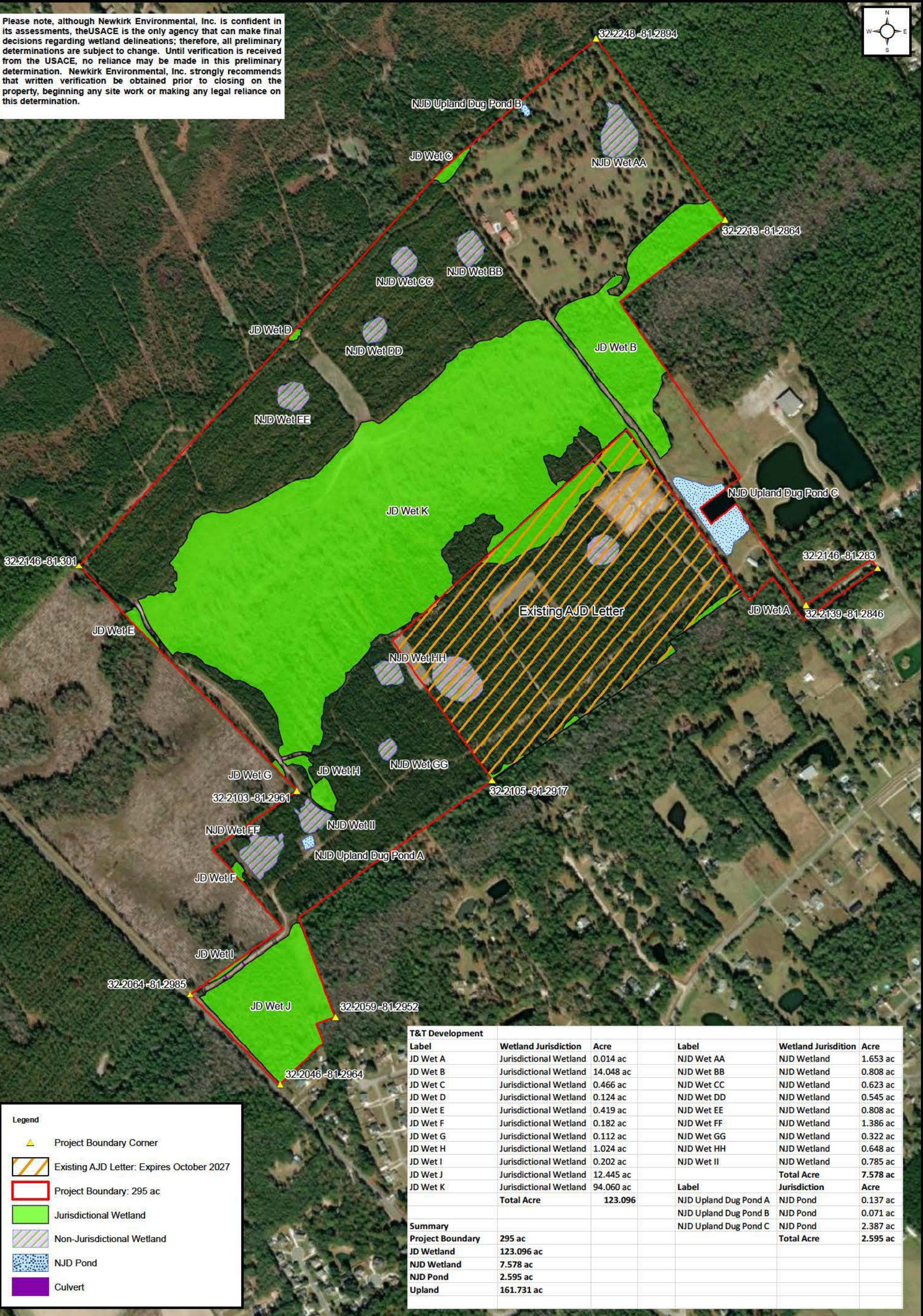
- a. 1. Date of Office (desktop review): March 2024
2. Date(s) of Field Review (if applicable): March 29, 2024
- b. Data sources used to support this determination (included in the administrative record).
  - ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Wetland Delineation August 22, 2022
  - ☒ Aquatic Resources delineation map: provided by applicant, Resource Map dated April 1, 2024
  - ☒ Wetland data sheets submitted by applicant dated 8/22/2022
  - ☒ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: SAS-2020-00420; AJD/ARDR approved on October 6, 2022.
  - ☒ Photographs: submitted by applicant dated 8/22/2022 and field site investigation 3/29/2024
  - ☒ Aerial Imagery: Google Earth Imagery – 199, 2011, 2012 and 2021
  - ☒ LIDAR: NOAA Lidar used in ARCGIS; Lidar Map, Lidar with Hillshade
  - ☒ USDA NRCS Soil Survey: NRCS Web Soil Survey 4/9/2024
  - ☒ USFWS NWI maps: NWI Mapper 4/9/2024
  - ☒ USGS topographic maps: submitted by applicant dated August 22, 2022
  - ☒ USGS NHD data/maps: TNW Map
  - ☒ Section 10 resources used: SAS List
  - ☒ Antecedent Precipitation Tool Analysis: Site Visit: 4/5/2024

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.



Please note, although Newkirk Environmental, Inc. is confident in its assessments, theUSACE is the only agency that can make final decisions regarding wetland delineations; therefore, all preliminary determinations are subject to change. Until verification is received from the USACE, no reliance may be made in this preliminary determination. Newkirk Environmental, Inc. strongly recommends that written verification be obtained prior to closing on the property, beginning any site work or making any legal reliance on this determination.



T&T Development					
Label	Wetland Jurisdiction	Acre		Label	Wetland Jurisdiction Acre
JD Wet A	Jurisdictional Wetland	0.014 ac		NJD Wet AA	NJD Wetland 1.653 ac
JD Wet B	Jurisdictional Wetland	14.048 ac		NJD Wet BB	NJD Wetland 0.808 ac
JD Wet C	Jurisdictional Wetland	0.466 ac		NJD Wet CC	NJD Wetland 0.623 ac
JD Wet D	Jurisdictional Wetland	0.124 ac		NJD Wet DD	NJD Wetland 0.545 ac
JD Wet E	Jurisdictional Wetland	0.419 ac		NJD Wet EE	NJD Wetland 0.808 ac
JD Wet F	Jurisdictional Wetland	0.182 ac		NJD Wet FF	NJD Wetland 1.386 ac
JD Wet G	Jurisdictional Wetland	0.112 ac		NJD Wet GG	NJD Wetland 0.322 ac
JD Wet H	Jurisdictional Wetland	1.024 ac		NJD Wet HH	NJD Wetland 0.648 ac
JD Wet I	Jurisdictional Wetland	0.202 ac		NJD Wet II	NJD Wetland 0.785 ac
JD Wet J	Jurisdictional Wetland	12.445 ac			Total Acre 7.578 ac
JD Wet K	Jurisdictional Wetland	94.060 ac		Label	Jurisdiction Acre
	Total Acre	123.096		NJD Upland Dug Pond A	NJD Pond 0.137 ac
				NJD Upland Dug Pond B	NJD Pond 0.071 ac
				NJD Upland Dug Pond C	NJD Pond 2.387 ac
					Total Acre 2.595 ac
Summary					
Project Boundary	295 ac				
JD Wetland	123.096 ac				
NJD Wetland	7.578 ac				
NJD Pond	2.595 ac				
Upland	161.731 ac				

Legend

Project Boundary Corner

Existing A/D Letter: Expires October 2027

Project Boundary: 295 ac

Jurisdictional Wetland

Non-Jurisdictional Wetland

NJD Pond

Culvert

Resource Map

Project #: 04-5095a1 Date: April 01 2024

