



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

SAS-OD-RC

April 24, 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-1999-02920

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 Georgia 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.

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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 A	JD	Section 404
Wetland B	JD	Section 404
Wetland C	JD	Section 404
Wetland E	JD	Section 404
Wetland G	JD	Section 404
Wetland H	JD	Section 404
Wetland I	JD	Section 404
Wetland J	JD	Section 404
Wetland F	Non-JD	None
Wetland K	Non-JD	None
Wetland L	Non-JD	None
Wetland M	Non-JD	None
Wetland N	Non-JD	None
Wetland O	Non-JD	None
Wetland P	Non-JD	None
Wetland Q	Non-JD	None
Wetland R	Non-JD	None
Wetland S	Non-JD	None
Pond A	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)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- e. Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies' pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime's approach to the plurality

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standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

f. 2008 Rapanos Guidance

3. REVIEW AREA.

A. Project Are Size (in acres): 170.05

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

Latitude: 32.203952 Longitude: -81.176757

C. Nearest City or Town: Port Wentworth

D. County: Chatham

E. State: Georgia

F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2008-01402	AJD	All waters were determined to be jurisdictional under the AJD
SAS-2006-01461	AJD	All waters were determined to be jurisdictional under the AJD

G. The project has been historically manipulated for the purposes of water treatment systems and ditching of onsite wetlands. Historical imagery shows the review area was not manipulated in 1974. In a 1981 aerial it is evidenced that ditches were dug in a large wetland system. Additionally, between 1974 and 1981 a water treatment system was constructed that is currently identified as Wetlands P, Q, R, and S. On October 31, 2008

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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 Savannah River, which is a TNW and an interstate water, is approximately 0.68 miles east of 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 field visit conducted on DATE (if applicable), 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)), and documented (include in AR) occurrences of boating traffic on the identified water. For interstate waters, based on a review several maps listed in Section 9 of this memorandum, the identified water is shown as an aquatic feature and crossing the interstate boundary of Georgia/South Carolina.

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. Wetlands A, C and G is all continue offsite to the east and are functioning as one wetland. This wetland contuse south/southeast abuts the Savanah River.

Wetland B abuts a drainage ditch that flows through a culvert and into Wetland A, which is part of a large wetland system that continues offsite and abuts the Savannah River.

Wetland E abuts a drainage ditch that flows through a culvert under Richmond Road that outlets to a drainage ditch and flows east and connects to Wetland C. Wetland C is part of a large wetland that continues offsite and abuts the Savannah River.

Wetland H abuts a drainage ditch that flows east and connects to Wetland C. Wetland C is part of a large wetland that continues offsite and abuts the Savannah River.

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Wetland I abuts a drainage ditch that flows east and connects to Wetland C. Wetland C is part of a large wetland that continues offsite and abuts the Savannah River.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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

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.

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.

- e. Tributaries (a)(5): Pond A may have been dug in uplands, but based on best available data this cannot be determined, but even so since its original function has been abandoned. The pond has an Ordinary High-Water Mark and has a CSC through a culvert to ditch (that is not an aquatic resource) for ~108' and connects to Wetland A, which continues offsite and abuts the Savannah River.
- 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 A Wetland C Wetland G	2.32 24.46 2.39	Yes, abuts Savannah River	Wetlands A, C and G are all connected offsite as part of a larger wetland system. The wetland continues south/southwest where it abuts the Savannah River. See below for additional information in regard to Wetland C.
Wetland B	1.49	No	Wetland B has a CSC in the form of a dry ditch (that does not have a OHWM) that traverses 321' northeast through a culvert that continues into Wetland A that abuts the Savannah River.
Wetland E	1.88	No	This wetland travels through a culvert under Richmond Road that connects to a dry ditch and traverses ~243' east through another culvert under Richmond Road and continues through the ditch and connects to Wetland C which connects offsite and abuts the Savannah River.
Wetland H	1.2	No	Wetland H abuts and connects to a drainage ditch and traverse ~897' and connects to Wetland C and subsequently follows Wetland C's flow path to the Savannah River.
Wetland I	0.22	No	Wetland H abuts and connects to a drainage ditch and traverse ~1,193' and connects to Wetland C and subsequently follows Wetland C's flow path to the Savannah River.

*Note: The site contains a series of **Drainage Ditches** that were dug throughout the site historically between 1974 and 1981. These ditches may have been dug in wetlands historically and do drain wetlands, but do not carry relatively permanent water. These ditches were determined to not be aquatic resources due to the absence of an OHWM and the absence of the 3 wetlands parameters (1. Hydrology, 2. Hydric soils and 3.) hydrophytic vegetation) so they were not assessed as JD or Non-JD. These features were defined and evident as a discrete feature that may constitute as a CSC.

Wetland C travels from west to east on the property. The wetland crosses through a 30' culvert that serves as a continuous surface connection (CSC) under Richmond

Road and continues on the eastern side of Richmond Road. The wetland then travels through another ~10' – 15' culvert that was previously permitted and the wetland continues offsite as part of the larger wetland system that abuts the Savannah River.

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 under the CWA as a preamble water.
- 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.
- 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.
- 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.
- 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

⁷ 51 FR 41217, November 13, 1986.

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 F	0.16	A depressional wetland that is surrounded by uplands. The uplands are higher in elevation based on the lidar, contours and in field observations. There was no CSC observed during site visit or based off of desktop review that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland K	0.39	A depressional wetland that is surrounded by uplands. The uplands are higher in elevation based on the lidar and contours along with in field observations. Uplands were verified between this wetland and jurisdictional wetland C. There was no CSC observed during site visit or based off of desktop review that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland L	0.69	A depressional wetland that is surrounded by uplands as verified during the site visit. The uplands are higher in elevation based on the lidar and contours. Uplands were verified around this wetland and there was no discrete feature observed during the site visit that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland M	0.20	A depressional wetland that is surrounded by uplands as verified during the site visit. The uplands are higher in elevation based on the lidar and contours. Uplands were verified around this wetland and between jurisdictional wetland G to the east. There was no discrete feature observed during the site visit that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland N	0.42	A depressional wetland that is surrounded by uplands as verified during the site visit. The uplands are higher in elevation based on the lidar and contours. Uplands were verified around this wetland and between jurisdictional wetland G to the east. There was no discrete feature observed during the site visit that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland O	1.09	A depressional wetland that is surrounded by uplands. The uplands are higher in elevation based on the lidar and contours. Uplands were verified around the wetland during the site visit and there no discrete feature observed that would constitute a CSC that would connect the wetland to a jurisdictional water.
Wetland P, Q, R and S	2.03	These wetlands appear to have been built in uplands between 1981 and 1994 and were a waste treatment facility. These facilities were abandoned between 2010-2011 when construction of a new facility was completed to the north. These areas have reverted to wetlands meeting all three wetland characteristics. The wetlands are surrounded by earthen berms and there was no discharge or discrete feature that would constitute a continuous surface connection to a jurisdictional water observed during the site visit.

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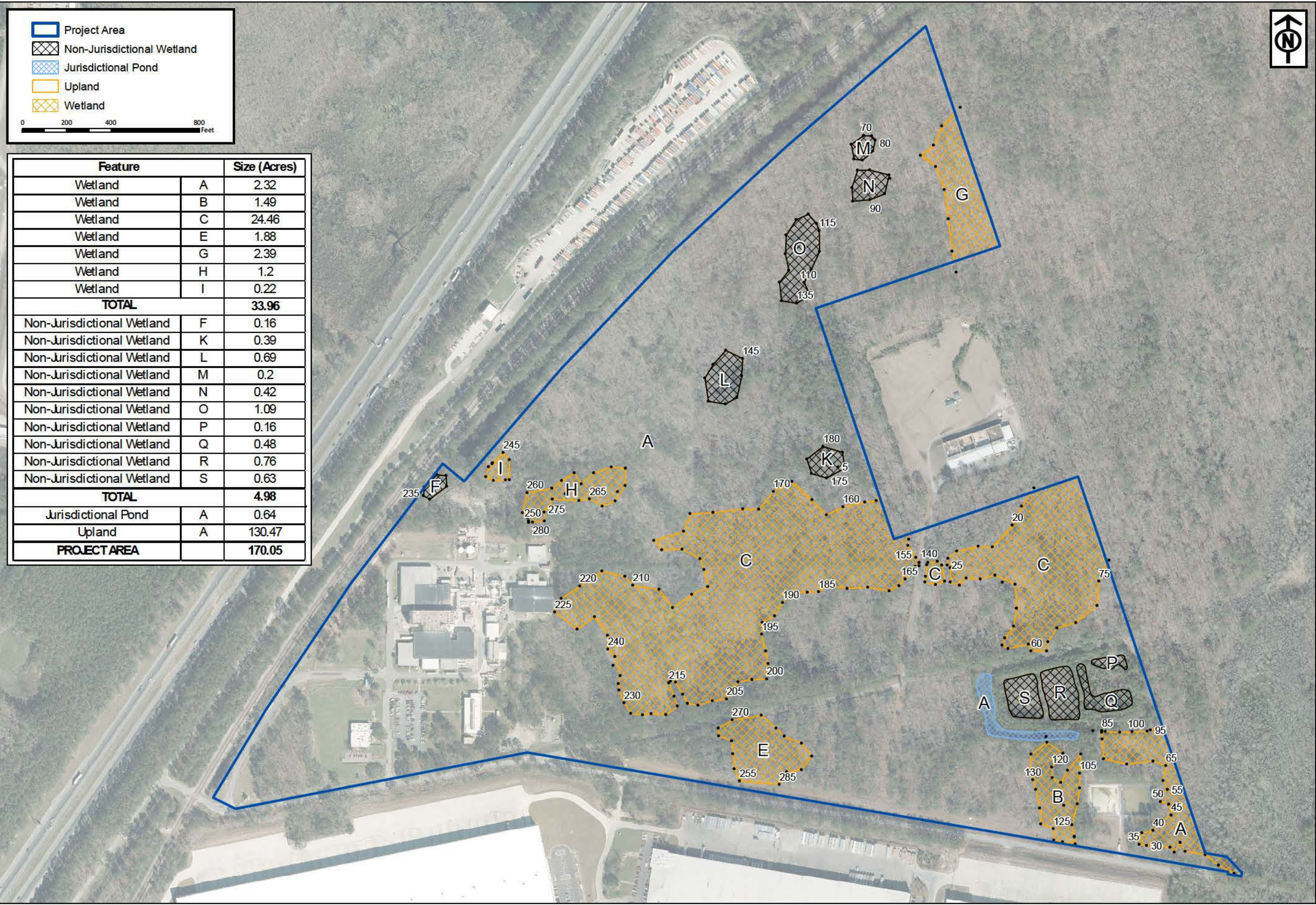
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. 1. Date of Office (desktop review): November 2023 and March 2024
2. Date(s) of Field Review (if applicable): 12/07/2023
 - b. Data sources used to support this determination (included in the administrative record).
 - X Aquatic Resources delineation submitted by, or on behalf of, the requestor:
Aquatic Resource Report October 23, 2023
 - X Wetland Exhibit and Drainage Feature Exhibit dated 4/3/2024
 - X Wetland field data sheets prepared by the Corps: included in Resource Report
 - X Photographs: Site Visit photos 12/7/2023
 - X Aerial Imagery: Historic Aerials.com aerial: 1974, 1981, 1984
 - X LIDAR: NOAA database, Lidar and Hillshade ARCPRO Maps
 - X USDA NRCS Soil Survey: NRCS Soil Map 6/20/2022
 - X USFWS NWI maps: NWI Map 6/20/2022
 - X USGS topographic maps: USGS Topographic Map 6/20/2022
 - X USGS NHD data/maps: NHD map made in ARCPRO
 - X Section 10 resources used: SAS Section 10 List
 - X Antecedent Precipitation Tool Analysis: 12/7/2023
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.

Project Area
 Non-Jurisdictional Wetland
 Jurisdictional Pond
 Upland
 Wetland

0 200 400 800 Feet



Feature		Size (Acres)
Wetland	A	2.32
Wetland	B	1.49
Wetland	C	24.46
Wetland	E	1.88
Wetland	G	2.39
Wetland	H	1.2
Wetland	I	0.22
TOTAL		33.96
Non-Jurisdictional Wetland	F	0.16
Non-Jurisdictional Wetland	K	0.39
Non-Jurisdictional Wetland	L	0.69
Non-Jurisdictional Wetland	M	0.2
Non-Jurisdictional Wetland	N	0.42
Non-Jurisdictional Wetland	O	1.09
Non-Jurisdictional Wetland	P	0.16
Non-Jurisdictional Wetland	Q	0.48
Non-Jurisdictional Wetland	R	0.76
Non-Jurisdictional Wetland	S	0.63
TOTAL		4.98
Jurisdictional Pond	A	0.64
Upland	A	130.47
PROJECT AREA		170.05



Wetland Exhibit

EM Industries Tract Chatham County, Georgia

RLC Project No.:	10-040.1
Figure No.:	1
Prepared By:	BS
Sketch Date:	4/3/2024
Map Scale:	1 inch = 400 feet