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

SAS-2024-00200 June 5, 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) , SAS-2024-00200

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.[1] 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.[2] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[3] 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] 33 CFR 331.2.
[2] Regulatory Guidance Letter 05-02.
[3] 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	JD	Section 404
Wetland 2	Non-JD	N/A
Wetland 3	JD	Section 404
Wetland 4	JD	Section 404
Pond	Non-JD	N/A
Intermittent Stream 1	JD	Section 404
Intermittent Stream 2	JD	Section 404
Ephemeral Stream 1	Non-JD	N/A
Ephemeral Stream 2	Non-JD	N/A
Ephemeral Stream 3	Non-JD	N/A
Ephemeral Stream 4	Non-JD	N/A
Ditch 1	Non-JD	N/A
Ditch 2	Non-JD	N/A
Ditch 3	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)

3. REVIEW AREA:

    a. 83.1 acres
    b. Latitude: 33.3627, Longitude: -82.0114
    c. Augusta
    d. Richmond County
    e. Georgia
    f. The oldest historical aerial imagery available of the review area was dated 1971. The aerial imagery indicates that the subject property was of agricultural use during that time. Between the fields, the corridor of a drainage feature is made visible by an associated tree line. Historic topographic maps and historic aerial

imagery indicate that the drainage feature was a ditch, constructed between 1948 and 1971 by a previous property owner in order to accommodate the growth of upland crops. The corridor leads to an area that was left forested and undeveloped, located within the southeastern limits of the subject property. Circa 1981, development occurred on the western portion of property to accommodate a different land use. Although railroad infrastructure is not present on topographic imagery until 2011, historic aerial imagery indicates that the railways were constructed in conjunction with the initial development. An easterly railroad traverses the northern portion of the site and a southerly rail spur traverses down the western portion of the property along the development. Outside of the western development, the remainder of the site was allowed to naturalize and revegetate, including the corridor of the drainage feature.

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

   a. The nearest TNW to the subject water is the Savannah River, located approximately 6 linear kilometers to the east.

   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)), and documented occurrences of boating traffic on the identified water. Further, the Savannah River is an aquatic feature that serves as the interstate boundary between Georgia and South Carolina.

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

   The subject aquatic resources located within the review area flow south out of the property for approximately one kilometer and into McDade Pond, an impoundment of Spirit Creek. From the outlet of McDade Pond, Spirit Creek flows primarily eastward for approximately 12 kilometers into the Savannah River.

6. SECTION 10 JURISDICTIONAL WATERS[4]: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

[4] 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.

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. 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**	**Flow Regime and additional description of the tributary**	**Method for determining flow regime**
Intermittent Stream 1	33 linear feet (0.002-acre)	Intermittent; See further explanation below table.	observed flow during site visit during normal precipitation conditions
Intermittent Stream 2	305 linear feet (0.02-acre)	Intermittent; See further explanation below table.	observed flow during site visits during normal and dryer than normal precipitation conditions

Intermittent Stream 1 (I1) is located in the northeastern limits of the subject property. It is limited to a 33-foot reach that crosses a narrow portion of the site and then flows south out of the property. I1 is associated with a relict tributary of Spirt Creek, indicated by NHD and historic topographic maps to have been historically perennial. The original alignment of the tributary was manipulated/channelized in conjunction with development

east of the property. I1 is a relatively permanent stream that is a tributary of Spirt Creek. Therefore, it meets the definition of an (a)(5) water.

Intermittent Stream 2 (I2) is located in the southeastern portion of the property. I2 is located below the corridor of the historic ditch, in a portion of the property that remained forested during the agricultural practices. It drains offsite into a lower reach of I1. I2 is a relatively permanent stream that is a tributary of Spirit Creek. Therefore, it meets the definition of an (a)(5) water.

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	1.29 acres	No	W1 is connected via a culverted rail crossing to an RPW (I1).
Wetland 3	0.02-acre	No	W3 is connected via a stormwater basin (with culverts), an adjacent wetland, and ephemeral channel to an RPW (I2)
Wetland 4	0.35 acres	No	W4 is connected via an ephemeral channel to stream RPW (I2).

Wetland 1 (W1) is located in the northwestern limits of the property. Like I1, it is associated with a relict tributary of Spirt Creek. W1 drains under the northern rail line and into I1. W1 is a wetland that has a continuous surface connection (CSC) from its connection to an RPW by a discrete feature (culvert). Therefore, it meets the definition of an (a)(7) water.

Wetland 3 (W3), like Ephemeral Stream 3 (E3) and Pond, is assumed to be a result of the established stormwater management for the western development. W3 drains southeast to Pond's culverted inlet. From the inlet, the surface connection continues through Pond (for approximately 250 feet) and its outlet into Wetland 4 (W4). W4 drains into I2 (an RPW) via an ephemeral channel, Ephemeral Stream 2 (E2). W3 is a wetland that has a CSC from its connection to an RPW by a series of discrete features (including stormwater structures, a wetland, and ephemeral channel). Therefore, it meets the definition of an (a)(7) water.

Wetland 4 (W4) is located in the southeastern limits of the property. Historically, like I2, W4 was located within the forested area, below the drainage feature. W4 is currently fed by stormwater that flows from the developed portions of the property located northwest of it. W4 drains into I2 via an ephemeral channel, E2. W4 is a wetland that has a CSC from its connection to an RPW by a discrete feature (ephemeral channel). Therefore, it meets the definition of an (a)(7) water.

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").[5] 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**	**Specific exclusion a-e**
Ditch 1	288 linear feet (0.01-acre)	a: Non-tidal drainage and irrigation ditches excavated on dry land.
Ditch 2	218 linear feet (0.01-acre)	a: Non-tidal drainage and irrigation ditches excavated on dry land.
Ditch 3	96 linear feet (0.02-acre)	a: Non-tidal drainage and irrigation ditches excavated on dry land.
Pond	0.78-acre	c: Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

Ditch 1 (D1) and Ditch 2 (D2) are located in the northwestern portion of the property and are directly associated with the northern rail line. Ditch 3 (D3) is located along the eastern side of the western rail spur, in the center of the site. All three ditches currently have limited structure, assumed to be due to a lack of maintenance. Further, they do not possess a presence of water. The ditches were constructed in uplands for the purpose of non-tidal drainage. Therefore, they meet the definition of (*a*) preamble waters.

Pond is located between the developed western portion of the site and undeveloped eastern portion of the site. Historic aerial imagery indicates that the features were not present until 1981. It appeared in conjunction with the development. Pond drains through its eastern berm towards W4. During the Corps site visit, water was observed upgradient of the inlet pipe of Pond and below the outlet of Pond. However, no water was present within the limits of the feature. Further, the feature was composed of upland soils and vegetation. It is assumed that water primarily traverses subsurface through the footprint of the pond and emerges at its outlet. Pond is understood to be an artificial feature excavated in dry land for the purpose of managing stormwater from the adjacent development. Therefore, it meets the definition of a (c) 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

[5] 51 FR 41217, November 13, 1986.

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**	**Type of resource generally not jurisdictional**
Ephemeral Stream 1	201 linear feet (0.01-acre)	Tributary lacks relatively permanent, standing or continuously flowing water
Ephemeral Stream 2	660 linear feet (0.05-acre)	Tributary lacks relatively permanent, standing or continuously flowing water
Ephemeral Stream 3	238 linear feet (0.020-acre)	Tributary lacks relatively permanent, standing or continuously flowing water
Ephemeral Stream 4	342 linear feet (0.2-acre)	Tributary lacks relatively permanent, standing or continuously flowing water
Wetland 2	1.10 acres	Wetland lacks a continuous surface connection to waters of the US

Based on historic imagery, Ephemeral Stream 1 (E1), Ephemeral Stream 2 (E2), Ephemeral Stream 4 (E4) are assumed to have been historically connected as a single drainage feature (ditch), constructed (in between 1948 and 1971) by a previous property owner in order to accommodate the growth of upland crops. The features are channelized and are primarily absent of water. During the Corps site visit, the footprint

of the original drainage feature between E2 and E4 contained was predominately indiscernible from the surrounding woodland. Ephemeral 3 (E3) was constructed in conjunction with Pond, in order provide stormwater management for the western development. During the site visit, no water was present in the feature. The ephemeral streams lack relatively permanent, standing or continuously flowing water and are assumed to only contain/convey water in response to precipitation events. Therefore, they do not meet the definition of (a)(5) waters.

The current footprint of Wetland 2 (W2) was not present on 1971 aerial imagery, as the area was primarily composed of crops. It is believed that W2 formed as a result of the drainage feature's degradation/lack of maintenance, after the land was no longer used for agriculture. Wetland 2 would be assumed to have a surface connection to downstream waters via E2. However, during the Corps site visit, around the southern limits of W2 and further downgradient, E2 was observed to have four consecutive locations where the feature loses form and channel is not discernible from the surrounding woodlands. The four locations have been determined to undermine E2 capacity to serve as a continuous surface connection (CSC):

1. The feature lost form, making it difficult to distinguish it from the surrounding woodlands.
2. After regaining some discernible form, two trees were observed in the center of the channel.
3. The channel had a segment that was completely filled with earth/sediment and which was topped with leaf litter.
4. The feature temporarily lost form again, making it difficult to discern from the surrounding woodlands.

Further downgradient of the breaks, a channel (E4) becomes clearly discernible form where it traverses through W4 and into I2.

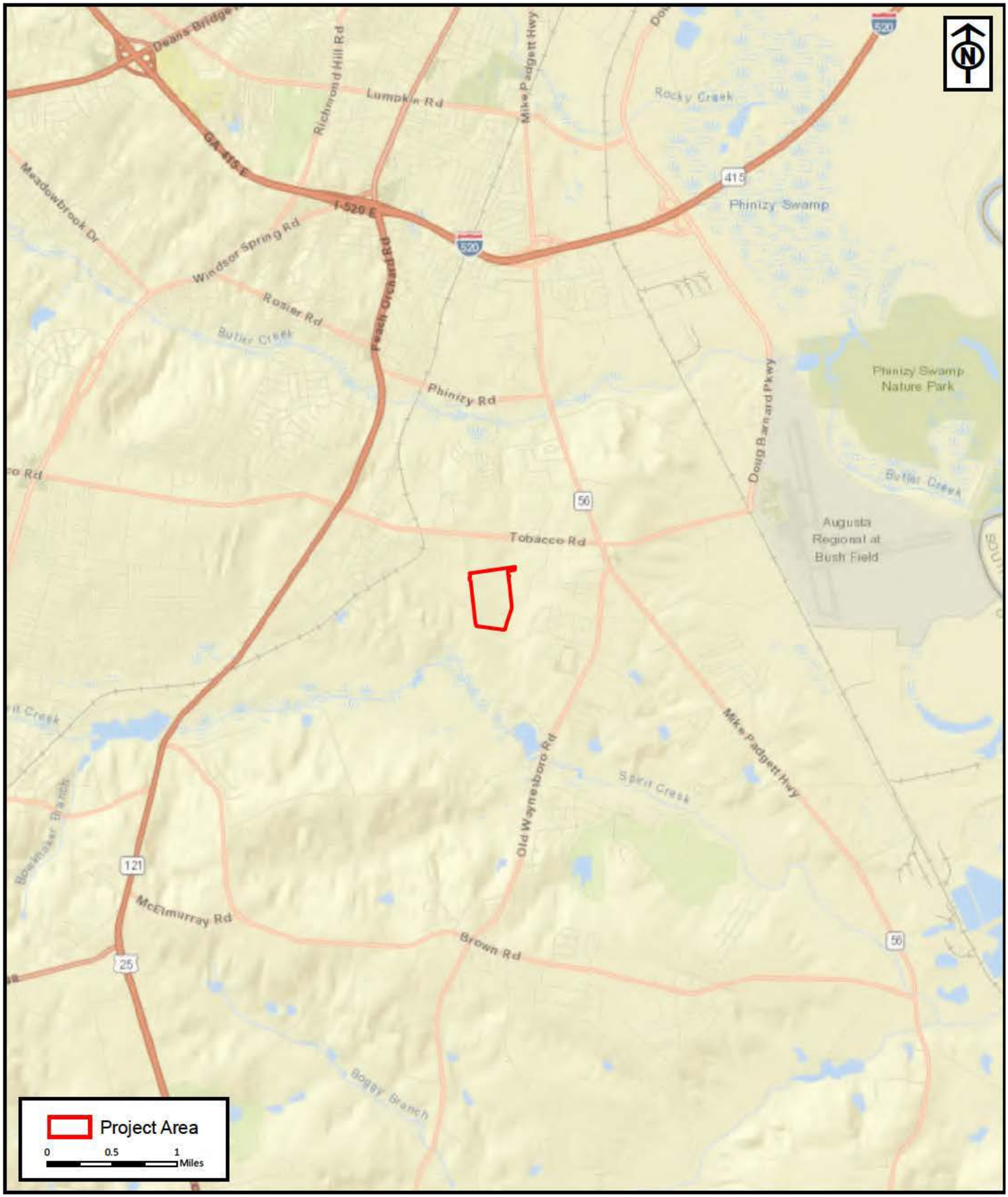
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

   a. Office (desktop) determination: March-May, 2024
   b. Field determination(s): December 2023 (Agent); February 29, 2024 (Agent); April 15, 2024 (CESAS-RDP and Agent)
   c. Data sources used to support this determination (included in the administrative record).
      ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Figure No.: 8: Aquatic Resource, Delineation GPS Exhibit, dated 03/01/2024, provided on PDF page 9 of the AJD Request

☐ Aquatic Resources delineation prepared by the USACE: Title and Date
☒ Wetland field data sheets: Wetland data forms and associated photographs, dated 12/01/2023, included on PDF pages 10 – 65 of the provided AJD Request
☐ OHWM data sheets prepared by the USACE: Title and Date
☐ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
☒ Photographs: Wetland data forms and associated photographs, dated 12/01/2023, included on PDF pages 10 – 65 of the provided AJD Request; and Mapped Photo Log, completed by CESAS-RDP, dated 04/15/2024.
☒ Aerial Imagery: Aerial Imagery with added demarcations of field observations, accessed from the National Regulatory Viewer by CESAS-RDP on 05/02/2024.
☒ LIDAR: LIDAR imagery (3DEP Slope, 3DEP DEM, and 3DEP Hillshade) with added demarcations of field observations, accessed from the National Regulatory Viewer by CESAS-RDP on 05/02/2024.
☒ USDA NRCS Soil Survey: Figure No.: 3: NRCS Soil Survey, dated 03/01/2024, provided on PDF page 4 of the AJD Request; and USDA hydric soil rating data, accessed by CESAS-RDP on 03/26/2024.
☒ USFWS NWI maps: Figure No.: 4: National Wetlands Inventory, dated 03/01/2024, provided on PDF page 5 of the AJD Request.
☒ USGS topographic maps: Historic topographic maps, accessed by CESAS-RDP in April 2024.
☒ USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP on 03/26/2024.
☐ Section 10 resources used: Title and Dates
☐ NCDWR stream identification forms
☒ Antecedent Precipitation Tool Analysis: List Date(s) 12/01/2023 (Normal Conditions); 02/29/2024 (Normal Conditions); and 04/15/2024 (Drier than Normal Conditions)
☒ Other sources of Information: Figure No.: 1: Project Location, dated 03/01/2024, provided on PDF page 2 of the AJD Request; and StreamStats accessed data by CESAS-RDP in April 2024

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]	[redacted]
Figure No.:	1
[redacted]	[redacted]
Sketch Date:	3/1/2024
Map Scale :	1 inch = 1 miles

Sarsaparilla Tract

Richmond County, Georgia

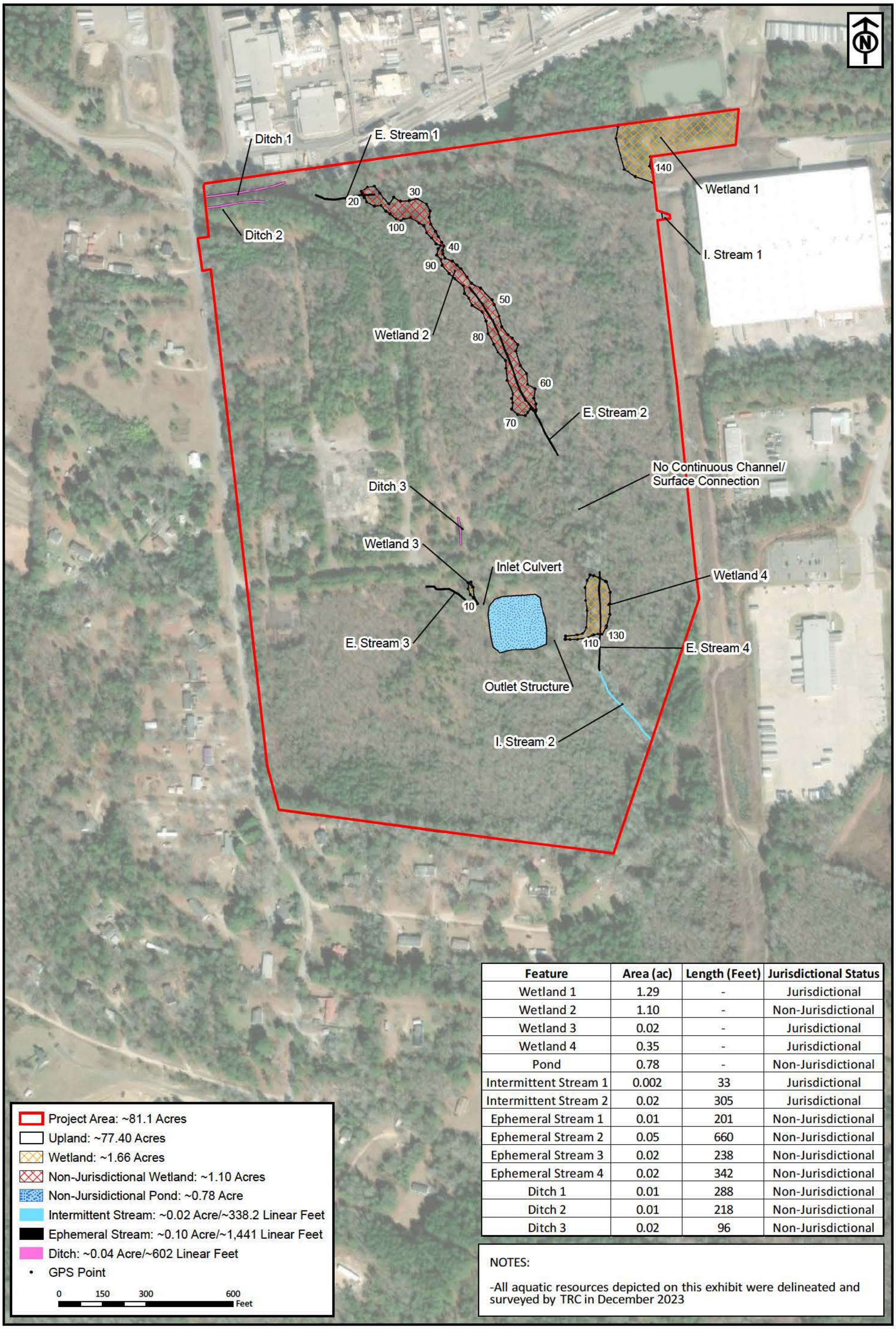
Project Location

Prepared For:
Solvay Specialty Polymers, LLC

[redacted]

Y:\2024 Projects\24-005 Ronald Mysona Solvay Augusta Tracts\graphics\Fig1_Location.mxd

Source(s): ESRI Basemap, World_Street_Map



Feature	Area (ac)	Length (Feet)	Jurisdictional Status
Wetland 1	1.29	-	Jurisdictional
Wetland 2	1.10	-	Non-Jurisdictional
Wetland 3	0.02	-	Jurisdictional
Wetland 4	0.35	-	Jurisdictional
Pond	0.78	-	Non-Jurisdictional
Intermittent Stream 1	0.002	33	Jurisdictional
Intermittent Stream 2	0.02	305	Jurisdictional
Ephemeral Stream 1	0.01	201	Non-Jurisdictional
Ephemeral Stream 2	0.05	660	Non-Jurisdictional
Ephemeral Stream 3	0.02	238	Non-Jurisdictional
Ephemeral Stream 4	0.02	342	Non-Jurisdictional
Ditch 1	0.01	288	Non-Jurisdictional
Ditch 2	0.01	218	Non-Jurisdictional
Ditch 3	0.02	96	Non-Jurisdictional

Project Area: ~81.1 Acres
Upland: ~77.40 Acres
Wetland: ~1.66 Acres
Non-Jurisdictional Wetland: ~1.10 Acres
Non-Jursidictional Pond: ~0.78 Acre
Intermittent Stream: ~0.02 Acre/~338.2 Linear Feet
Ephemeral Stream: ~0.10 Acre/~1,441 Linear Feet
Ditch: ~0.04 Acre/~602 Linear Feet
GPS Point

0 150 300 600 Feet

NOTES:

-All aquatic resources depicted on this exhibit were delineated and surveyed by TRC in December 2023

[redacted]
Figure No.: 8
[redacted]
Sketch Date: 6/3/2024
Map Scale : 1 inch = 300 feet

Sarsaparilla Tract
Richmond County, Georgia

Aquatic Resource Delineation GPS Exhibit
Prepared For: Solvay Specialty Polymers, LLC

[redacted]

Y:\2024 Projects\24-005 Ronald Mysona Solvay Augusta Tracts\graphics\Aquatic Resource Exhibit.mxd

Source(s): 2018 Chatham County NAIP Ortho Aerial