



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

SAS-2023-00024

July 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), SAS-2023-00024

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.

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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	Non-JD	N/A
Wetland B	Non-JD	N/A
Wetland C	Non-JD	N/A
Wetland D	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)

3. REVIEW AREA:

- a. 54.6 acres
- b. Latitude: 33.0743, Longitude: -81.9816
- c. Southeast of Waynesboro
- d. Burke County
- e. Georgia
- f. Historic aerials (since 1981) indicate that the property has been used for agriculture since. It is likely that the property was used for agriculture prior to this time. The property contains four wetlands (Wetlands A-D). Three of the four wetlands (Wetlands A-C) are connected by relic upland-dug ditches. The fourth wetland (Wetland D) is associated with a northerly tributary of McIntosh Creek.

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 waters is the Savannah River, located approximately 2.5 linear kilometers east of the review area. However, the flow

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path from the review area enters the Savannah River at a location approximately 60.5 linear kilometers southeast to the southeast.

- 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.

Wetlands A-C: N/A

Wetland D: The subject aquatic resource flows northeast offsite through a culverted field road crossing and eventually into an unnamed tributary of McIntosh Creek. The northeasterly unnamed tributary flows into a northerly tributary of McIntosh Creek. The northerly tributary flows directly into McIntosh Creek. McIntosh Creek flows primarily northeastward for approximately 4 kilometers into Brier Creek. Brier Creek then flows primarily southeastward for 96 kilometers into the Savannah River.

6. SECTION 10 JURISDICTIONAL WATERS⁴: 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. 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

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.

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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): N/A
- 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 D	2.12 acres	No	W1 is connected via a road crossing to a RPW.

Wetland D is located in the eastern limits of the property. During the delineation conducted by the Agent, it was observed that the land moving north from the northern tip of Wetland D is a broad swale with trees in it. The soil did not meet any hydric indicators. Additionally, historic aerial imagery indicate that there is a culvert in the field road located at the bottom of the onsite swale. Based on aerial imagery (dated around 2023), a break in the roadway is depicted at the location of the crossing, understood to be maintenance work on the culverted structure. NWI, NHD, historic topographic maps indicate that an RPW was historically located on both sides of the culverted road crossing. Lidar indicates that another swale is located across the field road and contains the historic tributary.

Wetland D is a wetland that has a continuous surface connection (CSC) from its connection to an RPW by discrete features (swale and culvert). 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

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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. 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. 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
Wetland A	2.35 acres	Wetland lacks a continuous surface connection to waters of the US
Wetland B	2.67 acres	Wetland lacks a continuous surface connection to waters of the US
Wetland C	0.49 acres	Wetland lacks a continuous surface connection to waters of the US

⁵ 51 FR 41217, November 13, 1986.

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During the onsite delineation, conducted by the Agent, relic upland-dug ditches were observed, connecting Wetlands A-C. These ditches were observed to be intact and continuous between the wetlands. The ditches are assumed to have been constructed in order drain the footprints of Wetlands A-C to support agricultural operations. Wetland A has a southwesterly ditch that leads towards Wetland B; Wetland C has a northeasterly ditch that leads to Wetland B; and Wetland B has a ditch that leads offsite to the west. The westerly ditch that leads from Wetland B to a location outside of the property was observed to travel upgradient for approximately 175 feet before continuing downgradient for approximately 280 feet. NHD and NWI indicate that the ditch connects to an intermittent tributary. However, LiDAR and aerial imagery do not depict such a tributary in the vicinity of the ditch and also indicate that the ditch likely loses its form within a forested area of the adjacent residential property, before connecting to any potential downstream waters identified in paragraphs (a)(1) through (a)(6) of the 1986 regulations. Therefore, the westerly ditch does not serve as a continuous surface connection (CSC) and Wetlands A-C do not meet the definition of waters identified in (a)(7) of the 1986 regulations.

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: June 2024 (CESAS-RDP)
- b. Field determination(s): September 29, 2022 (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: GPS Wetland Exhibit, dated 01/12/2024, provided as a supplement to the AJD Request.
 - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
 - ☒ Wetland field data sheets: Wetland data forms, dated 09/29/2022, included on PDF pages 21 – 26 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 GPS Site Photograph Index and associated photographs, dated 01/12/2024, provided as a supplement to the AJD Request.
 - ☒ Aerial Imagery: Figure No.: 5: Ortho Aerial, dated 12/07/2022, provided on PDF page 16 of the AJD Request; and historic aerial imagery (1993-2024), accessed by CESAS-RDP.
 - ☒ LIDAR: Figure No.1: NOAA Topographic Lidar, dated 11/30/2022, provided as a supplement to the AJD Request; LIDAR imagery (3DEP DEM and 3DEP

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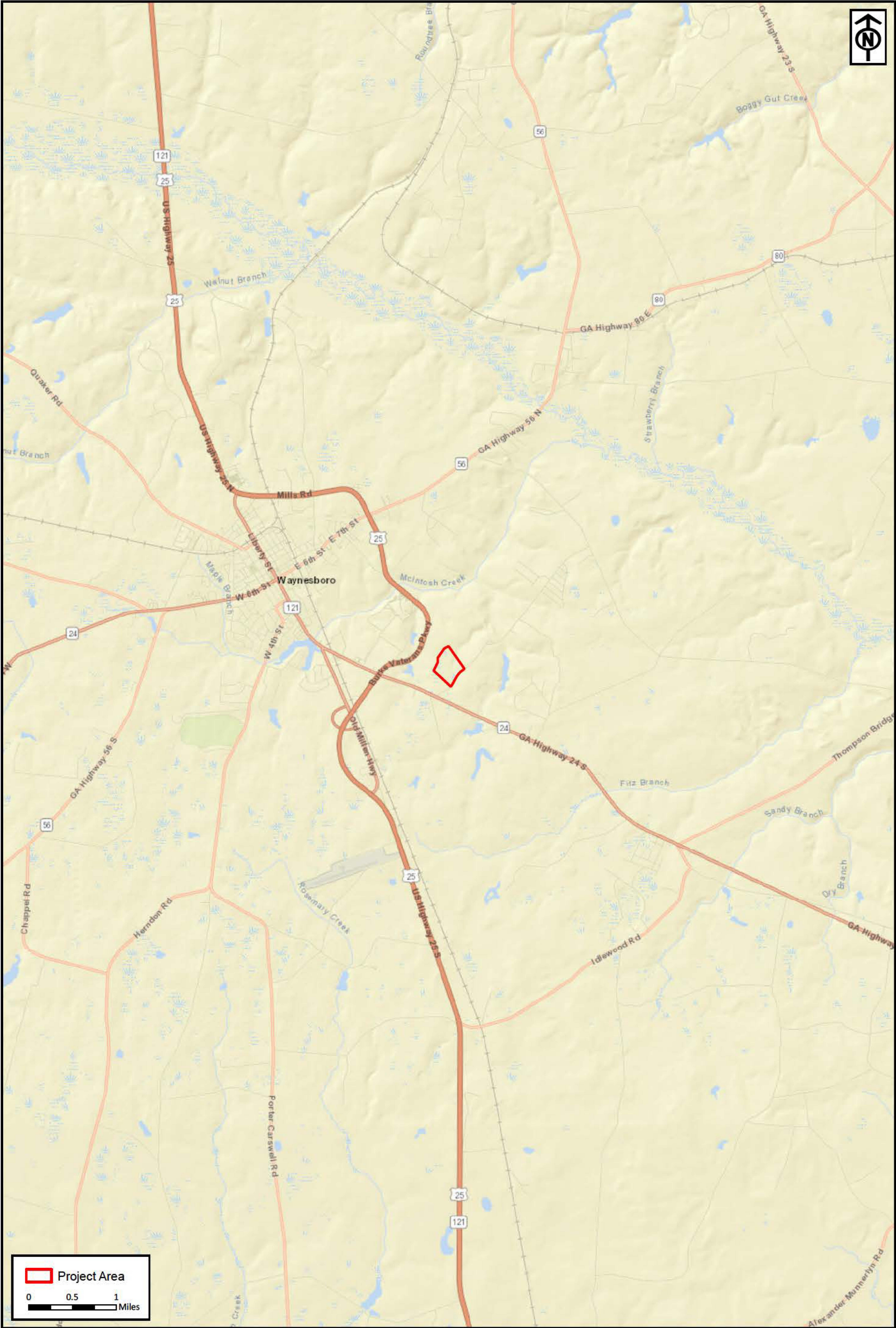
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Hillshade), accessed from the National Regulatory Viewer (NRV) by CESAS-RDP in November 2023 and June 2024.

- ☒ USDA NRCS Soil Survey: Figure No.: 3: NRCS Soil Survey, dated 12/16/2022, provided on PDF page 14 of the AJD Request; and USDA hydric soil rating data, accessed by CESAS-RDP on 11/13/2023.
- ☒ USFWS NWI maps: Figure No.: 4: National Wetlands Inventory, dated 12/07/2022, provided on PDF page 15 of the AJD Request.
- ☒ USGS topographic maps: Historic topographic maps (1920-2020), accessed by CESAS-RDP.
- ☒ USGS NHD data/maps: NHD data, accessed from the NRV by CESAS-RDP on 11/13/2023.
- ☐ Section 10 resources used: Title and Dates
- ☐ NCDWR stream identification forms
- ☒ Antecedent Precipitation Tool Analysis: List Date(s) 09/29/2022 (Normal Conditions)
- ☒ Other sources of Information: FEMA Flood Hazard data, accessed from the NRV by CESAS-RDP on 11/13/2023; and StreamStats data, accessed by CESAS-RDP.

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.



Project Area

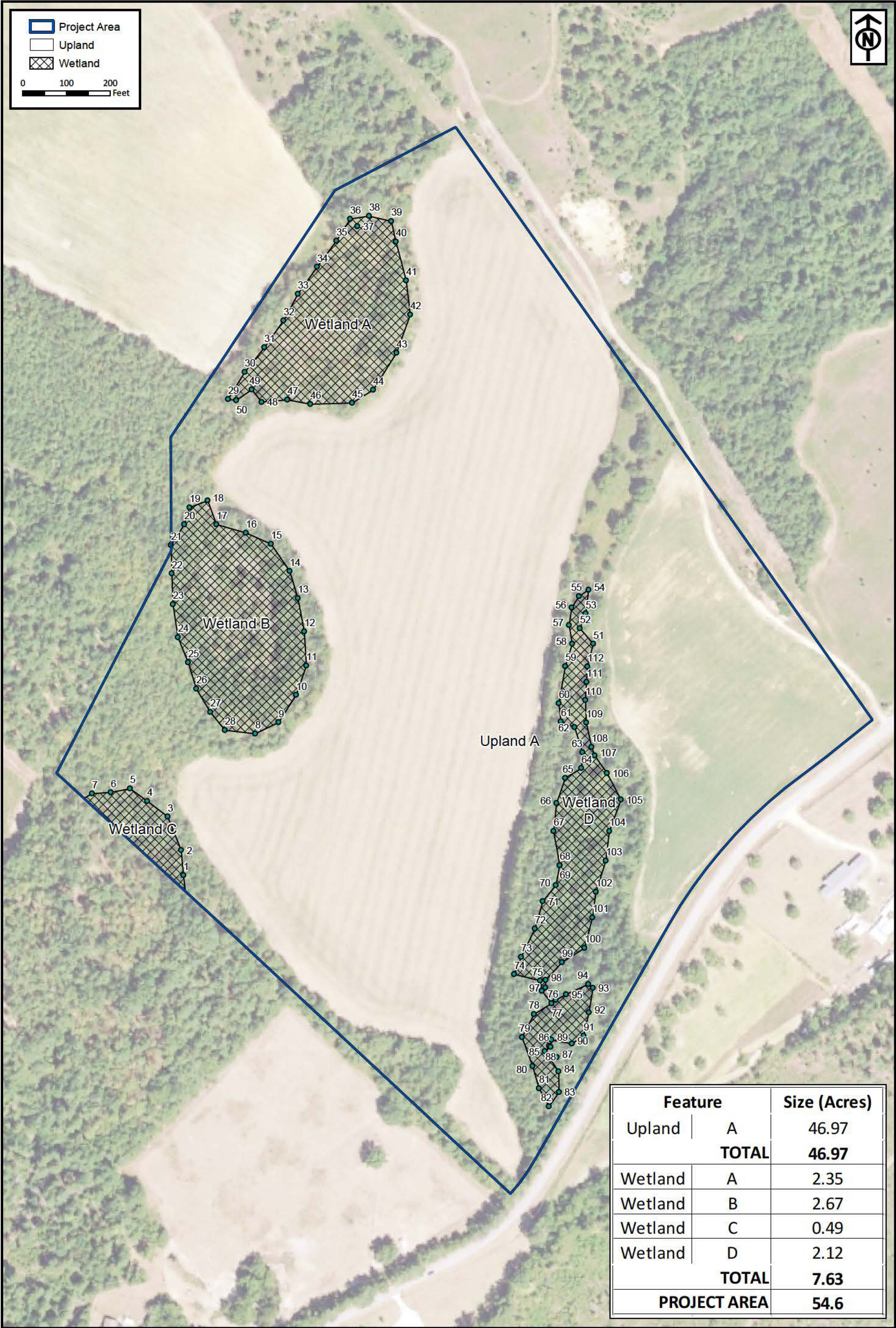
00.51

Miles

Figure No.:	
Prepared By:	
Sketch Date:	12/16/2022
Map Scale :	1 inch = 1 miles

Rangeley Tract
Burke County, Georgia

Project Location



Point	Latitude	Longitude	Point	Latitude	Longitude	Point	Latitude	Longitude
1	33.074112	-81.984193	39	33.078215	-81.982635	77	33.073264	-81.98147
2	33.07427	-81.98421	40	33.078087	-81.982602	78	33.073237	-81.981581
3	33.07448	-81.98431	41	33.077842	-81.982526	79	33.073092	-81.981672
4	33.074578	-81.984462	42	33.077629	-81.982496	80	33.07291	-81.981593
5	33.074658	-81.98459	43	33.07739	-81.982597	81	33.072772	-81.981547
6	33.074633	-81.984734	44	33.077157	-81.982773	82	33.072657	-81.981472
7	33.074626	-81.984874	45	33.077076	-81.982931	83	33.072748	-81.981397
8	33.075	-81.983657	46	33.077069	-81.983241	84	33.072876	-81.981399
9	33.075071	-81.983483	47	33.077097	-81.983413	85	33.073004	-81.981501
10	33.075243	-81.983352	48	33.077083	-81.983606	86	33.073037	-81.981469
11	33.075428	-81.983274	49	33.077161	-81.983677	87	33.072968	-81.981413
12	33.075641	-81.983289	50	33.077093	-81.983794	88	33.073031	-81.981458
13	33.07585	-81.983336	51	33.075561	-81.981136	89	33.073075	-81.981452
14	33.07602	-81.983399	52	33.075659	-81.981235	90	33.073052	-81.9813
15	33.076191	-81.983536	53	33.075751	-81.981191	91	33.0731	-81.981212
16	33.076261	-81.983724	54	33.0759	-81.98117	92	33.073248	-81.981172
17	33.076314	-81.983944	55	33.07586	-81.981241	93	33.073401	-81.981143
18	33.076465	-81.984009	56	33.075788	-81.981296	94	33.073425	-81.981176
19	33.076422	-81.984144	57	33.075679	-81.981315	95	33.07336	-81.981343
20	33.076315	-81.984183	58	33.075562	-81.981292	96	33.073318	-81.981445
21	33.076185	-81.984282	59	33.075421	-81.981345	97	33.073403	-81.981498
22	33.076007	-81.984277	60	33.075188	-81.981393	98	33.07345	-81.981495
23	33.075813	-81.98427	61	33.075074	-81.981379	99	33.073563	-81.981372
24	33.075606	-81.984231	62	33.075038	-81.981276	100	33.073652	-81.981205
25	33.075449	-81.984156	63	33.07488	-81.981217	101	33.073842	-81.981145
26	33.075283	-81.984096	64	33.074781	-81.981226	102	33.074004	-81.981118
27	33.075137	-81.983991	65	33.074719	-81.981346	103	33.0742	-81.981044
28	33.075023	-81.983883	66	33.074561	-81.981412	104	33.074385	-81.981019
29	33.077101	-81.983855	67	33.074385	-81.981434	105	33.074582	-81.980931
30	33.077271	-81.98373	68	<Null>	<Null>	106	33.07475	-81.981034
31	33.077424	-81.983585	69	33.074172	-81.981389	107	33.07486	-81.981125
32	33.077593	-81.98344	70	33.074046	-81.981417	108	33.074913	-81.98115
33	33.07776	-81.983334	71	33.073945	-81.981515	109	33.075066	-81.981189
34	33.077929	-81.98319	72	33.073774	-81.981574	110	33.075207	-81.981195
35	33.078093	-81.983045	73	33.073596	-81.981677	111	33.075321	-81.981186
36	33.07823	-81.982943	74	33.073487	-81.98173	112	33.075418	-81.981179
37	33.078184	-81.982888	75	33.073447	-81.981536			
38	33.078247	-81.982802	76	33.073382	-81.981495			