



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

SAS-OD-RC

10 OCTOBER 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-2024-00480

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 the state of 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 1	Non-JD	N/A
Wetland 2	Non-JD	N/A
Ditch	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. Project Are Size (in acres): 19.65 acres
- B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 32.273133° Longitude: -81.262848°
- C. Nearest City or Town: Rincon
- D. County: Effingham County
- E. State: Georgia
- F. Other associated Jurisdictional Determinations (including outcomes)

Regulatory File No.	Type	Outcome
SAS-2021-00583	PJD/ NWP 39	This approval showed wetland boundaries within the review area. This project was adjacent to the project under review with the confirmed wetland boundaries extending along the shared property line. Portions of the confirmed wetland boundaries extend onto the project under review.

G. Any additional, relevant site-specific information: This project site has primarily consisted of untouched forested woodlands based on aerial imagery available between 1985 and 2021. 2022 aerial imagery show the project site was cleared of most tree growth sometime between 2021 and 2022. Dirt roads cross through the project site and appear to support general trail accesses through the site rather than support of potential silviculture. Evidence is not present for significant manipulation of the site over an extended period of time.

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 11.7 miles east of the project 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 11 July 2024, 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]). Additionally, based on a review of maps listed in Section 9 of this memorandum, the identified water is shown as an aquatic feature serving as the Georgia/South Carolina state border.

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 Atlantic Gulf Coastal Plain Regional Supplement.

Wetlands 1 and 2 do not have continuous surface connection to a requisite water that would connect to the aforementioned TNW and are not jurisdictional.

The ditch is a stormwater conveyance from Blue Jay Road and the adjacent neighborhood stormwater retention pond that crosses through the western corner of the project site. Based on aerial review the ditch flows southeast along the property lines of adjacent parcels where it appears to terminate approximately 1,500 feet (0.29 mile) south of the project site and approximately 290 feet (0.06 mile) from Dasher Creek. This area of the ditch where it appears to terminate on aerial imagery

could not be field verified since it is located approximately 1,500 feet off-site; however, based on aerial, LiDAR, and hill shade imagery review the ditch loses definition in this area and likely discharges as sheet flow over upland areas before reaching Dasher Creek.

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
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): N/A
 - g. Adjacent wetlands (a)(7): 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 the 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”).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. 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
Ditch	0.2	Ditch was excavated wholly in and draining only upland areas and does not carry a relatively permanent flow of water.

- 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

⁷ 51 FR 41217, November 13, 1986.

- 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 1	1.86	Wetland lacks a continuous surface connection to water of the US
Wetland 2	0.05	Wetland lacks a continuous surface connection to water of the US

Wetland 1 abuts the northern property boundary and extends to the adjacent parcel that has been previously reviewed under an Aquatic Resources Determination Request and then permitted under a NWP 29 for the planned residential development (SAS-2021-00583). Wetland 1 is part of the wetland system on the southern edge of the adjacent property (abutting the property line). Wetland 1 was field verified on 11 July 2024 and portions of the adjacent property abutting the northern property boundary were evaluated for potential surface connectivity. There is no evidence of a continuous surface connection (i.e., discrete surface feature, ditch, or culvert) on the project site or the adjacent property that would connect Wetland 1 to a requisite water. Areas adjacent to Wetland 1 were verified as uplands. Uplands were verified to the northeast of Wetland 1 between the wetland and the Norfolk Southern Railroad Line that runs northwest to southeast. Uplands were also verified to the west/southwest of Wetland 1 between the wetland and the ditch located westward of the wetland, additionally there is no culvert present to connect Wetland 1 to the ditch and no evidence of a continuous surface connection.

Wetland 2 is a depressional wetland surrounded by uplands and was field verified on 11 July 2024. There is no discrete feature or culvert present at this location to connect Wetland 2 to the ditch located immediately the east and no evidence of a continuous surface connection; uplands were verified between Wetland 2 and the ditch. Additionally, the uplands surrounding Wetland 2 are higher in elevation on all sides with no evidence of a continuous surface connection to adjacent properties that would connect Wetland 2 to a requisite water.

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): 7/1/2024
2. Date(s) of Field Review (if applicable): 7/11/2024

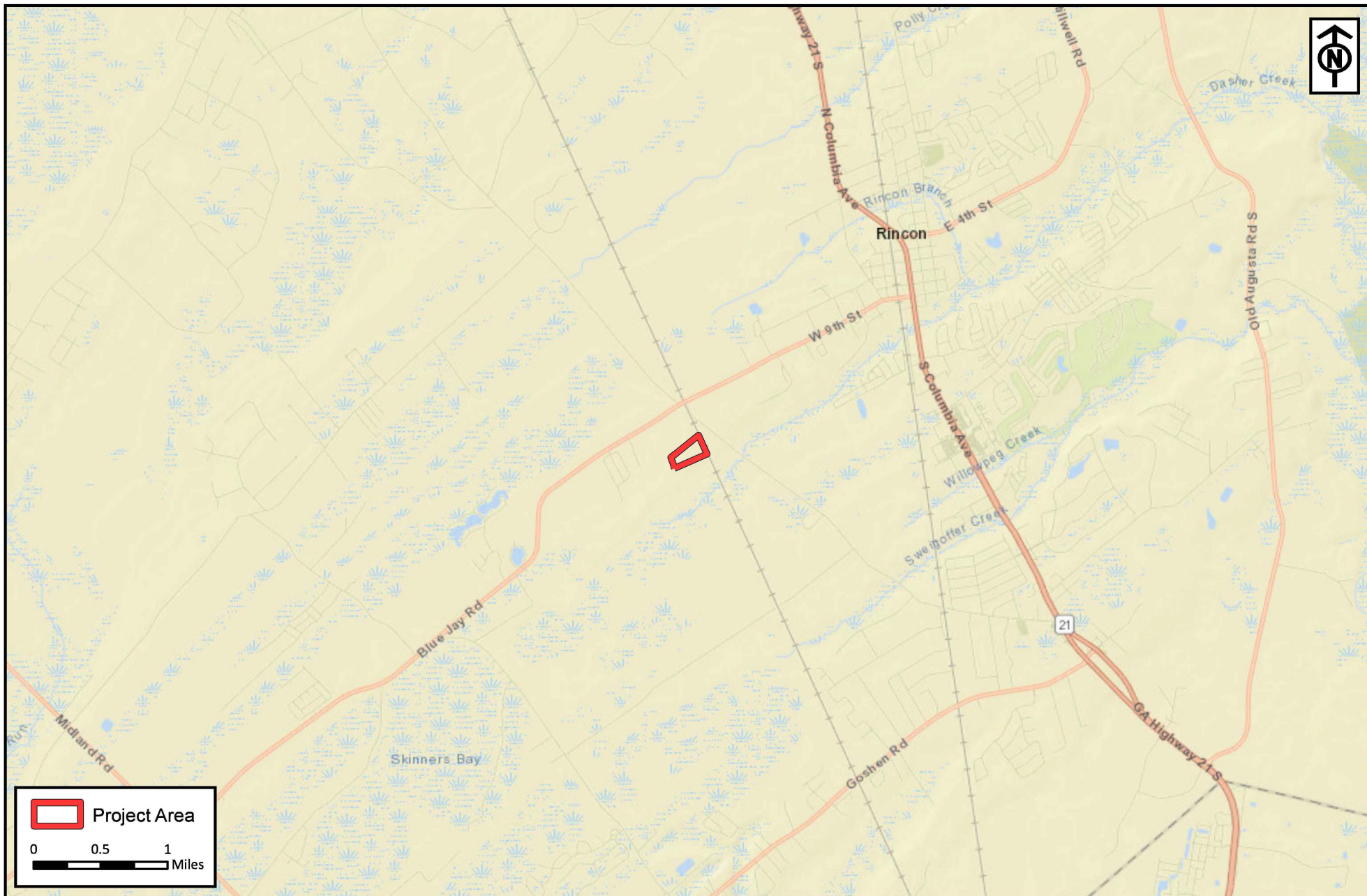
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- b. Data sources used to support this determination (included in the administrative record).
- ☒ Aquatic Resources delineation submitted by, or on behalf of, the applicant: Aquatic Resource Delineation GPS Exhibit, 7/31/2024 (Figure No. 8) prepared by Resource Land Consultants
 - ☒ Wetland field data sheets provided by, or on behalf of, applicant: 4/26/2024 prepared by Resource Land Consultants
 - ☒ Photographs: USACE site visit photos, 7/11/2024
 - ☒ Aerial Imagery provided by, or on behalf of, applicant: 2021 Aerial Imagery, 6/10/2024 (Figure No. 5) prepared by Resource Land Consultants; Google Earth Aerial Imagery 2024 Airbus and Historical Aerial Imagery between 1985 and 2024.
 - ☒ LIDAR: maps generated from ARCPRO and data from NOAA. Lidar Spectrum and Lidar Hillshade
 - ☒ USDA NRCS Soil Survey provided by, or on behalf of, applicant: NRCS Soil Survey, 6/10/2024 (Figure No. 2) prepared by Resource Land Consultants
 - ☒ USFWS NWI maps provided by, or on behalf of, applicant: National Wetlands Inventory, 6/10/2024 (Figure No. 4) prepared by Resource Land Consultants
 - ☒ USGS topographic maps provided by, or on behalf of, applicant: USGS Topographic Survey, 6/10/2024 (Figure No. 3) prepared by Resource Land Consultants
 - ☒ USGS NHD data/maps: NHD-TNW data provided on the National Regulatory Viewer (Georgia)
 - ☒ Section 10 resources used: SAS Section 10

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.



RLC Project No.:	24-097
Figure No.:	1
Prepared By:	CO
Sketch Date:	6/10/2024
Map Scale :	1 inch = 1 miles

Blue Jay Road Tract

Effingham County, Georgia

Project Location

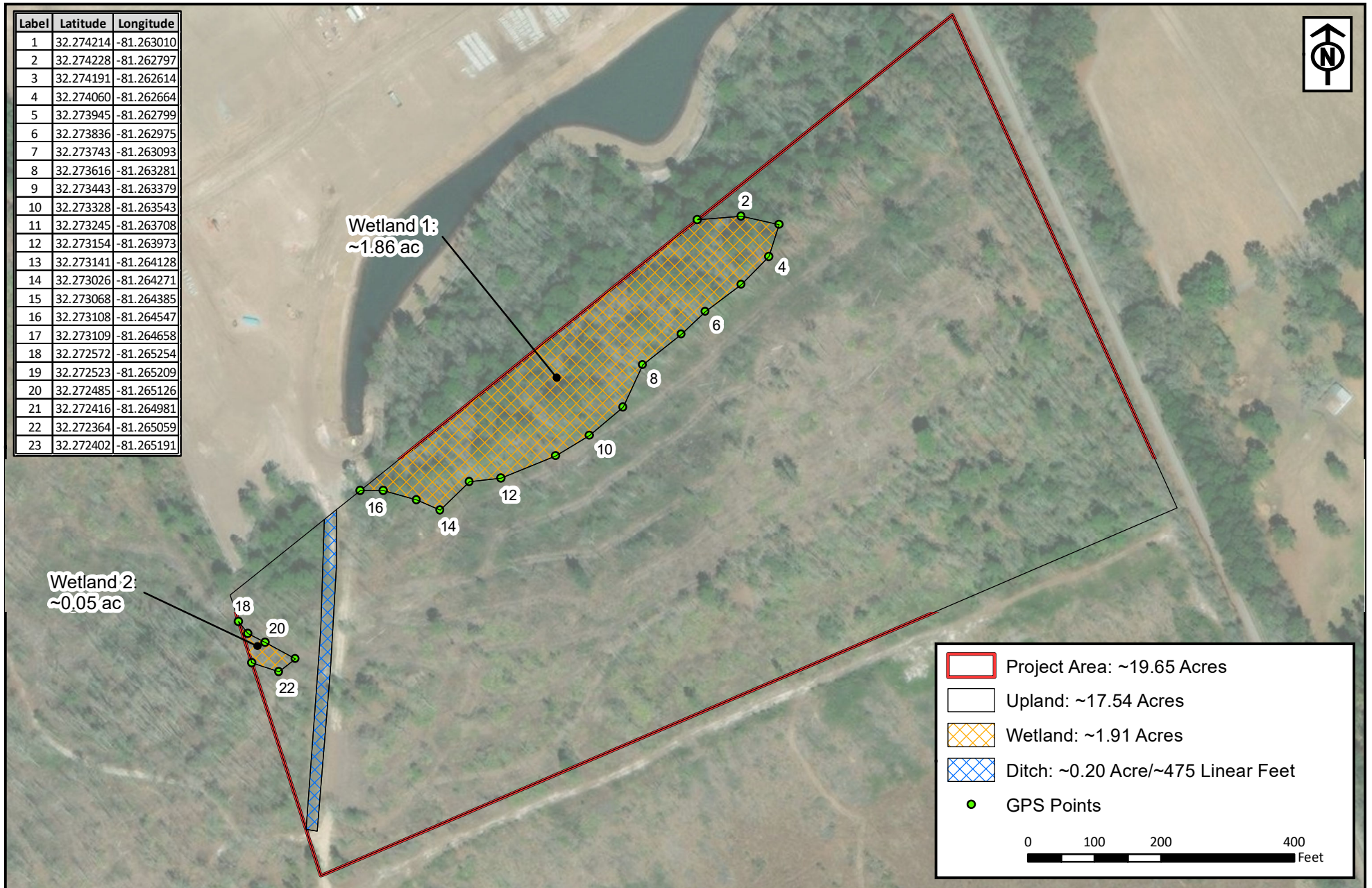
Prepared For: Braly Investments



**RESOURCE+LAND
CONSULTANTS**

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Savannah, GA 31405
tel 912.443.5896 fax 912.443.5898

Label	Latitude	Longitude
1	32.274214	-81.263010
2	32.274228	-81.262797
3	32.274191	-81.262614
4	32.274060	-81.262664
5	32.273945	-81.262799
6	32.273836	-81.262975
7	32.273743	-81.263093
8	32.273616	-81.263281
9	32.273443	-81.263379
10	32.273328	-81.263543
11	32.273245	-81.263708
12	32.273154	-81.263973
13	32.273141	-81.264128
14	32.273026	-81.264271
15	32.273068	-81.264385
16	32.273108	-81.264547
17	32.273109	-81.264658
18	32.272572	-81.265254
19	32.272523	-81.265209
20	32.272485	-81.265126
21	32.272416	-81.264981
22	32.272364	-81.265059
23	32.272402	-81.265191



RLC Project No.: 24-097
Figure No.: 2
Prepared By: MW
Sketch Date: 7/31/2024
Map Scale : 1 inch = 200 feet

Blue Jay Road Tract
Effingham County, Georgia

**Aquatic Resource
Delineation GPS Exhibit**
Prepared For: Braly Investments



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