



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

SAS-2023-00966

October 15, 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-2023-00966

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>1</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>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</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> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</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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SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2013-00375

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
WB	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 ("AJD Review Area 1"):

- a. ~21 acres
- b. Latitude: 32.9049, Longitude: -82.4151
- c. North of Wadley
- d. Jefferson County
- e. Georgia
- f. The oldest historical aerial imagery available of the review area was dated 1973. The aerial imagery indicates that the review area and surrounding areas were of agricultural land use. The areas across Spann Road, located immediately west of the review area, appear to have continued to be used for agriculture. However, the review area and other areas west of Spann Road were allowed to vegetate. Historic aerials indicate that the review area became forested in between 1993 and 2007. Timber harvesting was conducted in the winter of 2023-2024.

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

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SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2013-00375

- a. The nearest TNW to the subject water is the Ogeechee River, located approximately 23,000 feet 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.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>4</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 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

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<sup>4</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.

- 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

## 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>5</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. 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

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<sup>5</sup> 51 FR 41217, November 13, 1986.

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- 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
WB	6.2 acres	Wetland lacks a continuous surface connection to waters of the US

Historic aerial imagery indicates that the distinct, depressional footprint of WB existed since 1973. Starting on 1973 topographic mapping, a water is depicted in the location, bearing both wetland and open water characteristics. However, no associated tributaries are depicted. Additionally, NWI and NHD do not depict tributaries or other waters associated with WB. Historic aerial and Lidar imagery depict a northerly channelized feature (ditch) leading from the footprint of WB. However, there is no indication that the channelized feature connects to a downstream water via discrete features.

Following the June 2023 delineation, conducted by the Agent, a subsequent field assessment was conducted by the Agent in July 2024 to observe the conditions surrounding the perimeter of WB. No ditches or discrete features leading from WB were observed. The Corps conducted a field visit with the Agent on September 10, 2024. The wetland was observed to be inundated and the areas adjacent to the inundation were with debris from tree clearing. The Corps PM located a segment of the historic ditch that was identified during the desktop review. The ditch drained downgradient into WB. No other features associated with WB were identified.

Based on the information available, WB is a wetland that has no observable outlet. It lacks a discrete feature that would serve as a continuous surface connection to any downstream waters. Therefore, WB does 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: July-October 2024 (CESAS-RDP)
  - b. Field determination(s): June 2023 and July 2024 (Agent); September 2024 (CESAS-RDP)
  - c. Data sources used to support this determination (included in the administrative record).

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- ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Exhibits 6: *Depiction of Aquatic Resources Map*, dated 06/2023, included on PDF page 37 of the Applicant's request.
- ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
- ☒ Wetland field data sheets: Sampling Point *WB*, included on PDF pages 42 – 44 of the provided Applicant's Request, and dated 06/05/2023; and Sampling Point *WG*, included on PDF pages 57 – 59 of the provided Applicant's Request, and dated 06/06/2023.
- ☐ 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: Photos 4 – 5 and 25 – 26, included on PDF pages 101 – 102, and PDF page 115, respectively, of the Applicant's Request; and supplemental photos and associated email correspondence, dated 07/16/2024 through 07/18/2024.
- ☒ Aerial Imagery: Google Earth historic aerial imagery (1985 – 2024), accessed by CESAS-RDP.
- ☒ LIDAR: LIDAR imagery (3DEP Slope, 3DEP DEM, and 3DEP Hillshade), accessed from the National Regulatory Viewer by CESAS-RDP July – August 2024.
- ☒ USDA NRCS Soil Survey: Exhibit 4a: *Soil Survey Map* and Exhibit 4b: *Hydric Soils Map*, dated 06/2023, included on PDF pages 22 and 25, respectively, of the Applicant's request; and USDA hydric soil rating data, accessed by CESAS-RDP in 07/2024.
- ☒ USFWS NWI maps: NWI data, accessed via the National Regulatory View (NRV) by CESAS-RDP on 07/16/2024.
- ☒ USGS topographic maps: Historic topographic maps, accessed by CESAS-RDP in 07/2024.
- ☒ USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP in 07/2024.
- ☐ Section 10 resources used: Title and Dates
- ☐ NCDWR stream identification forms
- ☒ Antecedent Precipitation Tool Analysis: List Date(s) 06/05/2023 (Normal Conditions); 06/06/2023 (Wetter than Normal); and 07/14/2024 (Wetter than Normal).
- ☒ Other sources of Information: US Drought Monitor (06/06/2023 and 07/16/2024), accessed by CESAS-RDP; Exhibit 5a: *Flood Insurance Rate Map (FIRM)* and Exhibit 5c: *Flood Insurance Rate Map (FIRM)*, dated 06/2023, included on PDF pages 28 and 30, respectively, of the Applicant's request; and StreamStats accessed data by CESAS-RDP in 07/2024

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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.



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Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
WG	Non-JD	N/A

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
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- d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)

3. REVIEW AREA ("AJD Review Area 2"):

- a. ~50 acres
- b. Latitude: 32.8990, Longitude: -82.4178
- c. North of Wadley
- d. Jefferson County
- e. Georgia
- f. The oldest historical aerial imagery available of the review area was dated 1973. The aerial imagery indicates that the review area and surrounding areas were of agricultural land use. The immediate surrounding area appears to have continued to be used for agriculture. In the 1973 aerial, there is a round forested area connected to an easterly ditch that crosses Spann Road. The ditch was free of trees and vegetation. Since that time, the area around the ditch was allowed to naturalize/vegetate. By 2007, the areas immediately adjacent of the ditch are forested, and the ditch is not discernible. Timber harvesting was conducted in the winter of 2023-2024.

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

CESAS-RDP

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAS-2013-00375

- a. The nearest TNW to the subject water is the Ogeechee River, located approximately 23,000 feet 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.
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- a. TNWs (a)(1): N/A
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<sup>4</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.

- 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

## 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>5</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. 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

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<sup>5</sup> 51 FR 41217, November 13, 1986.

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- 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
WG	15.88 acres	Wetland lacks a continuous surface connection to waters of the US

Based on historic imagery (since 1973), a historic ditch traversed the current footprint of WG, passed through a culverted crossing of Spann Road, and terminated in the current footprint of WC. Historic aerials depict that the ditch and adjacent areas of its corridor were allowed to fully vegetate since 1973, indicating that the ditch was not maintained. A review of Lidar imagery indicates that remnants of the ditch may be present within the vegetated/forested area between WG and WC. The Agent inspected the culverted crossing during the June 2023 and July 2024 field visits. The culverted roadway crossing is located approximately 360 feet from the western limits of WC. The culvert was described as being poorly maintained. The culvert empties into a vegetated area that has no hydric soils. There is an area of immediately east of the culvert where the vegetation lacks density. However, no channel or other discrete surface features were observed leading from the culvert.

The Corps conducted a site visit with the Agent on September 10, 2024. The culvert was observed to be almost entirely embedded, with a clearance of approximately 3 inches. Immediately east of the culvert, no discrete feature was discernible due to the growth of vegetation (grasses). However, the density of the area immediately east of the culvert was noticeably less dense than the surrounding area. Upland soils were also observed in the area. Approximately 30 feet east of the culvert outlet, the area becomes forested. Within the forested limits, a discernible path, clear of vegetation with limited leaf litter, was observed for approximately 150 feet. The beginning of the path was level with the immediately adjacent areas, but gains depth after approximately 100 feet, having more ditch-like characteristics. Beyond the 150-foot limit, the ground was heavily covered in debris from tree clearing. Approximately 200 feet from the location that the historic ditch corridor was observed (at the northwestern limits of WC's delineated limits), a path was no longer discernable, even in areas with limited debris. It is understood that no continuous discrete connection currently exists between WG and WC.

The historic ditch and adjacent areas were allowed to naturalize overtime. Further, it is evident that the culvert associated with the ditch and Spann Road has not been sufficiently maintained. Based on the information available, the ditch and culvert have lost sufficient form and/or function to not meet the description of a continuous surface

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connection. Therefore, WG does 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: July-October 2024 (CESAS-RDP)
- b. Field determination(s): June 2023 and July 2024 (Agent); September 2024 (CESAS-RDP)
- c. Data sources used to support this determination (included in the administrative record).
  - ☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: Exhibits 6: *Depiction of Aquatic Resources Map*, dated 06/2023, included on PDF page 37 of the Applicant's request.
  - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
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  - ☒ Photographs: Photos 4 – 5 and 25 – 26, included on PDF pages 101 – 102, and PDF page 115, respectively, of the Applicant's Request; and supplemental photos and associated email correspondence, dated 07/16/2024 through 07/18/2024.
  - ☒ Aerial Imagery: Google Earth historic aerial imagery (1985 – 2024), accessed by CESAS-RDP.
  - ☒ LIDAR: LIDAR imagery (3DEP Slope, 3DEP DEM, and 3DEP Hillshade), accessed from the National Regulatory Viewer by CESAS-RDP July – August 2024.
  - ☒ USDA NRCS Soil Survey: Exhibit 4a: *Soil Survey Map* and Exhibit 4b: *Hydric Soils Map*, dated 06/2023, included on PDF pages 22 and 25, respectively, of the Applicant's request; and USDA hydric soil rating data, accessed by CESAS-RDP in 07/2024.
  - ☒ USFWS NWI maps: NWI data, accessed via the National Regulatory View (NRV) by CESAS-RDP on 07/16/2024.
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- ☒ USGS NHD data/maps: NHD data, accessed from the National Regulatory Viewer by CESAS-RDP in 07/2024.
- ☐ Section 10 resources used: Title and Dates
- ☐ NCDWR stream identification forms
- ☒ Antecedent Precipitation Tool Analysis: List Date(s) 06/05/2023 (Normal Conditions); 06/06/2023 (Wetter than Normal); and 07/14/2024 (Wetter than Normal).
- ☒ Other sources of Information: US Drought Monitor (06/06/2023 and 07/16/2024), accessed by CESAS-RDP; Exhibit 5a: *Flood Insurance Rate Map (FIRM)* and Exhibit 5c: *Flood Insurance Rate Map (FIRM)*, dated 06/2023, included on PDF pages 28 and 30, respectively, of the Applicant's request; and StreamStats accessed data by CESAS-RDP in 07/2024

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.

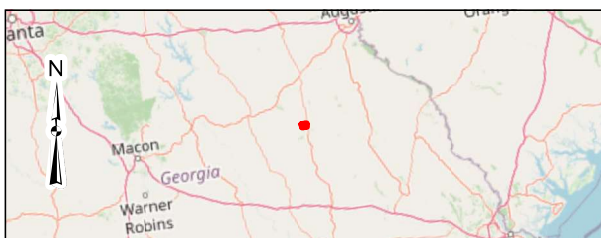




▬ Project Boundary   
 ▬ Wetland   
 ▬ Intermittent Stream  
▬ Perennial Stream   
▬ Ephemeral Stream

0    500    1,000    2,000  
 Feet

DATA SOURCES:  
 ESRI - World Imagery  
 Basemaps



Project No.: HN237094B  
 Date: Jun 2023  
 Drawn By: ML  
 Reviewed By: MB

**Terracon**  
 514 Hillcrest Indust. Blvd  
 Macon, GA  
 PH. 478-757-1606    terracon.com

### Depiction of Aquatic Resources Map

Jefferson County Solar Site  
 Delineated 6/5-6/9/2023  
 Spann Road  
 Wadley, Jefferson County, Georgia

### Exhibit

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