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

CESAS - RDP 22 Oct 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA U.S. 651*, 143 S. Ct. 1322 (2023) ,[1] SAS-2024-00533

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 this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

[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.

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
S1	JD	Section 404
Wet A	JD	Section 404
Wet B	Non-JD	No Authority
Wet C	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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

A. Project Are Size (in acres): 34.4
B. Center Coordinates of the Project Site (in decimal degrees)
Latitude: 33.709281 Longitude: -84.584231
C. Nearest City or Town: South Fulton
D. County: Fulton
E. State: Georgia

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 nearest TNW is the Chattahoochee River which the aquatic resources connect to is approximately 1.46-miles to the northwest.
   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 by the Corps of Engineers on 9/24/2024, 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)), 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, or Georgia/North Carolina, Georgia/Tennessee, Georgia/Alabama, or Georgia/Florida.

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

   The stream (S1) is a relatively permanent water (RPW) and is an unnamed tributary to Boat Rock Creek, an RPW. Boat Rock Creek flows to the Chattahoochee River, a traditionally navigable water (TNW). The S1 is a tributary to the Chattahoochee River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks.

   The wetland (Wet A) is a wetland that abuts the unnamed tributary titled S1, an RPW. The Stream (S1) is a tributary to Boat Rock Creek, an RPW. Boat Rock Creek flows to the Chattahoochee River, a traditionally navigable water (TNW). The wetland (Wet A) is an adjacent wetland to the Chattahoochee River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks. 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 and are contiguous with the unnamed tributary.

The wetland (Wet B) is a wetland that does not has a CSC and does not abut the nearest RPW titled S1, an RPW. The Stream (S1) is a tributary to Boat Rock Creek, an RPW. Boat Rock Creek flows to the Chattahoochee River, a traditionally navigable water (TNW). The wetland (Wet B) is not an adjacent wetland to the Chattahoochee River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks. 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 and are contiguous with the unnamed tributary.

The wetland (Wet C) is a wetland that abuts the unnamed tributary titled S1, an RPW. The Stream (S1) is a tributary to Boat Rock Creek, an RPW. Boat Rock Creek flows to the Chattahoochee River, a traditionally navigable water (TNW). The wetland (Wet C) is an adjacent wetland to the Chattahoochee River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks. 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 and are contiguous with the unnamed tributary.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

[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.

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 (in acres)	Flow Regime and additional description of the tributary	Method for determining flow regime
S1	2191	See attached delineation map	observed flow during site visit during normal precipitation conditions, NCDWR stream identification form

   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
Wet A	0.11	Yes, S1	The wetland boundary abuts stream S1, an RPW
Wet C	0.8	Yes, S1	The wetland boundary abuts stream S1, an RPW

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. 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 (in acres)	Type of resource generally not jurisdictional
Wet B	0.02	Wetland lacks a continuous surface connection to a water of the US. Desktop review conducted by the USACE on 9/17/2024 suggested that Wet B may be contiguous or abutting S 1. A site visit was conducted by the USACE on 9/24/2024 to confirm or deny that there is no CSC to S1. During the site visit there was

[7] 51 FR 41217, November 13, 1986.

		no observed CSC from the wetland to S1 and the section of land between the wetland and S1 has no wetland characteristics.

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): 9/17/2024
2. Date(s) of Field Review (if applicable): 7/3/2023 – Consultant 9/24/2024 – CESAS – RDP

b. Data sources used to support this determination (included in the administrative record).
☒ Aquatic Resources delineation submitted by, or on behalf of, the requestor: "Figure 6: Site Waters" – Consultant received on June 24, 2024
☐ Aquatic Resources delineation prepared by the USACE:
☐ Wetland field data sheets prepared by the Corps:
☐ OHWM data sheets prepared by the USACE:
☐ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
☒ Photographs: Prepared by the Consultant received on June 24, 2024, Prepared/taken by CESAS – RDP 9/24/2024
☒ Aerial Imagery: "Figure 2: Aerial Map" Prepared by consultant received on June 24, 2024
☒ LIDAR: Prepared by CESAS-RDP on 9/17/2024
☒ USDA NRCS Soil Survey: "Figure 3: Site Soils" prepared by consultant received on June 24, 2024
☒ USFWS NWI maps: "Figure 4: National Wetlands Inventory" prepared by consultant, received on June 24, 2024
☐ USGS topographic maps:
☐ USGS NHD data/maps:
☐ Section 10 resources used:
☒ NCDWR stream identification forms
☐ Antecedent Precipitation Tool Analysis: List Date(s)
☐ Other sources of Information: List

10. OTHER SUPPORTING INFORMATION. Upon initial desktop review "Wet B" appeared to be abutting and therefore adjacent to the unnamed perennial stream and a site visit conducted by USACE was requested to confirm the connection. Upon site visit "Wet B" did not show signs of a clear continuous surface connection and therefore was determined to be non-adjacent and a non-jurisdictional aquatic

resource. Soil plugs were taken in the area in between the wetland and the stream and there was no wetland soils or hydrology present, thus creating a boundary between the wetland and S1. The wetland “Wet B” is in a natural depression that is not abutting due to sediment being deposited from S1 during large flood events and no CSC is found along the length of the wetland.

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.

Base Map Source: ESRI Aerial Imagery, 2023

1:12,000

0 600 1,200 2,400 Feet

Westlake Site

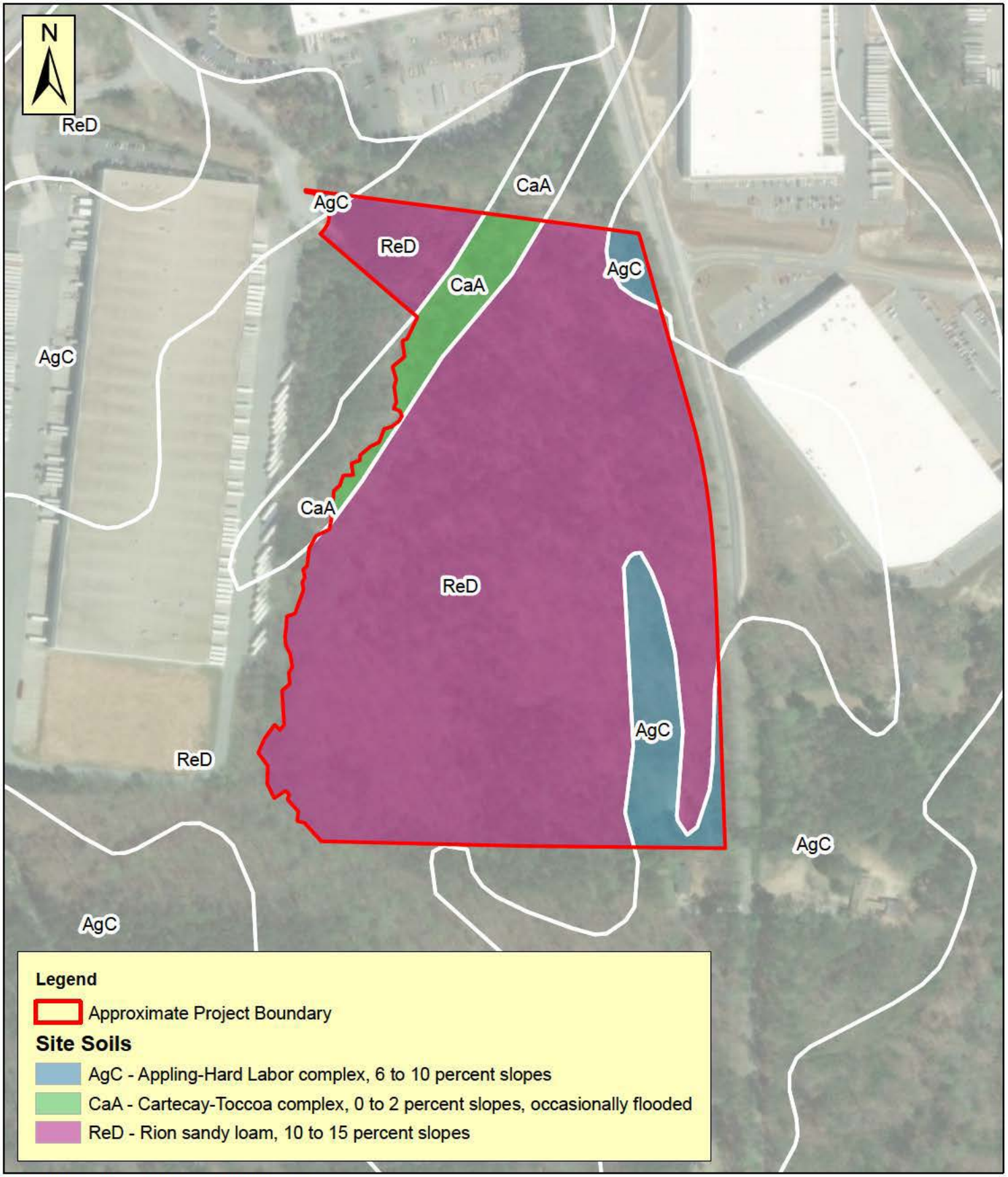
South Fulton, Georgia

corblu ECOLOGY GROUP

Figure 2

Aerial Map

Project No. 02-061523



Base Map Source: ESRI Aerial Imagery, 2023
Soil Data Source: USDA NRCS Web Soil Survey
Downloaded 6/30/2023

1:4,000

0 205 410 820 Feet

Westlake Site

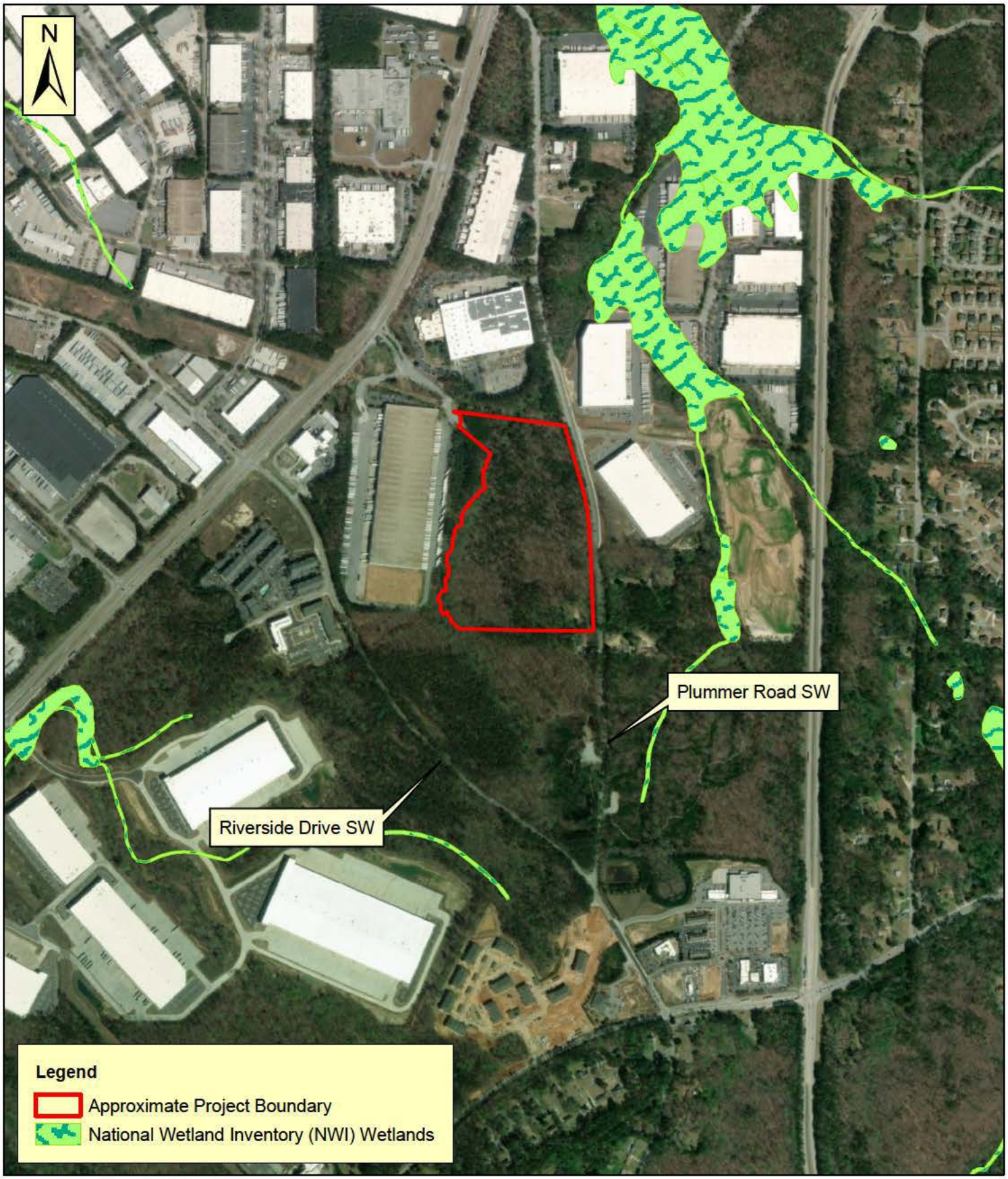
South Fulton, Georgia

corblu ECOLOGY GROUP

Figure 3

Site Soils

Project No. 02-061523



Base Map Source: ESRI Aerial Imagery, 2023
NWI Data Source: USFWS, National Wetlands Inventory (NWI), HUC8 03130002. Downloaded 4/11/2024

1:12,000

0 600 1,200 2,400 Feet

Westlake Site

South Fulton, Georgia

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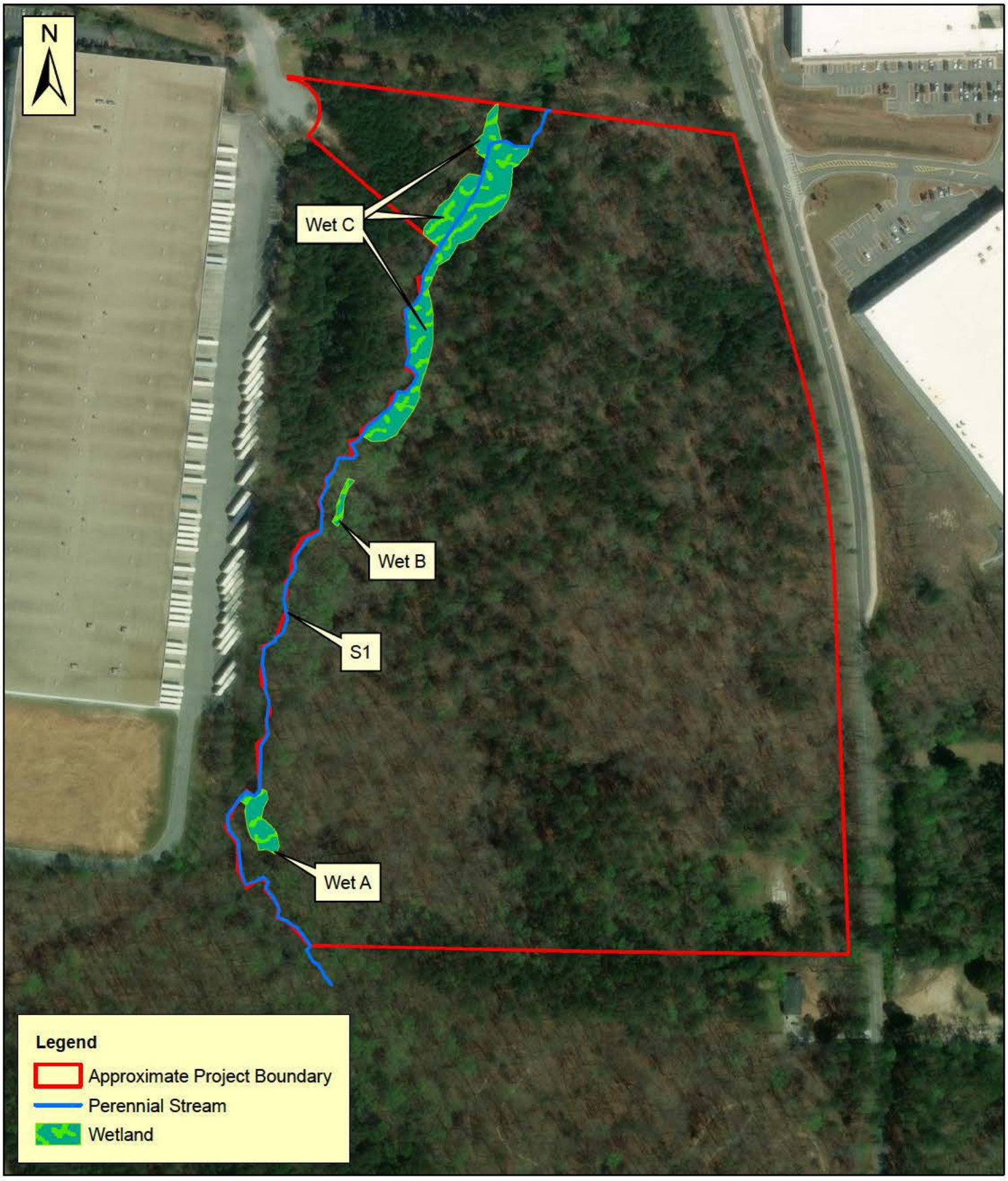
Figure 4

National Wetlands Inventory (NWI)

Project No. 02-061523



Base Map Source: ESRI Aerial Imagery
Survey Date: 7/3/2023

1:3,000

0 150 300 600 Feet

Westlake Site

South Fulton, Georgia

corblu ECOLOGY GROUP

Figure 6

Site Waters

Project No. 02-061523

Photograph No. 1: Typical mixed hardwood forested habitat within the project area.

Photograph No. 2: Downstream facing view of unnamed perennial stream S1.

Photograph No. 3: Perennial stream S1 abutted by forested wetland area Wet C.

Photograph No. 4: Northeast facing view of S1 flowing through Wet C.

Photograph No. 5: Representative view of forested wetland area Wet A, abutting S1.

Photograph No. 6: Representative view of forested wetland area Wet B, located within the floodplain of S1.

NC DWQ Stream Identification Form Version 4.11

Date: 7/3/23	**Project/Site:** Westlake	**Latitude:** 33.711
Evaluator: MSW	**County:** Fulton, GA	**Longitude:** -84.5848
Total Points: *Stream is at least intermittent if ≥ 19 or perennial if ≥ 30** 35.5	**Stream Determination (circle one)** Ephemeral Intermittent Perennial ☑	**Other** *e.g. Quad Name:*

A. Geomorphology (Subtotal = 18)	Absent	Weak	Moderate	Strong
1[a]. Continuity of channel bed and bank	○ 0	○ 1	◉ 2	○ 3
2. Sinuosity of channel along thalweg	○ 0	○ 1	○ 2	◉ 3
3. In-channel structure: ex. riffle-pool, step-pool, ripple-pool sequence	○ 0	◉ 1	○ 2	○ 3
4. Particle size of stream substrate	○ 0	○ 1	◉ 2	○ 3
5. Active/relict floodplain	○ 0	○ 1	○ 2	◉ 3
6. Depositional bars or benches	○ 0	○ 1	◉ 2	○ 3
7. Recent alluvial deposits	○ 0	◉ 1	○ 2	○ 3
8. Headcuts	○ 0	○ 1	◉ 2	○ 3
9. Grade control	○ 0	◉ 0.5	○ 1	○ 1.5
10. Natural valley	○ 0	○ 0.5	○ 1	◉ 1.5
11. Second or greater order channel	◉ No = 0		○ Yes = 3	

[a] artificial ditches are not rated; see discussions in manual

B. Hydrology (Subtotal = 9.5)				
12. Presence of Baseflow	○ 0	○ 1	◉ 2	○ 3
13. Iron oxidizing bacteria	○ 0	◉ 1	○ 2	○ 3
14. Leaf litter	○ 1.5	◉ 1	○ 0.5	○ 0
15. Sediment on plants or debris	○ 0	○ 0.5	◉ 1	○ 1.5
16. Organic debris lines or piles	○ 0	○ 0.5	○ 1	◉ 1.5
17. Soil-based evidence of high water table?	○ No = 0		◉ Yes = 3	

C. Biology (Subtotal = 8)				
18. Fibrous roots in streambed	○ 3	◉ 2	○ 1	○ 0
19. Rooted upland plants in streambed	◉ 3	○ 2	○ 1	○ 0
20. Macrobenthos (note diversity and abundance)	○ 0	◉ 1	○ 2	○ 3
21. Aquatic Mollusks	◉ 0	○ 1	○ 2	○ 3
22. Fish	○ 0	○ 0.5	◉ 1	○ 1.5
23. Crayfish	◉ 0	○ 0.5	○ 1	○ 1.5
24. Amphibians	○ 0	○ 0.5	◉ 1	○ 1.5
25. Algae	◉ 0	○ 0.5	○ 1	○ 1.5
26. Wetland plants in streambed	○ FACW = 0.75 ○ OBL = 1.5 ◉ Other = 0			

*perennial streams may also be identified using other methods. See p. 35 of manual.

Notes:

Sketch: