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

SAS-2017-00166 November 12, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 598 U.S. 651 (2023) , SAS-2017-00166

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	404
Wetland 2	JD	404
Tributary 1	JD	404
Tributary 2	JD	404
Tributary 3	JD	404
Tributary 4	JD	404
Pond 1	JD	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 ("Poole Mountain South"):

   a. 57.02 acres
   b. Latitude: 34.0497, Longitude: -83.8515
   c. Northwest of Auburn
   d. Gwinnett County
   e. Georgia
   f. Aerial imagery (since 1955) indicate that the property was historically used for agriculture. However, the property was gradually allowed to vegetate increasingly over the years, particularly after the 2000s.

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

The Middle Oconee River is the nearest TNW to which the subject aquatic resources in the review area connect. It is located approximately 80,000 linear feet (~15 linear miles) east of the review area.

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

   The first reach of Tributary 1 flows southward through Wetland 1 and Wetland 2 and is impounded at Pond 1. The impoundment results in an approximately 200-foot break between Pond 1 and beginning of Tributary 1's second reach. From the outlet of Pond 1's impoundment, Tributary 1 flows southward and into Tributary 2. Tributary 3 flows generally northward and into Tributary 2. Tributary 2 flows eastward and out of the review area.

   Tributary 4 flows eastward and then southeastward until it exits the review area.

   According to USGS StreamStats, after Tributary 4 exits the property, it flows for approximately 800 feet southeastward and enters Tributary 2. After Tributary 2 exits the review area, it flows northeastward for approximately 5,000 feet (~1 mile) and enters Little Mulberry River. Little Mulberry River flows eastward for approximately 30,000 feet (~5.5 miles) and enters Mulberry River. Mulberry River flows eastward for approximately 90,000 feet (~17 miles) and enters the Middle Oconee River, the closest TNW.

6. SECTION 10 JURISDICTIONAL WATERS[4]: 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 use because of changed conditions or the presence of obstructions.

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):

Name of Aquatic Resource	Size (in acres)	Rationale, including written Description of Lateral Limits or reference to an attached map showing the lateral limits	Method for determining lateral limits
Pond 1	0.26	See attached delineation map	OHWM indicators (Natural line impressed on the bank)

Pond 1: Subject water is an impoundment of Tributary 1, located in the western portion of the review area. Based on historic aerial imagery from 1963, the footprint of the pond was located within a southerly forested corridor. Maintained crops were adjacent to both sides of the corridor. The pond appears on aerial imagery from 1972, with a constructed dam at its southern limits. Pond 1 impounds Tributary 1, a relatively permanent water (RPW) tributary. Therefore, Pond 1 meets the definition of an (a)(4) water.

e. Tributaries (a)(5): N/A

Name of Aquatic Resource	Size (linear feet)	Flow Regime and additional description of the tributary	Method for determining flow regime
Tributary 1	983	Intermittent; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form
Tributary 2	1,033	Perennial; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form
Tributary 3	10	Intermittent; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form
Tributary 4	1,420	Intermittent; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form

Tributary 1: The subject water is a southeasterly tributary of Tributary 2, located in the western portion of the review area. During the Agent's onsite delineation, Tributary 1

was observed to have two (2) flow regimes within its relevant reach (referred to as ES1 and IS1). The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regimes. The first assessed segment (ES1), 52 linear feet in length, received a score of 13.5, concluding an ephemeral flow regime. The second assessed segment (IS1), 931 linear feet in length (including both reaches upstream and downstream of the impoundment), received a score 23, concluding an intermittent flow regime. Comprising a majority of the tributary (95%), segment IS1's intermittent flow regime best characterizes Tributary 1. Tributary 1 is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Middle Oconee River. Therefore, it meets the definition of an (a)(5) water.

Tributary 2: The subject water is an easterly tributary that traverses the southern boundary of the review area. Based on available information, it is understood that the tributary enters the property at stream order that is <1. Its relevant reach does not end within the property. During the Agent's onsite delineation, the tributary was observed to contain a single flow regime. The assessed reach (PS1) received a score of 35 on the NC DWQ Stream Identification Form Version 4.11, concluding a perennial flow regime. Tributary 2 is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Middle Oconee River. Therefore, it meets the definition of an (a)(5) water.

Tributary 3: The subject water is a northerly tributary of Tributary 2. It enters the review area from the south, just before its confluence with Tributary 2. During the Agent's onsite delineation, the tributary was observed to contain a single flow regime. The assessed reach (IS3) received a score of 19 on the NC DWQ Stream Identification Form Version 4.11, concluding an intermittent flow regime. Tributary 3 is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Middle Oconee River. Therefore, it meets the definition of an (a)(5) water.

Tributary 4: The subject water is a southeasterly tributary of Tributary 2, located in the eastern portion of the review area. Its confluence with Tributary 2 is located outside the review area. During the Agent's onsite delineation, Tributary 4 was observed to have two (2) flow regimes within its relevant reach (referred to as ES2 and IS2). The scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regimes. The first assessed segment (ES2), 202 linear feet in length, received a score of 13, concluding an ephemeral flow regime. The second assessed segment (IS1), 1,218 linear feet in length, received a score 21.5, concluding an intermittent flow regime. Comprising a majority of the tributary (86%), segment IS2's intermittent flow regime best characterizes Tributary 4. Tributary 4 is a relatively permanent tributary of Little Mulberry River, an RPW and tributary of the Middle Oconee River. Therefore, it meets the definition of an (a)(5) water.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): N/A

Name of Aquatic Resource	Size (in acres)	Contiguous with or abutting? If so, list water	Describe continuous surface connection
Wetland 1	0.009	Yes, Tributary 1	The wetland boundary is connecting and contiguous with Tributary 1, an RPW
Wetland 2	0.24	Yes, Tributary 1 and Pond 1	The wetland boundary is connecting and contiguous with Tributary 1 (an RPW) and Pond 1 (an impoundment of an RPW)

Wetland 1: Wetland 1 is an emergent wetland located in the western portion of the review area. It has a continuous surface connection (CSC) by physically abutting Tributary 1, an RPW. Therefore, it meets the definition of an (a)(7) water.

Wetland 2: Wetland 2 is an emergent wetland located in the western portion of the review area. It has a continuous surface connection by physically abutting Tributary 1 (an RPW) and Pond 1 (an impoundment of an RPW). 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. 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

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

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). N/A

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: September-November 2024 (CESAS-RDP)
b. Field determination(s): March 13-21, 2024 (Agent); October 2024 (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: Exhibit 1: *Aerial Photo W/ Aquatic Resource Locations*, as prepared by the Agent, and dated 11/7/2024; Exhibit 4: *Cowardin Table*, as prepared by the Agent, and dated 11/7/2024; and Exhibit 10: *Data Point Locations*, as prepared by the Agent, and dated 3/27/2024.
   ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
   ☒ Wetland field data sheets: Sampling points: *W1* and *U1*, as prepared by the Agent, and dated 03/13/2024.
   ☐ 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 and key maps collectively prepared by the Agent, and dated 03/27/2024 including, Exhibit 11: *Photo Locations*; Exhibit 12: *Site Photos*; Exhibit 13: *Photo Locations*; and Exhibit 14: *Site Photos*.
   ☒ Aerial Imagery: Exhibit 4: *Aerial Photograph*, as prepared by the Agent, and dated 3/27/2024.

☒ LIDAR: LIDAR imagery (3DEP DEM and 3DEP Hillshade), accessed from the National Regulatory Viewer (NRV) by CESAS-RDP in September 2024.

☒ USDA NRCS Soil Survey: Exhibit 5: Soils Survey Map and Exhibit 6: USDA Soils Legend, as prepared by the Agent, and dated 03/27/2024; and USDA hydric soil rating data, accessed by CESAS-RDP in September 2024.

☐ USFWS NWI maps: Exhibit 7: *USFWS NWI Map*, as prepared by the Agent, and dated 3/27/2024.

☒ USGS topographic maps: Historic topographic maps (1891-2024), accessed by CESAS-RDP in September 2024.

☒ USGS NHD data/maps: NHD data, accessed from the NRV by CESAS-RDP in September 2024.

☐ Section 10 resources used: Title and Dates

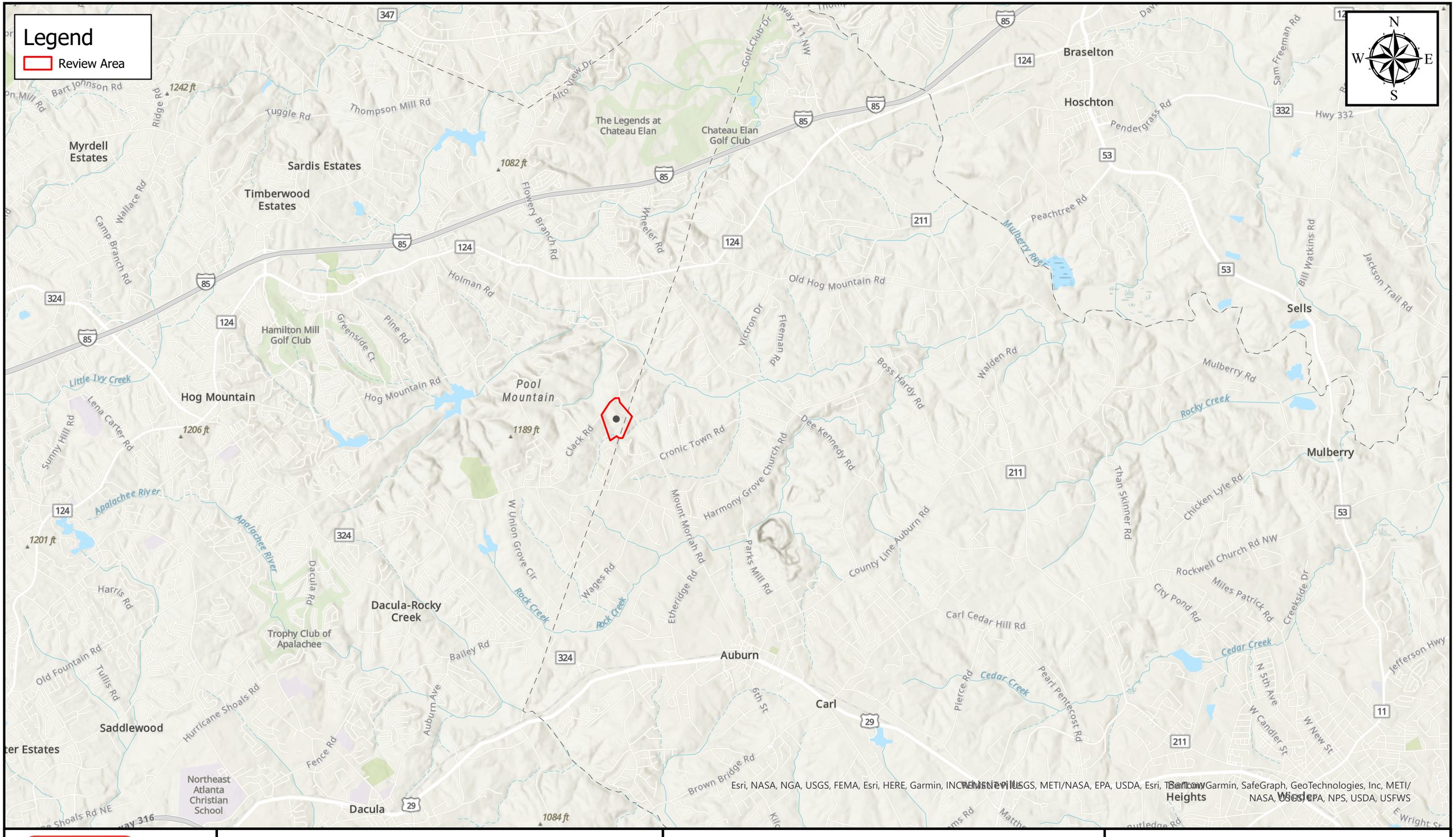
☒ NC DWQ stream identification forms

☒ Antecedent Precipitation Tool Analysis (List Date(s)): APT data between 3/13/24 and 3/21/24 (all "Wetter than Normal" conditions); and APT data from 10/17/24 ("Normal Conditions").

☒ Other sources of Information: Exhibit 9: *FEMA Flood Hazard Map*, as prepared by the Agent, and dated 3/27/2024; and Exhibit 8: *USGS Stream Stats Map*, as prepared by the Agent, and dated 3/27/2024.

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.



SAS-2017-00166 (Poole Mountain South)

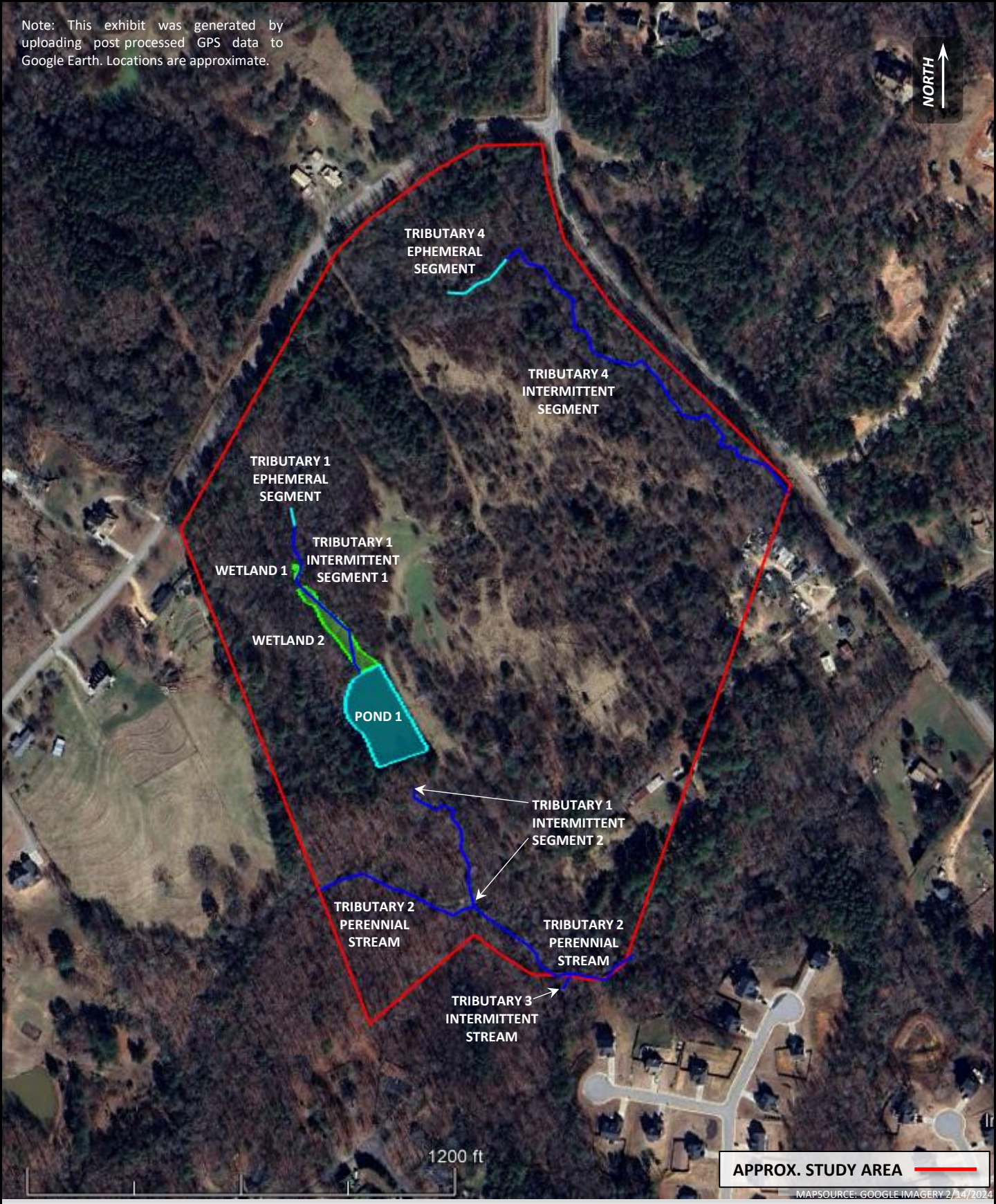
0 1 2 4
mi

Map Center: 83.830536°W 34.050197°N

Map Created by: CESAS-RDP

Date: 11/12/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



AERIAL PHOTO W/ AQUATIC RESOURCE LOCATIONS

DELINEATION OF AQUATIC RESOURCES
POOLE MOUNTAIN SOUTH
SAS-2017-00166
GWINNETT COUNTY, GEORGIA

EXHIBIT 1
PREPARED 11/7/2024 BY:
NELSON ENVIRONMENTAL, INC.
www.NelsonEnvironmental.us PH:404/862-1665

PREPARED FOR:
ST. BOURKE