

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

SAS-2021-00048

December 30, 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-2021-00048

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 iurisdiction.

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 Georgia due to litigation.

1. SUMMARY OF CONCLUSIONS.

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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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	Section 404
Wetland 2	JD	Section 404
Wetland 3	JD	Section 404
Wetland 4	JD	Section 404
Wetland 5	JD	Section 404
Wetland 6	Non-JD	N/A
Wetland 7	JD	Section 404
Wetland 8	JD	Section 404
Wetland 9	Non-JD	N/A
OW Wetstone Creek	JD	Section 404
OW4	JD	Section 404
OW5	JD	Section 404
OW5A	JD	Section 404
OW5B	JD	Section 404
OW7	JD	Section 404
OW Reservoir 14	JD	Section 404
OW Pond 4	JD	Section 404
OW Pond 5B	JD	Section 404
OW Pond 7	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 (2023)
- 3. REVIEW AREA.
 - A. ~800 acres
 - B. Latitude: 33.4222, Longitude: -82.7257
 - C. Northwest of Warrenton
 - D. Warren County
 - E. Georgia

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G. Onsite waters are associated with Rocky Comfort Creek and Whetstone Creek. Historic imagery indicates that the property has been historically used for agriculture. Reservoir 14 is located in the eastern portion of the review area.

- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
 - A. The Ogeechee River, located approximately 185,000 linear feet (56 linear kilometers) southeast of the subject review, is the nearest TNW.
 - 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

Wetland 2 abuts and drains into OW Wetstone Creek (Whetstone Creek). OW Wetstone Creek flows southward and into OW Reservoir 14 (Reservoir 14), an impoundment of OW Wetstone Creek. Wetland 3 abuts and drains into OW Reservoir 14. OW Reservoir 14 flows southward to its impoundment, located along a boundary of the review area. Flows from OW Reservoir 14 are understood to discharge outside of the review area and into an offsite reach of OW Wetstone Creek. OW Wetstone Creek reenters the review area.

Wetland 1 drains primarily eastward into the reach of OW Wetstone Creek that reenters the review area. OW Wetstone Creek flows southward and exits the review area.

OW4 flows southward and into OW Pond 4, an impoundment of OW4. OW Pond 4 discharges southward through its impoundment and into OW4. OW4 continues to flow southward and exits the review area. It is understood to continue to flow southward until it drains into Rocky Comfort Creek. Water from Wetland 4 either drains into OW4 or OW Pond 4.

A northern portion of Wetland 5 has sections that either abuts and directly drain into OW Pond 5 and OW5B, or drain eastward outside of the review area. OW Pond 5, an impoundment of OW5B drains southeastward and discharges from its

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impoundment into OW5B. OW5B flows southeastward and exits the review area. OW5B is understood to continue to flow eastward and into Rocky Comfort Creek.

Water from OW5A and Wetland 3 flow westward and exit the review area. Both waters are understood to continue westward until they drain into Rocky Comfort Creek. A southern portion of Wetland 5 has sections that either drain directly into OW4, or drain westward or southward until they exit the review area, from which they are understood to ultimately drain into Rocky Comfort Creek.

OW7 flows southward and into OW Pond 7, an impoundment of OW7. OW Pond 7 discharges southward through its impoundment and into OW7. OW7 continues to flow southward enters OW5. A southeastern portion of Wetland 5 drains into OW5. OW5 flows eastward until it exits the review area. OW5 is understood to flow into Rocky Comfort Creek.

Wetland 8 drains northward and exits the review area. It is understood to continue north and drain into an offsite reach of OW5. A southeastern portion of Wetland 5 drains either northward or eastward outside of the review area. It is understood to continue and drain into Rocky Comfort Creek.

From the southern limits of the review area, OW Wetstone is understood to flow southward for approximately 9,000 linear feet and enters Rocky Comfort Creek. From this confluence, Rocky Comfort Creek is understood to flow for approximately 75 kilometers (approximately 24,600 feet) until it enters the Ogeechee River, the nearest TNW.

- 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

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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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):

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
OW Reservoir 14	8.87	See attached delineation map	OHWM indicators (Vegetation matted down, bent, or absent; and water staining)
OW Pond 4	2.86	See attached delineation map	OHWM indicators (Vegetation matted down, bent, or absent; and water staining)
OW Pond 5B	1.49	See attached delineation map	OHWM indicators (Vegetation matted down, bent, or absent; and water staining)
OW Pond 7	0.67	See attached delineation map	OHWM indicators (Vegetation matted down, bent, or absent; and water staining)

OW Reservoir 14: OW Reservoir 14 is located in the eastern portion of the property. Historic topographic maps indicate that it was established in between 1963 and 1972. It impounds flows of OW Wetstone Creek, an RPW. Therefore, it meets the definition of an (a)(4) water.

OW Pond 4: OW Pond 4 is located in the center portion of the property. Historic topographic maps and aerial imagery indicate that it was established in between 1988 and 1993. It impounds flows of OW4, an RPW. Therefore, it meets the definition of an (a)(4) water.

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OW Pond 5B: OW Pond 5B is located in the northwestern portion of the property. Historic topographic maps indicate that it was established in between 1963 and 1972. It impounds flows of OW5B, an RPW. Therefore, it meets the definition of an (a)(4) water.

OW Pond 7: OW Pond 7 is located in the northwestern portion of the property. Historic topographic maps indicate that it was established in between 1963 and 1972. It impounds flows of OW7, an RPW. Therefore, it meets the definition of an (a)(4) water.

Name of Size (in Aquatic Inear feet) Resource		Flow Regime and additional description of the tributary	Method for determining flow regime	
OW Wetstone Creek	2916	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	
OW4	3102	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	
OW5	4315	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	
OW5A	1781	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	
OW5B	1558	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	
OW7	3703	Perennial; See additional description below.	observed flow during site visit during normal precipitation conditions	

e. Tributaries (a)(5):

OW Wetstone Creek: The tributary is located along the eastern boundary of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have a perennial flow regime. The tributary is understood to flow year-round (relatively permanently). OW Wetstone Creek is a relatively permanent tributary of Rocky Comfort Creek, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

OW4: The tributary is located in the center of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have ephemeral flow within the reach located above OW Pond 4, and a perennial flow regime in the reach below OW Pond 4. The relative reach of the OW4 (which includes offsite limits), is understood primarily flow year-round (relatively permanently). OW4 is best characterized as a relatively permanent tributary of Rocky Comfort Creek, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

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OW5: The tributary is located in the center of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have a perennial flow regime. The tributary is understood to flow year-round (relatively permanently). OW5 is a relatively permanent tributary of Rocky Comfort Creek, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

OW5A: The tributary is located in the center of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have a perennial flow regime. The tributary is understood to flow year-round (relatively permanently). OW5A is a relatively permanent tributary of Rocky Comfort Creek, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

OW5B: The tributary is located in the center of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have a perennial flow regime. The tributary is understood to flow year-round (relatively permanently). OW5B is a relatively permanent tributary of Rocky Comfort Creek, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

OW7: The tributary is located in the center of the review area. During the Agent's onsite delineation (conducted during Normal Conditions based on the APT), the tributary was observed to have a perennial flow regime. The tributary is understood to flow year-round (relatively permanently). OW7 is a relatively permanent tributary of OW5, an RPW and tributary of the Oconee River. Therefore, it meets the definition of an (a)(5) water.

- f. The territorial seas (a)(6): N/A
- Name of Size (in Contiguous with Describe continuous surface connection Aquatic or abutting? If so, acres) Resource list water 10.96 Wetland 1 The wetland boundary is connecting and contiguous with Yes OW Wetstone Creek, an RPW. Wetland 2 9.13 Yes The wetland boundary is connecting and contiguous with OW Wetstone Creek, an RPW. 5.11 Wetland 3 Yes The wetland boundary is connecting and contiguous with OW Wetstone Creek, an RPW, and OW Reservoir 18, an impoundment of an RPW.
- g. Adjacent wetlands (a)(7):

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Wetland 4	13.58	Yes	The wetland boundary is connecting and contiguous with OW4, an RPW, and OW Pond 4, an impoundment of an RPW.	
Wetland 5	81.88	Yes	The wetland boundary is connecting and contiguous with OW5, OW5A, OW5B, and OW7, all RPWs, and OW Pond 5B and OW Pond 7, impoundments of RPWs.	
Wetland 7	5.96	Yes	The wetland boundary is connecting and contiguous with OW7, an RPW, and OW Pond 7, an impoundment of an RPW.	
Wetland 8	1.46	Yes	The wetland boundary is understood to be connecting and contiguous with OW5, an RPW.	

Wetland 1: Wetland 1 is located in the southeastern portion of the review area. The wetland abuts and drains into OW Wetstone Creek, an RPW and tributary of the Ogeechee River. Therefore, it meets the definition of an (a)(7) water.

Wetland 2: Wetland 2 is located in the northeastern portion of the review area. The wetland abuts and drains into OW Wetstone Creek, an RPW and tributary of the Ogeechee River. Therefore, it meets the definition of an (a)(7) water.

Wetland 3: Wetland 3 is located in the eastern portion of the review area. The wetland abuts and drains into OW Wetstone Creek, an RPW and tributary of the Ogeechee River and OW Reservoir 18, an impoundment of an RPW. Therefore, it meets the definition of an (a)(7) water.

Wetland 4: Wetland 4 is located in the center of the review area. The wetland abuts and drains into OW4, an RPW and tributary of the Ogeechee River and OW Pond 4, an impoundment of an RPW. Therefore, it meets the definition of an (a)(7) water.

Wetland 5: Wetland 5 is located throughout the center and western portions of the review area. The wetland abuts and drains into OW5, OW5A, OW5B, and OW7, RPWs and tributaries of the Ogeechee River, and OW Pond 5B and OW Pond 7, impoundments of RPWs. Therefore, it meets the definition of an (a)(7) water.

Wetland 7: Wetland 7 is located in the western portion of the review area. The wetland abuts and drains into OW4, an RPW and tributary of the Ogeechee River and OW Pond 7, an impoundment of an RPW. Therefore, it meets the definition of an (a)(7) water.

Wetland 8: Wetland 8 is located in the southwestern portion of the review area. The wetland is understood to abut and drain into an offsite reach of OW5, an RPW and tributary of the Ogeechee River. Therefore, it meets the definition of an (a)(7) water.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

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- 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 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).

Wetland 6: Wetland 6 is located in the southeastern portion of the review area. Based on available information, the current footprint of the wetland was upland until a pond was established circa 1972, likely to support an agricultural operation. There is no

⁵ 51 FR 41217, November 13, 1986.

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indication that the pond was an impoundment of a tributary. The pond reverted into a wetland. During the Agent's onsite delineation, the wetland was not saturated and primarily contained FAC vegetative species. No inlet, outlet, or associated discrete features were observed. Further, the area between Wetland 3 and Wetland 6 were determined to be uplands. Wetland 6 does not abut or have a continuous surface connection to a jurisdictional water. Therefore, it does not meet the definition of an (a)(7) water.

Wetland 9: Wetland 9 is located in the southern portion of the review area, north of W Elam Church Road. Based on historic aerial imagery, the current footprint of the wetland was cleared uplands circa 1955. The area was allowed to naturalize into forest until circa 1993, when it is indicated that land disturbance activities occurred to accommodate field road establishment. It is understood that the current footprint of the wetland was excavated during this time. The excavated area was allowed to naturalize. No inlet, outlet, or discrete features were observed during the Agent's onsite delineation. Wetland 9 does not abut or have a continuous surface connection to a jurisdictional water. Therefore, it does not meet the definition of an (a)(7) 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. Office (desktop) determination: March-December 2024 (CESAS-RDP)
 - b. Field determination(s): November-December 2023 (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: Page 1 of 1: *Project Key Map*, as prepared by the agent and dated 1/15/2024; and Page 1 of 24 – Page 24 of 24: Aquatic Resources *Delineation Map[s]*, as prepared by the Agent, and dated 11/7/2024.
 - $\hfill\square$ Aquatic Resources delineation prepared by the USACE: Title and Date
 - \boxtimes Wetland field data sheets
 - □ 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
 - \boxtimes Photographs: Site photographs (Page 1 of 13 Page 13 of 13), prepared by the Agent, and dated 11-12/2023.

Aerial Imagery: Aerial imagery retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP from 11-12/2024; and historic aerial imagery from retrieved from Google Earth by CESAS-RDP in 12/2024.

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LIDAR: LIDAR (3DEP DEM and 3DEP Hillshade) and 2-foot contour imagery, retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in 12/24.

⊠ USDA NRCS Soil Survey: Page 1 of 24 – Page 24 of 24: *Hydric Rating by Map Unit*, as prepared by the Agent, and dated 11/7/2024.

☑ USFWS NWI maps: NWI map retrieved by CESAS-RDP in 12/2024.

 \boxtimes USGS topographic maps: Page 1 of 24 – Page 24 of 24: USGS Topographic *Map*, as prepared by the Agent, and dated 11/7/2024; and historic topographic maps retrieved by CESAS-RDP in 12/2024.

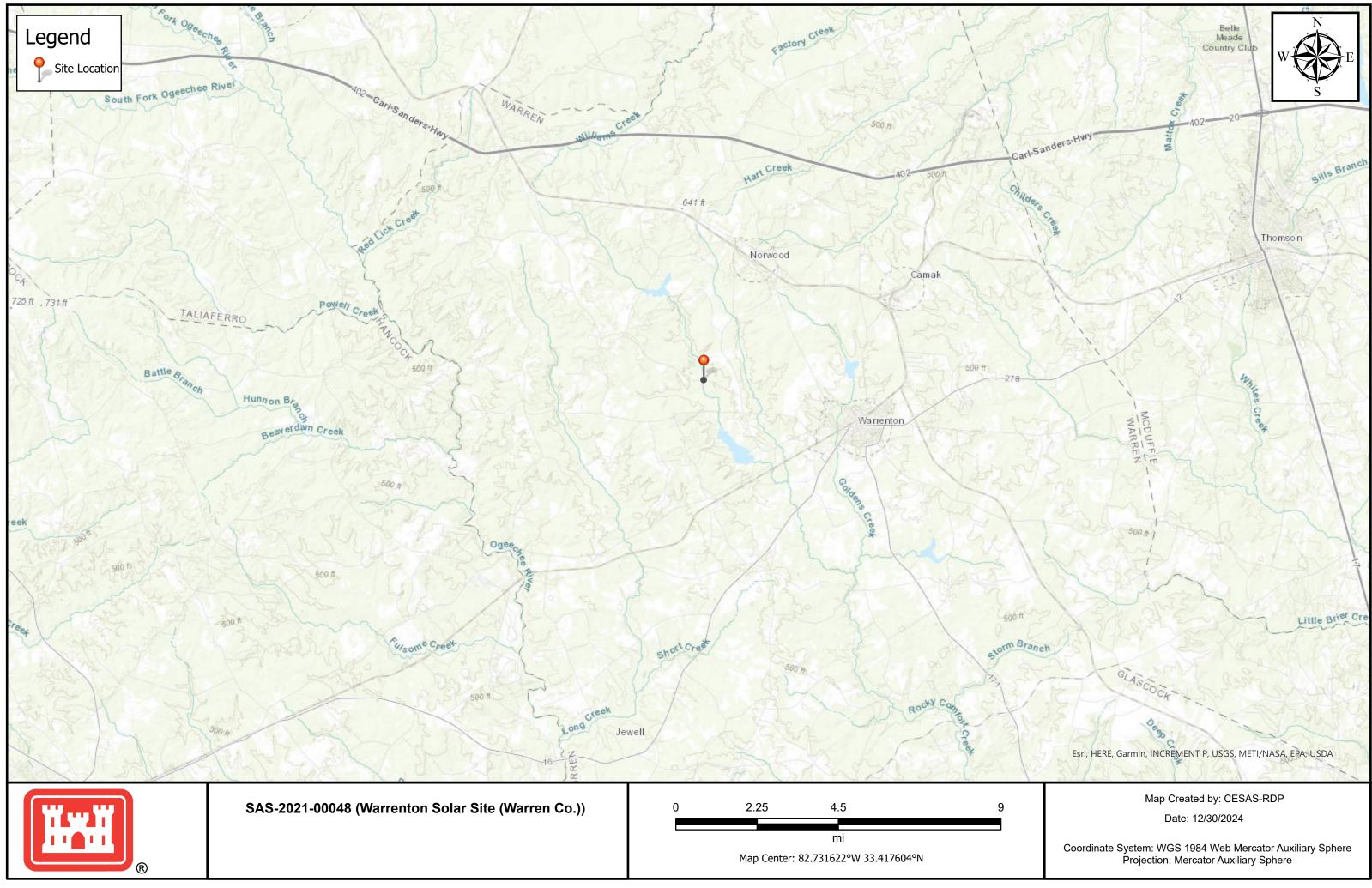
☑ USGS NHD data/maps: NHD data layer contained within Page 1 of 24 – Page 24 of 24: *Aquatic Resources Delineation Map[s]*, as prepared by the Agent, and dated 11/7/2024, retrieved from the NRV by CESAS-RDP in 07/24.

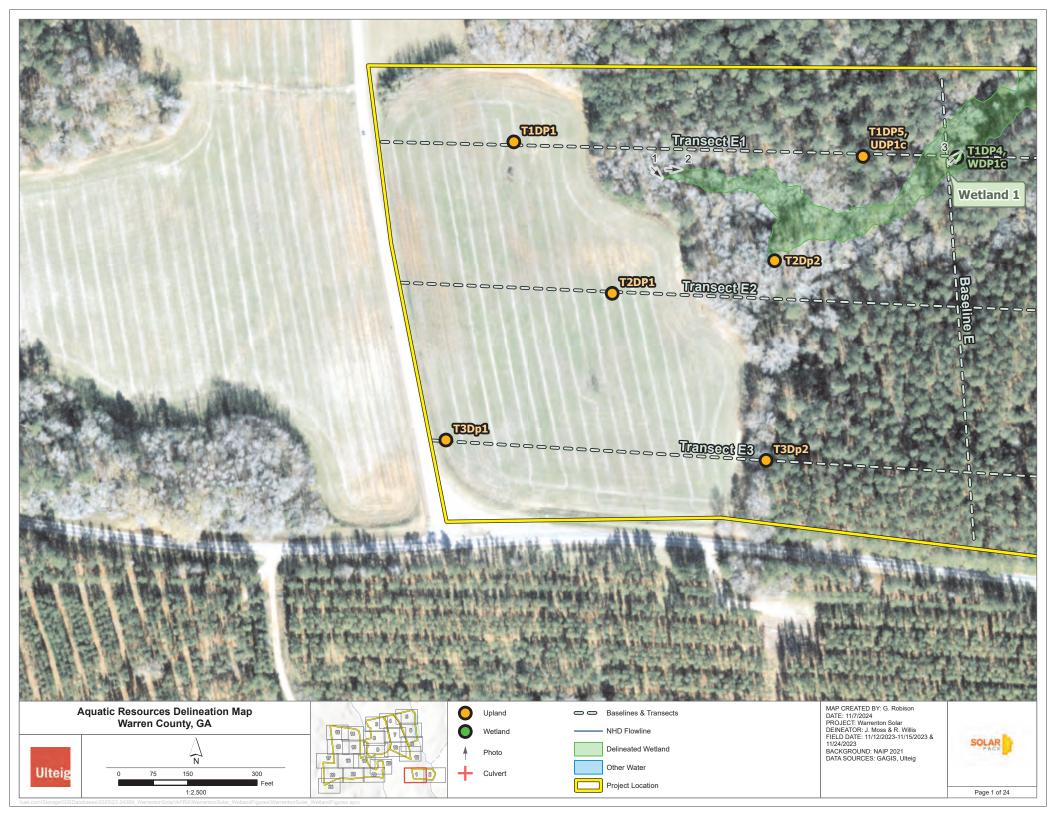
- □ Section 10 resources used: Title and Dates
- □ NC DWQ stream identification forms
- Antecedent Precipitation Tool Analysis (List Date(s)): APT Data from 11/13/2023 (Normal Conditions).

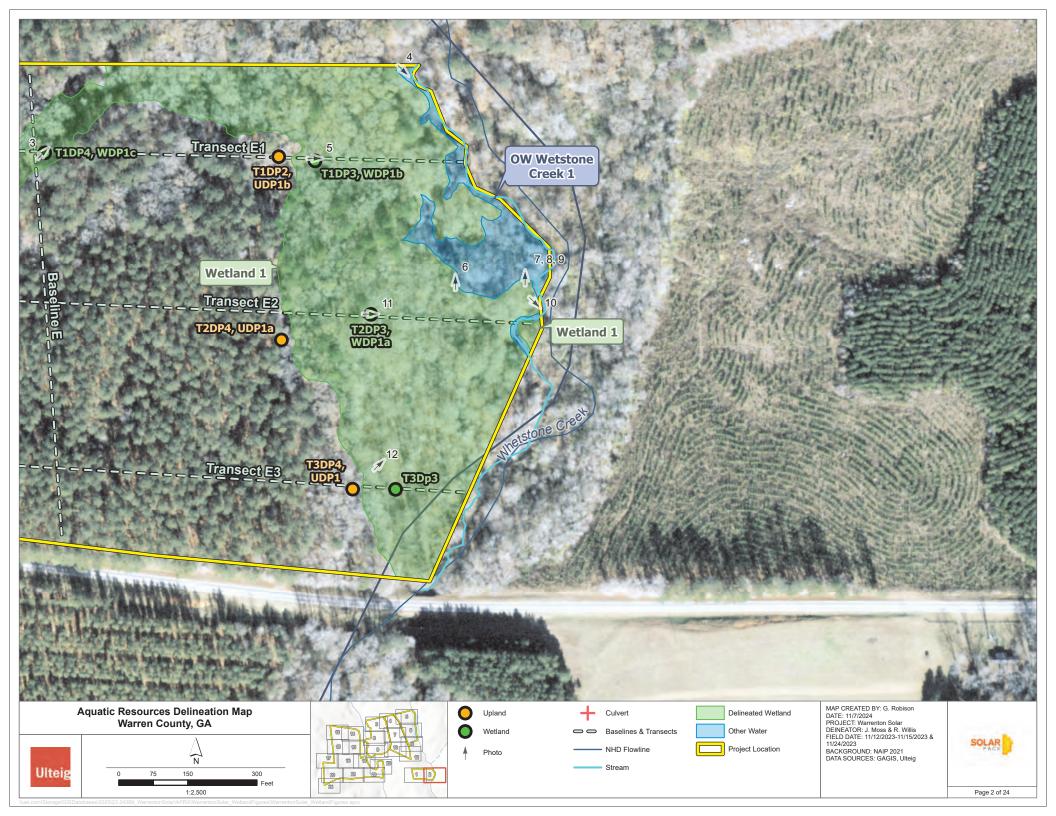
☑ Other sources of Information: FEMA Flood Zone data retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP in 12/24; and StreamStats data retrieved by CESAS-RDP in 12/24.

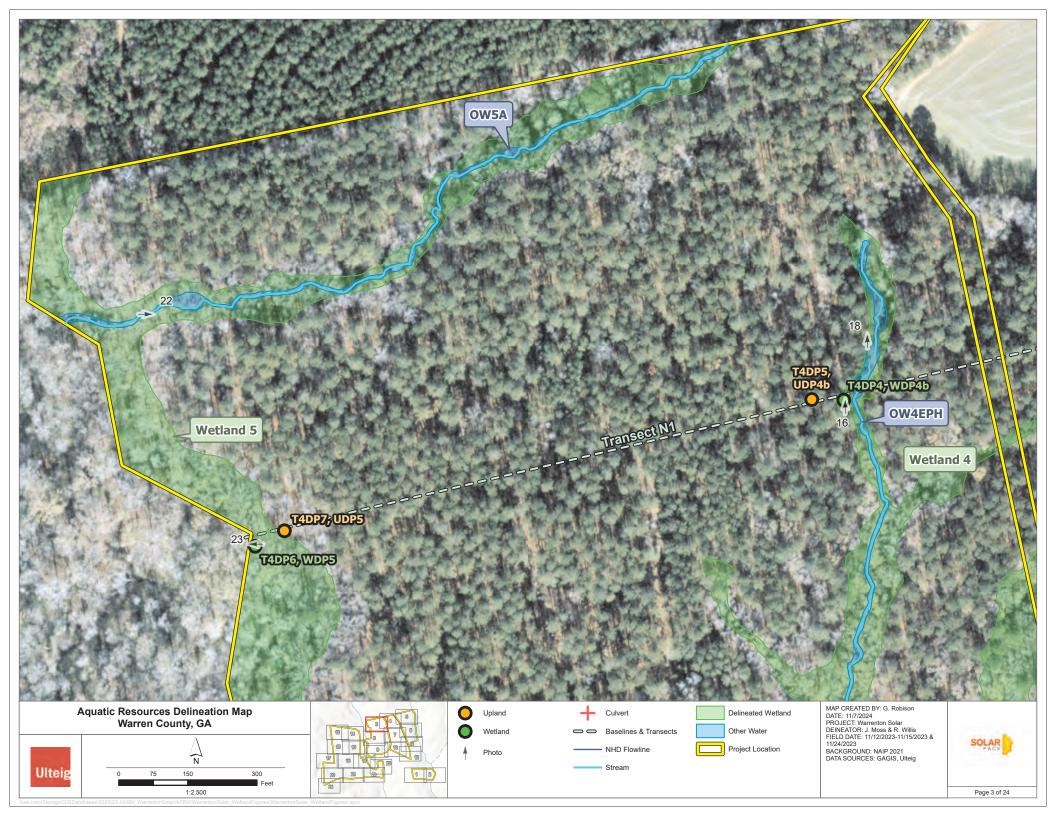
10. OTHER SUPPORTING INFORMATION. N/A

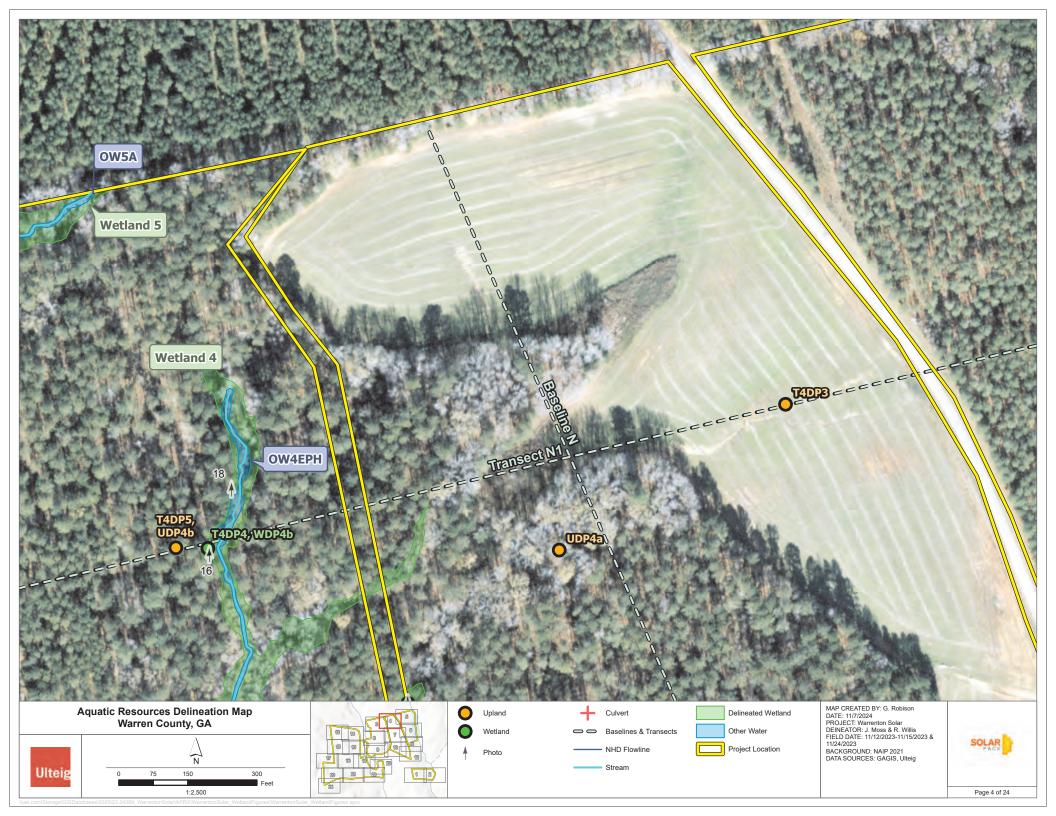
11.NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

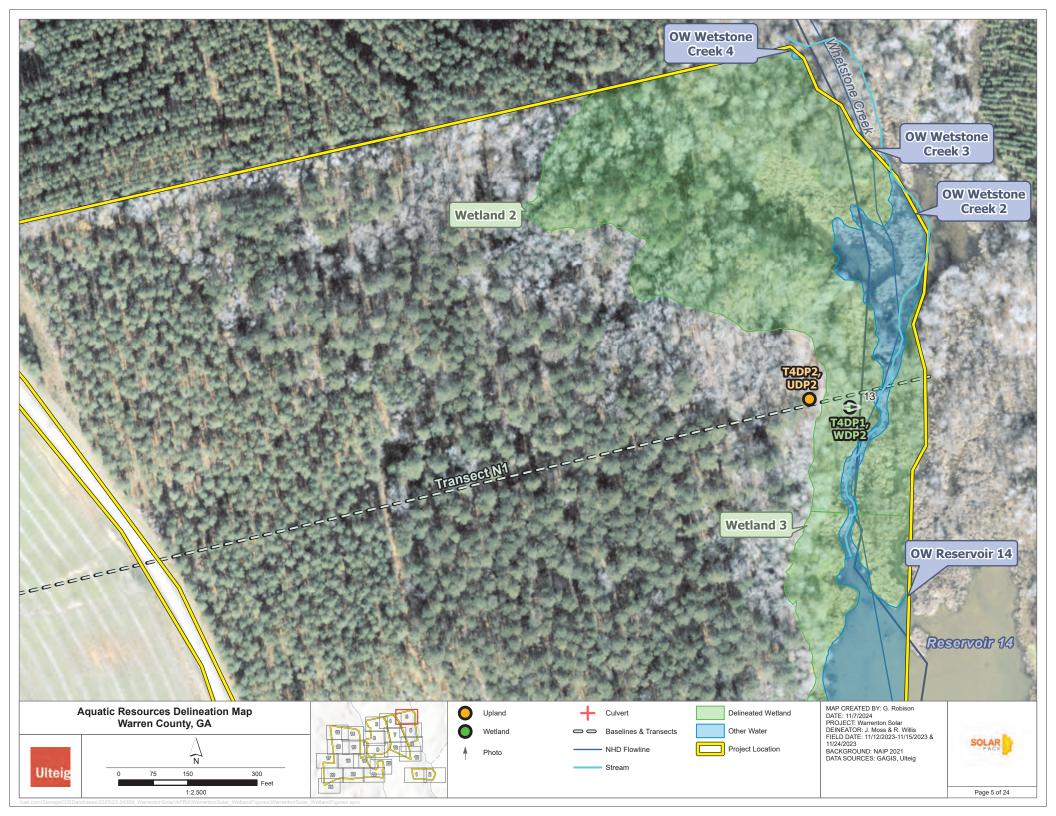


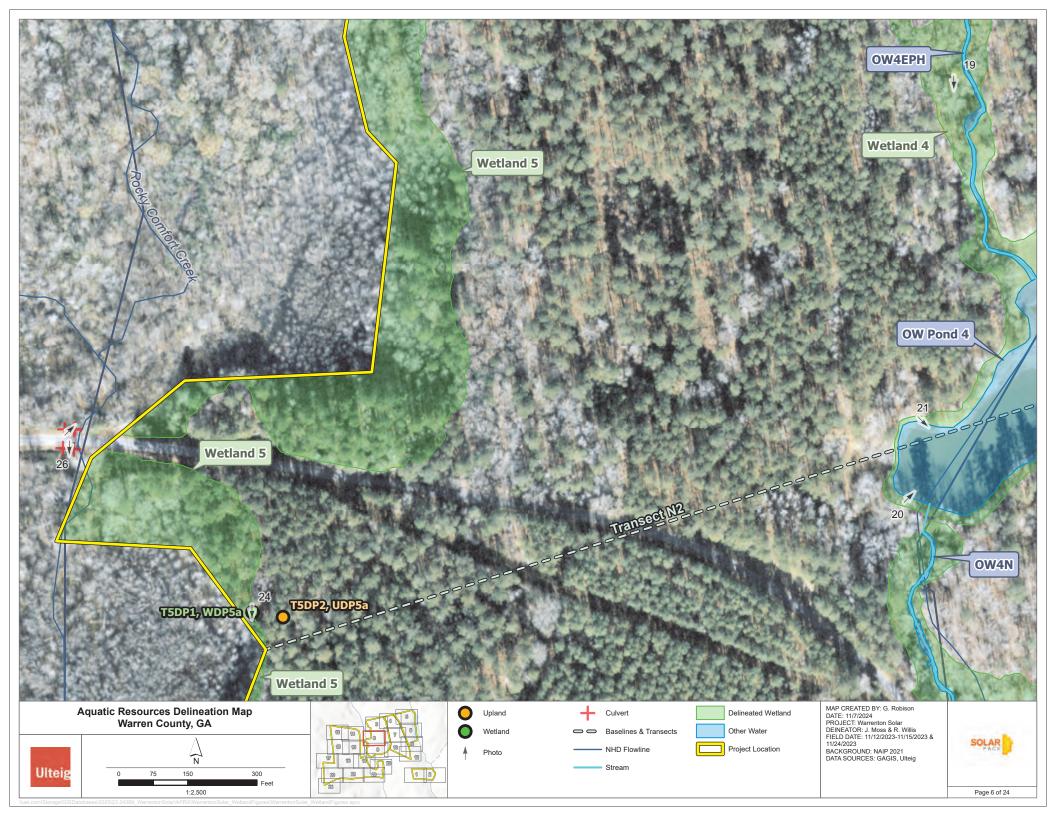


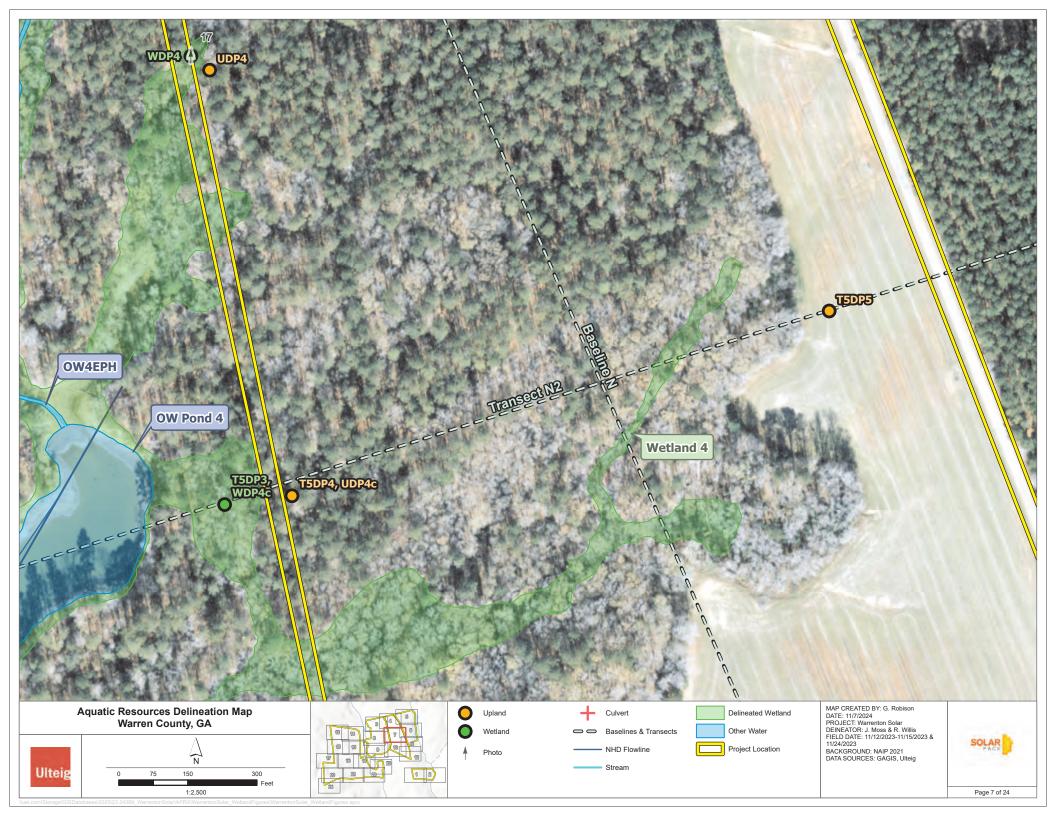


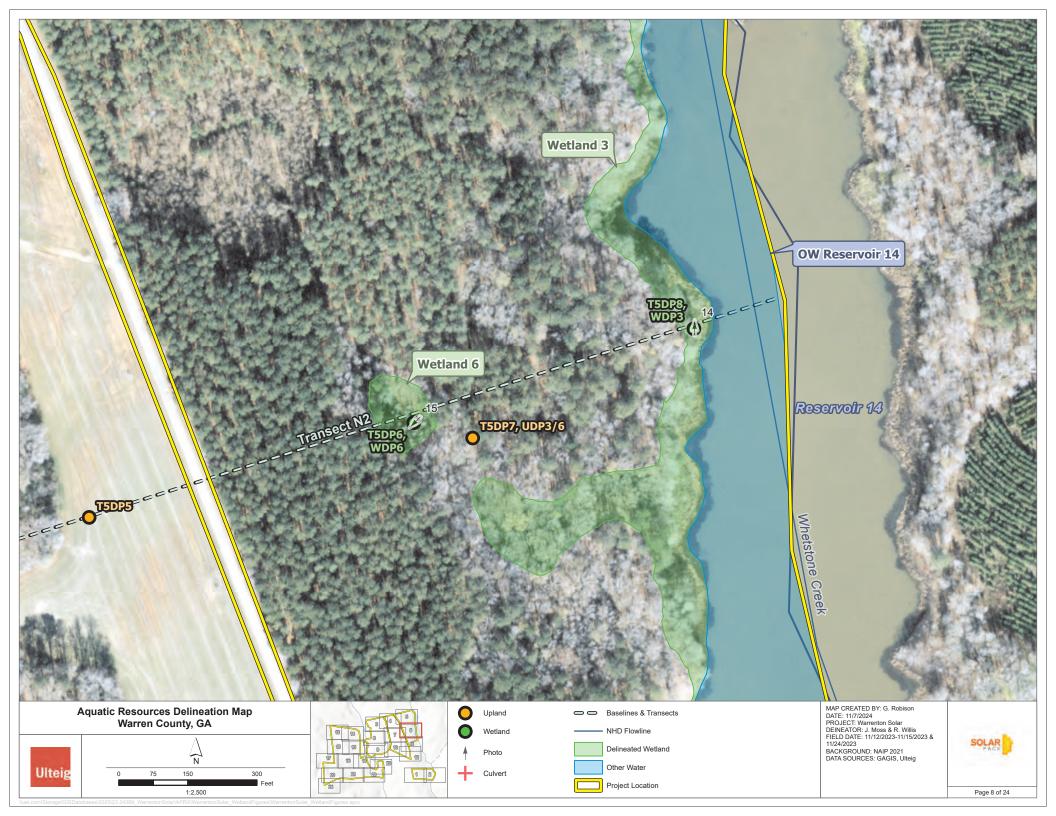


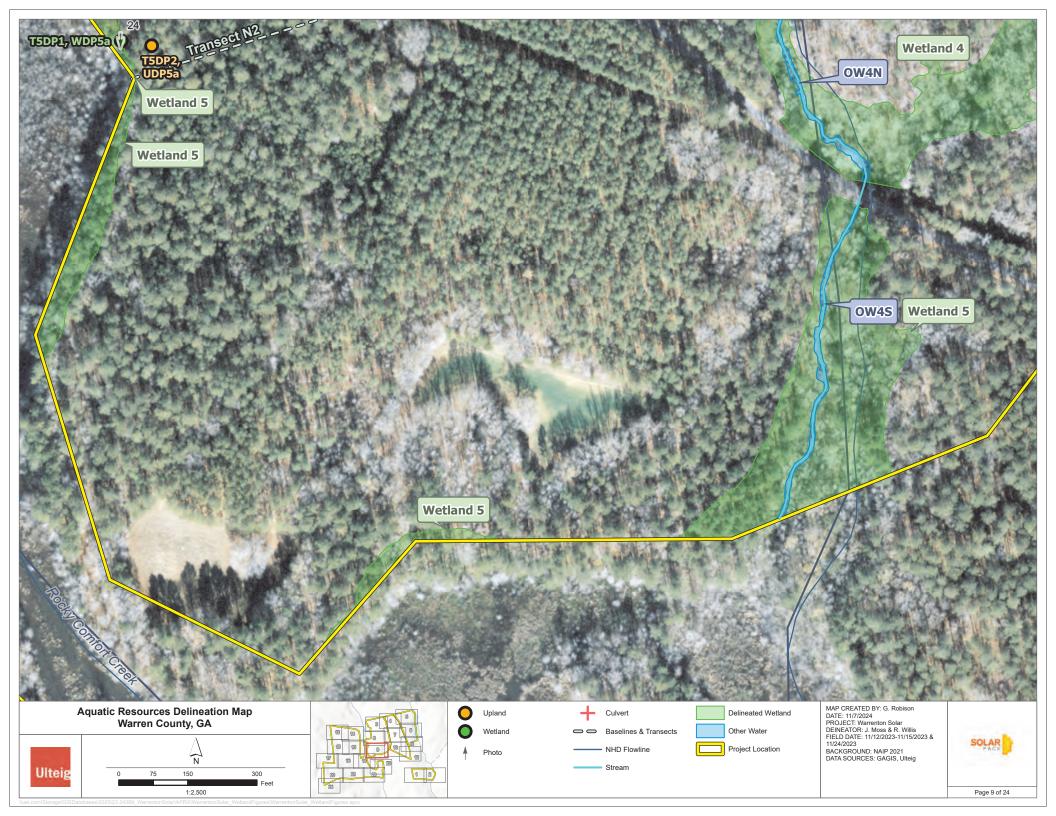


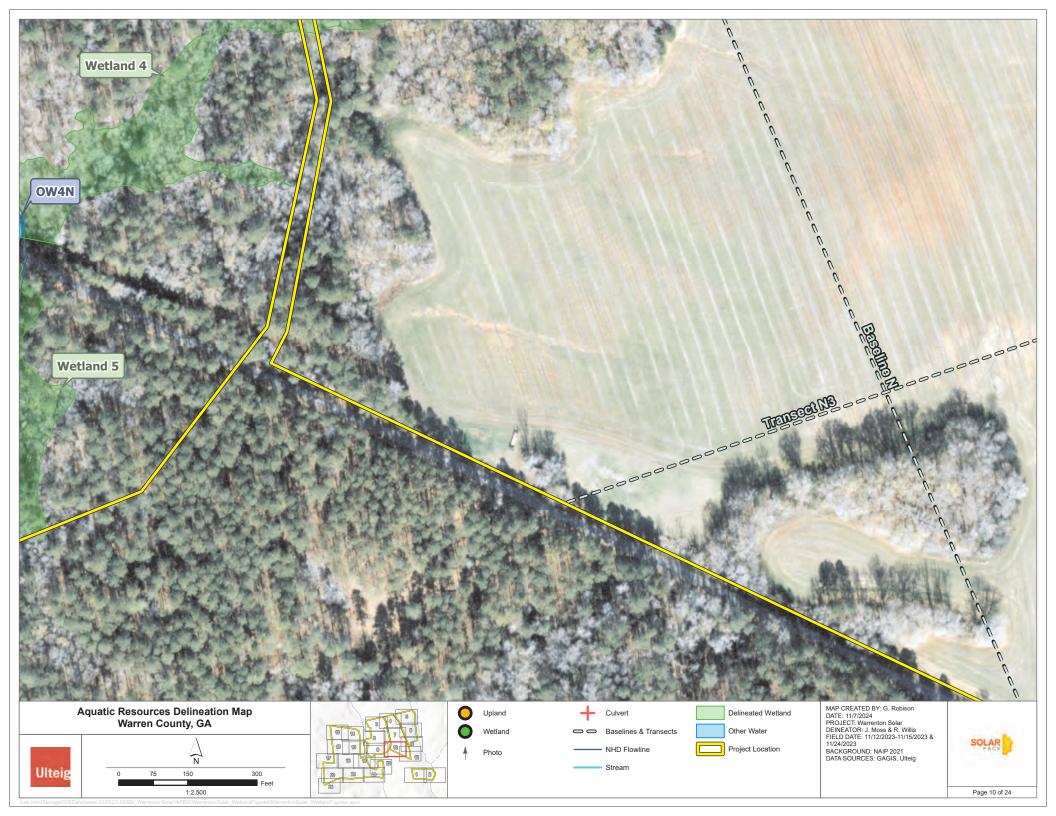


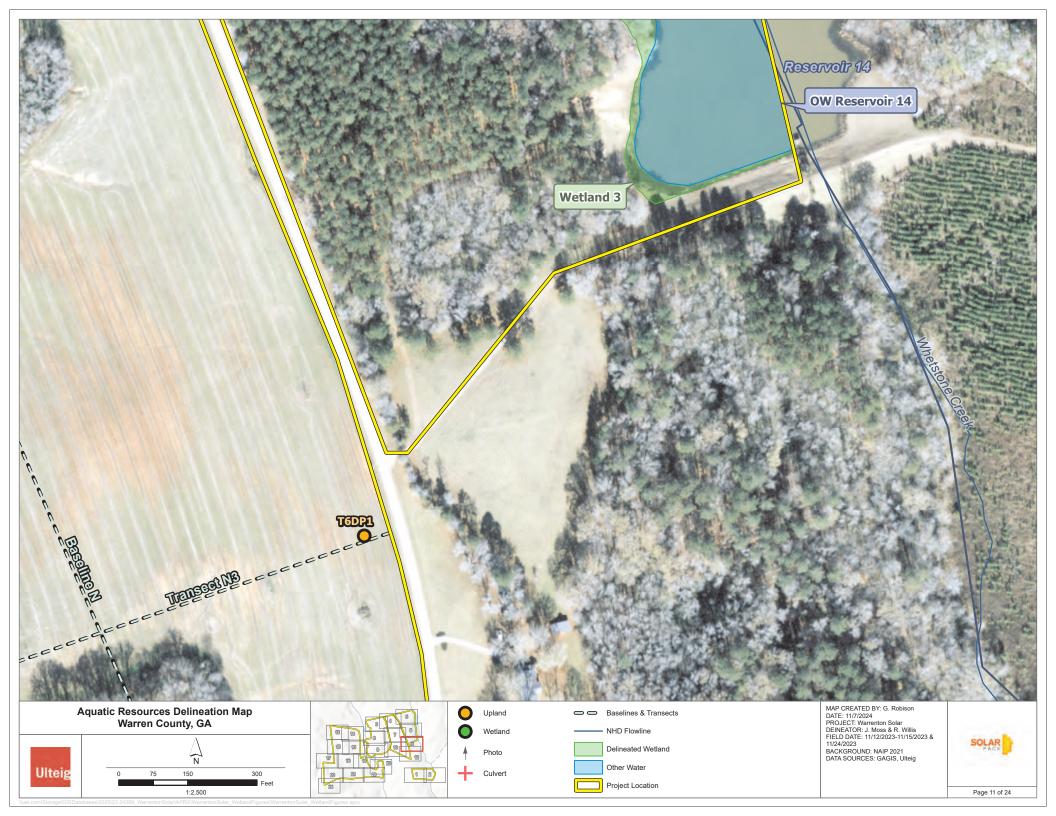


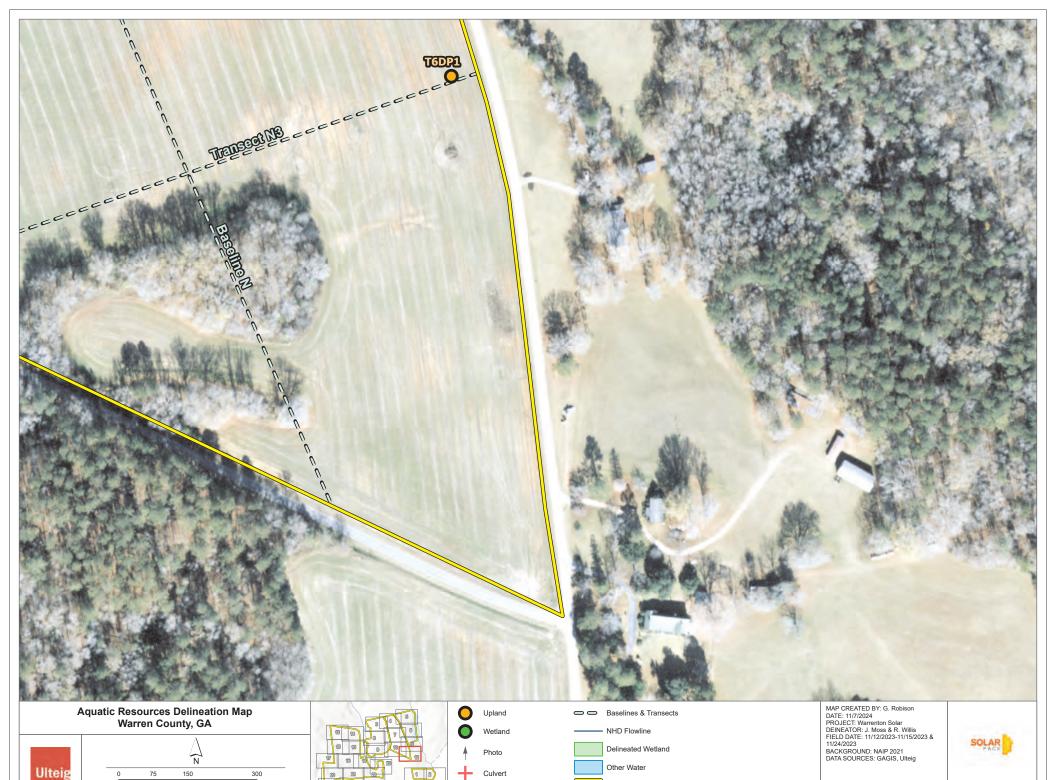








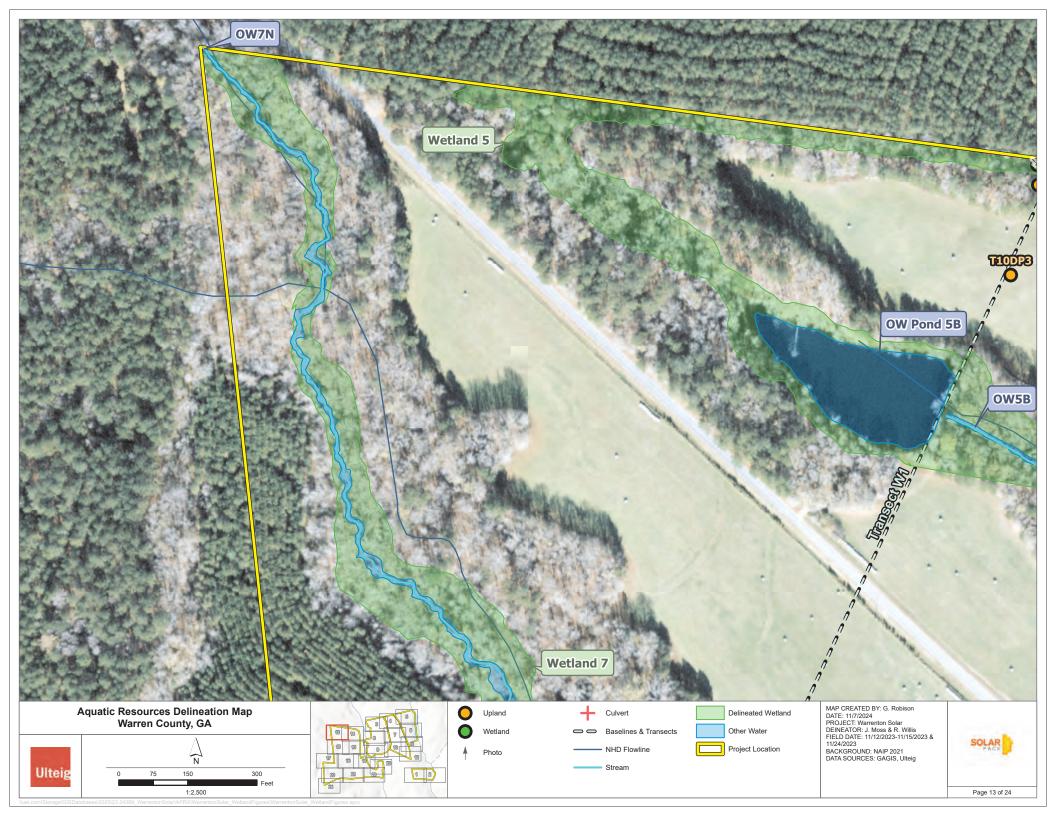


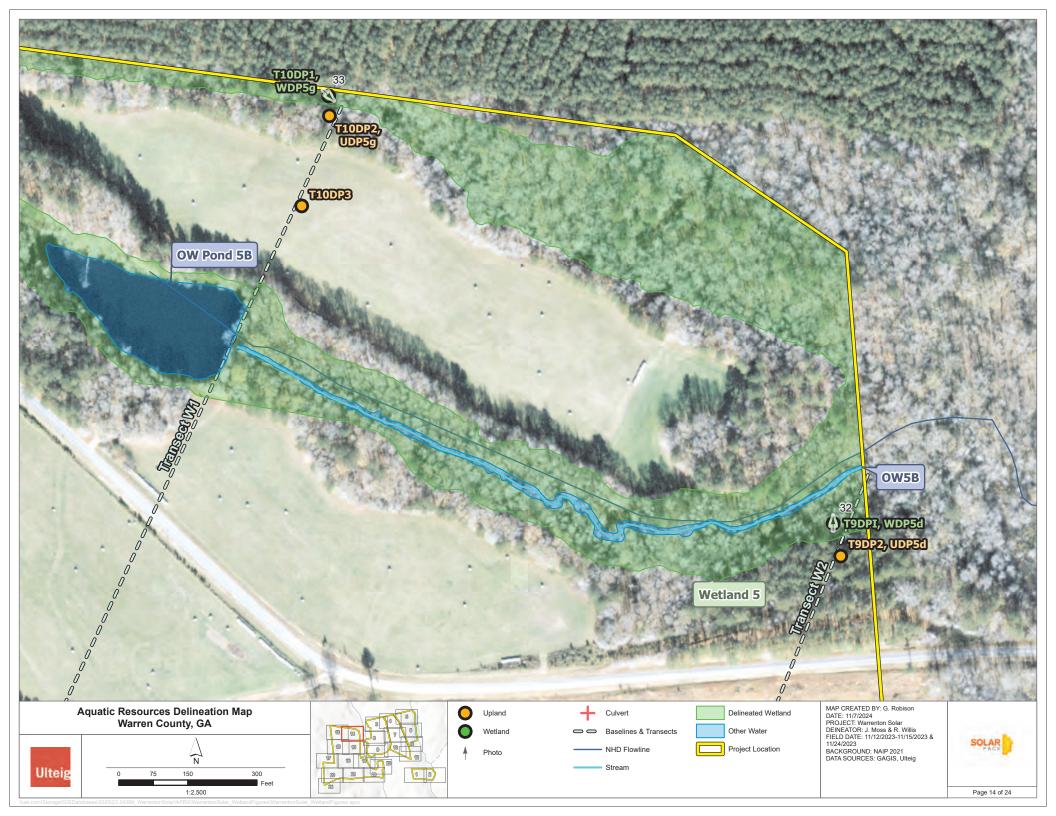


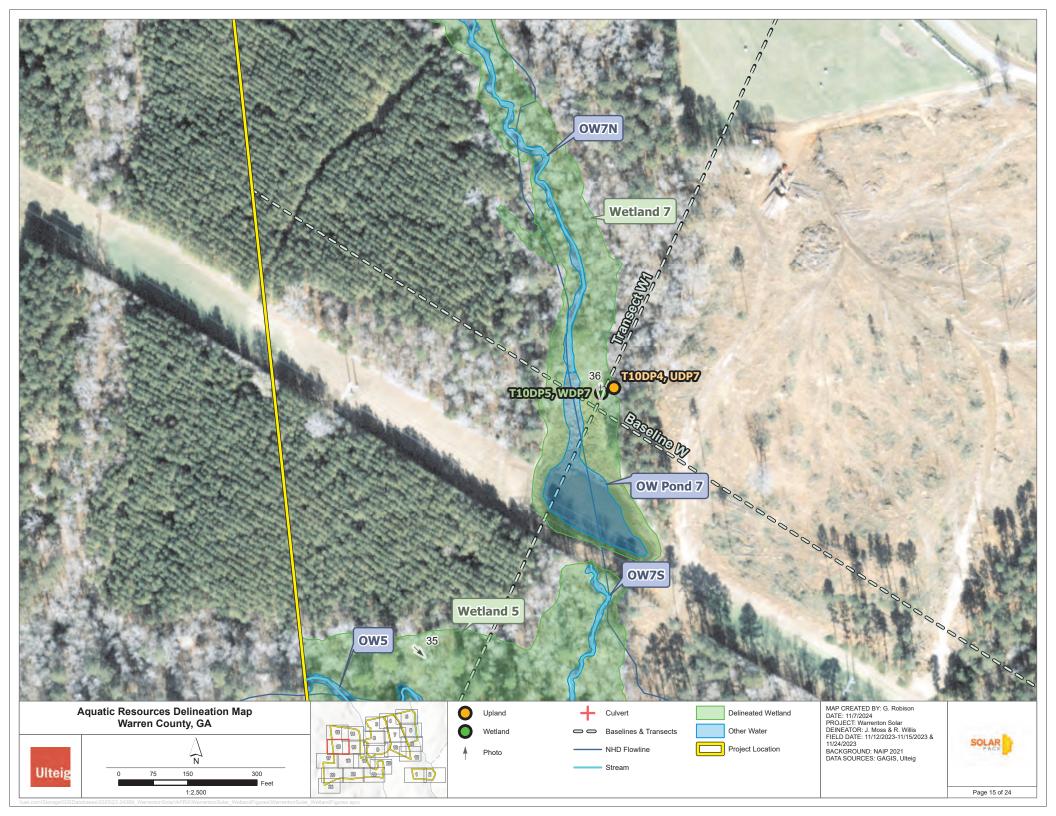
Project Location

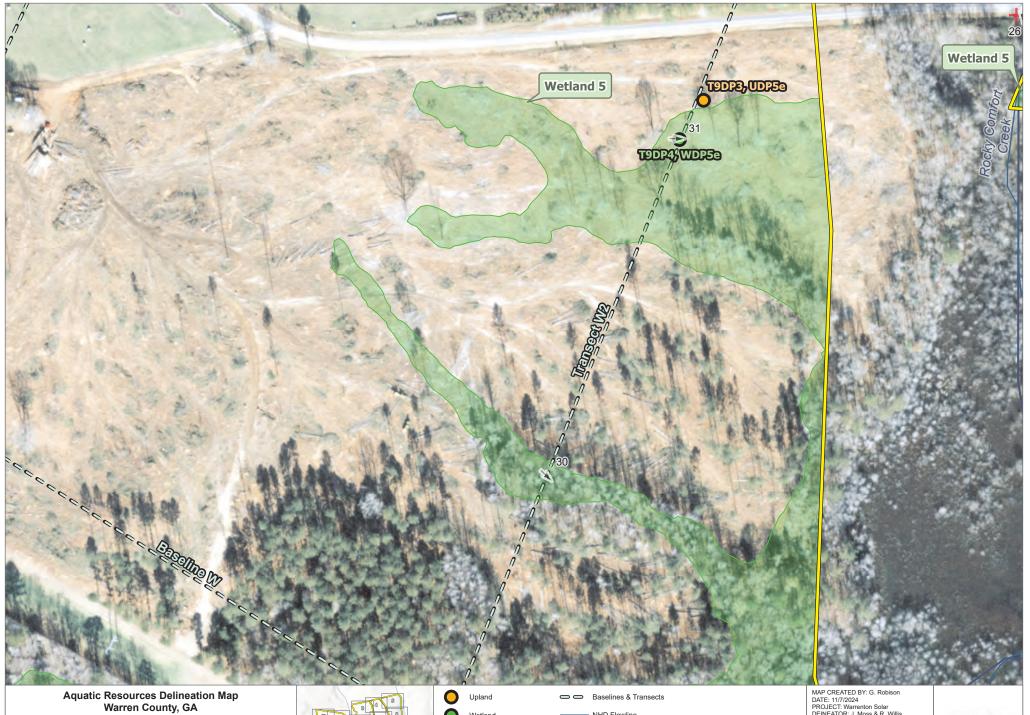
Feet

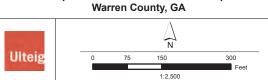
1:2,500















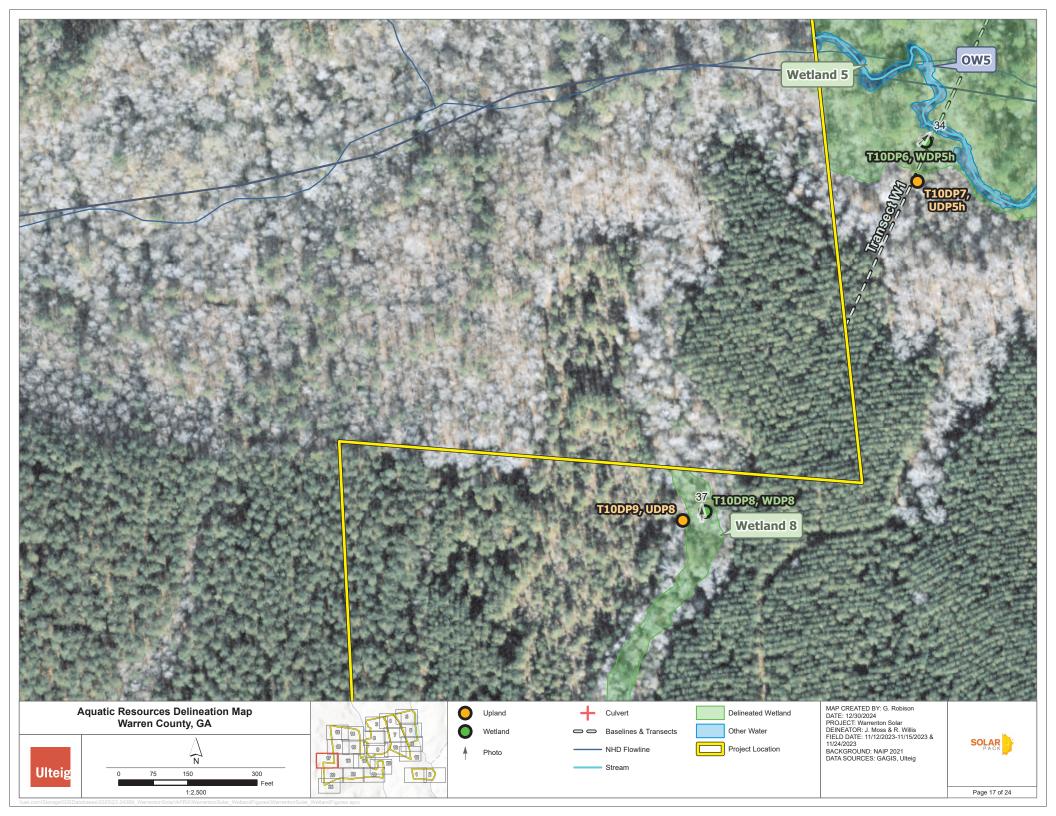
Delineated Wetland Other Water

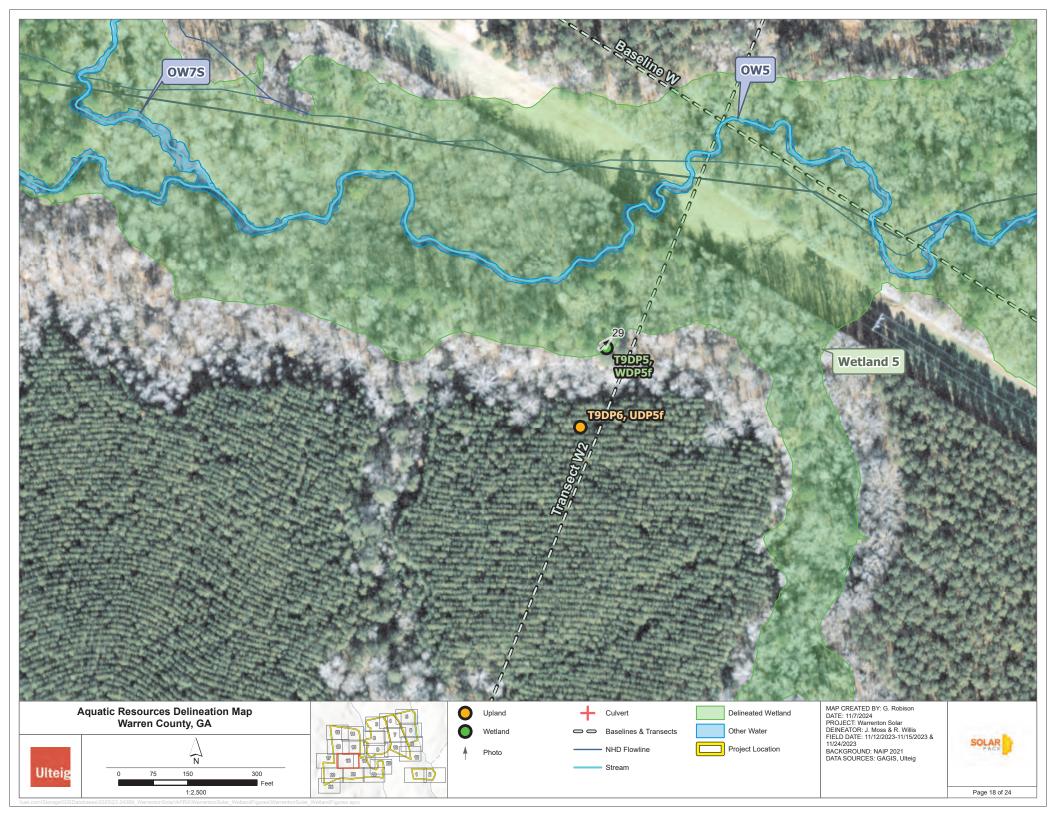
Project Location

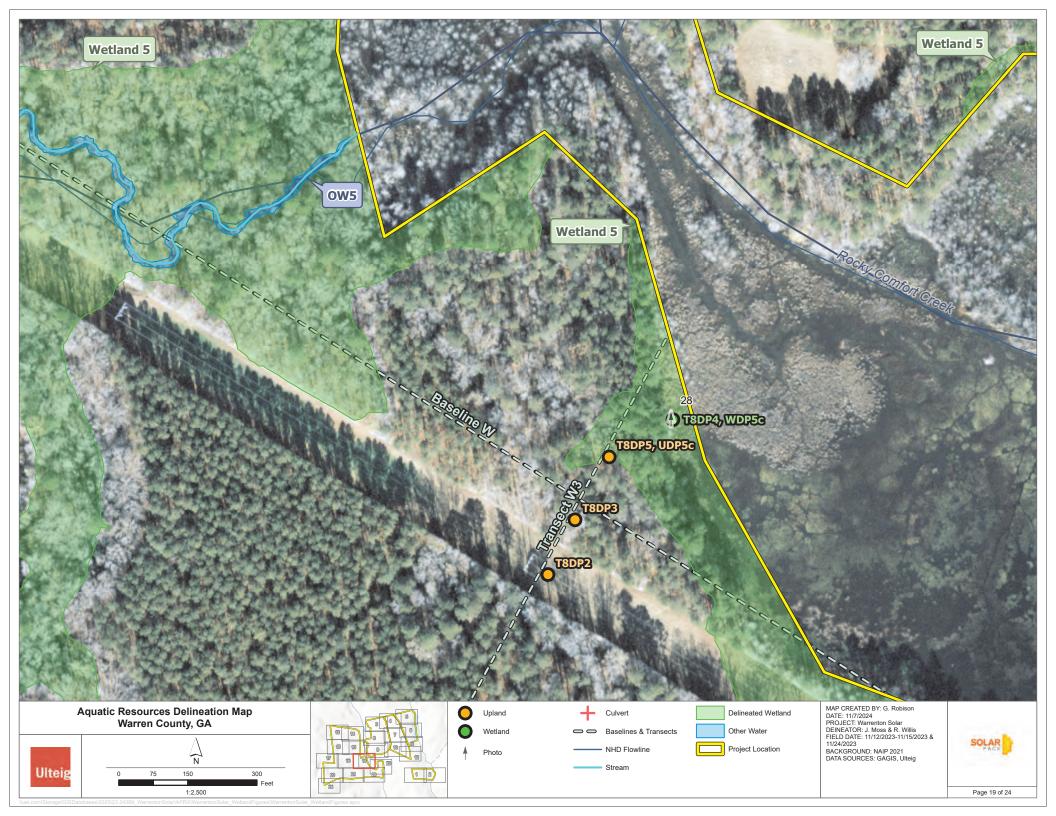
MAP CREATED BY: G. Robison DATE: 11/7/2024 PROJECT: Warenton Solar DEINEATOR: J. Moss & R. Willis FIELD DATE: 11/12/2023-11/15/2023 & 11/24/2023 BACKGROUND: NAIP 2021 DATA SOURCES: GAGIS, Ulteig

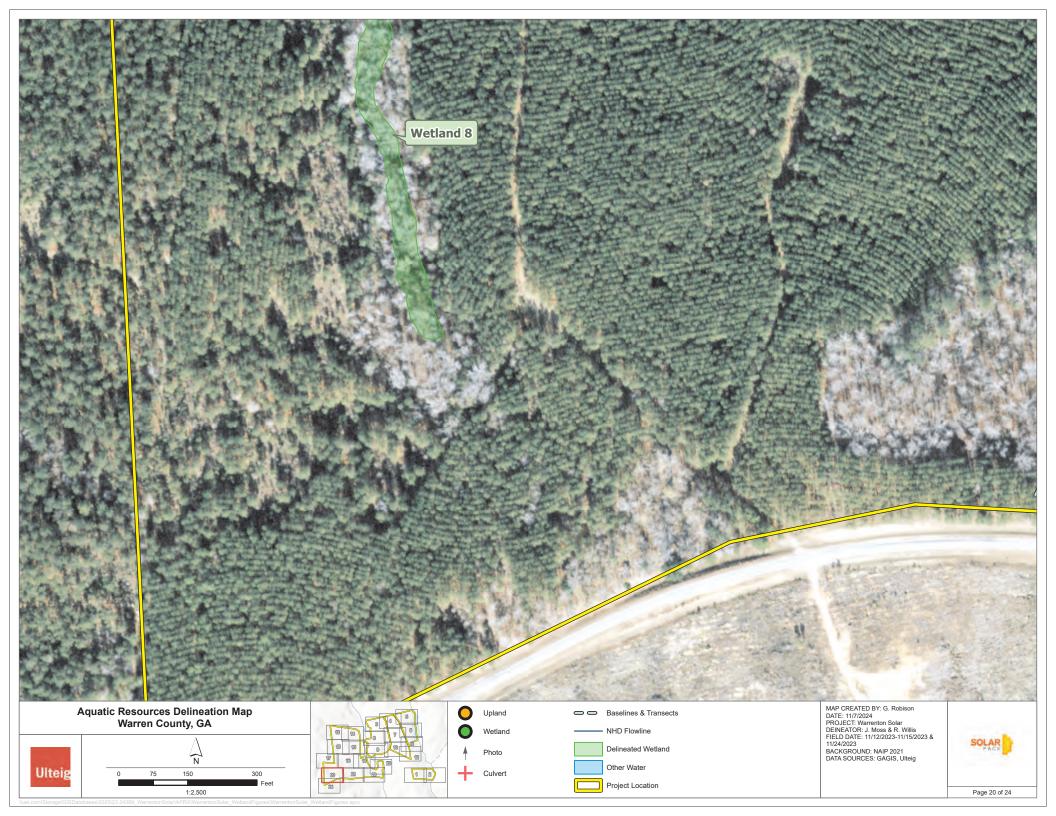


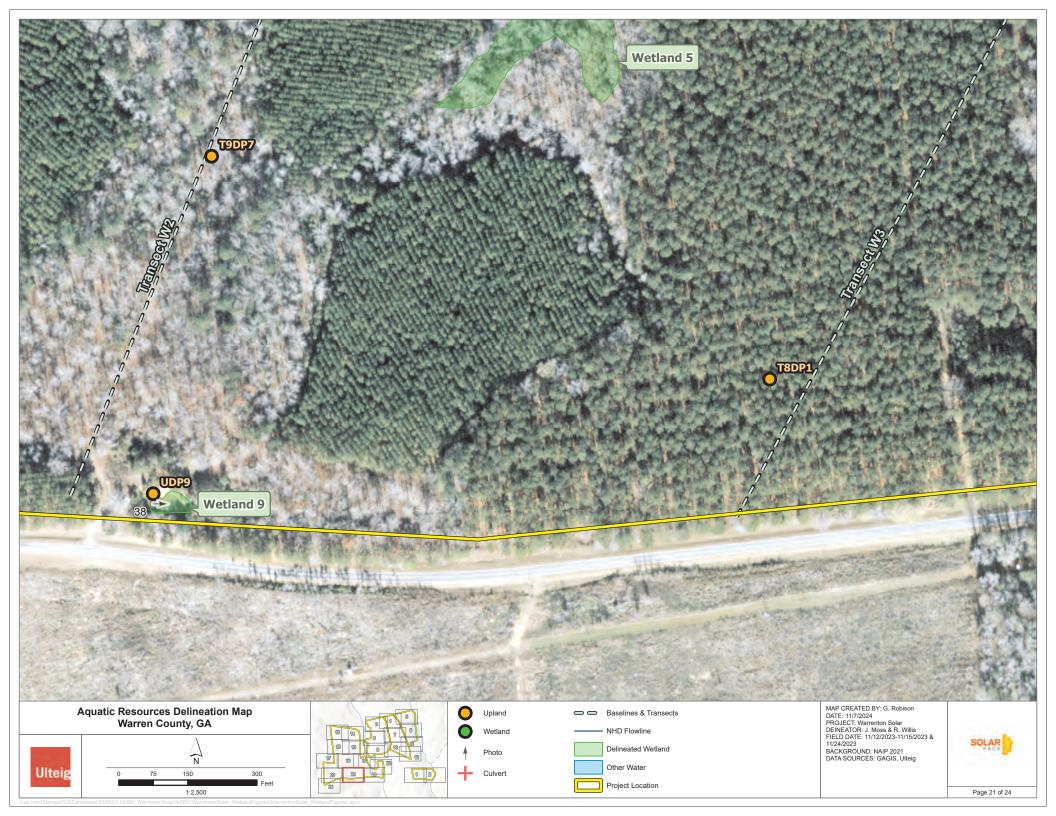
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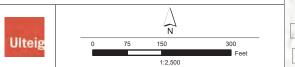
















Other Water

Project Location





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