



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

SAS-2017-00166

January 16, 2025

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.

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1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Wetland 1	Non-JD	N/A
Tributary 1	JD	404
Tributary 2	Non-JD	N/A
Tributary 3	Non-JD	N/A
Tributary 4	Non-JD	N/A
Tributary 5	Non-JD	N/A
Tributary 6	JD	404
Tributary 7	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. 651 (2023)

3. REVIEW AREA ("Poole Mountain West"):

- a. 96.76 acres
- b. Latitude: 34.0496, Longitude: -83.87203
- c. Northwest of Auburn
- d. Gwinnett County
- e. Georgia
- f. Aerial imagery (since 1955) indicates that the property has remained forested and undisturbed.

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 85,000 linear feet (~30 linear kilometers) east of the review area.

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

Wetland 1 does not have a flowpath to a TNW, interstate water, or the territorial seas.

Tributary 4 flows westward and Tributary 5 flows northwestward and merge to form Tributary 1. Tributary 3 and Tributary 4 flow southwestward and into Tributary 1. Tributary 1 flows westward and exits the property. After exiting the review area, Tributary 1 is understood to flow northwest for approximately 1,500 linear feet and enters Lake Mulberry River Eleven, an impoundment of Little Mulberry River. Lake Mulberry River Eleven discharges through its impoundment and into Little Mulberry River. Little Mulberry River flows generally eastward for approximately 130,000 linear feet (~40 linear kilometers) and enters the Middle Oconee River, the closest TNW.

Tributary 7 flows northward and exits the property. It is understood to continue to flow for approximately 220 linear feet and merges with another unnamed tributary of Little Mulberry River that is understood to also be a first order stream. The two tributaries form an unnamed 2nd order stream that flows northwestward for approximately 950 linear feet and enters Little Mulberry River. From this confluence, Little Mulberry River flows generally eastward for approximately 130,000 linear feet (~40 linear kilometers) and enters the Middle Oconee River, the closest TNW.

Tributary 6 flows southward and exits the property. It is understood to continue to flow southward for approximately 1,200 linear feet and enters a tributary that is understood to be of a higher order. The unnamed higher order tributary flows northeastward for approximately 9,000 linear feet and enters the Little Mulberry River. From this point of confluence, Little Mulberry River flows generally eastward for approximately 121,000 linear feet (~37 linear kilometers) and enters the Middle Oconee River, the closest 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

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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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
- d. Impoundments (a)(4): N/A
- 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	1,573	Perennial; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form
Tributary 6	382	Intermittent; See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form
Tributary 7	245	Intermittent (based on relevant reach); See further explanation below table.	Observed flow during site visit; NC DWQ Stream Identification Form

Tributary 1: The subject water is a westerly flowing tributary located in the center of the review area. The subject water was assessed by the Agent on March 21 and 25, 2024, during clear weather conditions. According to the U.S. Army Corps of Engineers (Corps) Antecedent Precipitation Tool (APT), recent rainfall conditions were wetter than normal on both days. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regime. The tributary (previously referred to as PS1) received a score of 30, concluding a perennial flow

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regime. 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 6: The subject water is a southerly flowing tributary located in the southeastern portion of the review area. The subject water was assessed by the Agent on March 21 and 25, 2024, during clear weather conditions. According to the Corps APT, recent rainfall conditions were wetter than normal on both days. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regime. The tributary (previously referred to as IS2) received a score of 26.5, concluding an intermittent flow regime. Tributary 6 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 7: The subject water is a northerly flowing tributary located in the northeastern portion of the review area. The subject water was assessed by the Agent on March 21 and 25, 2024, during clear weather conditions. According to the Corps APT, recent rainfall conditions were wetter than normal on both days. Additionally, during the Agent's onsite delineation, the tributary was observed to have two flow regimes (referred to as ES1 and IS1). The upper reach, ES1, had no surface water was present within the channel. However, OHWM indicators were observed in the ES1 reach; at the break in slope the non-vegetated channel had previously washed away leaf litter and debris. The ES1 reach of Tributary 7 was up to approximately four feet wide, entrenched up to approximately one foot, and contained clay, sand, and gravel substrates. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow various flow regimes. The first assessed segment (ES1), 177 linear feet in length, received a score of 14, concluding an ephemeral flow regime. The second assessed segment (IS1), 68 linear feet in length, received a score 22.5, concluding an intermittent flow regime. Additionally, based on available information, Tributary 7 is understood to have approximately 220 linear feet of intermittent stream channel offsite. Comprising a majority of the tributary (85%), intermittent flow best characterizes the relevant reach of Tributary 7. Tributary 7 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

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

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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). N/A

Name of excluded feature	Size	Type of resource generally not jurisdictional
Wetland 1	0.2-acre	Wetland lacks a continuous surface connection (CSC) to a water of the US (WOTUS).
Tributary 2	504 linear feet	Tributary that is a non-relatively permanent water.
Tributary 3	522 linear feet	Tributary that is a non-relatively permanent water.
Tributary 4	544 linear feet	Tributary that is a non-relatively permanent water.
Tributary 5	168 linear feet	Tributary that is a non-relatively permanent water.

⁵ 51 FR 41217, November 13, 1986.

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Wetland 1: The subject water is centered in the northern portion of the review area. It is situated on a hilltop and confined within a depression. During the Agent's onsite delineation, no discrete features were observed that could connect the wetland to downgradient waters. Wetland 1 was not observed to have a CSC to a WOTUS. Therefore, it does not meet the definition of an (a)(7) water.

Tributary 2: The subject water is a southwesterly flowing tributary of Tributary 1, located in the center of the review area. Tributary 2 is up to approximately four feet wide, entrenched up to approximately one foot, and contains sand, gravel, and cobble substrates. The subject water was most recently assessed by the Agent on March 21, 2024, during clear weather conditions. According to the Corps APT, recent rainfall conditions were wetter than normal. This tributary was not flowing at the time of onsite inspection; however, small accumulations of standing water were present in pools along the reach. Ordinary High Water Mark (OHWM) indicators were observed along the reach of Tributary 2, including a non-vegetated channel; changes in the character of soil from the channel bed and the surrounding uplands; and the presence of piles of litter and debris. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regime. The tributary (previously referred to as ES2) received a score of 14.5, concluding an ephemeral flow regime. Tributary 2 is understood to only flow in response to precipitation events. It does not have a relatively permanent presence of flowing or standing water. Therefore, it does not meet the definition of an (a)(5) water.

Tributary 3: The subject water is a southwesterly flowing tributary of Tributary 1, located in the center of the review area. Tributary 3 is up to approximately four feet wide, entrenched up to approximately one foot, and contained clay, sand, and gravel substrates. The subject water was most recently assessed by the Agent on March 21, 2024, during clear weather conditions. According to the Corps APT, recent rainfall conditions were wetter than normal. No surface water was observed within the channel at the time of onsite inspection. OHWM indicators were observed along the reach of Tributary 2, including a non-vegetated channel and washed away leaf litter and debris. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regime. The tributary (previously referred to as ES3) received a score of 14.5, concluding an ephemeral flow regime. Tributary 3 is understood to only flow in response to precipitation events. It does not have a relatively permanent presence of flowing or standing water. Therefore, it does not meet the definition of an (a)(5) water.

Tributary 4: The subject water is a westerly flowing tributary of Tributary 1, located in the center of the review area. Tributary 4 is approximately five feet wide, entrenched up to approximately two feet, and contained sand, gravel, cobble, and boulder substrates. The subject water was most recently assessed by the Agent on October 17, 2024,

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during clear weather conditions. According to the Corps APT, recent rainfall conditions were normal. No surface water was observed within the channel at the time of onsite inspection. OHWM indicators were observed along the reach; at the break in slope of the non-vegetated channel showed evidence of previous flows in the form of piles of debris and litter. Additionally, the scoring system of the NC DWQ Stream Identification Form Version 4.11 was used to determine the flow regime. The tributary (previously referred to as ES4) received a score of 14.5, concluding an ephemeral flow regime. Tributary 4 is understood to only flow in response to precipitation events. It does not have a relatively permanent presence of flowing or standing water. Therefore, it does not meet the definition of an (a)(5) water.

Tributary 5: The subject water is a northwesterly flowing tributary of Tributary 1, located in the center of the review area. Tributary 5 is approximately three feet wide, entrenched up to approximately one foot, and contained sand, gravel, and cobble substrates. The subject water was most recently assessed by the Agent on October 17, 2024, during clear weather conditions. According to the Corps APT, recent rainfall conditions were normal. No surface water was observed within the channel at the time of onsite inspection. OHWM indicators were observed along the reach; at the break in slope, the non-vegetated channel showed evidence of previous flows as the channel had been washed clear of debris and leaf litter. The soil profile of the channel of this tributary was examined and determined to contain more coarse-grained sediments in the top layer of the soil profile than the surrounding uplands. Additionally, the tributary (previously referred to as ES5) received a score of 14.5, concluding an ephemeral flow regime. Tributary 5 is understood to only flow in response to precipitation events. It does not have a relatively permanent presence of flowing or standing water. Therefore, it does not meet the definition of an (a)(5) 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: Office (desktop) determination: September 2024 - January 2025 (CESAS-RDP)
 - b. Field determination(s): March 21, 2024 (Agent); March 25, 2024 (Agent); and October 17, 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.
 - ☐ Aquatic Resources delineation prepared by the USACE: Title and Date
 - ☒ Wetland field data sheets

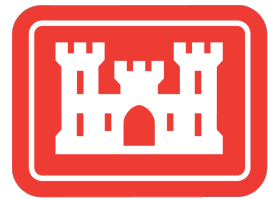
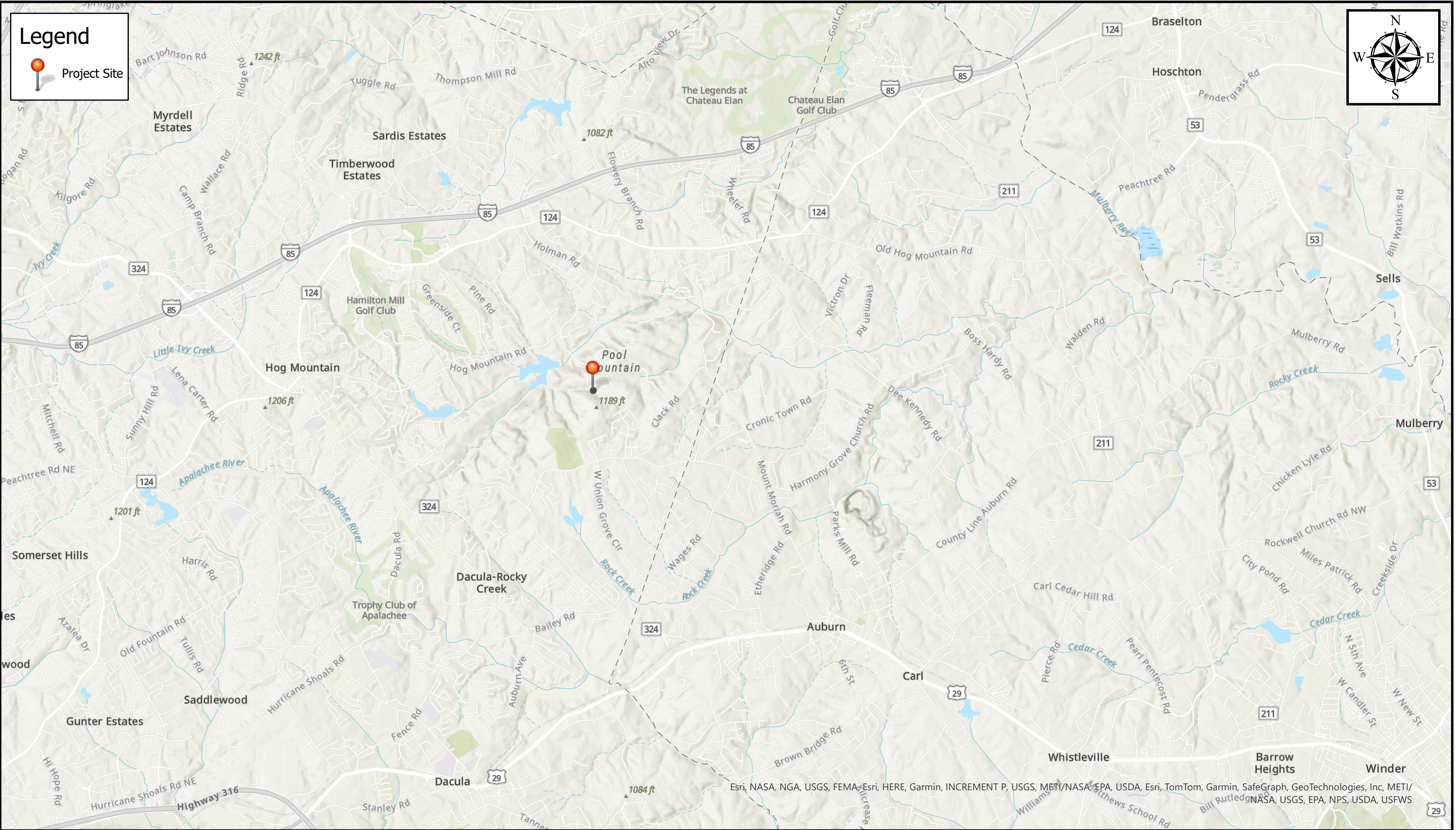
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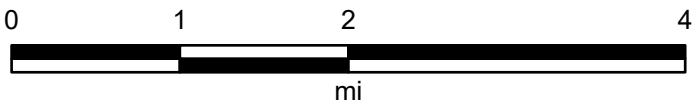
- ☐ OHWM data sheets prepared by the USACE: Title and Date
- ☐ Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
- ☒ Photographs: Exhibit 1: Photo Key Map w/ Aquatic Resource Locations and Exhibits 2-4: Photo[s] 1-9 (Photos Taken 03/21/2024 & 10/17/2024), as collectively prepared by the Agent, and dated 1/5/2025.
- ☒ Aerial Imagery: Exhibit 4: *Aerial Photograph*, as prepared by the Agent and dated 3/25/2024.
- ☒ LIDAR: LIDAR (3DEP DEM and 3DEP Hillshade) and 2-foot contour imagery, retrieved from the National Regulatory Viewer (NRV) by CESAS-RDP from 9/2024.
- ☒ USDA NRCS Soil Survey: Exhibit 5: *USDA Soils Survey Map*, prepared by Agent, and dated 3/25/2024; and Hydric Rating by Map Unit, retrieved by CESAS-RDP in 9/2024.
- ☒ USFWS NWI maps: Exhibit 6: USFWS NWI Map, prepared by Agent, and dated 3/25/2024.
- ☒ USGS topographic maps: Exhibit 2: USGS Quadrangle Map, prepared by Agent, and dated 3/25/2024; and historic topographic maps, retrieved by CESAS-RDP in 9/2024.
- ☒ USGS NHD data/maps: NHD data retrieved from the NRV by CESAS-RDP in 9/2024.
- ☐ Section 10 resources used: Title and Dates
- ☒ NC DWQ stream identification forms
- ☒ Antecedent Precipitation Tool Analysis (List Date(s)): APT Data from 3/13-21/2024 ("Wetter than Normal" Conditions) and 10/17/2024 ("Normal Conditions").
- ☒ Other sources of Information: Exhibit 7: USGS Stream Stats MAP, prepared by Agent, and dated 3/25/2024; and Exhibit 8: *FEMA Flood Hazard Map*, prepared by Agent, and dated 3/25/2024.

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 - West)
Site Location Map



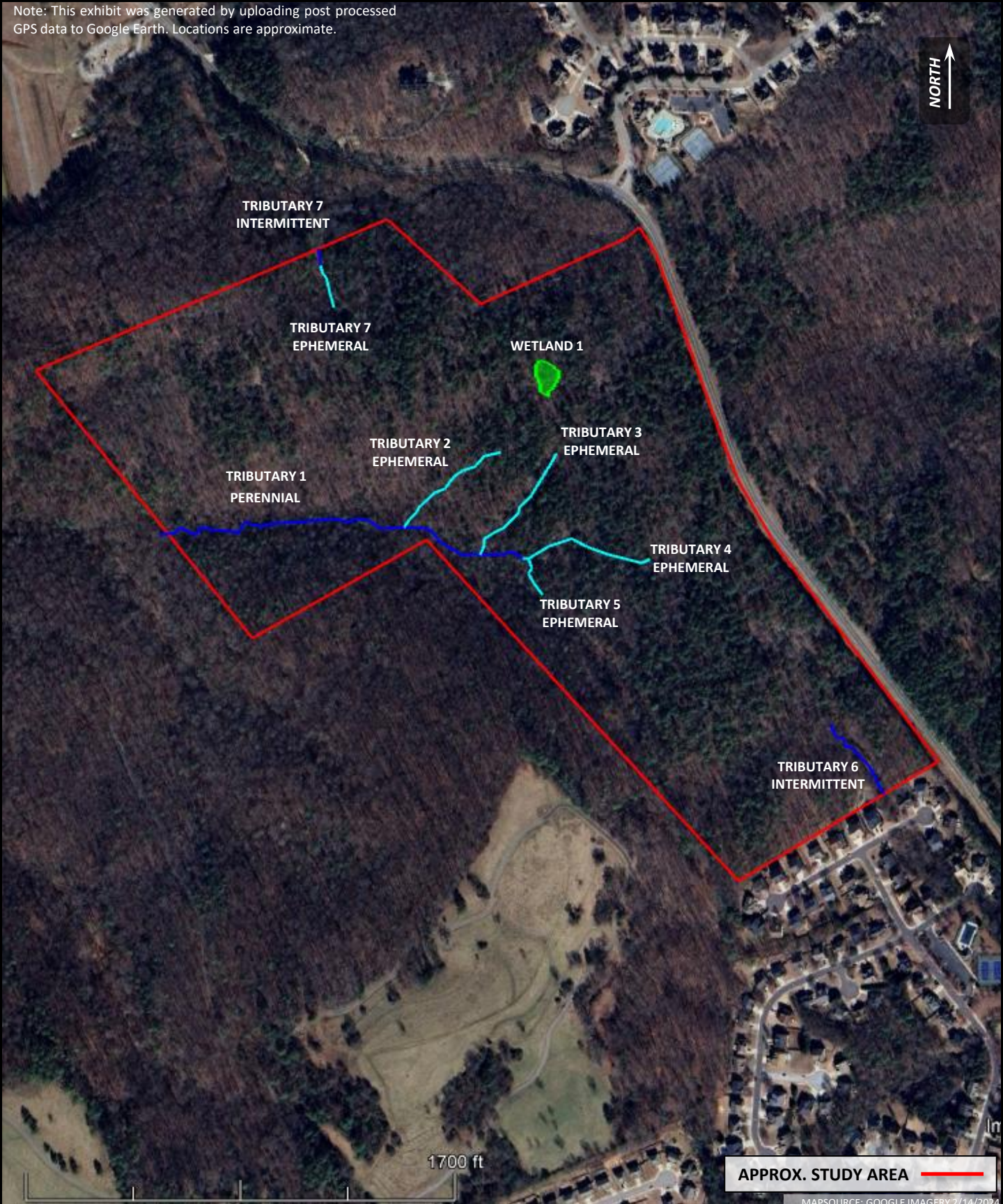
Map Center: 83.84703°W 34.045606°N

Map Created by: CESAS-RDP

Date: 1/16/2025

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

Note: This exhibit was generated by uploading post processed GPS data to Google Earth. Locations are approximate.



**AERIAL PHOTO W/
AQUATIC RESOURCE LOCATIONS**

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

APPROX. STUDY AREA —

PREPARED FOR:
ST. BOURKE

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