



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
600 VESTAVIA PARKWAY SUITE 203
VESTAVIA HILLS, ALABAMA 35216

CESAM-RD-N

October 16, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ SAM-2022-00307-SNR; MFR #1 of #1²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Alabama due to litigation.

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).
 - i. E-1 – non-jurisdictional tributary due to lack of relatively permanent flow of water

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. The review area is limited to the feature identified as E-1, which is part of a 13-acre parcel in Birmingham, Jefferson County, Alabama. The center of the review area is Latitude 33.407750, Longitude -86.766166 and is located in the Cahaba River Watershed 8-digit hydrologic unit code (HUC 03150202). The attached figures depict the 13-acre parcel and the review area within that parcel. There are other aquatic resources on the 13-acre parcel which are not being evaluated as part of this AJD.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to which the aquatic resource is connected is the Cahaba River. The Cahaba River is on the Mobile District's Section 10 list.⁶

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

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

Stream E-1 flows northwest within the property boundaries for 225 linear feet before converging with another unnamed tributary on the 13-acre parcel; the unnamed tributary flows north for approximately 100 linear feet before exiting the property boundary and discharging into a headwall; it then flows below ground in a man-made drainage system below and along Rocky Ridge Elementary School before discharging into Dolly Brook (the exact length of this portion of flow is unknown due to lack of access and knowledge of the previously constructed drainage system in place); Dolly Brook then meanders southeast through a system of culverts and rip-rap lined stream beds for approximately 2,700 linear feet before discharging into Cahaba Lake; Dolly Brook then flows south through Cahaba Lake for approximately 1,400 linear feet before discharging back into Dolly Brook; Dolly Brook continues to flow southeast for approximately 1,200 linear feet before converging with the Cahaba River; the Cahaba River continues to flow south for 4.3 miles before reaching the section of the river that is designated as a Section 10 water in Jefferson County, Alabama.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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.

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
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁹ 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

⁹ 51 FR 41217, November 13, 1986.

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- 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).

Stream “E-1”: 225 linear foot (0.02 acre) ephemeral stream, located at 33.407750, -86.766166; 5-E was determined to be non-jurisdictional based on review of on-site photographs, descriptions provided by the Agent, and observations during a site visit on June 21, 2024 that provided evidence that the tributary is a non-relatively permanent water, lacking year-round flow or seasonal flow, and only flowing during and immediately after rain events; no hydric soils were found in the bed of the stream and bank features are lacking and the aquatic bed is always above the water table.

- 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. In office evaluation using desktop resources was completed on June 20, 2024. Site visit conducted on June 21, 2024 with USACE Project Manager [REDACTED], [REDACTED] USACE Team Leader [REDACTED], and [REDACTED] representative [REDACTED].
 - b. Figures 1-2 Site Location Map, Aerial Photography Map; Submitted by [REDACTED].

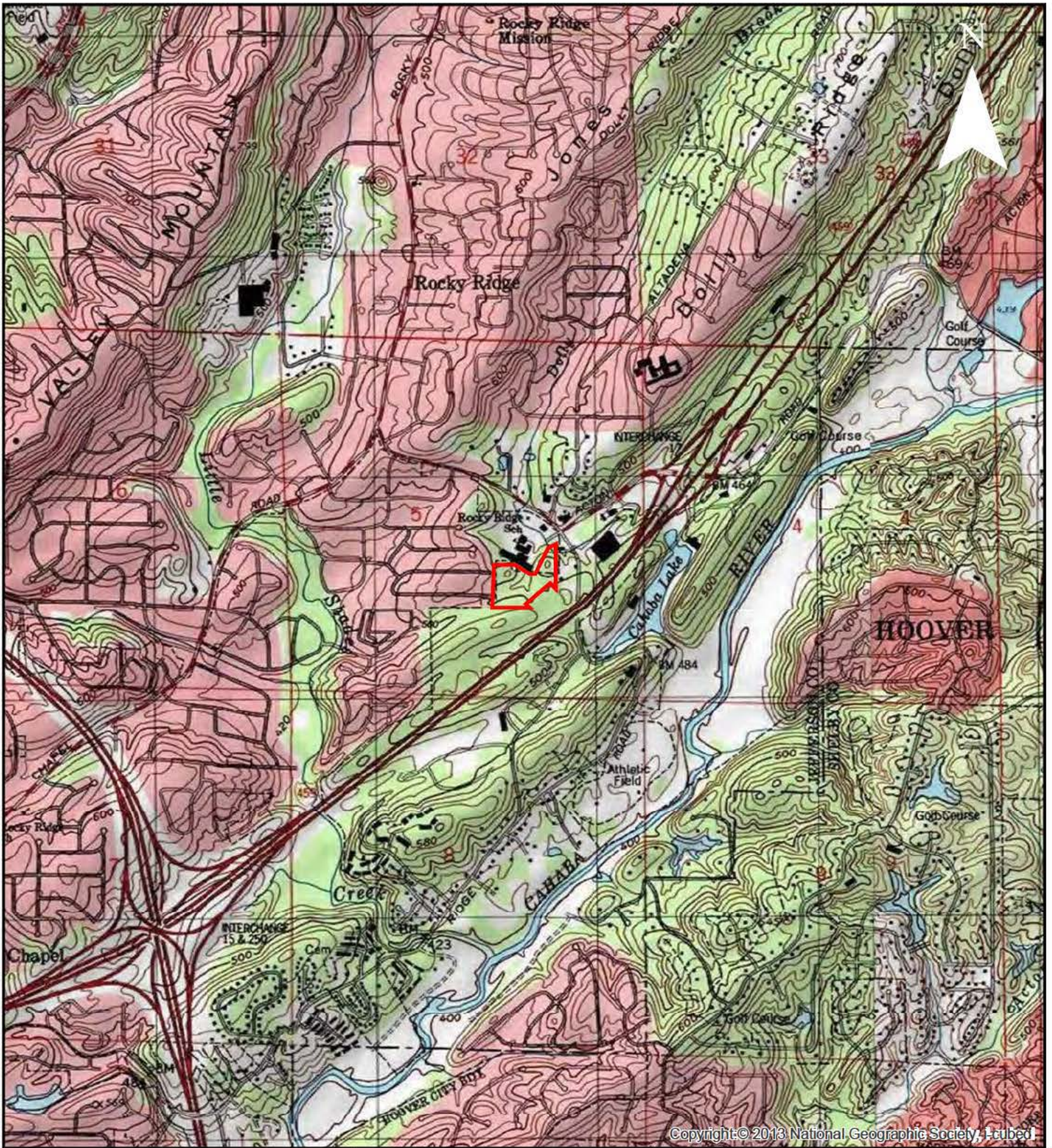
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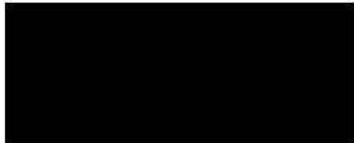
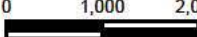
- c. Figure 3 NRCS Soil Web Survey, Soil Map. <https://websoilsurvey.nrcs.usda.gov/app/>. Submitted by [REDACTED], accessed in March 2022.
- d. Figure 4, NWI Map. <https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>. Submitted by [REDACTED] accessed in March 2022.
- e. Figure 6, Hillshade and Digital Elevation Model (DEM) layer from Corps National Regulatory Viewer <https://arcportal-ucop-corps.usace.army.mil/>
- f. Figures 7-8 Aquatic Resources Location Aerial Maps; Submitted by [REDACTED].
- g. Consultant's revised delineation report dated July 31, 2024

10. OTHER SUPPORTING INFORMATION.

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




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<p>Legend</p> <p> Site Boundary</p>		<p>TITLE:</p> <p>Site Location Map</p>	<p>FIGURE NO.</p> <p>1</p>
		<p>NWP 29 Application/PCN</p> <p>Acton Road Site</p> <p>Acton Rd. & Old Rocky Ridge Rd.</p> <p>Birmingham, Alabama</p>	<p>PROJECT NO.</p> <p>2224320</p>
<p>528 MINERAL TRACE</p> <p>HOOVER, AL 35244</p> <p>(205) 985-4874</p>	<p>SCALE:</p> <p>0 1,000 2,000</p> <p></p> <p>1 inch = 2,000 feet</p>	<p>DRAWN BY</p> <p>MJI</p>	<p>DATE DRAWN</p> <p>11-11-2022</p>



Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

Legend

 Approximate Site Boundary



528 MINERAL TRACE
 HOOVER, AL 35244
 (205) 985-4874

TITLE:
 Site Aerial Map
 NWP 29 Application/PCN
 Acton Road Site
 Acton Rd. & Old Rocky Ridge Rd.
 Birmingham, Alabama


SCALE: 0 100 200

 1 inch = 200 feet

FIGURE NO.
 2
 PROJECT NO.
 2224320
 DRAWN BY
 MJI
 DATE DRAWN
 11-11-2022

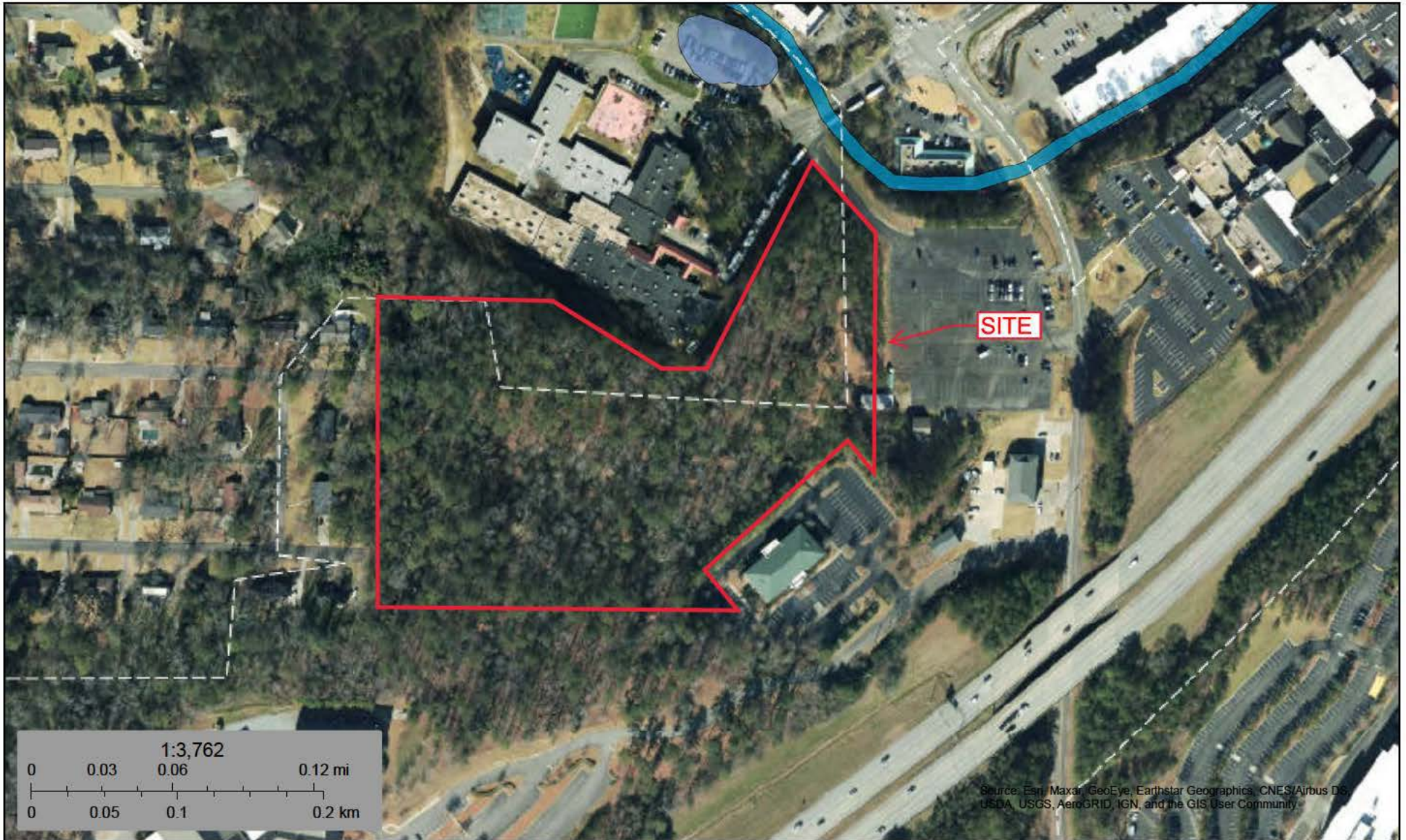
Soil Map—Jefferson County, Alabama
(Figure 5 - Site Soils Map)



Map Scale: 1:1,520 if printed on B portrait (11" x 17") sheet.
0 20 40 80 120 Meters
0 50 100 200 300 Feet
Map projection: Web Mercator Corner coordinates: WGS84 Edge tics: UTM Zone 16N WGS84



Figure 4 - NWI Map



March 7, 2022

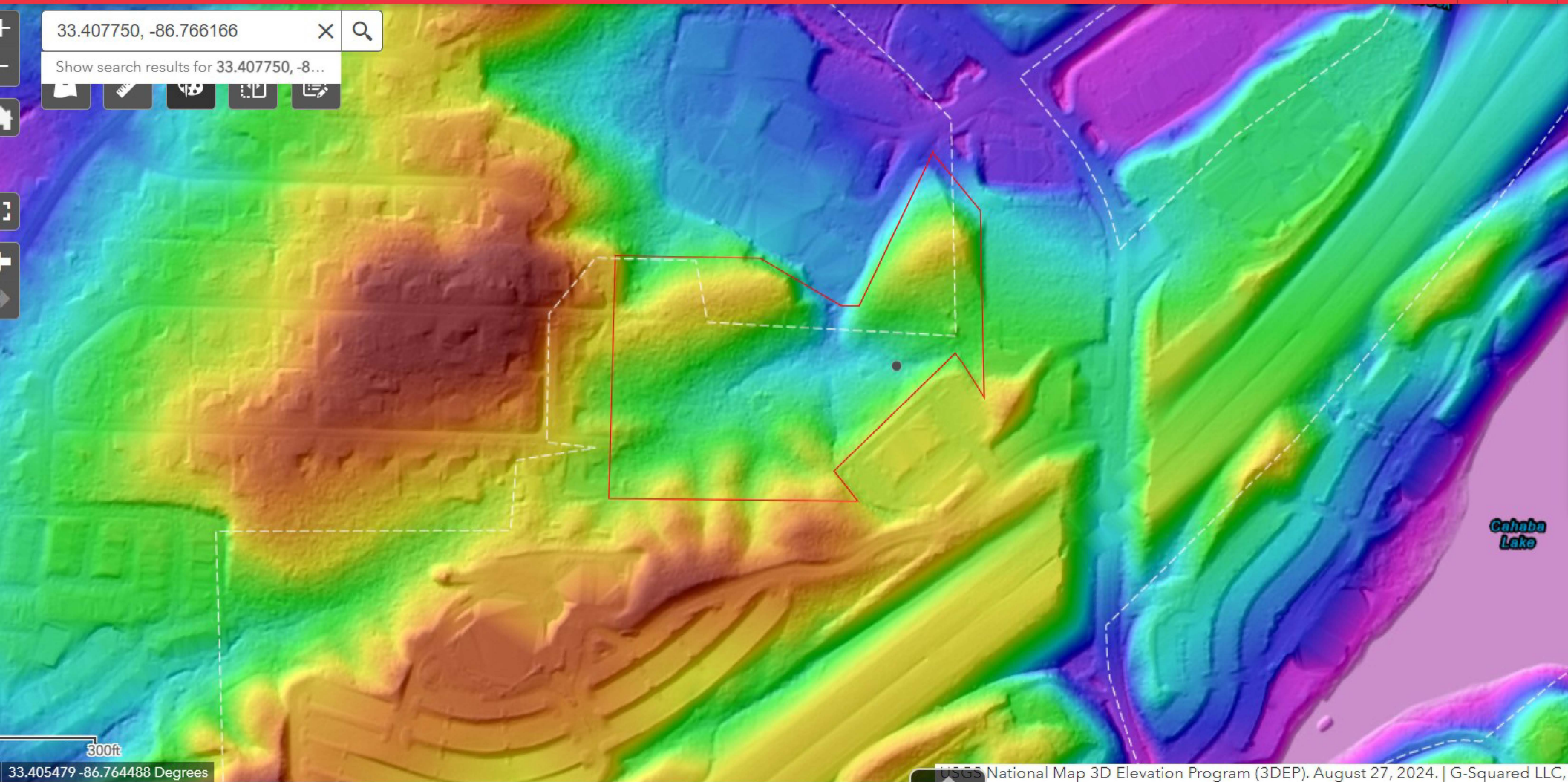
Wetlands

- | | | |
|--|---|--|
|  Estuarine and Marine Deepwater |  Freshwater Emergent Wetland |  Lake |
|  Estuarine and Marine Wetland |  Freshwater Forested/Shrub Wetland |  Other |
| |  Freshwater Pond |  Riverine |

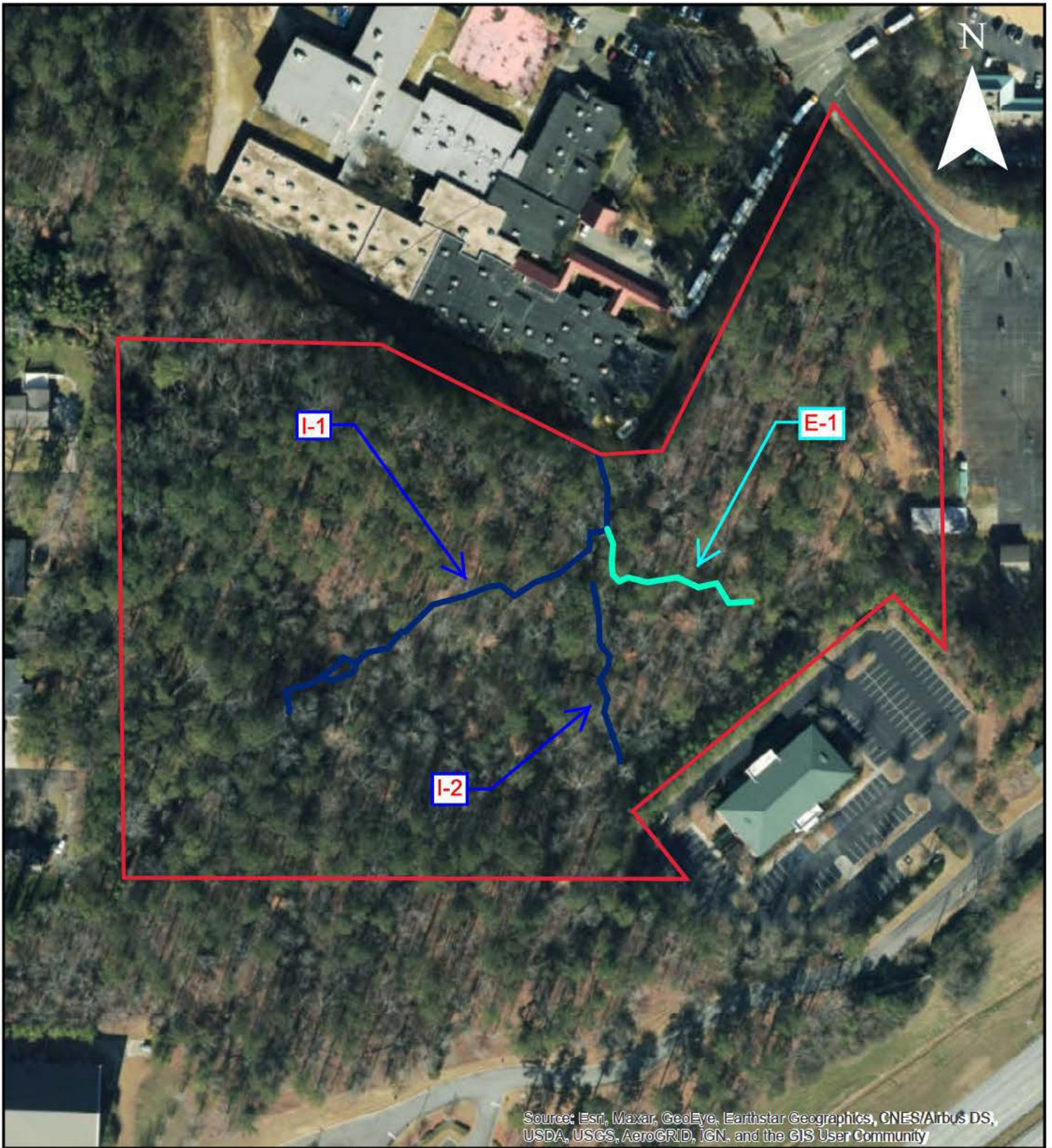
This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.



33.407750, -86.766166

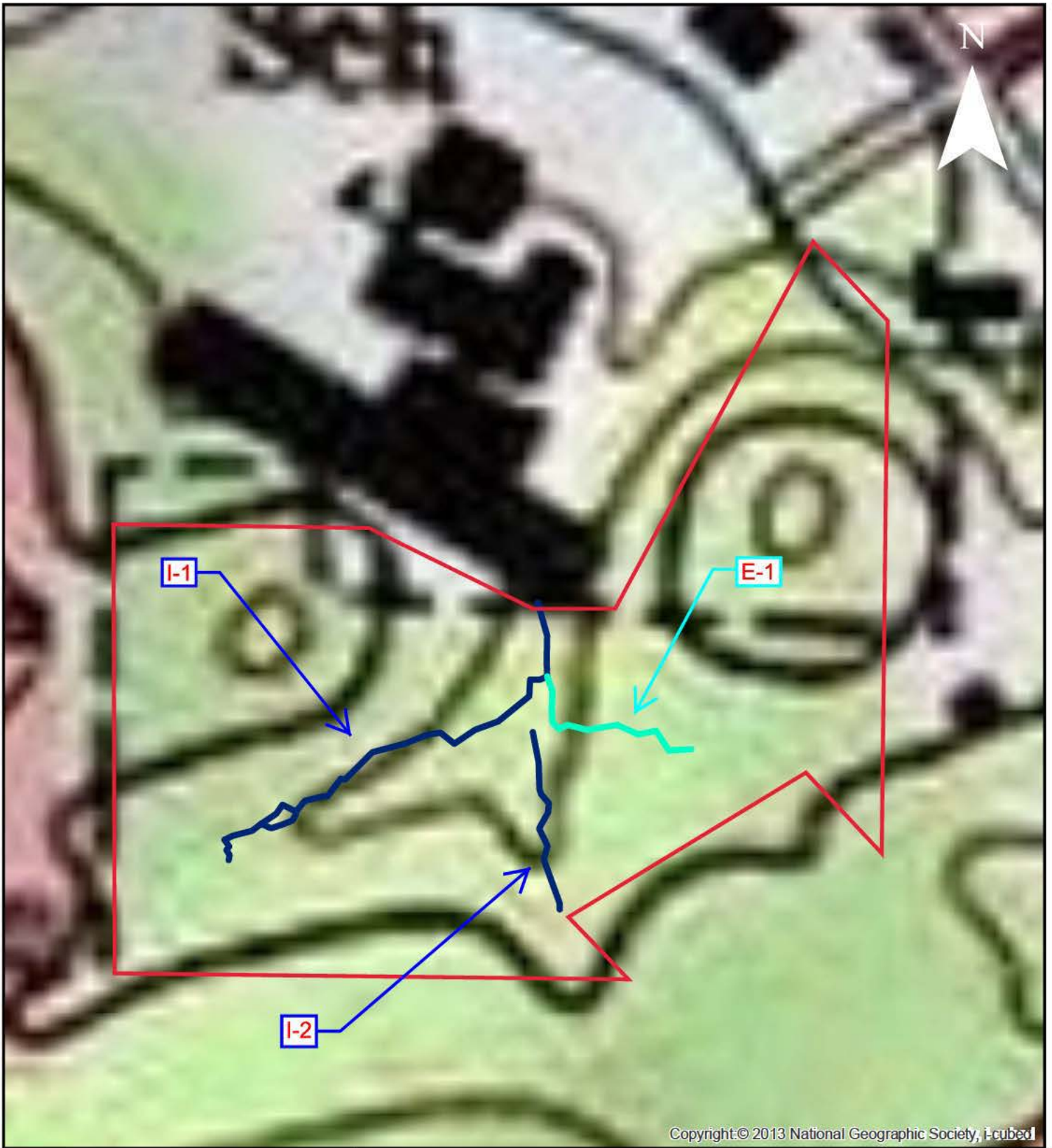
Show search results for 33.407750, -8...







Cahaba Lake



<p>Legend</p> <p> Ephemeral Feature</p> <p> Intermittent Feature</p>		<p>TITLE:</p> <p>Aerial Map with Site Features</p>	<p>FIGURE NO.</p> <p>6</p>
		<p>NWP 29 Application/PCN Acton Road Site Acton Rd. & Old Rocky Ridge Rd. Birmingham, Alabama</p>	<p>PROJECT NO.</p> <p>2224320</p> <p>DRAWN BY</p> <p>MJI</p>
<p>528 MINERAL TRACE HOOVER, AL 35244 (205) 985-4874</p>	<p>SCALE:</p> <p>0 75 150</p>  <p>1 inch = 150 feet</p>	<p>DATE DRAWN</p> <p>11-11-2022</p>	



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<p>Legend</p> <p> Ephemeral Feature</p> <p> Intermittent Feature</p>		<p>TITLE:</p> <p>Topographic Map with Site Features</p>	<p>FIGURE NO.</p> <p>7</p>
		<p>NWP 29 Application/PCN Acton Road Site Acton Rd. & Old Rocky Ridge Rd. Birmingham, Alabama</p>	<p>PROJECT NO.</p> <p>2220802</p>
<p>528 MINERAL TRACE HOOVER, AL 35244 (205) 985-4874</p>	<p>SCALE:</p> <p>0 75 150</p>  <p>1 inch = 150 feet</p>	<p>DRAWN BY</p> <p>MJI</p>	<p>DATE DRAWN</p> <p>02-21-2022</p>