



D DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT  
600 VESTAVIA PARKWAY, SUITE 203  
THE SHELBY BUILDING  
VESTAVIA HILLS, AL 35216

CESAM-RD-N

26 February 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),<sup>1</sup> SAM-2022-01135-SNR; MFR #1 of #1<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> 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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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 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).

The review area for this AJD is limited to the six features identified below.

- i. E-1; non-relatively permanent water; non-jurisdictional.
- ii. E-2; non-relatively permanent water; non-jurisdictional.
- iii. E-3; non-relatively permanent water; non-jurisdictional.
- iv. E-4; non-relatively permanent water; non-jurisdictional.
- v. E-5; non-relatively permanent water; non-jurisdictional.
- vi. Pond-2; artificial lake created by excavating dry land to collect and retain water for stock watering; non-jurisdictional.

## 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)
- e. 2003 SWANCC guidance

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3. REVIEW AREA. The review area for this AJD is limited to the six features identified as E-1, E-2, E-3, E-4, E-5 and Pond-2 and are situated within a 30-acre parcel located east of Interstate 65 (I-65) and south of County Road 222 in Good Hope, Cullman County, Alabama, at Latitude 34.128419, Longitude -86.863960. The attached figures depict the review area.
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 resources are connected is the Sipsey Fork. Sipsey Fork is on the Mobile District's Section 10 list and is a large tributary to Mulberry Fork, which converges with Locust Fork to form the headwaters of the Black Warrior River. Pond-2 is not connected to a TNW, interstate water, or territorial sea.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

After precipitation events, E-1 directs flow southwest into P-1. From the northern boundary of the review area, P-1 meanders 0.33 miles northwest, converges with another unnamed tributary (UT), and flows west through a culvert along I-65. After exiting the culvert along I-65, P-1 flows west for an additional 1.57 miles before converging with a large UT to form the headwaters of Ryan Creek. Ryan Creek meanders southwest for 9 miles before entering the limits of Alabama Power Company's Lewis Smith Lake. Within Lewis Smith Lake, Ryan Creek meanders 18.15 miles southwest until it flows into Sipsey Fork above the Lewis Smith Dam. Sipsey Fork flows south for 0.85 miles, passes through the dam, and continues flowing southwest for 2.56 miles until it becomes a Section 10 water as it falls below the normal pool elevation of the Corps' Bankhead Lake.

After precipitation events, E-2 directs flow north into I-2. I-2 flows into P-1, P-1 flows into Ryan Creek, and Ryan Creek flows into Sipsey Fork as described above.

After precipitation events, E-3 directs flow north into I-2. I-2 flows into P-1, P-1 flows into Ryan Creek, and Ryan Creek flows into Sipsey Fork as described above.

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<sup>6</sup> 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.

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After precipitation events, E-4 directs flow northwest into Wetland 1. Wetland 1 has a continuous surface connection with P-1. P-1 flows into Ryan Creek, and Ryan Creek flows into Sipsey Fork as described above.

After precipitation events, E-5 directs flow northwest into Wetland 1. Wetland 1 has a continuous surface connection with P-1. P-1 flows into Ryan Creek, and Ryan Creek flows into Sipsey Fork as described above.

Pond-2 is an artificial pond created by excavating dry land to collect and retain water for stock watering; therefore, it does not have a continuous surface connection with a TNW, interstate water, or territorial sea.

6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: 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.<sup>8</sup> 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

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<sup>7</sup> 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.

<sup>8</sup> 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.

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- 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”).<sup>9</sup> 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.

Pond-2 is a 0.0747-acre artificial pond created by excavating dry land to collect and retain water for stock watering. Pond-2 is centered at 34.127805, -86.864199. The feature holds water year-round and would be considered relatively permanent. Pursuant to the preamble to the Final 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the US. See preamble 328.3 Definitions (e), which states the Corps generally does not consider the following water to be waters of the U.S.: "Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

- 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

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<sup>9</sup> 51 FR 41217, November 13, 1986.

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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).

E-1, E-2, E-3, E-4, and E-5 are streams that are non-relatively permanent waters. These features only flow in response to rainfall events. E-1 is centered at 34.129455, -86.862681; E-2 is centered at 34.127596, -86.863973; E-3 is centered at 34.127506, -86.863499; E-4 is centered at 34.128354, -86.862813; and E-5 is centered at 34.128477, -86.863057.

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. Site visit was conducted with a Mobile District project manager and the consultant on December 21, 2022. In office evaluation using desktop resources was completed on January 22, 2024.

b. USGS National Map at <https://apps.nationalmap.gov/viewer/>. Accessed on January 22, 2024.

c. USDA-NRCS Web Soil Survey provided by the agent in the preconstruction notification dated November 7, 2023.

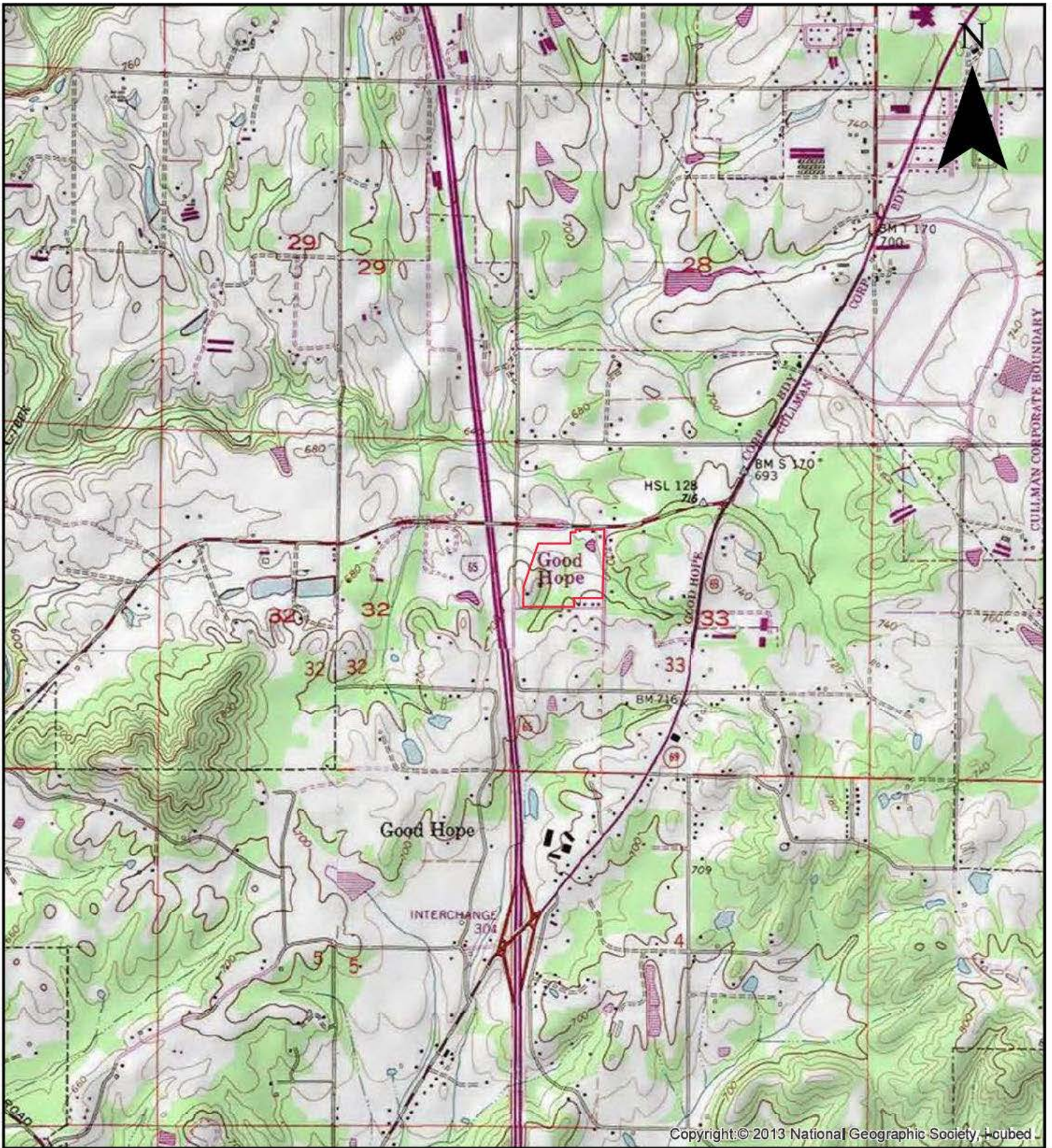
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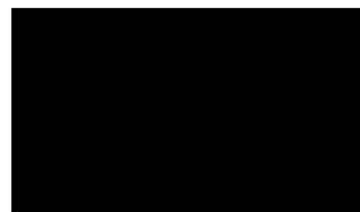

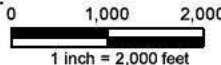



d. Google Earth aerial photography dated March 1997, September 2010, October 2015, and May 2023.

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.





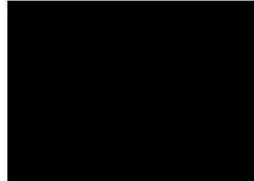





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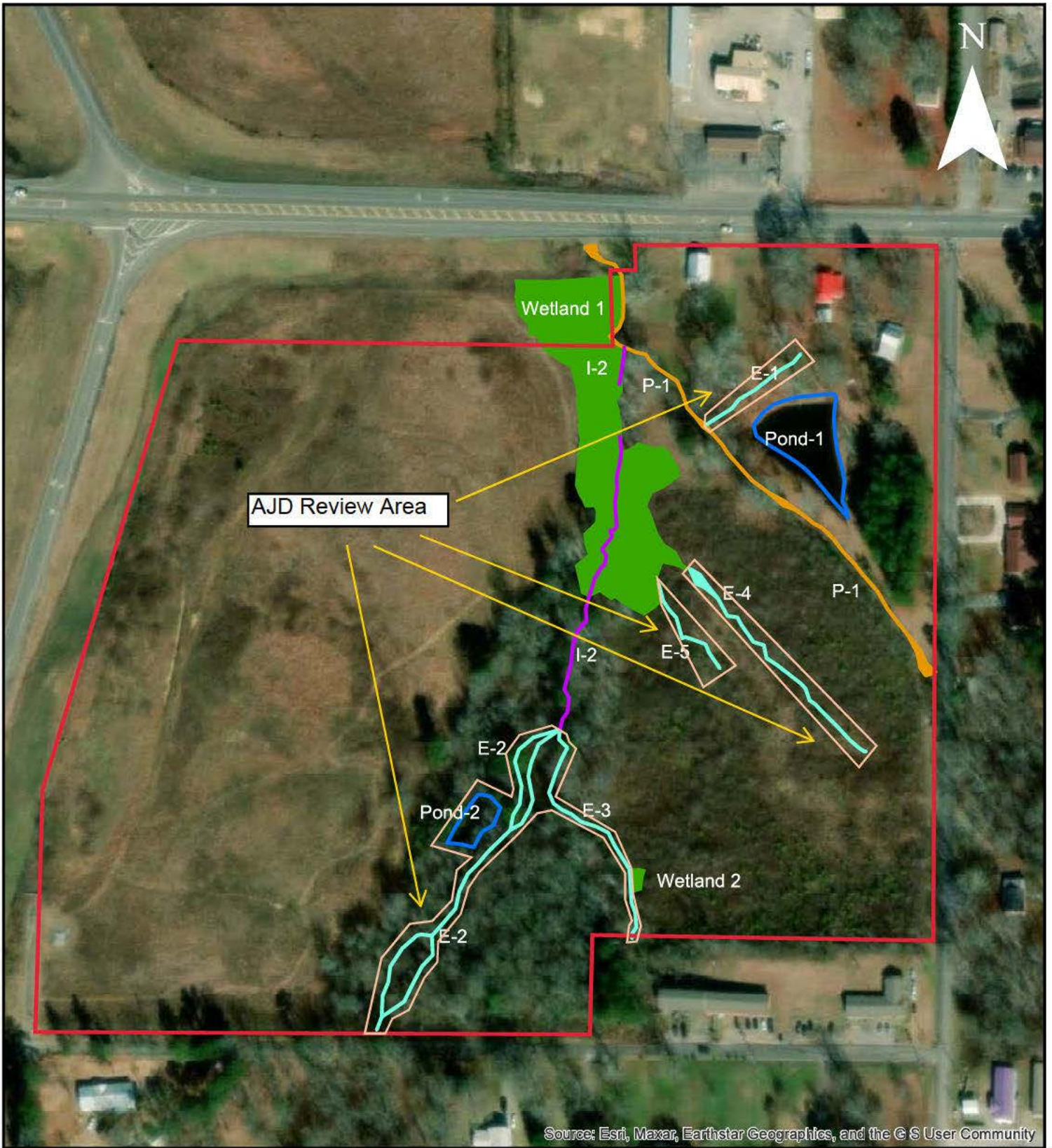
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| <p><b>Legend</b></p> <p> Site Boundary</p> |  | <p><b>TITLE:</b> Site Location Map</p>  <p><b>SCALE:</b><br/> <br/>     1 inch = 2,000 feet</p> | <p><b>FIGURE NO.</b><br/>1</p> <p><b>PROJECT NO.</b><br/></p> <p><b>DRAWN BY</b><br/></p> <p><b>DATE DRAWN</b><br/></p> |
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Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

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| <p><b>Legend</b></p> <p> Site Boundary</p> |  | <p><b>TITLE:</b> Site Aerial Map</p>                     | <p><b>FIGURE NO.</b></p> <p>2</p>                                                                                                                                                                                                                                                                                                           |
|                                                                                                                              |  | <p><b>SCALE:</b> 0 125 250</p>  <p>1 inch = 250 feet</p> | <p><b>PROJECT NO.</b></p>  <p><b>DRAWN BY</b></p>  <p><b>DATE DRAWN</b></p>  |



Source: Esri, Maxar, Earthstar Geographics, and the © S User Community

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| <p><b>Legend</b></p> <ul style="list-style-type: none"> <li><span style="border: 2px solid red; display: inline-block; width: 20px; height: 10px; margin-right: 5px;"></span> Site Boundary</li> <li><span style="border-bottom: 2px solid cyan; display: inline-block; width: 20px; margin-right: 5px;"></span> Ephemeral Features</li> <li><span style="border-bottom: 2px solid purple; display: inline-block; width: 20px; margin-right: 5px;"></span> Intermittent Feature</li> <li><span style="border-bottom: 2px solid yellow; display: inline-block; width: 20px; margin-right: 5px;"></span> Perennial Feature</li> <li><span style="border-bottom: 2px solid blue; display: inline-block; width: 20px; margin-right: 5px;"></span> Ponds</li> <li><span style="background-color: green; display: inline-block; width: 20px; height: 10px; margin-right: 5px;"></span> Wetlands</li> <li><span style="border: 2px solid orange; display: inline-block; width: 20px; height: 10px; margin-right: 5px;"></span> AJD Review Area</li> </ul> | <div style="background-color: black; width: 100%; height: 100%;"></div> | <p><b>TITLE:</b><br/>Aerial Map with Site Features</p> <div style="background-color: black; width: 100%; height: 100%;"></div> <p><b>SCALE:</b> 0 100 200<br/>1 inch = 200 feet</p> | <p><b>FIGURE NO.</b><br/>6</p> <p><b>PROJECT NO.</b><br/>[REDACTED]</p> <p><b>DRAWN BY</b><br/>[REDACTED]</p> <p><b>DATE DRAWN</b><br/>[REDACTED]</p> |
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