



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

CESAM-RD-N

May 7, 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-2023-01183-CMS 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 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).

| Waters Name | Latitude | Longitude | Waters Size | Type Of Aquatic Resource | Geographic Authority |
|-------------|----------|-----------|-------------|---------------------------------|----------------------|
| OW-1 | 34.326 | -85.8124 | 3 ACRES | NON-WOTUS-LAKE.POND.NEGATIVE-A3 | None |
| S-1 | 34.3201 | -85.8183 | 190 FEET | A5.TRIB-404 | Section 404 |
| S-2 | 34.3209 | -85.8123 | 1669 FEET | NON-WOTUS-STREAM.NEGATIVE-A5 | None |
| S-3 | 34.3214 | -85.8157 | 2226 FEET | A5.TRIB-404 | Section 404 |
| S-4 | 34.3244 | -85.8117 | 438 FEET | NON-WOTUS-TRIB.NEGATIVE-A5 | None |
| S-5 | 34.3239 | -85.8113 | 258 FEET | NON-WOTUS-TRIB.NEGATIVE-A5 | None |

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

3. REVIEW AREA. The review area is comprised of 165 acres centered at latitude 34.3220, longitude -85.8135 in Portersville, DeKalb County, Alabama.

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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 Coosa River (Neely Henry Lake). The Coosa River is on the Mobile District's Section 10 waters list. Section 10 waters are a subset of TNWs.⁶ The Coosa River is also an interstate water as it originates in Rome, Georgia and crosses the Georgia-Alabama state line east-northeast of Gadsden.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. **S-1** flows off the subject site and into culvert under the railroad and another culvert under Highway 11 for a distance of approximately 2,300 feet to Mush Creek, a relatively permanent water (RPW). Mush Creek flows approximately 2 miles to its confluence with Big Wills Creek, an RPW. Big Wills Creek meanders approximately 46 miles to the Coosa River (Neely Henry Lake), a TNW, in Gadsden. **S-3** flows in a northwesterly direction in the southwestern portion of the site, then flows along the review area boundary and parallel to a railroad track for a short distance before entering a culvert under the railroad and then flows outside of the review area where it converges with S-1 along Highway 11 before entering a culvert under Highway 11 and flowing approximately 500 feet to Mush Creek and along the flowpath described above for S-1 to the Coosa River, a TNW.

OW-1, S-2, S-4, and S-5 do not flow to a TNW, interstate water, or the territorial seas.

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

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.

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

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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): **S-1** is a second order tributary that originates off-site and flows a short distance (190 feet) on the southeastern corner of the review area. The consultant identified it as an intermittent tributary. S-1 has defined bed and banks, sediment sorting, lack of vegetation, evidence of scour. Based on these observations, S-1 is defined as an RPW.

S-3 is a first order tributary that originates at a headcut at the base of a steep, rock outcrop within the review area. At the time of the Corps' site visit on March 11, 2024, S-3 exhibited base flow, exhibited signs of sediment sorting, defined bed and banks, scour, lack of vegetation. Based on these observations, S-3 is defined as an RPW.

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

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

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- 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
- 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*.

OW-1 is a 3-acre abandoned quarry pit that was created in uplands during rock quarry operations at the site. OW-1 does not have a tributary flowing into it or out of it and is completely surrounded by uplands. OW-1 does not support a link to interstate or foreign commerce. It is not known to be used by interstate or foreign travelers for recreation or other purposes. It does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce and is not known to be used for industrial purposes by industries in interstate commerce. For all of these reasons, OW-1 does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a).

⁹ 51 FR 41217, November 13, 1986.

- 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).

S-2 is a non-relatively permanent water that is 1,669 linear feet long in the review area. This is a first order stream that originates near the eastern property boundary. This stream only flows in response to rainfall events and is above the water table. S-2 exhibited weak bed and banks, had leaf litter in the bed, lacked indicators of hydric soils, and lacked base flow.

S-4 is a non-RPW that is 438 feet long in the review area. This is a first order stream that originates on the property and flows a short distance and ends near a logging road where the bed and banks disappear. This stream only flows in response to rainfall events and is above the water table. S-4 exhibited weak bed and banks, lacked indicators of hydric soils, and lacked base flow.

S-5 is a non-RPW that is 258 feet long in the review area. This is a first order stream that originates on the property and flows a short distance and ends near a logging road where the bed and banks disappear. This stream only flows in response to rainfall events and is above the water table. S-5 exhibited weak bed and banks, lacked indicators of hydric soils, and lacked base flow.

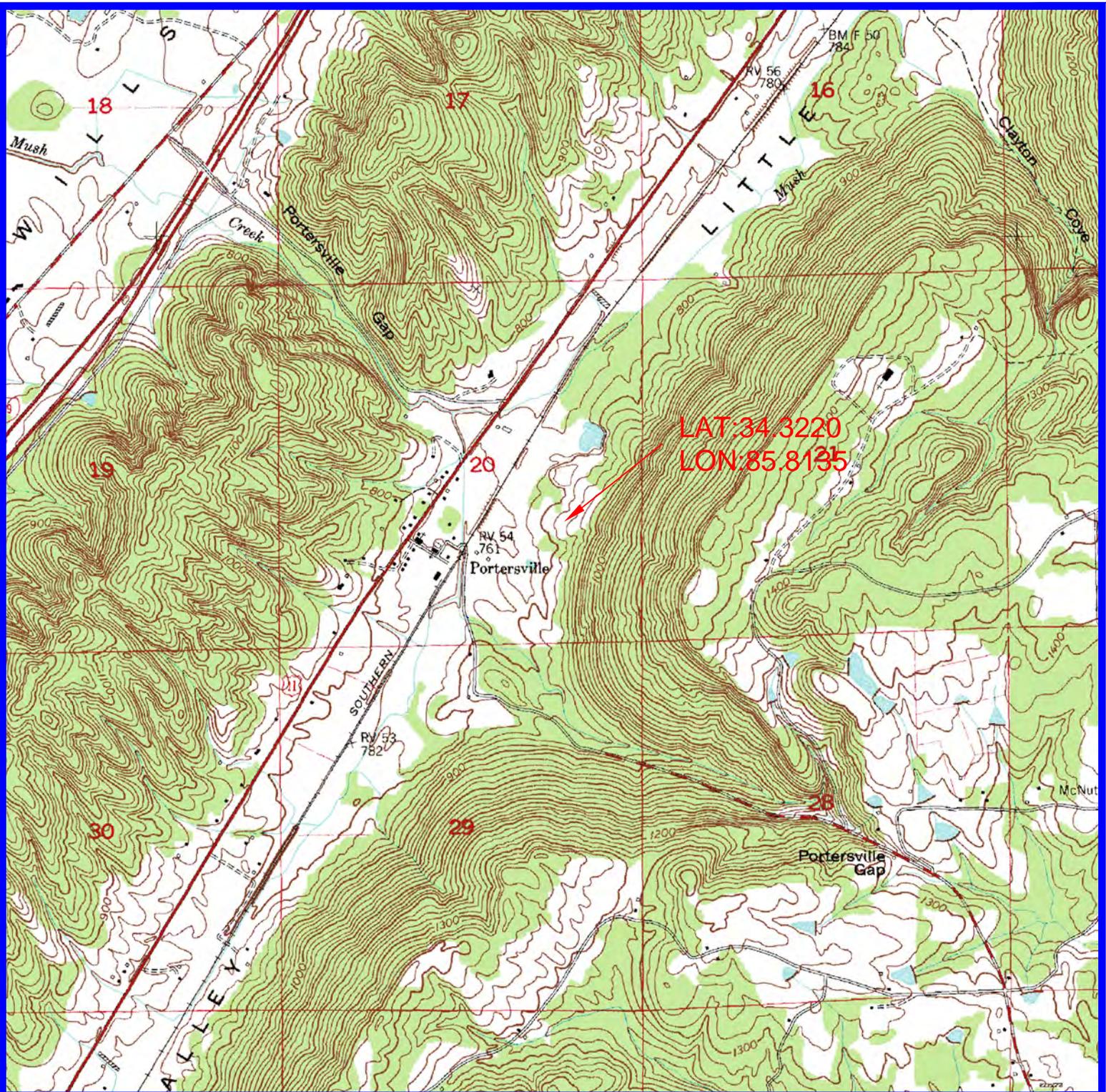
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Corps personnel site visit March 11, 2024.
 - b. McGehee Engineering's revised JD request dated February 2, 2024, with the exception of changes that were made after the March 11, 2024 site visit (such as flow regime for S3 and length of S3).
 - c. Updated waters table received March 18, 2024, updated delineation map received April 23, 2024, and updated shape files received April 23, 2024.
 - d. Corps National Regulatory Viewer – Aerial photos, USGS quad, Lidar accessed multiple times in March and April 2024.

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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.



SCALE: 1" = 2000'
at 8 1/2" x 11"

December 5th, 2023

WHITAKER CONTRACTING, CORP.
PORTERSVILLE QUARRY
(APPROXIMATELY 165 ACRES)



PROJECT AREA MAP

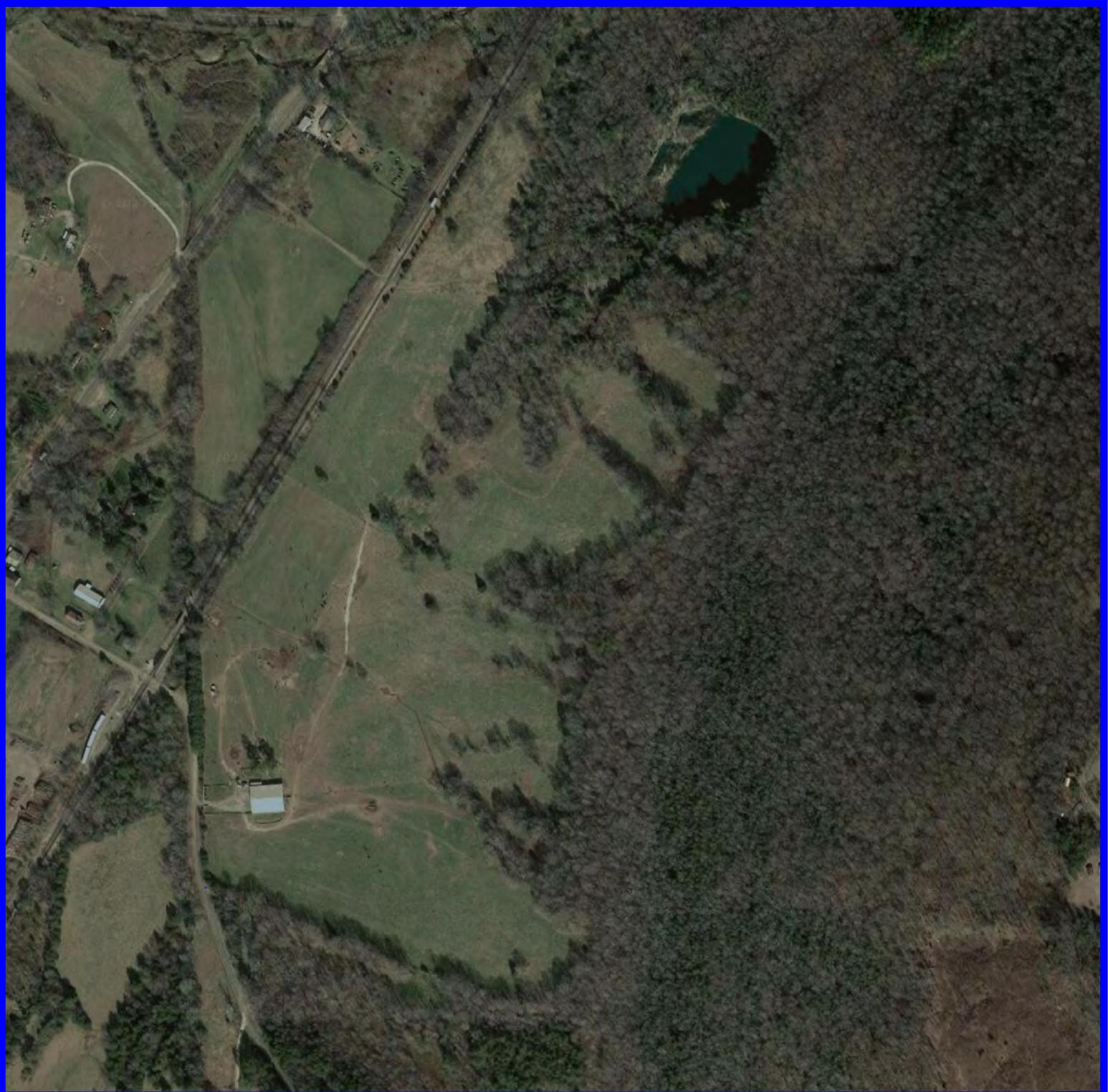
SECTIONS 20, TOWNSHIP 8 SOUTH, RANGE 8 EAST
ALL IN DEKALB COUNTY, ALABAMA
AS FOUND ON THE PORTERSVILLE, ALABAMA USGS QUADRANGLE

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mcgehee engineering corp
post office box 3431
jasper, alabama 35502-3431
telephone: (205) 221-0686 fax: 221-7721
email: StephenB@mcgehee.org



PROJECT BOUNDARY

Latitude: 34.3220 N
Longitude: -85.8135 W



SCALE: 1" = 500'
at 8 1/2" x 11"

December 5th, 2023

WHITAKER CONTRACTING, CORP.
PORTERSVILLE QUARRY
(APPROXIMATELY 165 ACRES)



AERIAL PHOTO
(Photo Date: 01-2022)

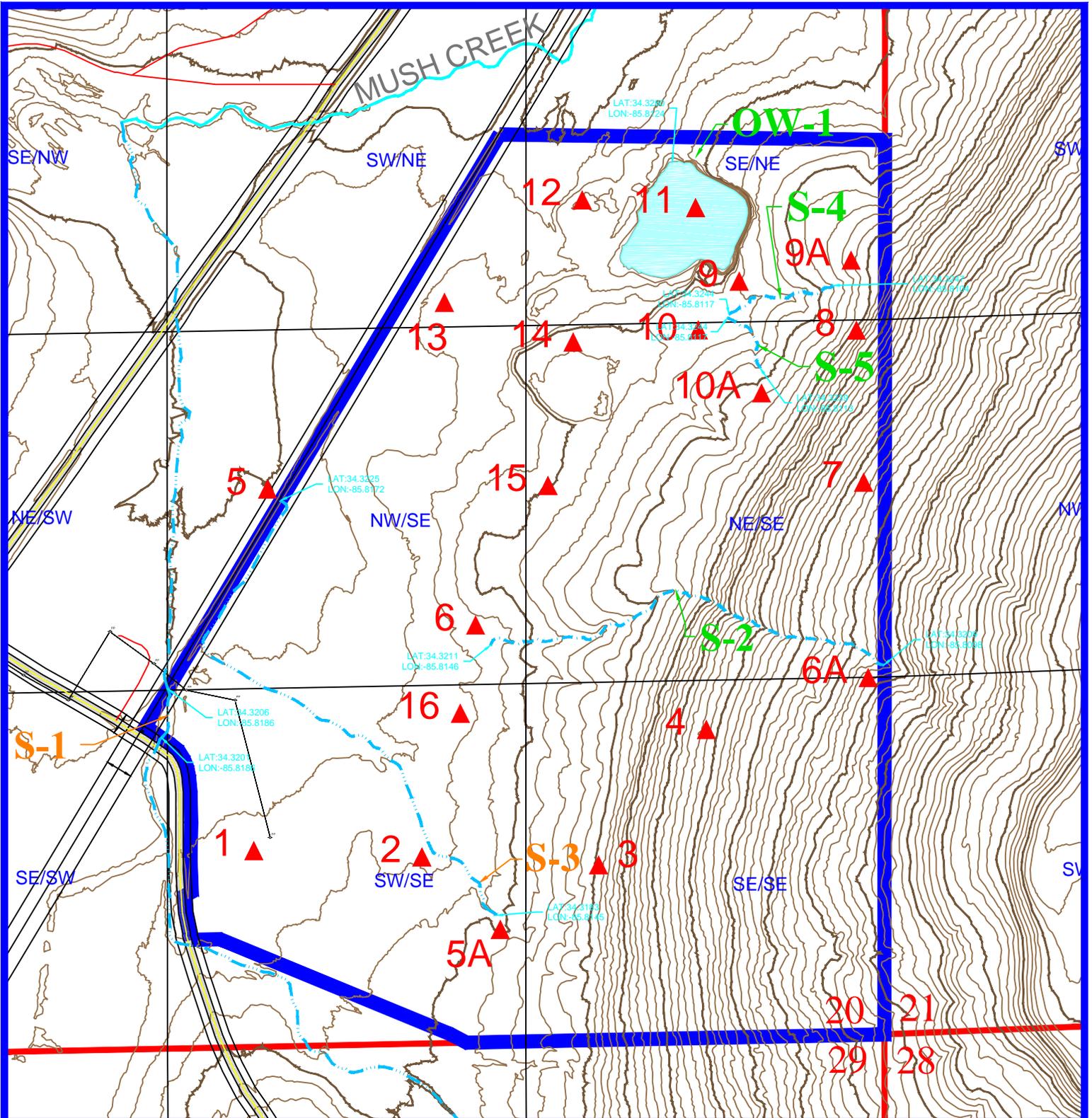
SECTIONS 20, TOWNSHIP 8 SOUTH, RANGE 8 EAST
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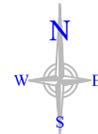
PROJECT BOUNDARY

Latitude: 34.3220 N
Longitude: -85.8135 W



SCALE: 1" = 500'
at 8 1/2" x 11"
April 23rd, 2024

WHITAKER CONTRACTING, CORP.
PORTERSVILLE QUARRY
(APPROXIMATELY 165 ACRES)



LEGEND

- == PRIVATE ROAD
- PUBLIC ROAD
- SECTION
- OCCUPIED DWELLING
- - - EPHEMERAL STREAM
- · · · · INTERMITTENT STREAM
- PERENNIAL STREAM
- WETLAND
- S-1 WATERS ID JURISDICTIONAL
- S-1 WATERS ID NON-JURISDICTIONAL
- OPEN WATER IMPONDEMENTS
- ▲ DELINEATION POINTS
- STREAM CHANGE INDICATOR
- U.S.G.S. CONTOURS

DELINEATION MAP

SECTIONS 20, TOWNSHIP 8 SOUTH, RANGE 8 EAST
ALL IN DEKALB COUNTY, ALABAMA
AS FOUND ON THE PORTERSVILLE, ALABAMA USGS QUADRANGLE

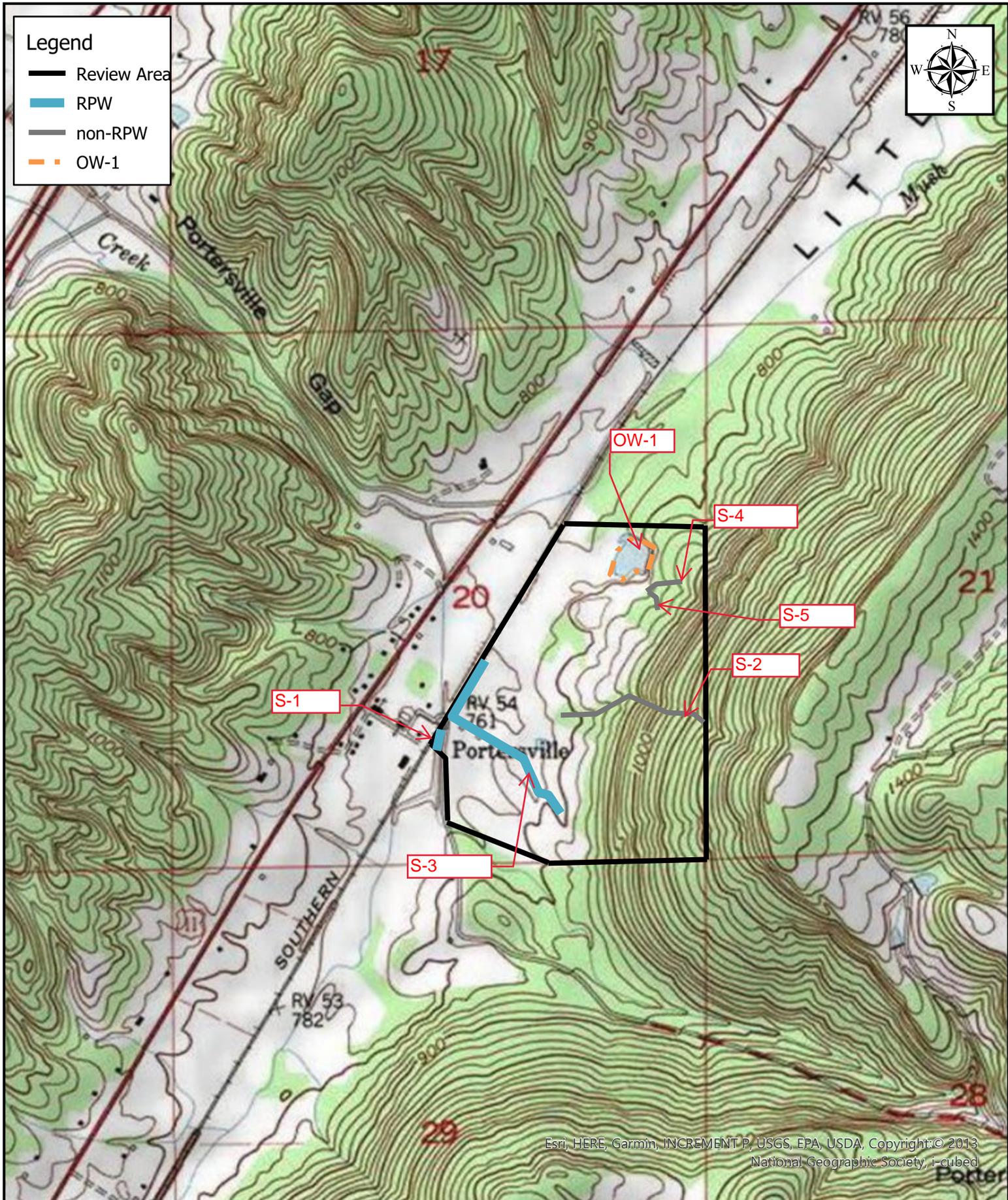
PROJECT BOUNDARY

Latitude: 34.3220 N
Longitude: -85.8135 W

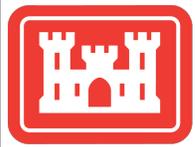
MEC
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Legend

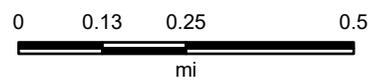
-  Review Area
-  RPW
-  non-RPW
-  OW-1



Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Copyright: © 2013 National Geographic Society, i-cubed



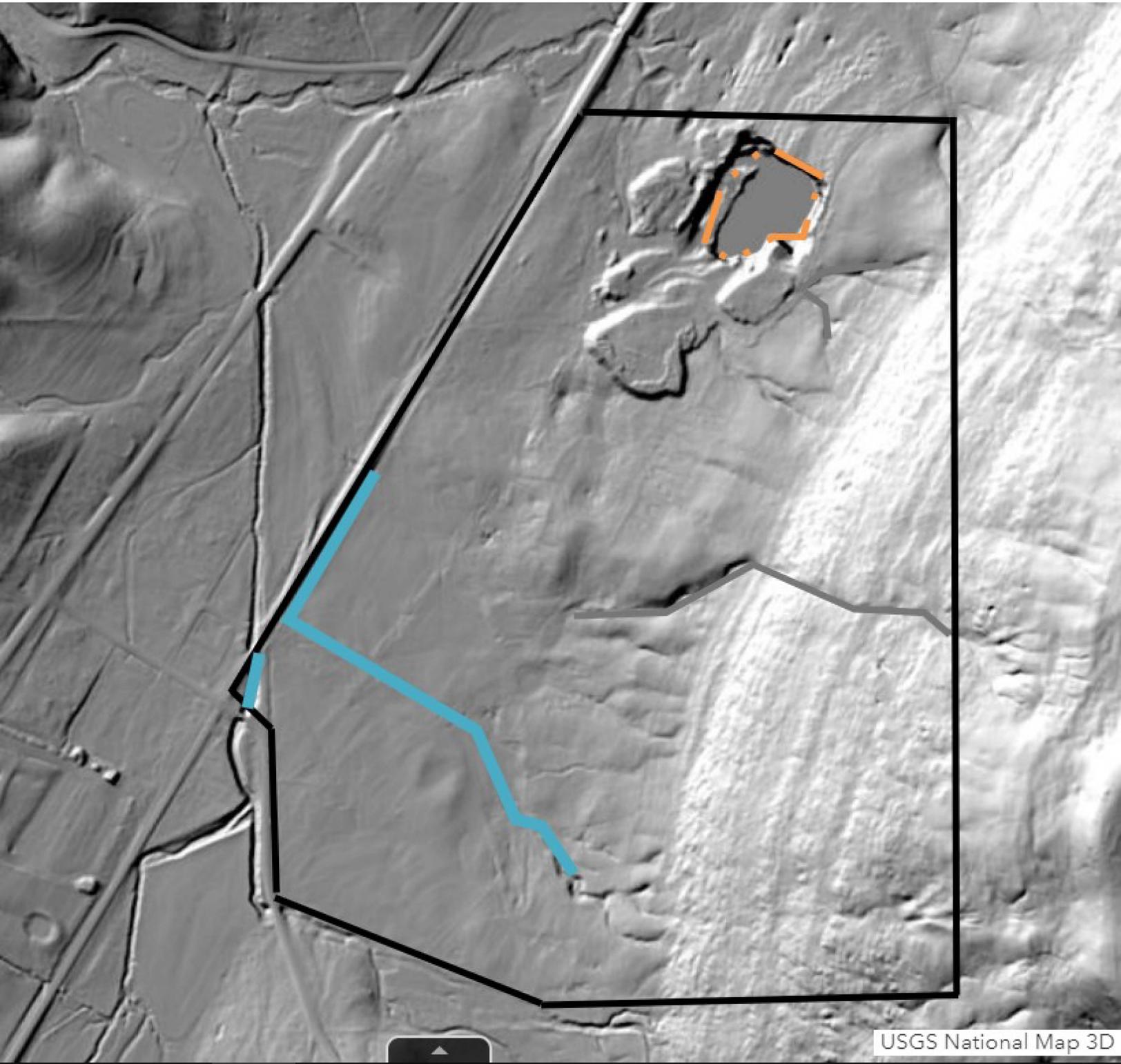
SAM-2023-1183-CMS
Delineation Map
USGS Quad



Map Center: 85.816341°W 34.324081°N

Map Created by: Courtney Shea
 Date: 4/30/2024

Coordinate System: WGS 1984 Web
 Mercator Auxiliary Sphere



USGS National Map 3D

SAM-2023-1183-CMS
Portersville Quarry
LiDAR Hillshade