



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

CESAM-RD-N

March 28, 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-2023-1110-CMS, 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 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

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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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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).

The review area for this AJD includes only those features identified as S4R1, S12, S13, S14, S21, S23, S24, and S26R1. These features are part of a larger 110-acre review area that includes aquatic resources that are identified on a PJD form.

Waters Name	Latitude	Longitude	Waters Size	Type Of Aquatic Resource
S12	33.3501	-86.85324	350 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S13	33.34994	-86.85292	206 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S14	33.34954	-86.85265	165 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S21	33.34867	-86.85168	653 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S23	33.34572	-86.85509	259 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S24	33.34493	-86.85584	564 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S26R1	33.34334	-86.85597	203 FEET	NON-WOTUS-STREAM.NEGATIVE-A5
S4R1	33.3516	-86.85172	128 FEET	NON-WOTUS-STREAM.NEGATIVE-A5

## 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)

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3. REVIEW AREA. The review area for this AJD includes only those features identified as S4R1, S12, S13, S14, S21, S23, S24, and S26R1. These features are part of a larger 110-acre review area that includes aquatic resources that are identified on a PJD form.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Cahaba River is the closest TNW to which the aquatic resources are connected.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The aquatic resources flow into Scout Creek within the property boundary. Scout Creek becomes an impoundment southeast of the review area and is approximately 3,500 feet in length. Water exits the Scout Creek impoundment and converges with Black Creek and flows approximately 200 feet to the southwest into Wilborn Lake. Water exits Wilborn Lake and Black Creek continues to flow downstream for approximately 1800 linear feet before flowing into the Cahaba River.
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,

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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.

<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.

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
- 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.
- 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.
- 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

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

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the review area and describe how it was determined to be a waste treatment system.

- 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.
- 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).

S4R1, S12, S13, S14, S21, S23, S24, and S26R1 are non-relatively permanent waters that flow only in response to rainfall events. These features exhibit weak bed and banks, lacked indicators of baseflow, contained leaf litter in the bottom of the channels, and were above the water table.

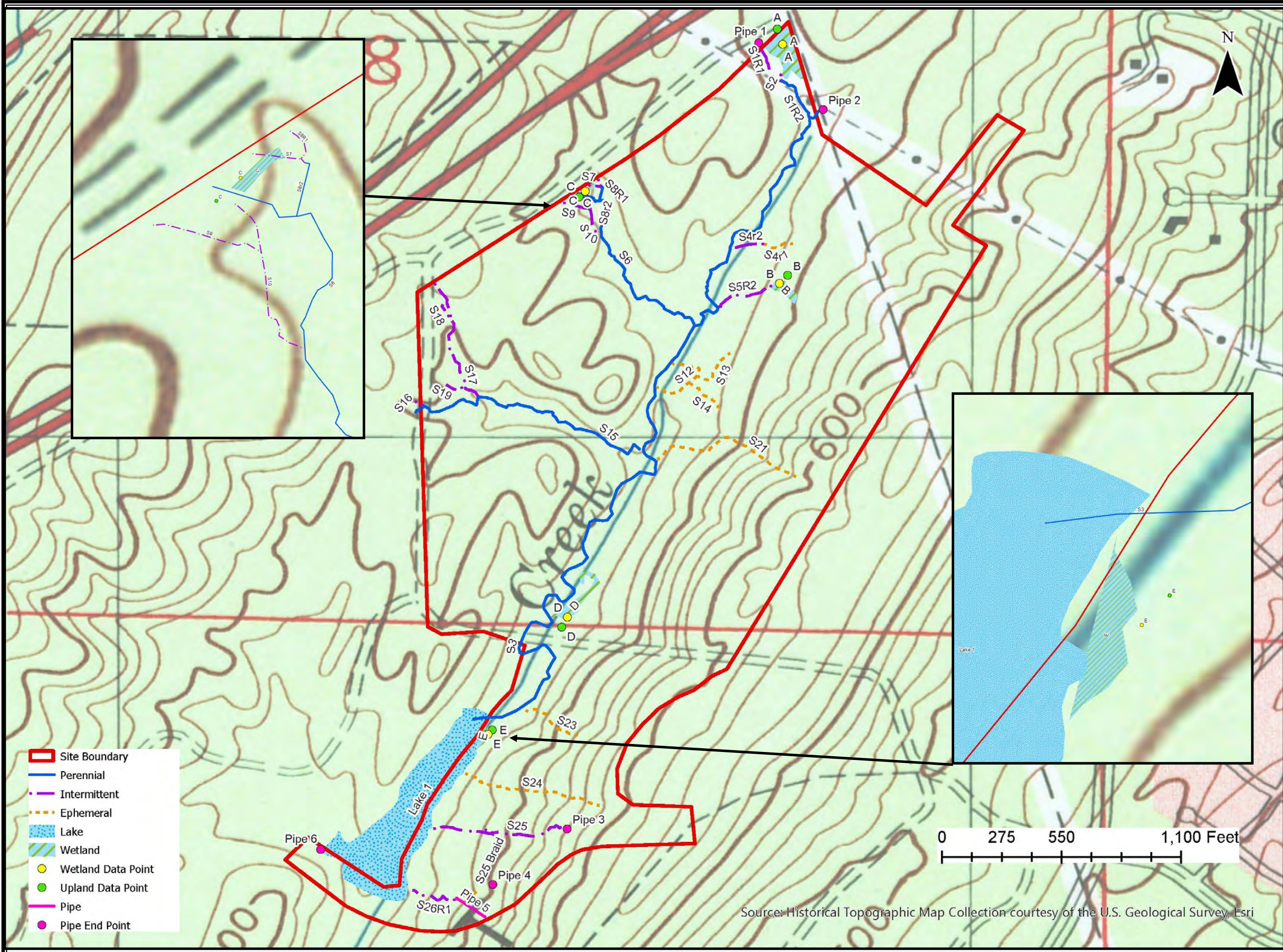
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Spectrum Environmental’s report dated February 13, 2024
  - b. National Regulatory Viewer, accessed March 26, 2024
  - c. North Carolina Division of Water Quality Identification Methods for the Origins of Intermittent and Perennial Stream, Version 4.11, September 1, 2010
  - d. Observations during site visit January 30, 2024.
  - e. Antecedent Precipitation Tool

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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.



**TITLE**

**Figure 8a — Site Delineation Overview**  
 Jurisdictional Determination  
 SAM-2023-1110-CMS  
 Broad Metro, LLC  
 Stadium Trace Village Phase 2  
 Hoover, Jefferson County, AL

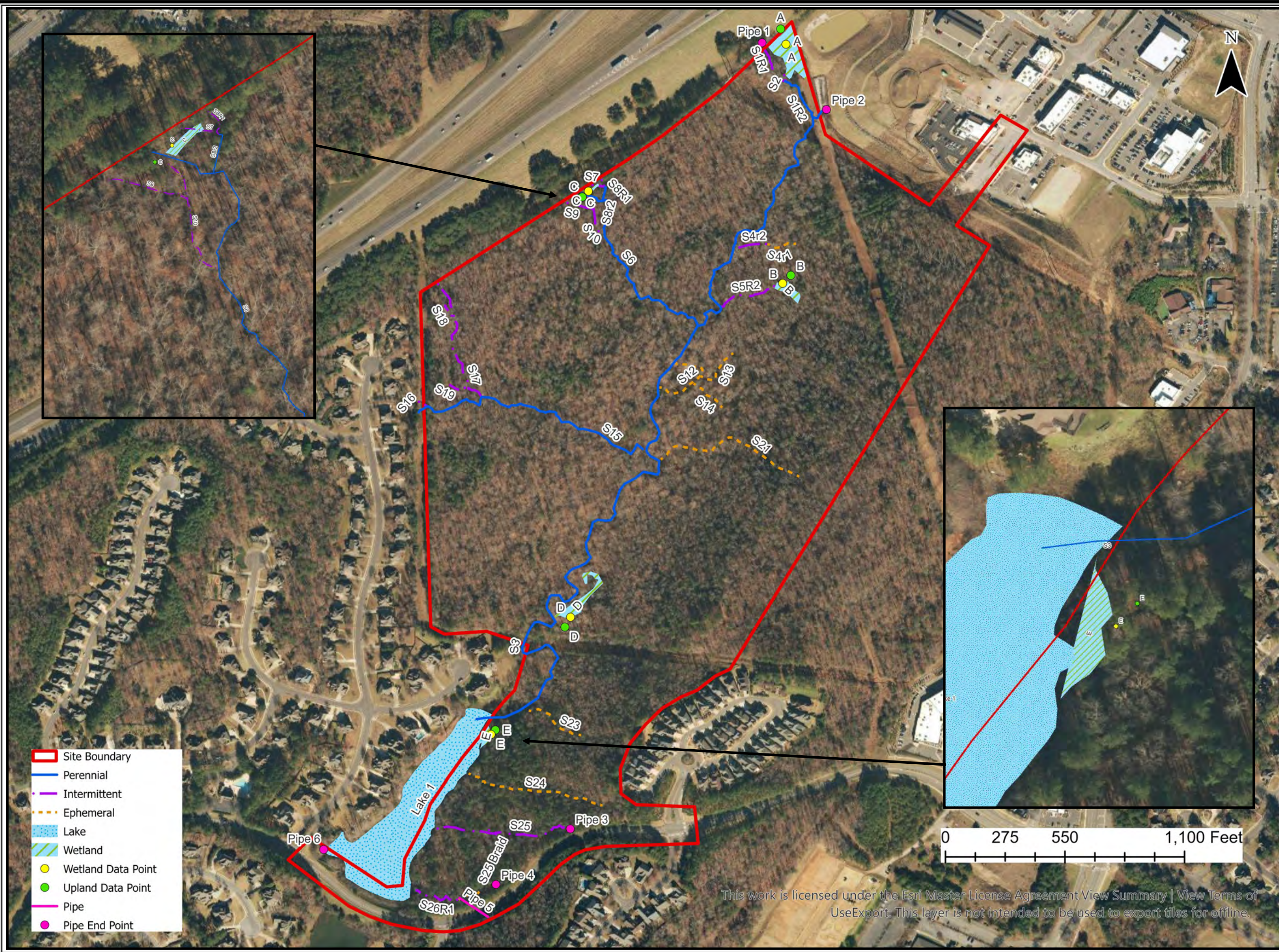


Drawn By:	Client #:
LP	3244
Checked By:	Date:
BS	02/05/2024
Project Mgr.:	Project #:
SF	3244-004-33

Source:  
 Image courtesy of ESRI and USGS  
 Helena, Alabama 7.5 minute  
 quadrangle.

2/5/24	JD Update	LP
DATE	REVISION NOTE	BY

Source: Historical Topographic Map Collection courtesy of the U.S. Geological Survey, Esri



- Site Boundary
- Perennial
- Intermittent
- Ephemeral
- Lake
- Wetland
- Wetland Data Point
- Upland Data Point
- Pipe
- Pipe End Point

**TITLE**

**Figure 8b — Site Delineation Overview**  
 Jurisdictional Determination  
 SAM-2023-1110-CMS  
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 Stadium Trace Village Phase 2  
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Drawn By:	Client #:
LP	3244
Checked By:	Date:
BS	02/05/2024
Project Mgr.:	Project #:
SF	3244-004-33

Source:

Image courtesy of ESRI.

2/5/24	JD Update	LP
DATE	REVISION NOTE	BY

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