IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA, Plaintiff, v. CHAMELEON LLC and GARY V. LAYNE, Defendants.	)))))))))))	Civil Action No. 3:23cv763

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Despite contending that its bare-bones Complaint containing virtually no supporting facts and a repetitive series of legal conclusions contains "the necessary short and plain statement" of facts supporting its CWA claim, the Government felt compelled to provide a completely impermissible 17-page expert declaration, in addition to its 30-page Opposition, explaining the supposedly alleged well-pled facts. But the only "facts" to be found are admittedly just three: StreamStats web site information referred to in the Complaint, a "hillshade elevation" image and data also referenced in the Complaint, and generic, non-specific "observations" from an EPA Site inspection conducted by the expert declarant in 2021. Completely absent are any facts, arguments, or even bare mention in any way contesting the most important facts in this case (as demonstrated by USGS maps incorporated by reference in the Complaint): the nearest mile-plus stretches of Lickinghole Creek and Campbell Creek are intermittent streams that do not, as a matter of law, qualify as waters of the United States ("WOTUS"). *That* omission and concession alone is dispositive. Even assuming for the sake of argument to the Government can survive this omission and concession, these three "facts" do not confer jurisdiction. Instead, they confirm the lack of jurisdiction.

Mr. Layne has been asking for years the same question that is now before the Court[1]:

> Can you please explain where the WOTUS are on or adjacent to the property?

But the Government has never answered this question during the four years since Mr. Layne posed it in writing to EPA. Most recently and importantly, neither the Complaint nor the Government's 47 pages of opposition papers come close to answering this basic jurisdictional

[1] Excerpt from May 29, 2020 Letter from Mr. Layne to Ms. Almeter. *See* Doc. 2-12, Case No. 3:21mc2 (E.D. Va. Mar. 12, 2021). The Government relied on this letter in its Complaint, (*see* Compl. ¶ 57), and the Court may take judicial notice of its own records, *see Anderson v. Fed. Deposit Ins. Co.*, 918 F.2d 1139, 1141 n.1 (4th Cir. 1990), so Defendants may rely on it in this reply for both reasons. (*See* Mem. 6 (legal standard for consideration of other documents).)

question. The Government's lengthy briefing and inappropriate declaration do nothing more than confirm that it has failed to provide *any well-pled* facts supporting the presence of WOTUS connected to the Site and, therefore, CWA jurisdiction is lacking here.

I. Intermittent Streams Are Not WOTUS.

A. The Government Concedes That The 1.38 Miles Of Lickinghole Creek And 1.02 Miles Of Campbell Creek Approaching The Site Are Intermittent.

For all the proverbial ink spilled attempting to escape the inevitable, the Government failed to address Defendants' argument that significant stretches of water bodies *before* reaching the Site themselves do not qualify as WOTUS. Thus, the Government has conceded that jurisdiction fails at those points, requiring dismissal.

As Defendants explained in their Memorandum in Support of Their Motion to Dismiss, "[t]hree sections of Lickinghole Creek identified as intermittent run 7,284 feet (1.38 miles)," (Mem. 9), and the "northwestern . . . intermittent section[] of Campbell Creek stretches 5,385 feet (1.02 miles)," (Mem. 11), before reaching the Site. At these points, they fail to qualify as WOTUS. (Mem. 9, 11.) The Government does not even put up a fight on these points, instead focusing exclusively on some "unnamed tributaries" not shown on the USGS maps incorporated into the Complaint but allegedly located on the Site. (*See generally* Opp'n.; Almeter Decl.)

As this Court has regularly held, failure to defend a claim concedes it. *See, e.g.*, *Global Tel*Link Corp. v. JACS Solutions, Inc.*, __ F. Supp. 3d __, 2023 WL 8918281, at *11 (E.D. Va. Dec. 27, 2023); *Amazon.com, Inc. v. WDC Holdings LLC*, 2023 WL 2815140, at *11 (E.D. Va. Apr. 6, 2023) (party "conceded th[e] point" where it failed to respond to arguments). This Court addressed a similar issue in *Global Tel*Link* where defendant argued that plaintiff had provided no more than a legal conclusion that defendant had conspired to violate a contract. *See* 2023 WL 8918281, at *11. In "responding" to that argument, plaintiff instead focused on the alleged

conspiracy to violate *different* contracts. *Id.* Thus, the opposition never addressed the arguments trained on the relevant allegations in the complaint. *See id.* This conceded the argument, requiring dismissal of the claim. *See id.*

So too here. Defendants argued that these identified stretches of Lickinghole Creek and Campbell Creek did not qualify as WOTUS because they are classified as intermittent. (Mem. 9, 11.) But not a word of *these* long, downstream stretches of the creeks appears in the 47 pages of opposition papers. (*See generally* Opp'n; Almeter Decl.) Just as plaintiff did in *Global Tel*Link*, the Government concedes the argument here, requiring dismissal.

B. The USGS-Identified Intermittent Streams Are Not WOTUS, And CWA Jurisdiction Ends Where They Begin.

If there is one thing that the Parties agree on, it is that *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), adopted Justice Scalia's thoughtful and precise approach articulated in *Rapanos v. United States*, 547 U.S. 715 (2006), to determine CWA jurisdiction over wetlands. (*See* Opp'n 18-19.) But the Government's analysis rests on a faulty premise, focusing only on "unnamed tributaries" allegedly on the Site, failing to bridge the huge gap between the Site and traditionally-navigable waters.

As Defendants explained, the proper starting point for assessing whether CWA jurisdiction existed over the Site begins with where jurisdiction "undoubtedly lies: the Chicahominy and Pamunkey Rivers" because those "are traditionally-navigable waterways." (Mem. 8.) The jurisdictional assessment then moves upstream towards the Site. Both of the traditionally-navigable waters have streams feeding into them (Stony Run and Mechumps Creek) that are identified as perennial in the incorporated USGS maps. It is an open question whether these stretches would qualify as WOTUS, (*see* Mem. 8), but for purposes of disposing of the instant motion and assuming they do, CWA jurisdiction still does not come close to reaching the Site.

Stony Run and Mechumps Creek also have streams that flow into them (Lickinghole Creek and Campbell Creek), but these two streams are perennial but only to a point. They both become intermittent over a mile from the Site, as detailed above. It is at these points that the Government's chains of waterways attempting to connect traditionally-navigable waterways to the Site end.

That the Complaint claims that these creeks are "relatively permanent" does not make them so. *Rapanos*, confirmed by *Sackett*, requires that the water at issue be "relatively permanent." *See Rapanos*, 547 U.S. at 742. The Complaint's statement that these stretches are "relatively permanent" is a legal conclusion, given zero deference under *Iqbal* and *Twombly*.[2] *See Call v. GEICO Advantage Ins. Co.*, 2023 WL 5109549, at *2 (E.D. Va. Aug. 9, 2023) (Hudson, J.). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Here, there are no factual allegations supporting the frame of legal conclusions. What is more, the bare legal allegations conflict with the websites relied on in the Complaint, meaning that the websites control. (*See* Opp'n 18 (citing *Call*, 2023 WL 5109549, at *3).)

Moreover, *Rapanos* makes clear that the start of these USGS-identified intermittent streams is where CWA jurisdiction ends because these USGS-identified streams were *specifically* discussed. At that time, the regulation defining WOTUS included, in addition to traditionally navigable waters, "other waters" such as "intermittent streams" and "mudflats." *Rapanos*, 547 U.S. at 724 (Scalia, J.). With that regulation before the Court, Justice Scalia emphasized at least six different times that intermittent flow disqualified a channel as WOTUS. *See, e.g.*, *id.* at 733, 735-36, 739. Indeed, the dissent took strong issue with Justice Scalia's analysis that intermittent

[2] The Complaint invokes this legal conclusion, without factual enhancement, twelve times. (*See* Compl. ⁋⁋ 28, 31-38, 40.) It does the same for the legal conclusion that the wetlands maintain a "continuous surface connection" five times. (*See* Compl. ⁋⁋ 28, 30, 34, 38, 40.)

flow was disqualifying for WOTUS. Attempting to bolster its argument, the dissent tried to point out concrete examples of channels with intermittent flow that would still count as WOTUS. *Rapanos*, 547 U.S. at 801 (dissent). This included "intermittent streams," which the dissent contended were still "streams" (and WOTUS) nonetheless. *Id.* In arguing that "common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams," the dissent pointed directly to USGS mapping. *Id.* (citing U.S. Dept. of Interior, U.S. Geological Survey, Topographic Map Symbols 3 (2005)). In other words, the dissent provided the example of a USGS-labeled "intermittent stream" as an "intermittent stream" that was still a "stream" in the dissent's view of what constituted WOTUS.

Justice Scalia squarely addressed where the dissent's "intermittent streams," including USGS-mapped intermittent streams, fell when it came for a determination of WOTUS. He stated that "the dissent's 'intermittent' . . . streams . . . are not" within the definition of "relatively permanent." *Id.* at 732 n.5 (Scalia, J.). Thus, they were not WOTUS. *See id.* Unquestionably, one of "the dissent's 'intermittent' . . . streams" was USGS-mapped intermittent streams.

These are the *exact* streams that the Government relies on in attempting to establish jurisdiction here. The Government does not, and cannot, dispute that the USGS maps incorporated by reference in its Complaint classify the relevant sections of Lickinghole Creek, Campbell Creek, and the mapped, unnamed tributaries connected thereto as *intermittent streams*. *Rapanos*, adopted by *Sackett* and untouched on this very point, forecloses jurisdiction.

C. The Presence Of Intermittent Streams Also Means That There Is No Continuous Surface Connection.

The concession that long stretches of intermittent streams lead to the Site also demonstrates that the Government cannot show a continuous surface connection such that it is difficult to determine where the wetlands end and WOTUS begins. *See Sackett*, 598 U.S. at 676.

In *Lewis v. United States*, the Fifth Circuit recently held that the Government could not meet this continuous surface connection requirement where the wetlands were linked to traditional navigable waters through a non-relatively permanent tributary. 88 F.4th 1073, 178 (5th Cir. 2023). There, the Court noted that the "nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary." *Id.* Thus, it was "not difficult to determine where the 'water' ends and any 'wetlands' on the Lewis property begin—there is simply no connection whatsoever." *Id.* Thus, there was "no factual basis *as a matter of law*" for CWA jurisdiction. *Id.* (emphasis added).

Just as in *Lewis*, the chain of water bodies the Government seeks to connect wetlands to WOTUS contains lengthy stretches of intermittent streams (*i.e.*, non-relatively permanent tributaries) that themselves are not WOTUS, as the Government concedes. Thus, just as in *Lewis*, "there is simply no connection whatsoever." This too requires dismissal.

II. The Almeter Declaration Cannot And Does Not Save The Government.

Buried twenty four pages into its Opposition brief, the Government finally admits that it can only point to three "facts" in the Complaint to support its claim: StreamStats web site information referred to in the Complaint, a "hillshade elevation" image and data also referenced in the Complaint, and non-specific "observations" from an EPA Site inspection conducted by the expert declarant in 2021. (Opp'n 24.) Apparently given the dearth of allegations on these points in the Complaint (not to mention their lack of any legal significance – discussed below), the Government was forced to take the inappropriate tact of having Ms. Almeter provide a 17-page declaration to attempt to create cognizable, supporting "facts," as well as their legal import. The sum of Ms. Almeter's testimony (even if acknowledged by the Court and read in its most favorable light) is that StreamStats provides information about the Site, that hillshade data provides

information about the Site, and that her inspection in 2021 is "consistent" with the websites' information.

As an initial matter, the Almeter Declaration amounts to an impermissible attempt to amend the Complaint through briefing. It should not be considered. Even so, the elaboration on the three "facts" identified in the Complaint are insufficient to establish CWA jurisdiction.

A. The Government Cannot Amend Its Complaint Through Briefing, And The Almeter Declaration Should Be Disregarded.

It is axiomatic that a party cannot amend a pleading through briefing. *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC,* 713 F.3d 175, 184 (4th Cir. 2013); *see, e.g.*, *Lokhova v. Halper*, 441 F. Supp. 3d 238, 264 n.24 (E.D. Va. 2020). That is exactly what the Government attempts to do here in providing the Almeter Declaration.

First, the Government operates under the mistaken assumption that Defendants pursue dismissal for lack of subject matter jurisdiction on a "factual" rather than "facial" basis. The Government incorrectly states that Defendants' Motion "attacks the factual basis" for this Court's subject matter jurisdiction, (*see* Opp'n 16), implying that Defendants seek dismissal based on a "factual" challenge to jurisdiction, (*see* Opp'n 4 (citing cases deciding "factual" challenge to subject matter jurisdiction)). But that is clearly not the case here.

As Defendants unequivocally stated, they are pursuing a "facial" attack on subject matter jurisdiction. (Mem. 4.) And "[a] facial challenge, *such as Defendants make here*, contends that the complaint fails to allege sufficient well-pled facts supporting subject matter jurisdiction." (Mem. 4 (emphasis added) (citing *Stewart v. Nottoway Cnty.* __ F. Supp. 3d __, __, 2023 WL 484 9936, at *3 (E.D. Va. July 28, 2023) (Hudson, J.).) This meant that Defendants sought dismissal, as it clearly did throughout its Memorandum in Support, based on the four corners of the Complaint and documents relied on by the Complaint. (*See* Mem. 4 (citing *Stewart*, __ F. Supp. 3d __, 2023

WL 4849936, at *3; *Ketterson v. Wolf*, 2001 WL 940909, at *3 (D. Del. Aug. 14, 2001).) Nowhere in the Complaint is Ms. Altmeter's declaration to be found. And nowhere in the Complaint appear any factual allegations about the previous Site investigation, other than to state that it occurred.[3]

Submitting Ms. Altmeter's 17-page declaration is a blatant attempt to smuggle in her testimony to amend the Complaint to stave off dismissal under *both* Rule 12(b)(1) and Rule 12(b)(6).[4] This is impermissible. *See S. Walk at Broadlands Homeowner's Ass'n*, 713 F.3d at 184; *Lokhova*, 441 F. Supp. 3d at 264 n.24. As such, the Court should disregard it completely. *See, e.g.*, *Phillips v. Loudon Cnty. Public Sch.*, 2020 WL 2205065, at *5 (E.D. Va. May 6, 2020) (stating that it was "not appropriate to consider" declaration at motion to dismiss stage).

B. The Almeter Declaration Confirms The Presence Of Drainage Channels That Do Not Qualify As WOTUS.

Even to the extent that the Court considers the 17-page Almeter Declaration, which it should not and need not, it purportedly seeks to "correct" Defendants' misunderstanding of the websites relied on in the Governments' Complaint. (*See* Opp'n 25-27.) This is curious given that the Complaint, as Defendants explained, contained two hyperlinks that simply took the user to a map of *the entire United States*. (*See* Mem. 7 n.6.) The Complaint offered no further explanation or detail about the maps.

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[3] The Government claims that it has "on-the-ground data" from this "thorough" inspection. (Opp'n 26-27.) At the initial Rule 26(f) conference, the Government raised, yet again, the prospect of another Site inspection. The next day, the Government served a Rule 34 request for entry, to which Defendants have objected on the basis of, among others, this completely dispositive motion. This, of course, begs the question as to how "thorough" that inspection was several years go.

[4] Defendants moved to dismiss under both Rule 12(b)(1) and Rule 12(b)(6) given the split in authority as to which bucket CWA jurisdiction fit to ensure that Defendants fully protected themselves from the Government's impermissible assertion of jurisdiction. The Government submitted the declaration under the incorrect assumption that Defendants pursued a "factual challenge" under Rule 12(b)(1), which they clearly did not. The Declaration is impermissible in either a Rule 12(b)(1) or Rule 12(b)(6) context.

The maps speak for themselves and understanding them is a straightforward endeavor. *Cf. United States v. Gavegnano*, 2007 WL 806052, at *2 (W.D. Va. Mar. 15, 2007) (recognizing that "most judges can probably read a map"). Moreover, Defendants' reading is completely consistent with Ms. Almeter's sworn testimony before this Court in 2021. (*See* Almeter Decl. ¶ 7, Doc. 2-5, Case No. 3:21mc2 (E.D. Va. Mar. 12, 2021).) Just as Defendants point out, so too did Ms. Almeter identify significant portions of intermittent streams leading to the Site. (*See id.*)

Regardless, the further elaboration by Ms. Almeter now does not alter the analysis.

1. StreamStats

The Government relies on Ms. Almeter to explain StreamStats further—that the website uses "regression equations to generate a digital stream layer to represent the expected location and extent of streams or drainage areas." (Opp'n 25 (citing Almeter Decl. ¶ 14).) The Government faults Defendants for not divining from their Complaint that Defendants should have utilized the "stream data layer" tool, (Opp'n 25), despite the Government's Complaint never mentioning it.

In any event, this tool does not help the Government's case. Understandably, the Government finds its Figure 2 visually appealing—there is a blue pixelated line running through the Site. But that does not fabricate an "unnamed tributary," much less WOTUS.

In fact, StreamStats has a Frequently Asked Questions page discussing the blue pixelated line:

What are the blue pixelated lines? Are they real streams? Why are there so many/few of them?

By StreamStats

"Are they real streams?"[5] The answer is no. According to the website, "[t]hey aren't necessarily true streams, *especially in headwaters areas*." (emphasis added.) As the Government must acknowledge, the blue pixelated line on the page runs to the "[u]pper portion of the watershed," (Mem. Ex. C-2), of Lickinghole Creek. In other words, it is *past* the headwaters of Lickinghole Creek. The FAQ page goes on to explain that "in more weathered terrain, with more humid climates, the stream grids tend to correspond to drainage channels, and will often coincide with streams. However, they are *not* intended to mean there is a stream in that place; only that if there were overland flow that these areas where that flow would tend to accumulate, given the terrain represented in the [digital elevation models]."

This is exactly what Ms. Altmeter testified to regarding this information—that the pixelations showed a channel and drainage basin. When she previously submitted a declaration in support of the administrative warrant, she indicated that "StreamStats maps a low-flow channel and drainage basin bisecting the property upstream and connecting into the NHD stream of an unnamed tributary to Lickinghole Creek." (Doc. 2-5, ¶ 7, Case No. 3:21mc2 (E.D. Va. Mar. 12, 2021).) StreamStats indicated that this "unnamed tributary" was "intermittent." (*Id.*) The same goes for all the other "unnamed tributaries." (*Id.*)

If the Government's position that the blue pixelated lines showed "streams" (which StreamStats says it does not) conferring jurisdiction, it would impermissibly confer jurisdiction under the CWA in a near unlimited fashion, wherever water may fall. *See Rapanos*, 547 U.S. at 722. These blue pixelated lines stretch far from any identified streams—intermittent or not. (*See* Exhibit G.) Indeed, students and teachers at Randolph Macon, seeking to build a garden, could be

[5] https://www.usgs.gov/streamstats/what-are-blue-pixelated-lines-are-they-real-streams-why-are-there-so-manyfew-them

subject to the CWA's "crushing" consequences if they placed dirt in this alleged jurisdictional water (which apparently runs through buildings) on campus. *Sackett*, 598 U.S. at 660.

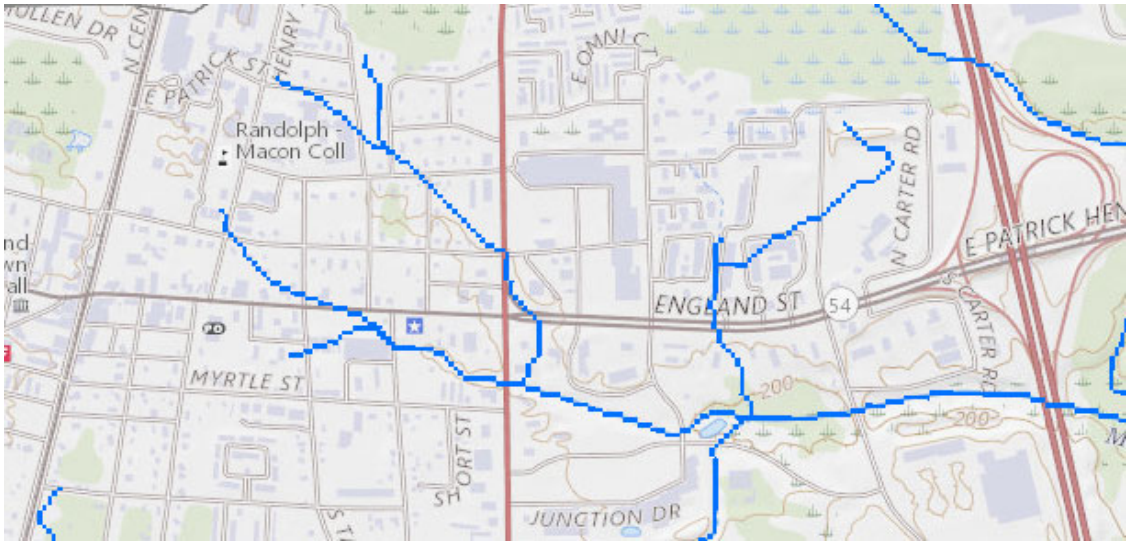

Figure 10 (excerpted from Exhibit G-4).

The blue line pixelations, based on an algorithm, make sense as delineating where rain goes rather than where a stream is. As can be seen in the below figure, the multiple blue line pixelations run through buildings:

Figure 11 (excerpted from Exhibit G-6.)

Figure 12 (excerpted from Exhibit G-6.)

It is of course implausible that streams would flow through the lobbies of these buildings.

Relatedly, StreamStats also provides an interesting (albeit legally irrelevant) "raindrop" feature that allows one to see where a drop of rain would end if it fell in a certain place, which confirms that is what these blue pixelated lines are meant to show. Using that feature, it confirms (by red pixilated line), that it would drain towards the blue pixelated line, down the topography towards Lickinghole Creek. This includes rain that falls both on Site *and* off-Site, including off rooftops of large buildings, as with its other "pixilations."

Figure 13 (excerpted from Exhibit G-7).

Figure 14 (excepted from Exhibit G-9).

What the Government seeks to do is supplant the Commonwealth and its subdivisions and operate as the local zoning board wherever a raindrop will fall. But that is exactly what *Sackett* and *Rapanos* foreclose. As Justice Thomas put it, *Sackett* "curb[ed] a serious expansion of federal authority that ha[d] simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling 'a local zoning board.'" *Sackett*, 598 U.S. at 709 (Thomas, J., concurring); *see Rapanos*, 547 U.S. at 738 (Scalia, J.) ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown a willingness to exercise with the scope of discretion that would befit a local zoning board.").

2. Hillshade Elevation Data

The Government's and Ms. Almeter's reliance on "hillshade elevation data" is similarly unavailing. As Defendants explained in moving to dismiss, hillshade data simply brings topography into sharper view so that watersheds can be seen more clearly. (Mem. 25-26.) The Government agrees. (Opp'n 10.) But the Government attempts to use the hillshade data to establish the presence of unnamed tributaries and WOTUS again is unavailing.

For example, the hillshade elevation data layer of the National Map, relied on by the Complaint, confirms what Justice Scalia observed in *Rapanos*: that "the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls." 547 U.S. at 722 (Scalia, J.). As illustrated by Exhibit H, the Commonwealth is full of drainage channels throughout its borders. (*See* Exhibit H-2 through H-4.)

As can be seen in the hillshade data surrounding the Site, there is no identifiable stream on Site:

Figure 15 (excerpted from Exhibit H-9.)

As the opacity increases, these drainage channels come into sharper focus:

Figure 16 (excepted from Exhibit H-10.)

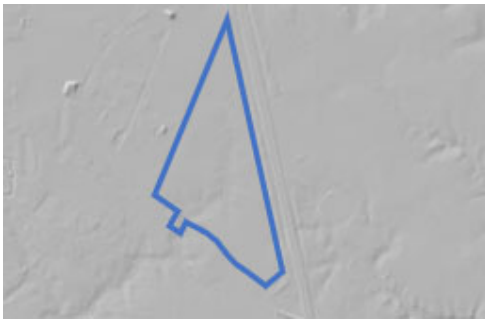

Figure 18 (excerpted from Exhibit H-8.)

Indeed, the more one focuses on the area surrounding the Site, the clearer it becomes that the land is covered in drainage channels that do not, as with the Site, contain perennial or intermittent streams.

Figure __ (excerpted from Exhibit __) – Slide 17

The Government's position would allow jurisdiction to creep further inland without any connection to WOTUS whatsoever, so long as rain fell on that land. But common sense dictates that water has to drain *somewhere*. And just because rain drains somewhere does not make those drainage channels WOTUS. The Supreme Court has specifically rejected this. *See Rapanos*, 547 U.S. at 739 (Scalia, J.) (rejecting that "channels that periodically provide drainage for rainfall" constitute WOTUS). Precedent squarely forecloses this "'Land Is Waters' approach to federal jurisdiction." *Id.* at 734.

3. Site Inspection In 2021

The third "fact" that the Government attempts to interject impermissibly through Ms. Almeter is that she made observations "consistent" with the blue pixelated line at her 2021 inspection. (Opp'n 10 (citing Almeter Decl. ⁋⁋ 16-17).) But that does not get the Government anywhere. The blue pixelated line simply shows where water drains, if present. That is plainly not enough (and contrary to *Rapanos*) to satisfy the test for relatively permanent waters.

III. The Government Impermissibly Attempts To Displace The Commonwealth's Regulation Of The Site.

A. The Government Has No Answer For The Argument That Its Position Would Erode The Commonwealth's Interests In Regulating Lands and Waters.

The text of the CWA itself, *Rapanos*, and *Sackett* all confirm the primacy of the States in regulating their lands and waters. (Mem. 13.) The Government does not address this point.

And as the Complaint recognizes, Virginia DEQ was addressing the exact issue that the Government attempts to do here. Moreover, nowhere does the Government dispute DEQ's statements regarding intermittent streams post-*Sackett* and that its authority remains *untouched* by *Sackett*, (*see* Mem. 15-16 (citing DEQ Memorandum 1-3)), and that *Sackett* "appears to exclude . . . intermittent streams . . . from CWA protection," (Mem. 24 (quoting DEQ Memorandum 1)). Tellingly, the Government fails to address that DEQ's mission and mandate remain to protect the wetlands within the Commonwealth's borders. Nothing suggests that the Commonwealth cannot continue to do just that here. *See Sackett*, 598 U.S. at 683 ("States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.").

Sidestepping this argument, the Government notes instead that all should rest assured, the EPA and Corps have recently announced that they are applying the "pre-2015" regulatory definition of WOTUS, (Opp'n 6 n.1), paying lip service to the Supreme Court's numerous proclamations that the CWA's reach had limits. The "Pre-2015 Regulatory Regime (updated on Mar. 18, 2024)" hyperlink, (*id.*), brings the user to the EPA's website that states that the "pre-2015 regulations are commonly referred to as the 1986/1988 regulations, but the agencies note that the 1986/1988 regulations have largely been in place since 1977."[6] The agencies seek to assure the

[6] This regulation applies in the 27 states which challenged and successfully enjoined the current administration's January 2023 "Revised Definition of 'Waters of the United States'" Rule (2023 Rule), admitted to be overreaching and illegal by EPA and the Corps. While the Corps and EPA

regulated community that the "pre-2015 regulatory regime" will be "implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training and experience." *Id.* To the contrary, these chilling words immediately refer the regulated community to Justice Scalia's admonition in *Rapanos* that, as here, the "enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute – during the past five Presidential administrations." *Rapanos*, 547 U.S. at 722 (Scalia, J.). They also recall his (now prescient) warning that:

> "**In the last three decades**, the Corps and [EPA] have interpreted their jurisdiction over the 'waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States. . . . And that was just the beginning. The Corps has also asserted jurisdiction over **virtually any parcel of land containing a channel or conduit** – whether man made or natural, broad or narrow, permanent or ephemeral - **through which rainwater or drainage may occasionally or intermittently flow.**"

Id. (emphasis added).

Indeed, the Government's current regulatory "regime" finds its genesis in regulations pre-dating *Sackett*, *Rapanos*, and *SWANNC*—three of the cases striking down the Government's regulatory scheme over the last several decades. Moreover, the online "guidance" for the regulated community to understand the governing definition of WOTUS is anything but helpful. Quite the contrary, it is a mind-numbing, Kafkaesque-compilation of dozens and decades-worth of "Coordination Memorand[a]", "superseding" documents which "Re-evaluate Jurisdiction," "current implementation" directives, "field memoranda" and even the 1979 "Civiletti

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have issued a "conforming" rule seeking to amend the illegal provisions of the 2023 Rule, *id.*; *see also* "Revised Definition of 'Waters of the United States' Conforming," 88 Fed Reg 61966, that relatively-straightforward "conforming" rule only applies to the 23 states that did not challenge the 2023 WOTUS Rule. It is unclear why the agencies chose not to apply the straightforward, "conforming" rule to the 27 state challengers, including Virginia.

Memorandum." Here, as the Court bemoaned in *Sackett*, property owners "may find it necessary to retain an expensive expert consultant" and expensive lawyers to help them wade through this regulatory morass, with little chance of success with the agencies. 598 U.S. at 670.

B. The Government's Cases Regarding Relative Permanence Largely Rely On Pre-*Sackett* Cases Under The Old Regulatory Framework.

The Government's reliance on cases assessing what is considered "relatively permanent" holds no water here. First, most of them are pre-*Sackett* cases. (*See* Opp'n 27-29.) They were decided during a time when the regulations were ever-changing and when the "significant nexus" test for jurisdiction was alive and well. Critically EPA's own guidance in the wake of *Rapanos* counseled that relative permanence was still considered in establishing a "Significant Nexus Determination." *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008) [2008 Guidance] at 1, 8.[7] Thus, there was a hodgepodge of regulations during an unclear time in which relatively permanence could bleed from its own analysis into the "significant nexus" analysis. Indeed, this did happen. In *Precon Development Corp. v. U.S. Army Corps of Engineers*, the Fourth Circuit upheld the Corps' determination that a stream had relative permanence, but it did so in the context of its "Significant Nexus Determination." *See* 633 F.3d 278, 284, 293 & n.12 (4th Cir. 2011) (cited by Opp'n 21).

To the extent that the Government relies on any post-*Sackett* decisions, they do not address intermittent streams like the ones here.

In *United States v. Andrews*, the court found that the wetlands at-issue were jurisdiction

[7] The 2008 Guidance is available on the EPA's website: https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

based on their connection to a *perennial* stream. *See* __ F. Supp. 3d __, 2023 WL 4361227, at *10 (D. Conn. June 12, 2023). There is no mention of intermittent streams in that opinion. Even if it followed that a perennial stream conferred jurisdiction in all circumstances, the Government has failed to contest that the 1.38 miles of Lickinghole Creek and 1.02 miles of Campbell Creek that approach the Site are intermittent, still dooming the claim. *See* Section II.A.

In *United States v. Bobby Wolford Trucking & Salvage*, defendants sought to vacate a consent decree from 2020. *See* 2023 WL 8528643, at *1 (W.D. Wash. Dec. 8, 2023). Defendants focused on the Government's experts failing to use the phrase "continuous surface connection" to "describe the relationship between the wetlands and streams" at issue. *Id.* at *3. Once again, there is no mention of any intermittent stream.

In *City of San Francisco Baykeeper v. City of Sunnyvale*, the court denied a motion for reconsideration on a pre-*Sackett* motion for summary judgment in which the court applied the "significant nexus" test. *See* 2023 WL 8587610, at *1-3 (N.D. Cal. Dec. 11, 2023). The court denied reconsideration because its prior decision found that the channel at-issue "flow[ed] seasonally," seizing on *Rapanos*'s language that "seasonal rivers" were not necessarily excluded from CWA jurisdiction. *Id.* at *5.

Neither *Andrews* nor *Bobby Wolford* saves the Government because they do not discuss intermittent streams at all. The best that *Baykeeper* gets the Government is that a "seasonal river" can be considered "relatively permanent," which *Rapanos* and *Sackett* do not foreclose. *See Rapanos*, 547 U.S. at 732 n.5. *But* there is no allegation—factual or legal—that any unnamed tributary to Lickinghole Creek or Campbell Creek is a "seasonal river."

IV. The Court Should Deny Leave To Amend.

The Government requests in a footnote that it be given leave to amend should the Court grant Defendants' Motion. (Opp'n 28 n.7 (citing *Fariasantos v. Rosenberg & Assocs., LLC*, 303 F.R.D. 272, 279 (E.D. Va. 2014).) The Court should deny that request.

The very case relied on by the Government in making that request demonstrates why amendment would be futile here. In *Fariasantos v. Rosenberg & Associates, LLC*, this Court rejected a request for leave to amend as futile. *See* 303 F.R.D. at 279. There, plaintiff sought leave to amend the complaint to conform the complaint's allegations to plaintiff's motion for class certification by adding a Henrico County subclass. *See id.* But the Court found that as a matter of law, plaintiff's proposed subclass of Henrico County residents could not meet Rule 23's class certification requirements. *See id.* Thus, this Court denied plaintiff's request for leave as futile.

So too here. As a matter of law intermittent streams do not qualify as WOTUS. The Government has also failed to even challenge that the mile-plus stretches of Lickinghole Creek and Campbell Creek before approaching Site are intermittent. Moreover, while the Government claims that it can add facts related to "unnamed tributaries" and alleged WOTUS based on the Almeter Declaration, that declaration says nothing about those lengthy stretches whatsoever. Thus, any amendment to the Complaint to add additional facts that might suggest jurisdiction would be futile, and, therefore, the Complaint should be dismissed with prejudice.

CONCLUSION

For the reasons set forth above and previously stated in their Memorandum In Support of Their Motion to Dismiss, this Court should dismiss the Government's Complaint with prejudice.

Dated: April 3, 2024

Respectfully submitted,

/s/ *Frank Talbott V*
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*Not yet admitted in Eastern District of Virginia

Counsel for Chameleon LLC and Gary V. Layne

CERTIFICATE OF SERVICE

I certify that on April 3, 2024, I filed the forgoing electronically, which sent a notice of electronic filing to all counsel of record in this matter.

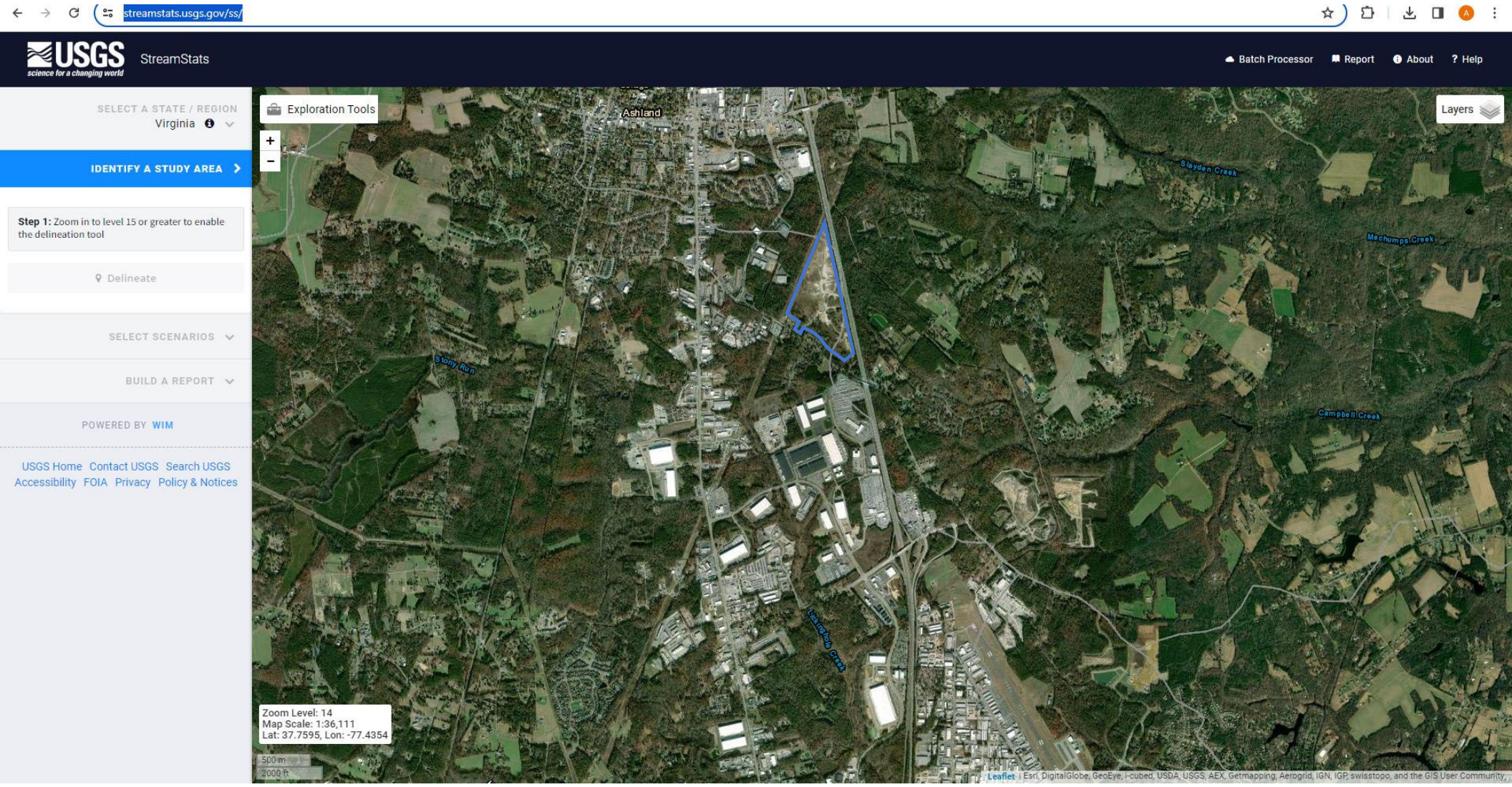
/s/ *Frank Talbott V*

Exhibit G

USGS StreamStats Using "National Geographic" base map

https://streamstats.usgs.gov/ss/

Maps shown at Zoom Levels 14 and 15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Slayden Creek
Mechumps Creek
Campbell Creek
Stony Run
Leadington Creek
Zoom Level: 14
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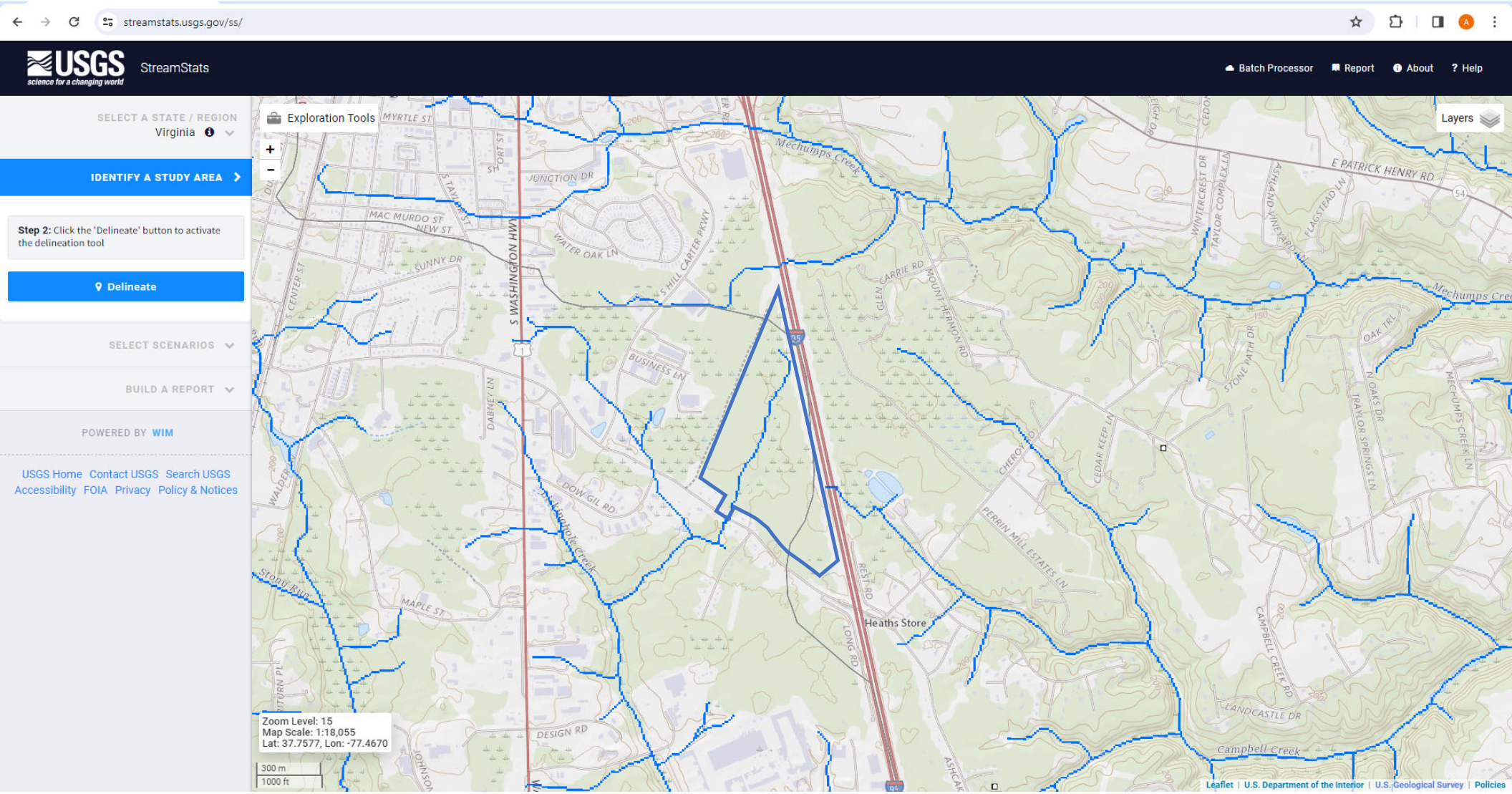
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MOUNT PERMON RD
BUSINESS LN
DABNEY LN
DOW GIL RD
Stony Run
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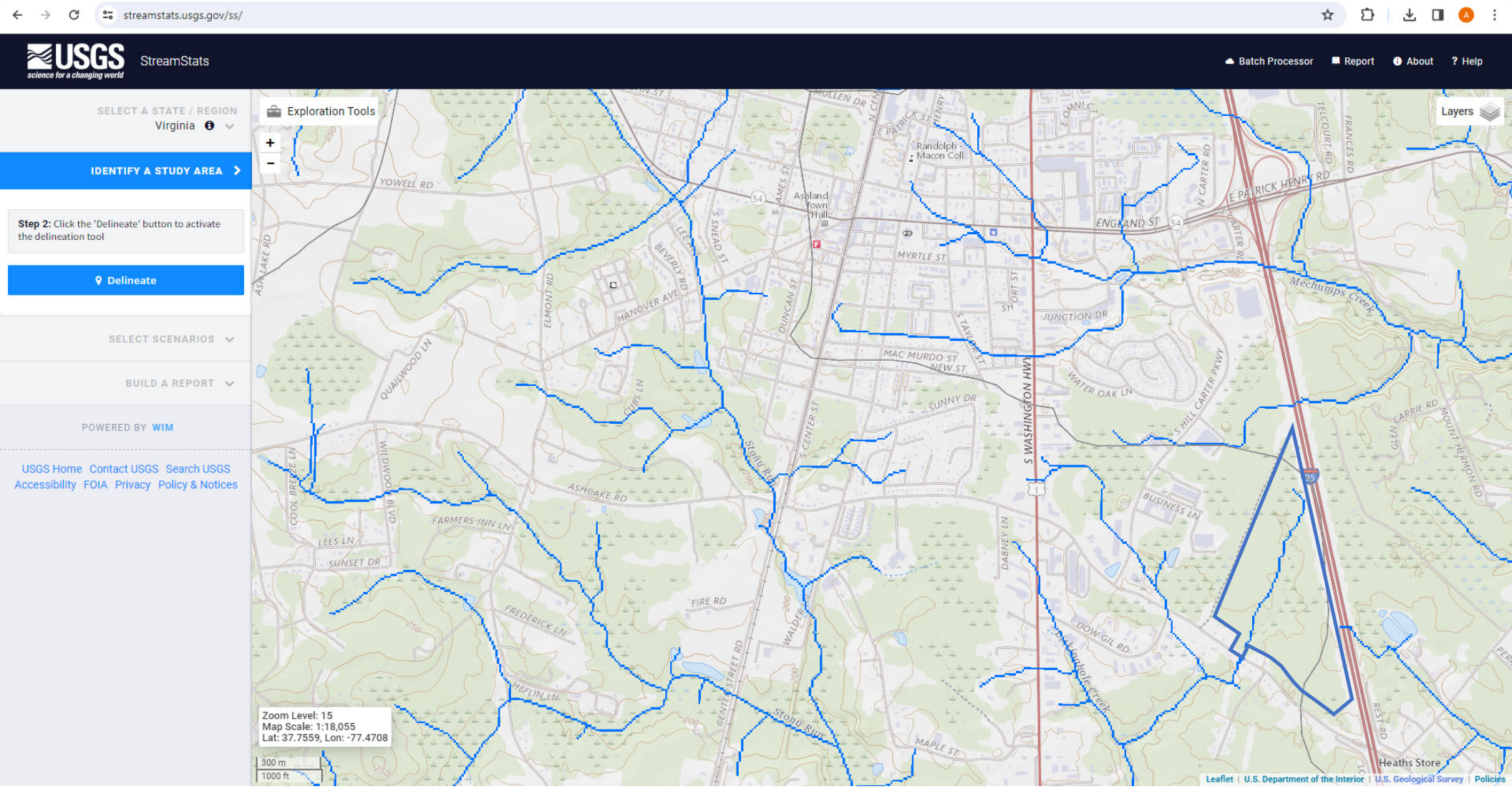
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SUNNY DR
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FARMERS INN LN
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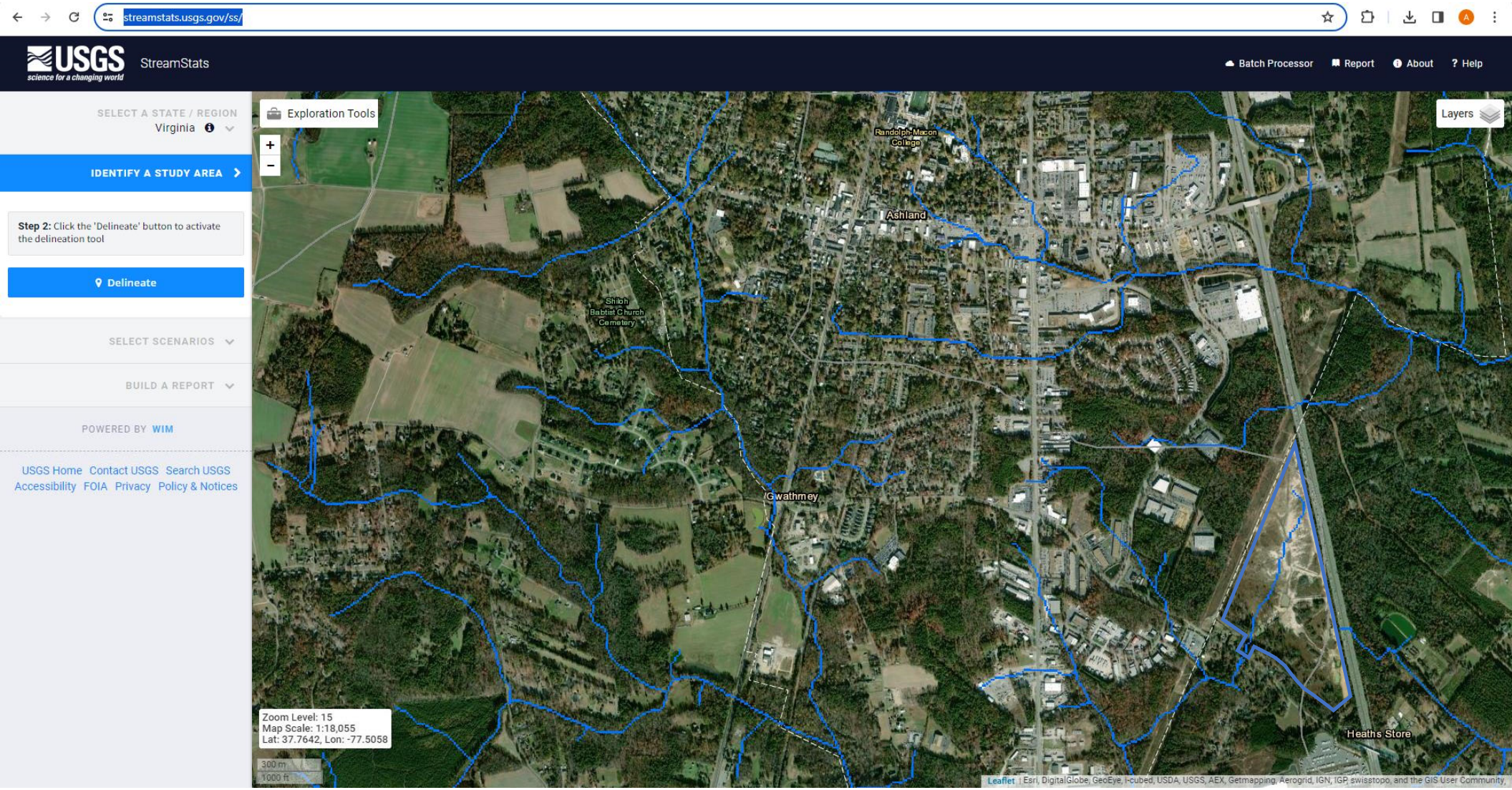
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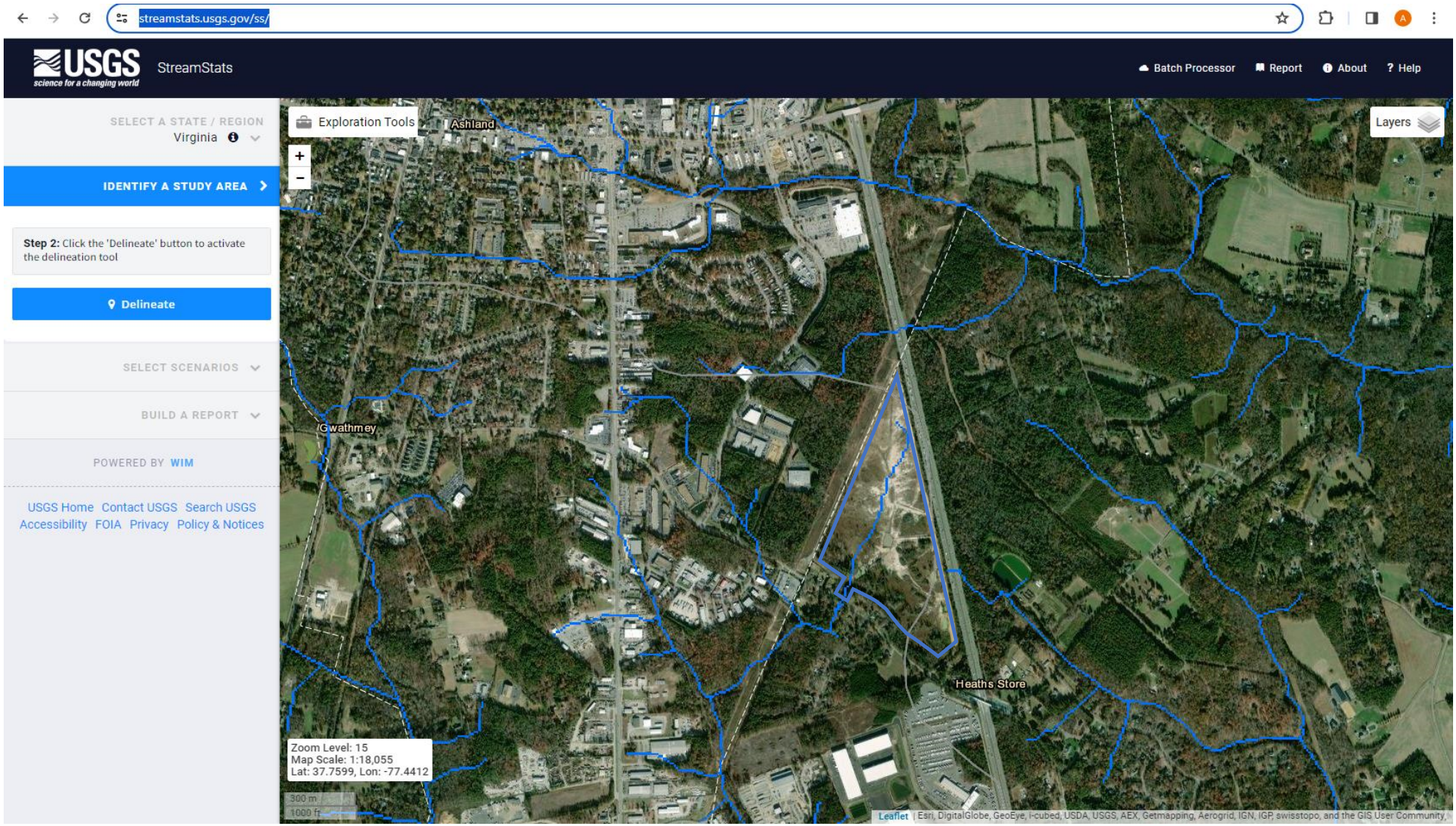
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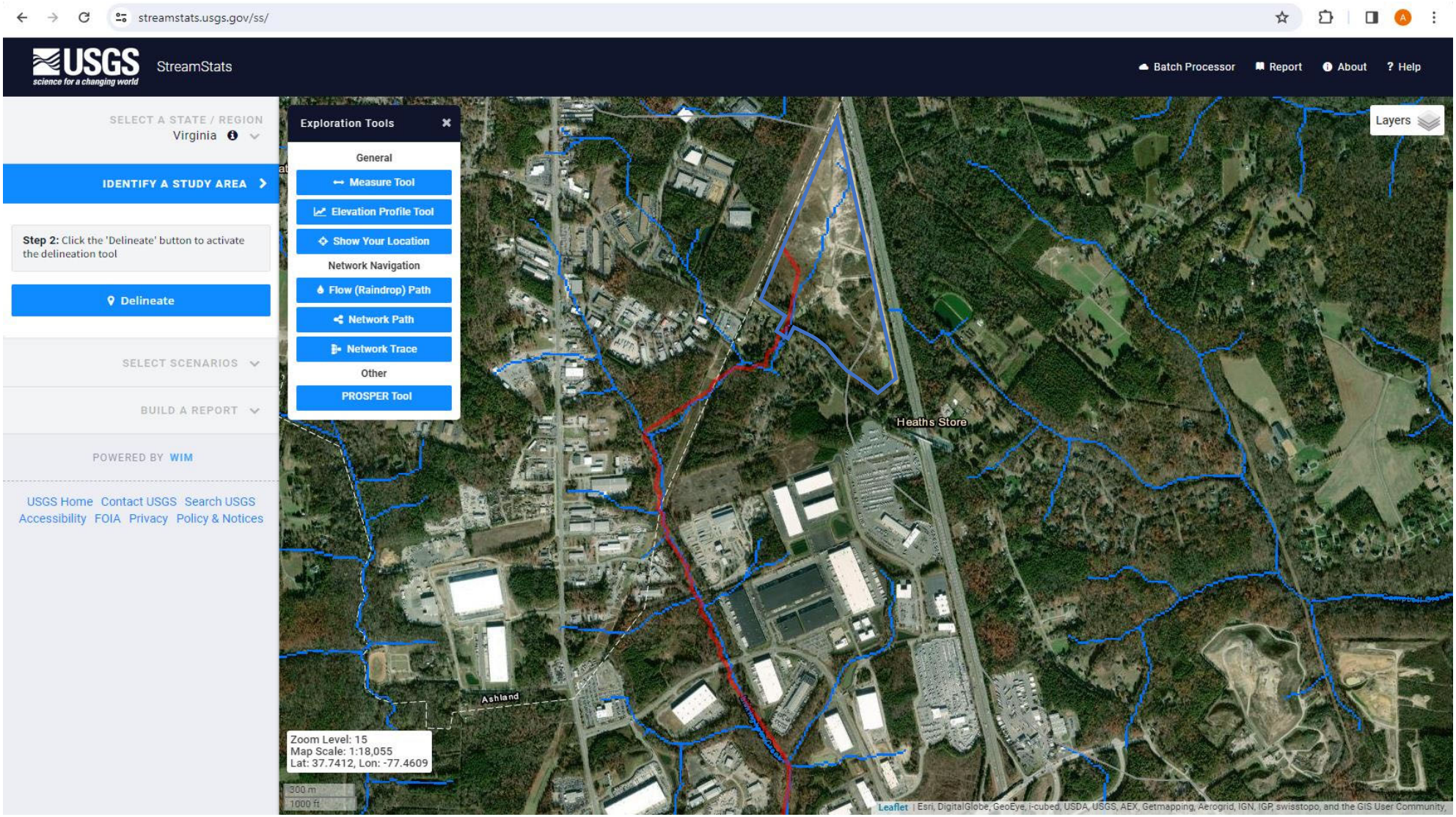
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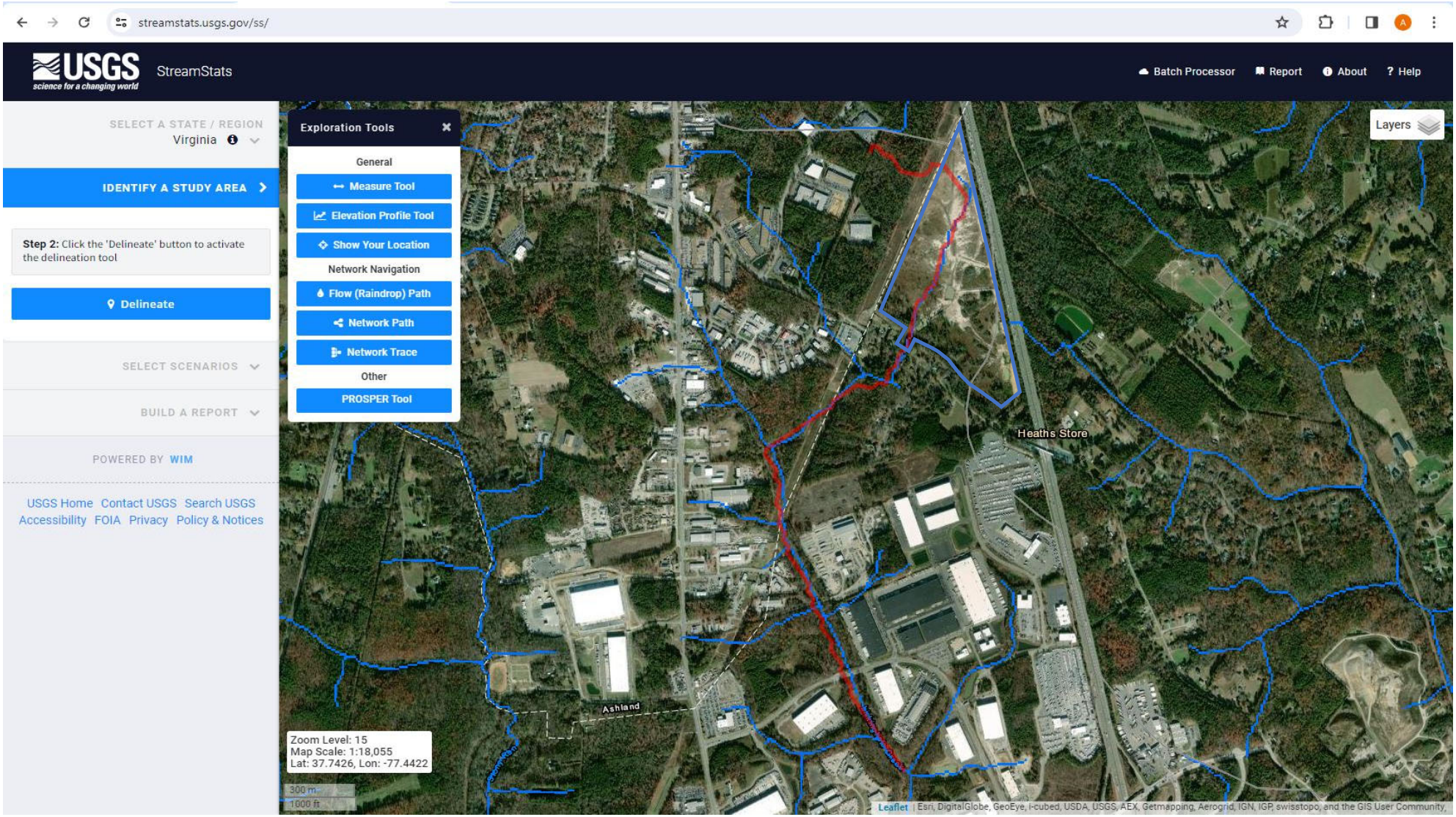
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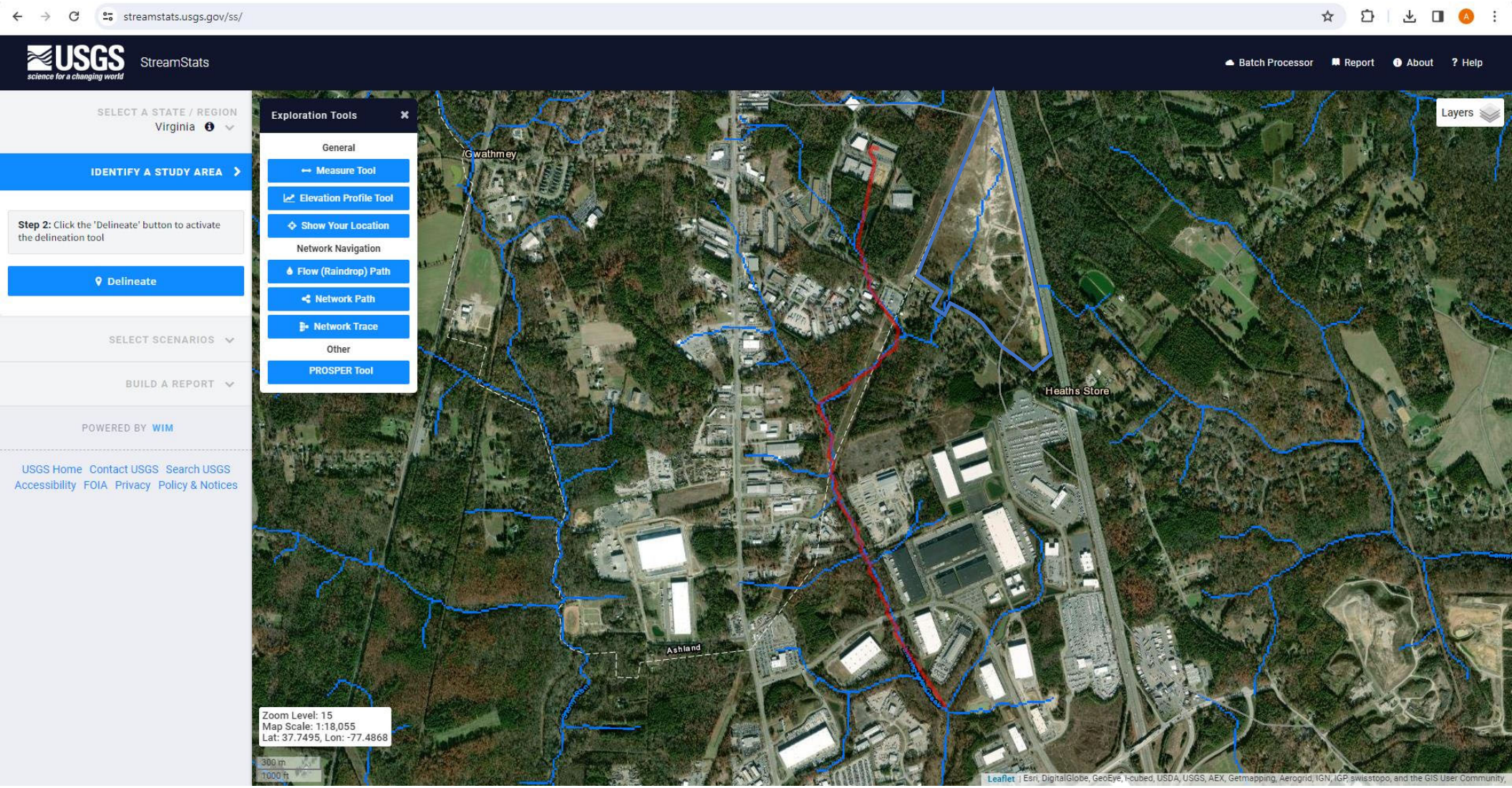
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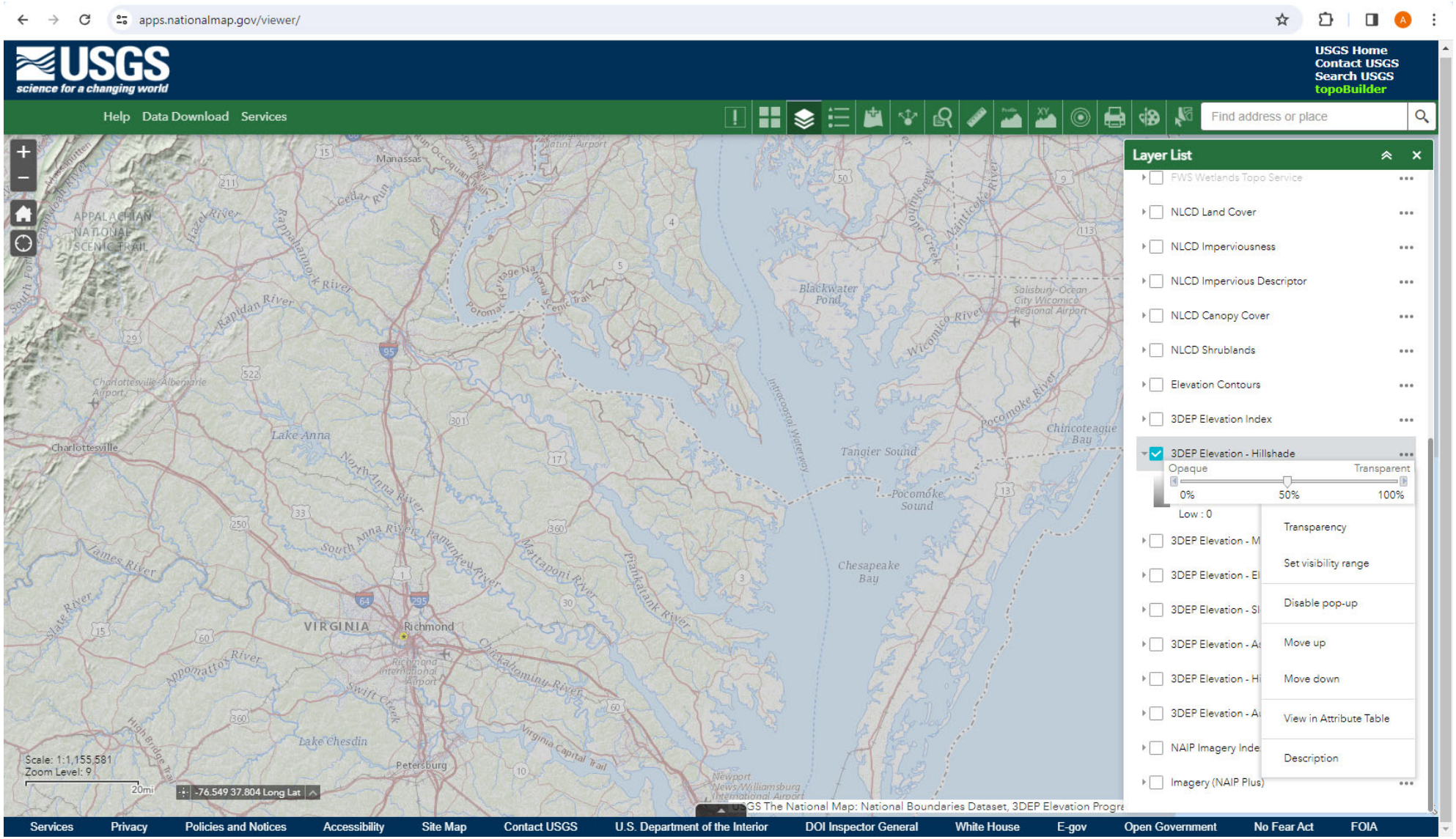
Exhibit H

USGS National Map with 3DEP Elevation - Hillshade

https://apps.nationalmap.gov/viewer/

Maps shown at Zoom Levels 9, 13, 14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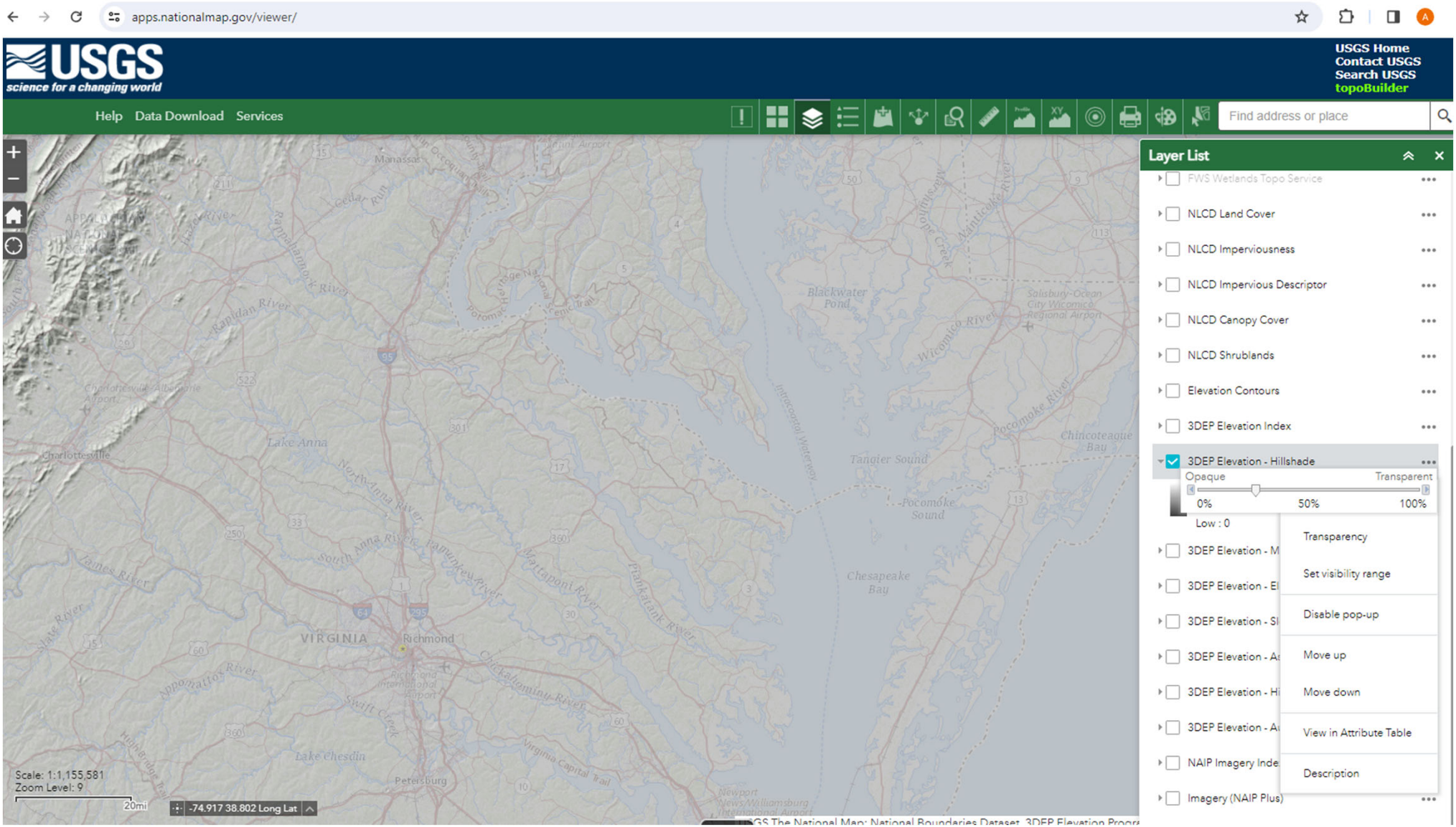
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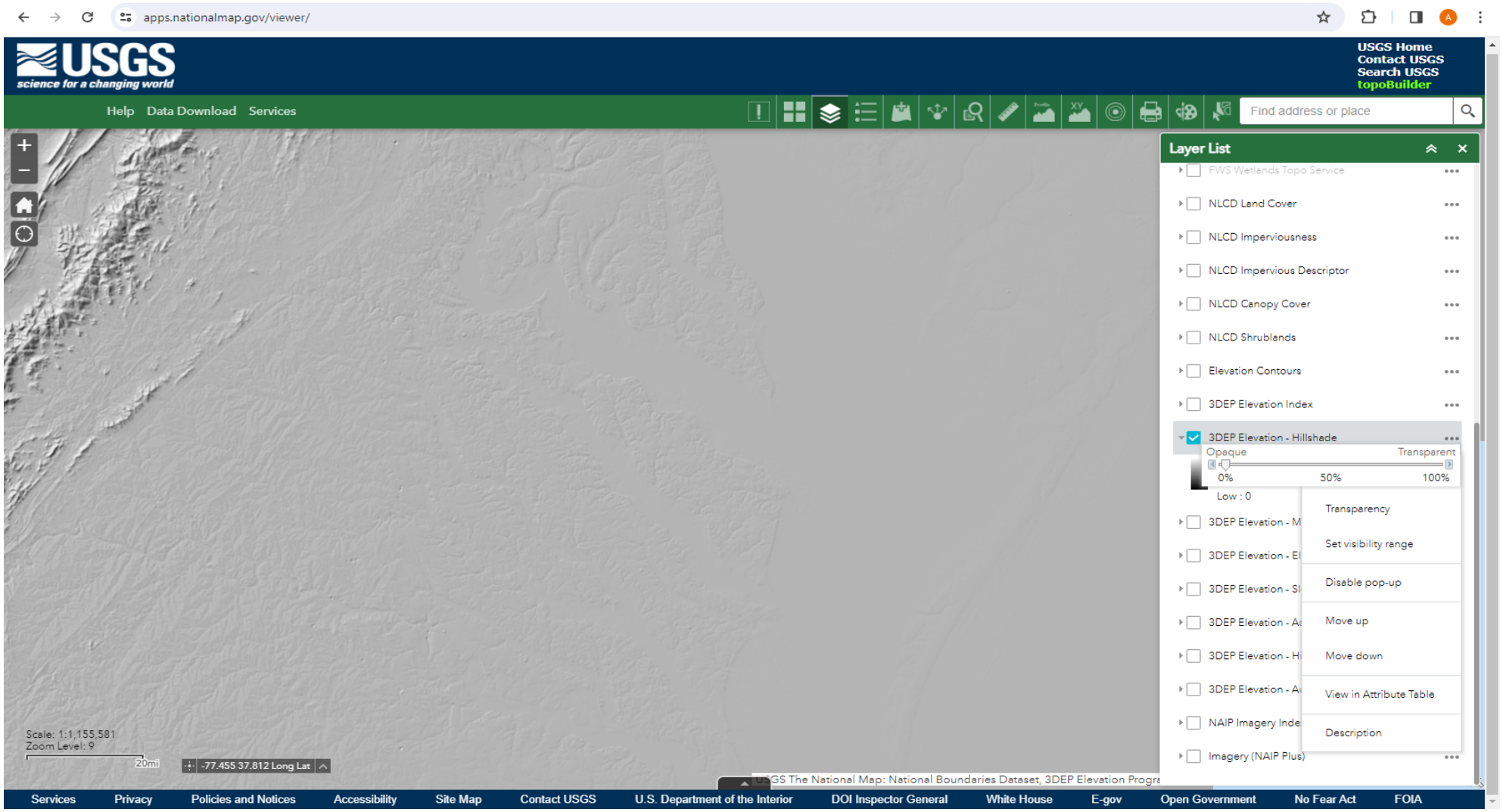
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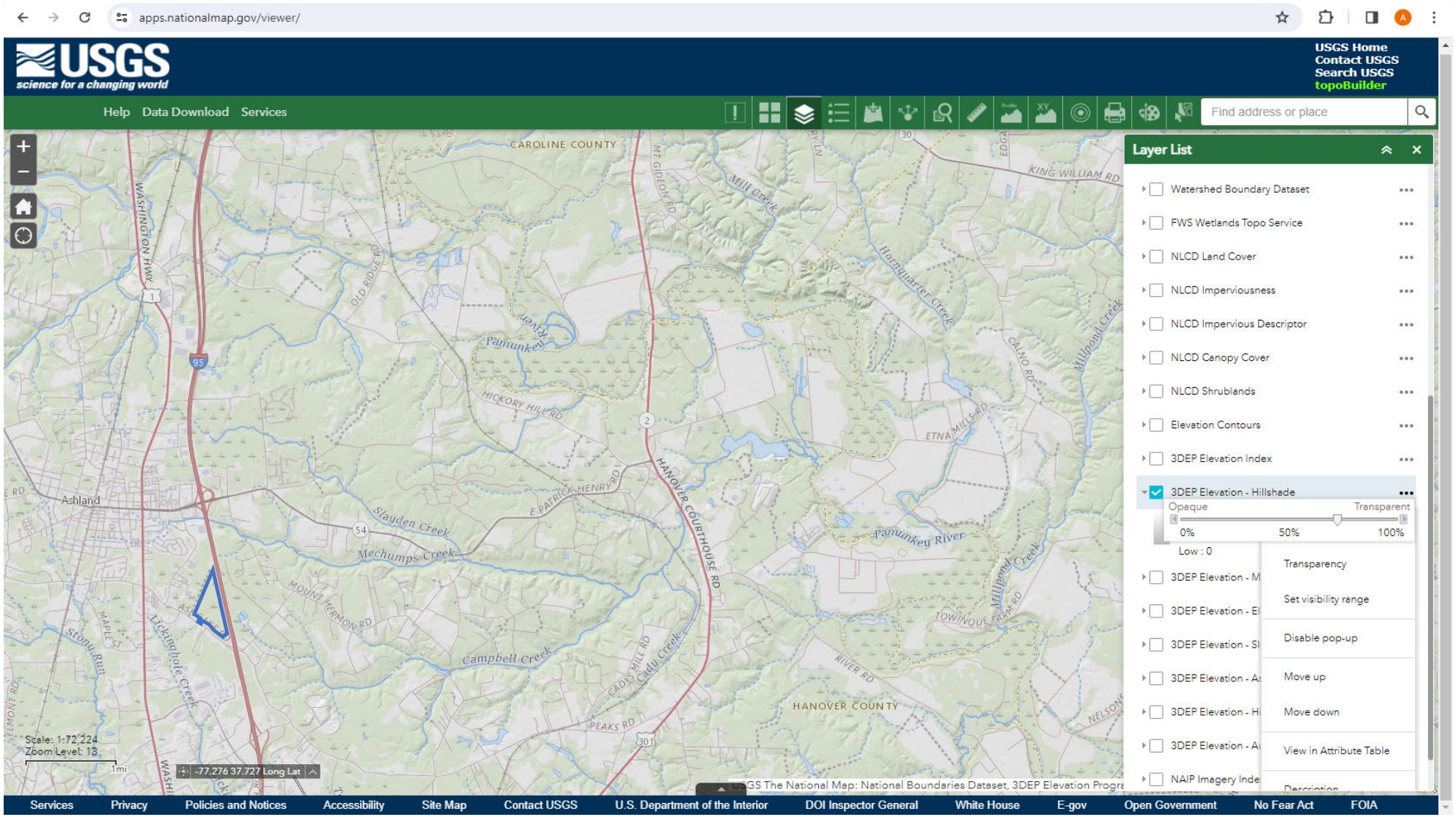
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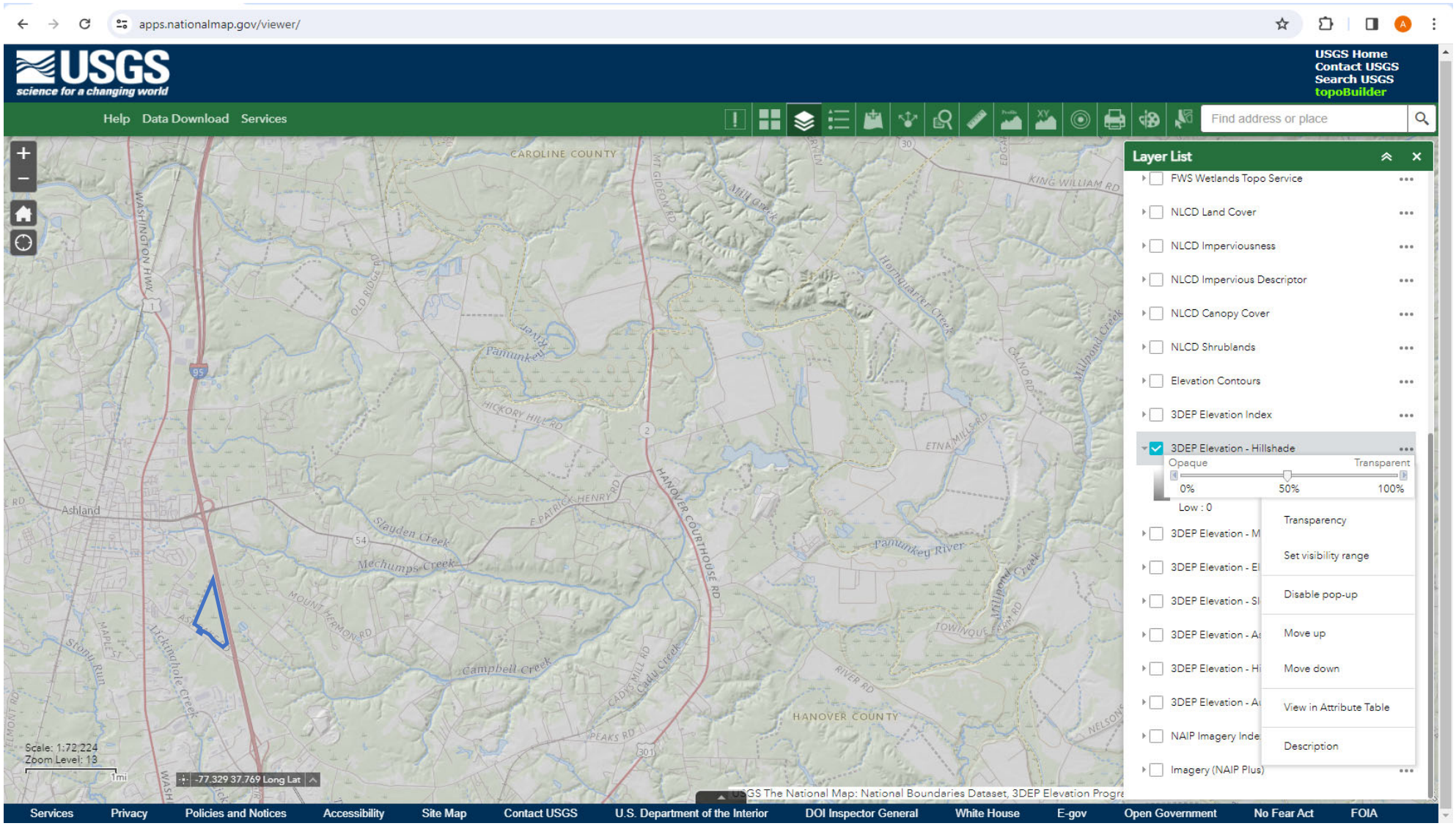
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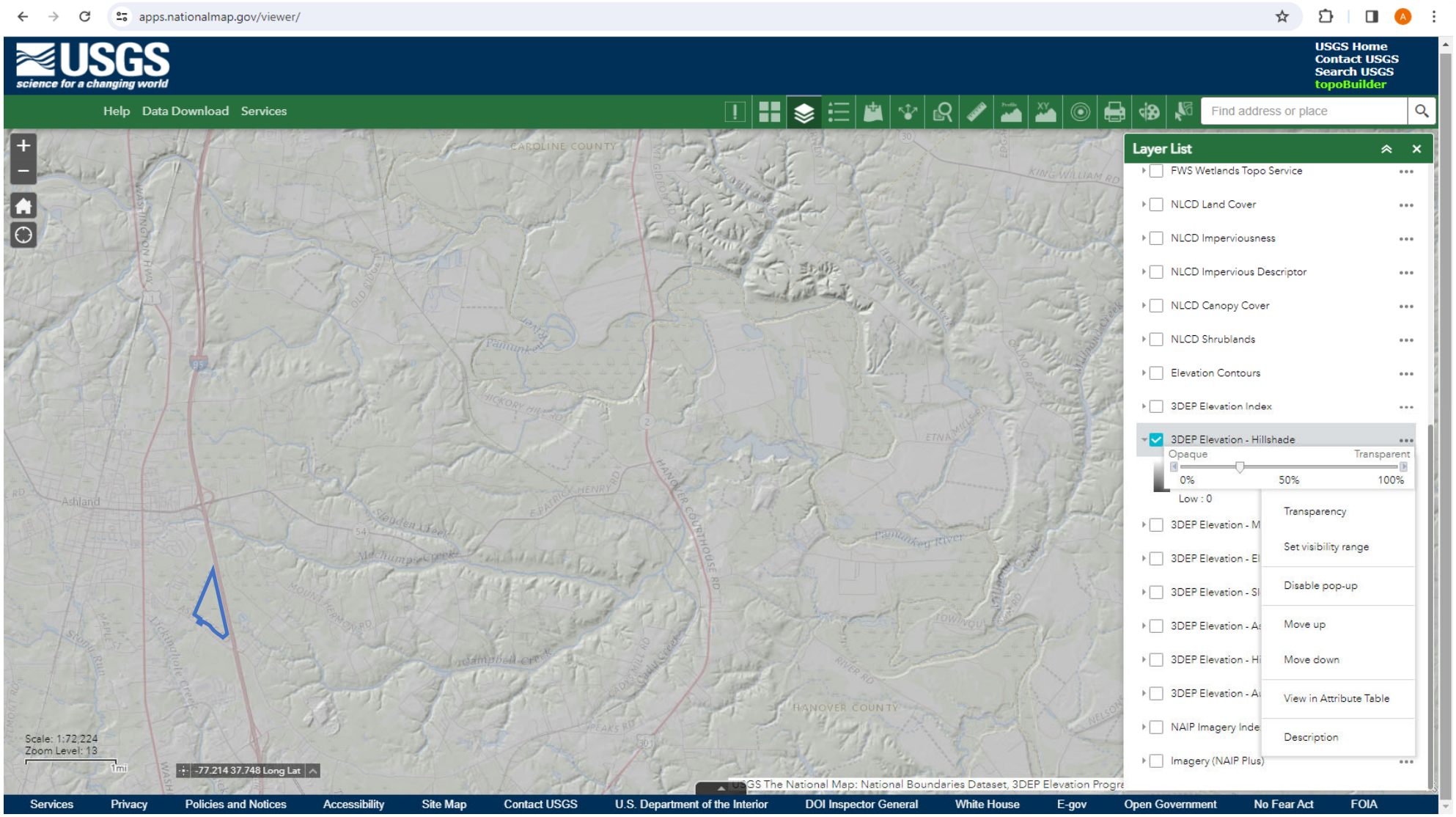
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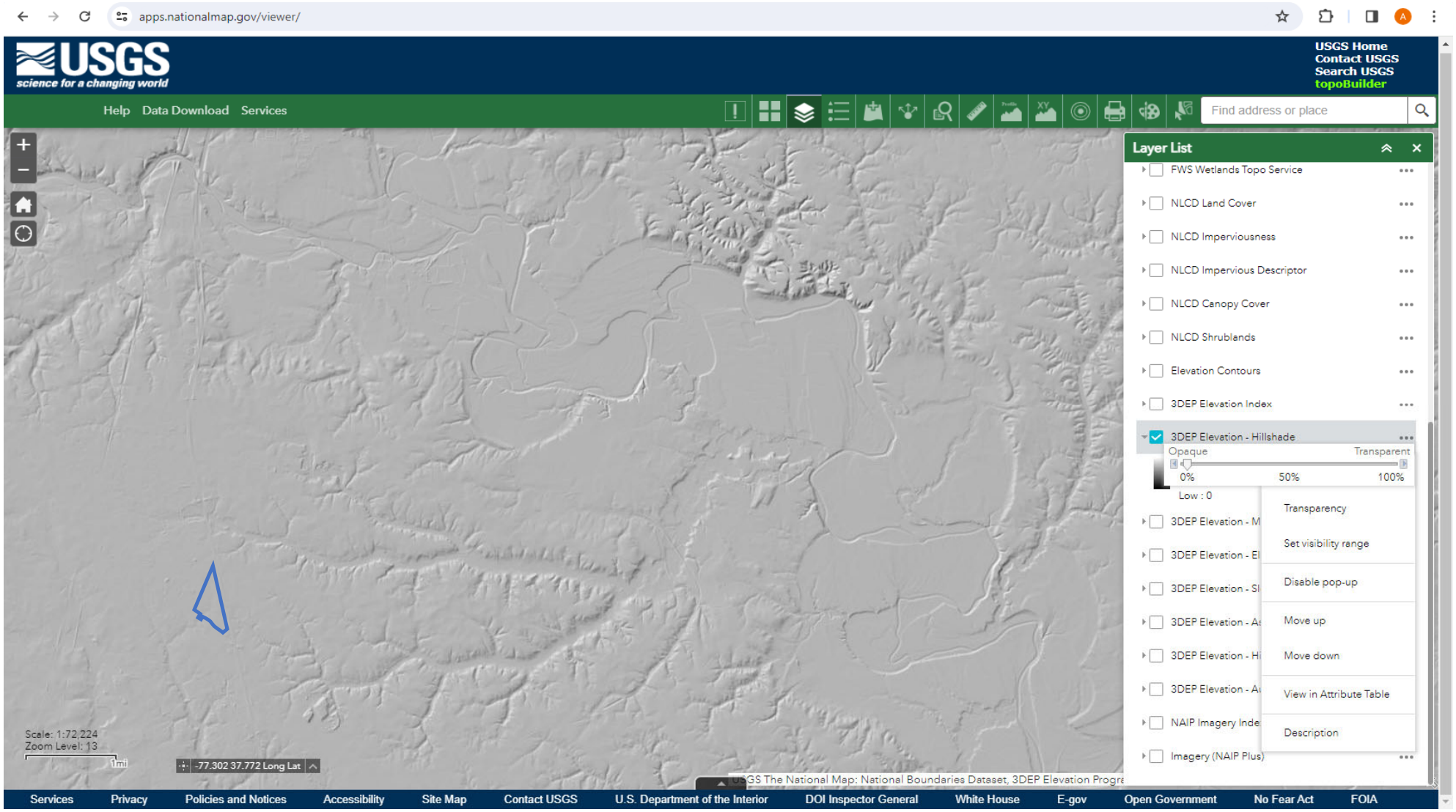
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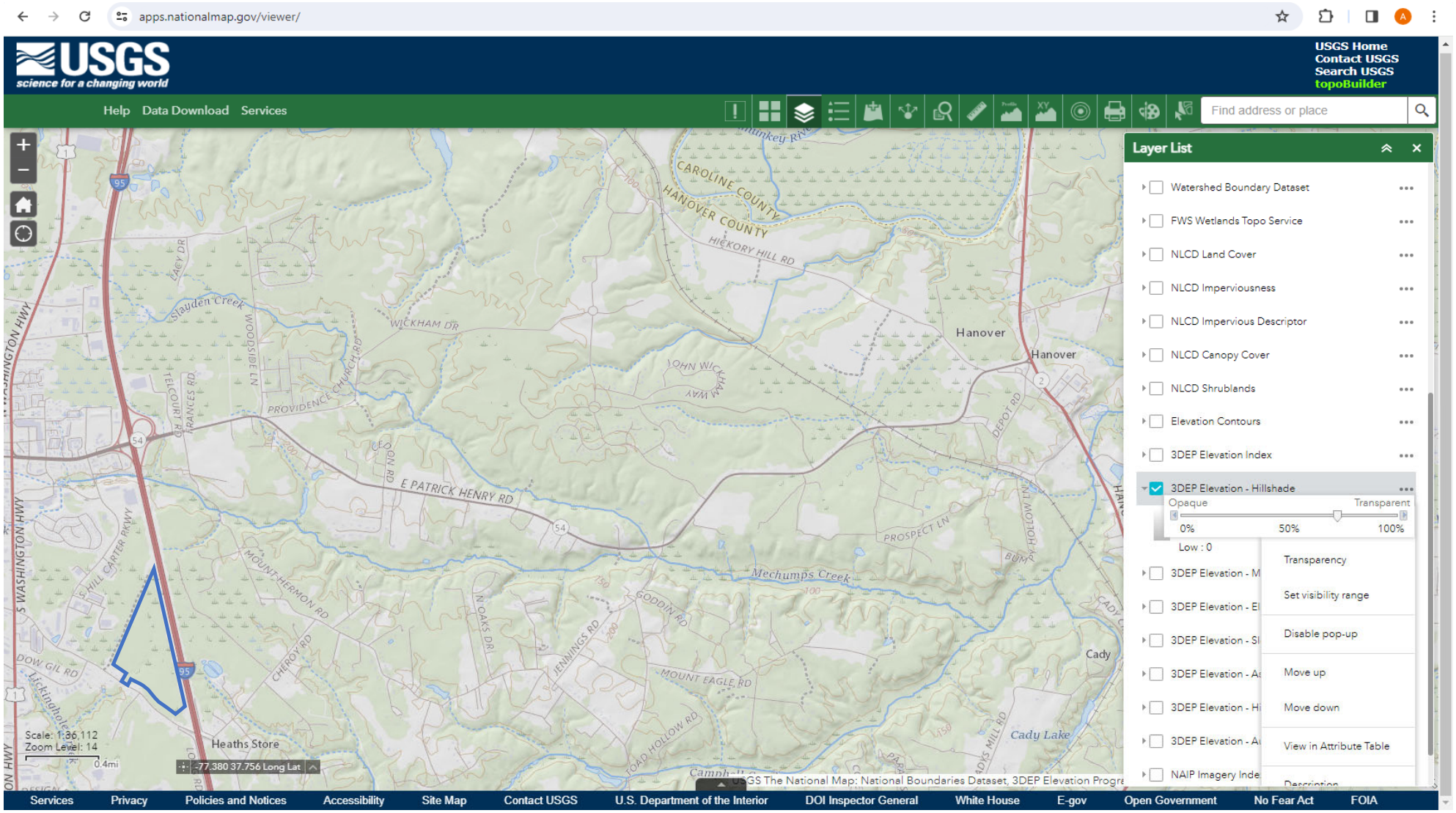
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NLCD Canopy Cover
NLCD Shrublands
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3DEP Elevation Index
3DEP Elevation - Hillshade
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Slayden Creek
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PROVIDENCE CHURCH RD
Hanover
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GODDIN RD
JENNINGS RD
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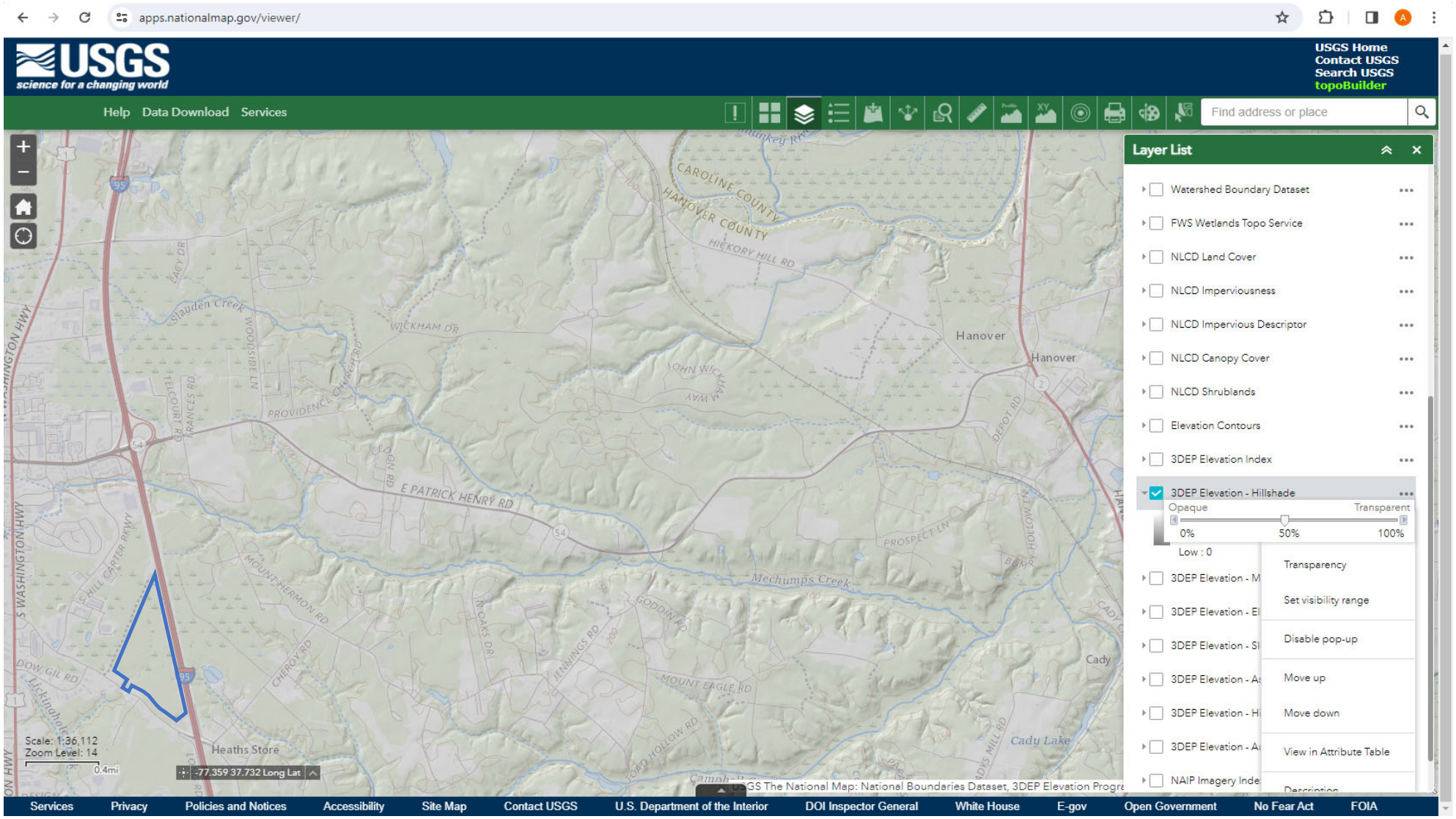
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FWS Wetlands Topo Service
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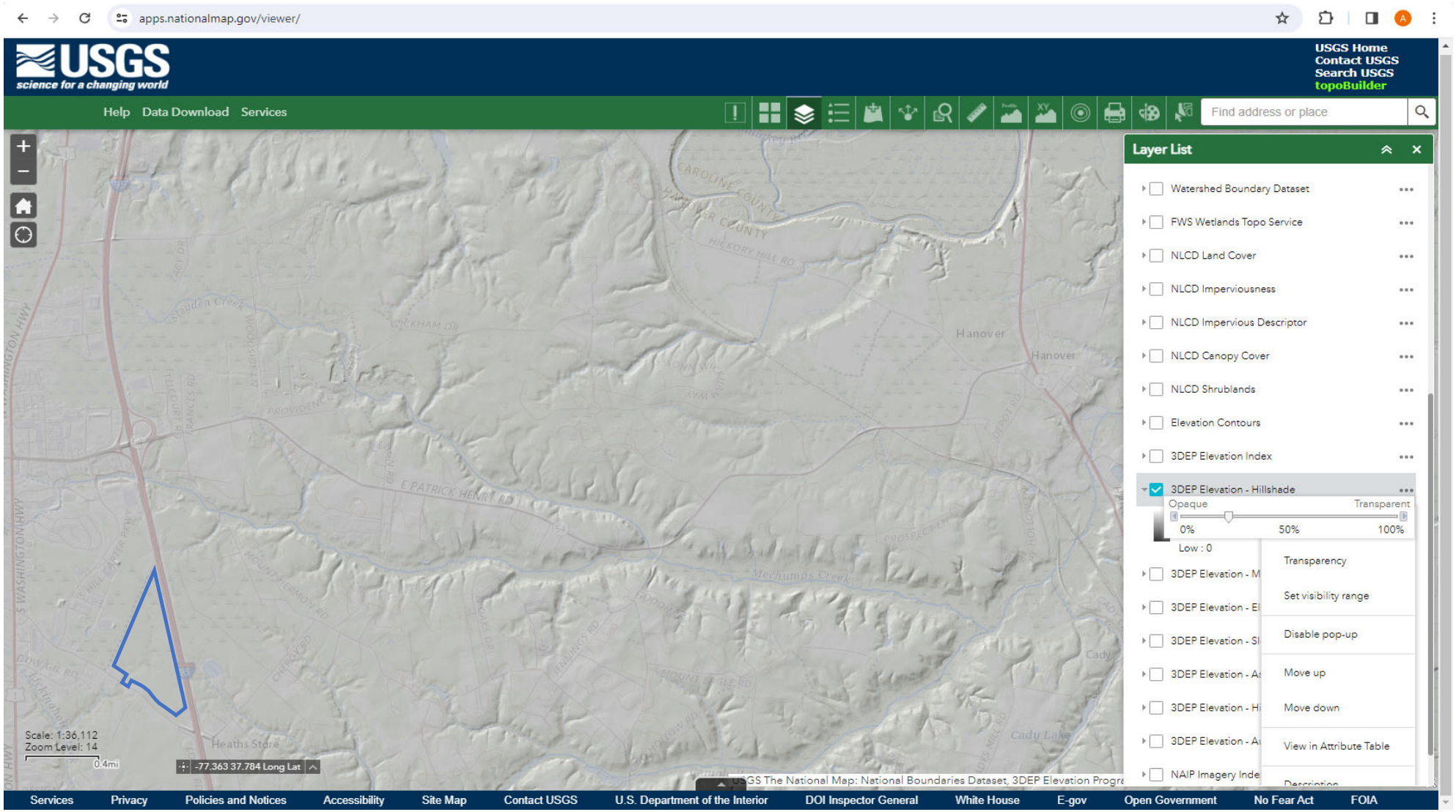
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Data Download
Services
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Layer List
Watershed Boundary Dataset
FWS Wetlands Topo Service
NLCD Land Cover
NLCD Imperviousness
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NLCD Canopy Cover
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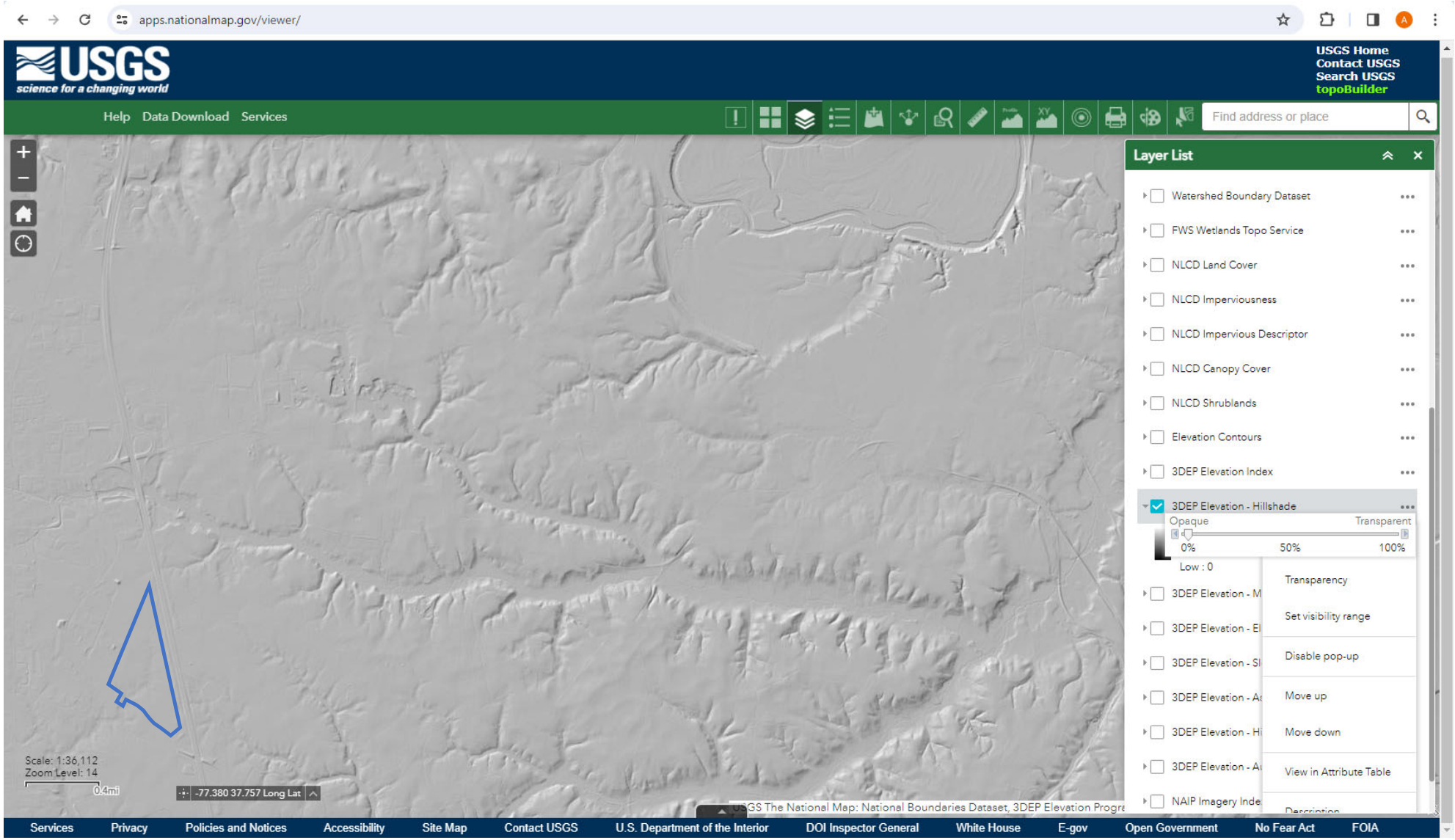
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FWS Wetlands Topo Service
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NLCD Imperviousness
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Elevation Contours
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