



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT  
69 HAGOOD AVENUE  
CHARLESTON, SOUTH CAROLINA, 29403

CESAC-RDS

13 June 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> SAC-2023-01060, (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 in this state 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).

Name of Aquatic Resource	Acres (AC.)/Linear Feet (L.F.)	Waters of the U.S. (WOUS)	Section 404/ Section 10
JD W1: 1-9	1.93 AC	Yes	Section 404
JD W2: 1-148	45.67 AC	Yes	Section 404
JD W3: 1-8	0.38 AC	Yes	Section 404
JD W4: 1-4	0.41 AC	Yes	Section 404
JD W5: 1-20	0.57 AC	Yes	Section 404
JD W6: 1-17	12.18 AC	Yes	Section 404
JD W8: 1-39	12.29 AC	Yes	Section 404
JD T1: 1-2	0.01 AC/ 60 L.F.	Yes	Section 404
JD T2: 1-3	0.01 AC/ 230 L.F.	Yes	Section 404
JD T3: 1-24	1.3 AC/ 4,642 L.F.	Yes	Section 404
JD T4: 1-4	0.17 AC/ 938 L.F.	Yes	Section 404
JD T5: 1-9	0.87 AC/ 3,150 L.F.	Yes	Section 404
JD T6: 1-6	0.03 AC/ 566 L.F.	Yes	Section 404
JD T1-9	0.09 AC/ 1,259 L.F.	Yes	Section 404
JD T8: 1-6	0.22 AC/ 1,201 L.F.	Yes	Section 404
JD T9: 1-5	0.05 AC/ 407 L.F.	Yes	Section 404
JD T10: 1-4	0.03 AC/ 464 L.F.	Yes	Section 404
JD T11: 1-2	0.02 AC/ 280 L.F.	Yes	Section 404
JD P2: 1-4	0.13 AC	Yes	Section 404
Non-JD P1: 1-8	0.17 AC	No	N/A
Non-JD Ditch	0.20 AC	No	N/A

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).

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- 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. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

3. REVIEW AREA.

- a. Project Area Size: 329 acres
- b. Center Coordinates of the review area: Latitude: 33.193611° Longitude: -80.430833°
- c. Nearest City: Harleyville
- d. County: Dorchester
- e. State: South Carolina

The Hutto Tract is located at East Main Street, Harleyville, Dorchester County, South Carolina. The project review area consists of two parcels totaling approximately 329 acres. According to the Dorchester County Online Geographic Information System (GIS) Database website, the Tax Map Sequence Numbers (TMS#s) are: 049-00-00-055 (319.76 acres) and 049-00-00-119 (9.08 acres). The site currently consists of wooded land, clear-cuts, access roads, dilapidated structures, and agricultural fields. Surrounding areas consists of commercial properties, single-family residences, wooded land, and agricultural fields.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is Four Hole Swamp, which is classified as "Navigable waters of the U.S." from its mouth to R.M. 5.0. Navigable limits of Four Hole Swamp are documented in the Corps Navigability Study of 1977, Edisto River Area Report No. 03.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

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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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W1: Jurisdictional Wetland 1 flows south into wetlands south of the review area, which flow into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

W2: Jurisdictional Wetland 2 flows south into off site wetlands outside of the review area and east into off-site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

W3: Jurisdictional Wetland 3 flows west into an off-site jurisdictional tributary which flows south into another off-site jurisdictional tributary which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

W4: Jurisdictional Wetland 4 flows east into an off-site jurisdictional tributary and wetlands, which flow southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

W5: Jurisdictional Wetland 5 flows east into Jurisdictional Tributary 3, which flows east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

W6: Jurisdictional Wetlands 6 flows southeast into Jurisdictional Wetland 8 and Jurisdictional Tributaries T5, T6, T7, T8, T10, and T11, which flow southeast into Jurisdictional Tributaries T3 and T4, which flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

W8: Jurisdictional Wetland 8 flows southeast into Jurisdictional Tributaries T5, T6, T7, T8, T10, and T11, which flow southeast into Jurisdictional Tributaries T3 and T4, which flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

T1: Jurisdictional Tributary 1 flows southeast into Jurisdictional Wetland W2, which flows south into off-site wetlands outside of the review area and east into off site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

T2: Jurisdictional Tributary 2 flows south into Jurisdictional Wetland 2, which flows south into off-site wetlands outside of the review area and east into off site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

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T3: Jurisdictional Tributary 3 flows east into off-site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

T4: Jurisdictional Tributary 4 flows south, connecting with Jurisdictional Tributary 5 via culverts in the north and Jurisdictional Tributary 3 in the south, which flows east into off-site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

T5: Jurisdictional Tributary 5 flows southeast into off-site jurisdictional tributaries and wetlands of Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

T6: Jurisdictional Tributary 6 connects with Wetland W6 to the north, which flows southeast into Jurisdictional Tributaries T5, T6, T7, T8, T10, and T11, which flow southeast into Jurisdictional Tributaries T3 and T4, which flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

T7: Jurisdictional Tributary 7 flows southeast until it connects with Jurisdictional Tributary 3 via culverts, which flows east into off-site wetlands outside of the review area, which flow southeast into Walnut Branch and its unnamed tributaries, which flows southeast into Four Hole Swamp, a TNW.

T8: Jurisdictional Tributary 8 flows between portions of Jurisdictional Wetland 8, which flows southeast into Jurisdictional Tributaries T5, T6, T7, T8, T10, and T11, which flow southeast into Jurisdictional Tributaries T3 and T4, which flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

T9: Jurisdictional Tributary 9 flows southeast into Jurisdictional Tributary 5, which flows southeast into off-site jurisdictional tributaries and wetlands of Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

T10: Jurisdictional Tributary 10 flows southeast along portions of Jurisdictional Wetland W8, which flows southeast into Jurisdictional Tributaries T5, T6, T7, T8, T10, and T11, which flow southeast into Jurisdictional Tributaries T3 and T4, which flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

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T11: Jurisdictional Tributary 11 flows east across Jurisdictional Tributaries T7 and T8, and into Jurisdictional Tributary T5, which flows southeast into off-site jurisdictional tributaries and wetlands of Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

P2: Jurisdictional Pond 2 flows into Jurisdictional Wetland W5, which flows east into Jurisdictional Tributary 3, which flows east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.

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.
  - b. Interstate Waters (a)(2): N/A.
  - c. Other Waters (a)(3): 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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- d. Impoundments (a)(4): Labeled as JD-P2, the review area contains a 0.13-acre jurisdictional pond. The pond was determined to have been excavated from within waters of the U.S. Currently the pond is contiguous to jurisdictional wetland 5.
- e. Tributaries (a)(5): The review area contains eleven man-made (11) jurisdictional tributaries all totaling 13,197 L.F. The 11 onsite tributaries were determined to have a relatively permanent flow, a flow regime of intermittent by review of aerial photos, onsite inspection conducted by Corps staff dated December 12, 2023, and USGS 3D Elevation Program (3DEP) map services. The tributaries had well defined bed and banks, assorted substrate, an Ordinary High Water Mark (OHWM), and standing and/or flowing water was noted during the site visit conducted by Corps Staff. The tributaries varied from approximately three to twelve feet in width and varied from approximately less than a foot to three feet in depth. SCDNR 2020 IR photos depict defined linear features for all tributaries with a dark signature which typically represents a tributary with an intermittent flow regime. Lidar depicts dark blue linear signatures for all three tributaries. All tributaries flow east into an off-site jurisdictional tributary, which flows southeast into Walnut Branch, which flows southeast into Four Hole Swamp, a TNW.
- f. The territorial seas (a)(6): N/A.
- g. Adjacent wetlands (a)(7): The review area contains seven jurisdictional wetland areas; W1: 1-9, W2: 1-148, W3: 1-8, W4: 1-8, W5: 1-20, W6: 1-17, and W8: 1-39 for a total of 73.42 acres. The wetland areas exhibited wetland indicators of hydrophytic vegetation, wetland hydrology, and hydric soils, which were verified by Corps Staff on December 12, 2023. the wetland areas are also subjected to a high seasonal water table. Review of the submitted data sheets and additional information included in this review reveal these features contains all three parameters that define a wetland as outlined in the 1987 Corps of Engineers Wetland Delineation Manual and Atlantic and Gulf Coastal Plain Regional Supplement (Version 2.0). W1 continues offsite and flows south into wetlands south of the review area which flow directly into Walnut Branch, a jurisdictional tributary. W2 flows south into off site wetlands outside of the review area that continue to flow southeast into Walnut Branch, a jurisdictional tributary. W3 flows west into an off-site unnamed jurisdictional tributary which flows south into another off-site unnamed jurisdictional tributary which flows southeast into Walnut Branch, a jurisdictional tributary. W4 flows east into an off-site unnamed jurisdictional tributary which flow southeast into Walnut Branch, jurisdictional tributary. W5 is contiguous, directly abutting Jurisdictional Tributary 3. Lastly,

W6 flows southeast into Jurisdictional Wetland 8 which are contiguous, directly abutting Jurisdictional Tributary T7.

## 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.

Non-JD Pond 1: The review area contains a 0.17-acre pond labeled as P1 on the associated aquatic resource depiction. This pond was determined to be associated with the prior farming activity on the parcel, excavated wholly out of uplands for the purpose of irrigation and stock watering. This feature is an Preamble water (51 FR 41217) Reference page 16 of 59; generally non-jurisdictional features in the preamble to the 1986 regulations “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.

Non-JD Ditch: The review area contains several upland excavated ditches with a total approximate length of +/- 4,104 linear feet or 0.20 acre. These features are identified as Non-JD Ditch on the associated aquatic resource depiction. These linear features were evaluated by Corps Staff during a site visit conducted on December 12, 2023, and were determined to be excavated wholly in uplands, lacked evidence of an OHWM, and do not carry a relatively permanent flow of water.

- 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.

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



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- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A.
  - e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A.
  - f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A.
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. Review Performed for Site Evaluation: Office (Desk) Determination. Date: January 20, 2024. Field Determination. Date: December 12, 2023
  - b. Aquatic Resources delineation submitted by, or on behalf of, the requestor: Approved Jurisdictional Determination Request package including wetland determination forms, associated data maps, and aquatic resource map titled “Potential Waters of the U.S. Map” dated January 9, 2024, prepared by ECS Southeast, LLP and edited by Corps.
  - c. Photographic Log: Provided by ECS Southeast, LLP. dated July 31, 2023.
  - d. Aerial Imagery Map: Provided by ECS Southeast, LLP. dated July 14, 2023.
  - e. National Wetland Inventory Map: “USFWS National Wetland Inventory Map” provided by ECS Southeast, LLP. dated July 14, 2023.
  - f. Natural Resource Conservation Survey: “NRCS Soil Survey Map of Dorchester County” prepared by ECS Southeast, LLP. dated July 14, 2023.

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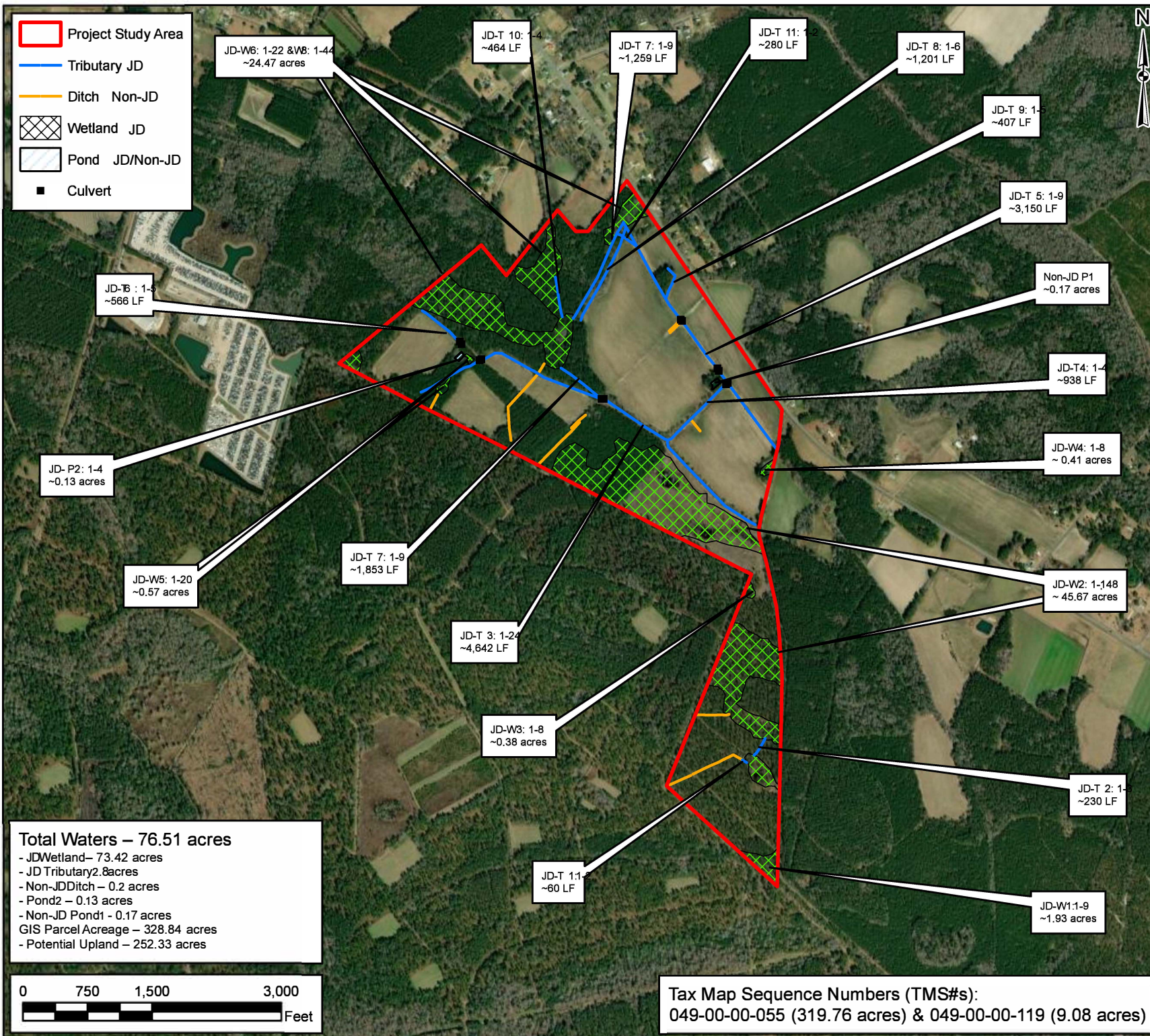
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- g. U.S. Geological Survey Map: "USGS Topographic Map Harleyville, SC Dated: 1977 SC Quadrangle" provided by ECS Southeast, LLP. dated July 14, 2023.
- h. NOAA LiDAR Elevation Map: Provided by ECS Southeast, LLP. dated July 14, 2023.
- i. USGS 3D Elevation Program (3DEP) Map Service – Hillshade and LiDAR prepared by the Corps' dated December 11, 2023.
- j. FEMA Flood Hazard Map: Provided by ECS Southeast, LLP. dated July 14, 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.





Client:



Project:

HUTTO TRACT

EAST MAIN STREET,  
HARLEYVILLE,  
DORCHESTER COUNTY,  
SOUTH CAROLINA

Title:

**POTENTIAL WATERS  
OF THE U.S. MAP**

NOTES:

1. POTENTIALLY JURISDICTIONAL WATERS OF THE U.S. WERE OBSERVED BY ECS ON JULY 11 & 12, 2023.
2. FINDINGS HAVE BEEN FIELD VERIFIED BY THE USACE ON DECEMBER 12, 2023. FINDINGS DEPICTED ON THIS MAP HAVE NOT BEEN FORMALLY VERIFIED BY THE USACE AND/OR SCDHEC AND ARE SUBJECT TO CHANGE.
3. THIS MAP SHOULD BE USED FOR PRELIMINARY PLANNING PURPOSES.

Drawn By:

LPJ

Scale:

1" = 1,500'

Approved By:

PMS

Date:

1/9/2024

ECS Project No.

49: 20636

**FIGURE 7**