



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

CESPK-RDC-S

02 November 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ SPK-2023-00463, MFR 1 of 1.²

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

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

¹ While the Revised Definition of "Waters of the United States"; Conforming 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, the territorial seas, or interstate water 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.

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This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area).

The review area does not contain any aquatic resources. There are no features with an ordinary high water mark, nor does the area contain wetlands, as hydrophytic vegetation, hydric soils, and wetland hydrology are not present.

The review area is primarily flat and slopes from approximately 170 feet elevation in the southwest corner to approximately 150 feet elevation in the northeast corner. The review area is not within a floodplain and soils on-site are not mapped as hydric. There are no significantly concave surfaces occurring within the area. Recent aerial imagery of the review area contains no visible saturated soil signatures. There is an apparent culvert just outside the review area that crosses under Interstate 5 (at approximately 37.08861°, -121.00073°), but there is no ordinary high water mark uphill or downhill from it, and there are no apparent wetland indicators near it.

Canals surround much of the review area, which affect flow runoff both to and from the area. The review area has likely been leveled in the past, and has recently been subject to grazing, mowing, and tilling. Based on available historic aerial imagery and topographic maps, the land in the review area appears to have been managed regularly for agricultural purposes since at least 1958 (aerial imagery is enclosed), and there is no compelling evidence of aquatic resources historically being present within the review area.

The submitted delineation report's survey occurred on April 13, 2023, during which the area was experiencing normal conditions during the dry season according to the Antecedent Precipitation Tool. The Antecedent Precipitation Tool was further utilized in concert with historic aerial satellite imagery to analyze the review area after recent precipitation events. According to the Antecedent Precipitation Tool, precipitation occurred near the area around December 6, 2022, May 18, 2020, April 11, 2015, and

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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October 22, 2009, and aerial imagery dated December 7, 2022, May 22, 2020, April 12, 2015, and October 28, 2009, respectively, showed no strong evidence of aquatic resources or saturated soil signatures in the review area following the precipitation events.

The submitted aquatic resources delineation report also determined that there were no aquatic resources present within the review area. Supporting information provided in the report included representative site photographs and data forms that identified all sampling areas to be uplands.

2. REFERENCES.

a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")

b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))

c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 296.60 acres. It is located at latitude 37.090026°, longitude -121.007695°, Santa Nella, Merced County, California.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶ N/A. There are no aquatic resources so there is no connection. However, the nearest TNW is the San Joaquin River.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A. However, surface flows and runoff resulting from precipitation drain to the northeast into the San Joaquin and Kings River Canal which eventually flows into San Joaquin River.

6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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

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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.

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 2023 Rule as amended, 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 2023 Rule as amended. 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. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A.
- b. The Territorial Seas (a)(1)(ii): N/A.
- c. Interstate Waters (a)(1)(iii): N/A.
- d. Impoundments (a)(2): N/A.
- e. Tributaries (a)(3): N/A.
- f. Adjacent Wetlands (a)(4): N/A.
- g. Additional Waters (a)(5): N/A.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review

"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 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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area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹ N/A.

b. 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 2023 Rule as amended (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. An office evaluation was conducted and completed on November 2, 2023.

b. USGS EarthExplorer <<https://earthexplorer.usgs.gov/>>. Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Accessed October 19, 2023.

c. USGS EarthExplorer. [AR1VRU000020112] [aerial photo]. 1:30,000. 000002. 112. Sioux Falls, South Dakota: USGS Earth Resources Observation and Science Center. July 25, 1958. Collected October 19, 2023.

d. Maxar Global Enhanced GEOINT Delivery. <<https://evwhs.digitalglobe.com/>>. Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Accessed from October 17, 2023, through October 24, 2023.

e. WorldView-1. (October 28, 2009). WV01, 09OCT28191637-P3DS-016064866010_01_P001, Orthorectified. Westminster, CO, USA: DigitalGlobe, Inc., collected October 26, 2023.

f. Maxar Global Enhanced GEOINT Delivery. (December 07, 2022). Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Collected October 26, 2023, from <https://evwhs.digitalglobe.com/>.

g. Alphabet Inc. Google Earth Pro (version 7.3.4.8642) and Google Street View (via desktop browser). Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Accessed from October 17, 2023, through October 24, 2023.

h. Google Earth Pro 7.3.4.8642. (May 22, 2020, and April 12, 2015). Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Collected October 26, 2023.

⁹ 88 FR 3004 (January 18, 2023)

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- i. Nationwide Environmental Title Research, LLC.
<<https://www.historicaerials.com/>>. [aerial imagery and topographic maps dated between 1920-2021]. Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Accessed from October 17, 2023, through October 24, 2023.
- j. OpenTopography. (<https://portal.opentopography.org/datasets>). [topography data]. Santa Nella, California. Latitude 37.090026°, Longitude -121.007695°. Collected October 25, 2023, and October 26, 2023.
- k. FEMA Flood Map Service Center. <<https://msc.fema.gov/portal/home>>. Santa Nella, California, Latitude 37.090026°, Longitude -121.007695°. Accessed October 23, 2023.
- l. California Department of Water Resources Best Available Maps.
<<https://gis.bam.water.ca.gov/bam/>>. Santa Nella, California, Latitude 37.090026°, Longitude -121.007695°. Accessed October 23, 2023.
- m. *San Luis Ranch Project Aquatic Resources Delineation Report*, dated June 20, 2023, prepared by ICF International Inc.
- n. USGS National Geospatial Program Historical Topographic Map Explorer (<https://livingatlas.arcgis.com/topoexplorer/index.html>) and National Map (<https://apps.nationalmap.gov/viewer/>). Santa Nella, California, Latitude 37.090026°, Longitude -121.007695°. Accessed October 26, 2023.
- o. Antecedent Precipitation Tool, U.S. Army Corps of Engineers, accessed October 18, 2023.
- p. USDA Natural Resources Conservation Service Web Soil Survey.
<<https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>>. Santa Nella, California, Latitude 37.090026°, Longitude -121.007695°. Accessed October 17, 2023.

10. OTHER SUPPORTING INFORMATION. N/A.

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

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1. *Figure 4-1, Aquatic Resources Delineation Map*, of the *San Luis Ranch Project Aquatic Resources Delineation Report*, dated June 20, 2023, prepared by ICF International Inc.
2. USGS EarthExplorer aerial imagery dated July 25, 1958.
3. *USGS Historical Topographic Maps*, compiled by Christopher Link on November 2, 2023.
4. *Antecedent Precipitation Tool data and respective aerial imagery*, compiled by Christopher Link on October 30, 2023.

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