



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

CESPK-RDI-N (SPK-2022-00153)

29 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-2022-00153].

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.² 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.³

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*").

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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.

CESPK-RDI-N

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00153]

- a. Ten stream channels were delineated as ephemeral and having no downstream connection to outside bodies of water. The channels flow downhill into a geographically flat area where flows would either percolate into the ground or evaporate before reaching another water body. All aquatic resources are non-relatively permanent and have no downstream connection to a (a)(1) water and are not jurisdictional under the Amended 2023 Rule consistent with *Sackett*.

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)
- d. "Aquatic Resource Delineation Report for the Bilk Exploration Project," Cedar Creek Associates (October 2023)

3. REVIEW AREA. The 1,320-acre survey area is located in Humboldt County, Nevada, approximately 28 miles west of Oroville, and 50 miles northwest of Winnemucca, Nevada. The approximate center of the review area is located at Latitude 41.54013, Longitude -118.315635. No previous approved jurisdictional determination are associated with the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest interstate water is the Quinn River which its east fork crosses the Oregon-Nevada state line at Latitude 41.999196, Longitude -117.51533. The Quinn River flows near the review area to the south, but no aquatic resources delineated have a flow path to the Quinn River (Enclosure 1 and 2).

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. No aquatic resources within the survey area have a downstream connection or flow path to any TNW, Territorial Seas, or Interstate Waters. Aquatic resources in the Review Area flow from North to the South towards the interstate portion of the Quinn River but do not reach the Quinn River.

CESPK-RDI-N

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00153]

6. SECTION 10 JURISDICTIONAL WATERS⁵: There are no 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 1899.⁶

7. SECTION 404 JURISDICTIONAL WATERS: There are no aquatic resources within the review area that 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*.

- 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. None of the aquatic resources within the review area are jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended.

- a. All aquatic resources within the Review Area are ephemeral drainages that only flow in direct response to precipitation/snowmelt and are not considered relatively permanent under the Amended 2023 Rule consistent with *Sackett*.

Table 1. Non-Relatively Permanent Streams

⁵ 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.

⁶ 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.

CESPK-RDI-N

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00153]

Channel Id	Length (linear feet)	Acres	Local Water Way
Channel 1	6419	2.89	N/A
Channel 2	674	0.31	N/A
Channel 3	2601	1.17	N/A
Channel 4	716	0.32	N/A
Channel 5	8807	3.95	N/A
Channel 6	2012	0.92	N/A
Channel 7	34	0.02	N/A
Channel 8	10028	4.52	N/A
Channel 9	1751	0.8	N/A
Channel 10	6502	2.95	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. A desktop review and investigation was performed on November 27, 2023 utilizing the following information:
- b. "Aquatic Resource Delineation Report for the Bilk Exploration Project," Cedar Creek Associates (October 2023)
- c. USGS National Hydrography Dataset (NHD), accessed November 27, 2023
- d. National Regulatory Viewer, 3DEP Hillshade, 3DEP Digital Elevation Model, National Wetland Inventory, USGS Topo, accessed November 27, 2023
- e. Alphabet Inc. Google Earth Pro. Latitude 41.54013, Longitude -118.315635, accessed November 27, 2023.

10. OTHER SUPPORTING INFORMATION. Hydrologic data in the National Hydrography Dataset Plus High Resolution for 4-digit hydrologic units – 1604, shows that the aquatic resources in the Review Area do not reach the Quinn River (Enclosure

CESPK-RDI-N

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00153]

2). Evidence to support the relative permeance of streams was gathered from the “Aquatic Resource Delineation Report for the Bilk Exploration Project” prepared by Jesse Dillon of Cedar Creek Associates in October 2023. As all aquatic resources in the Review Area are non-relatively permanent and have no downstream connection to a (a)(1) water, as a result they do not meet the definition of (a)(3) tributaries or other (a)(5) waters.

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.

Encls

1. Bilk Exploration Project Delineation
2. Bilk Exploration Project NHDPlus

Ethan Schindler

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