



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

CESPK-RDC-D (SPK-2023-00285)

29 Feb 2024

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-2023-00285.

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

a. 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*").

b. 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 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.

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1. SUMMARY OF CONCLUSIONS. The following is 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).

- a. Seasonal Wetland 1 (SW-1), non-jurisdictional, 0.003 acre
- b. SW-2, non-jurisdictional, 0.008 acre
- c. SW-3, non-jurisdictional, 0.006 acre

2. REFERENCES.

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

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

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

d. CESPK-RD, memorandum for record (Traditional Navigable Water (TNW); Navigable In Fact Determination for the Lower American River from River Mile 12 to Folsom Lake (Regulatory Branch SPK-2008-00099)), 4 February 2008.

3. REVIEW AREA. The approximately 9.6-acre review area is located near the intersection of East Bidwell Street and Creekside Drive, Latitude 38.67005°, Longitude -121.14966°, City of Folsom, California. The review area is characterized by historic cobble mine tailing piles, approximately 10-15 feet in height, scattered throughout the site and dominated by annual brome grassland. The low areas between the tailing piles are comprised of oak woodland containing valley oak, interior live oak, and Fremont cottonwood.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream traditional navigable water is the Lower American River (reference 2.d).

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The nearest jurisdictional feature, Humbug Creek (a relatively permanent (a)(3) tributary), is located to the north of the review area, and flows generally southwest, ending at Lake Natoma, which is an impoundment of the Lower American River below the point where it becomes an (a)(1)(i) traditional navigable water (reference 2.d). LiDAR imagery reveals that the review area drains to the southwest and the applicant's delineation report indicates that a culvert, approximately 25ft-wide, lies between the southwest corner of the site and Humbug Creek. This culvert is approximately 400 feet away from the nearest seasonal wetland in the review area.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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.
- e. Impoundments (a)(2): N/A.
- f. Tributaries (a)(3): N/A.
- g. Adjacent Wetlands (a)(4): N/A
- h. Additional Waters (a)(5): N/A.

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.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. There are no 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).⁷

b. SW-1, SW-2, and SW-3 are non-adjacent wetlands. SW-1, SW-2, and SW-3 (seasonal wetlands) are wetlands in low-lying depressions between the mine tailing piles. Data points collected in these depressions meet the Corps’ three-part test. LiDAR (Enclosure 2) and satellite imagery (Enclosure 3) shows that the wetlands are separated from Humbug Creek to the north by remnants of old tailing piles and a bike path. These wetlands are not adjacent to Humbug Creek, the nearest potential relatively permanent (a)(3) tributary. SW-1 is separated from Humbug Creek by approximately 150 feet of uplands and a large tailing pile with a built bike path along the top. SW-2 is separated from Humbug Creek by approximately 300 feet of uplands and two to three tailing piles. SW-3 is separated from Humbug Creek by approximately 200 feet of uplands and is bounded by a tailing pile in all directions. These wetlands do not abut Humbug Creek, and are not connected to Humbug Creek by a discrete feature such as a non-jurisdictional ditch, swale, pipe, or culvert forming a continuous surface connection, nor is there a natural berm, bank, dune or similar natural landform between these wetlands and a relatively permanent water that provides evidence of a continuous surface connection (reference 2.d at p. 3095).

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. Madrone Ecological Consulting, LLC (Madrone). 2021. *Aquatic Resources Delineation Report Creekside Folsom Property*. Prepared for Tekin & Associates LLC. Dated January 2023.

b. Google Earth Pro 7.3.3.7786 (July 21, 2020). Taken April 2014. Sacramento, California. Latitude 38.67025°, Longitude -121.14989°. Eye Alt. 1781 ft. Accessed February 6, 2024.

c. Google Earth Pro 7.3.3.7786 (July 21, 2020). Taken February 2018. Sacramento, California. Latitude 38.67025°, Longitude -121.14989°. Eye Alt. 1781 ft. Accessed February 6, 2024.

d. Google Earth Pro 7.3.3.7786 (July 21, 2020). Taken February 2022. Sacramento, California. Latitude 38.67025°, Longitude -121.14989°. Eye Alt. 1781 ft. Accessed February 6, 2024.

⁷ 88 FR 3004 (January 18, 2023)

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e. USGS National Map 3D Digital Elevation Program (3DEP). ArcGIS Pro. Latitude 38.67025°, Longitude -121.14989°. Accessed February 6, 2024.

f. *Custom Soil Resource Report for Sacramento County, California*. Web Soil Survey. USDA Natural Resources Conservation Service. Generated February 15, 2024.

10. OTHER SUPPORTING INFORMATION. The seasonal wetlands in the review area do not seem to exhibit characteristics that would indicate they are one wetland. SW-1 is separated from SW-2 by approximately 200 feet of uplands, and both SW-1 and SW-2 are separated from SW-3 by approximately 300 feet of uplands. According to the Natural Resources Conservation Service (NRCS) Soil Survey Database (NRCS 2023), two soil mapping units occur within the Study Area: (107) Argonaut-Auburn complex, 3 to 8 percent slopes; and (245) Xerorthents, dredge tailings, 2 to 50 percent slopes (Enclosure 4). Argonaut-Auburn complex is well drained and non-hydric with a depth of more than 80 inches to the water table. Xerorthents, dredge tailings, is somewhat excessively drained and non-hydric with a depth to the water table also exceeding 80 inches. The wetlands are thus unlikely to be connected via subsurface hydrologic connection. As noted in the consultant's delineation report, surface water in the review area likely comes from direct precipitation, most of which drains through the excessively well drained tailings piles, though a small amount is retained in the slickens deposits and forms the seasonal wetlands.

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.

4 Encls

1. Wetland Delineation Map
2. LiDAR Imagery
3. Aerial Imagery
4. NRCS Web Soil Survey

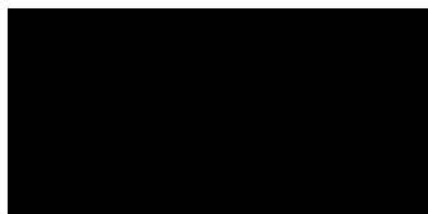




Figure 3
Aquatic Resources Delineation