



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

CESPK-RDC-D (SPK-2020-00324)

5 Mar 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),<sup>1</sup> (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>

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),<sup>5</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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<sup>1</sup> 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.

<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, 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.).

<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.

1. SUMMARY OF CONCLUSIONS.

a. The following table lists each individual feature within the review area and the jurisdictional status of each one (i.e., identifies whether each feature is/is not a water of the United States and/or a navigable water of the United States). None of the features within the review area are waters of the U.S. or navigable waters of the U.S.

Name of Aquatic Resource	Cowardin	Description	Waters of the U.S	Navigable Waters of the U.S.
Drainage 1	R6	Ephemeral Riverine	No	No
Drainage 2	PEM	Upland Drainage Ditch	No	No
Drainage 3	PEM	Upland Drainage Ditch	No	No
Drainage 4	R6	Ephemeral Riverine	No	No
Drainage 5	R6	Ephemeral Riverine	No	No

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 No. 173 (September 8, 2023).

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

3. REVIEW AREA. The review area is the 13.92-acre project site is located in Section 29, Township 12 N, Range 18E, near Latitude 38.8594°, Longitude -120.0117°, Meyers, El Dorado County, California. The review area is identical to that of a previously issued AJD under the same file no. SPK-2020-00324 (AJD verification date June 11, 2020).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is Lake Tahoe (Enclosure 2). The Sacramento District identifies Lake Tahoe as a navigable water of the United States pursuant to the RHA and 33 CFR Part 329 (i.e., a Section 10 Water) in its entirety.<sup>6</sup>

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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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Drainage 5 flows to Drainage 1 which flows to Drainage 4 through the review area, to Meyers Creek which flows to the Upper Truckee River, which flows to Lake Tahoe, 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. There are no Section 404 jurisdictional waters within the review area.

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 area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b)<sup>10</sup>. Drainages 2 and 3 are ditches that may be excluded under paragraph b(3) of the Amended 2023 Water Rule as they were excavated from historical uplands and do not support relatively permanent water (Enclosure 3). This conclusion is based on a review of historic aerial photography, historic USGS topographic quadrangles, ground level photos provided by the project biologist, and a digital terrain model (DTM) created by the Corps from LiDAR data. A review was performed of aerial photography collected between December 1939 and June 2023 and available on Google Earth; none of these photos definitely displayed the presence of surface water in any mapped aquatic feature (Enclosure 5). A review of historic (1955, 1967, 1992, and 2021) USGS 7.5-minute topographic quadrangles was performed; none of the surveyed aquatic resources were portrayed on any of these, thereby inferring that these features were likely excavated within uplands (Enclosure 3).
- 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). Drainages 1, 4, and 5 are features that do not meet the relatively permanent waters standard as (a)(3) tributaries. The flow regime for these features is defined as ephemeral flow, as their flow derives from direct precipitation, storm-water runoff

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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.

<sup>9</sup> See Rivers and Harbors Act Navigable Waters of the U.S. in Sacramento District at <https://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/Navigable-Waters-of-the-US/>.

from US 50, and irrigation runoff from within the project vicinity. There are an estimated 11-20 flow events in the review area each year according to the 2020 Approved Jurisdictional Determination (Enclosure 1). This conclusion is based on a review of historic aerial photography, historic USGS topographic quadrangles, ground level photos provided by the project biologist, and a DTM created by the Corps from 2010 LiDAR data. A review was performed of aerial photography collected between December 1939 and June 2023 and available on Google Earth; none of these photos definitively exhibit the presence of surface water in Drainages 1, 4, or 5 (Enclosure 5). A review of historic (1955, 1967, 1992, and 2021) USGS 7.5-minute topographic quadrangles was performed; Drainages 1, 4, and 5 were not portrayed on any of these, thereby inferring that these features were considered to be too ephemeral to map (Enclosure 3). Drainages 1, 4, and 5 also are barely visible on the LiDAR-based DTM, inferring the lack of persistent seasonal flow, which would be expected to result in deeper scour and a more pronounced bed and bank than present (Enclosure 4). This shallow channel depth associated with Drainages 1, 4, and 5 is readily observable in the ground-level photos recorded by the project biologist (Enclosure 2).

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. Desk evaluation conducted on February 8, 2024.

b. Maps, plans, plots or plat submitted by or on behalf of the applicant - *Final Aquatic Resources Delineation Report Pioneer Trail/US 50 Intersection Safety Improvement Project* by NEC dated April 2020 (Enclosure 6).

c. U.S. Geological Survey map(s) - 1.24K; *Echo Lake* accessed February 8, 2024.

d. USDA Natural Resources Conservation Service Soil Survey - *Final Aquatic Resources Delineation Report Pioneer Trail/US 50 Intersection Safety Improvement Project* by NEC dated April 2020, Appendix B, Figure 7.

e. National wetlands inventory map(s) - *Final Aquatic Resources Delineation Report Pioneer Trail/US 50 Intersection Safety Improvement Project* by NEC dated April 2020, Appendix B, Figure 5.

f. Aerial Photographs - Open-source imagery on Google Earth from July 2021 and June 2023 accessed February 8, 2024

g. Other photographs - *Final Aquatic Resources Delineation Report Pioneer Trail/US 50 Intersection Safety Improvement Project* by NEC dated April 2020, *Representative Photographs, Appendix C*.

10. OTHER SUPPORTING INFORMATION. *Sacramento District, Pioneer Trail US 50 Safety Improvement, SPK-2020-00324. APPROVED JURISDICTIONAL DETERMINATION FORM* by U.S. Army Corps of Engineers dated April 17, 2020. The report determined Drainages 2 and 3 are ditches that were constructed wholly in uplands for the purpose of storm-water management and [were] not jurisdictional aquatic resources. Drainages 1, 4, and 5 were described as having ephemeral flows, and influenced by surface runoff from Highway 50 as stormwater management features (direct response to precipitation).

CESPK-RDC-D (SPK-2020-00324)

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

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. *Sacramento District, Pioneer Trail US 50 Safety Improvement, SPK-2020-00324. APPROVED JURISDICTIONAL DETERMINATION FORM* by U.S. Army Corps of Engineers dated April 17, 2020
2. *GROUND LEVEL PHOTOGRAPH LOCATIONS AND DIRECTIONS* by NCE dated October 17, 2019
3. *1955-2021 - Historic Topographic Map SPK-2020-00324 Pioneer Trail US 50 Safety Project* by U.S. Army Corps of Engineers
4. *LiDAR Digital Terrain Model SPK-2020-00324 Pioneer Trail US 50 Safety Project* by U.S Army Corps of Engineers
5. *Google Earth for AJD (1939-2023)* by U.S. Army Corps of Engineers
6. *Final Aquatic Resources Delineation Report Pioneer Trail/US 50 Intersection Safety Improvement Project* by NCE dated April 2020

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