



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

CESPK-RDI-N

16 May 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-1998-25143]

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 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.

a. There are four unnamed, non-jurisdictional, non-relatively permanent stream channels within the review area measuring 13,117 linear feet.

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 2,020-acre review area is located along the west slope of the Bare Mountain Range to the east of US-95, eight miles south of Beatty, Latitude 36.8369, Longitude -116.7014, Nye County, Nevada (Enclosure 1). The review area was verified under an Approved Jurisdictional Determination on August 14, 2019, in which all aquatic resources within the review area were disclaimed as being isolated and not having a direct or indirect connection to the Amargosa River, the nearest interstate Relatively Permanent Water. As such, the aquatic resources within the review area were determined to be intrastate waters with no connection to interstate commerce and were not jurisdictional. Additionally, the waters, when evaluated in 2019, were determined to be ephemeral and only flow in direct response to precipitation. As such, they have been classified as non-relatively permanent for the purposes of this evaluation.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A. The Amargosa River is the nearest interstate water but the aquatic resources within the review area do not have a connection to this resource.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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.

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7. SECTION 404 JURISDICTIONAL WATERS:

- 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. The four unnamed stream channels within the review area have an ordinary high water mark but do not have relative permanence and are therefore non-relatively permanent, non-jurisdictional waters.

9. DATA SOURCES.

a. A desktop review and investigation was performed on May 14, 2024 utilizing the following information:

(1) [REDACTED] 2018. "Aquatic Resources Delineation Report [REDACTED]"

(2) [REDACTED] 2018. "Aquatic Resource Delineation Supplement [REDACTED]"

(3) [REDACTED] 2024. "Aquatic Resource Re-verification Request"

(4) USGS National Hydrography Dataset (NHD), 2023. Accessed May 14, 2024. (<https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer>)

(5) Digital Globe, 2023. Historic Aerial Imagery, 2020-2024. Accessed May 14, 2024. (<https://evwhs.digitalglobe.com>)

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(6) Google Earth, 2024. Historic Aerial Imagery, 2024. Accessed May 14, 2024.

(7) USGS 3D Elevation Program (3DEP) for 1/3 Arc Second resolution, 2022. Accessed May 14, 2024. (<https://www.sciencebase.gov/catalog/item/4f70aa9fe4b058caae3f8de5>)

(8) USGS Watershed Boundary Dataset (WBD) for 12-digit Hydrologic Unit – 180902020602. Accessed May 14, 2024. (<https://www.sciencebase.gov/catalog/item/51361e87e4b03b8ec4025c22>)

(9) USACE National Regulatory Viewers, South Pacific Division, Nevada. Accessed May 14, 2024. (<https://arcportal-ucop-corps.usace.army.mil/s0portal/apps/experiencebuilder/experience/?id=3daa5a6e0b43416db33b181f2eebb751&page=Main&views=Geospatial-Viewers>)

10. OTHER SUPPORTING INFORMATION. The information included in the project's aquatic resources delineation report adequately delineated all aquatic resources within the review area and provided sufficient information to demonstrate that all aquatic resources within the review area lack relative permanent and are therefore non (a)(3) tributaries.

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.

Encl

