

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

CESPK-RDC-S 10 September 2024

MEMORANDUM FOR RECORD

<u>SUBJECT:</u> 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-2024-00124]

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.

³ Regulatory Guidance Letter 05-02.

² 33 CFR 331.2.

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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a. Provide 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).

Name of Aquatic Resource	Jurisdictional/Non- Jurisdictional	Authority
SW-1	Non-jurisdictional	None
SW-2	Non-jurisdictional	None
SW-3	Jurisdictional	Section 404
SW-4	Jurisdictional	Section 404
SWS-1	Non-jurisdictional	None
SWS-2	Jurisdictional	Section 404
SEEP-1	Jurisdictional	Section 404
SEEP-2	Non-jurisdictional	None
SEEP-3	Non-jurisdictional	None
SEEP-4	Jurisdictional	Section 404
SEEP-5	Non-jurisdictional	None
DD-1	Non-jurisdictional	None
ED-1	Non-jurisdictional	None
ED-2	Non-jurisdictional	None
ED-3, ED-4, ED-5, RD-6, RD-7, RD-8	Jurisdictional	Section 404
ED-6	Non-jurisdictional	None
ED-7	Non-jurisdictional	None
ID-1	Jurisdictional	Section 404
PC-1	Jurisdictional	Section 404
RD-1	Non-jurisdictional	None
RD-2	Non-jurisdictional	None
RD-3	Non-jurisdictional	None
RD-4	Non-jurisdictional	None
RD-5	Non-jurisdictional	None
RD-9	Non-jurisdictional	None

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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. <u>REVIEW AREA.</u> The approximately 81.8-acre review area is located adjacent to Old Country Club Drive and Bass Lake Road at Latitude 38.65867, Longitude -121.02990, within El Dorado Hills, El Dorado County, California (Enclosure 1).
- 4. <u>NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.</u> The nearest TNW, the Mokelumne River, is located approximately 70.5 miles straight-line distance to the southwest of the review area, estimated using the Corps Navigable Waters layer in Google Earth. The Mokelumne River is a TNW subject to Section 10 of the Rivers and Harbors Act from the river mouth to Frandy Grage which is located approximately 3.5 miles upstream of New Hope Road.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Jurisdictional Aquatic Resources (AR) within the review area flow to Carson Creek, which is a relatively permanent tributary to the Mokelumne River. The Mokelumne River is a traditional navigable water pursuant to 33 CFR 328.3(a)(1)(i). Carson Creek flows southeast into Deer Creek, which flows into the Cosumnes River. The Cosumnes River is tributary to the Mokelumne River. See Figure 1. Review Area Downstream Connection to (a)(1) Water and Figure 2. Jurisdictional Aquatic Resources Flowpath Map included in Enclosure 2. Each AR's Flowpath to the Mokelumne River is addressed individually below.
- 6. <u>SECTION 10 JURISDICTIONAL WATERS</u>⁵: 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

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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.

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- 7. <u>SECTION 404 JURISDICTIONAL WATERS:</u> The following aquatic resources within the review area 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): **ID-1** is a 0.311-acre/ 1,543-linear-foot segment of a relatively permanent, first-order tributary to the Mokelumne River, a TNW. The ID-1 tributary reach originates to the east of the review area. Within the review area, ID-1 flows west and crosses through a culvert under Bass Lake Road. After exiting the culvert, the ID-1 tributary reach continues flowing west for approximately 515 linear feet (LF)/ 0.10 miles before reaching an unnamed second-order tributary (this is the end of the ID-1 tributary reach). The unnamed second order tributary flows west for approximately 0.76 miles/4,030 LF before entering Carson Creek. Carson Creek flows into Deer Creek which flows into the Cosumnes River and then the Mokelumne River. A review of multiple aerial photographs obtained from Google Earth Pro (2/5/2021, 5/17/2023, 3/14/2024) and Digital Globe (1/31/2021, 2/6/2021, 2/27/2021, 3/12/2021, 1/13/2022, 1/22/2022, 1/6/2023) show that the ID-1 tributary reach has flowing or standing water year-round or continuously during certain times of the year and for more than just a short duration in direct response to precipitation (Enclosure 3), even when the region is in severe or extreme drought (Enclosure 8).
- **PC-1** is a 0.033-acre/ 54-linear-foot segment of Carson Creek, a relatively permanent (a)(3) tributary to the Mokelumne River. Carson Creek follows the flowpath to the Mokelumne River described above. PC-1's tributary reach measures 4.39 miles and is a third-order tributary reach of Carson Creek. The tributary reach originates approximately 0.09 miles upstream of PC-1, where two second-order unnamed tributaries join. The tributary reach ends approximately 4.3 miles downstream of PC-1, where another third-order tributary reach flows into PC-1's tributary reach. Carson Creek is mapped as an intermittent stream on the U.S. Geological Survey (USGS) Topographic Quadrangle and on the USGS National Hydrography Dataset (NHD). A review of multiple aerial photographs taken during both the wet and dry season and obtained from Google Earth Pro (2/5/2021, 6/3/2021, 8/10/2021, 5/17/2023, 3/14/2024) and Digital Globe (5/1/2022, 10/30/22, 12/21/2022, 6/23/2023) show that the PC-1 tributary reach has flowing or standing water throughout most of the year and for more than just a short duration in direct response to precipitation (Enclosure 4).

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RD-8 (0.022 acre/ 472 LF), RD-7, (0.003 acre/ 64 LF), RD-6 (0.009 acre/ 192 LF), **ED-5** (0.018 acre/ 234 LF), **ED-4** (0.007 acre/ 78 LF), and **ED-3** (0.006 acre/ 58 LF) are six separate segments of the same relatively permanent, first order tributary reach. The RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary reach originates approximately 200 feet east of the review area at the eastern end of RD-8. RD-8 flows west through SEEP-4 and into RD-7. Flows from RD-7 cross through a culvert located under a driveway off of Old Country Club Drive and into RD-6. RD-6 flows west within the review area and then southwest through a culvert under Old Country Club Drive. The tributary reach continues through a concrete-lined channel for approximately 0.09 miles before crossing west through a culvert under Bass Lake Road. The tributary reach then flows through ED-5, ED-4, and ED-3 before reaching an unnamed, relatively permanent second order tributary. The unnamed second order tributary flows west for approximately 0.76 miles/4,030 LF before flowing into Carson Creek which is tributary to the Mokelumne River, as described above. A review of multiple aerial photographs obtained from Google Earth Pro (2/2/2018, 2/5/2021, and 3/14/2024) and Digital Globe (1/31/2021, 2/27/2021,1/13/2022, 1/22/2022, and 2/13/2023) show that the RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary reach has flowing or standing water continuously during certain times of the year and for more than just a short duration in direct response to precipitation (Enclosure 5), even when the region is in severe or extreme drought (Enclosure 8).

f. Adjacent Wetlands (a)(4): **SEEP-1** is a 0.005-acre segment of a wetland that extends south beyond the review area. Outside of the review area, the southern boundary of SEEP-1 directly abuts Carson Creek, resulting in an unbroken surface connection to the tributary. Therefore, SEEP-1 is adjacent to, and has a continuous surface connection to, a relatively permanent (a)(3) tributary. Please see Enclosure 9 for aerial photos obtained from Google Earth Pro which show SEEP-1 abutting Carson Creek (Enclosure 9).

Features labeled **SW-3**, **SW-4**, **SWS-2**, and **SEEP-4** are located in the southeast portion of the review area. All four wetlands have a continuous surface connection to the relatively permanent RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary described in Section 7.e. SW-4 and SEEP-4 directly abut the tributary. SW-3 and SWS-2 are considered adjacent wetlands because they are connected to the RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary through SW-4 and at least one discrete feature, as described below. The discrete features serve as physical connections that maintain a continuous surface connection between the SW-3 and SWS-2 adjacent wetlands and the relatively permanent tributary.

SWS-2 is connected to SW-4 via ED-6, an 81 LF non-relatively permanent drainage, and an approximately 19 LF swale (Enclosure 6, Photo 12). At its downstream (eastern) end, ED-6 transitions from an ephemeral drainage into a swale. The swale provides a connection to SW-4 which abuts the relatively permanent tributary

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RD-8/RD-7/RD-6/ED-5/ED-4/ED-3. The total distance between SWS-2 and the relatively permanent tributary, including the length of S-4, is approximately 167 LF. SW-3 is connected to SW-4 via an approximately 115 LF swale (Enclosure 6, Photo 8). The total distance between S-3 and the relatively permanent tributary, including the length of S-4, is approximately 145 LF. The swale features that provide discrete physical connections exhibit scour marks and a change in vegetation between the features and the surrounding upland areas. These indicators were observed during a May 29, 2024, site visit. Please refer to Photo 8 of Enclosure 6 for a representative photo. The following table provides the individual acreages of each jurisdictional wetland feature:

Feature ID	Acreage
SW-3	0.006
SW-4	0.019
SWS-2	0.008
SEEP-4	0.294

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 area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁷

DD-1, RD-1, RD-2, RD-3, RD-4, RD-5, and RD-9 are non-relatively permanent roadside ditches excavated wholly in and draining only dry land. Google Earth aerial imagery shows that DD-1, RD-2, RD-3, RD-4, RD-5 and RD-9 were all constructed in uplands between June 2020 and October 2020 when Country Club Drive was relocated further north and Bass Lake Road was expanded from two to three lanes. The roadside ditches are non-relatively permanent because they have flowing or standing water for only a short duration in direct response to precipitation. The ditches are excluded from USACE jurisdiction under paragraph (b)(3). A review of aerial photos obtained on Digital Globe and taken during the wet season (1/31/2021, 2/27/2021, 3/12/2021, 1/22/2022, 4/15/2022, 2/13/2023) do not reveal any flowing or standing water in the roadside ditches. The following table provides each feature's acreage and linear feet:

Feature ID	Acreage	Linear Feet
DD-1	0.005	68

⁷ 88 FR 3004 (January 18, 2023)

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RD-1	0.0004	16
RD-2	0.024	352
RD-3	0.074	810
RD-4	0.004	78
RD-5	0.111	1,332
RD-9	0.003	80

DD-1 is located on the northern side of Country Club Drive and conducts flows from the roadway into ID-1. RD-1 runs west along Old Bass Lake Road and flows into an ephemeral drainage (ED-2) which then flows into Carson Creek. RD-2 is adjacent to Bass Lake Road and flows south into ID-1. RD-4 flows west along Country Club Drive and through a culvert into RD-3. RD-3 continues west along Country Club Drive then flows through a culvert into RD-5. RD-5 flows south along Bass Lake Road and then west through a culvert under the roadway and into RD-9. RD-9 flows into the RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary reach. Please see *Figure 3. Flowpath Map of (b)(3) Excluded Ditches* of Enclosure 2 for a representation of the flowpath of each ditch. Aside from RD-1, all of the roadside ditches are lined with rocks and are entirely unvegetated.

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).

SW-1, SW-2, SWS-1, SEEP-2, SEEP-3 and SEEP-5 are wetlands that are not adjacent to an (a)(1), (a)(2), or (a)(3) water. The following table provides the individual acreages of each feature:

Feature ID	Acreage
SW-1	0.007
SW-2	0.001
SWS-1	0.009
SEEP-2	0.060
SEEP-3	0.002
SEEP-5	0.014

SW-1 is situated near the RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 relatively permanent (a)(3) tributary but does not abut, nor is adjacent to, the tributary. Please refer to Photos 22 and 23 of Enclosure 6 for representative photos from a May 29, 2024, site visit of the wetland and the upland area that separates SW-1 from the relatively permanent (a)(3) tributary.

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SW-2 and SEEP-2 are situated upslope of SW-3, but neither feature is connected to SW-3 through a discrete physical feature. A swale, located at the southern end of SW-2, directs flows from SW-2 towards SW-3. However, the swale does not fully connect SW-2 to SW-3 as it becomes indiscernible from the surrounding upland areas approximately 88 LF downslope of SW-2 (halfway between the two wetland features). Please see Photos 4-7 of Enclosure 6 for representative photos of the swale located downstream of SW-2.

SWS-1 is located adjacent to Old Country Club Drive and flows southeast along the roadway. SWS-1 is not adjacent to any jurisdictional waters, nor is it connected to a jurisdictional water via a discrete physical feature.

SEEP-3 and SEEP-5 are situated approximately 290 LF upslope of SWS-2 and SEEP-4. There is a dirt access road located approximately 45 feet to the southwest of the features. A swale extends approximately 228 feet downslope of the dirt access road, towards SWS-2 and SEEP-4. However, the swale does not serve as a discrete physical feature connecting SEEP-3 and SEEP-5 to the downstream wetland, because it does not extend above the northeast side of the dirt access road and does not connect to SEEP-3 or SEEP-5. Please see Photos 2 and 3 of Enclosure 7 for representative photos of the swale that is located on only the southwest side of the dirt access road that runs parallel below SEEP-3 and SEEP-5.

Ephemeral drainages labeled **ED-1**, **ED-2**, **ED-6** and **ED-7** are non-relatively permanent tributaries that do meet the conditions of paragraph (a)(3) and are not jurisdictional. The tributaries are non-relatively permanent because they contain flowing or standing water for only a short duration in direct response to precipitation. A review of aerial photos obtained on Digital Globe and taken during the wet season (2/27/2021, 3/12/2021, 1/22/2022, 4/15/2022, 2/13/2023) do not reveal any flowing or standing water in the tributaries. Please note that ED-1 is in an area near Carson Creek with dense tree cover and is therefore not visible on aerial imagery. However, the section of the tributary reach that flows directly into ED-1 (on the south side of Tong Road) is visible on aerial imagery and does not display flowing or standing water on any of the aforementioned dates. The ephemeral drainages were mapped at the OHWM which was identified based on the extent of scour and extent of adjacent vegetation. The following table provides each feature's acreage and linear feet:

Feature ID	Acreage	Linear Feet
ED-1	0.003	65
ED-2	0.001	29
ED-6	0.001	81
ED-7	0.001	78

ED-1 is located on the north side of Tong Road and flows north into Carson Creek. ED-2 is located along Old Bass Lake Road and flows northeast through a culvert

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under Silver Dove Way before draining into Carson Creek. ED-6 is located at the western end of SWS-2 and connects the swale to SW-4. ED-7 is located between SEEP-4 and SW-4 and connects the two wetland features.

- 9. <u>DATA SOURCES</u>. 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. U.S. Army Corps of Engineers. May 29, 2024. Field Visit.

 b. Aquatic Resources Delineation Report 	ort	, El Dorado
County, California. February 2024.		
c. Aquatic Resources Delineation Map		
June 12, 2024.		

- d. Google Earth Pro 7.3.3.7692. Imagery dates: February 2, 2018; June 16, 2020; October 22, 2020; February 5, 2021; June 3, 2021; August 10, 2021; May 17, 2023; March 14, 2024. Accessed June 18, 2024.
- e. Google Earth Pro 7.3.3.7692. Imagery dates: April 17, 2014; August 8, 2017; June 3, 2021. Accessed July 24, 2024.
- f. Digital Globe. Imagery Dates: January 31, 2021; February 6, 2021; February 27, 2021; March 12, 2021; January 13, 2022; January 22, 2022; April 15, 2022; May 1, 2022; October 30, 2022; December 21, 2022; January 6, 2023; February 13, 2023. Accessed 18 June 2024.
- g. U.S. Army Corps of Engineers ERDC Antecedent Precipitation Tool, Dates: January 31, 2021; February 6, 2021; February 27, 2021; March 12, 2021; January 13, 2022; January 22, 2022; April 15, 2022; May 1, 2022; October 30, 2022; December 21, 2022; January 6, 2023; February 13, 2023. Accessed 18 June 2024.
- h. U.S. Geological Survey. Topographic Map, Clarksville, CA. 1:24000. 2021. Accessed June 17, 2024. 2Retrieved from https://ngmdb.usgs.gov/topoview/.
- i. U.S. Geologic Survey. National Hydrography Dataset, 18040013 HUC8. Accessed April 24, 2024. Retrieved from: https://www.usgs.gov/national-hydrography-dataset.
- 10. <u>OTHER SUPPORTING INFORMATION.</u> The U.S. Army Corps of Engineers' Antecedent Precipitation Tool (APT) shows that Digital Globe imagery from January 31, 2021, February 6, 2021, February 27, 2021, March 12, 2021,

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January 13, 2022, January 22, 2022, and April 15, 2022, was taken during the wet season when the region was in either severe or extreme drought conditions. The 3-month antecedent precipitation for each date was within a normal or drier than normal range. These imagery dates were used to help inform the flow regime of the ID-1 and RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary reaches because we would not expect aquatic resources that hold water for only short durations following precipitation to flow under these conditions. The Digital Globe imagery dated January 6, 2023, was taken during the wet season with a drought index of severe wetness and a 3-month antecedent precipitation that was wetter than normal. This image served as a comparison for the other images used to determine the flow regime of the ID-1 tributary reach since we would expect most aquatic resources to flow under these conditions. Similarly, the February 13, 2023, Digital Globe imagery was taken during the wet season with a drought index of severe wetness and a 3-month antecedent precipitation that was wetter than normal. This image was used as a comparison for the other images used to determine the flow regime of the RD-8/RD-7/RD-6/ED-5/ED-4/ED-3 tributary reach.

The APT tool shows that Digital Globe imagery from May 1, 2022, October 30, 2022, and June 23, 2023, was taken during the dry season when the region was either in severe or incipient drought conditions. The 3-month antecedent precipitation for each date was within a normal range. These imagery dates were used to help inform the flow regime of the PC-1 tributary reach because we would not expect an aquatic resource that holds water for only a short duration following precipitation to flow under these conditions. Digital Globe imagery from December 12, 2022, was taken during the wet season when the region was experiencing a drought index of mild wetness and a 3-month antecedent precipitation within normal range. This date was used to further validate the flow regime of the PC-1 tributary reach because we would expect a seasonal tributary to flow under these conditions, which is what was observed in the image. APT results for all Digital Globe imagery dates are included in Enclosure 8.

11. <u>NOTE:</u> 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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10 Encls

- 1. Site Vicinity Map
- 2. Flow path Maps
- 3. ID-1 Digital Globe Imagery
- 4. PC-1 Digital Globe Imagery
- 5. RD-8/RD-7/RD-6/ED-5/ED-4/ED-3

Tributary Digital Globe Imagery

- 6. May 29, 2024, Site Visit Additional Photos
- 7. May 29, 2024, Site Visit Photo Log
- 8. APT Results- Digital Globe Imagery Dates
- 9. SEEP-1 Google Earth Pro Aerial Imagery
- 10. Aquatic Resources Delineation Map

