



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
4101 JEFFERSON PLAZA NE
ALBUQUERQUE, NEW MEXICO 87109-3435

CESPA-RD

May 3, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ SPA-2024-00068 (MFR 2 of 2)²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ While the Supreme Court’s decision in *Sackett* 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 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, interstate water, or territorial seas 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in the state of Texas due to litigation.

1. SUMMARY OF CONCLUSIONS.

- 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).
 - i. **Unnamed Drainage (Review area ST03x01-83652) – is not a water of the United States.**
 - ii. **Unnamed Drainage (Review area ST03x02-83652) – is not a water of the United States.**

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **Within the approximate 20 linear mile or 160.7-acre project area that would be used for the installation of a 20-inch diameter natural gas pipeline the Corps identified three review areas that intersect two unnamed aquatic resources. This project is located approximately 26 miles West of the town of Jal or 40 miles south of Carlsbad, in Loving County, Texas.**

- a. **Review area ST003x01-83652 is centrally located at Latitude 31.994112°, Longitude -103.7032894° and includes 120.5 linear feet of an unnamed drainage exhibiting an ordinary high-water mark.**
- b. **Review area ST03x02-83652 is centrally located at Latitude 31.99417°, Longitude -103.703561° and includes 120.5 linear feet of an unnamed drainage exhibiting an ordinary high-water mark.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

CONNECTED. The subject resources discussed above does not have a continuous surface water connection to an A1, 2, or 3 water. Each study reach exhibits clear Ordinary High-Water Mark (OHWM) within each review area but eventually these indicators dissipate and any flows that would occur is reduced to over land sheet flow without any continuous indicators of an OHWM that lead to a TNW either indirectly or directly.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. **N/A.**
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ **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 pre-2015 regulatory regime and 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 pre-2015 regulatory regime. 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. TNWs (a)(1): **None**
 - b. Interstate Waters (a)(2): **None**
 - c. Other Waters (a)(3): **None**

⁶ 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.

⁷ 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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- d. Impoundments (a)(4): **None**
- e. Tributaries (a)(5): **None**

- f. The territorial seas (a)(6): **None**

- g. Adjacent wetlands (a)(7): **None**

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁸ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. **None**

- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. **N/A**

- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. **N/A**

- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. **N/A**

- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. **N/A**

⁸ 51 FR 41217, November 13, 1986.

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- f. 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 pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

The study reaches within review areas ST03x01, & ST03x02 do not have relatively permanent flow. The channel contains flow or standing water for only a short duration only in response to precipitation events. The beta Stream Duration Assessment Method (SDAM) for the Arid West was performed within the review areas which concluded that the study reaches are consistent with a non-relatively permanent flow duration or characterized as ephemeral.

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. Report entitled, *Field Form for the Beta Arid Streamflow Duration Assessment Method, project number: SPA-2024-00068-Lea County Expansion, Waterway Name; ST03x01* prepared SWCA Environmental Consultants, Inc., dated November 16, 2023.
 - b. Report entitled, *Aquatic Resources Inventory Report for the Lea County Expansion Project, Lea County, New Mexico, and Loving County, Texas, Project Number: SPA-2024-00068*, prepared by SWCA Environmental Consultants, Inc., dated January 2024.
 - c. Report entitled, *Arid West Ephemeral and Intermittent Streams OHWM Datasheet (combined)*, Project Number: SPA-2024-00068, Datasheet number: 83652, prepared by *SWCA Environmental Consultants, Inc., dated November 16, 2024.*
 - d. Office evaluation, which evaluated GoogleEarth images dated December 2023, March 2022, June 2022, February 2019, November 2015, April 2013, May 2011, August 2008, October 2005, July 2005, June 2005, and January 1996.
 - e. The USACE, National Regulatory Viewers, South Pacific Division, Texas Regulatory viewer, NHD data set and NWI data set on 5/1/2024.
10. OTHER SUPPORTING INFORMATION. **Based on the information provided and an evaluation of over 20 years of aerial images, the flow regime of the stream reaches within the project areas do not meet the relatively permanent standard**

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per the Pre-2015 Rule, because they do not have flowing or standing water year-round or continuously during certain times of year.

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.