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

CESPA-RD January 10, 2025

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-2024-00448[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

[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.

AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state 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).

      Table 1. Summary of Waterbodies within the Review Area

Feature ID	Degrees Latitude	Degrees Longitude	Jurisdictional Status	Average OHWM (ft)	Length in Survey Area (LF)
shud014e	31.020101	-105.264197	No	2	438.37
shud015e	31.020160	-105.262701	No	4	477.41
915.78					

2. REFERENCES.

1. USACE. 2009. List of Navigable Waters of the United States in the Albuquerque District. June 17, 2009.

2.Dick-Peddie, W.A. and W.H. Moir. 1999. New Mexico Vegetation: Past, Present, and Future. University of New Mexico Press.

3. Sackett v. EPA, 598 U.S. _, 143.S. Ct. 1322 (2023)

4. 2003 SWANCC guidance

5. 2008 Rapanos Guidance

3. REVIEW AREA. The review area consists of the Saguaro Connector Pipeline Project, Border Facilities, total of a 26.04-acre parcel of land, approximate center point of latitude 31.01°N, longitude -105.26°W, Hudspeth County, Texas. The applicant has requested the review for aquatic resources located within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The closest A1 water to the review area is the Rio Grande, a Traditionally Navigable Water (TNW). The center point of the review area is approximately 1 mile from the Rio Grande.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
6. SECTION 10 JURISDICTIONAL WATERS[6]: 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] shua001p (Rio Grande) is a known TNW consisting of 2,660 LF within the review area with an average OHWM of 25 ft. The Rio Grande is a non-tidal waterbody that is also on the district's Section 10 waters list.

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): (Rio Grande), a known TNW by congressional act and interstate waterbody that is shared by Colorado, New Mexico, and Texas, as well as two countries (the U.S. and Mexico) with an average OHWM of 25 ft.

[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.

b. Interstate Waters (a)(2): As well as being a traditional navigable water (see Section 7.a), shua001p (Rio Grande) is also an interstate water that serves as the border between the United States and Texas.

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4) N/A

e. Tributaries (a)(5): N/A

f. The territorial seas (a)(6): [N/A

g. Adjacent wetlands (a)(7): N/A

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. N/A

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

[8] 51 FR 41217, November 13, 1986.

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

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).

Table 3. Summary of Non-jurisdictional Waterbodies within the Review Area

Feature ID	Degrees Latitude	Degrees Longitude	Observed Regime	SDAM Report Result	Potential RPW?	Average OHWM (ft)	Length in Survey Area (LF)
shud014e	31.020101	-105.264197	Ephemeral	Ephemeral	No	2	438.37
	Unnamed, isolated ephemeral dry wash located outside the 100-year floodplain. Based on topographic maps, the wash originates on Devil Ridge 0.7 mile to the north of the Survey Area and continues south 0.2 mile, where it appears to merge with another unnamed ephemeral wash (shud015e), that drains into the Red Light Draw, that continues south approximately 17.5 miles into the Rio Grande River. NWI/NHD maps match the topographic maps. However, aerial maps show the feature terminates approximately 1.6 miles south of the Survey Area at split tank (NWI mapped as a pond (PUBf)) where there is no visible continuation of a defined channel out of split tank to the south. Additionally, less than 100 feet south of split tank is Eagle Mountain Road. Split tank and Eagle Mountain Road are visible on historical google earth aerial imagery since 1996, disconnecting the feature from a direct connection downstream to the Rio Grande. **This ephemeral wash is not a continuously draining body of water with a continuous surface connection to a TNW or RPW and is non-jurisdictional.**						
shud015e	31.020160	-105.262701	Ephemeral	Ephemeral	No	4	477.41
	Unnamed, isolated ephemeral dry wash located outside the 100-year floodplain. Based on topographic maps, the wash originates on Devil Ridge 0.7 mile to the north of the Survey Area and continues south 0.2 mile, where it appears to merge with another unnamed ephemeral wash (shud014e), that drains into the Red Light Draw, that continues south approximately 17.5 miles into the Rio Grande River. However, aerial maps show the feature terminates approximately 1.6 miles south of the Survey Area at split tank (NWI mapped as a pond (PUBf)) where there is no visible continuation of a defined channel out of split tank to the south. Additionally, less than 100 feet south of split tank is Eagle Mountain Road. Split tank and Eagle Mountain Road are visible on historical google earth aerial imagery since 1996, disconnecting the feature from a direct connection downstream. **This ephemeral wash is not a continuously draining body of water with a continuous surface connection to a TNW or RPW and is non-jurisdictional.**						
Total							**915.78**

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. National Wetlands Inventory Mapper (accessed on 7-15-2024)

   b. Google Earth Imager aerial photographs (2023, 2021, 2017)

   c. Digital Globe aerial photographs (2024, 2023, 2022)

   d. Heilman & Associates Inc. 2024, Jurisdictional Determination Request. June 2024

   e. USDA, NRCS. 2016. Web Soil Survey. Available online at http://websoilsurvey.nrcs.usda.gov/.

   f. ERM. 2024 Wetland Delineation Report. October 2024

10. OTHER SUPPORTING INFORMATION.

Memorandum on NAP-2023-01223

Memorandum on NWK-2022-00809

Memorandum on SWG-2023-00284

CURRENT AND HISTORICAL AERIAL IMAGERY
The review area is bounded by the Quitman mountains to the east and the Rio Grande to the west. Currently and historically land use within the 26.04-acre review area includes active pasture and agriculture. From 1996 to 2005 the review area was tilled and maintained. Within the review area there are multiple dark signatures, indicative of waterbodies with vegetation growing along the edges.

PHYSIOGRAPHY
As represented in the U.S. Geological Survey (USGS) Schroder Arroyo Quadrangle, Texas – Hudspeth County 7.5-Topographic Series, the elevation at the review area ranges between 3,400 and 3,500 feet above mean sea level (USGS, 2022b). According to the topographic maps the review area is mostly undeveloped.

CLIMATE

The Texas climate is characterized by hot summers, mild to cool winters, with widely variable precipitation across the state. Geologic features of Texas largely influence the climate causing large east-west variations in precipitation, and the state is subject to frequent and variable extreme events, such as droughts and heat waves (National Oceanic and Atmospheric Administration [NOAA], 2022). The majority of Texas, by percent land area, experienced drought conditions throughout 2022 and most of 2023 (NOAA, 2023).

Based on the APT calculations, all site visits were under normal conditions. All APT calculations displayed monthly values of mild drought on the Palmer Drought Severity Index and dry season based on the water-balance metrics.

MAPPED SOILS
The mountain ranges of the Chihuahuan Deserts are a geologic mix, but most soils are derived from limestone beds. The mountains contain limestone slopes and basins contain alluvium and erosional materials from the surrounding mountains (Griffith et al., 2007). According to the USDA's NRCS. These soils, respectively, are:

• Baviza loamy fine sand, 1 to 8 percent slopes (BAC);
• Castolon, Gadsden, and Lomapelona soils, 0 to 1 percent slopes, occasionally flooded (CBA);
• Chillon extremely gravelly sandy loam, 1 to 3 percent slopes (CIB);
• Changas-Corazones complex, 1 to 30 percent slopes (CCE);
• Ojinaga-Corazones complex, 1 to 5 percent slopes (OCB);
• Pantera-Riverwash complex, 0 to 2 percent slopes, frequently flooded (PRA);
• Redlight and Terlingua soils and Rock outcrop, 5 to 30 percent slopes (RDF);
• Redlight and Terlingua soils and Rock outcrop, 35 to 65 percent slopes (RDG);
• Terlingua-Corazones complex, 10 to 30 percent slopes (TCE); and
• Tornillo very fine sandy loam, 0 to 1 percent slopes, rarely flooded (TOA).

Of the soils mapped by the NRCS within the review area, only the Castolon, Gadsden and Lomapelona soil is considered hydric in Hudspeth County, Texas according to the National Hydric Soils list (NRCS, 2022b).

WETLANDS
At the time of the field survey, no wetlands were identified in the review area.

WATERBODIES
At the time of the field survey, 2 flowpaths were identified within the review area. No perennial or intermittent streams were identified. The 2 observed waterbodies were found to flow only in direct response to precipitation events and were observed to be dry during field investigations.

STREAMFLOW DURATION ASSESSMENT METHOD FOR THE ARID WEST
The SDAM report results, and Google Earth historical imagery review are provided in the delineation report and are paired with the waterbody data sheets. All streamflow duration assessments resulted in an ephemeral classification and supported the flow regimes identified in the field. All waterbodies lacked the five biological indicators used to evaluate flow regimes with the SDAM for the Arid West. Therefore, these waterbodies do not experience relatively permanent flows or standing water.

CONCLUSION
Based on the APT calculations, all site visits were under normal conditions.

All 2 ephemeral flow paths are non-relatively permanent waters that flow only in direct response to precipitation events based on the desktop review, local climatic conditions, field observations, and the SDAM analysis. Also, the 4 ephemeral flow paths lack continuous flow path to a downstream water, therefore not considered water of the United States.

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.