



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT REGULATORY DIVISION
NW COLORADO BRANCH, GRAND JUNCTION OFFICE
400 ROOD AVENUE, ROOM 224
GRAND JUNCTION, CO 81501-2520

SPA-RD-W

May 16, 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 SPA-2023-00611.

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.

SPA-RD-W

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2023-00611

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. **Fraser River, jurisdictional, Section 404**

- ii. **Wetland A, jurisdictional, Section 404**

- iii. **Wetland B, jurisdictional, Section 404**

- iv. **Wetland C, non-jurisdictional, non-jurisdictional**

- v. **Wetland D, non-jurisdictional, non-jurisdictional**

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 88 FR 3116-17 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area is 6.3 acres, approximately centered at latitude 39.922767°, longitude -105.781058°, within the Town of Winter Park, Grand County, Colorado.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The Colorado River has a Strahler stream order of nine (9) from its confluence with the Roaring Fork River to its confluence with the Green River. Within that reach, the Colorado River intersects the boundary between the states of Colorado and Utah at a location approximately 183 aerial miles to the southwest of the review area. Therefore, the Colorado River at its**

confluence with the Roaring Fork River is the nearest downstream interstate water. ⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **Wetlands A and B drain directly to the Fraser River (an (a)(3) water), which conveys relatively permanent flows to the Colorado River (TNW) at a location approximately 15.6 miles downstream of the review area.**
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 2023 Rule as amended, 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 2023 Rule as amended. 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. Traditional Navigable Waters (TNWs) (a)(1)(i): **N/A**

⁵ 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.

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. 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): **The Fraser River conveys relatively permanent flows and is a direct tributary to the Colorado River (TNW).**
- f. Adjacent Wetlands (a)(4): **Wetland A is a 0.39-acre palustrine emergent (PEM) wetland that abuts the Fraser River ((a)(3) water). Wetland B is a 0.42-acre palustrine scrub shrub (PSS) wetland that abuts the Fraser River ((a)(3) water). Both Wetland A and Wetland B are part of a larger wetland system located partially outside of the review area. The portion of Wetland A that abuts the Fraser River is located outside of the review area.**
- 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).⁸ **N/A.**
- 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).

Wetland C is a 0.03-acre PEM wetland that is not connected to the Fraser River or other aquatic resources by any discrete conveyance feature. This wetland occurs in a shallow swale at the toe of the slope of an existing dirt road and collects water primarily from snowmelt, precipitation events, and a small seasonal seep. It is located approximately 234 feet from the Wetland A and 187 feet from Wetland B. There is an elevation gain of 6 feet between the Wetland B boundary and this wetland with an abrupt transition

⁸ 88 FR 3004 (January 18, 2023)

of vegetation from PEM wetland to upland pasture grass. Three locations were sampled between Wetland B and Wetland C which documented no hydric soil indicators at all three locations. The wetland is located outside the FEMA 100-year flood plain.

***Wetland D* is a 0.42-acre (PSS) wetland that is not connected to the Fraser River or other aquatic resources by any discrete conveyance feature. It is located approximately 290 feet from the Fraser River ((a)(3) water). This wetland occurs in a depression (previously excavated area) and collects water from snowmelt and precipitation events. The wetland is located outside the FEMA 100-year flood plain.**

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. **USACE National Regulatory Viewer, Elevation Profile, Accessed April 25, 2024.**
 - b. **Aquatic Resource Delineation Report, by Peak Ecological Services, dated December 19, 2023.**
 - c. **Google Earth Aerial Photograph Imagery, dated September 1999, October 2005, March 2006, August 2007, March 2008, September 2011, October 2015, and September 2019.**
 - d. **USDA NRCS Web Soil Survey accessed November 25, 2023.**
 - e. **USGS National Hydrography Dataset (NHD), utilized on November 14, 2023.**
 - f. **USGS 7.5 Minute Topographic Map, Fraser, Colorado Quadrangle, Project Location Map, accessed November 25, 2023.**
 - g. **National Flood Hazard Layer FIRMette Map (# 08049C0992C), dated November 25, 2023.**
 - h. **Site Photographs by the agent, taken on July 10, 2023, and provided to the Corps on December 19, 2023.**
 - i. **USACE National Regulatory Viewer, Digital Elevation Model Map, Accessed April 25, 2024.**

SPA-RD-W

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2023-00611

j. **USACE National Regulatory Viewer, Hillshade Map, Accessed April 25, 2024.**

k. **USACE National Regulatory Viewer, Slope Map, Accessed April 25, 2025.**

10. **OTHER SUPPORTING INFORMATION. In conclusion, Wetland C and D have no discrete conveyance features that connect them to the nearest (a)(1) or (a)(3) water. Therefore, these resources have been determined to not be a water of the United States because they does not meet one or more categories of waters of the United States under the 2023 Rule, as amended.**




BACKGROUND: ESRI WORLD IMAGERY

Figure 1. Aquatic Resource Delineation Map
River Club Project - Planning Area 1A
Grand County, Colorado

Legend

- Parcel Boundary
- Palustrine Emergent (PEM)
- Palustrine Scrub-Shrub (PSS)
- Riverine (Fraser River)
- Wetland Off Property
- ★ Wetland Data Point
- ★ Non-Wetland Data Point


 1:1,500
 1 inch = 125 feet
 Date: December 2023