



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
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PUEBLO, CO 81003-3040

CESPA-RDS

26JUNE2024

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-2022-00451.²

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

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),⁵ the 2023 Rule as amended,

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 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, the territorial seas, or interstate water 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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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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. Wetland-1, non-jurisdictional (Section 404).
 - ii. Wetland-2, non-jurisdictional (Section 404).
 - iii. Wetland-3, non-jurisdictional (Section 404).
 - iv. Wetland-4, non-jurisdictional (Section 404).
 - v. OHWM-1, non-jurisdictional (Section 404).

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 review area consists of an approximately 11-acre undeveloped parcel bounded by Rolling Thunder Way to the north, Meridian Road to the east, and an unnamed tributary to Black Squirrel Creek to the west and south; at approximately latitude 38.935443°, longitude -104.613677°; Section 12, Township 12 South, Range 65 West; Falcon, El Paso County, Colorado. The review area is surrounded by residential and commercial development to the west, north, and east. Five (5) aquatic resources (ARs), consisting of four (4) palustrine emergent wetlands and one stream channel, are located within the review area. Aerial imagery suggest onsite wetland hydrology appears to be driven by the manipulation of the surrounding landscape as a result of development that has occurred over several years. Additionally, a culvert under Rolling Thunder Way, at the northern boundary of the review area, directs stormwater flows from the surrounding areas to the site.

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Near the southern boundary of the review area, indicators of surface flow were identified and consisted of an incised channel (OHWM-1) approximately 1 to 2-feet wide and approximately 25-feet long within the review area. The channel appears to originate from a small head-cut in the landscape and does not connect to any wetlands in the review area. Flows that reach the head-cut would occur via sheet flow from the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Arkansas River, which is located over 56-river miles south of the review area.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The wetlands within the review area do not contain a continuous surface connect to a TNW. OHWM-1 connects to a TNW via eight (8) unnamed tributaries to Black Squirrel Creek, a tributary to Chico Creek, a tributary to the Arkansas River.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ 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.

⁷ 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.

⁸ 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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“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
- 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. 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).⁹ 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-1 is a 0.42-acre palustrine emergent wetland located near the eastern boundary of the review area and extending from the outlet of the culvert beneath Rolling Thunder Way to the center of the review area. If surface water discharges from the wetland, it would do so as overland sheet flow. The wetland does not

⁹ 88 FR 3004 (January 18, 2023)

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contain a continuous surface connection to an RPW and therefore does not meet the definition of an (a)(4) water as defined in the 2023 Rule, as amended. See supporting information in Section 10 below and attachments.

Wetland-2 is a 0.34-acre palustrine emergent wetland located near the northern boundary of the site along an abandoned roadway and west of Wetland-1. This abandoned roadway, which begins at the northern boundary of the review area and extends just north of the center of the review area, aides in retaining hydrology within Wetland-2. If surface water discharges from the wetland it would do so as overland sheet flow. The wetland does not contain a continuous surface connection to an RPW and therefore does not meet the definition of an (a)(4) water as defined in the 2023 Rule, as amended. See supporting information in Section 10 below and attachments.

Wetland-3 is a 0.03-acre palustrine emergent wetland located near the southern boundary of the review area between Wetland-4, to the south, and Wetland-1, to the north. The wetland is located within a depression in the landscape that holds water during portions of the year. If surface water discharges from the wetland, it would do so as overland sheet flow. The wetland does not contain a continuous surface connection to an RPW and therefore does not meet the definition of an (a)(4) water as defined in the 2023 Rule, as amended. See supporting information in Section 10 below and attachments.

Wetland-4 is a 0.02-acre palustrine emergent wetland located near the southern boundary of the review area and southwest of Wetland-3. Wetland-4 is located within a very shallow depression. The shallow nature supports a monoculture of Baltic rush (*Juncus balticus*). If surface water discharges from the wetland it does so as overland sheet flow. The wetland does not contain a continuous surface connection to an RPW and therefore does not meet the definition of an (a)(4) water as defined in the 2023 Rule, as amended. See supporting information in Section 10 below and attachments.

OHW-1 is an incised channel which exhibits an ordinary high-water mark (OHWM). OHWM-1 is located approximately 85-feet southwest of Wetland-4. The feature begins at a small head-cut in the landscape, then extends south curving west at the review area boundary. This feature does not extend to any of the wetlands on the property and the feature does not exhibit relatively permanent flow. Almost the entire feature contains willow shrubs (*Salix spp.*), with no willows growing outside of the feature within the review area. The lack of a high-seasonal water table in the area is indicated by the requestor's agent identifying a restricting soil layer when digging soil pits during the wetland delineation. OHWM-1 does not meet the definition of an (a)(3) tributary.

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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. U.S. Geological Survey (USGS). National Map Viewer-National Hydrography Data Set. <https://apps.nationalmap.gov/viewer/>. Accessed 12/27/2023.
 - b. USGS. Falcon Quadrangle, Colorado-El Paso County. 1:24,000. 7.5-minute Series. United States Department of the Interior, 2023.
 - c. Google Earth Aerial Imagery (10/2011, 11/2015, 06/2017, 10/2019, 05/2020, & 07/2022).
10. OTHER SUPPORTING INFORMATION. An on-site inspection of the review area was conducted by the Corps on March 13, 2024, and again on May 7, 2024, with U.S. Environmental Protection Agency (EPA) staff. During the site visit, it was confirmed that the incised channel at the southern boundary of the review area does not extend to any wetland onsite and therefore does not act as a discrete feature where a continuous surface connection may exist between the wetlands and the nearest RPW. Furthermore, the area between the wetlands and the incised channel lacks any distinct concave microtopography, which could provide continuous surface flow to the nearest RPW.
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.

U-Haul at Falcon AJD-Overview Map

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Legend

-  Review Area
-  Wetland






Google Earth

U-Haul at Falcon AJD-Aquatic Resource Map

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Legend

-  OHWM
-  Review Area
-  Wetland



Google Earth