



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
PUEBLO FIELD OFFICE
201 WEST 8TH STREET, SUITE 350
PUEBLO, CO 81003-3040

CESPA-RDS

30OCT2024

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-2023-00284 (MFR 1 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

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. OHWM-R1 (West Fork Sand Creek, Strahler stream order 2), Non-jurisdictional, Section 404
 - ii. OHWM-R2 (West Fork Sand Creek, Strahler stream order 3), Jurisdictional, Section 404.
 - iii. OHWM-02 (Unnamed Tributary to West Fork Sand Creek [east tributary], Strahler stream order 2), 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 10.61-acre area located in Colorado Springs, El Paso County, Colorado at a center point of approximately latitude 38.844639, longitude -104.743143. Three (3) aquatic resources are located within the review and consist of two reaches of West Fork Sand Creek (WFSC), which include OHWM-R1 (0.35-acres) and OHWM-R2 (1.05-acre), and OHWM-02 (0.32-acre) an unnamed tributary to WFSC located to the east. See the attached boundary map of the review area and aquatic resources.

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 at Boone, Colorado. The Arkansas River stream reach from Boone, downstream of the confluence with the Huerfano River, is a stream of the same stream order that crosses the state line into

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Kansas, thereby making it an (a)(1)(iii) interstate water. The straight-line distance from the review is to the nearest TNW is approximately 50-miles.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The subject aquatic resources have a surface water connection to Sand Creek, an RPW and tributary to Fountain Creek, an RPW and tributary to the Arkansas River, a TNW at Boone, Colorado. The flow path distance from the review area to the nearest TNW is over 67-miles.
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 "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

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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- 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): **OHWM-R2** (West Fork Sand Creek) encompasses approximately 1.05-acres (0.38-miles) below the confluence with OHWM-02 to the East Platte Ave bridge. A site visit conducted with the U.S. Environmental Protection Agency (EPA), City of Colorado Springs (CSU), Colorado Department of Public Health and Environment (CDPHE), and SWCA Environmental Consultants (SWCA) on May 7, 2024, verified standing and flowing water from the confluence of OHWM-R2 and Sand Creek, to a point approximately 380-feet upstream of the East Platte Ave Bridge, near the first existing instream drop structure. Above the first drop structure to the confluence of OHWM-01 and OHWM-R2, no standing or flowing water was observed. The approximate linear distance of observed surface water flow is 4,787-feet. The approximate linear distance where flow or standing water was not observed is 1,583-feet. Of the total approximately 6,370-foot review reach, within the same Strahler stream order 3, approximately 75-percent of the stream reach contained relatively permanent flow. Based on the percentage of stream reach containing relatively permanent flow, the entire stream reach between the confluence of OHWM-R2 and OHWM-02 and the downstream confluence of OHWM-R2 and Sand Creek (i.e. Strahler stream order 3), is considered to have relatively permanent flow. Therefore, OHWM-R2 is considered an (a)(3) tributary water.
- 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

⁹ 88 FR 3004 (January 18, 2023)

- 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).
- **OHWM-R1** (West Fork Sand Creek) consists of approximately 1,100 linear feet of streambed (0.35-acres) within the review area. OHWM-R1 is considered Strahler stream order 2 beginning at the confluence of OHWM-R2 and OHWM-01 upstream to its terminus. Aerial imagery review of the Strahler stream order reach does not depict flow within the reach during review of several historic aerial images. Additionally, historic aerial imagery indicates the portion of OHWM-R1 upstream of the review area appears to have been artificially created for stormwater conveyance as development began in the 1960's. This supports the lack of relatively permanent flow in the reach as flows are driven by precipitation events directed into the system. Finally, the applicant conducted a U.S. Environmental Protection Agency (EPA) beta Streamflow Duration Assessment Method (SDAM) within the review reach. The SDAM indicated flows within the review reach are ephemeral (i.e., not relatively permanent). Based on the information above, the stream lacks relatively permanent flow and is not a waters of the U.S. within the review reach.
 - **OHWM-02** (Unnamed Tributary to West Fork Sand Creek [east tributary]) consists of approximately 0.27-miles of streambed (0.32-acres) within the review area. OHWM-02 is considered Strahler stream order 2 beginning at the confluence of WFSC and OHWM-02 upstream to its terminus. Aerial imagery review of the Strahler stream order reach does not depict flow within the reach during review of several historic aerial images. Additionally, historic aerial imagery indicates the portion of OHWM-02 upstream of the review area appears to have been artificially created for stormwater conveyance as development began in the 1960's. This supports the lack of relatively permanent flow in the reach as flows are driven by precipitation events directed into the system. Finally, the applicant conducted a U.S. Environmental Protection Agency (EPA) beta Streamflow Duration Assessment Method (SDAM) within the review reach. The SDAM indicated flows within the review reach are ephemeral (i.e., not relatively permanent). Based on the information above, the stream lacks relatively permanent flow and is not a waters of the U.S. within the review reach.

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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. SWCA Environmental Consultants. Aquatic Resources Inventory Report for Improvements on the West Fork Sand Creek Colorado Springs, El Paso County, Colorado. Dec. 2023.
 - b. USGS. "The National Map - Advanced Viewer." Apps.nationalmap.gov, apps.nationalmap.gov/viewer/. Accessed October 22, 2024.
 - c. "Historic Aerials: Viewer." www.historicaerials.com, www.historicaerials.com/viewer. Accessed October 22, 2024.
10. OTHER SUPPORTING INFORMATION. A site visit was conducted from the review area, downstream to the confluence of WFSC and Sand Creek, on May 7, 2024, with staff from EPA, CDPHE, CSU, and SWCA.
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.

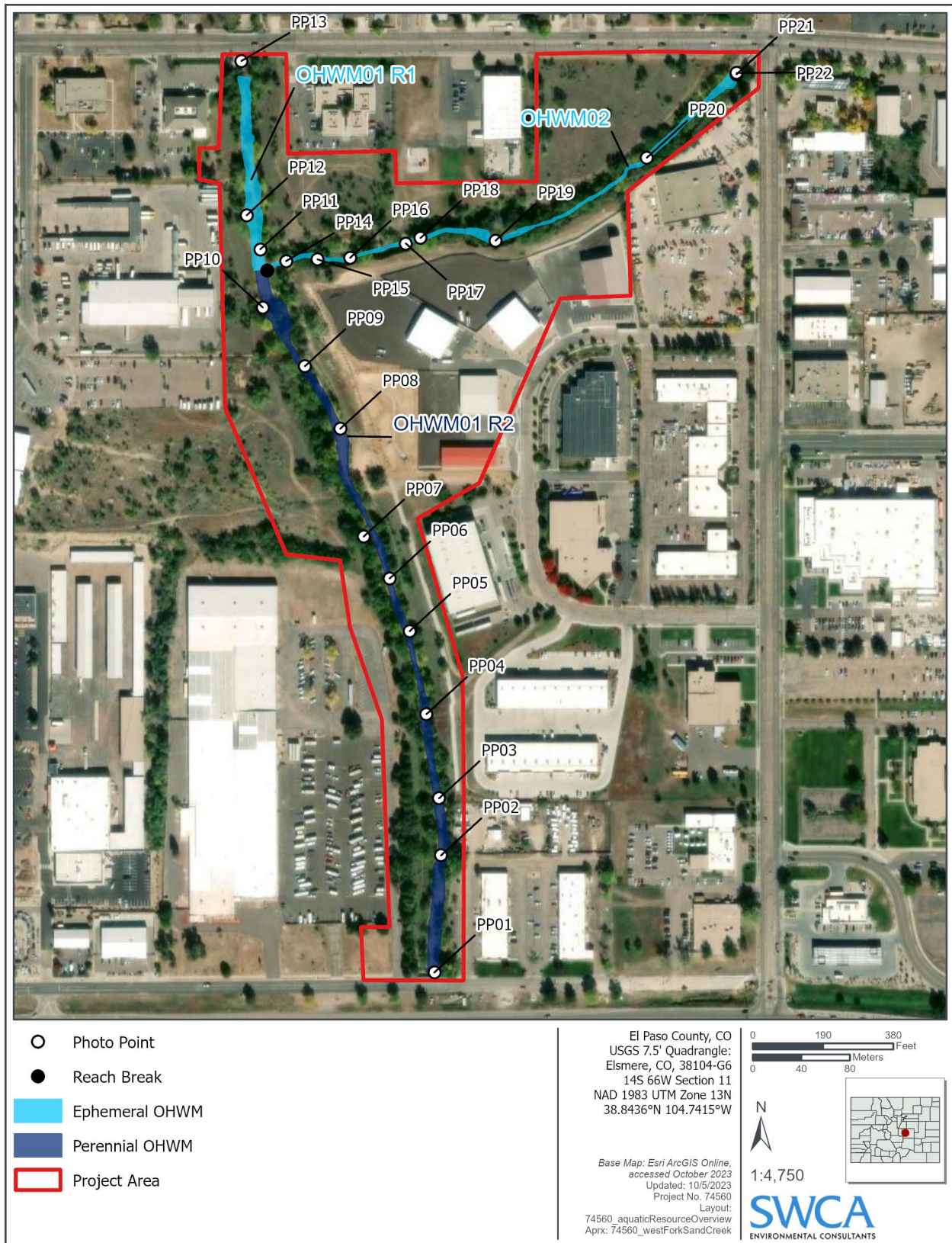


Figure A-3. Overview of aquatic resources within the Project area.