



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

CESPA-RD

July 18, 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-2023-00375 (MFR 1 of 1)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, 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 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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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. **Tijeras Creek Reach 1 – is not a water of the United States.**
 - ii. **Tijeras Creek Reach 2 – is not a water of the United States.**

2. REFERENCES.

- a. **“Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)**
- b. ***Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)**
- c. **“Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))**

3. REVIEW AREAS: **“The Corps review encompassed two distinct review areas along Tijeras Creek, within an approximate 12-acre project site slated for the implementation of diverse stream and riparian habitat restoration initiatives. Situated on the western outskirts of the village of Tijeras, in Bernalillo County, New Mexico.**

4.

- i. **Review area 1 (Tijeras Creek reach 1) is located at Latitude 35. 07829°, Longitude -106.39463° (coordinates for downstream end of study reach 1) and includes approximately 557.7 linear feet of Tijeras Creek.**
- ii. **Review area 2 (Tijeras Creek reach 2) is located at Latitude 35.07948°, Longitude -106.39619° (coordinates for downstream end of study reach 2) and includes approximately 541.3 linear feet of Tijeras Creek.**

5. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The subject resources discussed above have a continuous surface connection to the Rio Grande a TNW.**

6. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **Tijeras Creek flows East to West and is directly connected to the Rio Grande. The flowpath from review**

areas extend approximately 18 river miles where Tijeras Creek spills into a large sediment basin and from the basin the flowpath continues approximately 2 river miles within a concrete lined channel to the Rio Grande.

7. 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**
8. 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): **None**
 - b. The Territorial Seas (a)(1)(ii): **None**
 - c. Interstate Waters (a)(1)(iii): **None**
 - d. Impoundments (a)(2): **None**
 - e. Tributaries (a)(3): **None**
 - f. Adjacent Wetlands (a)(4): **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.

- g. Additional Waters (a)(5): **None**

9. 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 **None**
- 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).

The subject study reaches fall within stream order 4 of Tijeras Creek based on data by Buto, S.G., Anderson, R.D. and is the extent of the relative reach for this AJD review. The relative reach starts at the nexus of Arroyo San Antonio with Tijeras Creek, located upstream of the review areas at approximately latitude 35.09189, longitude -106.371174, where Tijeras Creek changes from a stream order 3 to an order 4. Extending approximately 20 river miles to where Tijeras Creek enters a large sediment basin at approximately latitude 35.00327, longitude -106.64606. Based on data collected by the applicant, USGS stream gauge data available in the area and information obtained by the Corps, the relative reach includes approximately 83.9% of its area consistent with indicators of potential non-relatively permanent stream characteristics and approximately 16.1% of the relative reach containing standing water and are considered potential relatively permanent reaches.

Additionally, the beta Stream Duration Assessment Method (SDAM) for the western mountains was performed within the review areas which concluded that study reaches 1 & 2 of Tijeras Creek are consistent with a non-relatively permanent flow duration or are characterized as ephemeral. Therefore, the study reaches of Tijeras Creek within review areas 1 and 2 do not exhibit relatively permanent flow characteristics and are non-relatively permanent waters. Further, the channel contains flow or standing

⁸ 88 FR 3004 (January 18, 2023)

water for only a short duration and solely in direct response to high intensity precipitation events. Therefore, the reach does not experience relatively permanent flows and is not a water of the United States under paragraph (a)(3) of the 2023 conforming rule.

10. 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 beta Streamflow Duration Assessment Method for the Western Mount*, project number: SPA-2023-00375, Site Code/identifier: Reach 1, Waterway Name: Tijeras Creek, prepared by County of Bernalillo, dated April 19, 2024.
- b. Report entitled, *Field form beta Streamflow Duration Assessment Method for the Western Mount*, project number: SPA-2023-00375, Site Code/identifier: Reach 2, Waterway Name: Tijeras Creek, prepared by County of Bernalillo, dated April 19, 2024.
- c. Buto, S.G., and Anderson, R.D., 2020, National Hydrography Dataset Plus High Resolution (NHDPlus HR)-A hydrography framework for the Nation: U.S. Geological Survey Fact Sheet 2020-3033, 2 p., <https://doi.org/10.3133/fs20203033>.
- d. NetworkNHDFlowline feature class of the NHDPlus_H_National_Release geodatabase, last modified 2022-07-06: <https://prd-tnm.s3.amazonaws.com/index.html?prefix=StagedProducts/Hydrography/NHDPlusHR/National/GDB/>
- e. Tijeras Arroyo at Coyote Springs RD NR Carnuel, NM. (n.d.), USGS, U.S. Department of Interior, data for the last 30 days: May 14, 2024-June 14, 2024. <https://waterdata.usgs.gov/monitoring-location/08330492/#parameterCode=00065&period=P7D&showMedian=false>
- f. Office evaluation, which evaluated Google Earth© Pro images dated October 2023, May 2022, February 2022, October 2020, March 2020, October 2018, March 2018, April 2017, October 2016, November 2015, March 2014, February 2014, January 2013, March 2012, August 2011, May 2011, February 2011, November 2009, June 2007, April 2006, June 2005, February 2004.
- g. The USACE, National Regulatory Viewer, South Pacific Division, New Mexico viewer, NHD data set and NWI data set on 5/31/2024.
- h. Esri, NASA, NGA, USGS, FEMA | City of Albuquerque, Bernalillo County, NM, Texas Parks & Wildlife, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, Bureau of Land Management, EPA, NPS, USDA, USFWS. <https://ipgr.maps.arcgis.com>

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11. 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 area do not meet the relatively permanent standard, per the 2023 Rule as amended, because they do not have flowing or standing water year-round or continuously during certain times of year.

12. 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.

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Enclosure 1

