



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

CESPA-RD

May 3, 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-2023-00608 (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.

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. **Unnamed Drainage (Review area ST01-83652 (STO1))– is not a water of the United States.**
 - ii. **Unnamed Drainage (Review area ST02x01-83652 (ST02x01)) – is not a water of the United States.**
 - iii. **Unnamed Drainage (Review area ST02x02-83652 (ST02x02)) – 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: **Within the approximate 20 linear mile or 160.7-acre project area that would be used for the installation of a 20-inch diameter natural gas pipeline, the Corps identified three review areas that intersect three separate unnamed aquatic resources. This project is located approximately 26 miles West of the town of Jal or 40 mile south of Carlsbad, in Lea County, New Mexico.**

- i. **Review area ST01 is centrally located at Latitude 32.064872°, Longitude - 103.653782° and includes 40 linear feet of an unnamed drainage exhibiting an ordinary high-water mark.**
- ii. **Review area ST02x01 is centrally located at Latitude 32.059666°, Longitude -103.645516° and includes 150 linear feet of the unnamed drainage exhibiting an ordinary high-water mark.**
- iii. **Review area ST02x02 is centrally located at Latitude 32.056440°, Longitude -103.646827° and includes 146.6 linear feet of an unnamed drainage exhibiting an ordinary high-water mark.**

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2023-00608

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The subject resources discussed above do not have a continuous surface water connection to an A1, 2, or 3 water. Each study reach exhibits clear Ordinary High-Water Mark (OHWM) within each review area but eventually these indicators dissipate and any flows that would occur is reduced to over land sheet flow without any discrete, continuous indicators of an OHWM that lead to a TNW indirectly or directly.⁶**
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **N/A**
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.

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.

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

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 **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 study reaches within review areas ST01, ST02x01, & ST02x02 do not have relatively permanent flow. The channel contains flow or standing water for only a short duration only in response to precipitation events. The beta Stream Duration Assessment Method (SDAM) for the Arid West was performed within the review areas which concluded that the study reaches are consistent with a non-relatively permanent flow duration or characterized as ephemeral.

⁹ 88 FR 3004 (January 18, 2023)

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2023-00608

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. Report entitled, *Field Form for the Beta Arid Streamflow Duration Assessment Method*, project number: SPA-2024-00068-Lea County Expansion, Waterway Name: ST01, prepared SWCA Environmental Consultants, Inc., dated November 16, 2023.
 - b. Report entitled, *Field Form for the Beta Arid Streamflow Duration Assessment Method*, project number: SPA-2024-00068-Lea County Expansion, Waterway Name: ST02x01, prepared SWCA Environmental Consultants, Inc., dated November 16, 2023.
 - c. Report entitled, *Field Form for the Beta Arid Streamflow Duration Assessment Method*, project number: SPA-2024-00068-Lea County Expansion, Waterway Name: ST02x01, prepared SWCA Environmental Consultants, Inc., dated November 16, 2023.
 - d. Report entitled, *Aquatic Resources Inventory Report for the Lea County Expansion Project, Lea County, New Mexico, and Loving County, Texas*, Project Number: SPA-2024-00068, prepared by SWCA Environmental Consultants, Inc., dated January 2024.
 - e. Report entitled, *Arid West Ephemeral and Intermittent Streams OHWM Datasheet* (combined), Project Number: SPA-2024-00068, Datasheet number: 83652, prepared by *SWCA Environmental Consultants, Inc.*, dated November 16, 2024.
 - f. Office evaluation, which evaluated Google Earth images dated December 2023, March 2022, June 2022, February 2019, November 2015, April 2013, May 2011, August 2008, October 2005, July 2005, June 2005, and January 1996.
 - g. The USACE, National Regulatory Viewers, South Pacific Division, New Mexico viewer, NHD data set and NWI data set on 5/1/2024.
10. 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 areas 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.
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.