



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

CESPA-RD

October 23, 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-2024-273] [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,

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.

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPA-2024-273]

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. SLCA East, is not a water of the United States
 - ii. LCTCH West, 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. "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 total review area is approximately 8.3 acres. Two non-relatively permanent tributaries were delineated for the Bernalillo County Upper La Cueva Watershed Drainage Improvement project in the City of Albuquerque, Bernalillo County, New Mexico. The applicant has requested the review of 2 aquatic resources located within the review area (e.g., ULCW POI 1 (Tributary)).

Tributary ID	Latitude	Longitude	Flow Regime	Survey Area	
SLCA East - upstream	35.183753°	-106.501282°	Ephemeral	2450' lf	4.18 ac
SLCA East - downstream	35.182690°	-106.508839°			
LCTCH West - upstream	35.183072°	-106.511436°	Ephemeral	1980' lf	4.12 ac
LCTCH West – downstream	35.182284°	-106.517741°			

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Rio Grande at approximate Latitude 35.211098°, Longitude -106.612336°, which is approximately 8 miles from the review area.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. From the lower part of the review

area, the arroyo flows into a trapezoidal concrete channel for approximately 0.25-miles. It then enters the North Domingo Baca Dam stormwater detention basin (which receives stormwater from three other storm water conveyances, according to Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA) who operate this facility there has only been documented water in the dam 4 times in the last 10 years). The overflow exits the basin and flows into a storm drain at Eubanks Blvd NE, surfacing approximately 1.5 miles west at Barstow St NE.

From Barstow St NE, the water flows through the North Domingo Baca Channel, an open dirt ditch, for about 0.6 miles to Wyoming Blvd NE. It then enters a storm drain for 0.35 miles before exiting behind Kinney Dam another stormwater detention basin (which receives stormwater from three other storm water conveyances, according to AMAFCA water has flowed through the Kinney Dam on 11 instances in the last 10 years). The water continues through an open dirt channel for 0.5 miles before flowing into a storm drain for 1.5 miles.

Finally, it enters the Domingo Baca Channel (trapezoidal concrete channel, which receives water from two other storm water channels) for 1 mile, continues to the North Diversion Channel (trapezoidal concrete channel, which receives storm water from 11 other diversion channels) for 2.8 miles, and ultimately reaches the Rio Grande at total of approximately 8 miles west 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

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.

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPA-2024-273]

“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).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).
 - I. SLCA East - This feature is classified as a stream order of 1, approximately 2.07 stream miles in length. It extends from latitude 35.185229°, longitude -106.482219° to latitude 35.182621°, longitude -106.516121°. According to a Stream Duration Assessment Method (SDAM) conducted by the project

⁸ 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-2024-273]

proponent, this feature does not exhibit relatively permanent flow and therefore does not meet the definition of an (a)(3) tributary. Additionally, historic aerial imagery from Google Earth indicates that the tributary's stream duration remains consistent along its length, confirming that the entire stream order is non-relatively permanent.

- II. LCTCH West - This feature is classified as a stream order of 1, approximately 1.20 stream miles in length. It extends from latitude 35.188911°, longitude - 106.498523° to latitude 35.182621°, longitude - 106.516121°. According to a SDAM conducted by the project proponent, this feature does not exhibit relatively permanent flow and therefore does not meet the definition of an (a)(3) tributary. Additionally, historic aerial imagery from Google Earth indicates that the tributary's stream duration remains consistent along its length, confirming that the entire stream order is non-relatively permanent.

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. Bernalillo County Upper La Cueva Watershed Drainage Improvement, Potential Waters of the United States Evaluation and Streamflow Duration Assessment Summary, April 2024
- b. USGS Topo Map Alameda, NM 2023
- c. USGS Topo Map Sandia Crest, NM 2032
- d. Maintenance Responsibilities for Drainage Facilities in the Albuquerque Metropolitan Area, February 2024
- e. Google Earth Imagery, April 24, 2024, May 9, 2023, February 15, 2022, August 21, 2020, September 9, 2019, September 10, 2018, March 6, 2018
- f. AMAFCA Email received October 11, 2024

10. OTHER SUPPORTING INFORMATION. N/A

SPA 2024-273

Approved Jurisdictional Review Area

Legend

 Review Area



LCTCH West

SLCA East