

APPENDIX C: Jurisdictional Delineation

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YONDER GLAMPING RESORT PROJECT
DELINEATION OF JURISDICTIONAL WATERS



CITY OF TWENTYNINE PALMS, SAN BERNARDINO COUNTY, CALIFORNIA

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8 February 2024

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1.0 INTRODUCTION

WSP USA Environment and Infrastructure, Inc. (WSP) was contracted by Terra Nova Planning and Research to conduct a delineation of jurisdictional aquatic resources for the proposed Yonder Glamping Resort Project (project) in Twentynine Palms, San Bernardino County, California. This jurisdictional delineation report provides methods, results, and discussion of the assessment. All report figures are provided in Appendix A of this report.

1.1 Purpose

The purpose of the aquatic resource delineation is to determine the extent of state and federal jurisdiction within the project area potentially subject to regulation by the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act (CWA), Regional Water Quality Control Board (RWQCB) under Section 401 of the CWA and Porter Cologne Water Quality Control Act, and California Department of Fish and Wildlife (CDFW) under Section 1602 of the California Fish and Game Code.

1.2 Project Description

The project is proposed to consist of the development of a 150-acre glamping resort with a total of 130 units. Additional amenities include food & beverage space, and a main lodge that could host special events. Vehicular access will be provided via the one driveway connection to the extension of Lear Avenue at Cactus Drive, with a secondary access driveway connecting to the easterly extension of Sullivan Road.

1.3 Project Location

The project is situated entirely within the city of Twentynine Palms, San Bernardino County, California (Figure 1, Regional Map). It occupies the southeast corner of the 7.5-minute Sun Fair, California, United States Geological Survey (USGS) quadrangle, located in Township 1 North, Range 8 East, within Section 33 (Figure 2, USGS Map). The project is specifically located on Assessor's Parcel Number (APN): 061-412-115. The project site is positioned between Highway 62 and Sullivan Road to the north and south, respectively, and is bordered by Shoshone Valley Road to the east and Monte Vista Drive to the west (Figure 3, Local Vicinity Map).

2.0 METHODS

Prior to conducting the delineation fieldwork, the following literature and materials were reviewed:

- Aerial photographs (Google Earth 2023) of the project site at a scale of 1:1800 to determine the potential locations of jurisdictional waters or wetlands;

- USGS topographic maps to determine the presence of any “blue line” drainages or other mapped water features (USGS 2023A);
- U.S. Department of Agriculture soil mapping data (USDA 2023);
- United States Fish and Wildlife Service (USFWS) National Wetlands Inventory (NWI) map to identify areas mapped as wetland features (USFWS 2023).

A field delineation of aquatic resources was conducted by WSP senior biologist, Marshall Paynard, on October 30, 2023. All areas suspected of being jurisdictional waters identified during the literature review were assessed on-foot to determine if they meet the minimum criteria to be considered jurisdictional by the USACE, RWQCB, and CDFW. Visual observations of vegetation types, geomorphology, and soil type were used to locate areas for evaluation. Weather conditions during the delineation fieldwork was conducive for surveying with conditions of clear skies, winds ranging from 1 to 5 miles per hour, with temperatures of 62-75° Fahrenheit during the surveys.

If present, USACE regulated Waters of the United States (WUS), including wetlands, and RWQCB Waters of the State of California (WSC) were delineated according to the methods outlined in *A Field Guide to the Identification of the Ordinary High-Water Mark (OHWM) in the Arid West Region of the Western United States* (USACE 2008a). The extent of jurisdiction was determined based on indicators of an OHWM. The OHWM width was measured at points wherever clear changes in width occurred.

If present, potential federally regulated wetlands were identified based on the *Wetlands Delineation Manual* (USACE 1987) and *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region* (USACE 2008b). Three criteria must be fulfilled to classify an area as a wetland under the jurisdiction of the USACE: 1) a predominance of hydrophytic vegetation, 2) the presence of hydric soils, and 3) the presence of wetland hydrology. State wetlands, if present, were delineated using the methodology per the 1987 Manual and Supplement and modified to allow for areas devoid of hydrophytic vegetation to be considered a wetland per the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures).

The lateral extent of RWQCB jurisdictional areas identified as WSC were determined by indicators of the OHWM. The OHWM was determined by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, or the presence of litter and debris. Streambeds under jurisdiction of the CDFW were delineated from the lateral extent of the stream banks (i.e., top of bank to top of bank), or to the extent of the associated riparian vegetation dripline, if present. If streambed banks were not identifiable or riparian vegetation was absent, CDFW jurisdiction was determined to be similar to jurisdictional RWQCB areas.

To determine jurisdictional boundaries, the surveyor walked the length of the drainage within the project site and recorded the centerline with a Trimble GeoXH global positioning system. The width of the drainage was determined by the OHWM indicators at locations where transitions were apparent. Other data recorded included bank height and morphology, substrate type, and all vegetation within the streambed and riparian vegetation adjacent to the

streambed, if any. Areas that lacked evidence of hydrophytic vegetation and wetland hydrology did not receive soil testing since indicative wetland parameters were absent. Upon completion of fieldwork, all data collected in the field were incorporated into a Geographic Information System (GIS). The GIS was then used to quantify the extent of jurisdictional waters and prepare graphical representations of the data.

3.0 ENVIRONMENTAL SETTING

3.1 Existing Conditions

The project site is located in a span of open desert terrain. To the west, there are single-family homes, while State Route (SR) 62 runs to the north. In the south, the area opens to more expansive lands, and a few scattered homes can be found just beyond the southeast boundary. Moreover, concrete curbs transect the project site in the north, along the span of designated roadways. These curbed areas have been heavily damaged from flow events.

3.2 Topography

The project site exhibits predominantly level terrain, with gentle decline towards the southern direction. The project topography is roughly level overall, with a slight decline to the north. Elevations range from approximately 2,615 feet above mean sea level (AMSL) (796 meters) in the south, to 2,509 feet AMSL (764 meters) in the north.

3.3 Hydrology

In the desert region, despite generally low rainfall averages, precipitation often arrives in the form of intense, brief storms, leading to flash floods in washes and canyons. The project area is situated within an endorheic basin, which is an area devoid of an outlet to the ocean. Water in these basins follows processes of evaporation, infiltration, or accumulation. Ephemeral streams and washes are notably present in the project area, remaining dry for extended periods but swiftly filling during and after rain events. These ephemeral streambeds and washes primarily drain towards the north.

The project site is located within the Southern Mojave Basin (HUC 181001) and falls within the Southern Mojave Sub-Basin (HUC 18100100), and the Mesquite Lake Watershed (HUC 1810010018).

3.4 Vegetation

Two vegetation and land cover types were documented on the project site, disturbed habitat and creosote bush scrub (Figure 4, Vegetation and Land Cover). Descriptions of the vegetation and land cover types are detailed below.

3.4.1 Disturbed Habitat

This land cover type includes access roads and other areas cleared of vegetation through human activity within the project site. These areas are not paved and retain a soil substrate. Disturbed habitat is primarily located within the central and eastern segments of the project site.

3.4.2 Creosote Bush Scrub

Creosote bush scrub is the primary vegetation community present in the project site. The community is dominated by creosote bush (*Larrea tridentata*) and is accompanied by various co-dominant species, including white bur-sage (*Ambrosia dumosa*), white rhatany (*Krameria bicolor*), allscale saltbush (*Atriplex polycarpa*), and cheesebush (*Ambrosia Salsola*). Chinchweed (*Pectis papposa*) is also present at the herbaceous level throughout the project site.

3.5 National Wetlands Inventory (NWI)

The USFWS is the principal federal agency that provides information to the public on the extent and status of the nation's wetlands. The USFWS has developed a series of maps, known as the NWI to show wetlands and deep-water habitat. This geospatial information is used by federal, state, and local agencies, academic institutions, and private industry for management, research, policy development, education, and planning activities. The NWI program was neither designed nor intended to produce legal or regulatory products; therefore, wetlands identified by the NWI program are not the same as wetlands defined by the USACE and RWQCB.

The NWI Mapper (USFWS 2023) was accessed on-line to review mapped wetlands or riverine areas within the project site. No wetlands or riverine features are depicted in the NWI dataset (Figure 5, NWI and NHD Map).

3.6 National Hydrography Dataset (NHD)

The National Hydrography Dataset is a comprehensive dataset that provides information about surface water features, such as rivers, lakes, and streams. It is maintained by the USGS and is widely used for various applications, including environmental research, resource management, and mapping.

The NHD includes information on the flow and relationships between different water features, helping to create a detailed and interconnected representation of the nation's hydrography. It is important to note that the dataset is has its limitations in accuracy and should not be used to determine jurisdiction of waters. The NHD data was accessed online to aid in the identification of potentially jurisdictional waters, no water features were depicted in the NHD as occurring in the project site (Figure 5, NWI and NHD Map).

3.7 Soils

Official soil mapping data for the project site is not available as of USDA records from 2023 (USDA 2023). However, the soils in the area are predominantly sandy and well-drained, as typically characteristic of desert landscapes. The nearest mapped soil, approximately one mile to the south, is classified as Morongo loamy sand, with slopes ranging from 2 to 8 percent. The Morongo series consists of very deep, somewhat excessively drained soils that formed in alluvium derived from granitoid and/or gneissic rocks. Morongo soils are on fan aprons, inset fans, fan remnants and in drainageways (USDA 2023).

4.0 RESULTS

Based on the field visit, no jurisdictional wetlands were identified, and six (6) non-wetland ephemeral drainages were documented in the project site (Figure 6, Potential Jurisdictional Waters). The lateral limits (OHWM) of non-wetland waters ranged from 1 to 30 feet and was determined by heterogeneity in soils, vegetation, and geomorphology compared to the adjacent uplands. Soils within the ephemeral features were composed of well-drained, coarse textures, such as sandy or gravelly materials with low organic content. The total acres of the non-wetland waters contained within the project site summed to 1.01 acres and 6,468 linear feet (1,973 meters). No hydrophytic or native riparian plant species were observed in project site. Table 1, below, details the drainage names and their related acreages and linear feet comprised in the project site.

Conclusions derived from the jurisdictional delineation indicate that the ephemeral waters documented in the project site are likely jurisdictional WSC regulated by the CDFW and RWQCB. No waters were deemed jurisdictional WUS as they are ephemeral waters lacking continuous surface connection to (a)(1) waters, namely traditional navigable waters or territorial seas. Given the episodic flow regime and well-drained soils, both CDFW streambed and RWQCB jurisdictions coincided across the project site.

It should be noted that the USACE, in collaboration with the Environmental Protection Agency (EPA) as needed, retains the ultimate authority for the final jurisdictional determination of WUS, while the Regional Water Quality Control Board (RWQCB) holds the ultimate authority for the final jurisdictional determination of WSC. Furthermore, the CDFW exercises ultimate discretion in determining its jurisdiction.

Table 1. Potentially Jurisdictional Drainages

| Drainage | Type | Cowardin Class | Jurisdiction | Linear Feet | Acres |
|-----------------|-------------|-----------------------|---------------------|--------------------|--------------|
| A | Ephemeral | R4SBJ | WSC/CDFW | 881 | 0.06 |
| B | Ephemeral | R4SBJ | WSC/CDFW | 2,552 | 0.51 |
| C | Ephemeral | R4SBJ | WSC/CDFW | 1,155 | 0.25 |
| D | Ephemeral | R4SBJ | WSC/CDFW | 1,074 | 0.15 |
| E | Ephemeral | R4SBJ | WSC/CDFW | 496 | 0.02 |
| F | Ephemeral | R4SBJ | WSC/CDFW | 310 | 0.01 |
| Total | | | | 6,468 | 1.01 |

5.0 IMPACTS TO JURISDICTIONAL AREAS

No impacts to jurisdictional waters are proposed for the project. The project has been strategically designed to avoid impacts to any potentially jurisdictional waters (Figure 7, Project Impacts).

5.1 Permitting Requirements

The project will not result in impacts to jurisdictional waters and therefore authorization from RWQCB and CDFW are not required. If there is a change in project design and impacts to waters are proposed, the appropriate permits will be necessary.

6.0 REFERENCES

Cowardin, L.M., V. Carter, F.C. Golet, and E.T. LaRoe. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U.S. Department of the Interior.

Google. (2023). Google Earth (Version 9.90.0.5). Google. <https://www.google.com/earth/>

Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. USDA 2023. Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/>. Accessed December 2023.

U.S. Army Corps of Engineers (USACE). 1987. Wetlands Delineation Manual, Technical Report Y-8. U.S. Army Engineer Waterways Experiment Station, Vicksburg, Mississippi. 100 pp. + append.

_____. 2008a. A Field Guide to the Identification of the Ordinary High-Water Mark (OHWM) in the Arid West Region of the Western United States. A Delineation Manual. Lichvar and McColley. August.

_____. 2008b. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region. September.

U.S. Fish and Wildlife Service. USFWS 2023. National Wetlands Inventory Mapper. Available online at: <http://www.fws.gov/wetlands/Data/Mapper.html>. Accessed December 2023.

United States Geological Survey (USGS). USGS 2023A. 7.5-Minute Series Sun Fair United States Geological Survey.

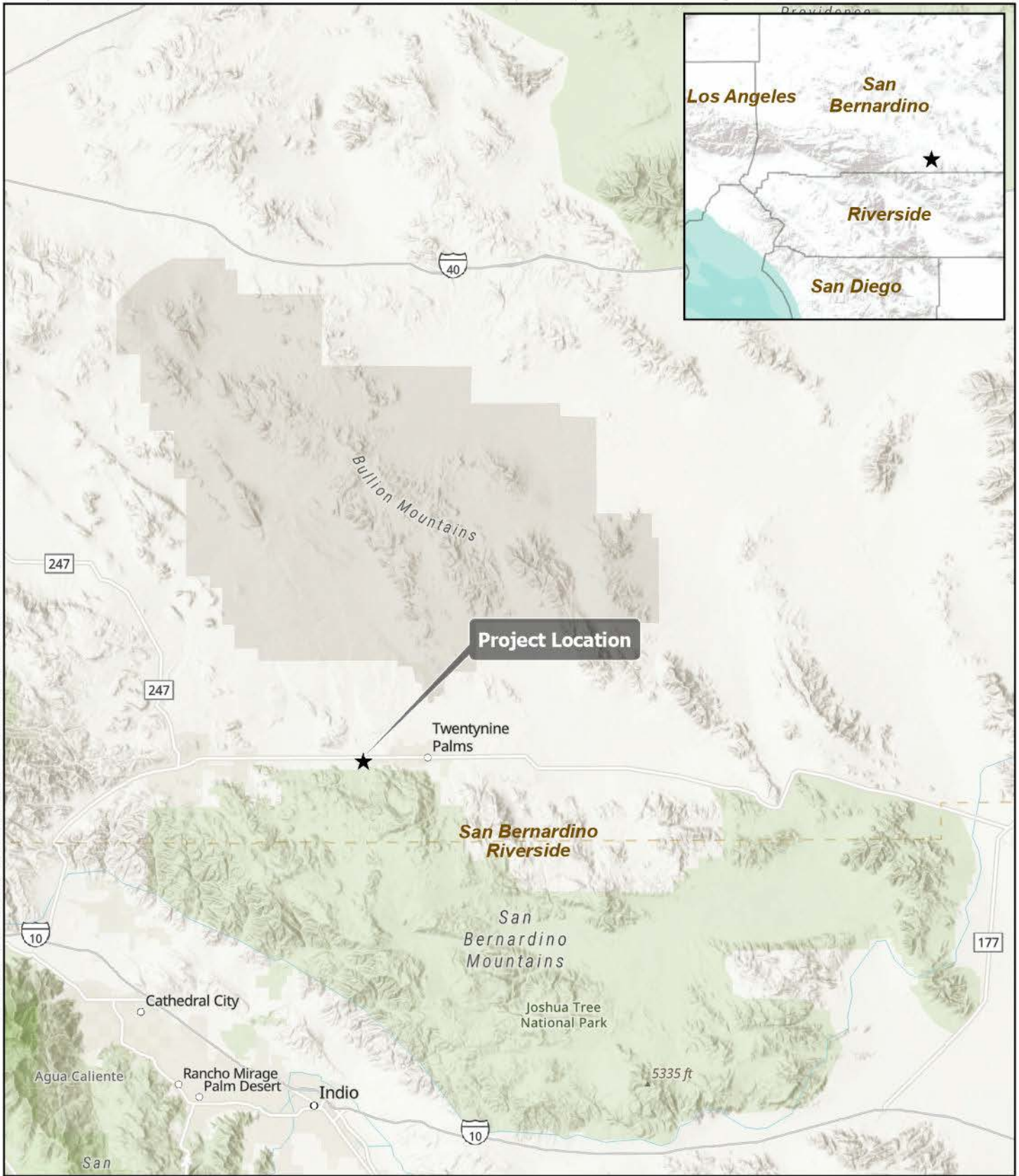
USGS. 2023b. National Hydrography Dataset. <https://www.usgs.gov/core-science-systems/ngp/national-hydrography>. Accessed December 2023.

Weather Underground (Accessed 2023):
<https://www.wunderground.com/dashboard/pws/KCANEWBE16>

Western Regional Climate Center (Accessed 2023): <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?ca9325>

APPENDIX A- FIGURES

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★ Project Location

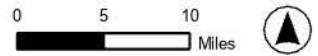
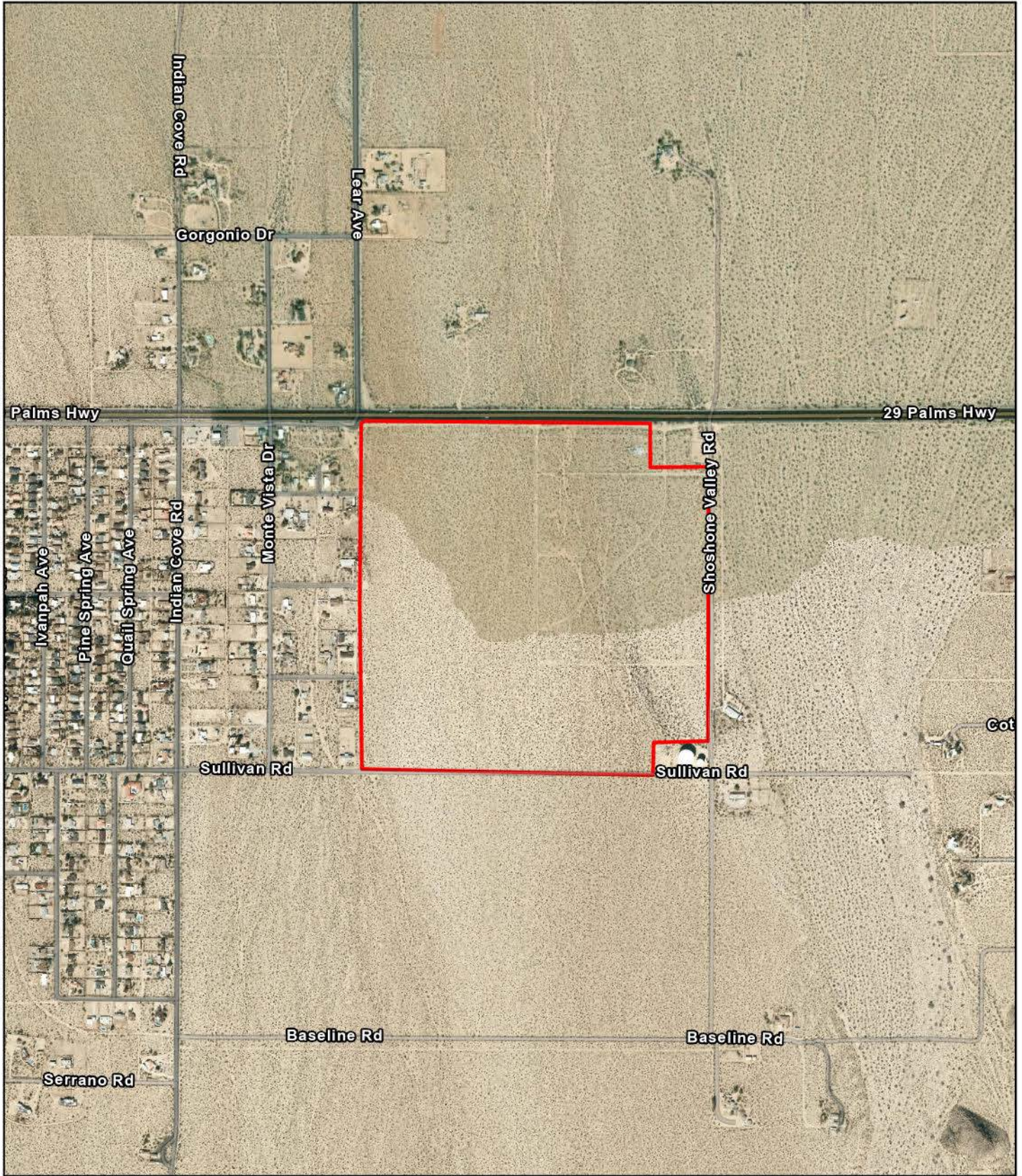



FIGURE 1
Regional Map
Delineation of Jurisdictional Waters Report
Yonder Glamping Resort Project
Twentynine Palms, CA

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 Project Boundary

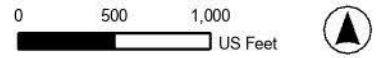
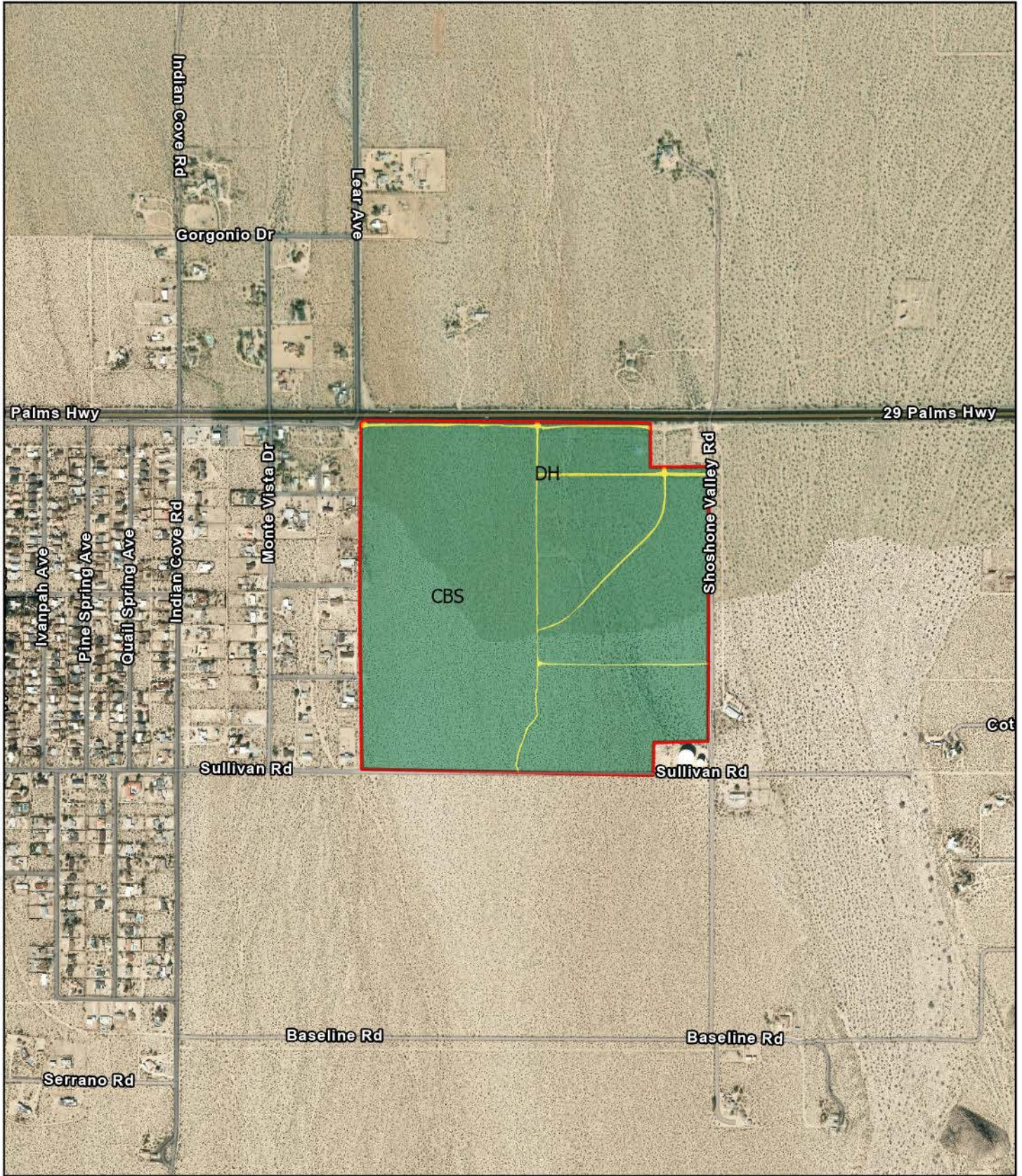




FIGURE 3
Local Vicinity Map
Delineation of Jurisdictional Waters Report
Yonder Glamping Resort Project
Twenty-nine Palms, CA

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 Project Boundary

 Creosote Bush Scrub (CBS)
 Disturbed Habitat (DH)

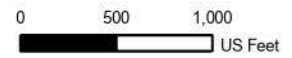
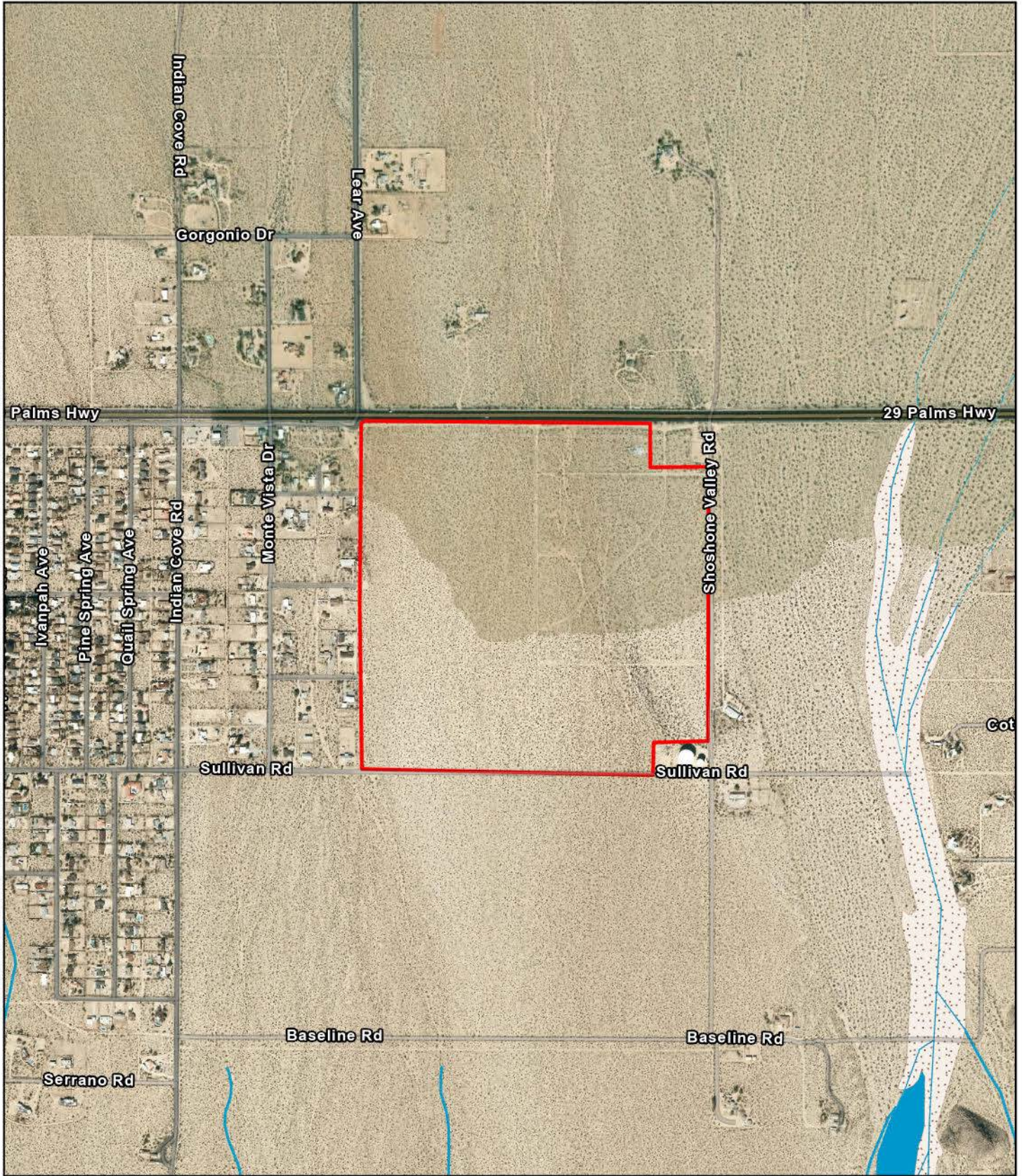


FIGURE 4
 Vegetation and Land Cover
 Delineation of Jurisdictional Waters Report
 Yonder Glampering Resort Project
 Twentynine Palms, CA

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- Project Boundary
- National Wetlands Inventory (NWI)
- National Hydrography Dataset (NHD)
- Playa or Wash

- National Wetlands Inventory (NWI)
- River

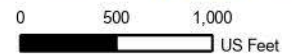
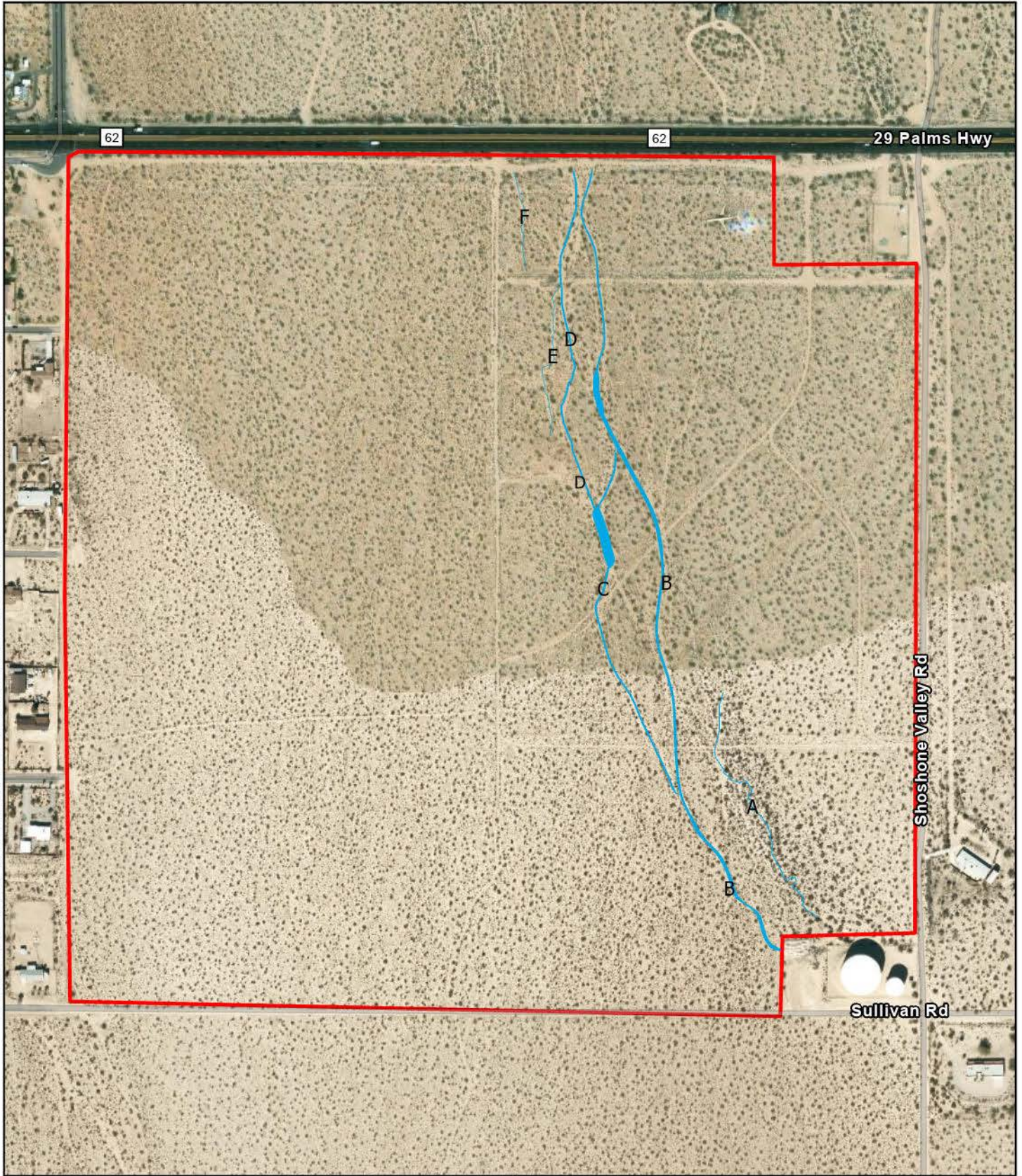



FIGURE 5
 NWI and NHD Map
 Delineation of Jurisdictional Waters Report
 Yonder Glamping Resort Project
 Twentynine Palms, CA

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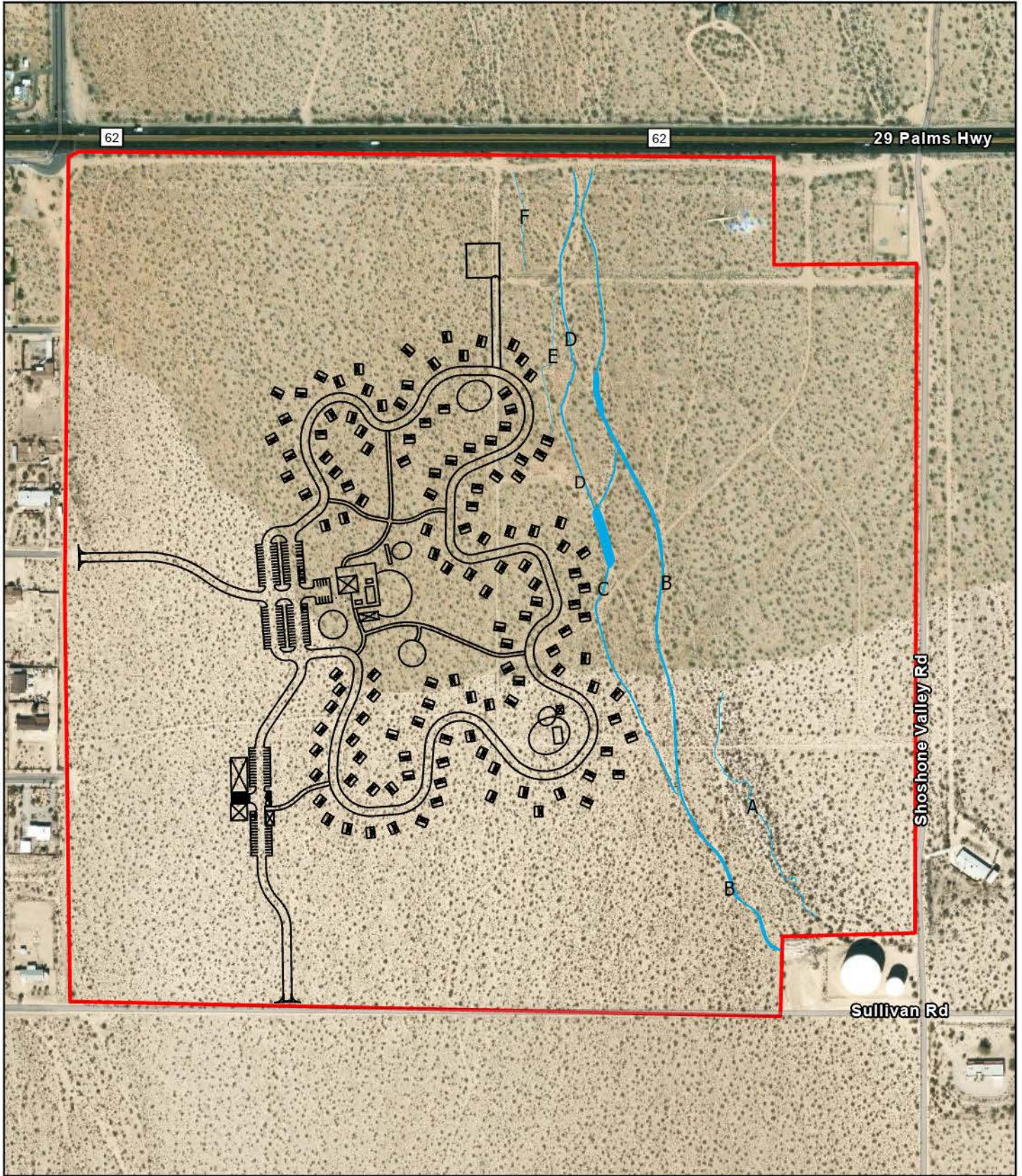
 Project Boundary

 Ephemeral Drainages



FIGURE 6
 Potential Jurisdictional Waters
 Delineation of Jurisdictional Waters Report
 Yonder Glampping Resort Project
 Twentynine Palms, CA

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- Project Boundary
- Project Footprint
- Ephemeral Drainages

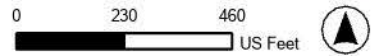


FIGURE 7
 Project Impacts
 Delineation of Jurisdictional Waters Report
 Yonder Glamping Resort Project
 Twentynine Palms, CA

APPENDIX B- SITE PHOTOGRAPHS

**WSP USA
PHOTOGRAPHIC RECORD**

Client: Terra Nova Planning and Research

Job Number: 322520147

Site Name: Yonder Glamping Resort Project

Location: Twentynine Palms, CA

Photographer: Marshall Paymard

Date: October 26, 2023

Photograph No. 1



Photo 1: Facing south. Soils of Drainage A.

Photograph No. 2



Photo 2: Facing northwest. View of shelving along Drainage B.

**WSP USA
PHOTOGRAPHIC RECORD**

Client: Terra Nova Planning and Research

Job Number: 322520147

Site Name: Yonder Glamping Resort Project

Location: Twentynine Palms, CA

Photographer: Marshall Paymard

Date: October 26, 2023

Photograph No. 3



Photo 3: Facing north. View of Drainage C.

Photograph No. 4



Photo 4: Facing northeast. View of Drainage C.

**WSP USA
PHOTOGRAPHIC RECORD**

Client: Terra Nova Planning and Research

Job Number: 322520147

Site Name: Yonder Glamping Resort Project

Location: Twentynine Palms, CA

Photographer: Marshall Paynard

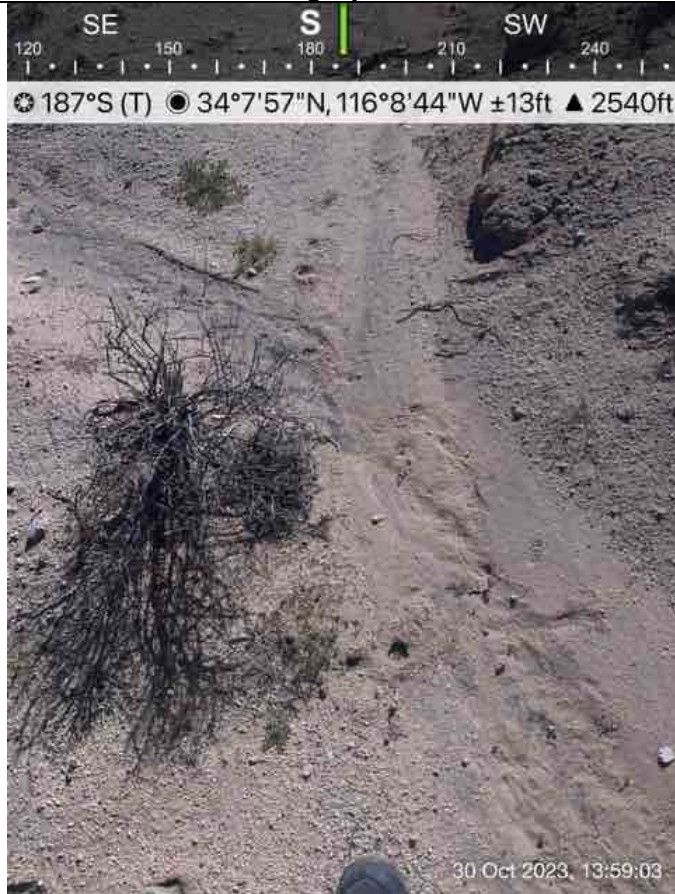
Date: October 26, 2023

Photograph No. 5



Photo 5: Facing north. Shelving associated with Drainage D.

Photograph No. 6



**WSP USA
PHOTOGRAPHIC RECORD**

Client: Terra Nova Planning and Research

Job Number: 322520147

Site Name: Yonder Glamping Resort Project

Location: Twentynine Palms, CA

Photographer: Marshall Paymard

Date: October 26, 2023

Photo 6: Facing east. View of habitat, including erosion and disturbances.

Photograph No. 7



Photo 7: Facing north. View of Drainage F.

Photograph No. 8



Photo 8: Facing north. View of Drainage C.

APPENDIX C- REGULATORY FRAMEWORK

REGULATORY FRAMEWORK

U.S. Army Corps of Engineers

The U.S. Army Corps of Engineers (USACE) regulates the discharge of dredged or fill material in waters of the United States (WOTUS) pursuant to Section 404 of the Clean Water Act (CWA).

Waters of the United States

On August 29, 2023, the U.S. Environmental Protection Agency and the Department of the Army issued a final rule amending the "Revised Definition of 'Waters of the United States,'" initially published in the Federal Register on January 18, 2023. This amendment aligns the definition of "waters of the United States" with the U.S. Supreme Court's decision in the case of *Sackett v. Environmental Protection Agency* on May 25, 2023. The Supreme Court deemed certain parts of the January 2023 Rule invalid based on its interpretation of the CWA in the *Sackett* decision. Consequently, the agencies have modified key elements of the regulatory text to comply with the Court's ruling. The conforming rule, titled "Revised Definition of 'Waters of the United States'; Conforming," was published in the Federal Register and became effective on September 8, 2023.

Furthermore, due to ongoing litigation, the January 2023 Rule is currently not in effect in certain states and for certain parties. The agencies are applying the January 2023 Rule, as amended by the conforming rule, in 23 states, the District of Columbia, and the U.S. Territories. In the remaining 27 states and for specific parties, the agencies are interpreting "waters of the United States" in accordance with the pre-2015 regulatory framework and the Supreme Court's decision in *Sackett* until further notice. To summarize some of the most applicable highlights, the agencies' new rule defines WOTUS as:

Categories of Jurisdictional Waters

1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

Eight exclusions from the definition of "waters of the United States" are codified at paragraph (b), and key terms are defined at paragraph (c). "Adjacent" is defined at (c)(2) as "having a continuous surface connection."

Key Court Rulings

The definition of "waters of the United States" has been shaped by five key Supreme Court decisions. In 1985, *United States v. Riverside Bayview Homes, Inc.* upheld the USACE's jurisdiction over wetlands near navigable waters, asserting that such wetlands are intricately connected to navigable waters and often have significant effects on water quality and aquatic ecosystems.

However, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* in 2001 established that the mere use of non-navigable, isolated, intrastate waters by migratory birds does not alone justify federal authority under the CWA. This decision prompted agencies to develop guidance on the "waters of the United States" definition.

In 2006, *Rapanos v. United States* presented a plurality opinion defining "waters of the United States" as relatively permanent bodies with a continuous surface connection to traditional navigable waters. Justice Kennedy, in a concurring opinion, introduced the concept of a "significant nexus," requiring a water or wetland to impact the integrity of other covered waters. Dissenting Justices argued for a broader interpretation.

Following *Rapanos*, in 2007 and 2008, additional guidance was developed to implement the definition of "waters of the United States." These legal developments illustrate ongoing complexities in interpreting and applying the regulatory framework.

On May 25, 2023, the Supreme Court ruled in *Sackett v. Environmental Protection Agency*, endorsing the *Rapanos v. United States* plurality standard for defining "waters of the United States." The Court concluded that the CWA's use of "waters" includes relatively permanent bodies of water forming geographic features such as streams, oceans, rivers, and lakes, as outlined in *Rapanos*. The Court also agreed with the plurality's formulation that wetlands are part of "the waters of the United States" when they have a continuous surface connection to bodies considered "waters of the United States" in their own right.

In response to the *Sackett* decision, on August 29, 2023, the agencies issued a final rule amending the January 2023 Rule to align with the Supreme Court's interpretation. Parts of the January 2023 Rule were deemed invalid by the Court's decision. Consequently, key aspects of the regulatory text were amended to conform to the Court's ruling. The final conforming rule, titled "Revised Definition of 'Waters of the United States'; Conforming," became effective on September 8, 2023, following its publication in the Federal Register.

Regional Water Quality Control Board

The Regional Water Quality Control Board (RWQCB) regulates activities pursuant to Section 401(a)(1) of the CWA. Section 401 of the CWA specifies that certification from the State is

required for any applicant requesting a federal license or permit, including a Section 404 permit. Through the Porter Cologne Water Quality Control Act, the RWQCB asserts jurisdiction over waters of the State of California (WSC), which is generally the same as WOTUS but may also include waters not in federal jurisdiction.

The State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State was adopted in April 2020 and put into effect statewide on May 28, 2020.

The Water Boards define an area as wetland as follows:

An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area's vegetation is dominated by hydrophytes or the area lacks vegetation.

The Water Code defines WSC broadly to include "any surface water or groundwater, including saline waters, within the boundaries of the state." WSC include all WOTUS but also includes waters not in federal jurisdiction.

The following wetlands are waters of the state:

1. Natural wetlands,
2. Wetlands created by modification of a surface water of the state, and
3. Artificial wetlands that meet any of the following criteria:
 - a. Approved by an agency as compensatory mitigation for impacts to other waters of the state, except where the approving agency explicitly identifies the mitigation as being of limited duration;
 - b. Specifically identified in a water quality control plan as a wetland or other water of the state;
 - c. Resulted from historic human activity, is not subject to ongoing operation and maintenance, and has become a relatively permanent part of the natural landscape; or
 - d. Greater than or equal to one acre in size, unless the artificial wetland was constructed, and is currently used and maintained, primarily for one or more of the following purposes (i.e., the following artificial wetlands are not waters of the state unless they also satisfy the criteria set forth in 2, 3a, or 3b):
 - i. Industrial or municipal wastewater treatment or disposal
 - ii. Settling of sediment
 - iii. Detention, retention, infiltration, or treatment of stormwater runoff and other pollutants or runoff subject to regulation under a municipal, construction, or industrial stormwater permitting program
 - iv. Treatment of surface waters
 - v. Agricultural crop irrigation or stock watering

- vi. Fire suppression
- vii. Industrial processing or cooling
- viii. Active surface mining – even if the site is managed for interim wetlands functions and values
- ix. Log storage
- x. Treatment, storage, or distribution of recycled water
- xi. Maximizing groundwater recharge (this does not include wetlands that have incidental groundwater recharge benefits)
- xii. Fields flooded for rice growing

All artificial wetlands that are less than an acre in size and do not satisfy the criteria set forth in 2, 3.a, 3.b, or 3.c are not WSC.

California Department of Fish and Wildlife

The California Department of Fish and Wildlife (CDFW) regulates water resources under Section 1600-1616 of the California Fish and Game Code. Section 1602 states:

An entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.

Evaluation of CDFW jurisdiction followed guidance in the Fish and Game Code and A Review of Stream Processes and Forms in Dryland Watersheds. In general, under 1602 of the Fish and Game Code, CDFW jurisdiction extends to the maximum extent or expression of a stream on the landscape (CDFW 2010). It has been the practice of CDFW to define a stream as “a body of water that flows perennially or episodically and that is defined by the area in a channel which water currently flows or has flowed over a given course during the historic hydrologic course regime, and where the width of its course can reasonably be identified by physical or biological indicators” (Brady and Vyverberg 2013). Thus, a channel is not defined by a specific flow event, nor by the path of surface water as this path might vary seasonally. Rather, it is CDFW's practice to define the channel based on the topography or elevations of land that confine the water to a definite course when the waters of a creek rise to their highest point.