



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

October 29, 2024

CESPA-RD

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-2023-610².

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-2023-610

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).

Summary of Features within the Project Area

SWCA Unique Identifier	Aquatic Resources Type	OHWM Present (Yes/No)	Water of the U.S.	Arid West SDAM Classification	Latitude	Longitude	Total Acres within Project Area
ST01	Stream	Yes	No	Ephemeral	35.071186	-106.898981	46.81

2. REFERENCES.

1. USACE. 2009. List of Navigable Waters of the United States in the Albuquerque District. June 17, 2009.
2. ERO. 2023 Aquatic Resource Delineation Report. October 2023
3. USDA, NRCS. 2016. Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/>.
4. Dick-Peddie, W.A. and W.H. Moir. 1999. New Mexico Vegetation: Past, Present, and Future. University of New Mexico Press.
5. National Hydrography Dataset (NHD): The U.S. Geological Survey (USGS) NHD identifies surface water features such as streams, rivers, canals, ditches, ponds, lakes, and reservoirs (USGS 2016).
6. National Wetlands Inventory (NWI): The U.S. Fish and Wildlife Service (USFWS) NWI identifies and characterizes wetlands, including freshwater wetlands, emergent wetlands, forested/shrub wetlands, ponds, lakes, riverine wetlands, and others (USFWS 2024).
7. Federal Emergency Management Agency (FEMA) Flood Maps: FEMA flood maps identify areas at risk for flooding (FEMA 2024).
8. Natural Resources Conservation Service (NRCS) Soil Data: The NRCS Soil Survey Geographic Database (NRCS 2024a), including hydrologic soil groups (NRCS 2015), provides information on areas of potential inundation through

the presence of hydric soils. Some soil properties that can be useful for identifying aquatic resources include hydric soil components, drainage classifications, and taxonomic class.

9. Aerial Photographs and Imagery: Historic and current aerial photographs of the project area are useful for landscape-scale visualization of potential surface water features under different seasonal conditions (Google Earth Pro 2024).
3. REVIEW AREA: The U.S. Department of Agriculture (USDA) has mapped the 46.81-acre project area in the Southern Desertic Basin, Plains, and Mountains Major Land Resource Area (MLRA), which is characterized by intermontane desert basins and broad valleys bordered by gently sloping bajadas, alluvial fans, and terraces (USDA Natural Resources Conservation Service (NRCS) 2006). This MLRA is a majority of the Mexican Highland Section of the Basin and Range physiographic province and ranges in elevation from 2,600 to 8,500 feet. The average annual precipitation is 8 to 17 inches, most of which occurs as high-intensity thunderstorms from mid-spring to mid-autumn. The average annual temperature is 50°F to 71°F with the number of frost-free days ranging from 165 to 300.

The project area is further divided into the Albuquerque Basin ecoregion of New Mexico. The geology of the Albuquerque Basin ecoregion consists largely of quaternary fan alluvium and colluvium, with small areas of basalt. Located along the Rio Grande of central New Mexico near Albuquerque, in the Albuquerque Basin ecoregion, mostly ephemeral and intermittent streams flow from scattered hills and alluvial fans onto plains.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest interstate waterway is the Rio Grande.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The aquatic resources within the review area are tributaries to the Rio Grande River, located approximately 7.5 miles downstream.
6. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2023-610

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 "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

"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.

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).

The STO1 stream channels, as identified above in Section 1(a), do not meet the relatively permanent standard as defined in the 2023 Rule as amended. These waters only exhibit flowing or standing water for only a short duration in direct response to precipitation. This determination is based on site specific data, including the Streamflow Duration Assessment Method (SDAM), and regional weather patterns.

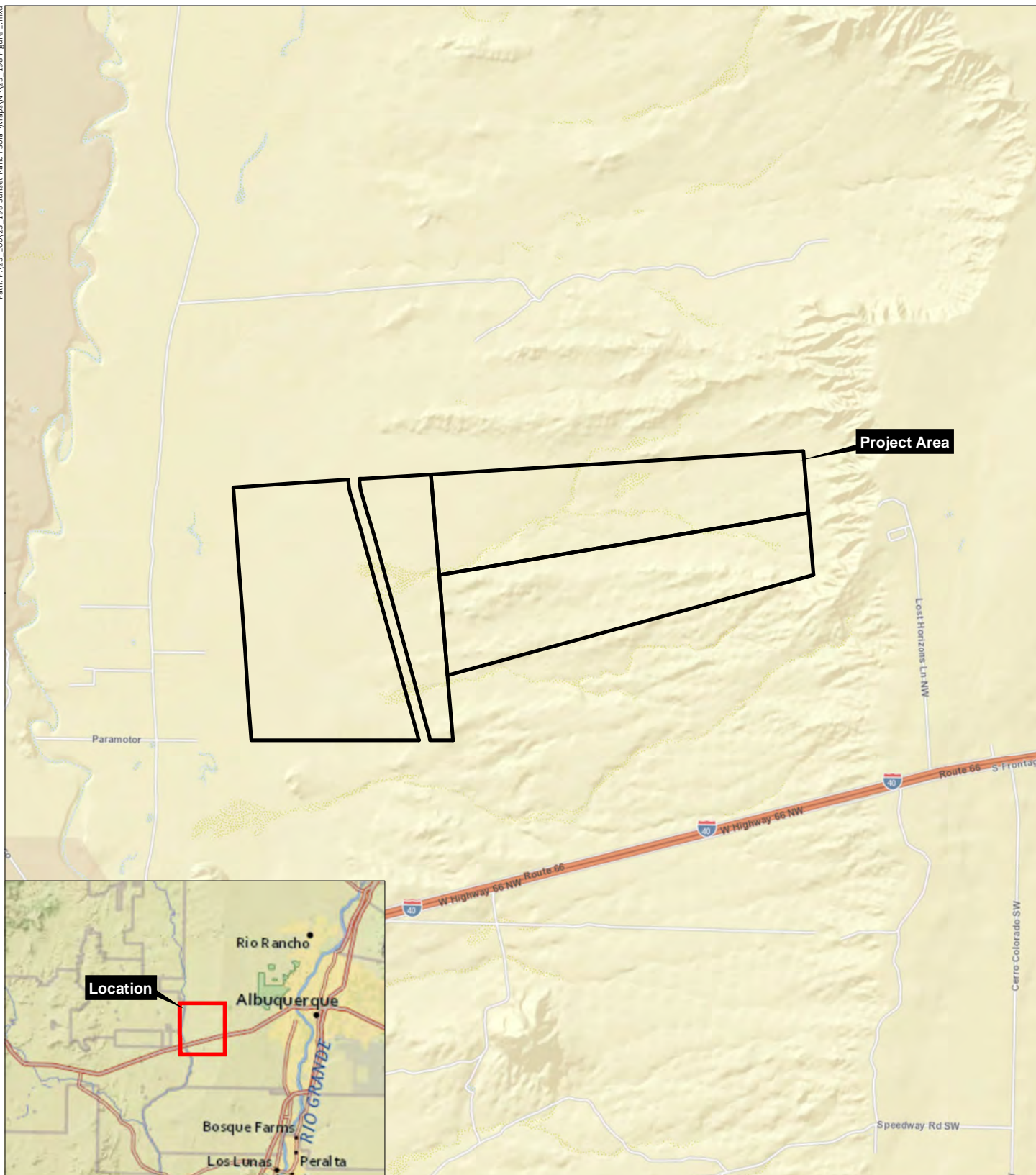
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. National Wetlands Inventory Mapper

10. OTHER SUPPORTING INFORMATION. N/A

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.

⁸ 88 FR 3004 (January 18, 2023)



Sunset Ranch Solar

Sections 22-27, 34, and 36, T10N, R1W; Sections 19 and 30, T10N, R1E; New Mexico PM

UTM NAD 83: Zone 13N; 326114mE, 3882038mN

Longitude 106.906977°W, Latitude 35.066116°N

USGS La Mesita Negra, NM Quadrangle

Bernalillo County, New Mexico

0 2,000 4,000
Feet



Figure 1
Vicinity Map

Prepared for: Acuity Solar Development
File: 23_198 Figure 1.mxd (GS)
October 6, 2023

ERO
ERO Resources Corp.