



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

CESPA-RD

07/17/2025

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) ,<sup>1</sup> SPA-2024-0146

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.<sup>2</sup> 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.<sup>3</sup>

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),<sup>4</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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- 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).

Feature ID	Stream Name	Type	Lat/Long	Length (linear feet) within Project Area	Jurisdictional Status
1	none	ephemeral	36°46'16.72"N 108°29'58.81"W	835	Non-jurisdictional
2	none	ephemeral	36°46'31.37"N 108°30'15.27"W	785	Non-jurisdictional
3	none	ephemeral	36°46'44.54"N 108°30'26.36"W	5,905	Non-jurisdictional
4	none	ephemeral	36°46'46.63"N 108°30'3.61"W	1,390	Non-jurisdictional
5	none	ephemeral	36°47'2.57"N 108°30'20.05"W	50	Non-jurisdictional
6	none	ephemeral	36°47'12.07"N 108°30'30.72"W	50	Non-jurisdictional
7	none	ephemeral	36°47'11.43"N 108°30'9.41"W	50	Non-jurisdictional
8	none	ephemeral	36°47'16.21"N 108°30'0.54"W	50	Non-jurisdictional
9	none	ephemeral	36°47'21.21"N 108°30'1.66"W	50	Non-jurisdictional
10	none	ephemeral	36°47'30.73"N 108°30'1.35"W	50	Non-jurisdictional
11	none	ephemeral	36°47'36.48"N 108°29'58.20"W	50	Non-jurisdictional
12	none	ephemeral	36°47'42.08"N 108°29'52.01"W	50	Non-jurisdictional
13	none	ephemeral	36°47'46.29"N 108°29'49.87"W	50	Non-jurisdictional
14	none	ephemeral	36°47'50.12"N 108°29'48.42"W	50	Non-jurisdictional
15	none	ephemeral	36°47'49.73"N 108°29'40.57"W	50	Non-jurisdictional
16	none	ephemeral	36°47'51.00"N 108°29'29.61"W	50	Non-jurisdictional

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17	none	ephemeral	36°47'51.46"N 108°27'53.68"W	1,843	Non-jurisdictional
18	none	ephemeral	36°48'4.65"N 108°26'53.37"W	2,456	Non-jurisdictional
19	none	ephemeral	36°48'24.62"N 108°26'52.08"W	1,740	Non-jurisdictional
20	none	ephemeral	36°48'44.81"N 108°27'5.34"W	3,965	Non-jurisdictional
21	none	ephemeral	36°49'36.95"N 108°27'17.37"W	6,469	Non-jurisdictional
22	Westwater Arroyo	ephemeral	36°49'27.65"N 108°26'27.71"W	8,926	Non-jurisdictional
23	none	ephemeral	36°49'49.50"N 108°26'59.81"W	2,339	Non-jurisdictional
24	none	ephemeral	36°50'28.57"N 108°26'16.50"W	4,263	Non-jurisdictional
25	none	ephemeral	36°49'23.25"N 108°25'56.99"W	3,714	Non-jurisdictional
26	none	ephemeral	36°49'13.52"N 108°26'30.00"W	1,813	Non-jurisdictional
27	none	ephemeral	36°48'55.96"N 108°26'38.64"W	4,295	Non-jurisdictional
<b>Total</b>				<b>51,338</b>	

## 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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The Project Area is located within San Juan County, NM. The proposed solar energy facility, the Ecosphere/Shiprock Solar Project (Project) is within the approximately 3,532-acre site at approximately Latitude 36.813503, Longitude -108.451186.

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4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The aquatic resource is not connected to a downstream TNW.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no flow path between the water and a downstream TNW.
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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.

- 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).<sup>7</sup> 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 Stream Duration Assessment Method (SDAM) was used to evaluate 52 stream reaches across 27 stream features within the Shiprock Solar Project assessment area. Each stream reach exhibited an Ordinary High-Water Mark (OHWM), indicating evidence of surface water flow. However, based on the SDAM results, all reaches were determined to be ephemeral, meaning they only carry water in direct response to precipitation and do not maintain seasonal or continuous flow. As such, these streams do not meet the definition of relatively permanent waters under the 2023 “Waters of the United States” (WOTUS) Rule, as amended. Relatively permanent waters are streams that exhibit continuous or predictable seasonal flow, which is not the case for any of the stream reaches assessed. Furthermore, no wetlands, intermittent streams, or perennial streams were identified within the assessment area. Therefore, all aquatic resource features within the assessment area are considered non-jurisdictional under the current WOTUS definition.

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<sup>7</sup> 88 FR 3004 (January 18, 2023)

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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 (2/18/2025)
  - b. USGS Topo Map Chaves County, NM 2022
  - c. Memorandum on NAP-2023-01223
  - d. Memorandum on NWK-2022-00809
  - e. Memorandum on SWG-2023-00284

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.