



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

CESPA-RD

07/07/2025

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) ,¹ SPA-2025-0222

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.² 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.³

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

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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	Latitude/ Longitude	Length (linear feet) Within Project Area	Jurisdictional Status
S-TP-101-EPH	N/A	Ephemeral	31.51151, -106.09715	3,415	No
S-TP-101.1-EPH	N/A	Ephemeral	31.51203, -106.0920	2,723	No
S-TP-102-EPH	N/A	Ephemeral	31.51578, -106.10155	1280	No
S-TP-103-EPH	San Felipe Arroyo	Ephemeral	31.53154, -106.10521	6,667	No
S-TP-104-EPH	N/A	Ephemeral	31.52887, -106.10936	5,884	No
S-TP-105-EPH	N/A	Ephemeral	31.53150, -106.09995	5,447	No
EF-TP-101	N/A	Erosional Feature	31.52918, -106.10328	1338	No
OW-TP-101	N/A	Man-made Livestock Pond	31.53630, -106.08017	N/A	No
OW-TP-102	N/A	Man-made Livestock Pond	31.53519, -106.08696	N/A	No
WD-TP-101	N/A	Man-made Livestock Pond	31.53689, -106.09158	N/A	No

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)

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- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
3. REVIEW AREA. The Project Area is located within in El Paso County, approximately 5.59 miles east from the town of Fabens, Texas and approximately 27 miles southeast of the City of El Paso, Texas. The proposed solar energy facility, the Desert Pine Solar Project (Project) is within the approximately 3,417-acre site at approximately Latitude 31.5241183, Longitude -106.0799932.
 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 WATERS⁵: 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 10.⁶ 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,

⁵ 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.

⁶ 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.

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).⁷ 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).

Based on the results of the September/October field delineation and application of the Beta Streamflow Duration Assessment Method (SDAM) for the Arid West, the six ephemeral streams (S-TP-101-EPH, S-TP-101.1-EPH, S-TP-102-EPH, S-TP-103-EPH, S-TP-104-EPH, and S-TP-105-EPH) and one erosional feature (EF-TP-101) identified within the Project Area do not meet the criteria for jurisdiction under the Clean Water Act (CWA).

⁷ 88 FR 3004 (January 18, 2023)

These features lack the characteristics of relatively permanent waters (RPWs), which are defined as continuous or long-lasting surface water bodies that contribute to downstream navigable waters. All identified streams were completely dry at the time of the field delineation and demonstrated only ephemeral flow regimes, meaning they carry water only in direct response to precipitation events. No indicators of intermittent or perennial flow were observed. The erosional feature (EF-TP-101) lacked Ordinary High-Water Mark (OHWM) indicators and consisted solely of sandy substrate and upland vegetation, consistent with overland flow paths formed by stormwater runoff.

The SDAM assessment confirmed that none of the streams exhibit the necessary hydrologic, geomorphic, or biological indicators to suggest sustained flow. Additionally, no hydrophytic vegetation, aquatic invertebrates, fish, or algal presence were observed in any of the features, further indicating the absence of aquatic ecosystem functions. S-TP-105-EPH, in particular, showed diminishing ephemeral stream characteristics upstream of its confluence, emphasizing the limited and sporadic nature of surface flow. None of the streams demonstrated a nexus to traditional navigable waters or downstream jurisdictional systems.

Given the lack of relatively permanent flow, absence of aquatic life, and limited hydrologic connectivity, these features do not meet the jurisdictional threshold under the current CWA regulatory framework, as clarified by the 2023 final rule and recent U.S. Supreme Court precedent. Therefore, these ephemeral streams and the erosional feature are considered non-jurisdictional and are not subject to regulation under Section 404 of the Clean Water Act.

Two open water features (OW-TP-101 and OW-TP-102) and one waterfilled depression (WD-TP-101) were identified within the Project Area during the September/October 2024 field delineation. The open water features consist of man-made livestock ponds that were excavated entirely within upland areas. These ponds exhibit moderately stable banks and lack aquatic vegetation, indicating minimal ecological function and no apparent surface water connection to jurisdictional waters. As artificial features created in uplands for agricultural purposes and with no evidence of perennial or intermittent surface flow, these ponds do not meet the definition of relatively permanent waters (RPWs) or jurisdictional impoundments under current Clean Water Act guidance. There is no indication that these features contribute to the chemical, physical, or biological integrity of downstream navigable waters.

The waterfilled depression (WD-TP-101) resulted from a leak in the City of Fabens water line that crosses the Project Area. This feature is anthropogenic and was not formed by natural hydrological processes. A formal wetland

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determination (SP-TP-122-UPL) was conducted for this feature using U.S. Army Corps of Engineers protocols. The data confirmed that the area does not meet the three criteria necessary to classify as a wetland—hydric soils, hydrophytic vegetation, and wetland hydrology. Specifically, the soils lacked hydric characteristics, and the vegetation did not include a dominant presence of FAC, FACW, or OBL plant species. As such, WD-TP-101 does not meet the regulatory definition of a wetland or a jurisdictional water under the Clean Water Act.

In summary, the open water features and waterfilled depression are either artificial upland excavations or result from non-natural sources (e.g., infrastructure leaks) and lack the hydrological and ecological characteristics necessary for federal jurisdiction. Therefore, these features are considered non-jurisdictional under the Clean Water Act and are not subject to regulation under Section 404.

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.