



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

CESPA-RD

August 20, 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-2024-00255 (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-2024-00255

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. **Unnamed drainage labeled “WC-01” (2,083 linear feet) – is not a water of the United States.**
 - ii. **Unnamed drainage labeled “WC-02” (1,194 linear feet) – 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. ***Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)**
- c. **“Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023)**

- 3. REVIEW AREAS: **The review area measures approximately 79 acres and is centrally located at latitude 33.050446°, longitude -106.008595°, on U.S. Highway 54/70, approximately 2 miles South of the town of Tularosa, in Otero County, New Mexico.**
- 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A.
- 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **N/A. The subject resources discussed above do not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water. In this case, the nearest TNW is the Rio Grande and is approximately 66 miles Southwest of the project area. Each study reach exhibits Ordinary High-Water Mark (OHWM) indicators within the review area, but these indicators eventually dissipate outside of the review area. Any flows that occur are reduced to overland sheet flow, without any discrete, continuous OHWM indicators leading to a TNW, either directly or indirectly.**

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 "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): **None**
 - b. The Territorial Seas (a)(1)(ii): **None**
 - c. Interstate Waters (a)(1)(iii): **None**
 - d. Impoundments (a)(2): **None**
 - e. Tributaries (a)(3): **None**
 - f. Adjacent Wetlands (a)(4): **None**
 - g. Additional Waters (a)(5): **None**

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.

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 **None**
- 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 study reaches (WC-01 and WC-02) within the review area do not exhibit relatively permanent flow patterns. The channels contain flow or standing water only for short durations and only in response to precipitation events. The beta Stream Duration Assessment Method (SDAM) for the Arid West, conducted within the review areas, concluded that the study reaches are consistent with a non-relatively permanent flow duration and are characterized as ephemeral.

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. **Report entitled, *No-permit Required Letter Request, Reynolds Solar Project – Otero County, NM*, includes a prepared Wetland Delineation Report, prepared by Westwood Professional Services, Dated November 2023.**
 - b. **Corps office evaluation, which included Google Earth images dated April 2023, December 2019, March 2016, October 2013, August 2011, August 2009, May 2009, September 2006, July 2005, August 2004, March 2003, January 2003, September 2003, and October 1996.**
 - c. **The USACE, National Regulatory Viewers, South Pacific Division, New Mexico viewer, NHD data set and NWI data set, accessed on 8/1/2024.**
10. OTHER SUPPORTING INFORMATION. **Based on the information provided and the evaluation of over 20 years of aerial images, the flow regimes of the unnamed drainages WC-01 and WC-02 within the project area are considered**

⁸ 88 FR 3004 (January 18, 2023)

CESPA-RD

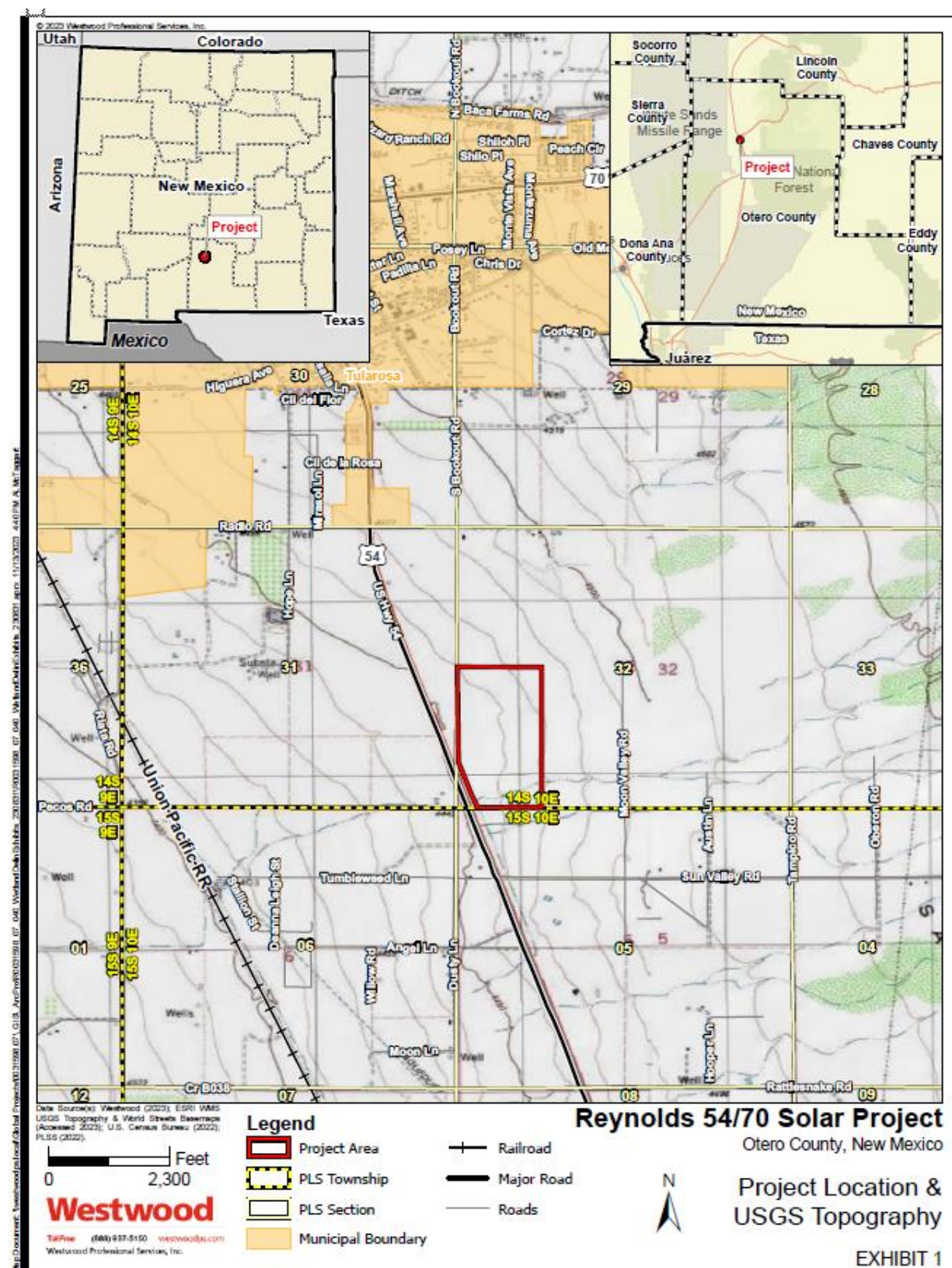
SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2024-00255

non-relatively permanent and lack a continuous surface connection to any (a)(1-3) water. The remaining area of this study consists entirely of uplands and upland erosional features.

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.

CESPA-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of Sackett v. EPA, 143 S. Ct. 1322 (2023), SPA-2024-00255



SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2024-00255

