



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
1970 EAST 3RD AVE, SUITE 109
DURANGO, COLORADO 81301

CESPA-RD

March 29, 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-2023-00520 (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.

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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 1 is not a water of the United States.
 - ii. Unnamed Drainage 2 is not a water of the United States.
 - iii. Unnamed Pond is not a water of the United States.
 - iv. WL-1 is not a water of the United States.
 - v. WL-2 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. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 52 acres and is located at the northeast corner of the intersection of Colorado State Highway (SH) 115 and US Highway 50, at latitude 38.419759°, longitude-105.03568°, Section 6 and 7, Township 19 South, Range 68 West, Fremont County, Colorado.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Arkansas River.⁶

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is

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5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The overall site flows towards US Highway 50. However, there is a two-track road without a culvert that severs the physical surface connection to the downstream channel south of US Highway 50. The downstream channel flows into the Arkansas River, which is approximately 1.3 miles to the south.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 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.

⁸ 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.

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- 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).⁹ 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).

Unnamed Drainage 1 does not have relatively permanent flow. The channel contains flow or standing water for only a short duration in direct response to precipitation events. The drainage enters the review area via two metal culverts that pass under SH 115, flows southerly through the center of the review area for approximately 720 feet (ft), and dissipates into overland sheet flow, where the channel loses its ordinary high water mark.

Unnamed Drainage 2 is located in the northwest portion of the review area and it does not have relatively permanent flow. The channel contains flow or standing water for only a short duration in direct response to precipitation events. The drainage forms from an area of overland sheet flow near SH 115, flows southerly through the review area for approximately 140 ft, and dissipates into overland sheet flow, where the channel loses its ordinary high water mark.

Unnamed Pond is a pond feature in the southern portion of the review area. It is located within the overall drainage but does not contain an outlet. There is no evidence that the pond has continuous flow that extends to the Arkansas River.

⁹ 88 FR 3004 (January 18, 2023)

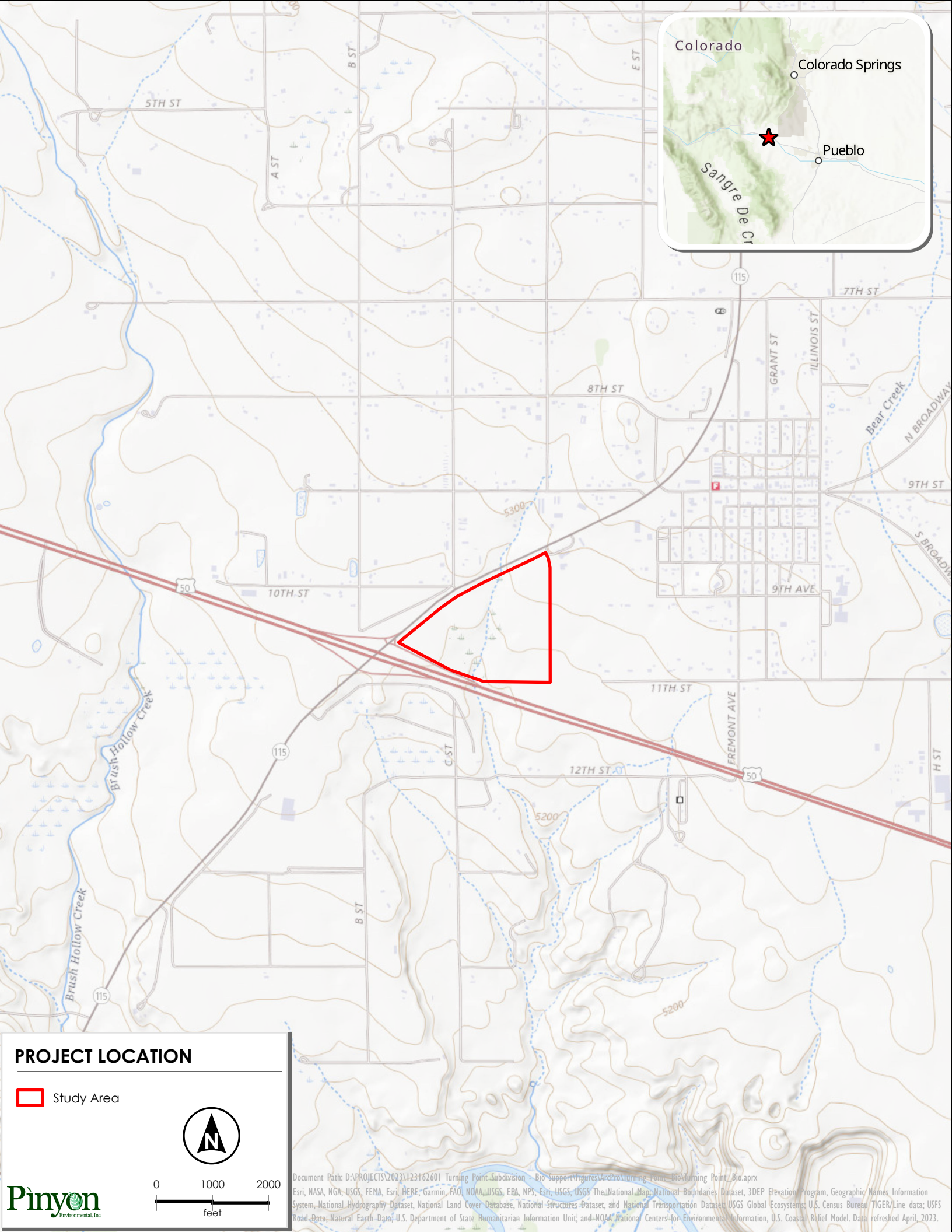
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WL-1 is a 0.30-acre palustrine scrub shrub wetland located in the southern portion of the review area north of Unnamed Pond. This wetland does not have continuous surface connection to a relatively permanent waterway and is separated from Wetland 2 by a natural rise in land and therefore does not meet the definition of adjacency under the 2023 Rule as amended.

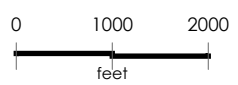
Wetland 2 (WL-2) is 0.08-acre palustrine scrub shrub wetland located southwest of Unnamed Pond. This wetland does not have continuous surface connection to a relatively permanent waterway and therefore does not meet the definition of adjacency under the 2023 Rule as amended. A two-track road exists down gradient of the wetland area between the wetland and the culvert under US Highway 50. The two-track road does not have a culvert and therefore severs the physical surface connection to a downstream channel that exists south of US Highway 50.

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, *Approved Jurisdictional Determination Request for the Turning Point Subdivision Project, Penrose, Fremont County, Colorado*, prepared by Pinyon Environmental, Inc., dated October 13, 2023.
 - b. Office evaluation on December 28, 2023, which evaluated GoogleEarth images dated October 2022, June 2018, June 2016, August 2013, October 2011, March 2006, April 2005, October 1999, and the USGS 1:24 K Quad.
 - c. Email and photos from Matt Santo, dated January 21, 2024, regarding potential distinct features.
10. OTHER SUPPORTING INFORMATION. Based on the information provided and an evaluation of over 20 years of aerial images, the flow regime of the three stream reaches within the project area are non-relatively permanent.
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.



PROJECT LOCATION

 Study Area



Document Path: D:\PROJECTS\2023\123162601 Turning Point Subdivision - Bio Support\Figures\ArcPro\Turning Point - Bio\Turning Point - Bio.aprx
Esri, NASA, NGA, USGS, FEMA, Esri, HERE, Garmin, FAO, NOAA, USGS, EPA, NPS, Esri, USGS, USGS The National Map, National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset, USGS Global Ecosystems, U.S. Census Bureau TIGER/Line data; USFS Road Data; Natural Earth Data; U.S. Department of State Humanitarian Information Unit; and NOAA National Centers for Environmental Information, U.S. Coastal Relief Model. Data refreshed April, 2023.

