



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
400 ROOD, ROOM 224
GRAND JUNCTION, COLORADO 81051

SPA-RD-W

April 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-2023-00554

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).

- i. **Wetland 1 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 88 FR 3116-17 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area is 5.8 acres, and is located at 47 Village Drive, latitude 39.9151°, longitude -105.7834°, within the township of Winter Park, in Grand County, Colorado.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The aquatic resource within the review area has no connection to a TNW, territorial sea, or interstate water.**

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **The aquatic resource onsite does not have a surface water or discrete flow path conveyance to a TNW. There were no flow paths identified between the aquatic resource within the review area and Vasquez Creek which is approximately 0.35 miles north of the Wetland 1.**

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

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.

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, 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

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.

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).

Wetland 1 is a 0.04-acre palustrine emergent wetland. There is a culvert located adjacent to Wetland 1 at latitude 39.9151°, longitude -105.7833° which has non-relatively permanent flowpath to a municipal storm sewer system inlet located at latitude 39.9152°, longitude -105.7828°. The municipal storm sewer system appears to follow U.S. Highway 40 in a northerly direction, which is downgradient from the review area and likely discharges to Vasquez Creek (an (a)(3) water) at latitude 39.9200° longitude -105.7854° (although a review of aerial photographs and street view photographs found no visible outfall structure). The number of stormwater laterals connecting to this municipal sewer system between the wetland and the probably discharge to Vasquez Creek is unknown.

Given the above information it is determined that Wetland 1 does not have a continuous surface connection or a discrete flow conveyance to a jurisdictional water because subsurface flow through a municipal underground storm sewer system does not qualify as a continuous surface connection in this case. Wetland 1 is therefore non-jurisdictional. This determination is based on review of Google Earth aerial photographs, the Corps' National Regulatory Viewer desktop resources, and wetland delineation report submitted by the applicant's agent.

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. **Google Earth Imagery dated September 1999, October 2005, August 2007, September 2011, October 2015, September 2019, and a Street View photograph dated October 2023. Accessed on April 1, 2024.**
 - b. **USACE National Regulatory Viewer, Hillshade Maps. Accessed on April 1, 2024.**

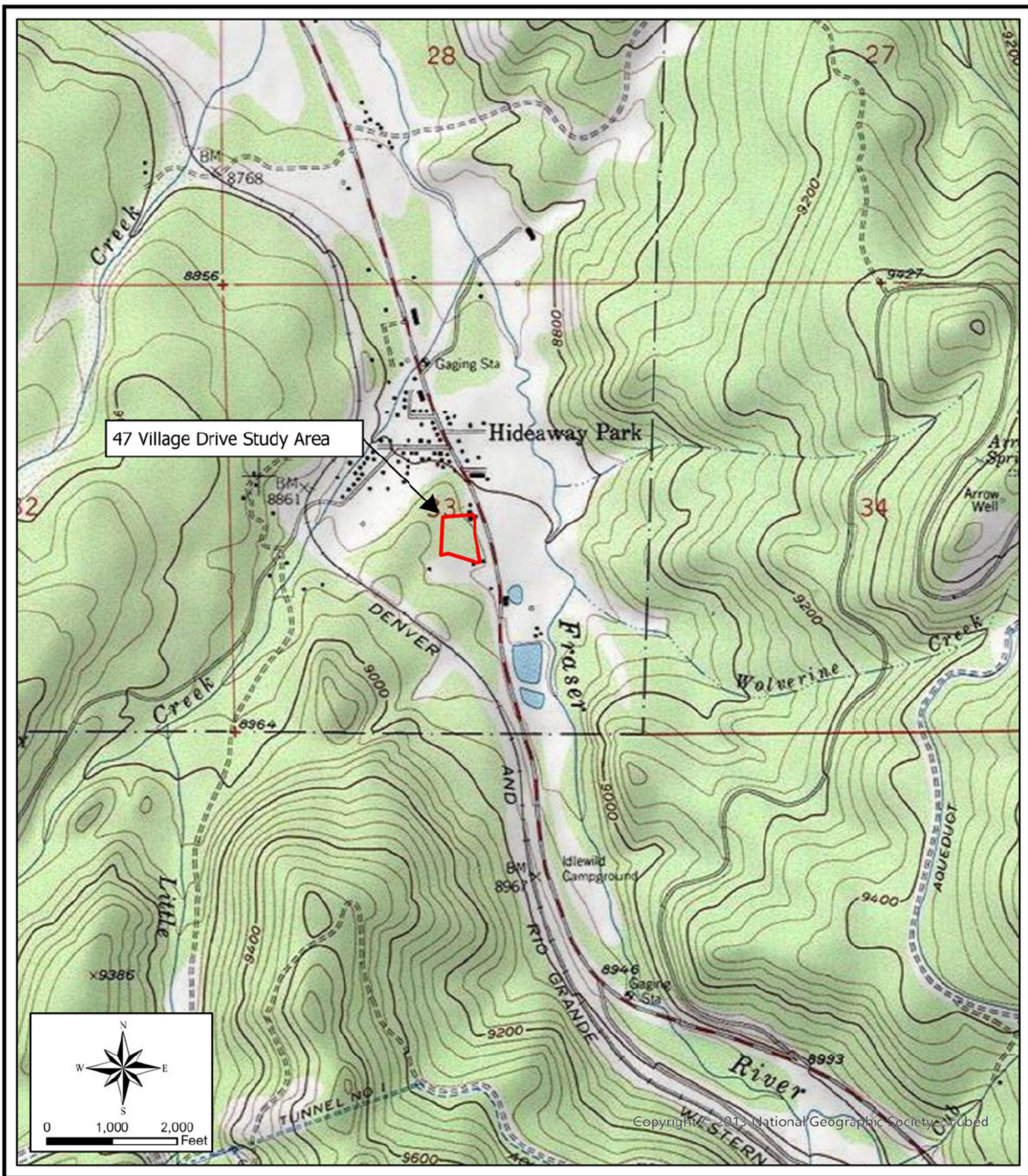
⁷ 88 FR 3004 (January 18, 2023)

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- c. **USACE National Regulatory Viewer, USGS Topographic Map. Accessed on April 1, 2024.**
- d. **USACE National Regulatory Viewer, Slope Map. Accessed on April 1, 2024.**
- e. **USACE National Regulatory Viewer, National Hydrology Data Map. Accessed on April 1, 2024.**
- f. **USACE National Regulatory Viewer, National Wetland Inventory Map. Accessed on April 1, 2024.**
- g. **USACE National Regulatory Viewer, FEMA Map. Accessed on April 1, 2024.**
- h. **USDA, Natural Resources Conservation Service, Web Soil Survey (<https://websoilsurvey.sc.egov.usda.gov/app/WebSoilSurvey.aspx>). Accessed on April 1, 2024.**
- i. **November 2023, Wetland Delineation Report with photographs, prepared by Wright Water Engineers, Inc.**

10. OTHER SUPPORTING INFORMATION. In conclusion, Wetland 1 has no surface connection or discrete flow conveyance to a water of the United States and therefore this resource has been determined to not be a water of the United States because it does not meet one or more categories of waters of the United States under the 2023 Rule as amended.



WINTER PARK, GRAND COUNTY, COLORADO

LOCATION MAP

47 VILLAGE DRIVE

PROJECT NO.
231-074.000

FIGURE

1



WINTER PARK, GRAND COUNTY, COLORADO

WETLAND DELINEATION

47 VILLAGE DRIVE

PROJECT NO.
231-074.000

FIGURE
2