



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

CESPA-RDN

May 31, 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-2024-00136.²

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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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.

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 Stream (238 linear feet) is not a water of the United States.
 - ii. W1 (0.02 acre) is not a water of the United States.
 - iii. W2 (0.04 acre) 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)
 - d. "*Memorandum on NWP-2023-602*", March 19, 2024
3. REVIEW AREA. The review area consists of approximately 9.9 acres centered at 38.9471, -104.609, Section 1, Township 13S, Range 65W, in the unincorporated community of Falcon, El Paso County, Colorado.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.⁶ The nearest TNW is the Arkansas River, which is an interstate water with a Strahler stream order of 9 where it crosses from Colorado into Kansas.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Any surface hydrology within the

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 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.

aquatic resources under review would flow southward into a concrete-lined basin which connects into a storm sewer beneath Falcon Marketplace. The discrete conveyance flow path emerges into a grass-lined channel to the south of Falcon Marketplace which has two culverts, which direct flow southward beneath or around a commercial plaza, before emerging south of Meridian Road. The flow path continues southeast through several unnamed tributaries for approximately 24 river miles before reaching Black Squirrel Creek. Black Squirrel Creek flows approximately 28 river miles southwest before reaching Chico Creek. Chico Creek flows approximately 15 river miles south before reaching the Arkansas River near Avondale, Colorado. The Arkansas River has a stream order of 8 at this location, until approximately 8.25 river miles downstream with the confluence of the Huerfano River. The Arkansas River becomes stream order 9 at this location, which is an (a)(1)(iii) interstate water which crosses into Kansas.

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

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.

- 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).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 Stream

Unnamed Stream is a 238-foot feature with OHWM characteristics which flows into W1. Unnamed Stream has a stream order of 1 and is part of the 1,300 linear foot relevant reach that extends from a headcut within the review area, where OHWM characteristics begin, downstream to where another unnamed tributary converges with the subject reach within the concrete-lined portion of the flow path, approximately 1,100 linear feet downstream of the review area. The relevant reach was determined using the applicant’s February 16, 2024, *Wetland Delineation Report* and NHD Flowline data, as show on the April 25, 2024, *Map of Project Vicinity*.

⁹ 88 FR 3004 (January 18, 2023)

A USGS StreamStats report generated on April 25, 2024, estimates that the drainage area into this stream is 0.7 square miles, that also includes all wetlands within the review area. The mean annual precipitation at the site is 19.82 inches, and the estimated maximum 24-hour precipitation that occurs once in 2 years is 1.91 inches. NRCS Web Soils Survey data indicates that most soil within this drainage consist of Columbine gravelly sandy loam, which is classified as well-drained. Other soils include Pring coarse sandy loam and Stapleton sandy loam, which are also well-drained. The HUC12 (110200040203) of the review area is situated on the edge of the Upper Arkansas basin and does not receive seasonal snowmelt from the mountains in the western portions of the Upper Arkansas basin. It is noted that the surrounding basin has been partially developed for commercial and residential purposes that may provide additional hydrologic inputs into the downstream flow path. However, the degree of development that may influence hydrology in the review area is minimal and not such that it would result in seasonal or sustained flows within the review area.

Based on the available information, the relevant reach does not experience relatively permanent flows due to it being part of a relatively small headwater basin (0.7 square miles), having well drained soils, and generally area having an arid environment. Additionally, any local snowpack is unlikely to accumulate such that it would contribute sustained or seasonal flows to downstream tributaries. Therefore, the reach does not experience relatively permanent flows and is not a water of the United States under paragraph (a)(3).

W1

Wetland-1 (W1) is a 0.02-acre emergent wetland that is located directly on the conveyance path of the relevant reach associated with the Unnamed Stream. W1 may also receive hydrology from Wetland 2 via a discrete surface connection or subsurface flows. W1 extends southward, slightly outside of the review area, where it connects to a culvert beneath Owl Place road. Based on available information, the flow path travels southward through a vegetated conveyance path, for approximately 1,100 linear feet south, until entering a constructed basin with a concrete-lined channel in the north of Falcon Marketplace. Based on NHD flowline data, another un-named first-order stream channel convergences with the relevant reach within the concrete-lined channel, marking the end of the relevant reach. After traveling approximately 1,200 feet westward in this basin, the stream path then enters into a storm sewer spanning approximately 1,350 feet beneath Falcon Marketplace.

The flow path continues south and south-southeast through culverts under a Wal-mart Supercenter where is enters a stormwater basin located directly south of Meridian Road and approximately 0.62 mile of conveyance path downstream

of the review area. The stormwater basin is dominated by cattails and exhibits areas of standing water. Based on aerial imagery, the stormwater basin exhibits standing water for relatively permanent periods throughout the year, making it the nearest downstream relatively permanent waterbody.

The conveyance path continues downstream of the stormwater basin where it travels through potential wetlands, swales, and unnamed streams before reaching Black Squirrel Creek. However, immediately before reaching Black Squirrel Creek, the unnamed stream draining the HUC12 encompassing the review area appears to turn into potential overland sheet flow at 38.7409, -104.3789 (see the map entitled *SPA-2024-00136 AJD, Potential Sheet Flow (38.7409, -104.3789)*). The unnamed stream also appears to turn into sheet flow approximately 7 miles upstream of this location (*SPA-2024-00136 AJD, Potential Sheet Flow (38.8189, -104.4768)*). These areas sever discrete surface connection with downstream tributaries and W1 is found to not have a continuous surface connection with a paragraph (a)(1), (a)(2), or (a)(3) water and is therefore not found to be an (a)(4) water.

It is noted that Black Squirrel Creek exhibits an OHWM for a majority of its path but there are areas where the only conveyance path would involve overland sheet flows before it converges with Chico Creek. Based on aerial imagery, Chico Creek appears to exhibit relatively permanent flows that contribute to the Arkansas River (the nearest (a)(1) water) and therefore, we believe Chico Creek is the nearest downstream (a)(3) water. However, we acknowledge that further investigation beyond the scope of this review is needed to determine if Black Squirrel Creek is or is not an (a)(3) water, and we recognize that the distinction of nearest (a)(3) water being either Chico Creek or Black Squirrel Creek does not alter our decision that the conveyance path from W1 to Black Squirrel Creek is severed at the locations described above.

W2

Wetland-2 (W2) is a 0.04-acre emergent wetland. During a delineation conducted on February 1, 2024, W2 was observed to display a discrete conveyance path into W1 through a vegetated swale. Therefore, similarly to W1, W2 has also been found to not be an (a)(4) water because it does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water.

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.

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2024-00136

- a. USACE desktop review consisting of the maps entitled *SPA-2024-00136 AJD, HU12 Watershed* and *SPA-2024-00136 AJD, Project Vicinity*, dated April 25, 2024; *SPA-2024-00136 AJD, Flow Path to TNW*, dated April 30, 2024; *SPA-2024-00136 AJD, Potential Sheet Flow (38.8189, -104.4768)* and *SPA-2024-00136 AJD, Potential Sheet Flow (38.7409, -104.3789)*, dated May 16, 2024.
- b. *Wetland Delineation Report for [REDACTED] Filing No. 1A, El Paso County, Colorado*. Prepared by Bristlecone Ecology, LLC, dated February 16, 2024.
- c. *Overlot Grading, Pond SR4 & Utility Construction Drawings for Falcon Marketplace, Falcon, Colorado. Sub-Regional Pond #1 (SR4)*. Drawing Number C7.2, as-built dated October 17, 2023. Prepared by Drexel, Barrell & Co.
- d. *Falcon Marketplace Pond As-Built, El Paso County, Colorado. Pond 1 (SR4) As-Built*. Drawing Number AB1, dated January 15, 2024. Prepared by Drexel, Barrell & Co.
- e. *Overlot Grading, Pond SR4 & Utility Construction Drawings for Falcon Marketplace, Falcon, Colorado. Storm Sewer Plan & Profile*. Drawing Number C7.0, as-built dated October 17, 2023. Prepared by Drexel, Barrell & Co.
- f. *Construction Drawings for Falcon Marketplace, Falcon, Colorado. Pond #2*. Drawing Number C7.15, as-built dated October 17, 2023. Prepared by Drexel, Barrell & Co.
- g. *Falcon Marketplace Pond As-Built, El Paso County, Colorado. Ponds 2&3 As-Built*. Drawing Number AB2, dated January 15, 2024. Prepared by Drexel, Barrell & Co.
- h. USGS StreamStats report, entitled *SPA-2024-00136 Stream Stats*, generated April 25, 2024.
- i. USFWS National Wetland Inventory (NWI) map, entitled *SPA-2024-00136*, generated April 25, 2024.
- j. NRCS Web Soil Survey map entitled *Soil Map—El Paso County Area, Colorado*, dated May 3, 2024.
- k. Google Earth aerial imagery dated April 30, 2006; August 30, 2006; April 29, 2011; November 22, 2011; May 5, 2020; and July 6, 2020.

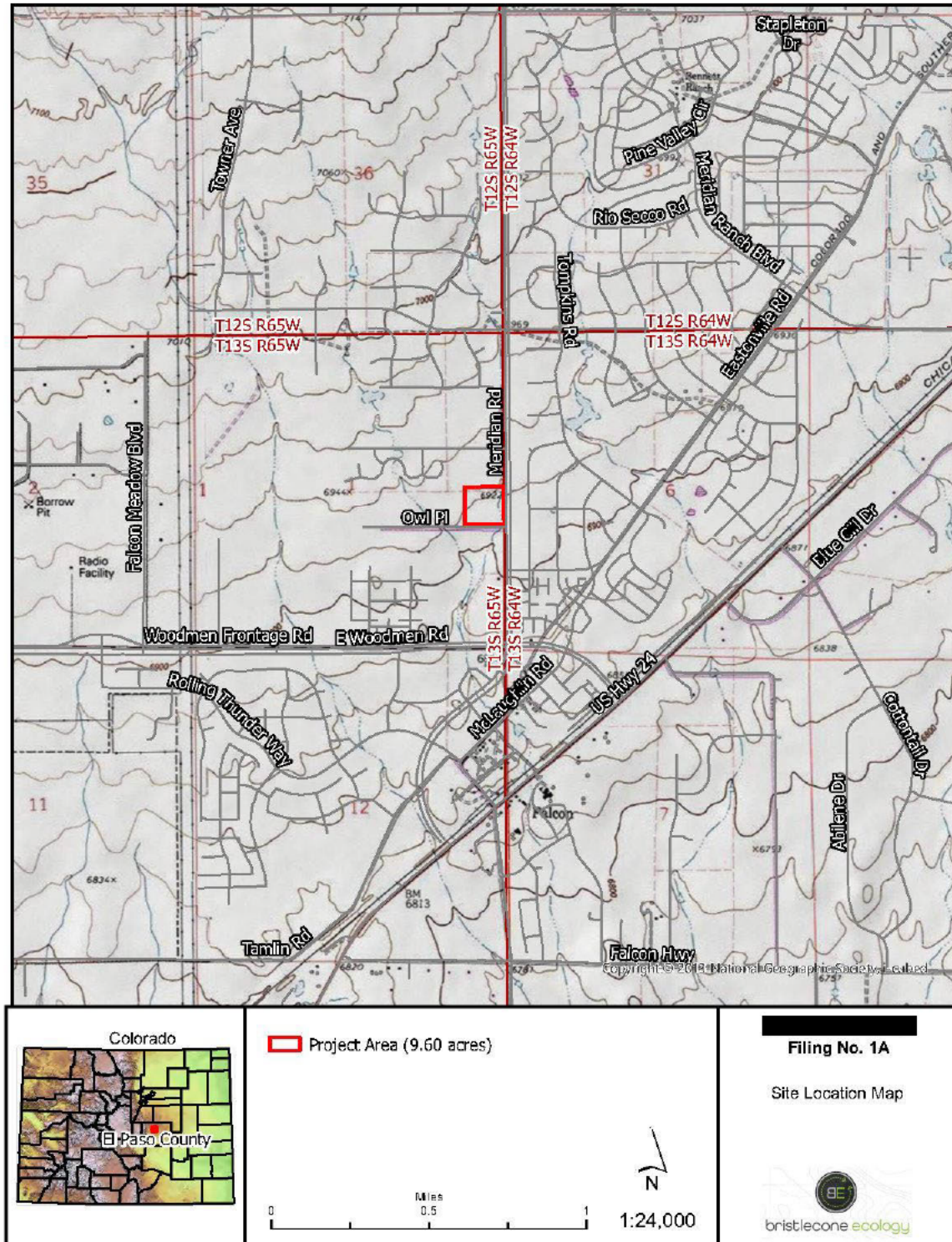
10. OTHER SUPPORTING INFORMATION.

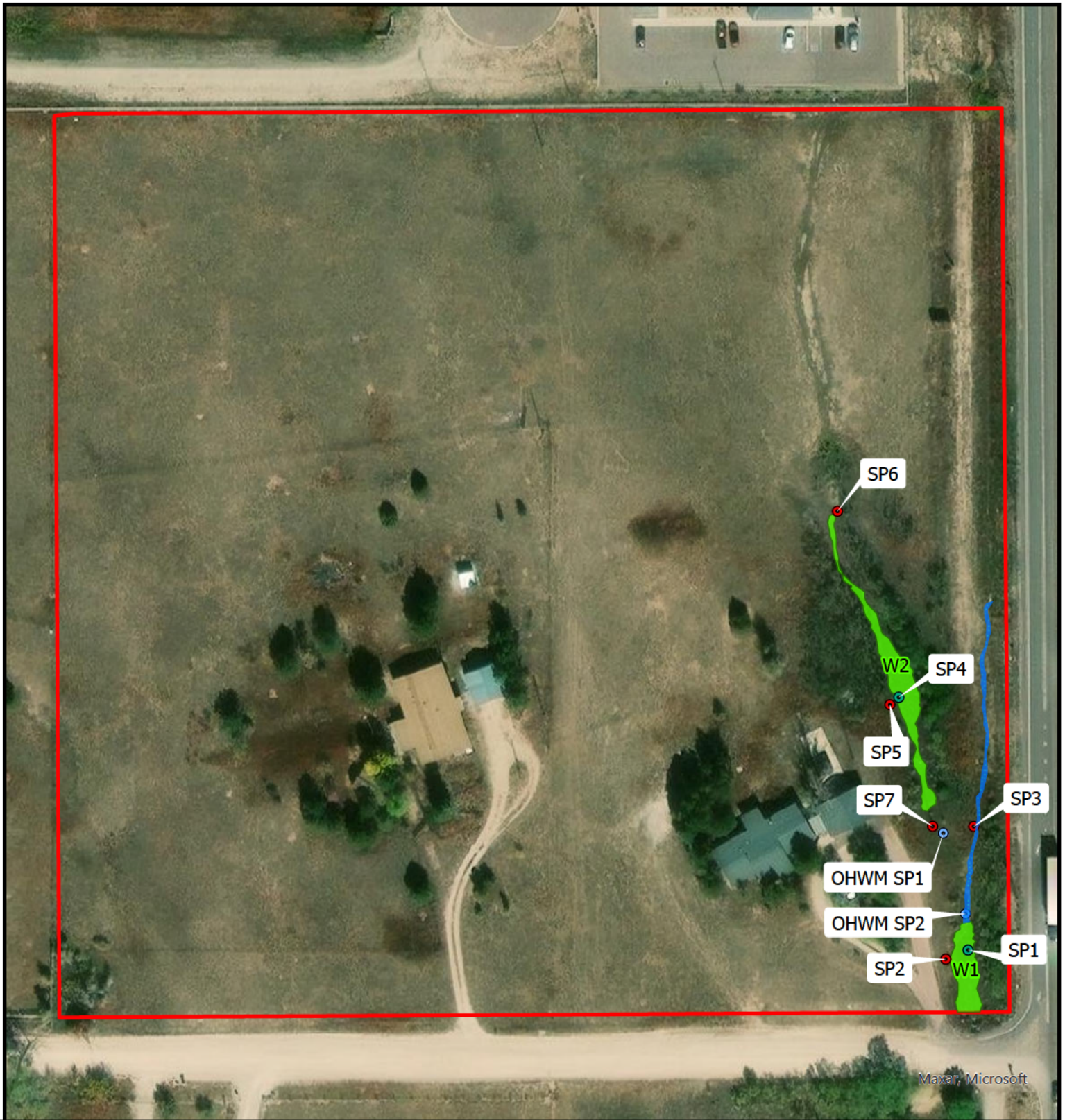
- a. USACE approved jurisdictional determination conducted under SPA-2007-00043-SCO, dated January 23, 2014. Prior to the construction of Falcon Marketplace, a wetland located within the Falcon Marketplace site was determined to be an isolated, non-jurisdictional wetland in 2007 and 2014 under SPA-2007-00043-SCO.
- b. There are no stormwater sewer features located within the review area or the relevant reach, but analysis of the potential conveyance paths that included stormwater pipes was needed to fully inform our review. The joint Memorandum on NWP-2023-602 signed by the US EPA and Office of the Assistant Secretary of the Army (Civil Works), dated March 19, 2024, determined that subsurface flow through a particular stormwater sewer of comparable length “does not qualify as flow through a discrete feature that can serve as a continuous surface connection.” The rationale given was that “multiple stormwater laterals drain into the city’s storm sewer system before it reaches the outfall ...” However, as seen in the construction plans of Falcon Marketplace prepared by Drexel, Barrell & Co. (Drawing Numbers C7.2, AB1, C7.0, C7.15, and AB2), the stormwater sewer does not appear to receive flow from other sewer laterals, and therefore serves as a discrete conveyance. It is unclear if multiple sewer laterals contribute flow beneath the commercial plaza between East Woodmen Road and Meridian Road, but given the narrowness of the watershed shown by the USGS SteamStats tool, this appears unlikely.

In conclusion, all wetlands and stream paths with an OHWM within the review area are found to be non-jurisdictional under the Clean Water Act, as amended by the 2023 *Sackett v. EPA* Supreme Court Decision.

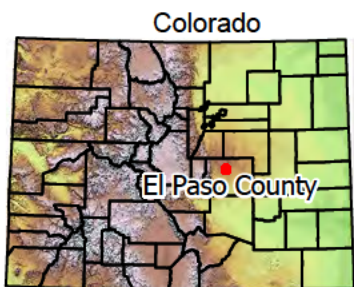
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Figure 1: Site Location Map

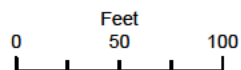




Maxar, Microsoft



- Project Area
- OHWM
- Wetlands
- OHWM Sample Point
- Upland Sample Point
- Wetland Sample Point

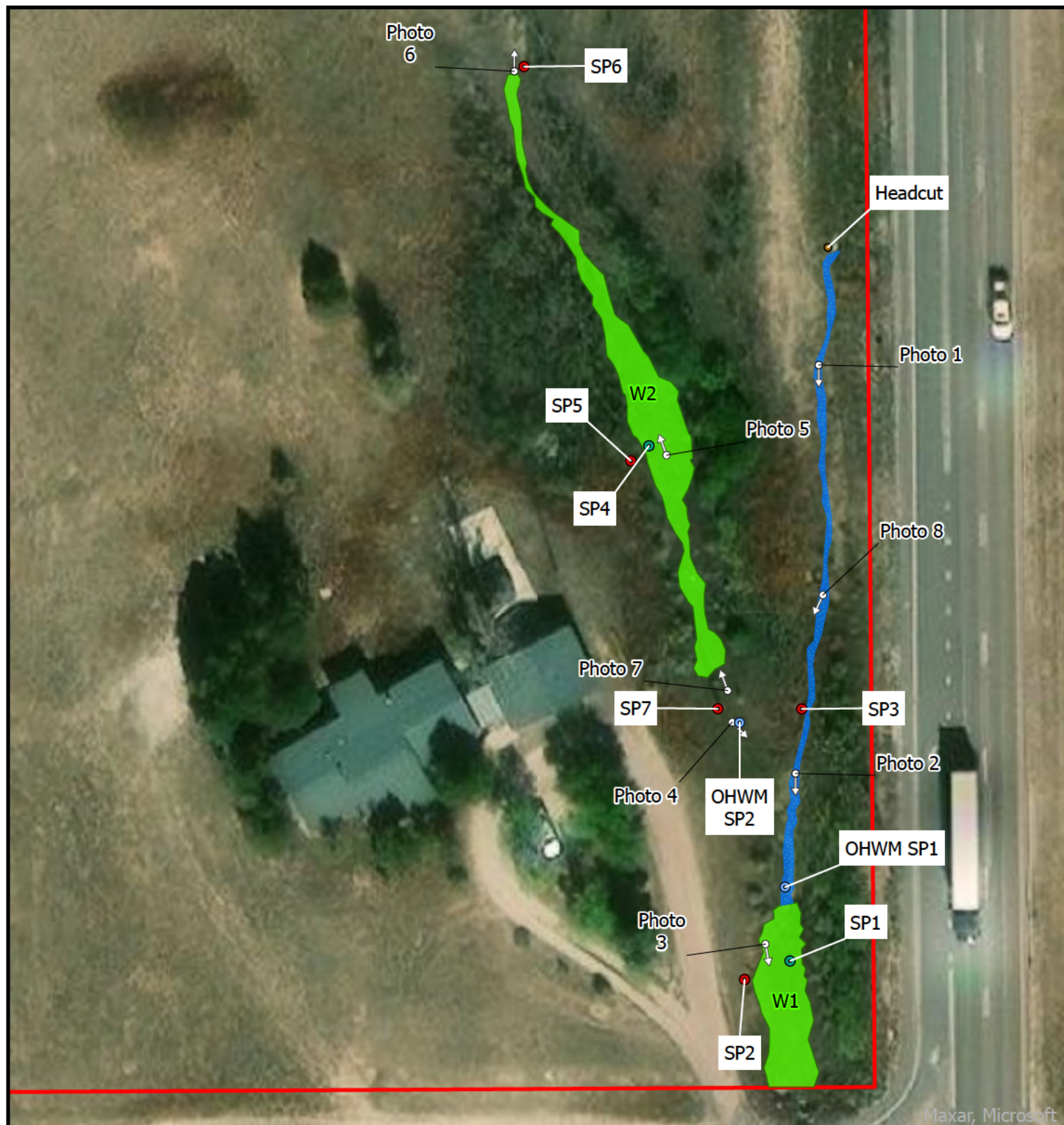


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Filing No. 1A

Wetland Location Overview





- OHWM
- Wetlands
- Project Area
- Headcut
- OHWM Point
- Upland Point
- Wetland Point
- Photo Point



0 50 100
Feet

1:550

Filing No. 1A

Wetland Location Detail

