



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

SPA-RDW

June 5, 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-2022-00474]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. **Wetlands A, B, C, D, and E are not jurisdictional, no surface connection to relatively permanent stream.**

<u>Wetlands</u>	<u>Area</u>	<u>Jurisdictional</u>
Wetland A	421 square feet	No- lack of connection to relatively permanent stream.
Wetland B	184 square feet	No- lack of connection to relatively permanent stream.
Wetland C	441 square feet	No- lack of connection to relatively permanent stream.
Wetland D	3,787 square feet	No- lack of connection to relatively permanent stream.
Wetland E	6,022 square feet	No- lack of connection to relatively permanent stream.

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. (2023)

3. REVIEW AREA.

The review area is 2.45 acres, latitude 40.059937° and longitude -105.926184° at the center of the review area, approximately 1.5 south of the Town of Granby, Grand County, Colorado, as shown on *Figure 1. Project Location Map Granby Ranch South Entry Parcel*, dated November 2022. No previous

jurisdictional determinations have been made for aquatic resources within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The Colorado River is the nearest downstream interstate water at its confluence with the Roaring Fork River. This is where the Colorado River becomes the same Strahler Stream Order as it is when it crosses the Colorado-Utah State boundary.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

Any potential flows within the review area would be conveyed in a general northeast direction, where they would enter a culvert under Village Road. Any flows would then be collected in a wetland depression that has no outlet or potential discrete conveyance path to the Fraser River (perennial tributary of the Colorado River).

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: N/A. No aquatic resources within the review area were found to be jurisdictional waters.

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.

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.

- 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.
- e. Impoundments (a)(2): N/A.
- f. Tributaries (a)(3): N/A.
- g. Adjacent Wetlands (a)(4): N/A.
- h. 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
- 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).

Wetlands A, B, C, D, and E are all connected to each other by swales, discrete conveyance paths, and/or shallow subsurface flows. Connections between the wetlands are generally sloped towards the northeast, where Wetland A connects to a culvert that transports any surface water north, under Village Road. That culvert transports any surface hydrology northward to a depression located outside of the review area. That depression exhibits no outlet or discrete conveyance path to the Fraser River. That same depression also receives flows from another culvert that would convey any flows from east to west, along the northside of Village Road. No culverts are present that have the potential to convey flows

⁹ 88 FR 3004 (January 18, 2023)

eastward towards the Fraser River but there is an abandoned culvert located west of Wetland A that indicates the site has been previously disturbed.

Given the flat nature of the review area, further investigation of other potential continuous surface connections in other directions was needed, including a potential discrete conveyance path along the southeast corner of the review area and any potential conveyance paths in the agricultural field located south of the review area.

The potential discrete conveyance path in the southeast corner of the review area is comprised of uplands for approximately 300 linear feet before it connects with a culvert that would transport any surface hydrology under a residential road that provides access to The Reserve development. This conveyance feature is not connected to any wetlands in the review area due to being separated by uplands that are approximately 3 feet higher in elevation than Wetlands D and E (nearest wetlands). This potential conveyance feature also has no indicators of surface flows or prolonged saturation. This potential conveyance feature is man-made and does not serve as a potential connection between wetland E and the Fraser River due to site topography.

A discrete conveyance path in the agricultural field located south of the review area was also identified and investigated, as it could provide a connection to a mosaic of wetlands located to the east of the agricultural field. Aerial imagery taken on 09/07/2010, at the end of the growing season, was useful for this review because it distinguished between lower-lying green areas that could serve as discrete conveyance paths and surrounding drier areas. This aerial imagery shows a potential for a conveyance path from wetlands on the northwestern corner of the field that heads west towards the culvert under Highway 40. This conveyance path is outside of the review area but within the same drainage basin as the review area and thus would only serve to provide a conveyance path from any wetlands in the northwest corner of the field to the review area. Therefore, it would not serve to connect the wetlands in the review area to the wetland mosaic located east of the agricultural field. The northeast corner of the agricultural field may also include wetlands that could serve as conveyance paths. However, there are no discrete features that would serve to connect the review area to any wetlands in the northeast corner of the agricultural field. Therefore, we have concluded that any flows in the review area can only flow northward, under Village Road, where they enter a closed depression that does not connect to a relatively permanent water.

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The basin that contributes potential flows to the review area is estimated to be 0.10 square miles and any upstream surface hydrology is conveyed to the review area from a culvert under State Highway 40. The basin experiences prolonged winter snowpack and snowmelt is the primary source of natural hydrology in the review area. The basin may also receive return flows from irrigation ditches associated with agricultural fields on both the east and west sides of the State Highway 40.

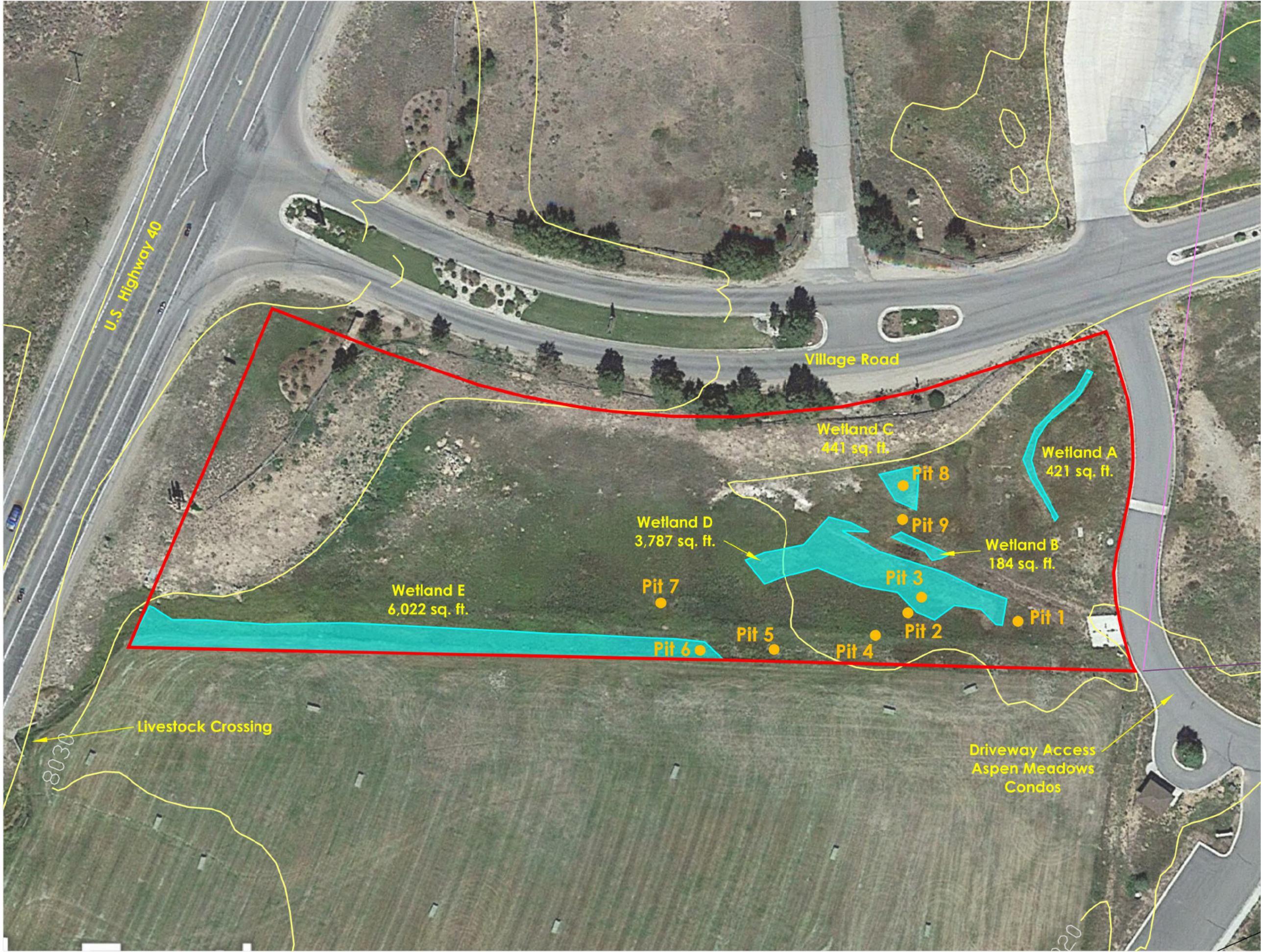
All wetlands within the review area are connected to each other via discrete conveyance paths or subsurface flows and each has been found to not be jurisdictional due to a lack of continuous surface connection to a relatively permanent water which has a flow path to an (a)(1) water. Specifically, Wetlands A, B, C, D, and E are located on a discrete conveyance flow path that terminates in a depression with no connection or association with the Fraser River (the nearest downstream relatively permanent water). Therefore, none of the wetlands within the review are jurisdictional features.

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. November 2022, Delineation Report prepared by Birch Ecology.
 - b. April 4, 2024, Delineation Map with Corps Edits.
 - c. April 30, 2024, U.S. Geological Survey StreamStats Report.
 - d. April 30, 2023, Google Earth Imagery and Street Views Compiled Images.

10. OTHER SUPPORTING INFORMATION.

In conclusion, all wetlands identified within the review area are not jurisdictional features due to a lack of surface connection to a water of the United States.

FIGURE 3. WETLAND MAP
SOUTH ENTRY PARCEL
GRANBY RANCH



LEGEND:

- Wetlands
- Existing Contours
- Boundary of Delineation
- Pit 1 Soil Pits



Date: October 2022
Contour Interval: 10 ft
Scale: 1 in = 60 ft

Wetland flagging was surveyed by Four Points Surveying and Engineering of Steamboat Springs, CO.