



Environmental and Animal Defense

P | (720) 722 - 0336  
E | [business@eadefense.org](mailto:business@eadefense.org)  
W | [www.eadefense.org](http://www.eadefense.org)

## EL PASO COUNTY PLANNING COMISSION RESPONSE AND COMMENT TO PROPOSED PUDSP

November 4, 2019

Submitted via Electronic Mail to [kari.parsons@elpasoco.com](mailto:kari.parsons@elpasoco.com)

Dear Planning Commissioners and Staff of El Paso County,

We are a Colorado-based nonprofit that focuses on environmental conservation and protecting animals. We have been reviewing the the impacts of the Forest Lakes project and have previously commented and spoken at hearings before this Commission and the Board of County Commissioners.

We submitted comments to this Commission detailing reasons that should have precluded approval of the Forest Lakes Phase 2 amended project proposal by the Planning Commission, including violations of federal law. Nevertheless, this Commission approved the amended proposal, which was subsequently approved by the Board of County Commissioners.

For the reasons set forth below, we ask this Commission to reject any application by applicant for pre-development grading or construction activities that results in ground disturbances prior to applicant's full compliance and consultation with federal and/or state agencies concerning the Endangered Species Act and Clean Water Act permitting for the project.

### Summary of Issues

#### **The Application DOES NOT meet the PUD Zoning District Requirements**

The Land Development Code of El Paso County requires that, among other factors:

- The proposed development is in compliance with the requirements of this Code and all applicable statutory provisions and will not otherwise be detrimental to the health, safety, or welfare of the present or future inhabitants of El Paso County;



*See Section 4.2.6 and Section 7.2.1 of the El Paso County Land Development Code (2019).*

The application does not comply with all applicable statutory provisions, namely, the Endangered Species Act and the Clean Water Act, and so, for the reasons detailed below, this Commission should not approve any application that requests approval for grading or other construction.

## **Discussion**

### *Endangered Species Act*

There are as many as four species impacted by this development protected by the Endangered Species Act (hereinafter “ESA”): the Preble’s Meadow Jumping Mouse, the Greenback Cutthroat Trout, the Mexican Spotted Owl, and the Ute Ladies'-Tresses.

The Endangered Species Act was enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>1</sup> An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range.”<sup>2</sup> A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>3</sup> Concurrent with a designation of threatened or endangered, the Secretary of the Interior then has the authority to designate critical habitat for a species.<sup>4</sup> Endangered and threatened species are not allowed for “take,” which is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>5</sup> Furthermore, each federal agency has the duty to consult with either the United States Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service to ensure that “any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the” critical destruction or adverse modification of habitat without an exemption, otherwise known as a Section 7 consultation.<sup>6</sup> Finally, there is a provision for citizen suits to uphold the integrity of the Act.<sup>7</sup>

---

<sup>1</sup> 16 U.S.C. § 1531.

<sup>2</sup> 16 U.S.C. § 1532.

<sup>3</sup> 16 U.S.C. § 1532.

<sup>4</sup> 16 U.S.C. § 1533.

<sup>5</sup> 16 U.S.C. § 1532.

<sup>6</sup> 16 U.S.C. § 1536.

<sup>7</sup> 16 U.S.C. § 1540.

### *Preble's Meadow Jumping Mouse*

As of July 10, 2018, FWS, relying upon documentation provided by Classic Homes' consultants, stated that, “[b]ased on the information you [Classic Homes] provided and FWS’ understanding of the project, local conditions, and current information, we agree with your determination that ‘take’ of the Preble’s meadow jumping mouse, which is protected under the Endangered Species Act as amended (16 USC 1531 et seq.), from the project is not reasonably certain to occur because all proposed development will be located more than 300 feet from the 100-year floodplain.” As of December 17, 2018, FWS has refused to comment on any updated plan proposal.



*Figure 1 - Preble's Meadow Jumping Mouse (U.S. Fish and Wildlife Service)*

There is significant cause for concern given the circumstances surrounding the Preble's Meadow Jumping Mouse, including the concern that any communication between Classic Homes and FWS was inadequate in the FWS's review of the information at stake.

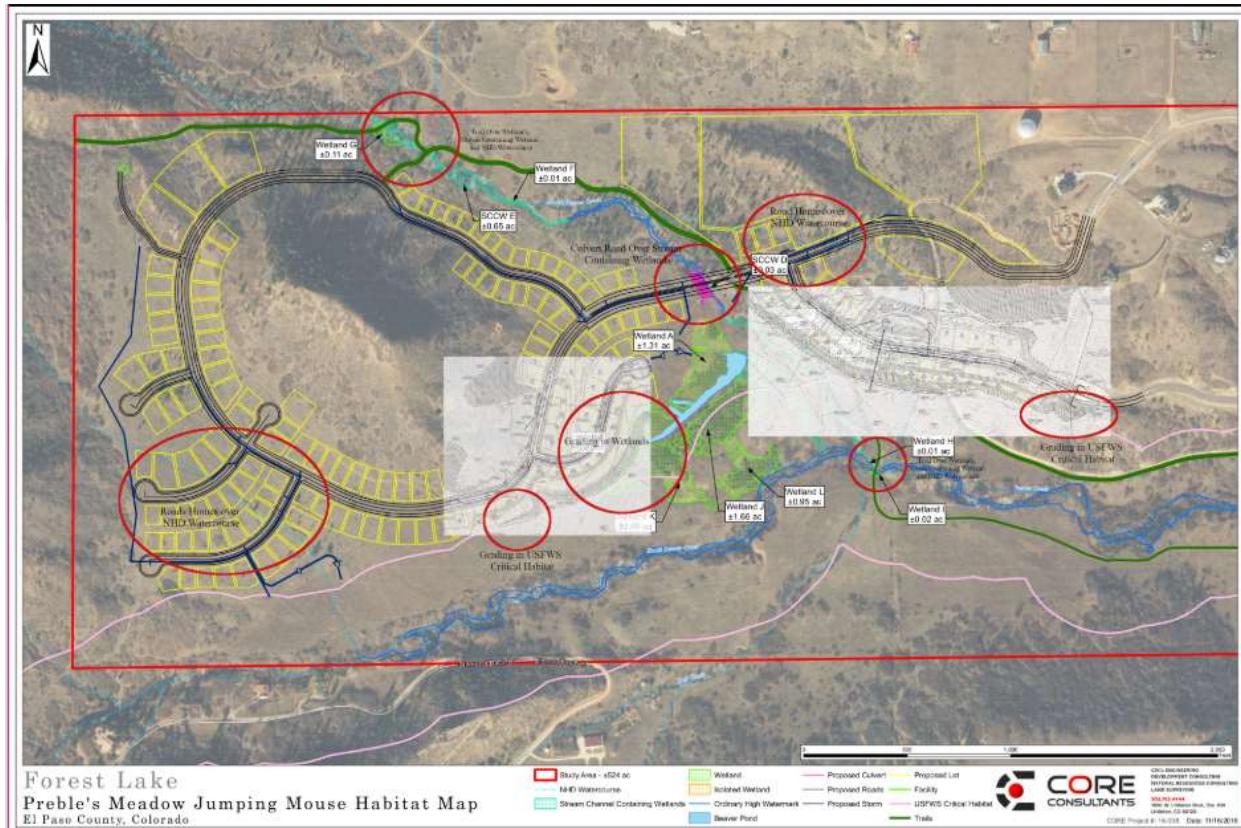
However, no species has undergone a formal Section 7 consultation. The only review of the environmental impacts of the project from the federal government are two letters from the FWS where one opining on the possibility of adverse effects within the critical habitat and possibility for “take” based upon the documents provided by Classic Homes.

As detailed in our previous comment letters, the Phase 2 of the Forest Lakes Development will undoubtably adversely impact the Preble's Meadow Jumping Mouse, its habitat, and will jeopardize the viability of this federally protected species.

The harm to the species starts at the first ground disturbance, including pre-construction activities such as grading.

## *Grading*

The applicant's current planning documents still show planned grading into the critical habitat zone, which was unreferenced by the applicant and FWS clearance letters. We pointed out that applicant's plans showed grading into the critical habitat in our previous comment letter.



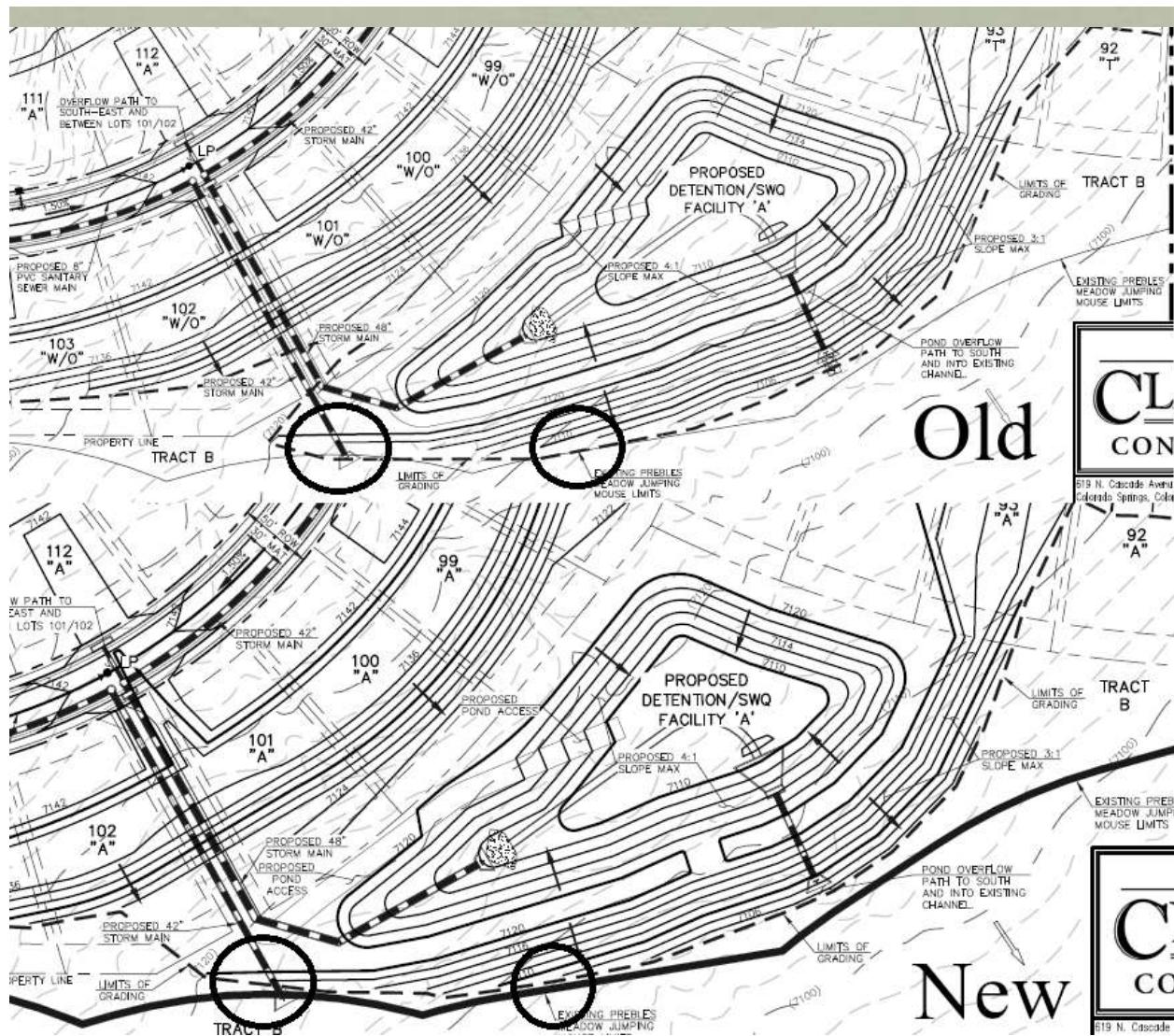
*Figure 2 - ESA and CWA Concerns - Larger version attached*

We provided the map overlay marked as Figure 2 that showed there were several points in which proposed grading will cut into the Preble's Meadow Jumping Mouse critical habitat zone. We stated the proximity of homes to the critical habitat boundary presumably created the necessity of grading into the critical habitat zone.

Despite applicant's own documents showing otherwise, applicant still stated during public hearings that there was no planned grading into critical habitat.

Applicant has since revised their grading lines in their current submission to remove these grading lines from the critical habitat zone. Applicant's plans now also omit grading lines that were present in the original application by simply cutting off the line where grading would seemingly, by necessity of the plan, extend into the critical habitat area.

Page 5 of 10  
**Environmental and Animal Defense**



*Figure 2 – Comparison of PUD Changes from PUDSP-18-001 to PUDSP-19-006 Minor Amendment*

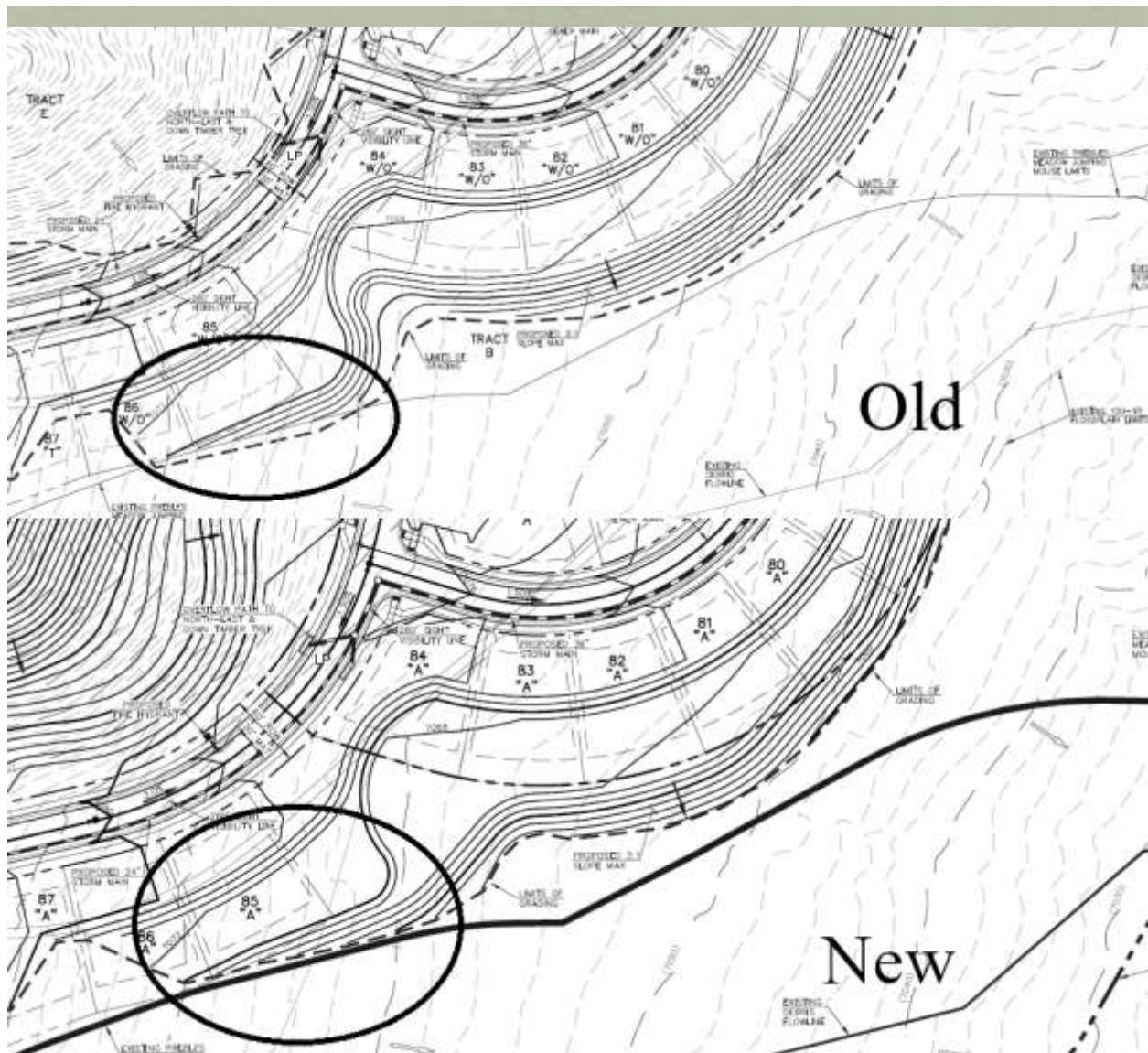


Figure 4 – Comparison of PUD Changes from PUDSP-18-001 to PUDSP-19-006 Minor Amendment

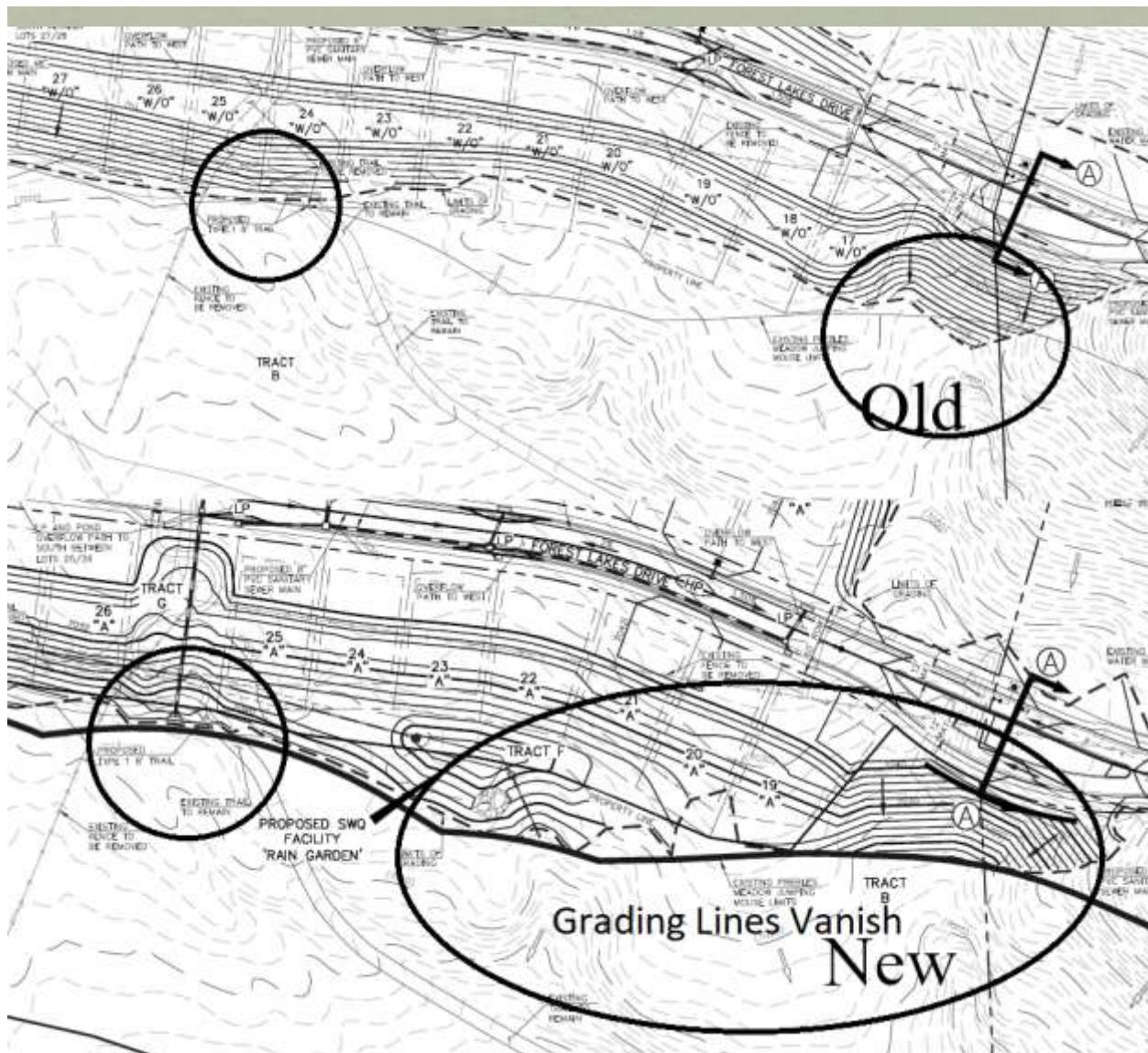


Figure 5 – Comparison of PUD Changes from PUDSP-18-001 to PUDSP-19-006 Minor Amendment

Applicant implicitly acknowledges misrepresenting their plans to this commission in previous hearings by correcting or omitting the grading lines in their current submission.

Nevertheless, the impacts from construction grading are not limited the physical disturbance of soil inside of critical habitat. Stormwater runoff caused by construction grading has its own adverse impact to downflow habitat even if grading ends before it enters the critical habitat area.

#### Clean Water Act

The Clean Water Act was implemented in order to “restore and *maintain* the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. 1251 (emphasis added). The Clean Water Act (“CWA”) regulates certain activities

affecting the nation's navigable waters. There is also a citizen suit provision of the CWA to further the purposes of the CWA.<sup>8</sup> New concerns have arisen in addition to our previously detailed Section 404 permitting concerns, which remain applicable in this instance for the planned bridge crossing over and affecting wetlands and waters of the United States.

Unless authorized by a CWA permit, stormwater runoff from construction activities constitutes actionable water pollution under the CWA because the sediment disturbed in construction will wash into waters due to rain and snow.<sup>9</sup> The U.S. Army Corps of Engineers (hereinafter "Corps") has the authority and *duty* to ensure that parties seeking to proceed under a nationwide permit meet the requirements for such action. One condition of a nationwide permit is that the discharge not destroy a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species.<sup>10</sup> The regulations thus are consistent with the Corps' obligation, under the Endangered Species Act, to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical."<sup>11</sup>

The Corps has not made any evaluation of the proposed Forest Lakes project. They have received no request for permits from the applicant and have not discussed with them in any way the proposed development. Despite any statement to the contrary by applicant, the only people that the Corps have interacted with concerning Forest Lakes project are the concerned citizens who have voiced their concerns about the projects impacts to the local environment. This information has been relayed to us by Tony Martinez, a listed Regulatory Project Manager for El Paso, Teller, Lincoln, Cheyenne, and Kiowa counties at the Albuquerque District Southern Colorado Regulatory Branch of the US Army Corps of Engineers.<sup>12</sup>

The CWA does not require major federal action before the Corps must consider environmental impacts. Rather, the Corps must consider the environmental impact of each act that it authorizes, both major and minor. In creating categories of nationwide permits, the Corps has "acted" to authorize discharges. Without evaluating the impacts of the project consistent with the requirements of the

---

<sup>8</sup> 33 U.S.C. 1365

<sup>9</sup> 40 C.F.R. § 122.26(a)(9)(i)(B), (b)(15)(i), (c)(1).

<sup>10</sup> 33 C.F.R. § 330.4(b)(2).

<sup>11</sup> 16 U.S.C. § 1536(a)(2).

<sup>12</sup> U.S. Army Corps of Engineers Southern Colorado Regulatory Branch website available at [https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/Southern-Colorado-Regulatory-Branch/fbclid/IwAR33uYqZ8Y0X2YE\\_gO8z07ea0tUUjsCfE9CpqIB-1bTv-iv0Xxw0ZF7nvY/](https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/Southern-Colorado-Regulatory-Branch/fbclid/IwAR33uYqZ8Y0X2YE_gO8z07ea0tUUjsCfE9CpqIB-1bTv-iv0Xxw0ZF7nvY/)

Endangered Species Act, any permit, even a standardized national permit or state agency permit through delegated authority, is in violation of the law. Thus, any statement by applicant that it doesn't need a permit or that it can proceed with grading with a permit that has not considered the impacts consistent with the requirements ESA in addition to the CWA is incorrect and would be in violation of the law.

Any argument by applicant that they meet the general requirements of a nationwide permit or delegated authority to the state of Colorado is insufficient. The Corps has a mandatory duty under law and still “acted” even by delegating authority if the environmental impacts are not considered. Both the CWA and ESA contain citizen suit provisions to force enforcement of these laws should the Corps or FWS fail to do so.

Therefore, permits for any construction activities, including grading, that generate stormwater runoff must be reviewed and approved by the Corps consistent with the Corps’ obligations under the Endangered Species Act and Clean Water Act.

Without first obtaining CWA lawful permits to engage in grading and construction activities, applicant’s proposal is not in compliance with all statutory provisions and the Planning Commission should reject any request by applicant to engage in any pre-development construction activities of any kind, including grading.

### **Conclusion**

This Commission should deny any request by applicant for pre-development grading, construction, or any ground disturbing activities before applicant secures the necessary permits that have been reviewed for impacts consistent with federal laws. Approval without them would be inconsistent with the PUD Zoning Restriction Requirements and contrary to the law.

Thank you for the opportunity to comment on this project proposal.

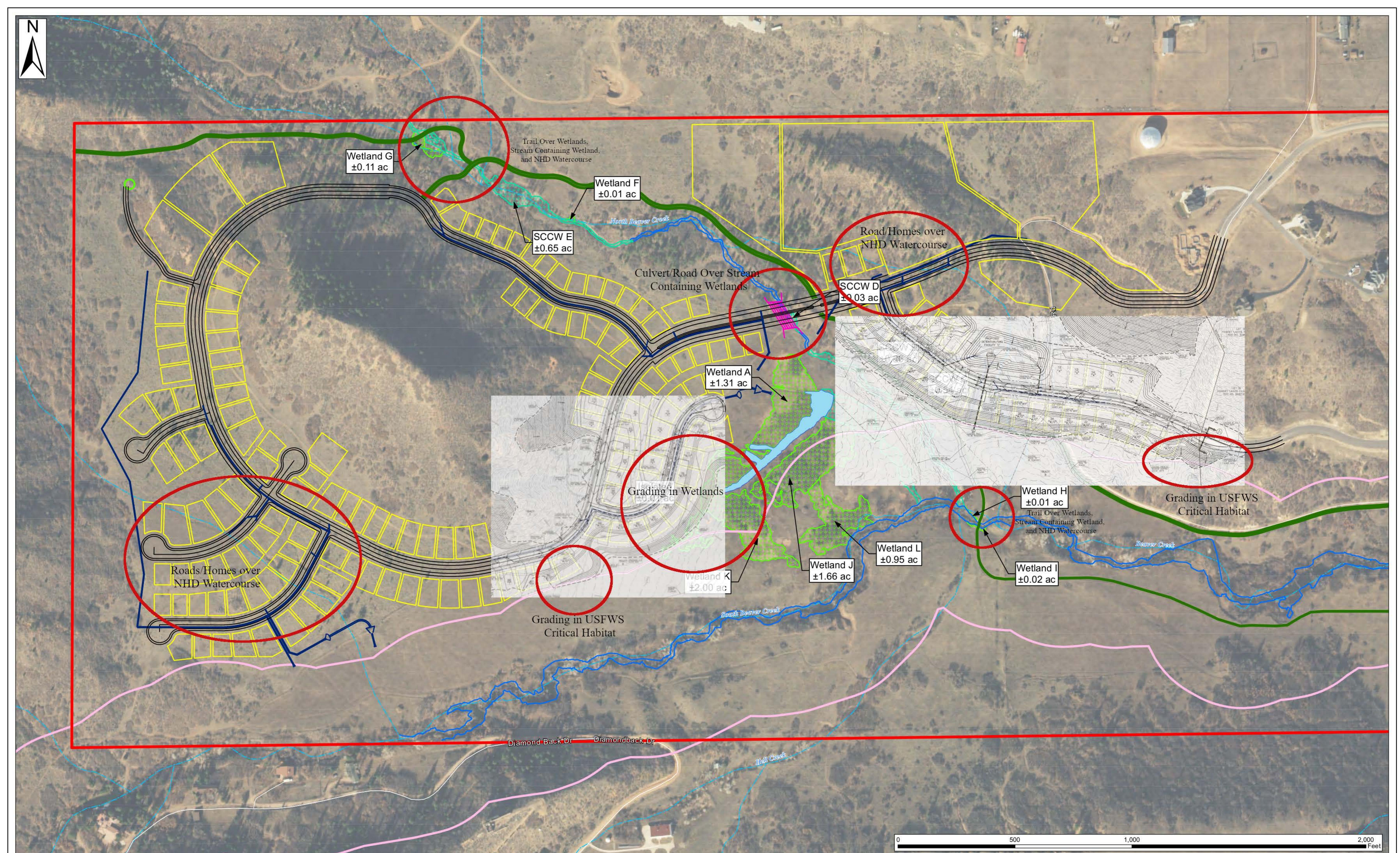
Sincerely,

Alexa Carreno, Esq.  
Environmental and Animal Defense  
501 S. Cherry St, Ste 1100  
Denver, CO 80246

Jeremy McKay, Esq.  
Environmental and Animal Defense  
501 S. Cherry St, Ste 1100  
Denver, CO 80246

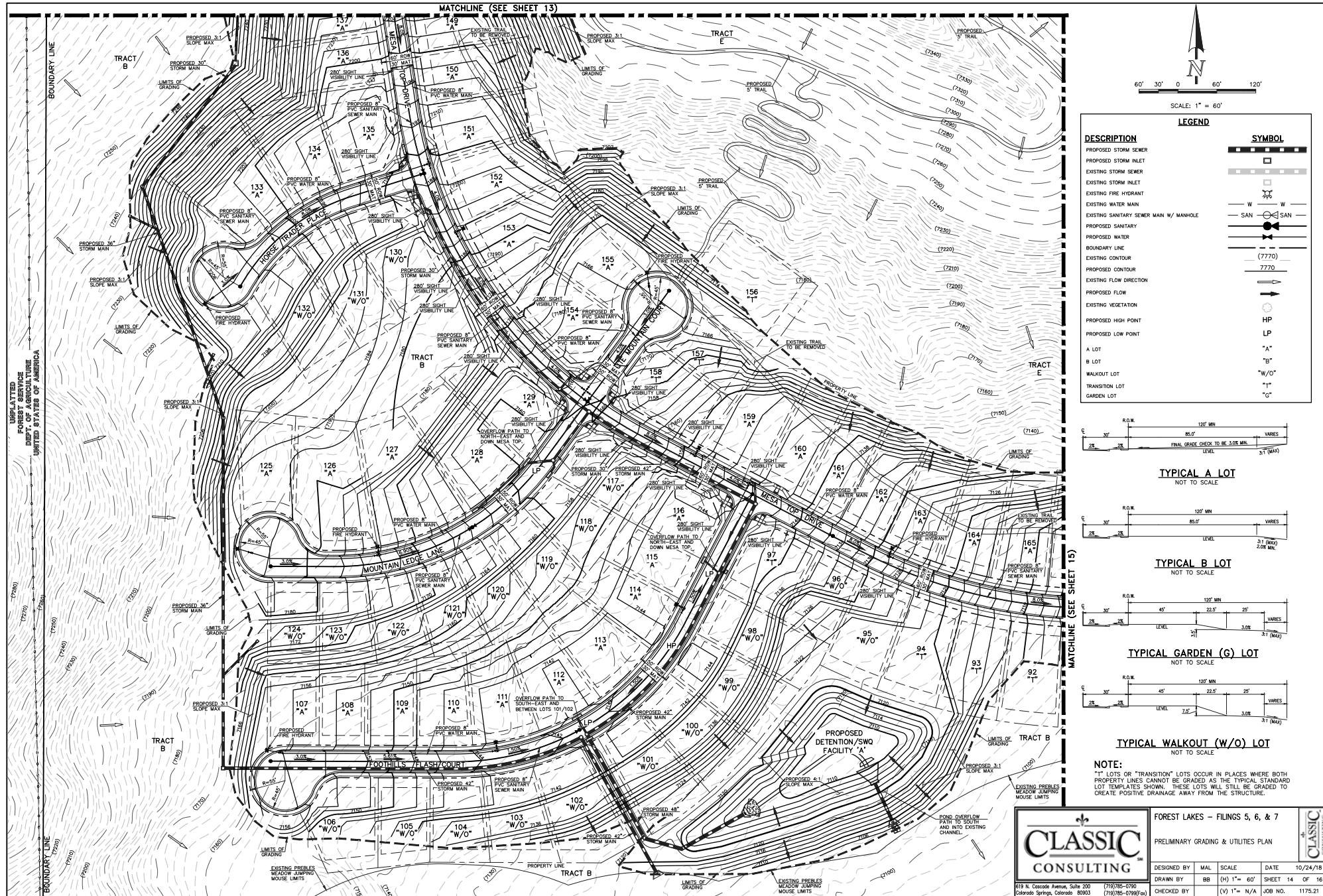
Attached Documents:

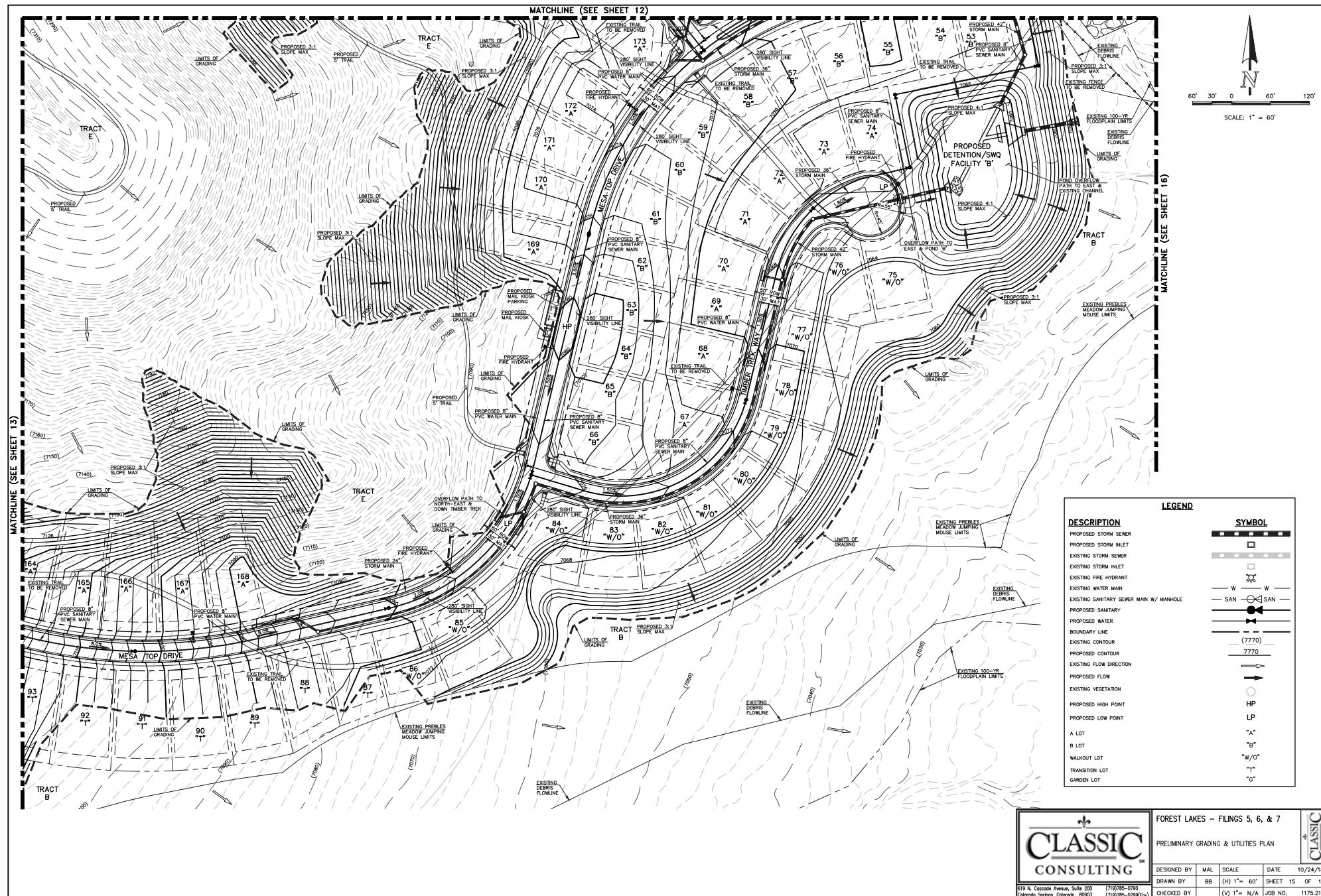
1. ESA and CWA Concerns Full Sized Version referenced in Figure 2
2. Pages 14-16 of PUDSP-18-001 PUD Development Plan used to generate Comparison of PUD Changes in Figures 3-5
3. Pages 50-52 of PUDSP-19-006 Minor Amendment Agenda Packet used to generate Comparison of PUD Changes in Figures 3-5



Forest Lake  
Preble's Meadow Jumping Mouse Habitat Map  
El Paso County, Colorado

- Study Area - ±524 ac      Wetland      Proposed Culvert  
NHD Watercourse      Isolated Wetland      Proposed Lot  
Stream Channel Containing Wetlands      Ordinary High Watermark      Facility  
Proposed Roads      Proposed Storm      USFWS Critical Habitat  
Beaver Pond      Trails
- CIVIL ENGINEERING  
DEVELOPMENT CONSULTING  
NATURAL RESOURCES CONSULTING  
LAND SURVEYING
- CORE**  
CONSULTANTS
- 303.703.4444  
1950 W. Littleton Blvd., Ste. 109  
Littleton, CO 80120
- CORE Project #: 16-038 Date: 11/16/2018





**FOREST LAKES – FILINGS 5, 6, & 7**

## **PRELIMINARY GRADING & UTILITIES PLA**

DESIGNED BY MAL SCALE DATE 10/24/18

DRAWN BY BB (H) 1"= 60' SHEET 15 OF 16

CHECKED BY (V) 1"= N/A JOB NO. 1175.21

