

Memorandum

To: El Paso County
From:
Date: June 16, 2023
Project: U-Haul Falcon
Subject: Wetlands and Army Corps of Engineers

Following is text from the Ecologist (Dan Maynard – Bristlecone Ecology) regarding the wetlands on the property and the Army Corps of Engineers review.

Based on the SCOTUS ruling in the Sackett vs. Environmental Protection Agency case, the EPA has issued the following statement regarding the definition of Waters of the United States and the regulatory status of the so-called Sackett-gap wetlands:

The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) are in receipt of the U.S. Supreme Court's May 25, 2023, decision in the case of Sackett v. Environmental Protection Agency. In light of this decision, the agencies will interpret the phrase "waters of the United States" consistent with the Supreme Court's decision in Sackett.

In accordance with the ruling, wetlands that do not possess a "surface water connection" to downstream Waters of the United States are no longer under U.S. Army Corps of Engineers and EPA jurisdiction and are therefore not federally regulated. Since the wetlands on the site are not hydrologically connected by a surface water connection to downstream Waters of the United States, they are not jurisdictional under the ruling.

Correspondence with the Corps regarding the site and determination is included at the end of this Memo.

For reference, following is a summary of the information provided to the Corps prior to the SCOTUS ruling, as part of the Request for Approved Jurisdictional Determination.

- The wetlands on the site are fed primarily by stormwater from upstream developments. Prior to the installation of the culvert under Rolling Thunder Way, the site did not receive sufficient hydrology for the formation of wetlands and was composed entirely of uplands.
- The wetlands on the site do not abut any downstream Waters of the U.S. and are therefore not under the jurisdiction of the U.S. Army Corps of Engineers. A permit is not required to disturb wetlands that are not jurisdictional.
- The wetlands on the site are not hydrologically connected to other wetlands or Waters of the U.S., and are contained within a very small drainage basin. They do not have the capacity to provide valuable functions such as sediment trapping or pollutant filtration, and do not possess a significant physical nexus to other aquatic resources.
- The wetlands on the site are primarily composed of non-obligate wetland plants, and their potential to absorb pollutants and provide nutrient cycling is therefore minimal. Since they are disconnected, they cannot provide benefits to downstream foodwebs, and thus do not provide significant chemical functions within the greater environment.
- The wetlands on the site are not particularly diverse, and composed largely of non-obligate plants that exist as much in uplands as they do in wetlands, and they do not provide

significant valuable habitat for birds, mammals, amphibians, or other animals. Site visits in September 2022 and April 2023 did not observe wildlife utilizing the wetlands. These site visits did, however, observe birds, mammals, and amphibians utilizing the wetlands in the drainage to the west of the site. Overall, the composition of flora and fauna in the wetlands is not significantly different than the surrounding grasslands in the region.

Following is the contact information for the project ecologist.



Dan Maynard
Owner / Ecologist
Bristlecone Ecology, LLC
2023 W Scott Place
Denver, CO 80211
M 971.237.3906

Matt Erichsen

From: Jashinsky, Kraig A CIV USARMY CESP (USA) <Kraig.A.Jashinsky@usace.army.mil>
Sent: Wednesday, May 31, 2023 3:25 PM
To: dmaynard@bristleconeecology.com
Cc: 'Nicole Hosking'; Matt Erichsen
Subject: RE: [Non-DoD Source] RE: SPA-2022-00451 - U-Haul at Falcon AJD

Hey Dan,

We have been reviewing your AJD and have been actively working on it under the current rule. However, in light of the Sackett II SCOTUS decision, we are awaiting guidance from EPA, DA, and USACE HQ on implementation, as you had implied. I have heard that we should be seeing some form of guidance here soon, and I will update you with a timeline as soon as I have more information on how to proceed. I will forward you information, when it becomes available, to clarify how the decision will affect this specific AJD and AJD's in general. I understand that this may be tough news to hear, but please know that we are actively working on the AJD and intend to get it out to you as soon as we can.

If you have any additional questions, feel free to reach out at any time.

Thanks,

Kraig Jashinsky
Regulatory Project Manager
Albuquerque District - Southern Colorado Branch
US Army Corps of Engineers
(719) 439-7281

From: dmaynard@bristleconeecology.com <dmaynard@bristleconeecology.com>
Sent: Tuesday, May 30, 2023 10:05 AM
To: Jashinsky, Kraig A CIV USARMY CESP (USA) <Kraig.A.Jashinsky@usace.army.mil>
Cc: 'Nicole Hosking' <Nicole_Hosking@uhaul.com>; 'Matt Erichsen' <merichsen@kiowaengineering.com>; Hellige, Kara A CIV USARMY CESP (USA) <Kara.A.Hellige@usace.army.mil>
Subject: [Non-DoD Source] RE: SPA-2022-00451 - U-Haul at Falcon AJD

Good morning Kraig,

We are writing to check in on the status of the U-Haul at Falcon AJD request we submitted on March 31st to your office following your request for additional info. We have not yet received a response that this request was received. We are also asking for clarification on the processing of AJDs in light of last week's SCOTUS ruling. Since this project was to be under review for a significant nexus evaluation, a standard that no longer applies, we want to understand how the Corps will process AJD requests in general and for this project (which lacks abutting wetlands) specifically.

We understand that guidance from USACE HQ may be forthcoming, and your office may be awaiting instructions. We also understand the Corps has a lot on its plate just now. We hope there will be some interim guidance for how the Corps intends to handle AJDs involving the "Sackett gap waters", including the wetlands on the U-Haul site, and that you can advise us how to proceed from a regulatory perspective.

We appreciate your response,

Dan



Dan Maynard
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From: dmaynard@bristleconeecology.com <dmaynard@bristleconeecology.com>
Sent: Thursday, April 20, 2023 11:33 AM
To: 'Jashinsky, Kraig A CIV USARMY CESPA (USA)' <Kraig.A.Jashinsky@usace.army.mil>
Cc: 'Nicole Hosking' <Nicole_Hosking@uhaul.com>; 'Matt Erichsen' <merichsen@kiowaengineering.com>
Subject: RE: SPA-2022-00451 - U-Haul at Falcon AJD

Hi Kraig,

Just reaching out about the U-Haul at Falcon project. Have you had a chance to review the resubmitted AJD request? Just want to make sure you have everything you need.

Thanks,
Dan



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From: dmaynard@bristleconeecology.com <dmaynard@bristleconeecology.com>
Sent: Friday, March 31, 2023 4:37 PM
To: 'Jashinsky, Kraig A CIV USARMY CESPA (USA)' <Kraig.A.Jashinsky@usace.army.mil>; SPA-RD-CO <SPA-RD-CO@usace.army.mil>
Cc: 'Nicole Hosking' <Nicole_Hosking@uhaul.com>; 'Matt Erichsen' <merichsen@kiowaengineering.com>
Subject: RE: SPA-2022-00451 - U-Haul at Falcon AJD

Good afternoon Kraig,

We have revised our AJD request for the U-Haul at Falcon project based on our conversation a couple weeks ago and the Corps' request for additional info on the site. Please see attached. Additional sampling, including a delineation for Problematic Wetlands, as well as data supporting a significant nexus analysis are included in the request.

Please let us know if you have any questions or require more info. Since the original request was administratively withdrawn, I'm resubmitting through the general mailbox but assuming this one will go to you.

Thanks,
Dan



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From: Jashinsky, Kraig A CIV USARMY CESPA (USA) <Kraig.A.Jashinsky@usace.army.mil>
Sent: Monday, March 20, 2023 3:37 PM
To: Daniel Maynard <dmaynard@bristleconeecology.com>
Subject: SPA-2022-00451 - U-Haul at Falcon AJD

Hey Dan,

I believe I sent this document attached to an email back on January 9th, but am sending it again. Both of the wetlands on the project site will likely need to be treated as wetlands needing additional information for a significant nexus determination. Information to include can be found under Section 3 "Additional information for applicable features" under "For wetland, pond, or lake features".

There is additional guidance in the Great Plains Regional Supplement for considering these as Problematic Wetlands under section 5.

If you have any additional questions on what you need to submit, feel free to reach out at any time.

Thanks,

Kraig Jashinsky
Regulatory Specialist
Albuquerque District - Southern Colorado Branch
US Army Corps of Engineers
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