



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
SOUTHERN COLORADO REGULATORY BRANCH
201 WEST 8TH STREET, SUITE 350
PUEBLO, COLORADO 81003-3040

September 16, 2022

MEMORANDUM FOR RECORD

SUBJECT: Supplemental Decision Document – Sterling Ranch Residential Development Project (Action No. SPA-2015-00428)

1. **Project Name:** Sterling Ranch Residential Development (Project)

2. **Applicant name and address:**

Elite Properties of America, Inc. dba: Classic Companies
Attn: Loren J. Moreland, Vice President/Project Manager
2138 Flying Horse Club Drive
Colorado Springs, CO 80921

3. **Project Location:** The approximately 1,443.7-acre project site is located along Sand Creek in the City of Colorado Springs, El Paso County, Colorado. The approximate center coordinates for the project are Latitude 38.964986°, Longitude -104.664928°.

4. **Project description, background, and modification request:**

4.1. **Original project description.** As stated in the Department of the Army (DA) permit dated February 29, 2016, the Sterling Ranch Residential Development Project includes installation of attendant utilities, channel improvements to the main stem of Sand Creek, three off-line stormwater detention ponds, development of two permanent residential access roads and associated culverts, and development of residential units. Permanent impacts to waters of the United States (WOTUS) will result from construction of the residential access roads and associated culverts, and construction of residential units in the unnamed western tributary to Sand Creek. Total cumulative permanent impacts from the discharge of fill material into WOTUS from the proposed project will total 4.21 acres and 5,048 linear feet within the main channel of Sand Creek and its western tributary. The project will be constructed in accordance with the attached drawings, entitled, "Sterling Ranch Wetland Impact Location Map, Sterling Ranch Sketch Plan figure number 8, and Sterling Ranch Channel Improvements & Mitigation Plan sheets 1 through 3 dated October 13, 2015, in Sand Creek, El Paso County, Colorado, Application by Jim Morley, Application No. SPA-2015-00428-SCO".

4.2. **Background.** On August 5, 2020, the permittee requested a permit modification from the U.S. Army Corps of Engineers (Corps) for the Project. The stated need for the modifications were to provide additional attendant features (access and utility) that were unintentionally omitted from the original permit, address changes in stormwater drainage requirements, and provide additional time to complete the construction. The requested modification specifically included: (1) modification of General Condition 1 to extend the time limit for completing the construction; (2) realignment and reshaping of approximately 7,900 linear feet of Sand Creek stream channel for the construction of a low flow channel; (3) bank armoring and grade control for stream bank stabilization; and (4) construction of a

utility line and two road crossings in Sand Creek that had been constructed without authorization.

The Corps reviewed the proposed changes and determined: (1) the stream channel realignment/reshaping, bank armoring, and grade control (items 3 and 4 above) were not minor changes and, therefore, would require a new public notice; and (2) a stream condition assessment would be required to document whether these activities would result in the loss of stream functions.

In response to the Corps' request for a stream condition assessment, the permittee applied the Colorado Stream Quantification Tool (CSQT) and found the proposed stream work (items 2 and 3 above) would result in the loss of approximately 2,664.2 stream functional feet (FF). The permittee redesigned the project to reduce the impacts, reapplied the CSQT, and found the proposed stream work, as revised, would result in the loss of approximately 1,046.6 FF. Due to the amount of compensatory mitigation that would be required for the proposed stream stabilization activities and after extensive consultation with the El Paso County, the permittee reassessed the need to develop the areas east of Sand Creek in order to accomplish the overall purpose of the project and determined the construction in these areas, as originally proposed, was no longer feasible given the new constraints. The permittee modified the project to remove construction east of Sand Creek from the project design, thereby eliminating the need for additional stormwater management facilities in the stream.

During the review of the requested changes, the Corps determined the work that had been conducted in Sand Creek for the utility line and two road crossings (item 4 above) were not part of the permitted design and involved the discharge of dredged/fill material into WOTUS. Therefore, these activities constituted a violation of Section 301(a) of the Clean Water Act (CWA) since a DA permit was not obtained pursuant to CWA Section 404. Furthermore, the Corps determined the permitted work was not in compliance with the terms and conditions of the permit since the approved mitigation plan was implemented concurrently with the construction of the project in accordance with Special Condition 1, which stated:

1. The permittee shall implement and abide by the compensatory mitigation plan titled Conceptual Mitigation Plan for Sterling Ranch Residential Development, prepared by CORE Consultants, Inc. on October 29, 2015, except where changes are necessary to comply with special conditions below. The permittee shall implement the mitigation plan concurrently with the construction of the project and complete the initial construction and plantings associated with the mitigation work prior to EITHER the initiation of operations OR completion of construction of the project. Completion of all elements of this mitigation plan is a requirement of this permit.

On September 28, 2021, the Corps issued a notice of violation and permit non-compliance and requested additional information to determine the appropriate course of action to resolve these matters.

On October 5, 2021, the permittee submitted the requested information.

On October 20, 2021, the Corps sent an email informing the permittee of its decision to resolve the violation and non-compliance matters by modifying the permit in accordance with 33 CFR 325.7(b).

On November 19, 2021, the permittee submitted a signed tolling agreement to conclude the enforcement procedures and initiate the after-the-fact (ATF) permitting process, along with a revised mitigation plan.

Between February 1 and August 25, 2022, the permittee made multiple revisions to the mitigation plan, and on September 2, 2022, the Corps determined the final revised mitigation plan was acceptable.

- 4.3. **Modified project description.** The Sterling Ranch Residential Development Project (Project) includes the construction of residential units and attendant utilities, channel improvements to the main stem of Sand Creek, off-line stormwater detention ponds, and the development of two permanent residential access roads and associated culverts. The Project will result in a total of 1.41 acres of impacts to waters of the United States (WOTUS) along Sand Creek, of which 0.47 acre will be temporary and 0.94 acre will be permanent. Additionally, the Project will include the construction of 5.96 acres of riparian wetland restoration and enhancement along Sand Creek to provide compensatory mitigation for the loss of aquatic resource functions resulting from the impacts.

The project will be constructed in accordance with the November 19, 2021, Revised Compensatory Mitigation Plan (Mitigation Plan), prepared by Bristlecone Ecology (enclosure 1) and Sterling Ranch Wetland Impact Location Map Markup (enclosure 2).

Tables 1 and 2 (enclosure 3) provide a list of the aquatic resources that will be impacted by the Project, as compared to the original authorization, and the riparian wetland restoration and enhancement that will serve as compensatory mitigation along Sand Creek.

5. **Authority:** Section 404
6. **Environmental Assessment, Statement of Findings, public interest review, and Section 404(b)(1) Guidelines analysis.** On February 18, 2016, the Corps issued a decision document that contained an Environmental Assessment, Statement of Findings, public interest review, and Section 404(b)(1) Guidelines analysis for the original permitted activity. This supplemental documentation is being prepared to address the individual and cumulative effect of the proposed permit modification on local resources. The District Engineer will impose, as necessary, additional conditions on the proposed permit modification or exercise discretionary authority to address locally important factors relating to the public interest, including any potential adverse effects on the human environment, and to ensure that the authorized activity results in no more than minimal individual and cumulative adverse effects on the environment.
7. **Other federal, state, and local authorizations obtained, required, and/or pending:**

- 7.1. **Endangered Species Act (ESA).** On January 25, 2016, the Corps determined the project was located within the USFWS block clearance for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*). In reviewing the requested permit modifications, the Corps reassessed the project's potential to adversely affect threatened and endangered species and determined there was no change in its previous determination of "No Effect." Therefore, the Corps has satisfied its requirements under Section 7 of the ESA.
- 7.2. **National Historic Preservation Act (NHPA) of 1966.** On February 18, 2016, the Corps determined the project had "no potential to cause effect" to historic properties. Based on the information provided, the Corps determined there would be no change in the previous determination of "no potential to cause effect," and the Corps has satisfied its requirements under Section 106 of the NHPA.
- 7.3. **Water Quality Certification (WQC).** On January 5, 2016, the Colorado Department of Public Health and Environmental (CDPHE) issued a Section 401 "Regular Certification" (No. 4378) for the project. On September 7, 2022, the CDPHE reviewed the project modifications and determined WQC No. 4378 remains in effect.
8. **General Evaluation:** The proposed modification work will not adversely affect the water quality, recreation, archeology, navigation, aesthetics, flood protection, conservation of natural resources, fish and wildlife resources, economics, or land use of the area.

The selected compensatory mitigation option – permittee responsible mitigation (PRM) – deviates from the order of the options presented in 33 CFR 332.3(b)(2)-(6) since the project is located within the Service Area of the Maria Lake Mitigation Bank. The Corps rationale for deviating from the order is as follows:

The project is located in a non-abutting HUC 8 upstream of the HUC 8 in which the Maria Lake mitigation site is located and consists primarily of stream riparian scrub-shrub wetlands, whereas the Maria Lake mitigation site consists primarily of alkali wet meadows. Moreover, stream riparian wetlands are considered to be particularly valuable in the headwaters reaches of the Fountain Creek sub-basin in Northern El Paso County because they provide important functions, especially those related to stormwater (e.g., retention and filtration), that historical data and current trends show are being lost at a relatively high rate (Fountain Creek is the most populated HUC 8 and contains some of the fastest growing communities in the State of Colorado). The continued loss of these watershed functions has directly affected changes in local stormwater drainage criteria, and Sand Creek where the proposed mitigation is located has been identified as an important contributor to those watershed concerns due to the abundance of streams with high erosion rates and elevated levels of sedimentation.

Based on the environmental setting (multiple sub-reaches within the project area already contain the targeted wetland community types), the Corps determined the proposed on-site mitigation would have a relatively high likelihood of success. Based on the location of the proposed mitigation sites within the watershed (immediately downstream of areas that have been master planned for large-scale residential development), the Corps determined the mitigation and associated legal site protection, would help preserve existing wetlands

that already provide essential functions within the watershed and buffer similarly situated downstream wetlands from the effects of continued development upstream. Based on the proposed methods of mitigation (establishment and enhancement), the Corps determined the mitigation would have beneficial indirect effects on adjacent wetland communities and replace wetlands acres that provide prioritized functions within the watershed that Maria Lake Mitigation Bank cannot provide. Therefore, the Corps determined the proposed on-site mitigation is environmentally preferable.

9. **Adverse Effects.** The following is a brief summary of the potential adverse effects of the proposed modified activity on the environment: The modified project involves a reduction in the amount of wetlands that will be permanently lost as a result of the activity. The original permit authorized the loss of approximately 4.21 acres of wetlands along Sand Creek and an unnamed Sand Creek tributary. The modified activity will result in the loss of approximately 0.94 acre of wetlands and approximately 0.41 acre of temporary wetland impacts. However, there will be an increase in temporal loss of function because the compensatory mitigation required by the original permit was not constructed concurrently with the permitted work in WOTUS. This temporal loss has resulted in elevated levels of erosion and sedimentation in Sand Creek downstream of the project. Overall, the modified project will result in a net decrease of overall permanent loss of wetlands.
10. **Permit Conditions.** The following additional measures are being required by this permit modification, and/or are being assured and provided voluntarily by the permit applicant, to ensure that the activity being authorized by the Corps will have no more than minimal adverse effects on the environment:

10.1. General condition 1 has been revised to read as follows:

1. The time limit for completing the work authorized ends on December 31, 2023. If you find that you need more time to complete the authorized activity, the permittee must submit a request for a time extension for consideration at least 1 month before the above date is reached.

10.2. Special conditions 1-4 have been revised to read as follows:

1. To compensate for the loss of aquatic resource functions associated with the permanent impacts to 0.94 acre of riparian wetlands and temporary impacts to 0.47 acre of riparian wetlands in Sand Creek, the permittee shall provide 5.96 acres of riparian wetland restoration comprised of 5.16 acres of establishment, 0.33 acre of re-establishment, and 0.47 acre of enhancement. The wetland restoration will be located on Mitigation Sites 35, 36, 37, 38, and 39, as listed in Table 2 and shown on the revised Sand Creek Restoration – Wetlands Exhibit. To ensure the success of the restoration sites, the permittee shall fully comply with the November 19, 2021, Revised Compensatory Mitigation Plan (Mitigation Plan), prepared by Bristlecone Ecology.

In addition to the performance standards outlined in the Mitigation Plan, the following must be achieved for three years without human intervention before the mitigation work will be considered successful:

- a. Noxious weed control: All species listed in the Colorado Noxious Weed Inventory List-A shall be 100% eradicated.
- b. Indicators of hydrology: The permittee shall ensure the areas intended to be wetlands exhibit USDA NRCS hydric soil characteristics appropriate for the region (e.g., as determined by Corps Regional Supplements to the Corps Delineation Manual) by year 5.

2. In accordance with the Mitigation Plan, the permittee shall submit annual monitoring reports in the format identified in the [Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines for the South Pacific Division](#) by December 31st of each year following completion of construction of the required compensatory mitigation. Submittal of the first monitoring report shall occur after the first growing season following completion of construction. The permittee shall monitor the compensatory mitigation areas for at least five consecutive growing seasons after construction, and/or until this office determines in writing that the approved performance standards and success criteria have been met.

3. The permittee shall commence construction of the compensatory mitigation required by Special Condition 1 of this permit before reinitiating construction activities in WOTUS authorized by this permit. All construction of the required compensatory mitigation shall be completed within 1 year following initiation of construction of the compensatory mitigation. In addition, the permittee shall notify this office in writing at least 10 calendar days prior to the scheduled mitigation construction begin date and within 10 calendar days following completion of the required compensatory mitigation.

4. Within 60 days following completion of the authorized work or at the expiration of the construction window of this permit, whichever occurs first, the permittee shall provide this office with as-built drawings and a description of the work conducted on the project site. The drawings shall be signed and sealed by a registered professional engineer and include:

- a. The Department of the Army Permit number;
- b. A plan view drawing of the location of the authorized work footprint (as shown on the permit drawings) with an overlay of the work as constructed in the same scale as the attached permit drawings. The drawings should show all "earth disturbance," wetland impacts, structures, and the boundaries of any on-site and/or off-site mitigation or avoidance areas;
- c. Ground and aerial photographs of the completed work. The camera positions and view angles of the ground photographs shall be identified on a map, aerial photograph, or project drawings; and
- d. The locations of all minor deviations between the work as authorized by this permit and the work as constructed with a list and descriptions of the deviations.

10.3. Special condition 5 has been removed from this permit.

10.4. The following new special conditions have been added:

5. To validate this authorization, the permittee shall take the actions required to record the Declaration of Conservation Covenants and Restrictions (CC&Rs) (enclosure 6), including the final permit and any applicable maps, drawings, and figures depicting the compensatory mitigation areas listed in Table 2, with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property. The permittee shall ensure the CC&Rs, including any modified CC&Rs that may be approved by this office, are recorded in the chain of title against the deed for this property. The permittee shall not record modified CC&Rs unless the proposed modifications have been reviewed and specifically approved in writing by this office.

The permittee shall provide this office with evidence of the recordation of the CC&Rs prior to initiation of construction activities in WOTUS authorized by this permit. If modified CC&Rs are approved by this office in writing, the permittee shall provide this office with evidence of the recordation of the modified CC&Rs within 10 days following recordation. In the event the recordation of the CC&Rs contain an expiration date, the permittee shall ensure re-recordation of the CC&Rs and provide this office with evidence of the re-recordation of the CC&Rs within 10 days following recordation.

6. To ensure completion and success of required compensatory mitigation, the permittee shall post a performance bond in the amount of \$447,000 with a federally approved surety. This bond shall not be released until this office has determined, in writing, that all Corps-approved performance standards have been met. The permittee shall provide this office with a draft performance bond to this office for review and approval. Prior to the initiation of any construction activities in WOTUS authorized by this permit, the permittee shall submit proof of the posting of the performance bond.

a. The posted performance bond shall be sent via certified mail to the following address:

Albuquerque District, U.S. Army Corps of Engineers
Regulatory Division
ATTN: Anica Lucero
4101 Jefferson Plaza NE
Albuquerque, New Mexico 87109-3435

b. If at any time during the construction or monitoring of the compensatory mitigation, this office determines the compensatory mitigation construction or performance standards outlined in the approved *Mitigation Plan* are not met, this office may require the permittee to:

(1) Submit a remediation plan for Corps approval to ensure the compensatory mitigation meets the Corps-approved performance standards;

- (2) Submit an alternative compensatory mitigation plan for Corps approval to compensate for direct and indirect effects and/or temporal loss to WOTUS authorized by this permit; or
- (3) Utilize the performance bond, payable to a designee, or placed in a fund pursuant to a standby trust agreement, to conduct alternative compensatory mitigation in accordance with an alternative compensatory mitigation plan. Any use of the performance bond funds, including designee, standby trust agreements, and alternative compensatory mitigation plans shall be specifically approved by this office in writing, prior to drawing upon the performance bond funds.

c. If after the final year of the monitoring period this office determines in writing that the performance standards have been met, including 3 years without human intervention, the performance bond may be released.

7. All notifications and submittals to the Corps required by the conditions of this permit shall be sent to SPA-RD-CO@usace.army.mil.

11. **Cumulative Impacts:** The effects of this project, when added to the effects of other similar projects, will not result in more than minimal cumulative adverse impacts.
12. **Finding of No Significant Impact:** Based on the information in the administrative record for this authorized permit activity, I have made a final determination that the modification of this permit will not have a significant adverse effect on the quality of the human environment and is, therefore, exempt from the requirement to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act.
13. **Public Interest Determination:** This permit modification, if conducted in accordance with the terms and conditions of the originally issued permit and any additional special conditions stated above and in the permit modification letter, will not be contrary to the public interest.

PREPARED BY:



Joshua G. Carpenter
Senior Project Manager

2022-09-16

Date

REVIEWED BY:

Kelly Allen
Chief, Regulatory Division

Date

APPROVED BY:

Kara A. Hellige
Chief, Southern Colorado Regulatory Branch

Date