

Bentonite Performance Minerals LLC
Permit No. 267C
Supporting Information-2.12

Section 2.12.20 Wyoming State Lease 42804 (WSL04) Amendment

The project area was determined to have no substantial nexus to the Belle Fourche River where it is designated as traditional navigable water. The project may proceed and does not need further approval from the United States Army Corps of Engineers. Correspondence from USACE is presented in this section. Please refer to attached map (Map 2.12.20-1) delineating wetlands within the WSL04 amendment area.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
WYOMING REGULATORY OFFICE
2232 DELL RANGE BOULEVARD, SUITE 210
CHEYENNE WY 82009-4942

April 8, 2016

Wyoming Regulatory Office

Ms. Jennifer Hartman
Bentonite Performance Minerals LLC
Colony, Wyoming Plant
554 U.S. Highway 212
Belle Fourche, South Dakota 57717

Dear Ms. Hartman:

This letter is in response to a request we received on February 3, 2016, for a jurisdictional determination concerning a wetland within the Wyoming State Lease 42804 claim west of Colony. The project review area is located in the portions of Sections 30, 31 and 32, Township 57 North, Range 62 West, Crook County, Wyoming.

The U.S. Army Corps of Engineers regulates the placement of dredged and fill material into wetlands and other waters of the United States as authorized primarily by Section 404 of the Clean Water Act (33 U.S.C. 1344). The term "waters of the United States" has been broadly defined by statute, regulation, and judicial interpretation to include all waters that were, are, or could be used in interstate commerce such as streams, reservoirs, lakes and adjacent wetlands. The Corps regulations are published in the *Code of Federal Regulations* as 33 CFR Parts 320 through 332. Information on Section 404 program requirements in Wyoming can be obtained from our website: <http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Wyoming.aspx>.

We have reviewed the information submitted by your company, as well as additional information in our office. Based on our evaluation of the available maps and information, it appears that two ephemeral drainages, 3 acres of channel-bottom wetland, and a 0.2-acre stock pond impoundment in the review area have no substantial nexus to the Belle Fourche River where it is designated as a traditional navigable water in South Dakota.

On June 5, 2007, our Headquarters in Washington, D.C. (HQUSACE) implemented guidance that requires an extensive evaluation and coordination procedure before exerting jurisdiction over many streams and wetlands. The guidance was based primarily on a ruling by the U.S. Supreme Court on June 19, 2006, in the case of *Rapanos et ux., et al. v. United States* (Nos. 04-1034 and 04-1384). We initiated coordination with the U.S. Environmental Protection Agency (USEPA) and HQUSACE on March 3, 2016. The USEPA, Region 8 concurred with our recommendations on March 16, 2016. **Therefore the subject aquatic resources are not waters of the United States as defined at 33 CFR Part 328.3(a).**

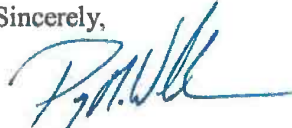
2.12.20-2

In the March 28, 2000, edition of the *Federal Register* (Vol. 65, No. 60), the Corps implemented an administrative appeals process for jurisdictional determinations. This letter and enclosed form serve as an approved jurisdictional determination. Bentonite Performance Minerals, LLC, the landowner and other affected parties may appeal any determination to the Northwestern Division Appeals Officer, Ms. Mary Hoffman, using the enclosed *Notification of Administrative Appeal Options and Process and Request for Appeal* form. Section 1 Part D of the form explains the appeal procedure. Please complete Section II if you disagree with this determination and send it to Ms. Hoffman at the address on the form prior to **June 7, 2016**, or forfeit the right to an administrative appeal.

As a result of this analysis, a Department of the Army authorization is not required for construction activities in these aquatic resources because the activities would not result in discharges of dredged or fill material into waters of the United States. This determination does not eliminate requirements to obtain any other applicable federal, state, tribal, or local permits. Any deviations from the proposed plan for the project area, provided as of February 29, 2016, could require authorization.

This determination is valid for a period of 5 years, until **April 8, 2021**. Thank you for your interest in cooperating with requirements of the U.S. Army Corps of Engineers' regulatory program. Please contact me by email at Paige.M.Wolken@usace.army.mil or at (307) 772-2300 and reference file NWO-2016-00217 if you have any questions.

Sincerely,



Paige M. Wolken
Project Manager
Wyoming Regulatory Office

The Omaha District, Regulatory Branch, Wyoming Regulatory Office is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete a Customer Service Survey found on our website: <http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Wyoming.aspx>. Paper copies of the survey are also available upon request for those without Internet access.

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 16 March 2016

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CENWO-OD-RWY, Bentonite Performance Minerals, LLC, WY State Lease 42804, NWO-2016-00217

C. PROJECT LOCATION AND BACKGROUND INFORMATION: NRPW wetlands

State: Wyoming County/parish/borough: Crook City: N/A
Center coordinates of site (lat/long in degree decimal format): Lat. 44.891025N; Long. -104.337348W
Universal Transverse Mercator: NAD 83

PLSS Location: portions of Sections 30, 31 and 32, Township 57 North, Range 62 West, Crook County, Wyoming, 6th PM (See Review Area on attached map)

Name of nearest waterbody: Trouble Creek & Belle Fourche River
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Belle Fourche River which is a TNW at the point of confluence of the Redwater River in Butte County, South Dakota (lat. 44.671653 N, lon. -103.845104)
Name of watershed or Hydrologic Unit Code (HUC): 10120201 Upper Belle Fourche
 Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
 Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date: 2 January 2016 (pmw)
 Field Determination. Date(s):

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.
 Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- Impoundments of jurisdictional waters
- Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: linear feet: width (ft) and/or acres.
Wetlands: acres.

c. Limits (boundaries) of jurisdiction based on: Pick List

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III F.

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- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
Explain: two unnamed ephemeral drainages with less than 60-90 days of continuous flow, livestock pond impoundment and abutting wetlands.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW: .

Summarize rationale supporting determination: .

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent": .

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: 6 square miles

Drainage area: 2 square miles

Average annual rainfall: 14.88 (total precip.) inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through 1 tributaries before entering TNW.

Project waters are 30 (or more) river miles from TNW.

Project waters are 1-2 river miles from RPW.

Project waters are 20-25 aerial (straight) miles from TNW.

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

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Project waters are **1-2** aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain: **Project is entirely within the state of Wyoming.**

Identify flow route to TNW⁵: **unnamed ephemeral tributary to unnamed ephemeral tributary to Belle Fourche River which is a TNW at the point of confluence of the Redwater River in Butte County, South Dakota (lat. 44.671653 N, lon. -103.845104).**

Tributary stream order, if known:

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: **Upper reaches appear to be mostly natural but with livestock pond impoundments; lower reaches have been partially altered with spreader dikes.**

Tributary properties with respect to top of bank (estimate):

Average width: **est 1-5 feet**
Average depth: **est 1 feet**
Average side slopes: **2:1**

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover: **90% wet meadow**
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain:

Presence of run/riffle/pool complexes. Explain: **no.**

Tributary geometry: **Relatively straight**

Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: **Ephemeral flow**

Estimate average number of flow events in review area/year: **11-20**

Describe flow regime: **short in duration due to rainfall.**

Other information on duration and volume:

Surface flow is: **Confined**. Characteristics: **Confined until the drainages enter the flood plain of the Belle Fourche River. At that point, the bed and banks terminate prior to the confluence with the Belle Fourche River.**

Subsurface flow: **Pick List**. Explain findings:

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):

Discontinuous OHWM.⁷ Explain: **Indicators of OHWM, including bed and bank terminate prior to the confluence with the Belle Fourche R.**

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

⁶ A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷ Ibid

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- fine shell or debris deposits (foreshore)
- physical markings/characteristics
- tidal gauges
- other (list):
- physical markings;
- vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: **unknown**.

Identify specific pollutants, if known:

(iv) Biological Characteristics. Channel supports (check all that apply):

- Riparian corridor. Characteristics (type, average width):
- Wetland fringe. Characteristics:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland size: **3 acres**

Wetland type. Explain: **palustrine emergent wet meadow dominated by hydrophytic grasses and sedges.**

Wetland quality. Explain: **unknown.**

Project wetlands cross or serve as state boundaries. Explain: **No.**

(b) General Flow Relationship with Non-TNW:

Flow is: **Ephemeral flow.** Explain:

Surface flow is: **Confined**

Characteristics: **hydrology is limited to channel bottom and directly abutting areas in upper watershed and becomes overland sheet flow prior to confluence with Belle Fourche R..**

Subsurface flow: **Pick List.** Explain findings:

Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

- Directly abutting
- Not directly abutting
 - Discrete wetland hydrologic connection. Explain:
 - Ecological connection. Explain:
 - Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are **30 (or more)** river miles from TNW.

Project waters are **20-25** aerial (straight) miles from TNW.

Flow is from: **Wetland to navigable waters.**

Estimate approximate location of wetland as within the **2-year or less** floodplain.

(ii) Chemical Characteristics:

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: **unknown.**

Identify specific pollutants, if known:

(iii) Biological Characteristics. Wetland supports (check all that apply):

- Riparian buffer. Characteristics (type, average width):
- Vegetation type/percent cover. Explain: **PEM wet meadow est. 90%.**
- Habitat for:
 - Federally Listed species. Explain findings: **none known.**
 - Fish/spawn areas. Explain findings: **none.**
 - Other environmentally-sensitive species. Explain findings: **none known.**
 - Aquatic/wildlife diversity. Explain findings: **limited / unknown.**

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3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: 4
 Approximately (3) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
Y	2.8		
Y	.2		

Summarize overall biological, chemical and physical functions being performed: **nutrient cycling, water filtration, minimal wildlife use/habitat.**

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: The relevant reach of drainage 1 consists of the upper reach where it occurs within the review area to downstream where it appears to flow into the Belle Fourche River during a high flow event, an estimated total length of 11,500 feet. The relevant reach of drainage 2 is only approximately 900 feet within the review area to its point of confluence to another 2nd order drainage (3). The defined bed and bank of drainages 2 and 3 terminate approximately 1,900 feet prior to the confluence of the Belle Fourche River, outside of the review area. It is estimated that the volume, duration and frequency of flow is minor, short (flows less than 60-90 continuous days during an average (typical) year), and infrequent (primarily occurring after snow melt in the spring or after large rainstorms in the summer). No flow data is available for the unnamed drainages located within the review area. An experienced staff member of Bentonite Performance Minerals LLC reported anecdotally that the ephemeral waterways flow only after large precipitation events which include snow melt and perhaps 1-2 larger rainfall events in the spring and early summer. The events last only a few days. Despite this, wetlands have established in and along the channel where water ponds and is periodically refreshed. The current land use within the upper portion of this watershed is primarily bentonite mining and livestock grazing. Drainages 1 and 2, within the review area, and their few wetlands, drain and intercept sediments for roughly a 2-square mile area. Rare short-duration, high volume flows may occasionally carry sediment and nutrients beyond where drainages terminate, as overland sheet flow to the Belle Fourche River. Only a small volume of water and sediment would likely be contributed to the RPW/TNW. There is no indication that these non-RPWs contribute to the chemical, physical, or biological integrity of the Belle Fourche in South Dakota (TNW), which is more than 85 river (34 aerial) miles down stream from

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the review area location. In addition, there is no evidence to suggest that the Belle Fourche River, from the point which is a TNW at the point of confluence of the Redwater River in Butte County, South Dakota (lat. 44.671653 N, lon. -103.845104) upstream through Crook County, Wyoming has commercial uses associated with navigation⁸. Individually and collectively, it is highly unlikely and very speculative to assume that the functions of these waters within the review area contribute or hold a significant amount of water, sediment, nutrients, concentrated minerals, or pollutants to have substantial effect on the chemical, physical or biological integrity of the Belle Fourche River (TNW), located more than 85 river miles (34 aerial miles) down stream from the review area reach, in South Dakota. Therefore, the relevant reaches of the identified non-RPWs and their abutting wetlands lack a significant nexus to the nearest traditionally navigable water.

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: . .

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:

TNWs: linear feet width (ft), Or, acres.
 Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: .
 Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):

Tributary waters: linear feet width (ft).
 Other non-wetland waters: acres.
Identify type(s) of waters: .

3. **Non-RPWs⁸ that flow directly or indirectly into TNWs.**

Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

Tributary waters: linear feet width (ft).
 Other non-wetland waters: acres.
Identify type(s) of waters: .

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

⁸See Footnote # 3.

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Provide acreage estimates for jurisdictional wetlands in the review area: _____ acres.

6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: _____ acres.

7. Impoundments of jurisdictional waters.⁹

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from "waters of the U.S.," or
 Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
 Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
 from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
 which are or could be used for industrial purposes by industries in interstate commerce.
 Interstate isolated waters. Explain: _____
 Other factors. Explain: _____

Identify water body and summarize rationale supporting determination: _____

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: _____ linear feet _____ width (ft).
 Other non-wetland waters: _____ acres.
Identify type(s) of waters: _____
 Wetlands: _____ acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
 Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
 Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: See Section III.C.2.
 Other: (explain, if not covered above): _____

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): _____ linear feet _____ width (ft).
 Lakes/ponds: _____ acres.
 Other non-wetland waters: _____ acres. List type of aquatic resource: _____
 Wetlands: _____ acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): 2,700 linear feet, 1-5 width (ft).
 Lakes/ponds: _____ acres.
 Other non-wetland waters: 0.2 acres. List type of aquatic resource: Drainage 2 impoundment - stock pond.

⁹ To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

**** PRE-DECISIONAL DRAFT ** NOT SUBJECT TO FOIA ** PRE-DECISIONAL DRAFT ****

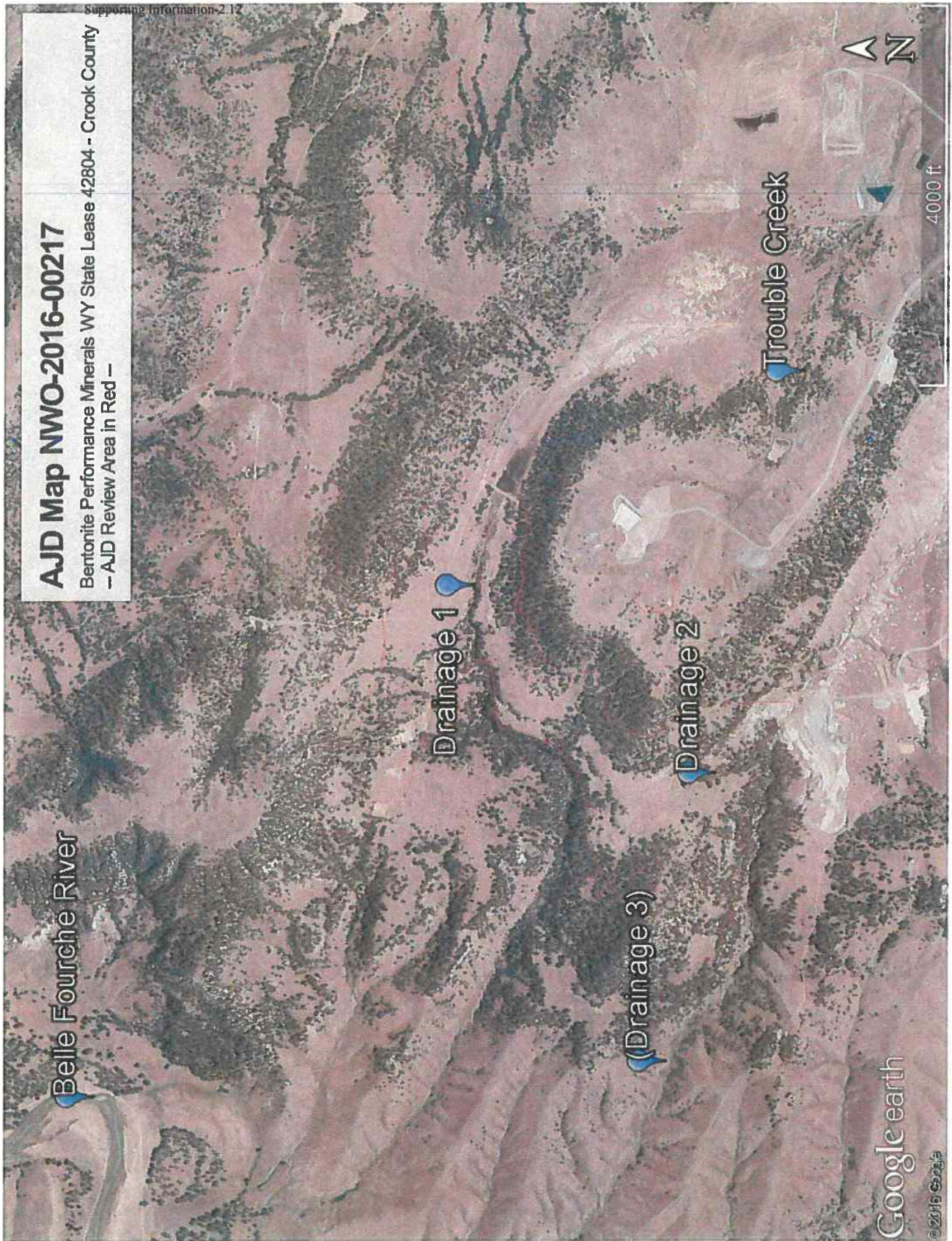
Wetlands: est. 3 acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps:
- Corps navigable waters' study:
- U.S. Geological Survey Hydrologic Atlas:
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: **WY-DEVILS RUN.**
- USDA Natural Resources Conservation Service Soil Survey. Citation:
- National wetlands inventory map(s). Cite name: **USFWS NWI mapping layer Google Earth & ORM.**
- State/Local wetland inventory map(s):
- FEMA/FIRM maps:
- 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): **Google Earth, Aug. 31, 2013.**
or Other (Name & Date): **As provided in request documentation by Bentonite Performance Minerals, LLC, Feb 2, 2016.**
- Previous determination(s). File no. and date of response letter: **NWO-2011-01739: adjacent review area including upstream reach of Drainage 1; May 30, 2012; *NWO-2013-00473: "at a point" Belle Fourche River TNW determination supporting comments, Feb 5, 2015.**
- Applicable/supporting case law:
- Applicable/supporting scientific literature:
- Other information (please specify):

B. ADDITIONAL COMMENTS TO SUPPORT JD: Determinations were made based on CWA rules and regulations (CFR 33, Parts 320-332) and the June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. EPA concurrence was received 16 March 2016.



2.12.20-12