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April 30, 2014

Daniel B. Frank, Esq.  
Frank Law Office, P.C.  
519 E. 18<sup>th</sup> Street  
Cheyenne, WY 82001

Dear Mr. Frank:

This is in regard to the field inspection and environmental site assessment that we, Kagel Environmental, LLC (KE), performed for you on the property of Andrew Johnson on Saturday, April 5, 2014. The subject project site is located within an approximate 8-acre farm parcel of land owned by Mr. Johnson, and is described as being within Section 30, Township 15 North, Range 115 West, Uinta County, near Fort Bridger, Wyoming. The purpose of this site assessment was to provide you (Frank Law Office, P.C.), with KE's professional opinion regarding the general identification and location of the extent of any federally regulated waters of the U.S., including wetlands, especially as regards the potential violation of the Clean Water Act as alleged in 2013 by the U.S. Army Corps of Engineers (COE), and the Environmental Protection Agency (EPA). As a former COE senior regulatory project manager and enforcement officer, the methodology KE used to identify the existence of regulated areas and/or impacted aquatic resources, etc., was that approved by the U.S. Army Corps of Engineers and Environmental Protection Agency, including adherence to the official 1987 *Corps of Engineers Wetlands Delineation Manual – Arid West and/or Western Mountains, Valleys, and Coast Region Supplement, 2008*.

Before summarizing our site inspection, findings, and conclusions, etc., we'd like to clarify that despite the contention by EPA that they believe the alleged violation site is located in Utah, Mr. Johnson has assured us that his farm is located in the state of Wyoming. In a "Letter of Potential Violation" dated May 22, 2013 addressed to Mr. Johnson and signed by James H. Eppers, Supervisory Attorney and Arturo Palomares, Director, EPA's Office of Enforcement, Compliance and Environmental Justice, EPA stated that the alleged violation site is in the state of Utah. It's therefore reasonable to assume that there may be another alleged Clean Water Act violation in Utah by someone with the same name, or in the alternative, that the EPA simply was unable to accurately identify or determine in which state Mr. Johnson's farm is located.

It's KE's understanding that the Wyoming State Engineer designated the pond for the sole purpose of stock watering. Although it's KE's understanding that such stock ponds are exempt from Section 404 permitting (33CFR Part 323.4), they still require a permit from the state of Wyoming. It's also our understanding that the small creek channel where the pond is located is mostly perennial and identified as Six Mile Creek.



## **SITE DESCRIPTION & METHODS**

Upon arriving at the Johnson farm, the owner introduced himself and his wife (Katie Johnson), and then politely showed us the entire area of the recently constructed stock pond, including water control structure, culvert pipe, creek channel, erosion controls, and the nearby irrigation canal where the creek terminates. The stock pond is generally described as a rather narrow, oblong (elongated) shaped oval, and appears to have been constructed via a combination of excavation work and berm/dam construction. As calculated by Google Earth Pro Measuring Tools, the pond is approximately 615 feet in length along its east/west axis, and approximately 160 feet at its widest north/south axis. KE also observed that the pond construction did not appear to have required filling of wetlands, but the construction did require the discharge of fill material below the plane of the ordinary high water mark (OHWM) of the creek channel.

Although the measured distance of the pond beginning at the outfall culvert downstream of the dam, and the upstream western property line, is approximately 615 feet, the actual distance of the *traced channel meanders* totals approximately 690 linear feet. The average stream width measurement is 68-inches (5'8") and the average depth of the channel is 8-inches. All measurements and channel dimensions were taken with a Luftkin steel tape (25 foot) and are referenced from the OHWM of the creek. Since the pond construction resulted in the coverage of nearly 700 linear feet of original channel, KE reasonably determined the average or mean channel dimensions by carefully taking two creek channel measurements downstream of the pond, and two channel measurements upstream where the creek enters the pond (See Figures 1 and 2). After recording each of the [OHWM] measurements, KE averaged the sum of the totals which are presented in our findings herein (See Tables 1 and 2). This methodology provides a reliable tool for calculating a reasonably accurate estimate of channel impacts associated with the pond construction and associated fill material placed within the channel.

## **FINDINGS**

Based upon KE's April 5, 2014 on-site field inspection and data collection of the Johnson stock watering pond, we find and offer the following professional opinions regarding the alleged violation. To begin, KE observed and photo-documented that Six-Mile Creek is not tributary to any other tributary creek, stream, or river channel. After exiting the subject pond, Six-Mile Creek continues flowing for a distance of 0.33 tenths of a mile where it terminates at a relatively large man-made irrigation canal. It's KE's understanding that in the Omaha District of the COE, irrigation canals and ditches, where flows are regulated according to state appropriated water rights and functional water control structures, such irrigation structures are not considered as regulated waters of the U.S. subject to Section 404 permitting requirements.

Upon further research, KE also noted that even if the COE and EPA determined that irrigation canal and ditches **are** jurisdictional waters of the U.S. in Wyoming, the nearest



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in-fact/traditionally navigable water of the U.S. is the Green River. From tracing the tributary stream and/or small river channels all the way to the nearest confluence with the Green River, the distance appears to be approximately 80-100 miles. Consequently, KE opines that it's beyond any reasonable possibility that a discharge of some clean soil and rock fill material into Six-Mile Creek would have a *significant* effect upon the physical, chemical, *and* biological integrity of the Green River located nearly 100 miles away. Therefore, it's overwhelmingly evident in KE's opinion, that it's not even plausible that the discharge of fill material associated with the construction of Mr. Johnson's pond could have a significant nexus to the Green River.

In addition to our observations and findings regarding CWA jurisdiction of Six-Mile Creek per se, KE noted that *within* jurisdictional waters of the U.S., including wetlands, stock ponds are exempt from needing a Section 404 permit. In accordance to 33 CFR Part 323.4, it's KE's understanding that stock ponds are exempt from regulation provided the work doesn't impair or restrict the flow and circulation patterns (Six-Mile Creek), **and** put the area into a use it wasn't previous subject; *both* "recapture" tests must be met. In regard to flow and reach, we observed that there is as much water flowing out of the pond as there is flowing into the pond (See Photos). The pond appears to temporarily detain the water, probably picks up additional ground water, and then discharges the same or possibly more volume into the original channel. Hence, there is absolutely no observed restriction of flowing water in the channel of Six-Mile Creek downstream of the pond, and the circulation pattern of the channel has not changed. KE observed no diversions, cutoffs, or new/alternate channels created as a result of the stock pond.

In regard to putting the area into a new use, it's KE's understanding, as well as our observations, that the Johnson farm has been in agricultural use for more than a century, and that the use has not changed. KE observed livestock on the farm, irrigation ditches, irrigated pastures, and reviewed documents showing that Johnson has legal [irrigation] water rights, and that the pond is located within legally irrigated land pursuant to his state water right (WY State Engineer May 25, 2011). The use is therefore still agricultural (stock watering), and KE is unaware of any evidence of, or plans for, changing the Johnson farm from agriculture to commercial, residential, or industrial development.

In the event that the COE and the EPA ultimately pursue regulatory jurisdiction for the pond, KE checked to determine if the pond construction is authorized by an existing nationwide permit, most specifically, nationwide permit number eighteen (NWP#18). Please note that NWP#18 authorizes minor discharges of dredged or fill material into waters of the U.S., including wetlands. A minor discharge means 25 cubic yards or less, placed below the plane of the OHWM of a channel or within a jurisdictional wetland. Since all nationwide permits are permits that have previously been authorized on a nationwide basis, there is no need to apply for these permits. However, many of these nationwide permits and/or their conditions require a *pre-construction notification* (PCN) to the COE in order for the agency to verify the applicability of the permit, and/or the need to add special conditions, etc. According to NWP#18, a PCN is only required if there will be a discharge into regulated wetlands, or if the discharge into a stream channel exceeds 10 cubic yards below the OHWM of the channel. Consequently, when the minor



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discharge is less than 10 cubic yards and/or is not placed in wetlands, the work is authorized and there is no need or requirement for notifying the COE prior to commencing with the work. Since KE concurred with the COE's and EPA's prior determination that the pond work didn't impact wetlands, KE took careful measurements and calculations to determine if the pond construction resulted in the discharge of more than 10 cubic yards below the OHWM of Six-Mile Creek.

As mentioned earlier, KE employed standard field methods for measuring stream channel impacts for the purpose of obtaining the most accurate estimates practicable. Since the pond and extant fill prevent exactly precise calculations, a reasonably accurate alternative is to take precise channel measurements immediately upstream and downstream of the pond, and then calculate averages for both channel segments (Table 1). In the worst case scenario, i.e. inaccurately weighted toward maximum adverse impacts, only the channel dimensions downstream (below) the pond were also calculated (Table 2). By reviewing our data in both Tables, it is apparent that the maximum discharge of fill material below the OHWM along a 60 linear foot section of the distal end of the pond was significantly less than 10 cubic yards. Consequently, KE opines that if the creek channel was actually a regulated water of the U.S., the discharges of fill material associated with the construction of the Johnson pond was already authorized by NWP#18 and that there was no need for Mr. Johnson (or anyone else) to notify the COE prior to construction.

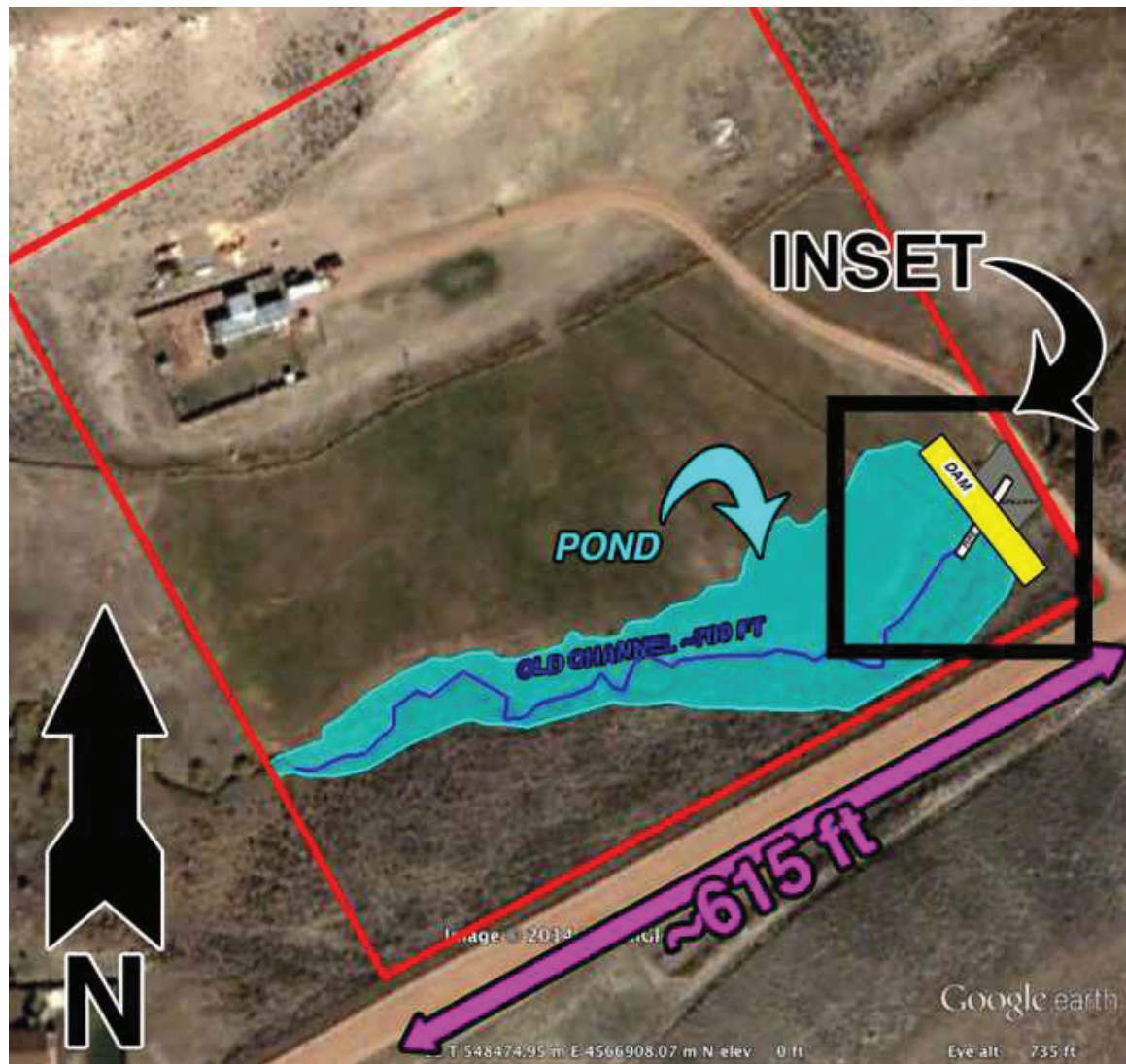
## CONCLUSION

As a former COE federal regulator and enforcement officer specializing in Section 404 Clean Water Act jurisdictional determinations, KE found no evidence of a federal or state violation. Should you have any questions, comments, or need additional information, please feel welcomed to contact us at your convenience.

Sincerely,

Ray L. Kagel, Jr., M.S.  
Professional Wetland Scientist #2234  
Wildlife Biologist

Susan W. Kagel, M.S., Ph.D.  
Wetland Scientist  
Project Manager

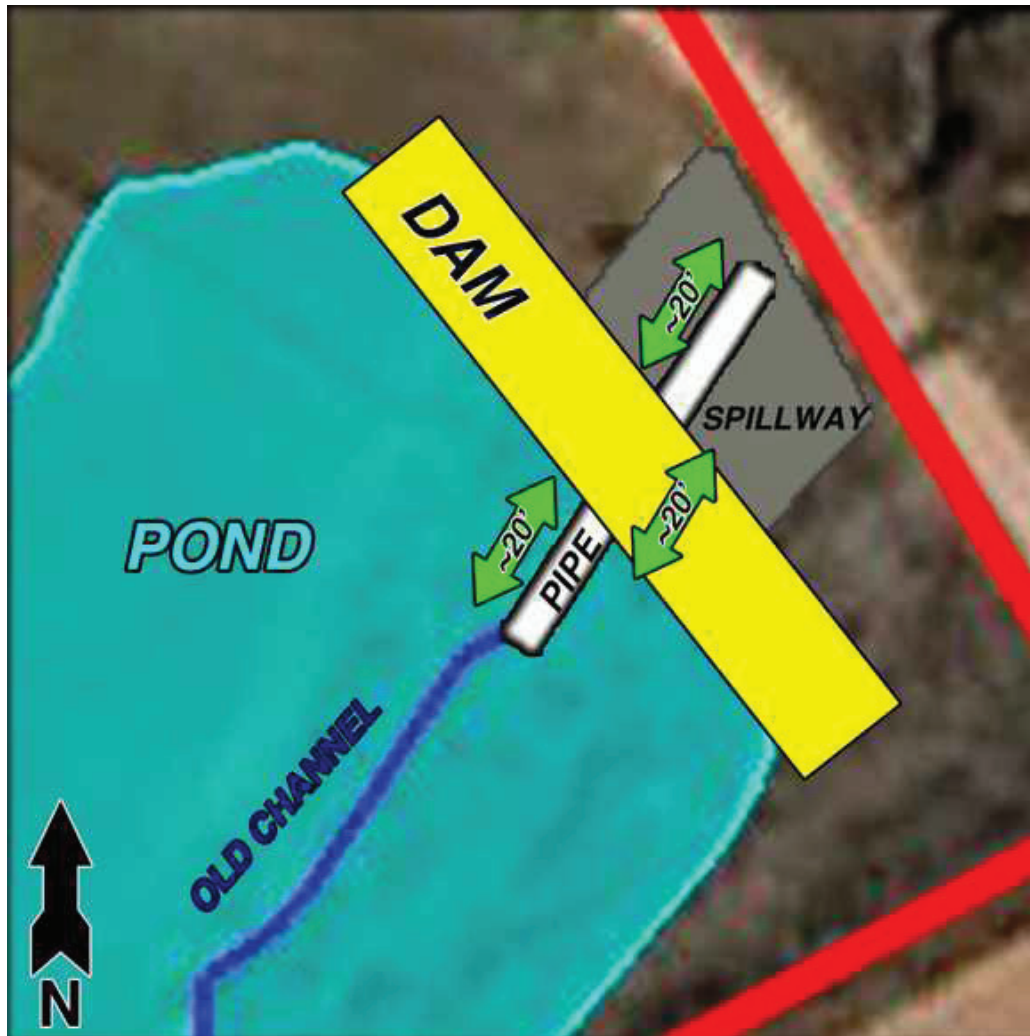


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**NO SCALE**

### **FIGURE 1. OVERVIEW OF THE JOHNSON STOCK WATERING POND.**

The original channel, as traced on historical aerial photographs, is represented by the blue line and meandered for approximately 700 feet on the Johnson property. An approximate representation of the pond is highlighted in aqua. The dam construction is shown within a black frame, and is blown up in the next figure.

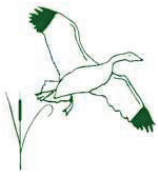


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**NO SCALE**

**FIGURE 2. DAM  
 CONSTRUCTION ON THE  
 JOHNSON PROPERTY.**

The dam is represented by the yellow triangle. The pipe through the dam is shown, and approximate lengths in the channel are indicated.



**Table 1. Calculations of actual fill placed below the Ordinary High Water Mark (OHWM)**

Downstream			Upstream	
Width 1	84 in	Average 68.5 in	58 in	Average 54 in
Width 2	53 in		50 in	
Depth 1	6 in	Average 8 in	5 in	Average 6 in
Depth 2	10 in		7 in	
Stream Width =		Average of 68.5 in and 54 in = <b>61.25 in</b>		
Stream Depth =		Average of 8 in and 6 in = <b>7 in</b>		
Fill Volume Calculations				
$61.25 \text{ in} \times 7 \text{ in} \times (60 \text{ ft} \times 12 \text{ in}) = 308,700 \text{ in}^3$				
$308,700 \text{ in}^3 \div 1,728 \text{ in}^3/\text{ft}^3 = 178.65 \text{ ft}^3$				
$178.65 \text{ ft}^3 \div 27 \text{ ft}^3/\text{yd}^3 = \mathbf{6.6 \text{ yd}^3 \text{ of fill below the OHWM}}$				

**Table 2. Calculations of *Worst Case Scenario*\* of fill placed below the Ordinary High Water Mark (OHWM)**

Measure	Width	Depth	Fill Volume Calculations
1	84 in	6 in	$84 \text{ in} \times 6 \text{ in} \times 60 \text{ ft} \times 12 \text{ in}/\text{ft} = 362,880 \text{ in}^3$
			$362,880 \text{ in}^3 \div 1,728 \text{ in}^3/\text{ft}^3 = 210 \text{ ft}^3$
			$210 \text{ ft}^3 \div 27 \text{ ft}^3/\text{yd}^3 = \mathbf{7.8 \text{ yd}^3 \text{ Fill below OHWM}}$
2	53 in	10 in	$53 \text{ in} \times 10 \text{ in} \times 60 \text{ ft} \times 12 \text{ in}/\text{ft} = 381,600 \text{ in}^3$
			$381,600 \text{ in}^3 \div 1,728 \text{ in}^3/\text{ft}^3 = 221 \text{ ft}^3$
			$221 \text{ ft}^3 \div 27 \text{ ft}^3/\text{yd}^3 = \mathbf{8.1 \text{ yd}^3 \text{ Fill below OHWM}}$

\*Worst case scenario is using the two measurements taken below the dam spillway, where the calculated fill below the OHWM would be the greatest.



Top Photo: East facing view of Dr. Kagel standing in outflow channel below dam.  
 Bottom Photo: Close-up western view of Dr. Kagel measuring OHWM width.



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**SITE PHOTOGRAPHY**



Top Photo: East view of downstream channel width (84") at the OHWM. Bottom Photo: Downstream (east) view of the channel above the pond.



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**SITE PHOTOGRAPHY**



Close-up view of measuring width and depth of channel upstream of Johnson pond.



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**SITE PHOTOGRAPHY**



Left Photo: Upstream (western) view of Dr. Kagel standing in Six-Mile Creek near its terminus in a man-made irrigation canal. Blue arrows indicate water flow direction. Right Photo: Close up of same view of Six-Mile Creek at the confluence with the irrigation canal.



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**SITE PHOTOGRAPHY**



Top Photo: Downstream view of irrigation canal that receives 100% of Six-Mile Creek flow. Bottom Photo: Upstream view of irrigation canal with Dr. Kagel standing above water control structure.



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**SITE PHOTOGRAPHY**