



DEPARTMENT OF THE ARMY  
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS  
REGULATORY DIVISION  
P.O. BOX 6898  
JBER, AK 99506-0898

CEPOA-RDS-SS

December 20, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime  
Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322  
(2023),<sup>1</sup> [POA-2009-00975] [MFR 1 of 1]<sup>2</sup>

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This

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<sup>1</sup> While the Supreme Court's decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

## 1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the review area

## 2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)
- e. 2008 Rapanos Guidance: List of Resources
- f. 2003 SWANCC Guidance: List of Resources

3. REVIEW AREA. The subject property is approximately 7.72 acres and is adjacent to North Tongass Highway. The subject property is located within Section 29, T. 74 S., R. 90 E., Cooper River Meridian; USGS Quad Map Ketchikan B-6; Latitude 55.4198° N., Longitude 131.7732° W.; in Ketchikan, Alaska. See the enclosed vicinity map.

Totem Bight State Historic Park is located at 9883 North Tongass Highway. The original trail system at Totem Bight was developed between 1938-1941 and has been improved substantially over the years. There have been no major repairs done to the trail system in over ten years.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Tongass Narrows, which is part of the territorial

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seas. However, no aquatic resources are present in the review area. Therefore, the nearest TNW is not connected with any aquatic resources in the review area.<sup>6</sup>

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup> N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. TNWs (a)(1): N/A
  - b. Interstate Waters (a)(2): N/A
  - c. Other Waters (a)(3): N/A

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>8</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).<sup>9</sup> Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A

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<sup>9</sup> 51 FR 41217, November 13, 1986.

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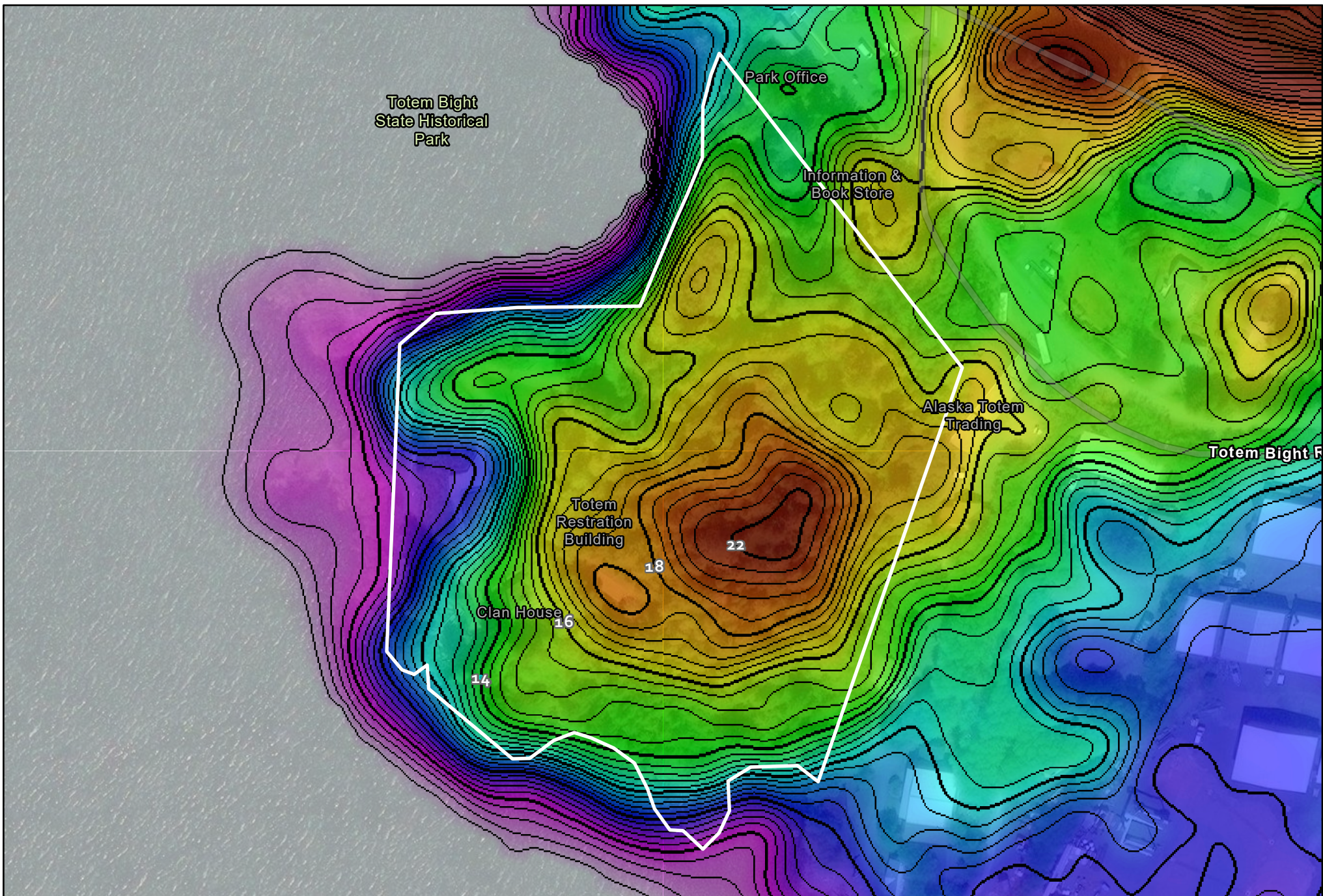
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. U.S. Army Corps of Engineers. 2009. POA-2009-00975 Preliminary Jurisdictional Determination.
  - b. U.S. Army Corps of Engineers. 2024. POA-2009-00975 Preliminary Jurisdictional Determination.
  - c. University of California, Davis – SoilWeb. 2023. <https://casoilresource.lawr.ucdavis.edu/gmap/>, Accessed: September 6, 2024.
  - d. U.S. Army Corps of Engineers Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Vicksburg, MS.
  - e. U.S. Army Corps of Engineers Environmental Laboratory. 2007. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0). Vicksburg, MS.
  - f. U.S. Fish and Wildlife Service. 2023. National Wetlands Inventory website. U.S. Department of the Interior, Fish, and Wildlife Service, Washington, D.C. <http://www.fws.gov/wetlands/>.
  - g. USDA. Tongass National Forest – Ketchikan Misty Fjords Project Area – Vegetation Mapping. 2024. <https://storymaps.arcgis.com/stories/14d0db3111564e6083d8bb66c874e2af>, Accessed: September 6, 2024.
  - h. National Wetland Plant List, Alaska Plant List Version 3.5 (2020). [https://cwbi-app.sec.usace.army.mil/nwpl\\_static/v34/home/home.html](https://cwbi-app.sec.usace.army.mil/nwpl_static/v34/home/home.html).
  - i. Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. U.S. General Soil Map (STATSGO2). Available online. Accessed: September 6, 2024.

10. OTHER SUPPORTING INFORMATION.

- a. Vegetation: Google Earth aerial imagery, photos provided by the requester, and the NWI show that the vegetation in the area of review is dominated by forested vegetation with dense tree coverage. The Tongass National Forest – Ketchikan Misty Fjords Project Area – Vegetation Mapping tool characterizes the vegetation as conifer forest dominated by western hemlock (*Tsuga heterophylla* [FAC]) with approximately 85% canopy cover, which is considered dense coverage. Photos provided by the requestor confirm the dominance of western hemlock in the area of review. The southwestern portion of the area of review is characterized as non-vegetated but is likely to support scrub-shrub species. iNaturalist records for the surrounding area provide a general overview for the vegetation present in the area of review. The Mud Bay area is likely to support species such as Sitka spruce (*Picea sitchensis* [FACU]), western hemlock (*Tsuga heterophylla* [FAC]), western lady fern (*Athyrium cyclosorum* [FAC]), and thimbleberry (*Rubus parviflorus* [FACU]). Because the vegetated part of the area of review is predominately western hemlock and other FAC and FACU species, we infer that this area does not meet the criteria for hydrophytic vegetation.
- b. Soils: There is no data from the Natural Resources Conservation Service (NRCS) in the Area of Review. The Digital General Soil Map of the US (STATSGO2) is a broad-based inventory of soils and non-soil areas that occur in a repeatable pattern on the landscape. According to the STATSGO2, Mud Bay is classified as Alexander Archipelago-Gulf of Alaska Coast-Maritime Upland-Glaciaded Hills and Plains. Glacial soils are often comprised of materials that can restrict the downward movement of water and cause the overlying soil to be saturated. However, the soil type in the vegetated part of the area of review appears to be the maritime forest-loamy colluvial slopes, limestone, which comprises approximately 11% of the map unit and is considered by NRCS as well drained and non-hydric. Further, the apparent lack of a prevalence of hydrophytic species within the vegetated part of the site indicates that there are no hydric soils present.
- c. Hydrology: Google Earth aerial imagery and photos provided by the requester show no standing water, channels or other indicators of surface water on the property.

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.





□ Area of Review  
— Contour (ft)  
Elevation (ft)  
0 22

**POA-2009-00975**  
0 210 420  
Feet  
Map Center: 131.772336°W 55.420104°N



Olivia Ortiz  
Date: 12/6/2024  
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere  
Datum: WGS 1984  
Scale: 1:3,000