



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

CEPOA-RDS-SS

[22 AUGUST 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-2023-00473. 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.

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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. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
  - i. Wetland 1, jurisdictional under Section 404 – 1.8 acres
  - ii. Unnamed tributary to Glacier Creek, jurisdictional under Section 404 – 1,087 linear feet

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 review area is approximately 2.45 acres and is located due west of the Alyeska Resort on Arlberg Avenue in Girdwood, Alaska (see Figure 1). The property owner intends to construct a children’s daycare facility, community recreation center, and housing at the subject project. The property is bordered to the south by Moose Meadows Park, which is owned by the Municipality of Anchorage (MOA). Arlberg Avenue borders the parcel to the east, and the Northface Road overflow parking lot borders the parcel to the north. A private helipad, constructed in 2015, and a paved footpath occupy the eastern portion of the property. The review area is located within Section 9, T. 10 N., R. 2 E., Seward Meridian; USGS Quad Map Seward D-6 NW; Latitude 60.97014° N., Longitude 149.1015° W.; Municipality

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of Anchorage, Alyeska Prince Addition Subdivision, Tract B, Frag Lot 9; in Girdwood, Alaska.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup> The nearest TNW is the Cook Inlet, which is part of the territorial seas.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 1 directly abuts an unnamed stream, identified on the Municipality of Anchorage (MOA) wetlands mapper as a second order stream and hereafter referred to as GLC-50-10, flows northwest from the review area for approximately 1,100 feet before joining a third order stream, GLC-50. GLC-50 flows west and then north for approximately 1,500 feet before entering Glacier Creek (see Figure 2). Glacier Creek flows approximately 3.5 miles south into the Cook Inlet, a TNW.
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

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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.

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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
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): GLC-50-10 is a relatively permanent water (RPW) that flows northwest from the review area for approximately 1,100 feet before joining a third order stream, GLC-50. GLC-50-10 is described on the MOA Wetlands Mapper as a second order perennial stream. Field observations supported this classification, as GLC-50-10 has a clearly defined and continuous bed and bank with an active floodplain. Flowing water was observed in the stream during the September 20, 2023, May 30, 2024, and July 2, 2024 site visits. An Ordinary High Water Mark (OHWM) was easily identifiable in the field due to the destruction of terrestrial vegetation, absence of vegetation within the stream channel, evidence of scour, and material sorting.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland 1 is a 1.8-acre palustrine shrub-scrub/emergent wetland with a continuous surface connection to Unnamed Stream. The area between Wetland 1 and Unnamed Stream consists of hummocks associated with the root crowns of trees. Sitka spruce (*Picea sitchensis* – FACU) is the most prevalent FACU species present and grows on the outer edge of the sampling area. The understory is dominated by FAC and FACW species such as lady fern (*Athrium cyclosum* – FAC) and meadow horsetail (*Equisetum pratense* – FACW). Lower areas within the hummocks contain wetland hydrology, hydrophytic vegetation, and hydric soils. Six wetland sample points were taken between the originally delineated wetland and Unnamed Stream on July 2, 2024. Three of the six wetland sample points meet all three criteria for a wetland as described by the *1987 Corps of Engineers Wetland Delineation Manual* and the *2007 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*. All six soil samples examined on July 2, 2024, had positive alpha, alpha-dipyridyl tests,

indicating both saturation and the presence of reduced iron. These positive tests indicate that the area from Wetland 1 to the stream are one continuous wetland with one hydrologic source.

This area between the stream and the larger delineated wetland is a wetland/non-wetland “mosaic,” defined in the Alaska Regional Supplement (2007) as a landscape that has complex microtopography with repeated small changes in elevation occurring over short distances, where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately. As described in the preamble of the “Revised Definition of ‘Waters of the United States’” rule, published in the *Federal Register* on January 18, 2023, wetland mosaics have historically been delineated as one wetland (88FR 3093). According to Policy Memo NWO-2003-60436<sup>9</sup>, two or more areas functioning as one wetland would be assessed for CWA jurisdiction under the pre-2015 regulatory regime consistent with *Sackett*. As discussed in Policy Memo NWO-2003-60436, the agencies consider the entire wetland to be “adjacent” if any part of the wetland is “adjacent.”

Based on observations made in the field on May 30, 2024, as well as information provided on the wetland data forms from the September 20, 2023 and July 2, 2024 consultant-provided reports, we have determined that Wetland 1 extends from the limits delineated by the consultant by approximately 55 linear feet to Unnamed Stream. From the limits delineated by the consultant to the stream, the wetland is approximately 10 feet wide. This distance is based on the limits of the hydrophytic vegetation and visual observations during the May 30, 2024, site visit (see photo log). Therefore, Wetland 1 is abutting and has a continuous surface connection to unnamed tributary GLC-50-10, an RPW. Wetland 1 is therefore adjacent to the unnamed tributary GLC-50-10 and is subject to CWA jurisdiction.

## 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>10</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

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<sup>9</sup> MEMORANDUM TO RE-EVALUATE JURISDICTION FOR NWO-2003-60436; [https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo\\_final\\_12-18-23\\_508c.pdf](https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf)

<sup>10</sup> 51 FR 41217, November 13, 1986.

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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
  - 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. Wetland Report supplied by consultant, dated November 3, 2023.
  - b. Site visit conducted by Corps staff with consultant present, May 30, 2024.
  - c. Additional wetland data forms and photos supplied by consultant, dated July 2, 2024.
  - d. *1987 Corps of Engineers Wetland Delineation Manual*

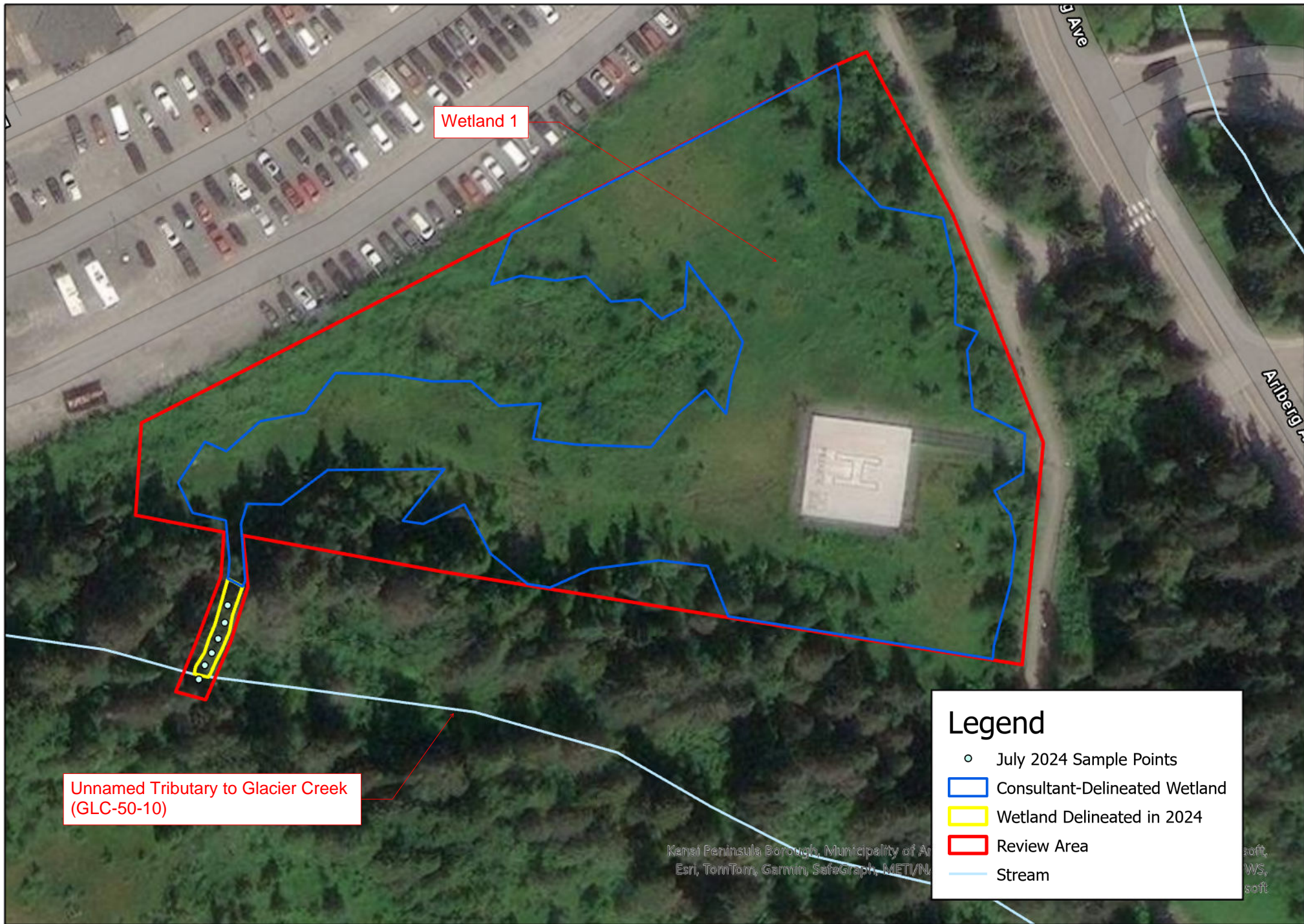
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- e. *2007 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*.
- f. Municipality of Anchorage Wetlands Mapper
- g. Policy Memo NWO-2003-60436

10. OTHER SUPPORTING INFORMATION. N/A

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.



Wetland 1

Unnamed Tributary to Glacier Creek  
(GLC-50-10)

**Legend**

- July 2024 Sample Points
- ▭ Consultant-Delineated Wetland
- ▭ Wetland Delineated in 2024
- ▭ Review Area
- Stream

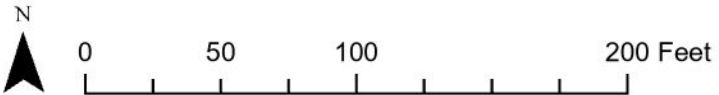


Figure 1



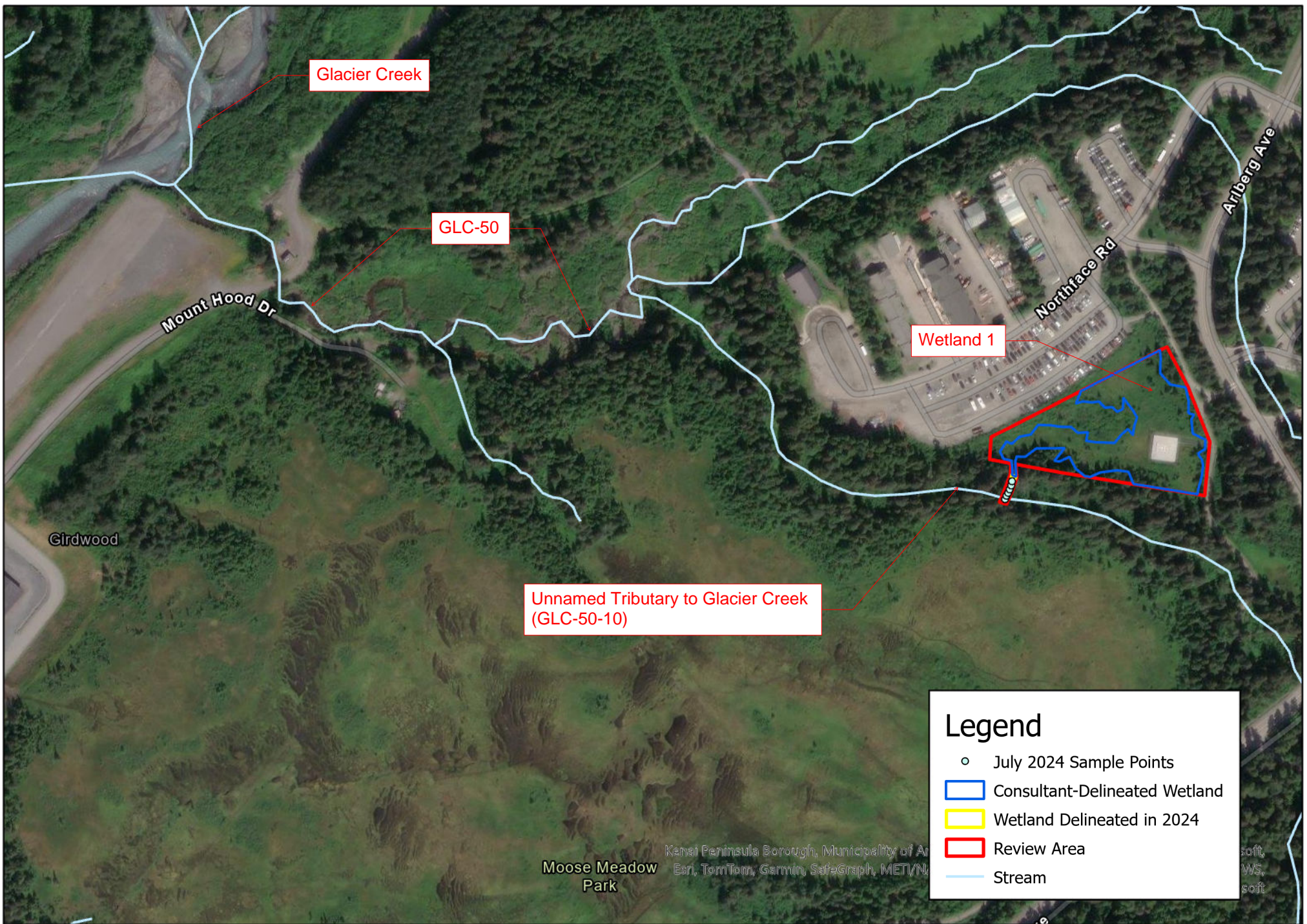


Figure 2

POA-2023-00473, Glacier Creek  
 Approved Jurisdictional Determination  
 July 29, 2024