



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

29 May 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),¹ POA-2024-00081, MFR 2 of 2²

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.³ 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.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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 AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ 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.

² 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.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ 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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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; non-jurisdictional

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 area of review is located at Lot D1, T18N, R1E, Section 27, Seward Meridian, 3182 N Trunk Rd. Palmer, AK and consists of a 3.16-acre area bound on the east side by Old Homestead Road and bound on the south side by East Bogard Road. There is a small creek (Wasilla Creek) outside of the review area to the east in-between the review area and Old Homestead Road. The area of review is contained within a parcel owned by Ralph Kircher. The northern portion of the lot is currently undeveloped and is uplands. The southern portion of the lot (surrounding the review area) and the lot to the west is developed as farmland. The approximate center of the area of review is located at latitude 61.61605° North, longitude 149.24436° West. No other AJDs have been done in the general vicinity.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Knick Arm, which is part of the territorial seas.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS
Wasilla Creek flows directly into Knick Arm, which is part of the territorial seas. However, Wetland 1 is not connected to Wasilla Creek or another TNW via a continuous surface connection. Available LiDAR and satellite imagery indicate that Wetland 1 is contained within a depression that is entirely surrounded by uplands. Neighboring vegetation is dominated by vegetation signatures that are indicative of upland communities.

Additionally, no surface connection is indicated by the National Hydrography Dataset (NHD) nor National Wetland Inventory (NWI) or the Cook Inlet Wetlands Mapper. Satellite imagery, spanning several years and different seasons, shows no signs of surface water or hydrology patterns between the review wetland and a TNW, nor did Google Earth Street View. There are some aerial images which show a “path,” but they have been confirmed to be ATV tracks and are not present on recent aerial imagery.

6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁶ 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.

⁷ 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.

⁸ 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.

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
- 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").⁹ 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.

Wetland 1 (0.47-acres) is not adjacent to or abutting a jurisdictional water and therefore would not be considered jurisdictional. The nearest jurisdictional water, Wasilla Creek, is about 0.1 miles (170 meters) southeast of the review area and

⁹ 51 FR 41217, November 13, 1986.

is separated due to changes in topography. The wetland is in a depression. No culverts are present to facilitate a continuous surface connection to Wasilla Creek. Given the lack of reasonable proximity or hydrologic connection, the review wetlands are unlikely to have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of Wasilla Creek or Knik Arm.

- 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*.

Wetland 1 (0.47-acre) is a non-navigable intrastate water that does not have a nexus to interstate or foreign commerce. It is located on private property and is not accessible to the public. Wetland 1 is not currently being used for commercial navigation, has not historically been used for commercial navigation, nor is susceptible to being used in the future for commercial navigation, including commercial water-borne recreation as they contain no open water. The wetlands are not adjacent to or abutting a jurisdictional water and therefore would not be considered jurisdictional. Hydrologic connectivity to jurisdictional waters is broken by uplands and lack culverts to support a continuous surface or subsurface connection. Given the absence of reasonable proximity or hydrologic connection to a jurisdictional water and the lack of a nexus to interstate or foreign commerce, the review wetland is considered an isolated water. This wetland would only have been jurisdictional based on the Migratory Bird Rule.

- 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).

Wetland 1 is not a TNW or tributary to a TNW. The non-tidal wetland is a combination of palustrine scrub shrub (PSS) and palustrine emergent (PEM) wetlands and does not have a continuous surface water connection to a jurisdictional water as discussed in 8 (b) and 8 (e) above. Therefore, the review wetlands are considered non-jurisdictional.

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. 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/>; accessed April 2024
 - b. USDA Soil Mapper; <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey>; accessed April 2024
 - c. Cook Inlet Wetland Mapper; <https://msb.maps.arcgis.com/apps/webappviewer/index.html?id=15658472427f459ab6d73b1d3ca5ab77>; accessed April 2024
 - d. Matanuska-Susitna Borough Mapper, 2019 USGS LiDAR Contours and Imagery: https://mapping.matsugov.us/Html5Viewer/index.html?viewer=MSB_Parcel_View er; accessed May 29, 2024
10. OTHER SUPPORTING INFORMATION. The on-site wetland is not adjacent to or abutting a TNW and therefore cannot be considered jurisdictional. The wetland is bordered by uplands. The nearest RPW that flows into a TNW, Wasilla Creek, is over 0.1-mile east of the review area. As described in Sections 8 (b), (e), and (f) above, there is no continuous surface water connection between the review area wetland and an RPW or a TNW. Given the lack of reasonable proximity or hydrologic connection to a jurisdictional water, the review wetlands are considered non-jurisdictional.
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

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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 IN QUESTION

S18N01E27

S18N01E26

3182

3400

7927

7955

E Bogard Rd

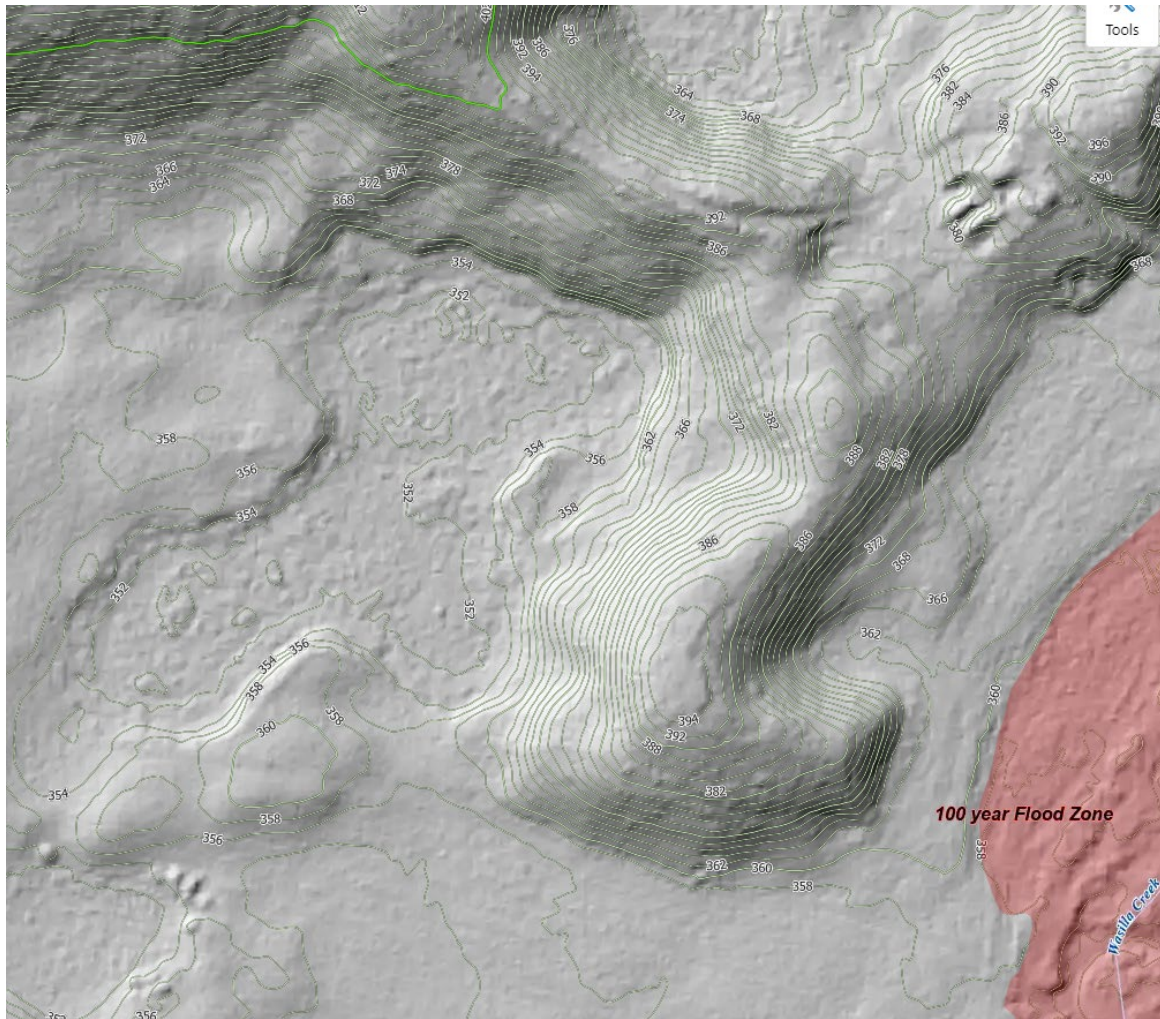
N Old Homestead Rd

N Trunk Rd

S18N01E34

8110

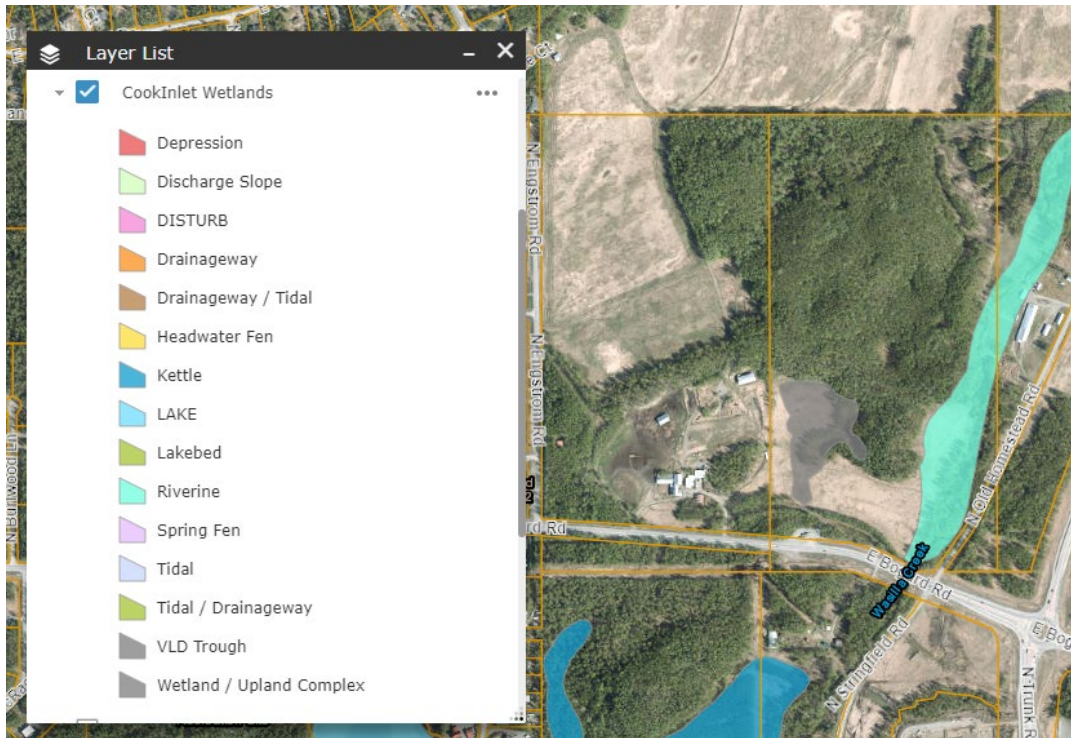
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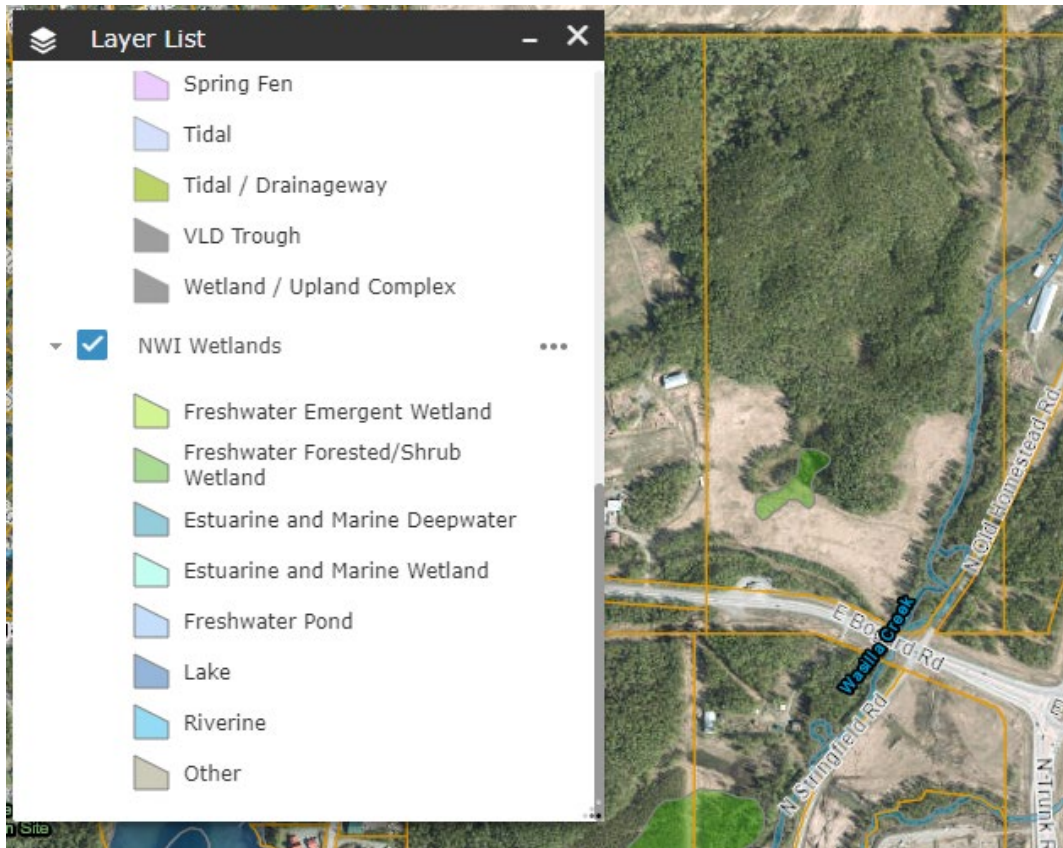
2019 Matanuska-Susitna Borough Mapper, 2019 USGS LiDAR Hillshade and Contours



Wetland 1



Cook Inlet Wetlands



NWI Wetlands



2022 imagery



2021 imagery



2019 imagery



2017 imagery

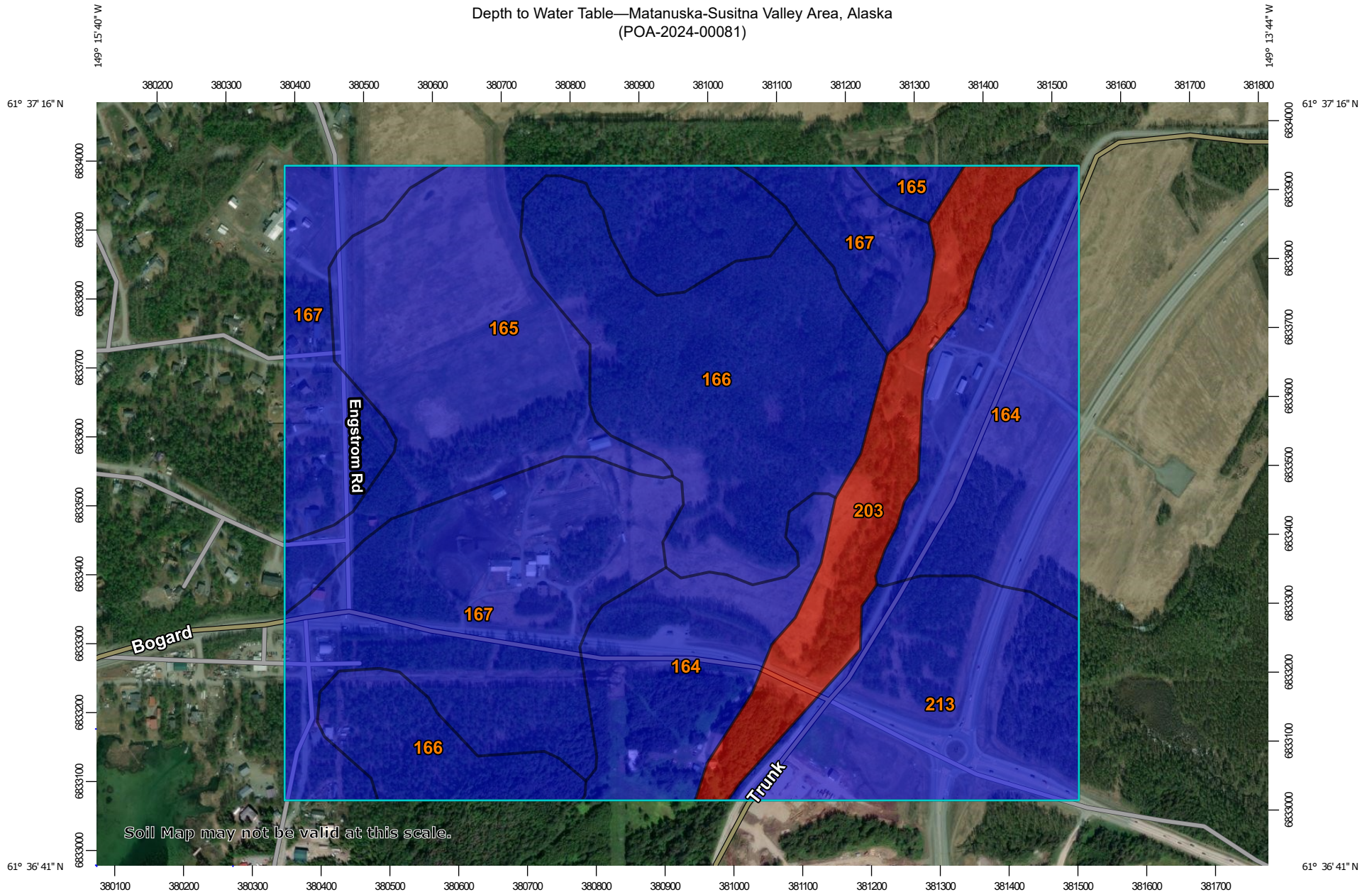


2016 imagery

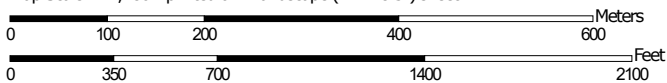


2011 imagery

Depth to Water Table—Matanuska-Susitna Valley Area, Alaska
(POA-2024-00081)
































Map Scale: 1:7,780 if printed on A landscape (11" x 8.5") sheet.



Map projection: Web Mercator Corner coordinates: WGS84 Edge tics: UTM Zone 6N WGS84



MAP LEGEND

Area of Interest (AOI)	 Not rated or not available
 Area of Interest (AOI)	Water Features
Soils	 Streams and Canals
Soil Rating Polygons	Transportation
 0 - 25	 Rails
 25 - 50	 Interstate Highways
 50 - 100	 US Routes
 100 - 150	 Major Roads
 150 - 200	 Local Roads
 > 200	Background
 Not rated or not available	 Aerial Photography
Soil Rating Lines	
 0 - 25	
 25 - 50	
 50 - 100	
 100 - 150	
 150 - 200	
 > 200	
 Not rated or not available	
Soil Rating Points	
 0 - 25	
 25 - 50	
 50 - 100	
 100 - 150	
 150 - 200	
 > 200	

MAP INFORMATION

The soil surveys that comprise your AOI were mapped at 1:24,000.

Warning: Soil Map may not be valid at this scale.

Enlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement. The maps do not show the small areas of contrasting soils that could have been shown at a more detailed scale.

Please rely on the bar scale on each map sheet for map measurements.

Source of Map: Natural Resources Conservation Service
Web Soil Survey URL:
Coordinate System: Web Mercator (EPSG:3857)

Maps from the Web Soil Survey are based on the Web Mercator projection, which preserves direction and shape but distorts distance and area. A projection that preserves area, such as the Albers equal-area conic projection, should be used if more accurate calculations of distance or area are required.

This product is generated from the USDA-NRCS certified data as of the version date(s) listed below.

Soil Survey Area: Matanuska-Susitna Valley Area, Alaska
Survey Area Data: Version 21, Sep 6, 2023

Soil map units are labeled (as space allows) for map scales 1:50,000 or larger.

Date(s) aerial images were photographed: Mar 25, 2015—Oct 19, 2023

The orthophoto or other base map on which the soil lines were compiled and digitized probably differs from the background imagery displayed on these maps. As a result, some minor shifting of map unit boundaries may be evident.

Depth to Water Table

Map unit symbol	Map unit name	Rating (centimeters)	Acres in AOI	Percent of AOI
164	Knik silt loam, 0 to 3 percent slopes	>200	50.2	19.0%
165	Knik silt loam, gently sloping and moderately steep	>200	49.0	18.6%
166	Knik silt loam, steep and sloping	>200	50.7	19.2%
167	Knik silt loam, undulating	>200	64.8	24.6%
203	Typic Cryaquents, 0 to 2 percent slopes	23	19.5	7.4%
213	Yensus silt loam, sloping and moderately steep	>200	29.7	11.2%
Totals for Area of Interest			264.0	100.0%

Description

"Water table" refers to a saturated zone in the soil. It occurs during specified months. Estimates of the upper limit are based mainly on observations of the water table at selected sites and on evidence of a saturated zone, namely grayish colors (redoximorphic features) in the soil. A saturated zone that lasts for less than a month is not considered a water table.

This attribute is actually recorded as three separate values in the database. A low value and a high value indicate the range of this attribute for the soil component. A "representative" value indicates the expected value of this attribute for the component. For this soil property, only the representative value is used.

Rating Options

Units of Measure: centimeters

Aggregation Method: Dominant Component

Component Percent Cutoff: None Specified

Tie-break Rule: Lower

Interpret Nulls as Zero: No

Beginning Month: January

Ending Month: December