



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

8 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),<sup>1</sup> POA-2024-00087, 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 AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

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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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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. Complex 1 (9.43 acres), jurisdictional under Section 404.
  - ii. Complex 2 (5.88 acres), non-jurisdictional.
  - iii. Complex 3 (122.80 acres), jurisdictional under Section 404.
  - iv. Complex 4 (14.38 acres), non-jurisdictional.
  - v. Pond 1 (2.82 acres), jurisdictional under Section 404.
  - vi. Pond 2 (1.89 acres), jurisdictional under Section 404.
  - vii. Pond 3 (0.03-acre), non-jurisdictional.
  - viii. Pond 4 (0.01-acre), non-jurisdictional.
  - ix. Stream 1 (82 linear feet), jurisdictional under Section 404.
  - x. Stream 2 (828 linear feet), jurisdictional under Section 404.
    - a. Stream 2A (153 linear feet) and Stream 2B (436 linear feet), jurisdictional under Section 404.
  - xi. Stream 3 (698 linear feet), jurisdictional under Section 404.
  - xii. Stream 4 (439 linear feet), non-jurisdictional.
  - xiii. Stream 5 (158 linear feet), jurisdictional under Section 404.

## 2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

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- 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 in northern Eagle River, within the Municipality of Anchorage (MOA), and consists of a 594.9-acre bound on the north and west by an Alaska Railroad Corporation right-of-way, on the east by Fire Creek and private residences, and on the south by Joint Base Elmendorf Richardson (JBER). The area of review is contained within parcels owned by Eklutna, Inc. The northern portion of the area of review is currently developed as a sand and gravel quarry. Additionally, a gravel road (Eklutna Park Drive) bisects the area of review from south to north. The remainder of the area of review is undeveloped land that is predominately forested. The area of review is located within the Cook Inlet ecoregion (USACE 2007). The approximate center of the area of review is located at latitude 61.347° North, longitude -149.581° West (North American Datum of 1983) and is found within the Public Land Survey System within Township 15 North, Range 2 West, Sections 34, 35, and 26 (Seward Meridian). The area of review is within the following two 12-digit hydrologic unit code (HUC) watersheds: 190204010306, Lower Eagle River; and 190204010804, Fire Creek (USGS 2023a).
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Knik Arm, which is part of the territorial seas.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Two of the wetland complexes (1 and 3) directly abut Fire Creek. Fire Creek flows northeast into Knik Arm, a TNW. The provided wetland delineation report (HDR 2024) indicates that 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.

reviewers mapped the continuous surface connections (CSC) between wetland complexes 1 and 3 with Fire Creek, an RPW.

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
  - d. Impoundments (a)(4): N/A
  - e. Tributaries (a)(5): Fire Creek is a relatively permanent water (RPW) that flows northeast from Eagle River into Knik Arm, which flows into the Pacific Ocean. According to the National Wetland Inventory and attached WDR, Fire Creek is

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<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.

characterized as a permanently flooded, upper perennial stream with an unconsolidated bottom (R3/5UBH). Due to the permanently flooded water regime, Fire Creek is a RPW that flows consistently throughout the year.

Fire Creek flows northward along the eastern boundary of the study area (Stream 1), into two ponds within the northeastern portion of the study area, then continues north into Knik Arm. In addition to Fire Creek, other perennial streams mapped within the study area included two small streams (Streams 2 and 3) that flow out of Wetland Complex 3, located west of and adjacent to Eklutna Park Drive, then through a culvert located beneath the road before ultimately flowing into Fire Creek on the eastern portion of the study area. According to the NWI, Streams 2 and 3 are characterized as permanently flooded, upper perennial streams with an unconsolidated bottom (R3UBH) (JDR, Table 4). Stream 2 has two additional stream channels located upstream of it (Stream 2A and Stream 2B). Streams 2A and 2B are also characterized as R3UBH; therefore, these additional stream channels are perennial. Stream 5 is located further south than Streams 2 and 3, but flows intermittently out of Wetland Complex 3, located east of Eklutna Park Drive, then through a culvert located beneath the road. Stream 5 is characterized as seasonally flooded, upper perennial stream with an unconsolidated bottom, ditched by the NWI (R4SBC) (JDR, Table 4). The perennial streams are relatively permanent waters and contribute flows to a downstream TNW; therefore, the perennial streams are subject to the Corps' jurisdiction.

There are two ponds (Ponds 1 and 2) are located on the northeastern portion of the study area and are connected by Fire Creek. Both Ponds 1 and 2 are permanently flooded (RPW) waters that contribute flow to an (a)(1) water through Fire Creek. Therefore, Ponds 1 and 2 are under the Corps' jurisdictional authority.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland complexes 1 and 3 are directly abutting and have a continuous surface connection to Fire Creek; therefore, the wetland complexes are adjacent to Fire Creek. The Web Soil Survey shows that hydric soils are prevalent in all of the mapped wetland complexes and follows the table showing which site points had hydric soil indicators in the wetland delineation report. Wetland complexes 1 and 3 comprise of 427.4 acres of palustrine wetlands. The Municipality of Anchorage (MOA) wetland mapper, National Wetlands Inventory (NWI), and Web Soil Survey all corroborate the findings of the provided wetland delineation report.

## 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
- 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).

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

Wetland Complexes 2 and 4 are not TNWs or tributaries to a TNW. These non-tidal wetland complexes are a combination of palustrine forested (PFO), palustrine scrub shrub (PSS), and palustrine emergent (PEM) wetlands. As documented in the wetland delineation report, the uplands surrounding the wetland complexes mostly lack the presence of hydric soil and wetland hydrology. The delineation report indicates that wetland complexes 2 and 4 do not possess a CSC with Fire Creek or any other waters. The MOA wetland mapper, NWI, and Web Soil Survey indicate that wetland complexes 2 and 4 are surrounded by uplands and do not have inlet or outlet channels. No channels or any other flow conveyances that could form a CSC occurs between Fire Creek and wetland complexes 2 and 4. Therefore, the wetlands comprising wetland complexes 2 and 4 are non-jurisdictional.

One intermittent stream flows through culverts beneath Eklutna Park Drive (Stream 4); the stream appears to go subsurface on the eastern portion of the study area and not connect to any other waterbodies. Since the intermittent stream lacks connection to a downstream (a)(1) water, the stream is not subject to the Corps' jurisdictional authority.

There are two ponds (Ponds 3 and 4) located east of and adjacent to Eklutna Park Drive within isolated depressional features that are surrounded by uplands. While the ponds are permanently flooded (RPW), they do not contribute flow to any category of jurisdictional waters (a)(1) - (a)(7). Therefore, Ponds 3 and 4 are not subject to the Corps' jurisdiction.

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. HDR Engineering. 2024. Jurisdictional Determination Report: Powder Reserve West Residential Development. Anchorage, AK.
  - b. Municipality of Anchorage. 2023. Municipality of Anchorage Wetlands Webmap – MOA Wetlands Mapping Tool, <https://moawms.maps.arcgis.com/apps/View/index.html?appid=860a95de287f448b953f9a51f4539a46>, Accessed: March 11, 2024.
  - c. University of California, Davis – SoilWeb. 2023. <https://casoilresource.lawr.ucdavis.edu/gmap/>, Accessed: March 11, 2024.
  - d. U.S. Army Corps of Engineers Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Vicksburg, MS.

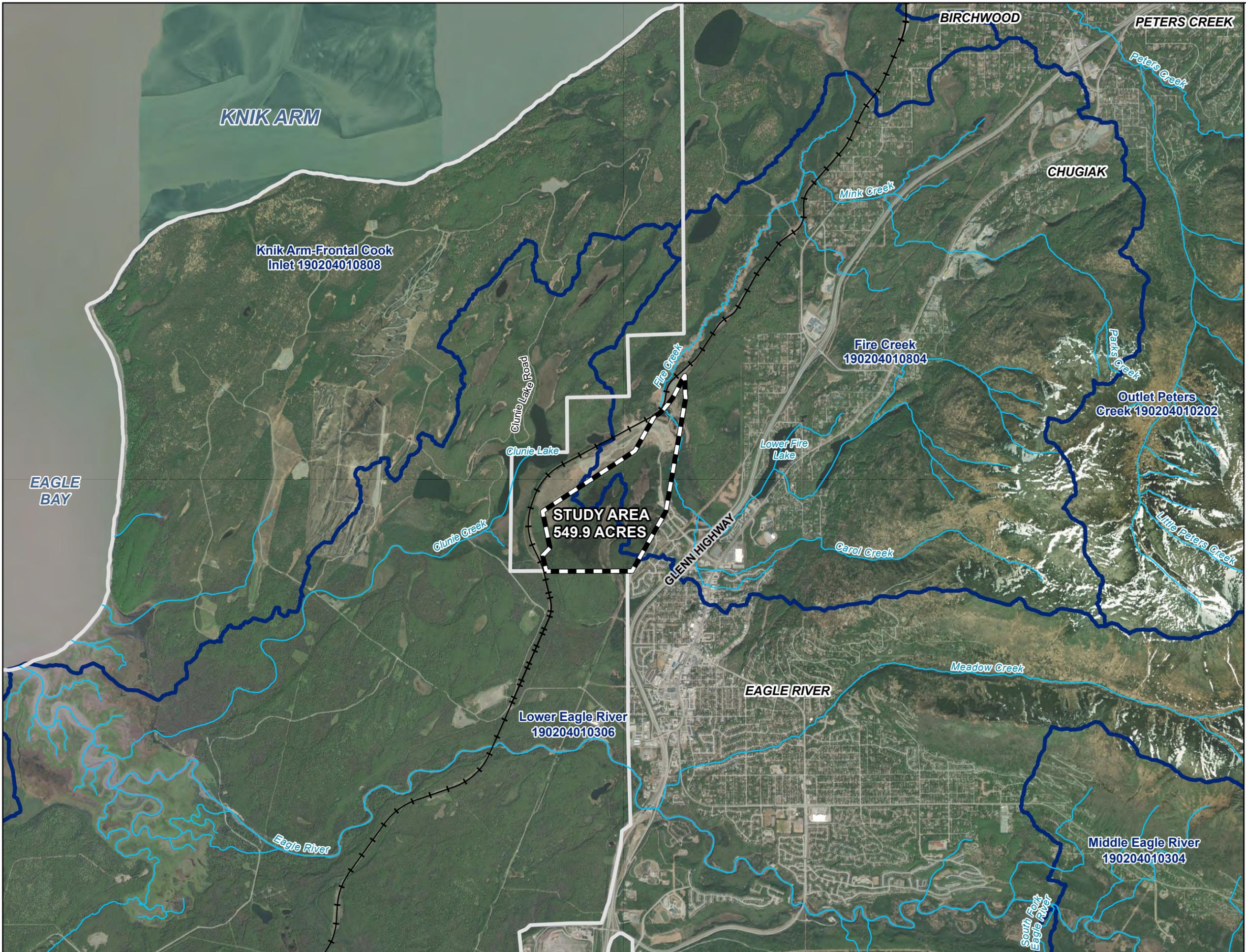
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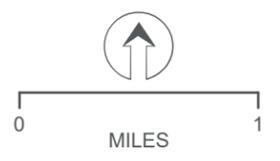
- e. U.S. Army Corps of Engineers Environmental Laboratory. 2007. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0). Vicksburg, MS.
- f. U.S. Fish and Wildlife Service. 2023. National Wetlands Inventory website. U.S. Department of the Interior, Fish, and Wildlife Service, Washington, D.C.  
<http://www.fws.gov/wetlands/>

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.



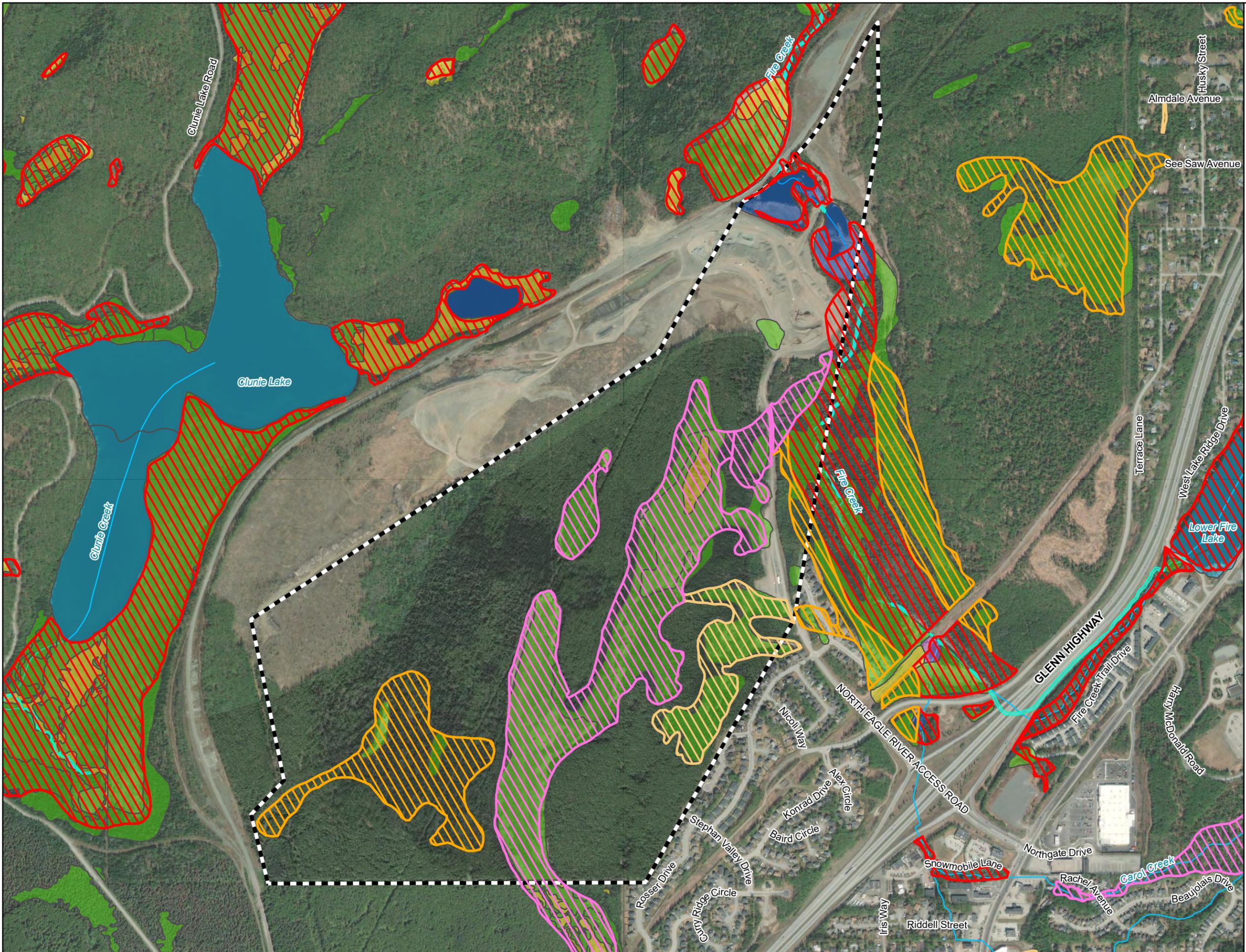
- LEGEND**
-  Study Area
  -  HUC 12 Watershed Boundaries
  -  Streams (NHD)
  -  Alaska Railroad
  -  Joint Base Elmendorf-Richardson



POWDER RESERVE WEST  
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STUDY AREA AND HUC12 WATERSHEDS  
FIGURE 1



**LEGEND**

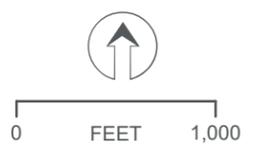
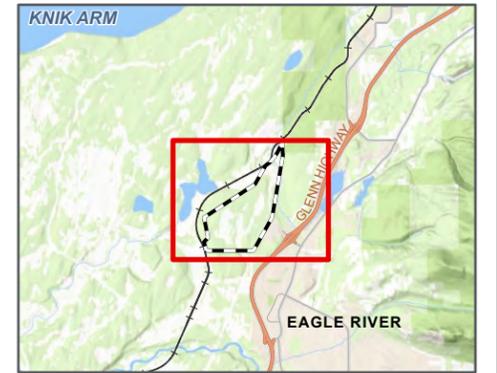
- Study Area
- Streams (NHD)

**USFWS National Wetland Inventory Mapping (USFWS 2023)**

- Freshwater Emergent Wetland
- Freshwater Forested/Shrub Wetland
- Estuarine and Marine Wetland
- Freshwater Pond
- Lake
- Riverine

**MOA Wetland Management Plan Mapping (MOA 2015a)**

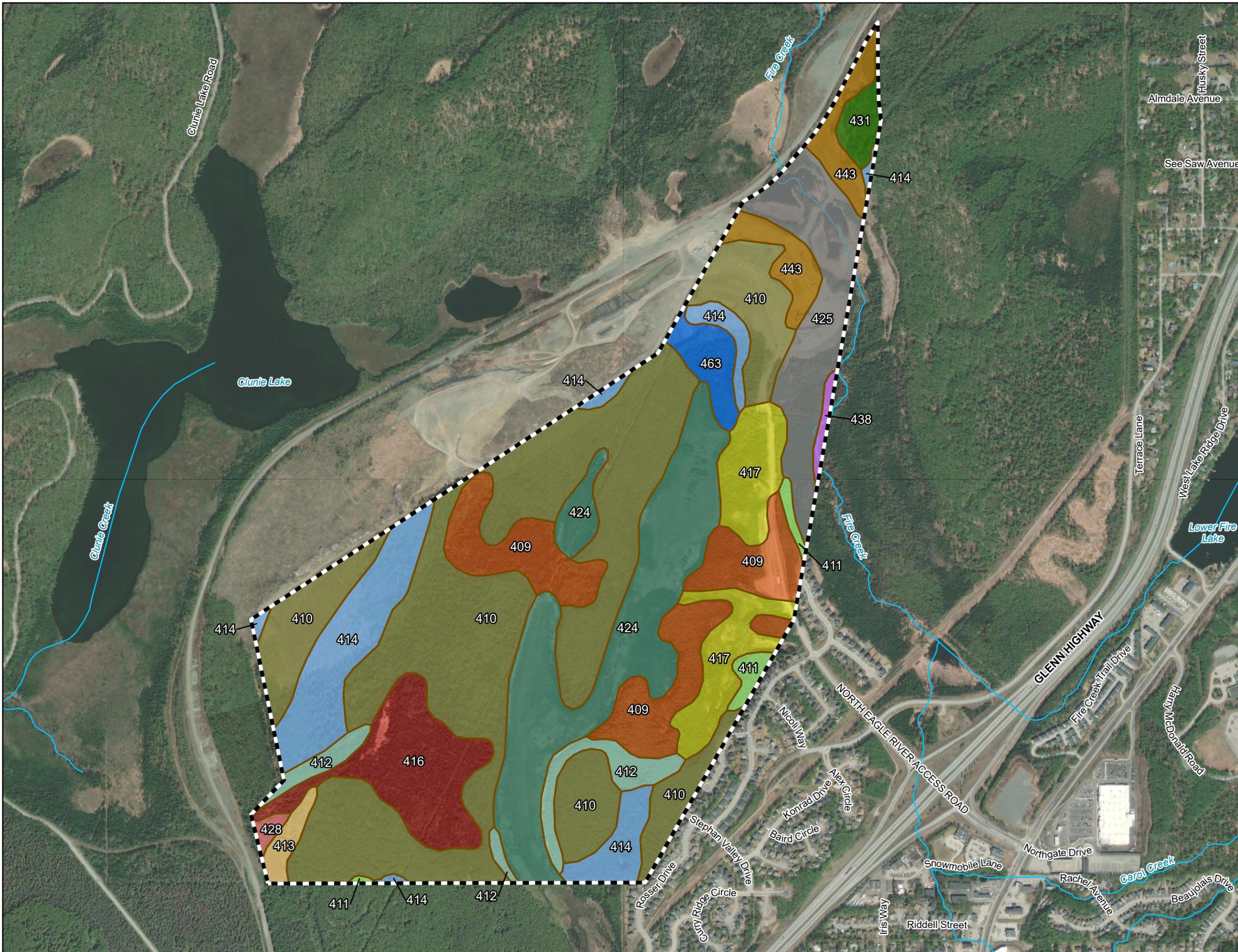
- Class A Wetlands
- Class B Wetlands
- Class C Wetlands
- Class D Wetlands



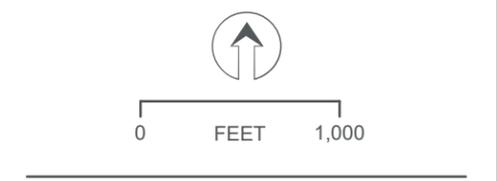
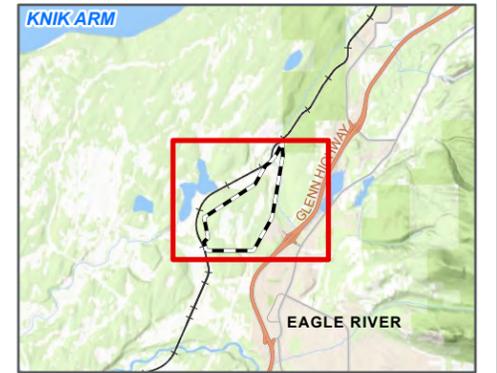
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EXISTING WETLAND MAPPING  
FIGURE 2



- LEGEND**
- Study Area
  - Streams (NHD)
- Soil Survey**
- 409 - Deception-Disappear complex, undulating and hilly; 15% Hydric
  - 410 - Deception-Estelle-Kichatna complex, 0 to 7 percent slopes; 3% Hydric
  - 411 - Deception-Estelle-Kichatna complex, 12 to 20 percent slopes; 6% Hydric
  - 412 - Deception-Estelle-Kichatna complex, 20 to 45 percent slopes; 0% Hydric
  - 413 - Deception-Estelle-Kichatna complex, 45 to 85 percent slopes; 0% Hydric
  - 414 - Deception-Estelle-Kichatna complex, undulating and hilly; 7% Hydric
  - 416 - Disappear-Pioneer Peak complex, 0 to 7 percent slopes; 70% Hydric
  - 417 - Doroshin peat, 0 to 7 percent slopes; 90% Hydric
  - 424 - Icknuun peat, 0 to 3 percent slopes; 90% Hydric
  - 425 - Jacobsen-Disappear-Doroshin complex, 0 to 3 percent slopes; 95 Hydric
  - 428 - Kashwitna-Kichatna complex, 0 to 3 percent slopes; 2% Hydric
  - 431 - Kashwitna-Kichatna complex, undulating; 10% Hydric
  - 438 - Moose River-Niklason complex, occasionally flooded, 0 to 3 percent slopes; 79% Hydric
  - 443 - Pits, gravel
  - 463 - Water, fresh



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SOIL SURVEY MAPPING  
FIGURE 3

# WETLAND COMPLEX 1

## LEGEND

Study Area

### Wetland Mapping

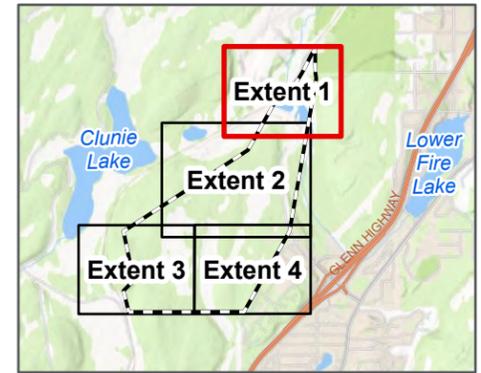
Jurisdictional Wetland and Waters

### Field Points

- Wetland Determination Form, Upland
- Wetland Determination Form, Wetland
- Observation Point, Wetland
- Observation Point, Waterbody

### Stream Mapping

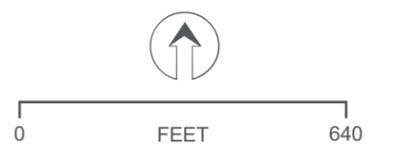
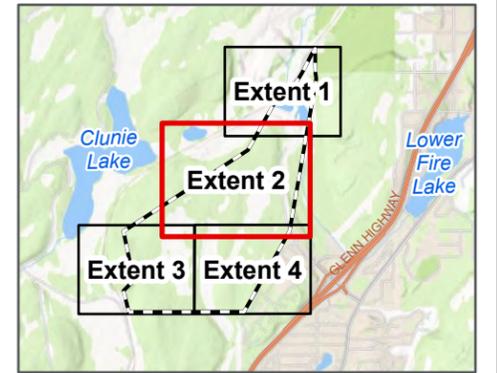
R3UBH



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WETLAND AND WATERBODY MAPPING  
FIGURE 4, EXTENT 1



- LEGEND**
- Study Area
  - Wetland Mapping**
    - Jurisdictional Wetland and Waters
    - Non-Jurisdictional Wetland and Waters
  - Field Points**
    - Wetland Determination Form, Upland
    - Wetland Determination Form, Wetland
    - Observation Point, Upland
    - Observation Point, Wetland
    - Observation Point, Waterbody
  - Stream Mapping**
    - Culvert
    - R3UBH
    - R4SBC
    - Non-Jurisdictional R4SBC



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WETLAND AND WATERBODY MAPPING  
FIGURE 4, EXTENT 2

# WETLAND COMPLEX 4

## LEGEND

 Study Area

### Wetland Mapping

 Jurisdictional Wetland and Waters

 Non-Jurisdictional Wetland and Waters

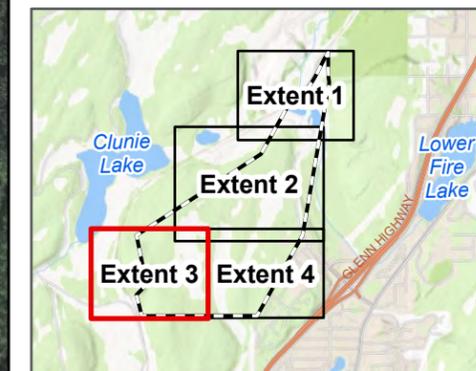
### Field Points

 Wetland Determination Form, Upland

 Wetland Determination Form, Wetland

 Observation Point, Upland

 Observation Point, Wetland



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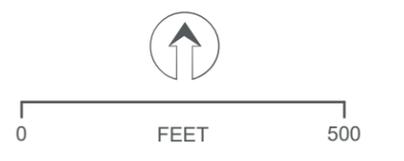
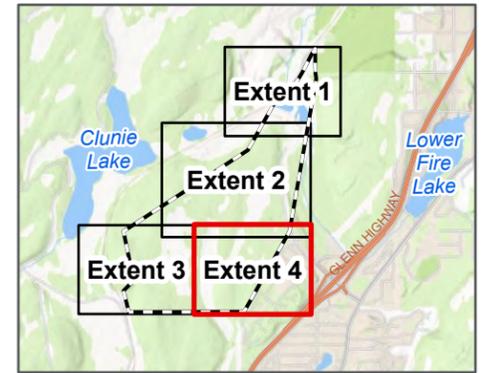
WETLAND AND WATERBODY MAPPING  
FIGURE 4, EXTENT 3



# WETLAND COMPLEX 3 CONT.

**LEGEND**

- Study Area
- Wetland Mapping**
- Jurisdictional Wetland and Waters
- Field Points**
- Wetland Determination Form, Upland
- Wetland Determination Form, Wetland
- + Observation Point, Upland
- + Observation Point, Wetland



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FIGURE 4, EXTENT 4