



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALASKA DISTRICT
1046 MARKS ROAD
FORT WAINWRIGHT, ALASKA 99703

POA-2024-00287, Worry Free Alaska

21 November 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-2024-00287] Wetland Delineation Report for: Frank Avenue –Lots 1 and 6, Block 2 Of the Metro Industrial Subdivision Fairbanks, Alaska; Worry Free Alaska; prepared by 3-Tier Alaska, October 8, 2024 (MFR 1 of 1).²

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

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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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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Alaska.

1. SUMMARY OF CONCLUSIONS.

The 0.04 acre subject wetland within the 1.97-acre review area is determined to be non-jurisdictional because it does 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).

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. 651, 143 S. Ct. 1322 (2023).
- e. MFR 1 of 1: Wetland Delineation Report for: Frank Avenue –Lots 1 and 6, Block 2 Of the Metro Industrial Subdivision Fairbanks, Alaska; Worry Free Alaska; prepared by 3-Tier Alaska, October 8, 2024.
- f. POA-2021-00420, negative AJD determination on August 25, 2021, located within Lots 1 and 2, Block 4, Metro Industrial Park, lot bounded by Peger Road, Frank Avenue and Tibor Street, Latitude 64.811086° N., Longitude -147.777600° W.; North Star Borough, in Fairbanks, Alaska.

3. REVIEW AREA: The review area is on 1.97 acres located at 64.811086 ° North, - 147.777600 ° West, Fairbanks, Fairbanks North Star Borough, Alaska. See attached Figure 1, dated 10/02/2024 from the Wetland Delineation Report for: Frank Avenue –Lots 1 and 6, Block 2 Of the Metro Industrial Subdivision Fairbanks, Alaska; Worry Free Alaska; prepared by 3-Tier Alaska, October 8, 2024.

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4. NEAREST TRADITIONAL NAVIGABLE WATER AND INTERSTATE WATER: The nearest traditional navigable water and interstate water is the Tanana River. The Tanana River is a Section 10 waterway. The subject wetland has no surface water connection to the Tanana River.⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS: There is no surface water flow path from subject wetland to TNW.
6. SECTION 10 JURISDICTIONAL WATERS⁷: There are no 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.
7. SECTION 404 JURISDICTIONAL WATERS:
 - a. TNWs (a)(1): N/A, There are no TNWs in the review area.
 - b. Interstate Waters (a)(2): N/A, There are no interstate waters (a)(2) in the review area.
 - c. Other Waters (a)(3): N/A, there are no lake or pond that meets the interstate/foreign commerce nexus test post-2001 SWANCC within the review area.
 - d. Impoundments (a)(4): N/A, There are no impoundments in the review area.
 - e. Tributaries (a)(5): N/A, there are no tributaries that are relatively permanent waters (RPWs) within the review area.
 - f. The territorial seas (a)(6): N/A, there are no territorial seas within the review area.
 - g. Adjacent wetlands (a)(7): N/A, there are no wetlands within the review area that were determined to be adjacent (i.e., having a continuous surface connection to

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.

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a TNW, interstate water, jurisdictional impoundment, jurisdictional tributary, or the territorial seas.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. There are no 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”).⁸
- b. There are no aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance.
- c. There are no 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.
- d. There are no aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.).
- e. There are no 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.”
- f. The 0.04 acre subject wetland in the 1.97-acre review area is determined to be non-jurisdictional because it does 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). The 0.04-acre subject wetland is bounded by roadways on all sides that do not contain culverts or bridges to other wetlands or waters according to the Fairbanks North Star GIS Stormwater System map. A culvert near the northwest corner of the subject property drains water into the road ditch that percolates into the ground within the ditch (MFR-1 of 1).

9. DATA SOURCES.

- a. MFR-1 of 1: Wetland Delineation Report for: Frank Avenue –Lots 1 and 6, Block 2 Of the Metro Industrial Subdivision Fairbanks, Alaska; Worry Free Alaska; prepared by 3-Tier Alaska, October 8, 2024.
- b. Fairbanks North Star Borough GIS Stormwater System map is available at: <https://fnsb.maps.arcgis.com/apps/webappviewer/index.html?id=66d32548f994406864d6e47d80678e>.
- c. This jurisdictional determination was based on desktop analysis and the field work completed by 3-Tier Alaska documented in MFR-1 of 1.

⁸ 51 FR 41217, November 13, 1986.

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10. 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.

