



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

CEPOA-RDS-NC

27 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),¹ POA-2024-00307, MFR 1 OF 1²

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 A, jurisdictional under Section 404

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 Silver Acres Subdivision is approximately 10 acres. The legal description for the review area is Lot 3, Black Bear Subdivision. The project site is located within Section 13, T. 40 S., R. 65 E., Copper River Meridian; USGS Quad Map Juneau B-2; Latitude 58.39868° N., Longitude 134.60043° W.; in Juneau, Alaska.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to the wetland matrix is the Mendenhall River. The Mendenhall River is considered to be a TNW because the Corps has determined

that it is known to have historically supported water-borne commerce. The Mendenhall River flows into Fritz Cove, which is part of the Gulf of Alaska.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The wetlands within the review area are part of a larger wetland that has a continuous surface connection to relatively permanent tributaries of the Mendenhall River, a Traditional Navigable Water, and to the river itself. The wetland directly abuts the Mendenhall River; Montana Creek, a relatively permanent water the flows to the Mendenhall River; and tributary of Montana Creek. In addition, a man-made ditch and a small channel that the applicant describes as a game trail extend from within the project area wetlands converging off-site to the Montana Creek tributary. The Mendenhall River flows to Fritz Cove, part of the Gulf of Alaska; the portion of the river from the Fritz Cove to the confluence with Montana Creek and possibly farther upstream is subject to tidal action.
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 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

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.

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):
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): The on-site portion of Wetland A is approximately 5.3 acres and comprised of palustrine scrub shrub, emergent and forested wetland communities. This wetland is part of a large wetland that abuts jurisdictional waters including a Traditional Navigable Water. A wetland delineation from Kai Environmental dated May 2024 determined that the 10-acre property contains approximately 4.5 acres of palustrine scrub-shrub broad leaved deciduous (PSS1) wetland, 0.5 acres of palustrine freshwater emergent persistent (PEM1) wetland, and 0.3 acres of palustrine forested broad leaved deciduous (PFO1) wetland. The Corps concurs with the technical data used to delineate the project site, see page 12 of the delineation for the geographic extent of Wetland A. These different types of wetlands are evaluated as one wetland for jurisdiction under the Clean Water Act, consistent with longstanding agency practice (see *Memorandum to Re-Evaluate Jurisdiction for NWO-2003-60436*, available at https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf). Although the delineation report asserts that “There is no surface water connection to tributaries of either Montana Creek or the Mendenhall River”, applicable National Wetland Inventory (NWI) information, recent aerial imagery and LiDAR imagery indicate that there is a surface connection to these waters. Wetland A abuts several relatively permanent tributaries that drain to Montana Creek, which drains to the Mendenhall River, which drains to Fritz Cove, a TNW and part of the Gulf of Alaska. One of the streams that Wetland A abuts is AWC stream # 111-50-10500-2003-3006, which is 0.12 miles away from the parcel; documentation of fish presence and rearing habitat by ADF&G demonstrates that the stream has sufficient flow to meet the relatively permanent standard under

the pre-2015 regulatory regime consistent with *Sackett*. The figures provide evidence of the MFR's assertions that the onsite wetland is part of a larger wetland that directly abuts tributaries to Montana Creek and abuts Montana Creek, a relatively permanent tributary of the Mendenhall River, which is a TNW. Further, the Black Bear figure indicates that there are surface channels that extend off site and directly connect to a Montana Creek tributary. See map sheets 1-4 dated August 27, 2024 and attached 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").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. 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

⁹ 51 FR 41217, November 13, 1986.

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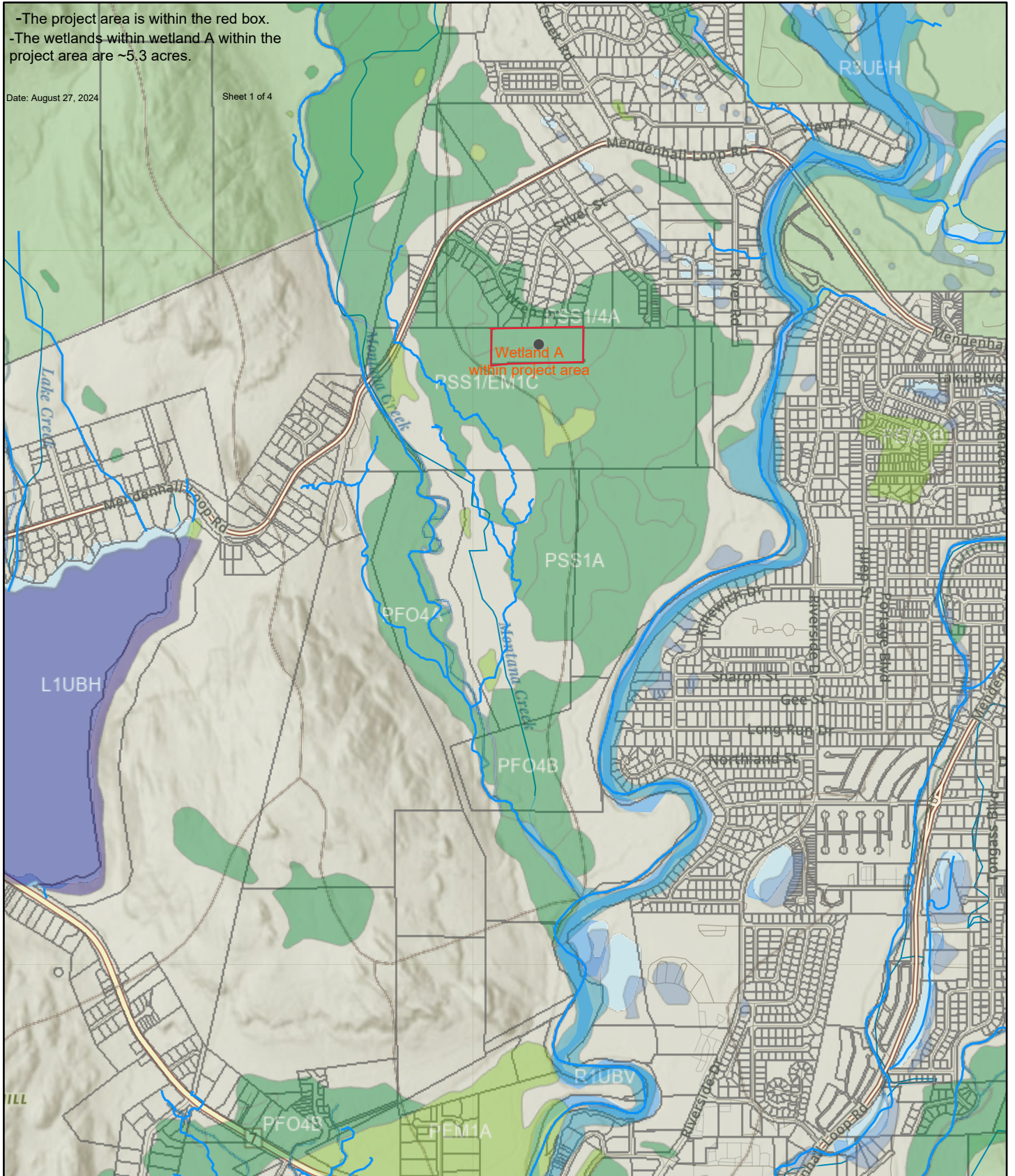
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries 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. A site visit was performed by KAI Environmental Consultants, LLC on May 2024, and wetland delineation reports were provided to the Corps.
 - b. The Corps National Regulatory Viewer. Accessed July 11, 2024. This resource provides LiDAR imagery as well as true color aerial imagery, National Wetland Inventory information, and other pertinent information.
 - c. 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 July 11, 2024.
 - d. ARCGIS - Home. 2023 Watersheds of Juneau. (n.d.). https://www.arcgis.com/apps/Embed/index.html?webmap=2eef1f0b569d4c009d6f3ca19f0b3ef6&extent=-135.934,58.1421,-132.8222,58.9971&zoom=true&scale=true&search=true&searchextent=true&legend=true&basemap_gallery=true&disable_scroll=false&theme=light. Accessed July 17, 2024.
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.

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-The project area is within the red box.
 -The wetlands within wetland A within the project area are ~5.3 acres.

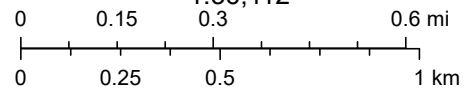
Date: August 27, 2024

Sheet 1 of 4



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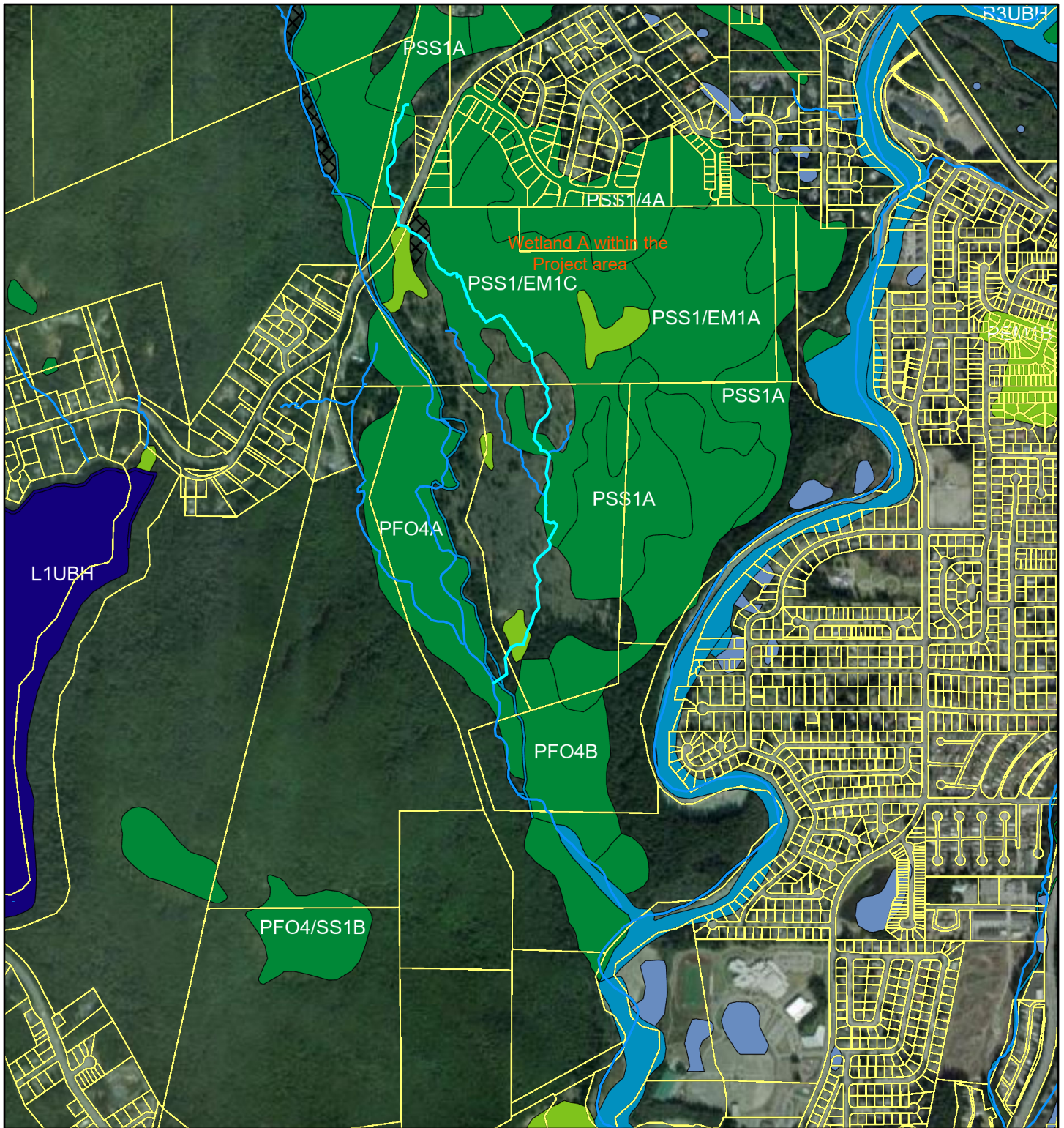
- | | | | | |
|-----------------------------------|---------------------|----------------------|------------------------|--------------|
| AWC 2024 - Anadromous streams | Connector | Levee | Playa | Project Area |
| Wetlands | Pipeline | Lock Chamber | Reservoir | |
| Freshwater Emergent Wetland | Stream/River | Spillway | Swamp/Marsh | |
| Freshwater Forested/Shrub Wetland | Underground Conduit | Stream/River | WBD Hydrologic Unit 12 | |
| Freshwater Pond | NHD Area | Wash | NHD Point | |
| Lake | Bridge | NHD Waterbody | Gauging Station | |
| Riverine | Canal/Ditch | Estuary | Rapids | |
| parcels (darklines) | Dam/Weir | Ice Mass | Sink | |
| NHD Flowline | Flume | Lake/Pond | Waterfall | |
| Canal/Ditch | | | | |

State of Alaska, Esri Canada, Esri, TomTom, Garmin, SafeGraph, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA, USFWS, NRCAN, Parks Canada, Esri, NASA, NGA, USGS, FEMA, Simonson, Quinn, Vetsy, et al, Source: USGS, EPA

Amanda Locken

Sources: Esri, USGS | Esri, NASA, NGA, USGS, FEMA | State of Alaska, Esri Canada, Esri, TomTom, Garmin, SafeGraph, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA, USFWS,


Alaska Fish Resources - Anadromous Waters Catalog





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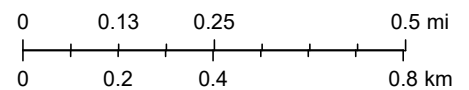
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 AWC 2024 - Anadromous streams


 parcels (light lines)

 Freshwater Pond

 Lake



Wetlands

 Freshwater Emergent Wetland

 Riverine Species

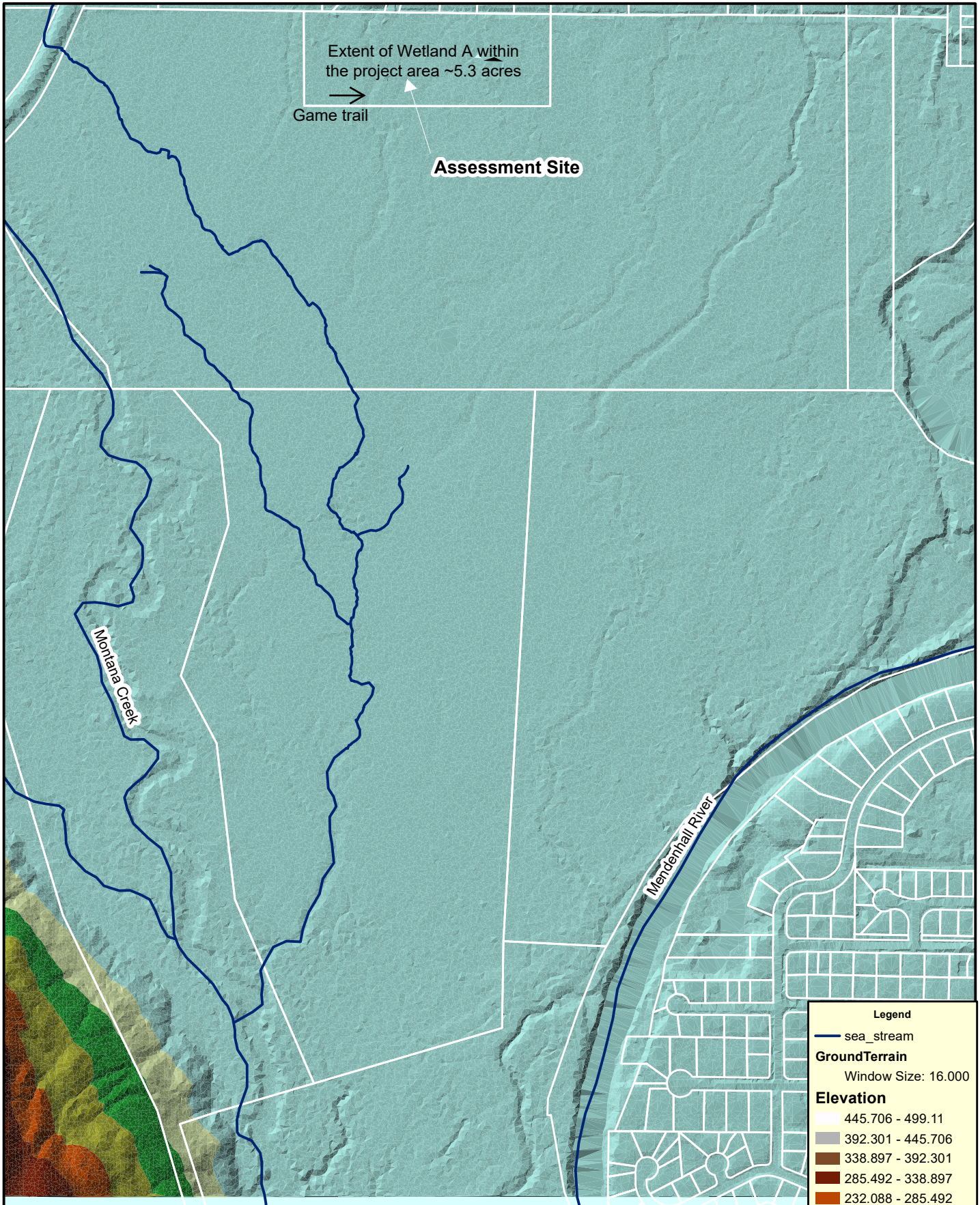
 Freshwater Forested/Shrub Wetland

 Polygons

 Project Area
Extent of Wetland A within the project area
~5.3 acres

Earthstar Geographics, ADFG SF GIS, Simonson, Quinn, Vetesy, et al

Lot 3, Black Bear Subdivision



Extent of Wetland A within
the project area ~5.3 acres
→
Game trail

Assessment Site

Montana Creek

Mendenhall River

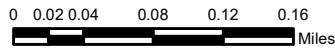
Legend

- sea_stream

GroundTerrain
Window Size: 16.000

Elevation

445.706 - 499.11
392.301 - 445.706
338.897 - 392.301
285.492 - 338.897
232.088 - 285.492
178.683 - 232.088
125.279 - 178.683
71.874 - 125.279
18.47 - 71.874



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Figure 4. Wetland areas (including uplands) as determined for the Silver Acres property in Juneau, Alaska, after field work conducted in May, 2024.



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