



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

September 19, 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-2024-00399, 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. A 31-foot stream section part of an unnamed stream (61 square feet) that crosses the Review Area (0.78-acre parcel); this is a Relatively Permanent Water of the U.S. (RPW) that flows into a Traditional Navigable Water of the U.S.; therefore, it is jurisdictional under Section 404 of the Clean Water Act.

## 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 covers the 0.78-acre parcel known as Block 6, Lot 6 of the Alpine Woods subdivision in Anchorage, Alaska (see figure 4 attached) near Latitude 61.108973° N., Longitude 149.763596° W. Although the Review Area was mapped by the Municipality of Anchorage as containing wetlands, the 2024 Wetland Delineation Report provided four (4) wetland determination data forms that indicate the Review Area does not contain wetlands.

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*Table 1: 2024 Summary of Wetland Determination Data Forms.*

Sampling Point	Hydrophytic Veg.	Wetland Hydrology	Soils	Wetland Criteria Met?
PS04	No	No	No	No
PS06	Yes	No	No*	No
PS09	Yes	No	No*	No
PS12	Yes	No	No	No

\* Needed additional field confirmation for wetland hydrology.

During Corps field verification conducted on September 13, 2024, the Corps inspected PS06 (saturation at 20 inches) and PS09. We dug holes adjacent to them to verify that the area did not meet soils or wetland hydrology. We found that although PS06’s soils met problematic soil indicator F3 and had saturation at 20 inches on May 30<sup>th</sup>, the site didn’t have saturation or water table within 16 inches of the profile on September 13, 2024, therefore it did not meet wetland hydrology. PS09 did not meet any of the normal or problematic soil indicators and did not have wetland hydrology. Based on our field inspection, we did not find additional information to change findings provided in the 2024 Wetland Delineation Report, even though the Municipality of Anchorage has mapped the area as wetlands.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup> Campbell Lake
  
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS  
 The 31-foot stream section in the Review Area is part of an Unnamed Stream that discharges into Little Campbell Creek, which in turn discharges into Campbell Creek, and eventually into Campbell Lake, a TNW under section 404 of the Clean Waters Act and a navigable water under Section 10 of the Rivers and Harbors Act.
  
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

<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.

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): The unnamed stream, of which the 31-foot section contained in the Review Area is part of, has been determined to be an RPW by the Corps. This determination is based on observations conducted during field data collection on May 30<sup>th</sup> for the 2024 Wetland Delineation Report and during Corps field verification conducted on September 13<sup>th</sup>. During these events, the stream had surface flows, which indicated that it supports continuous flow at least seasonally (at least 3 months).
  - f. The territorial seas (a)(6): N/A
  - g. Adjacent wetlands (a)(7): N/A

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<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.

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). N/A

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

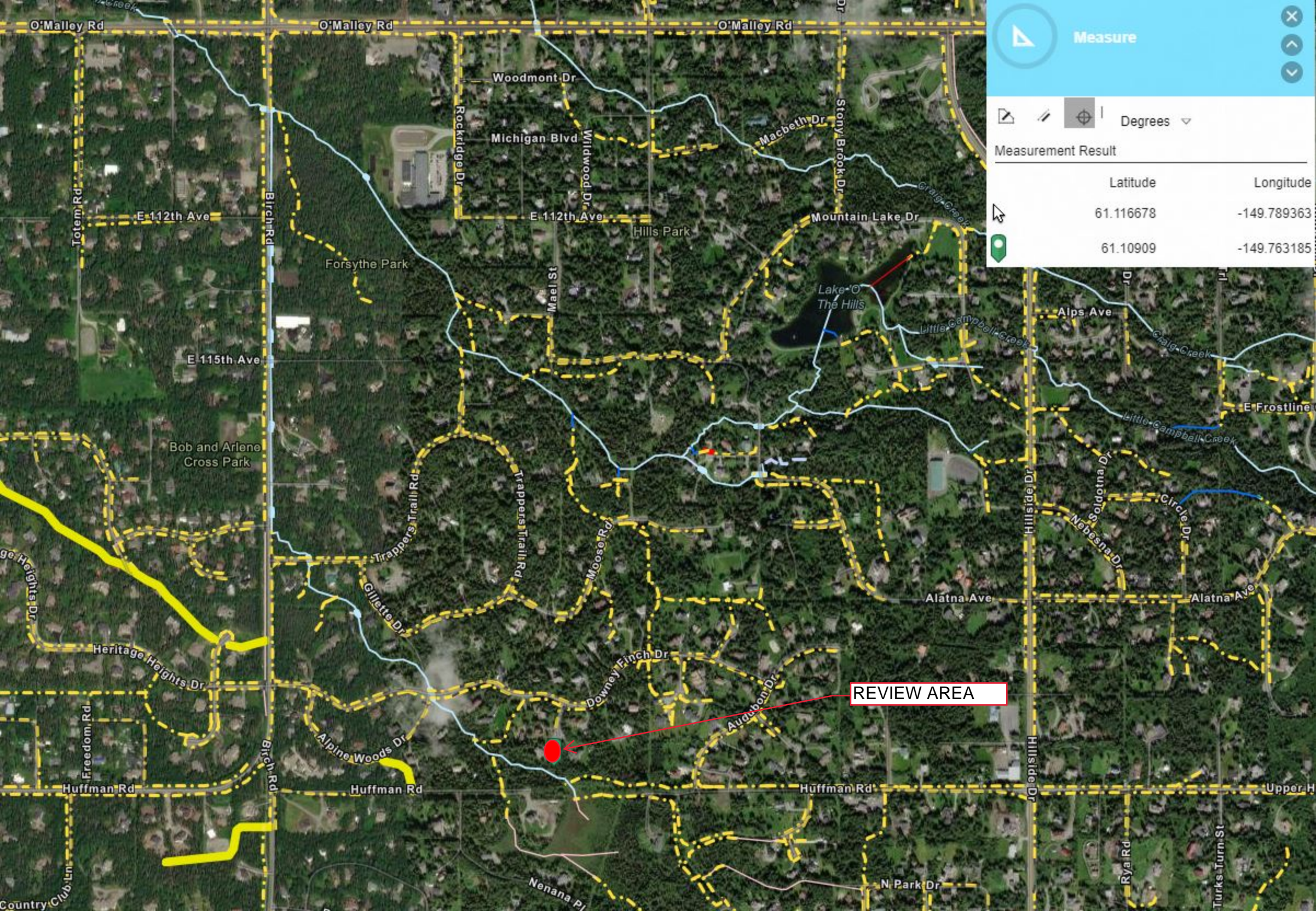
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Preliminary Jurisdictional Determination (also referred on this document as the Wetland Delineation Report). 2024. Prepared for Harding Homes of Alaska, Alpine Woods Block 6, Lot 6. Stantec Consulting Services, Inc. June 13, 2024.
  - b. Municipality of Anchorage. 2023. Municipality of Anchorage Wetlands Webmap – MOA Wetlands Mapping Tool. Accessed: September 18, 2024.
  - c. U.S. Army Corps of Engineers Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Vicksburg, MS.
  - d. 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.
  - e. 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/>
  - f. National Wetland Plant List, Alaska Plant List Version 3.5. 2020. [https://cwbi-app.sec.usace.army.mil/nwpl\\_static/v34/home/home.html](https://cwbi-app.sec.usace.army.mil/nwpl_static/v34/home/home.html)
10. OTHER SUPPORTING INFORMATION. During the wetland delineation field work conducted on May 30, 2024, and during field wetland delineation verification conducted on September 13, 2024, the 0.31-foot section of the unnamed stream in the Review Area showed perennial flows. The unnamed stream runs for approximately 0.56-mile downslope across private lands and under various driveway/road culverts until it reaches a ditch on the east side of Birch Road. The 0.55-mile Bird Road ditch runs parallel the road until connects with Little Campbell Creek at less than 600 feet from the intersection with O'Malley Road. The Municipality of Anchorage has classified the unnamed stream as an intermittent waterbody; the Corps defines an intermittent stream as one that contains flowing water during certain times of the year, when groundwater provides water for stream flow. As per Corps regulations, intermittent streams are jurisdictional waters of the U.S., even when sometimes they may not have flowing water during dry periods. Based on Corps observations and the 2024 Wetland Delineation Report, the unnamed stream (see unnamed stream photos attached) and the ditch along Birch Road support relatively perennial water flows. Little Campbell Creek then crosses under Birch Road and continues downslope through the City of Anchorage for more

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than 6 miles before discharging into Campbell Creek, an RPW. Campbell Creek discharges directly into Campbell Lake, a TNW.

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.



Measure

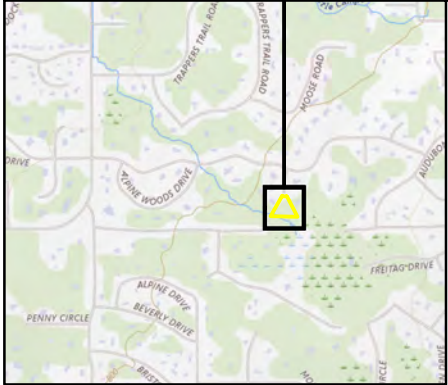
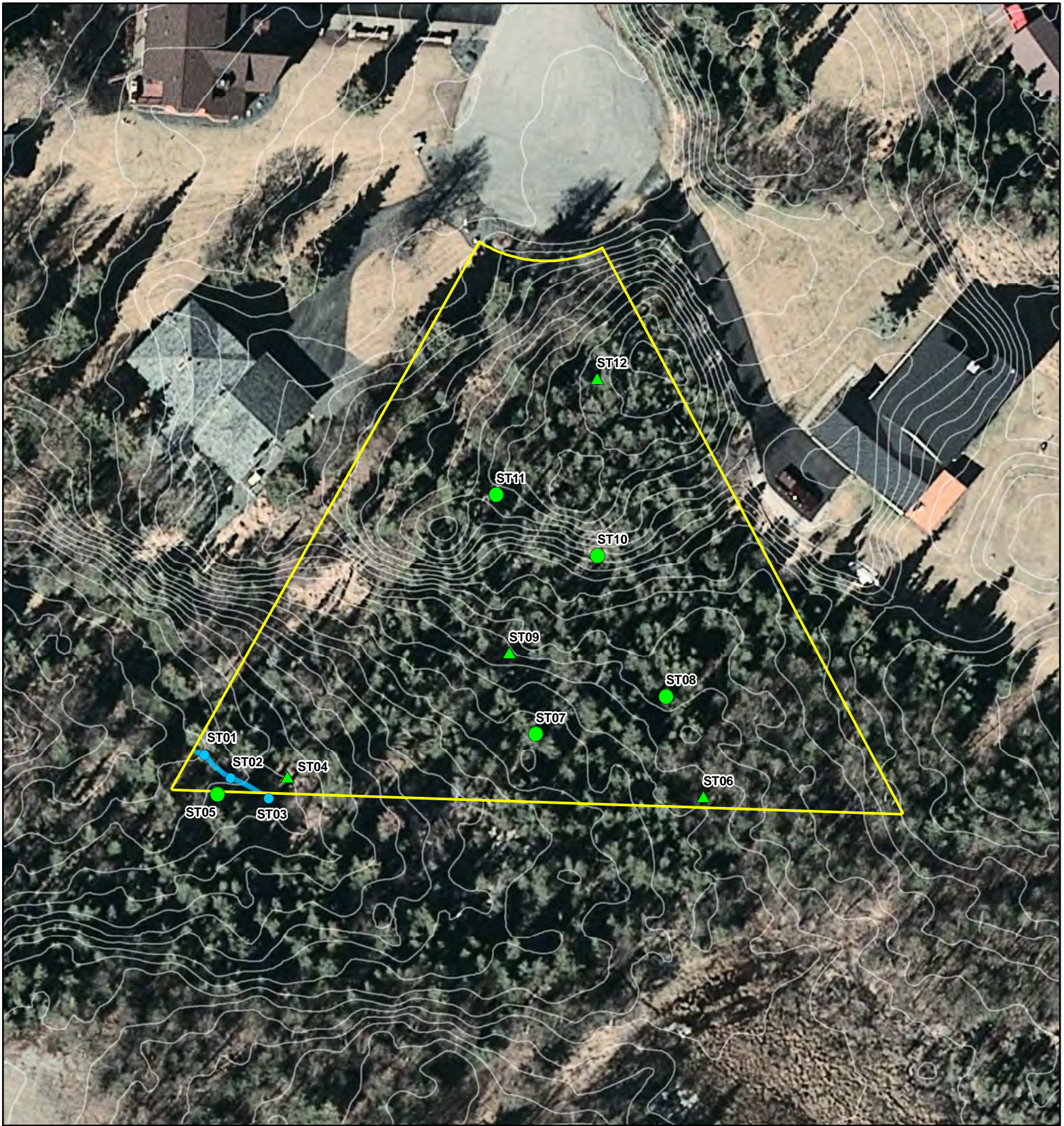
Degrees

Measurement Result

Latitude	Longitude
61.116678	-149.789363
61.10909	-149.763185

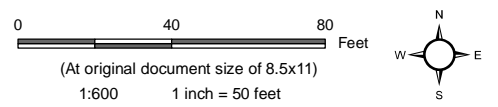
REVIEW AREA





- REVIEW AREA
- Field Plot Type, Status**
- ▲ Wetland Determination, Upland
- Field Verification Point, Upland
- Stream Crossing
- Mapping Status**
- ~ Perennial Stream

Imagery & Contours: Municipality of Anchorage 2015  
 Contours shown are on a 1-foot interval



*Client*  
 Harding Homes of Alaska

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*Project*  
 Alpine Woods Block 6, Lot 6

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*Figure*  
**Wetlands and Waters**

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*Figure Number*  
**4**



# PHOTO REPORT

Plot Number	ST01
Wetland Status	RPW
Plot Type	SC: Stream Crossing
Plot Date	5/30/2024
NWI Classification	R3UBH
HGM	Riverine Channel
Vegetation Type	Open Water
Latitude (DD)	61.1089934937
Longitude (DD)	-149.763752386



Photo Type: Hydrology

Direction: NA



Photo Type: Hydrology

Direction: SE



Photo Type: Hydrology

Direction: W